

**United States Court of Appeals**  
***For The Eighth Circuit***  
Thomas F. Eagleton U.S. Courthouse  
111 South 10th Street, Room 24.329  
**St. Louis, Missouri 63102**

**Stephanie N. O'Banion**  
*Acting Clerk of Court*

**VOICE (314) 244-2400**  
**FAX (314) 244-2780**  
[www.ca8.uscourts.gov](http://www.ca8.uscourts.gov)

April 19, 2024

Laura Foggan  
CROWELL & MORING  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004-0000

RE: 24-1075 GLBT Youth in IA Schools, etc., et al v. Kimberly Reynolds, et al

Dear Counsel:

The amicus curiae brief of the Iowa School Counselor Association has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at [www.ca8.uscourts.gov/all-forms](http://www.ca8.uscourts.gov/all-forms).

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Stephanie N. O'Banion  
Acting Clerk of Court

CRJ

Enclosure(s)

cc: Joshua Armstrong  
Shefali Aurora  
Rita N. Austen  
Michael A. Bamberger  
Katherine Blankenship  
Christopher James Blythe  
Sasha Buchert  
Effiong Dampha  
Alexa Smedley Den Herder  
Daniel Roberto Echeverri  
Laura Joy Edelstein  
Thomas Walter Foley  
Abbey J. Hudson

Cathryn M. Johns  
Daniel Joe Johnston  
Karen Loewy  
Anna Lyons  
Katherine Mather  
Nathan Maxwell  
Alice O'Brien  
Rebecca Hughes Parker  
Thomas Dillon Story  
Camilla B. Taylor  
Patrick Cannon Valencia  
Jason Walta  
Eric H. Wessan  
Owen Richard Wolfe

District Court/Agency Case Number(s): 4:23-cv-00474-SHL

IN THE  
**United States Court of Appeals**  
**for the Eighth Circuit**

---

GLBT YOUTH IN IOWA SCHOOLS TASK FORCE, D/B/A IOWA SAFE SCHOOLS, *et al.*,  
*Plaintiffs-Appellees,*

v.

KIMBERLY REYNOLDS, in her official capacity as GOVERNOR OF THE STATE OF  
IOWA, *et al.*,  
*Defendants-Appellants.*

JULIE MITCHELL, *et al.*, in their official capacity as BOARD MEMBER OF THE  
URBANDALE COMMUNITY SCHOOL DISTRICT,  
*Defendants.*

---

On Appeal from the United States District Court  
for the Southern District of Iowa, No. 4:23-cv-474  
The Hon. District Judge Stephen H. Locher

**BRIEF OF *AMICUS CURIAE* IOWA SCHOOL COUNSELOR  
ASSOCIATION IN SUPPORT OF APPELLEES AND AFFIRMANCE**

Laura A. Foggan  
Justin D. Kingsolver  
Joachim B. Steinberg  
**CROWELL & MORING LLP**  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Tel: (202) 624-2500  
Fax: (202) 628-5116  
Email: LFoggan@crowell.com

*Counsel for Amicus Curiae*

## **DISCLOSURE STATEMENT**

The amicus curiae here, Iowa School Counselor Association (“ISCA”), through its undersigned counsel, submits this Disclosure Statement pursuant to Federal Rule of Appellate Procedure 26.1.

ISCA is not a for-profit organization, ISCA does not have any parent company, and no person or entity owns ISCA or any part of ISCA. ISCA is unaware of any publicly held corporations not a party to this proceeding with a financial interest in its outcome.

**TABLE OF CONTENTS**

DISCLOSURE STATEMENT ..... i

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICUS CURIAE ..... 1

SUMMARY OF THE ARGUMENT .....1

ARGUMENT .....3

I. SCHOOL COUNSELORS OFFER STUDENTS NECESSARY AND PRACTICAL RESOURCES FOR THE INDIVIDUAL SUCCESS OF EACH STUDENT, PLAYING A PIVOTAL ROLE FOR STUDENTS IN IOWA SCHOOLS. ....3

    A. School Counselors in Iowa Must Satisfy Rigorous Standards and Follow a Nationally-Standardized Ethical Code.....6

    B. School Counselors Assist Students in Key Risk Factor Areas, Many of Which are Heightened for LGBTQ+ Students. ....8

    C. Since Iowa Enacted Senate File 496, School Counselors Have Struggled to Assist Students. ....11

II. SENATE FILE 496 IS VOID FOR VAGUENESS.....22

    A. Senate File 496 Does Not Adequately Tell School Counselors What is Prohibited.....23

    B. Senate File 496 Invites Arbitrary Enforcement. ....24

CONCLUSION.....28

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>City of Chicago v. Morales</i> , 527 U.S. 41 (1999).....	25
<i>Cramp v. Bd. of Pub. Instruction of Orange Cnty.</i> , 368 U.S. 278 (1961).....	25, 26
<i>D.C. v. City of St. Louis</i> , 795 F.2d 652 (8th Cir. 1986) .....	22
<i>FCC v. Fox Television Stations, Inc.</i> , 567 U.S. 239 (2012).....	3, 22
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966).....	25
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	23, 25, 26
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983).....	24, 27
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1939).....	24
<i>Mumad v. Garland</i> , 11 F.4th 834 (8th Cir. 2021) .....	21
<i>Nat’l Ass’n for Advancement of Colored People v. Button</i> , 371 U.S. 415 (1963).....	25, 27
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972).....	27
<i>Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.</i> , 83 F.4th 658 (8th Cir. 2023) .....	22, 23, 25
<i>Thibodeau v. Portuondo</i> , 486 F.3d 61 (2d Cir. 2007) .....	24

<i>United States v. Cardiff</i> , 344 U.S. 174 (1952).....	27
<i>VanDerStok v. Garland</i> , 86 F.4th 179 (5th Cir. 2023) .....	24
<i>Woodis v. Westark Cmty. Coll.</i> , 160 F.3d 435 (8th Cir. 1998) .....	24
<b>Statutes</b>	
Iowa Code § 256.11(9).....	6, 11
Iowa Code § 256.11(19) .....	11
Iowa Code § 279.78 .....	6, 11, 13, 18
Iowa Code § 279.79 .....	11
Iowa Code § 279.80(2).....	6, 11, 13, 26
<b>Other Authorities</b>	
<i>About ASCA</i> , American School Counselor Association, <a href="https://www.schoolcounselor.org/About-ASCA/Vision,-Mission-Goals">https://www.schoolcounselor.org/About-ASCA/Vision,-Mission-Goals</a> .....	5
<i>Adolescent Health</i> , Centers for Disease Control and Prevention, <a href="https://www.cdc.gov/nchs/fastats/adolescent-health.htm">https://www.cdc.gov/nchs/fastats/adolescent-health.htm</a> .....	8
<i>ASCA Ethical Standards for School Counselors</i> , American School Counselor Association, <a href="https://www.schoolcounselor.org/getmedia/44f30280-ffe8-4b41-9ad8-f15909c3d164/EthicalStandards.pdf">https://www.schoolcounselor.org/getmedia/44f30280-ffe8-4b41-9ad8-f15909c3d164/EthicalStandards.pdf</a> .....	4, 7, 8
<i>ASCA School Counselor Professional Standards &amp; Competencies</i> , American School Counselors Association, <a href="https://www.schoolcounselor.org/getmedia/a8d59c2c-51de-4ec3-a565-a3235f3b93c3/SC-Competencies.pdf">https://www.schoolcounselor.org/getmedia/a8d59c2c-51de-4ec3-a565-a3235f3b93c3/SC-Competencies.pdf</a> .....	5
<i>Becoming a School Counselor in Iowa: I Already Earned a College Degree</i> , Iowa School Counselor Association, <a href="https://iaschoolcounselor.org/I-have-a-college-degree">https://iaschoolcounselor.org/I-have-a-college-degree</a> .....	7

*Child Health*, Centers for Disease Control and Prevention,  
<https://www.cdc.gov/nchs/fastats/child-health.htm>.....8

*Facts About Suicide Among LGBTQ+ Young People*, The Trevor  
Project (Jan. 1, 2024),  
[https://www.thetrevorproject.org/resources/article/facts-about-  
lgbtq-youth-suicide/](https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/) .....5, 9, 10

Fed. R. App. P. 29 .....1

Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in  
Lesbian, Gay, Bisexual Populations: Conceptual Issues and  
Research Evidence*, 129(5) *Psychological Bulletin* 674-697 (2003) .....10

Michelle M. Johns et al., *Trends In Violence Victimization and  
Suicide Risk By Sexual Identity Among High School Students-  
Youth Risk Behavior Survey, United States, 2015-2019*, 69(1)  
*Morbidity and Mortality Weekly Report* 19-27 (2020).....9

Position Statement on Discrimination Against Transgender and  
Gender Diverse Individuals, American Psychiatric Association  
(July 2018), [https://www.psychiatry.org/File%20Library/About-  
APA/Organization-Documents-Policies/Policies/Position-2018-  
Discrimination-Against-Transgender-and-Gender-Diverse-  
Individuals.pdf](https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf) .....10



## **INTEREST OF AMICUS CURIAE<sup>1</sup>**

Amicus are the members of the Iowa School Counselors Association (“ISCA”),<sup>2</sup> which provides advocacy for and support to Iowa’s school counselors as they implement school counseling programs in line with the American School Counselor Association (“ASCA”) national models and guidance. For nearly sixty years, ISCA, as dedicated professionals, have committed to guiding, advocating, and empowering the Iowan students they serve across all nine area education districts in the state. The heart of ISCA’s mission lies in supporting the professional school counselors of Iowa as it strives to ensure that each student has access to a comprehensive school counseling program.

## **SUMMARY OF THE ARGUMENT**

The importance of the school counselor in students’ lives cannot be overstated. While some may think school counselors only provide academic support and college counseling, this does not even scratch the surface of the efforts of Iowan school counselors. In accordance with ethical guidelines established by the

---

<sup>1</sup> In accordance with Federal Rule of Appellate Procedure 29(a)(2), amicus curiae state that all parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

<sup>2</sup> The views expressed in this brief are those of ISCA and do not reflect the opinions of any specific, individual counselor affiliated with ISCA.

American School Counselor Association, the role of a school counselor is to “advocate for students’ physical and emotional safety” and create safe spaces for students to truly be themselves. School counselors help students navigate life issues taking place both inside and outside the classroom, such as parental divorce, economic uncertainty, housing insecurity and homelessness, substance abuse issues, truancy, academic underperformance, and mental health concerns, including self-harm. The school counselor plays an outsized role in ensuring the safety and well-being of all students, and that includes LGBTQ+ students whom face ostracism and rejection from their own peers and families. For these students, a school counselor’s ability to fulfill their ethical obligations can literally be a matter of life and death.

Senate File 496 (hereinafter “SF496”) all but destroys a school counselor’s ability to fulfill these obligations. SF496’s broad ban on any discussion or promotion of gender identity or sexual orientation and its forced disclosure to parents when a student seeks gender-related accommodations are not only cruel, but impermissibly broad and vague. School counselors are now left wondering whether they will be penalized by the state and potentially lose their certification for discussing parental divorce, dating, or even using a student’s nickname, all of which are based in gender, sexual orientation, or identity affirmation. The broad strokes of SF496 certainly suggest so. SF496 places school counselors in a bind where the

counselors do not know whether they even can perform their duties and do not understand what is required from them under the law.

SF496 should be stricken because it is unconstitutionally vague and vulnerable to arbitrary enforcement. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). School counselors do not, and cannot, understand what SF496 permits and what it bans. And the staggeringly broad language of SF496 makes it extremely vulnerable to arbitrary enforcement. In this brief, amicus ISCA respectfully urges the panel to affirm the District Court’s holding and find that SF496 is void for vagueness.

## **ARGUMENT**

### **I. SCHOOL COUNSELORS OFFER STUDENTS NECESSARY AND PRACTICAL RESOURCES FOR THE INDIVIDUAL SUCCESS OF EACH STUDENT, PLAYING A PIVOTAL ROLE FOR STUDENTS IN IOWA SCHOOLS.**

School counselors are key figures in the lives of their students. During their formative years, students experience safety, connection, and guidance from counselors in their schools. Counselors discuss everything from academic performance, standardized testing, and college applications to family dynamics, bullying, homelessness, and questions about students’ own identities. As the ethical guidelines established by ASCA articulate, the role of a school counselor is to

“advocate for students’ physical and emotional safety” and create safe spaces for students to truly be themselves.<sup>3</sup>

School counselors are a crucial and underappreciated part of the American education system. Childhood and adolescence can be emotionally turbulent, and students often need guidance that goes beyond mere classroom instruction or questions about standardized testing. While school counselors are considered educators, they must also be trusted advisors with whom students can express their needs and emotions without fear of punishment or retribution. To serve that pivotal role, counselors must be able to fully and confidentially address each student’s unique needs.

School counselors are held to rigorous standards, including training and certification, and are bound by state regulations and professional ethical guidelines accredited by national organizations. Many of these standards are established by ASCA, a national organization that supports school counselors through professional development, publications, resources, and advocacy. ASCA’s mission is to “create equitable opportunities and inclusive environments that enable all students to

---

<sup>3</sup> *ASCA Ethical Standards for School Counselors*, American School Counselor Association, at A.12(d), <https://www.schoolcounselor.org/getmedia/44f30280-ffe8-4b41-9ad8-f15909c3d164/EthicalStandards.pdf> (last visited Apr. 11, 2024) (hereinafter “ASCA Ethical Standards”).

succeed.”<sup>4</sup> ISCA adopts guidelines set forth by ASCA, meaning that school counselors in Iowa adhere to the same professional obligations as school counselors around the country. Schools in both associations utilize the ASCA National Model to develop a structured comprehensive school counseling program designed to meet the academic, career, social, and emotional development needs of students in every grade level K-12. Within the ASCA Model, school counselors adhere to professional standards and competencies which require an understanding and respect of differences in sexual orientation and gender identity,<sup>5</sup> as well as issues like suicidal ideation, which impact almost all adolescent populations, but disproportionately effect adolescents coping with issues of sexual orientation or gender identity.<sup>6</sup>

SF496 prevents school counseling professionals in Iowa from adhering to these nationally-recognized practices, and potentially punishing counselors for adhering to the standards, by (1) requiring the removal of educational and useful

---

<sup>4</sup> *About ASCA*, American School Counselor Association, <https://www.schoolcounselor.org/About-ASCA/Vision,-Mission-Goals> (last visited Apr. 11, 2024).

<sup>5</sup> *ASCA School Counselor Professional Standards & Competencies*, American School Counselors Association, at 3, <https://www.schoolcounselor.org/getmedia/a8d59c2c-51de-4ec3-a565-a3235f3b93c3/SC-Competencies.pdf> (last visited Apr. 11, 2024).

<sup>6</sup> *Facts About Suicide Among LGBTQ+ Young People*, The Trevor Project (Jan. 1, 2024), <https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/>.

social and emotional development books that include a “sex act” (Iowa Code § 256.11(9)(a)(2); 256.11(19)(a)(1)), (2) eliminating any accurate and informative instruction related to “gender identity” or “sexual orientation” including any discussions of basic familial life or important values such as respect or kindness (Iowa Code § 279.80(2)), and (3) forcing a mandatory parental reporting requirement if any student “requests an accommodation” related to gender identity regardless of student safety concerns (Iowa Code § 279.78(3)). SF496, which has no psychological or scientific rationale supporting it, presents an intractable problem for school counselors, who cannot faithfully perform their roles in accordance with their professional and ethical standards while complying with the law. Therefore, this provision unfortunately severely disadvantages and harms young people throughout Iowa, who the law blocks from the critical guidance that school counselors are charged with providing.

**A. School Counselors in Iowa Must Satisfy Rigorous Standards and Follow a Nationally-Standardized Ethical Code.**

Becoming a counselor in an Iowa school is no easy feat. To even be considered, applicants must have earned both a bachelor’s degree and a master’s degree in school counseling. Even if an applicant already holds a different master’s degree, they must complete additional educational coursework to qualify for

counselor positions.<sup>7</sup> Applicants must also complete clinical hours in the school setting including one-hundred hours of supervised practicum, and six-hundred hours of a supervised internship.<sup>8</sup> Finally, applicants must confirm their qualifications for certification with the Iowa Department of Education.<sup>9</sup> The qualifications for these positions are rigorous.

Because of the trust-based relationship they have with students, counselors are held to heightened ethical standards and obligations. Counselors must ensure that students are “treated with dignity and respect as unique individuals.” *ASCA Ethical Standards* at A.1(a). Their binding ethical guidelines require counselors to “actively work to establish a safe, equitable, affirming school environment in which all members of the school community demonstrate respect, inclusion and acceptance.” *Id.* at A.10(a). Regardless of race, gender, sexual orientation, and religion, counselors must “foster and affirm all students and their identity.” *Id.* at A.1(b).

Counselors are required to respect “students’ sexual orientation, gender identity and gender expression.” *Id.* at A.1(h). It is important that counselors “advocate for the equitable right and access to free, appropriate public education for

---

<sup>7</sup> See *Becoming a School Counselor in Iowa: I Already Earned a College Degree*, Iowa School Counselor Association, <https://iaschoolcounselor.org/I-have-a-college-degree> (last visited Apr. 11, 2024).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

all youth in which students are not stigmatized or isolated” based on their “gender identity, gender expression, [or] sexual orientation.” *Id.* at A.10(f). Counselors must also “advocate with and on behalf of students to ensure they remain safe at home, in their communities and at school,” while recognizing that a “high standard of care includes determining what information is shared with parents/guardians and when information creates an unsafe environment for students.” *Id.* at A.10(a).

**B. School Counselors Assist Students in Key Risk Factor Areas, Many of Which are Heightened for LGBTQ+ Students.**

School counselors support students with academic needs, but also with social and emotional learning. They help students navigate issues related to familial instability, like a parental divorce; economic uncertainty; housing insecurity and homelessness; substance abuse issues; truancy; academic underperformance, especially as related to out-of-classroom issues; and mental health concerns, including self-harm. That last category is crucial; suicide is the second leading cause of death among young people aged 10 to 14 and the third leading cause of death among 15 to 19-year-olds.<sup>10</sup>

---

<sup>10</sup> See *Child Health*, Centers for Disease Control and Prevention, <https://www.cdc.gov/nchs/fastats/child-health.htm> (last visited Apr. 11, 2024); see also *Adolescent Health*, Centers for Disease Control and Prevention, <https://www.cdc.gov/nchs/fastats/adolescent-health.htm> (last visited Apr. 11, 2024).



As has been widely reported, LGBTQ+ youth endure discrimination, harassment, and abuse due to their actual or perceived identities. That harassment and abuse often takes its most serious form in school settings. As a result of having to endure this treatment, LGBTQ+ youth face elevated risk for depression and other mental illness compared to those who are cisgender (*i.e.*, whose gender identity corresponds with the sex registered for them at birth) and heterosexual.<sup>11</sup> Research by the Trevor Project—a non-profit suicide prevention organization that provides 24/7 crisis support services for LGBTQ+ young people—found that 52% of LGBTQ+ youth who were enrolled in middle or high school reported being bullied either in person or electronically in the past year, and those who were bullied were three times more likely to attempt suicide in the past year.<sup>12</sup>

LGBTQ+ young people are more than three times as likely to attempt suicide than their peers.<sup>13</sup> The Trevor Project “estimates that more than 1.8 million LGBTQ+ young people. . .seriously consider suicide each year in the U.S.—and at least one attempts suicide every 45 seconds.”<sup>14</sup> To be clear, LGBTQ+ students are not inherently prone to suicide risk simply because of their sexual orientation or

---

<sup>11</sup> See *Facts About Suicide Among LGBTQ+ Young People*, *supra* note 5.

<sup>12</sup> *Id.*

<sup>13</sup> Michelle M. Johns et al., *Trends In Violence Victimization and Suicide Risk By Sexual Identity Among High School Students—Youth Risk Behavior Survey, United States, 2015-2019*, 69(1) *Morbidity and Mortality Weekly Report* 19-27 (2020).

<sup>14</sup> *Facts About Suicide Among LGBTQ+ Young People*, *supra* note 5.

gender identity, but because the LGBTQ+ students are often mistreated and stigmatized by their families, fellow students, and society at large. Simply, the experiences of LGBTQ+ youth—in particular the bullying, isolation, and stigmatization that still accompany that status in too many circles—lead to internalization of the unfounded belief that LGBTQ+ youth are somehow inferior to their peers, which naturally results in negative mental health outcomes as compared to the broader population and the internalization of those experiences compound to produce negative mental health outcomes.<sup>15</sup>

Various medical and psychiatric organizations have acknowledged the importance of providing affirming care to LGBTQ individuals, most notably the American Psychiatric Association.<sup>16</sup> The Trevor Project has found that LGBTQ+ individuals who have trusted adults within their schools report higher levels of self-esteem and a lower rate of mental health concerns.<sup>17</sup> In other words, the existence of people who play the role that school counselors do in Iowa provides a critical, life-saving resource for LGBTQ+ students.

---

<sup>15</sup> Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, Bisexual Populations: Conceptual Issues and Research Evidence*, 129(5) *Psychological Bulletin* 674-697 (2003).

<sup>16</sup> *See e.g.*, Position Statement on Discrimination Against Transgender and Gender Diverse Individuals, American Psychiatric Association (July 2018), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf>.

<sup>17</sup> *See Facts About Suicide Among LGBTQ+ Young People*, *supra* note 5.

**C. Since Iowa Enacted Senate File 496, School Counselors Have Struggled to Assist Students.**

On May 26, 2023, Iowa Governor Kim Reynolds signed SF496 into law. SF496 has sweeping ramifications for all school educators, but specifically impacts school counselors in severe ways. Since SF496's enactment, school counselors have had to reconsider the books used to assist students, the sweeping limits on potential instruction, and institute new processes for the mandatory reporting obligation for students seeking gender-affirming accommodations. This staggeringly broad law puts school counselors in an impossible situation, where they cannot perform their duties within the bounds of the law, if they can even determine what those ill-defined parameters of the law actually are.

**1. Senate File 496 is unclear, punitive in nature, and conflicts with school counselors' ethical obligations.**

Several provisions of SF496 are concerning to school counselors across Iowa. SF496 has vague and ill-defined prohibitions on “any program, curriculum, test, survey, questionnaire, promotion or instruction relating to gender identity or sexual orientation” in grades K-6. Iowa Code § 279.80(2) (the “Promotion Ban”). SF496 also contains a forced outing provision that requires school counselors to inform school administrators and parents when a student seeks to use alternative names or pronouns. Iowa Code § 279.78(2-3) (the “Forced Outing Provisions”). Other prohibitions in SF496 are similarly broad, such as the survey ban (Iowa Code § 279.79) and the book ban (Iowa Code §§ 256.11(19)(a)(1), 256.11(9)(a)(2)), which

further leave school counselors in the dark on how to both meet their ethical obligations and avoid punishment under SF496. Taken together, these sweeping measures significantly interfere with school counselors' professional responsibilities and undermine school counselors' role as trusted advisors to students.

The Promotion Ban's broad prohibition on any discussion "relating to gender identity or sexual orientation" is obviously vague and extraordinarily broad. Read literally, a school counselor would be legally prohibited from discussing some of the most common issues affecting students—like parental divorce, relationships with other students, or bullying based upon a student's perceived sexual orientation—or even help a student with their Spanish or French homework, since both languages use a masculine-feminine gender-based noun classification system. What if a student, not a counselor, brings up their parents? Is the school counselor allowed to discuss or affirm that child's family in any way? Is this promotion or instruction? Is the answer to the question different if that student has same-sex parents? This series of questions has been raised by multiple counselors to ISCA leadership. If enforced how Iowa legislators presumably intended it to be enforced, a school counselor could discuss heterosexual or cisgender identities, but could not discuss non-heterosexual orientations and non-cisgender identities.

The Promotion Ban's prohibitions directly interfere with the nature of a school counselors' role to serve all students. The ethical guidelines for school counselors

require them to “actively work to establish a safe, equitable, affirming school environment” and to “foster and affirm all students and their identity,” regardless of the race, gender, sexual orientation, or religion of their students. *See supra* Section I.A. By prohibiting all “programs,” “curriculum,” “promotion” and “instruction” that in any way relates “to gender identity or sexual orientation” (*see* Iowa Code § 279.80(2)), SF496’s Promotion Ban directly prevents school counselors from fulfilling these obligations. If an LGBTQ+ student struggling with their identity feels it necessary to speak with a counselor, the Promotion Ban forces that counselor to remain silent to that student’s struggles. Beyond obviously preventing school counselors from fulfilling their professional obligations to establish a safe school environment and to respect a student’s identity, the Promotion Ban will only serve to increase LGBTQ+ students’ feelings of shame and isolation, exacerbating an already-urgent situation facing this vulnerable population in Iowa.

The Forced Outing Provisions are no better. SF496 forces disclosure to parents when any student requests any accommodation relating to that student’s gender identity. *See* Iowa Code § 279.78(3). The Forced Outing Provisions require “licensed practitioner[s]” – defined to include school counselors – to inform a school district administrator if a student “requests an accommodation that is intended to affirm the student’s gender identity from a licensed practitioner employed by the school district, including a request that the licensed practitioner address the student

using a name or pronoun that is different than the name or pronoun assigned to the student in the school district’s registration forms or records.” *Id.* The school district administrator must then “report the student’s request to the student’s parent or guardian.” *Id.*

The requirements in the Forced Outing Provisions are impermissibly vague. Broadly read, mandated reporting to parents of any requests “intended to affirm the student’s gender identity” would force schools to inform parents every time a student makes any name request including nicknames, when a student requests an exception to the dress code for any reason, or when a student seeks to participate in their designated sports team, as in a male student seeking to participate on the male soccer team, which would affirm his gender identity. What rises to “request[ing] an accommodation[?]” If a student discusses gender identity with a counselor must the counselor report the conversation to a parent? And by mandating reporting when a student requests “that the licensed practitioner address the student using a name or pronoun that is different than the name or pronoun assigned to the student[,]” a school must inform parents whenever a male student named Samuel requests to be called Sam, or decides to ask his teachers to call him by his middle name. The broad discretion provided by this statutory language invites discriminatory application of this section – *i.e.*, that schools will only report such requests from non-cisgender students. Regardless, school counselors are left in the dark as to how they can abide

by the law and still fulfill their professional responsibilities and ethical obligations to the students they serve.

**2. ISCA survey results show that school counselors do not know what is allowed or prohibited by Senate File 496, leaving them unable to effectively do their job and fearful of arbitrary and unforeseeable punishment.**

After a year of confusion following SF496's enactment, ISCA conducted a survey of its member counselors in Spring 2024 to collect data on counselors' questions related to SF496 and the impacts the legislation had on counselors. 145 practicing licensed school counselors across the state of Iowa provided responses to sixty-six questions in the ISCA survey. The responding school counselors represent all grade levels and student population sizes ranging from a few hundred to over ten-thousand. The counselor respondents span the state of Iowa and represent all nine area education agency districts. The survey asked about school district changes and implementation since the enactment of SF496 as well as open-ended questions allowing counselors to provide narrative answers.

The responses from Iowa school counselors show that SF496 has made it impossible for them to serve their students and comply with the law. The vague language of the statute is both broad and invites arbitrary enforcement, leaving school counselors to guess at whether their conduct is legal. Counselors are confused and fearful of the consequences of the law for both themselves and their students. For example, one survey question asked whether counselors have seen

positive, negative, or no impacts on students based on the enactment of SF496. 89 respondents—or **over 60% of the responding counselors**—said they **have noticed either negative or severely negative impacts on students due to SF496**.

Counselors are also unsure of how SF496 will be specifically implemented. One survey respondent stated “I have also noticed impact on students and staff more in the form of **confusion and uncertainty with** what can be said to staff or **what staff are able to say to students**. The lack of clarity comes up more often than before the new laws.” Counselors are also concerned that the requirements of SF496 conflict with their ethical obligations, with one survey respondent articulating that “[Senate File 496] **contradicts our ethical code as school counselors and hurts students**.”

When facing these new and largely unknowable legal requirements, school counselors have sought guidance from their school and school district leadership. However, 12 counselors, or **only 8% of the respondents**, reported **receiving “formal, comprehensive written guidance” on SF496**. Even where such guidance is provided, there is not state-wide consistency in the guidance. 78 of the 145 responding counselors said that the “lack of guidance” on SF496 was a factor making their job more difficult, and **only one counselor out of 145** reported that the SF496 guidance had made their job easier. One counselor said, “[My job] now feels



uncertain[.]” Counselors also brought up other concerns in the ISCA survey, like how to react when *students* raise issues of gender identity or sexual orientation.

Counselors are unsure of how to implement the provisions of SF496. A counselor shared that “in a recent suicide prevention course, school counselors from one district **questioned** whether teachers/staff **could ask a student how they were doing if they had exhibited a change in behavior**, as staff in their district had been **cautioned not to ask these types of questions of students.**” SF496 has made counselors particularly wary to broach subjects with students, even if the counselor feels that the student has had an exhibited change of behavior that should be questioned. Simply put, SF496 is vague and puts impractical and imprecise requirements on counselors that they are unable to implement. As one counselor stated, “I feel like I have to be extra careful now with the new legislation and would like more information on best practice for school counselors.”

Similarly, various counselors flagged that whether they can use survey tools without explicit parental consent on each survey question in light of SF496 is unclear. Counselors now cannot be sure whether surveys without parental consent are allowed by the post-SF496 regime, so some counselors report eliminating all surveys and others report eliminating any personal identifying information from surveys, reducing their utility as an intervention tool. One counselor stated “[w]e screen[ed] 200 kids in 2022 and 40% flagged for at risk suicide / self-harm. This

year we screen[ed] 30 kids with [parental] consent and 10% flagged. **[SF496] has made it difficult for us to support and identify kids in need for counseling and supports.**” Similarly, another counselor reported that they now “conduct suicide screening only when there is cause for the survey.” The ambiguity created by SF496 strips school counselors of one of their key tools to identify and intervene for students considering self-harm, lest they risk punishment.

The Forced Outing Provisions of SF496 require school officials, including school counselors, to notify a student’s parent or guardian whenever a student asks school officials to provide an identity accommodation, such as a name or pronoun change. *See* Iowa Code § 279.78(3).<sup>18</sup> This mandates reporting by counselors, which necessarily requires counselors to break confidentiality with students. School counselors—and entire school districts—within Iowa are unsure about how to implement this rule. The term “requests an accommodation” might mean a formal request by a student made officially with the school, but it could also mean an

---

<sup>18</sup> The District Court order found that “no Plaintiff has standing to challenge the provisions of SF496 requiring school districts to notify a child’s parent if the child . . . seeks an accommodation relating to gender identity.” *See* App.482, R.Doc.65, at 4. Therefore, the District Court did not consider the vagueness of the Forced Outing Provision. But, the Court did consider the vagueness of other SF496 provisions, including the “book restrictions,” (*Id.* at 31, 38-41, Sections V.A.3, V.A.4.D), and the Promotion Ban. *Id.* at 41-44, Section VI. ISCA argues here that SF496 in its totality utilizes vague provisions that counselors are unable to implement other than in an arbitrary and inconsistent manner across the state of Iowa, including the book restrictions, Promotion Ban, and Forced Outing Provision.

informal request or a statement made in passing suggesting the student uses a nickname. Nor is it clear to school counselors in every instance what “affirm the student’s gender identity” would mean, which will lead to some counselors’ broad enforcement and other counselors’ arbitrary enforcement most likely against LGBTQ+ students.

Beyond these Forced Outing Provisions, what are counselors supposed to do when *students* raise questions *to school counselors* that may be “related to gender identity or sexual orientation” that may implicate other provisions of SF496, like the Promotion Ban? Should counselors give the stiff arm to students and altogether refuse to answer? Can the counselor provide any information to the student about gender identity or sexual orientation that is not considered “instruction” or “promotion”? Does the Promotion Ban include discussion of cis-gendered identities and heterosexual couples? If so, would that not prohibit discussions about most students’ families completely? Can counselors counsel a male student who is being bullied for “talking with a lisp,” or counsel a female student facing harassment for “dressing too much like a boy”? Because SF496 is so staggeringly broad and vague, school counselors must over-restrict the guidance they provide, or else risk punishment by the state.

These risks are not hypothetical. Some counselors are now providing a warning to students that they will be required to break confidentiality regarding

name or pronoun change requests due to SF496's vague mandatory reporting requirement. One counselor described the process as "students need a warning ahead of time that if they are going to share or request a pronoun / name change, it will go to their parents. That's only fair to them." But counselors report concerns about whether even providing *this warning* is allowed under SF496. Not only are counselors concerned this may put students at risk in some scenarios, but it also limits a counselor's ability to be perceived as reliable and trustworthy to students. As one counselor stated the lack of clarity has "**generally create[d] an atmosphere of don't ask / don't tell in my district.**"

The erosion of trust is a primary concern of ISCA's member counselors. Another counselor commented, "I feel this really **limits what students are willing to share when they are already hurting and feeling alone.** There are **several students** that come to mind **who have not come in to see a counselor at all this year** when they would come in as needed the year before." Another added "[w]e do our best to warn our students that if they come to us to confide in us about a name/gender pronoun change that we will have to inform their parents and if they're uncomfortable with that they should not tell us. **It is unfortunate that we cannot be a safe person for these students anymore.**" This deprivation of support is the direct result of the vagueness of SF496.

Identity is a salient consideration for adolescent development. And identity development may not be related to a students' gender identity or sexual orientation whatsoever. Consider nicknames. Student's desire to use nicknames has historically been respected by teachers for students, and certainly did not necessitate parental involvement. A "Josephine" who on the first day of school asks to be called "Jo" would never before have prompted a second thought, let alone a call to Jo's parents. But post-SF496, it is unclear to counselors what (if any) nicknames may be appropriate, and if (or when) nicknames would require mandatory reporting to parents. This is also not a hypothetical concern, as one ISCA survey respondent shared that "[s]ince the passing of SF496, our administration still allows [nicknames], if the name fits the current legal name (example: Josephine requests Jo). Unfortunately, we do not have written guidance and there is still a lot of grey area to what is expected of us." That school district, in seeking to follow the requirements of SF496, has placed a restriction on the very names that students can be called.

In so many ways, SF496 creates confusing, impractical, and unrealistic standards for school counselors, who must cautiously implement its provisions under threat of losing their job or worse. This is the exact paradigm that the constitutional "void for vagueness" doctrine is meant to guard against. *See Mumad v. Garland*, 11 F.4th 834, 838 (8th Cir. 2021) (noting concern that "[v]ague, 'standardless' statutes

also ‘invite arbitrary enforcement.’”) (citing *Johnson v. United States*, 576 U.S. 591, 595 (2015)) (cleaned up). Amicus ISCA thus respectfully urges this Court to affirm the district court’s finding that Plaintiffs are likely to succeed on their challenge to the SF496 on those grounds.

## II. SENATE FILE 496 IS VOID FOR VAGUENESS.

SF496 should be stricken because it is unconstitutionally vague and leaves school counselors in a position where they are both unable to discern what is forbidden under the law and are vulnerable to arbitrary enforcement. “The void-for-vagueness doctrine is embodied in the due process clauses of the fifth and fourteenth amendments.” *D.C. v. City of St. Louis*, 795 F.2d 652, 653 (8th Cir. 1986). That doctrine “addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Thus, “[a] governmental policy is unconstitutionally vague if it fails to ‘provide adequate notice of the proscribed conduct’ and lends ‘itself to arbitrary enforcement.’” *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668 (8th Cir. 2023) (quoting *United States v. Barraza*, 576 F.3d 798, 806 (8th Cir. 2009)). For school counselors, SF496 does

both, and is thus unconstitutional. This Court should affirm the district court and find that SF496 is void for vagueness.

**A. Senate File 496 Does Not Adequately Tell School Counselors What is Prohibited.**

SF496 is unconstitutionally vague because it does not give school counselors sufficient notice to determine what is impermissible. *See, e.g., Parents Defending Educ.*, 83 F.4th at 668. Vague laws offend due process because, if the law “assume[s] that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Without this required level of definiteness, “[v]ague laws may trap the innocent by not providing fair warning.” *Id.*

As the frontline statements of school counselors cited above show, SF496 does not provide guidance as to what it permits and what it outlaws. *See id.* (requiring that “laws must provide explicit standards for those who apply them.”). Counselors have no way to know what questions they may ask students, how they may respond to student questions that raise issues of orientation or gender, what might trigger a mandatory reporting requirement, or what topics they can permissibly advise students on. Given the educational prerequisites for becoming a school counselor in Iowa, counselors possess at least “ordinary intelligence” (and probably significantly more than “ordinary intelligence”) and when confronted with

a law that regulates core portions of their job functions, those counselors are not able to clearly say what they cannot do. This is a classic example of an impermissibly vague law. *See, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”).

**B. Senate File 496 Invites Arbitrary Enforcement.**

SF496 is also unconstitutional because it invites arbitrary enforcement. A law is void for vagueness not only if fails to define what is prohibited clearly enough, but also if it fails “to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner.” *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 438 (8th Cir. 1998). “As important as the Fifth Amendment’s guarantee of fair notice to individuals is the Amendment’s prohibition against ‘arbitrary enforcement’ by government officials.” *VanDerStok v. Garland*, 86 F.4th 179, 209 (5th Cir. 2023) (Oldham, J., concurring). To be constitutional, a law must have “minimal guidelines to govern law enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citations omitted). “Indeed, statutes must provide explicit standards for those who apply them to avoid resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Thibodeau v. Portuondo*, 486 F.3d 61, 66 (2d Cir. 2007) (internal citation and quotation marks omitted).



A law is thus void for vagueness if it is susceptible to arbitrary enforcement. *See Parents Defending Educ.*, 83 F.4th at 668-69. A law is susceptible to arbitrary enforcement when it lacks clarity and terms are left “open to unpredictable interpretations,” (*id.* at 669), or when it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis[.]” *Grayned*, 408 U.S. at 108–09. As a result, a law that ““necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat”” is impermissible. *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *Kolender*, 461 U.S. at 360).

If a law “is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case,” then it cannot be enforced. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966). And when a law implicates First Amendment concerns, which SF496 unquestionably does, it is even more important that it contain clear standards. *See Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”); *see also Cramp v. Bd. of Pub. Instruction of Orange Cnty.*, 368 U.S. 278, 287 (1961) (“[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect

on speech”) (citations omitted); *see also Grayned*, 408 U.S. at 109 (“[W]here a vague statute ‘abuts upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of those freedoms.’”) (cleaned up) (citations omitted).

SF496 is unconstitutionally vague because it invites arbitrary enforcement. As the district court found, the law’s language is not just broad—it is “staggeringly broad.” App.519, R.Doc.65, at 41. That acts as an invitation to arbitrary enforcement. A state official is free to determine, with unfettered and limitless discretion and with no pre-established standards, whether material was given to students as part of a “program, curriculum, test, survey, questionnaire, promotion, or instruction,” and worse even, what each of those words actually means. *See* Iowa Code § 279.80(2). They are also free to determine if that material “relat[ed] to gender identity or sexual orientation” (*id.*), as any textbook that uses the word “boy” or “girl” or “man” or “woman” will *by definition* fall within that term. “The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language.” *Cramp*, 368 U.S. at 286. As the district court noted, “[b]ased on the neutral definitions of ‘gender identity’ and ‘sexual orientation,’ SF496 unambiguously prohibits instruction relating to *any* gender identity (cisgender or transgender) and *any* sexual orientation (gay or straight). *See* Iowa Code § 216.2(10)[.]” App.519, R.Doc.65, at 41 (emphasis in original).

This places school counselors in the same position — at the whims of the enforcer — as someone subject to the law struck down in *Kolender*: “individual[s] whom police may think [are] suspicious but do not have probable cause to believe ha[ve] committed a crime, [are] entitled to continue to walk the public streets ‘only at the whim of any police officer’ who happens to stop [them].” 461 U.S. at 358 (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)); see also *United States v. Cardiff*, 344 U.S. 174, 176 (1952) (holding that “[w]ords which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula.”) (internal citation omitted). “Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (citation omitted).

Because SF496 lacks any guidance, school officials would be free to enforce the law however they personally felt it should be applied. That is not constitutionally permissible. First Amendment “freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.” *Button*, 371 U.S. at 433.

By placing school counselors under the threat of arbitrary punitive actions, SF496 chills the exercise of crucial rights and violates the federal constitution.

### CONCLUSION

Amicus respectfully urge the panel to affirm the District Court's holding.

Dated: April 17, 2024

By: **CROWELL & MORING LLP**

/s/ Laura A. Foggan

Laura A. Foggan

Justin D. Kingsolver

Joachim B. Steinberg

Roy A. Abernathy

Danielle E. Alvarez

Alexander T. Rosen

Jacob A. Zucker

**CROWELL & MORING LLP**

1001 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Tel: (202) 624-2500

Fax: (202) 628-5116

Email: LFoggan@crowell.com

*Counsel for Amicus Curiae*

*Iowa School Counselor Association*

## CERTIFICATE OF SERVICE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), because this brief contains 6,305 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point Times New Roman font.

3. This brief complies with the requirements of Local Rule 28A(h)(2) because it has been scanned for viruses and is free of viruses.

Dated: April 17, 2024

By: **CROWELL & MORING LLP**

/s/ Laura A. Foggan

Laura A. Foggan

*Counsel for Amicus Curiae*

*Iowa School Counselor Association*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2024, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 17, 2024

By: **CROWELL & MORING LLP**

/s/ Laura A. Foggan

Laura A. Foggan

*Counsel for Amicus Curiae*

*Iowa School Counselor Association*