Protect Democracy

February 22, 2022

Representative Bryan Avila
Senator Manny Diaz, Jr.

Via e-mail

RE: Unconstitutionality of H.B. 7/S.B. 148

Dear Representative Avila and Senator Diaz,

We write to you to express deep concern regarding the proposed Act Relating to Individual Freedom, part of Governor DeSantis's Stop W.O.K.E. Act, filed as H.B. 7/S.B. 148 on January 11, 2022.[1] The bill includes multiple provisions that amount to state censorship, violate constitutional law, and would fail judicial review. The bill flips on its head the fundamental premise of the First Amendment—that free discussion, not silence coerced by law, is the remedy for beliefs believed to be "noxious"—replacing the marketplace of ideas with coerced silence.[2]

The Bill is an Unconstitutional Content-Based Restriction on Speech.

A "bedrock principle" underlying the First Amendment is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[3] Yet that is precisely what H.B. 7/S.B. 148 seeks to do by redefining certain concepts in workplace diversity, equity, and inclusion trainings to combat discrimination ("DEI trainings") as themselves being discriminatory and the basis for legal liability for businesses. By prohibiting private employers from conducting DEI trainings that "espouse[], promote[], advance[], inculcate[]" or "endors[e]" certain ideas—including the notion of implicit or unconscious bias, white or male privilege, or that racial colorblindness functions to ignore rather than correct real inequalities—the bill is a facially content-based restriction. Indeed, the title of the bill—the "Stop W.O.K.E. Act—leaves no doubt as to its content-based nature.

---

[1] H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022); S.B. 148, 2022 Leg., Reg. Sess. (Fla. 2022) [hereinafter H.B. 7/S.B. 148], https://myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0007c1.docx&DocumentType=Bill&BillNumber=0007&Session=2022.

[2] *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law–the argument of force in its worst form.").

[3] *Texas v. Johnson*, 491 U.S. 397, 412 (1989); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

Laws by which the government regulates speech "because of disagreement with the message [the speech] conveys" presumptively violate the First Amendment.[4] That is exactly what Governor DeSantis seeks to do. In announcing H.B. 7/S/B. 148, Governor DeSantis said, "In Florida we are taking a stand against the state-sanctioned racism that is critical race theory. . . . We won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other."[5] The Governor's press release even identifies specific ideas the bill seeks to ban, including: "celebrating 'Black Communism,'" lessons that ask students to "deconstruct their racial identities, then rank themselves according to their 'power and privilege,'" programs that "encourage[] white employees to confront their 'privilege,' reject the principle of 'equality,' and 'defund the police,'" corporate programs that "teach[] that white toddlers 'develop racial biases by ages 3-5,'" and programs that teach "that America is a 'system of white supremacy'" and "that all Americans are 'raised to be racist.'"[6] The Governor may not like these ideas, but neither he nor the State of Florida may attempt to ban them in schools and places of private employment consistent with the First Amendment.

Further underscoring the content-based nature of this censorship, the eight forbidden concepts and six principles of individual freedom enumerated in H.B. 7/S.B. 148 are nearly identical to those proffered in an executive order by President Trump, in which he identified critical race theory and the 1619 Project as toxic propaganda that the EO sought to combat.[7] A federal court partially enjoined the EO because of claims that it chilled constitutionally protected speech based on content and viewpoint and because the banned concepts were so vague that it was impossible for Plaintiffs to determine what conduct was prohibited.[8]

The Bill Undermines Democracy and Unconstitutionally Censors Education.

Further, extending this censorship to K-12 classrooms and in public colleges and universities—by prohibiting teachers from advancing these concepts and restricting related readings or instructional materials—undermines American democratic values and echoes the tactics of authoritarian governments:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.[9]

---

[4] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015).
[5] Staff, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations, Flgov.com (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/.
[6] *Id.*
[7] Combatting Race and Sex Stereotyping, Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020), https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping.
[8] *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 542–43 (N.D. Cal. 2020).
[9] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (internal citations and some quotation marks omitted).

Accordingly, students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[10] and the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[11] If the First Amendment bars laws prohibiting advocating, teaching or embracing "the doctrine of forceful overthrow of government" (which it does),[12] it is difficult to imagine why it would permit a law barring, for example, a teacher's endorsement of the idea that "a person's . . . status as either privileged or oppressed is necessarily determined by his or her race . . . or sex."[13] Yet, this bill would remove from the marketplace of ideas that and other prohibited concepts which help students to grapple with inequity.

The Bill is Unconstitutionally Vague.

In addition, H.B.7/S.B. 148's prohibitions are impermissibly vague and impossible for teachers and employers to apply, especially as judged against the more stringent vagueness requirements applicable to laws that restrict speech.[14] There is no administrable line between "advancing" or "inculcating" the notion of white privilege, for example—that white people, by virtue of their race, experience less racial profiling, longer life expectancy, and greater access to good housing and schools because of the legacy of government redlining—which is forbidden, and "discussing" the notion of white privilege "in an objective manner," which is permitted.[15] Because the bill does not provide fair warning as to what manner of discussion is off-limits, it would discourage teachers and employers from venturing anywhere near the forbidden concepts for fear of crossing the murky line between discussing and advancing them. Such chilling of expression and self-censorship because of vagueness in the law violates the Due Process Clause and the First Amendment.[16]

* * *

H.B. 7/S.B. 148 is unconstitutional. It would needlessly result in costly litigation at the expense of Florida's taxpayers. We urge you to vote against this bill.

Sincerely,

Shalini Goel Agarwal, Counsel
The Protect Democracy Project, Inc.

CC: All House Representatives

---

[10] *Id.* at 506.
[11] *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (teachers).
[12] *Id.* at 599–601.
[13] H.B. 7/S.B. 148.
[14] *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) ("[W]hen a statute interferes with the right of free speech or of association, a more stringent vagueness test should apply.").
[15] *See Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 544 (holding that EO that prohibited "inculcat[ing]," "promot[ing]," or "teach[ing]" the concept of implicit bias but not "inform[ing]" about or "foster[ing] discussion" of the topic is unconstitutionally ambiguous and "poses a danger of arbitrary and discriminatory application").
[16] *Keyishian*, 385 U.S. at 604 ("The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.").