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DISCRIMINATORY CENSORSHIP LAWS

TULANE LAW REVIEW (FORTHCOMING)

Jonathan Feingold* & Joshua Weishart*

ABSTRACT

The summer of 2020 ignited global protests for racial justice. Across the United States, millions marched with a modest plea: that America reckon with its racism. For K-12 schools, this moment pushed local communities and district leaders to create more inclusive classrooms and curricula. Yet before the summer had ended, America’s antiracist turn provoked a backlash campaign that has proven far more impactful and enduring.

This campaign has featured the rise and spread of “discriminatory censorship laws”—a term we apply to government action designed to demean inclusionary values and to deny students access to critical knowledge, inquiry, and thinking. As of January 2024, over 20 states and 145 school districts had enacted at least one discriminatory censorship law regulating K-12 schools. These laws cover over 1.3 million educators and nearly half the nation’s 50 million public school students.

Many have analyzed the legality of discriminatory censorship laws. Few have systematically assessed their impact. This Article fills that gap by synthesizing otherwise siloed research. Drawing on this scholarship, we identify two overarching threats discriminatory censorship laws pose to students, educators, and public education writ large: (1) hostile learning environments and (2) miseducation. We also surface how discriminatory censorship laws have spread notwithstanding their lack of popular support. Albeit unpopular, this ongoing campaign of discriminatory censorship is unlikely to relent absent an equally committed and coordinated response.

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INTRODUCTION

The Georgia school board voted 4-3, along party lines, to fire elementary school teacher Katherine Rinderle. Her offense: Rinderle read her fifth-grade class “My Shadow is Purple,” a children’s book that explores gender roles and identity.¹ Rinderle had purchased the book, which her students had selected and was nominated for an award, at her school’s district-approved Scholastic Book Fair.² According to the district superintendent, Rinderle violated a state law passed the prior year. Rinderle’s attorney disputed the claim and took aim at the law itself:

To fire a teacher under a law that no two people could agree on is wrong. Ms. Rinderle, like other Georgia educators, does not know where the lines are drawn when it comes to sensitive, controversial, or divisive concepts. After two days of trial, we still do not know.³

The state board nevertheless upheld Rinderle’s dismissal, “without discussing it.”⁴ She sued, joined by a transgender student and youth organization asserting that LGBTQ-plus students have since “suffered the ripple effects” of Rinderle’s firing under the new “censorship” regime.⁵

¹ Press Release, *Statement on Cobb County school board decision to uphold termination of Katherine Rinderle*, Southern Poverty Law Center (Aug. 17, 2023), <https://www.splcenter.org/presscenter/statement-cobb-county-school-board-decision-uphold-termination-katherine-rinderle>.

² Christine Hauser, *Teacher is fired for reading book on gender identity in class*, N.Y. TIMES (August 18, 2023), <https://www.nytimes.com/2023/08/18/us/georgia-teacher-fired-gender-book.html>.

³ Press release, *Statement on Cobb County school board decision to uphold termination of Katherine Rinderle*, *supra* note 1.

⁴ AP News, *Georgia board upholds firing of teacher for reading a book about gender identity to students* (Feb. 22, 2024), <https://apnews.com/article/teacher-fired-book-georgia-shadow-is-purple-6a7f90ded1b55a11aa842c3be25d6826>.

⁵ Timothy Pratt, *Georgia lawsuit challenges anti-LGBTQ+ book bans over ‘real harms’*, THE GUARDIAN (Jul. 3, 2024), <https://www.theguardian.com/us-news/article/2024/jul/03/georgia-lawsuit-book-bans>.

Around the same time as Rinderle’s termination, a similar law in Florida undermined educational offerings at 562 high schools.⁶ If the schools offered the full AP Psychology curriculum, a staple for 30 years, they risked violating Florida’s new “Don’t Say Gay” law.⁷ But if teachers did not “teach all of the content in the course,” the students would not receive AP credit.⁸ The College Board, which oversees the AP curriculum, claimed that Florida’s Department of Education—by targeting content about sexual orientation and gender identity—had effectively banned the course.⁹ Although the state eventually relented, the announcement came too late for districts to reinsert AP Psychology into the year’s curriculum. The offending content: AP Psychology “asks students to ‘describe how sex and gender influence socialization and other aspects of development.’”¹⁰

Earlier that year, Florida officials invoked a separate 2022 law (the “Stop WOKE Act”) to reject a pilot AP African American Studies course.¹¹ To justify their decision, state officials characterized the AP course as “woke indoctrination,” “inexplicably contrary to Florida law,” and “significantly lack[ing] educational value.”¹² The targeted material: topics on “Intersectionality and Activism,” “Black Queer Studies,” “Movement for

⁶ Laura Meckler, *Florida says AP Psychology doesn’t violate the law, after all*, WASH. POST (August 9, 2023), <https://www.washingtonpost.com/education/2023/08/09/florida-schools-drop-ap-psychology-class/>.

⁷ Hannah Natanson, *Florida bans teaching about gender identity in all public schools*, WASH. POST (April 19, 2023), <https://wapo.st/3ZVEhNm>. With limited exception, Florida’s “Don’t Say Gay” law now prohibits “instruction” “on sexual orientation or gender identity.” *See id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Laura Meckler, *Florida says AP Psychology doesn’t violate the law, after all*, WASH. POST (August 9, 2023), <https://www.washingtonpost.com/education/2023/08/09/florida-schools-drop-ap-psychology-class/>.

¹¹ The Office of Articulation, Florida Department of Education, Letter from the Florida Department of Education to Brian Barnes (2023, January), <https://drive.google.com/file/d/1A7ooiX-5pyiCxxLbmrvyPKcD9rpolu3H/view>.

¹² *Id.*

Black Lives,” “Black Feminism and Literary Thought,” and “The Reparations Movement.”¹³

Those same Florida officials did more than retract the curriculum. They also infused the curriculum with openly rightwing viewpoints. Among other changes, the state’s GOP leadership adopted new social studies standards that suggested enslaved people benefitted from slavery¹⁴ and approved PragerU’s self-described right-wing “indoctrination” videos for classroom use.¹⁵

The foregoing examples are neither isolated nor surprising. They reflect the now-common and predictable impact of “discriminatory censorship laws”—a term we apply to recent government efforts to regulate classroom instruction on racism, gender identity, and other targeted topics.¹⁶ Others

¹³ Alia Wong & Ana Goñi-Lessan, *As demand for AP African American Studies curriculum surges across US, Florida ban remains*. USA TODAY (July 21, 2023), <https://www.usatoday.com/story/news/education/2023/07/21/ap-african-american-studies-rising-popularity/70388116007/>.

¹⁴ Meckler, *Florida says AP Psychology doesn’t violate the law, after all, supra* note 9; Manny Diaz Jr. (@CommMannyDiazJr), TWITTER (Jan. 20, 2023, 5:35 PM), <https://twitter.com/CommMannyDiazJr/status/1616565048767385601?s=20> (“Despite the lies from the Biden White House, Florida rejected an AP course filled with Critical Race Theory and other obvious violations of Florida law. We proudly require the teaching of African American history. We do not accept woke indoctrination masquerading as education.”).

¹⁵ Valerie Strauss, *Florida says it doesn’t want indoctrination in schools — but look at the materials it just approved*, WASH. POST (August 10, 2023), <https://www.washingtonpost.com/education/2023/08/10/indoctrination-florida-approves-schools/>. PragerU embraces the indoctrination label and has produced content that stigmatizes the Movement for Black Lives and related antiracist efforts. Specifically, PragerU’s website advertises the organization as being in the ‘mind-changing’ business” and its CEO affirmed her belief that “we should indoctrinate kids.” *See id.* An approved PragerU video distorts the murder of George Floyd (who it characterizes as “resist[ing] arrest”) as involving “false claims of racial targeting” that sparked “fiery protests” and spread “anger and violence.” *Id.* PragerU advertises the video as follows: “Teach middle and high school kids how the Black Lives Matter (BLM) movement and anti-police sentiment affected crime, families, and small business in American cities.” *Id.*

¹⁶ For brevity, we use the term “laws” to encompass various government actions that state and local officials have taken to regulate classroom conversations about targeted topics. Such actions include, *inter alia*, statutes passed by legislative bodies, district resolutions, agency policies, and executive actions. So-called “divisive concept” laws comprise a significant subset of all discriminatory censorship laws.

have employed terms such as “backlash bills,”¹⁷ “anti-literacy laws,”¹⁸ “anti-CRT laws,”¹⁹ and “educational gag orders”²⁰ to describe this new body of law. We prefer “discriminatory censorship laws” because we believe the term captures two discrete goals these laws further: (1) to discredit and demean inclusionary principles and practices and (2) to deny students access to critical knowledge about racism, sexism, gender identity, and other targeted topics (collectively, “targeted topics”).²¹

As we detail below, discriminatory censorship laws buttress a broader campaign to morally stigmatize and legally outlaw “diversity- and inequality-related discussion, learning, and student support in educational settings” and beyond.²² One University of California research team has

Jonathan Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723 (2022).

¹⁷ Feingold, *Reclaiming Equality*, *supra* note 15 at 751 (terming discriminatory censorship laws “backlash bills” to capture, in part, the discursive function these laws serve to stigmatize antiracist efforts).

¹⁸ Kathryn Russell-Brown, ‘*The Stop WOKE Act*’: *HB 7, Race, and Florida’s 21st Century Anti-literacy Campaign*, 47 NYU REV. L. SOC. CHANGE 1 (2022).

¹⁹ See Feingold, *Reclaiming Equality*, *supra* note 15.

²⁰ See Jeremy Young & Jonathan Friedman, *America’s Censored Classrooms* (Aug. 17, 2022), <https://pen.org/report/americas-censored-classrooms/> (employing “educational gag orders” to refer to “legislative restrictions on discussions of race, gender, American history, and LGBTQ+ identities in K-12 classrooms and on college campuses” . . . “a sweeping crusade for content- and viewpoint-based state censorship” . . . “a more general assault on discussions of systemic inequality” to “shut down important conversations in the classroom.”); see also Jonathan Friedman & James Tager, *Educational gag orders*, <https://pen.org/report/educational-gag-orders/>.

²¹ See *infra* Part III.A (outlining how discriminatory censorship laws create hostile learning environments and manufacture learning loss). Cf. M. Waters & S. Unsicker-Durham, *The Hydra nature of book banning and censorship*, 6 STUDY AND SCRUTINY: RESEARCH IN YOUNG ADULT LITERATURE 1 (2023) (“Whether student, educator, or concerned parent, with this current rise in book challenges and censorship across the US, we are all facing the same multi-headed beast, a dangerous and multifarious challenge to our fundamental rights for academic freedom and access to student-centered reading, writing, speaking, and listening.”).

²² Mica Pollock et al., *Supported, silenced, subdued, or speaking up? K12 educators’ experiences dealing with the conflict campaign, 2021-2022*, 9 J. LEADERSHIP, EQUITY & RSCH 2 (2023).

described this rightwing political project as a “conflict campaign,” a term that locates discriminatory censorship laws within a calculated effort to “inflam[e] Americans to battle public schools and one another.”²³

A growing number of scholars have analyzed the constitutionality of discriminatory censorship laws.²⁴ But few, if any, have provided a systematic assessment of the laws’ impact.²⁵ This Article fills that gap.²⁶ Specifically, we synthesize available research on the spread, scope, and impact of the still-growing body of discriminatory censorship laws. We then offer a series of recommendations for stakeholders best positioned to stem this backlash campaign.

As measured by spread, scope, and impact, the GOP’s discriminatory censorship campaign has been immensely effective. Between January 2021 and January 2024, state and local officials enacted over 240 discriminatory censorship laws that regulate K-12 classrooms.²⁷ These laws directly touch

²³ *Id.*

²⁴ See, e.g., Vanessa Miller et al., *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 MISSOURI L. REV. 61 (2024). Courts have also begun to weigh in. As of this writing, federal judges in Florida, Oklahoma and New Hampshire, have ruled (at least in part) for plaintiffs challenging the constitutionality of a state discriminatory censorship law. See *infra* Part IV.B.1.

²⁵ Most of the articles examining impact have focused on specific laws—as opposed to offering a more aggregate analysis. See, e.g., Russell-Brown, *supra* note 17.

²⁶ This Article builds upon, and draws from Jonathan Feingold & Joshua Weishart, *How Discriminatory Censorship Laws Imperil Public Education*, NATIONAL EDUCATION POLICY CENTER (Nov. 30, 2023), <https://nepc.colorado.edu/publication/censorship>.

²⁷ See *infra* Part I-II (detailing spread of discriminatory censorship laws). A growing number of discriminatory censorship laws regulate higher education. See Athena Mutua et al., *The War on Higher Education*, __ UCLA L. REV. DISCOURSE (forthcoming 2024); Isaac Kamola, *Manufacturing Backlash: Right-Wing Think Tanks and Legislative Attacks on Higher Education, 2021-2023*, AAUP Report 3 (2024), https://www.aaup.org/sites/default/files/Manufacturing_Backlash_final.pdf [<https://perma.cc/GN57-9DDD>] (“Today higher education is under attack. Since 2021 we have witnessed . . . an ‘unusually brazen series of challenges to academic freedom,’ unleashed by conservative activists and a ‘national-level political machine’ closely aligned with the Republican Party.”). For reasons of scope, this Article focuses on the K-12 context.

over 1.3 million educators and over 20 million students—a total that represents roughly half of the country’s public-school students.

The ferocious spread of discriminatory censorship laws has ushered in a new invidious form of school segregation. Two separate public education systems are set to diverge—split between “free” schools and “censored” schools. Students in “free” states and districts access schools that invite inclusionary values and promote critical thinking and comprehensive coverage of targeted topics.²⁸ Students in “censored” states or districts, in contrast, must navigate regimes that compel exclusionary values and spread miseducation. Yet as we unpack below, this segregation metaphor arguably understates the challenge. Even in “free” states, educators report anxiety that covering targeted topics could trigger backlash.²⁹

In addition to assessing impact, this Article identifies two underappreciated dynamics. First, the public and media have internalized an *over-reading* of discriminatory censorship laws that incorrectly assumes all such laws prohibit any instruction on targeted topics.³⁰ This over-reading facilitates discriminatory censorship because it incentivizes educators to self-censor (unnecessarily) and it enables rightwing actors to target disfavored (but lawful) curriculum.

Second, increasing evidence suggests that discriminatory censorship laws—and the assault on public education they buttress—are deeply unpopular. Public opinion should reassure those committed to more inclusive classrooms and curriculum. But as we detail, absent an equally coordinated and committed campaign against discriminatory censorship, there is little reason to believe public opinion will be sufficient to limit—let alone remedy—the harm discriminatory censorship laws have already wrought.

The Article proceeds in four parts.

²⁸ We recognize that even in free states, many students lack access to schools that meaningfully realize this commitment to inclusive and race-conscious classrooms and curriculum. See generally Cynthia Greenlee, *How History Textbooks Reflect America’s Refusal to Reckon with Slavery*, VOX (Aug. 26, 2019), <https://www.vox.com/identities/2019/8/26/20829771/slavery-textbooks-history>.

²⁹ See Mica Pollock et al., *The Conflict Campaign*, UCLA IDEA (Jan. 2022), <https://idea.gseis.ucla.edu/publications/files/the-conflict-campaign-report>.

³⁰ See e.g., *infra* Part II.B.1.

Part I outlines the genesis of discriminatory censorship laws. We outline how discriminatory censorship laws arose within a well-funded and calculated backlash campaign that emerged in response to the summer of 2020’s global uprising for racial justice.

Part II documents the spread and scope of discriminatory censorship laws. Most of the students who attend censored schools reside in GOP-controlled states. Still, we note that numerous school districts within Democrat-controlled states have imposed discriminatory censorship regimes.

Part III synthesizes existing research on the harms discriminatory censorship laws pose to students, educators and public education. As detailed below, we divide these harms into two primary categories: (1) *hostile learning environments* and (2) *miseducation*.

Part IV shifts the focus by identifying sites of resistance—what we term “backlash to the backlash.” We conclude with concrete recommendations directed at a range of stakeholders—all of whom are positioned to halt the spread of discriminatory censorship laws and mitigate their negative effects.

I. THE ORIGIN:
FROM RACIAL RECKONING TO “WHITELASH”³¹

Discriminatory censorship laws comprise one front in a broader campaign to stifle the anti-racist aspirations that animated 2020’s global uprising for racial justice.³² Across the United States, millions marched to the chorus of a simple plea: that America reckon with its racism. This multi-racial and cross-class coalition called on private and public entities to turn inward and

³¹ See generally Darren Lenard Hutchinson, *Continuous Action Toward Justice*, 37 J.L. & RELIGION 63 (2022) (“Several commentators describe Donald Trump’s 2016 election victory as a ‘whitelash.’ By this, they mean to convey the idea that because many whites were so angered by the election of Barack Obama as president they supported an openly racist, sexist, and generally polarizing candidate.”).

³² See generally Kimberle Crenshaw, *This is Not a Drill*, 68 UCLA L. REV. 1792 (2022); see also Kamola, *Manufacturing Backlash*, *supra* note 25.

interrogate how racism shaped daily operations and seemingly mundane institutional arrangements.³³

In the domain of public education, this global moment “sparked increasing K-12 efforts to discuss and explore issues of race and racism in U.S. society.”³⁴ To better support student-centered programming and professional development, many school districts coupled anti-racist commitments with plans to hire “equity directors.”³⁵ The moment bore promise that district leaders might translate public statement into meaningful action through school budgets, practices, and pedagogy.

Yet before summer had even ended, the backlash arrived. Enabled by rightwing think tanks and foundations,³⁶ conservative activist Christopher Rufo set in motion what would become a coordinated campaign of discriminatory censorship.³⁷ During a September 2020 appearance on Tucker Carlson’s Fox News show, Rufo launched the first primetime broadside against antiracism and “Critical Race Theory” (CRT).³⁸ Marshaling now-

³³ See, e.g., Michael Z. Green, *(A)Woke Workplaces*, 2023 WIS. L. REV. 811, 813 (2023) (“After the tragic murder of George Floyd in May 2020 and the international protests in response, employers wrestled with how to address their employees’ growing concerns about racial justice. A number of companies embraced the Black Lives Matter (BLM) movement, engaged in discussions about the existence of systemic racism, and hired consultants on matters of race to speak to and train their workers.”).

³⁴ Pollock et al., *Supported, silenced, subdued, or speaking up?*, *supra* note 22 at 2 (“The summer of 2020 and its nationwide protests denouncing police brutality sparked increasing K–12 education efforts to discuss and explore issues of race and racism in U.S. society.”).

³⁵ *Id.*

³⁶ See Kamola, *Manufacturing Backlash*, *supra* note 25.

³⁷ Bryan Metzger & Jake Lahut, *Trump issued an Executive Order on Critical Race Theory after seeing a segment about it on Tucker Carlson’s show: Book*, BUSINESS INSIDER, (Dec. 8, 2021), <https://www.businessinsider.in/politics/world/news/trump-issued-an-executive-order-on-critical-race-theory-after-seeing-a-segment-about-it-on-tucker-carlsons-show-book/articleshow/88152058.cms>.

³⁸ See B. Wallace-Wells, *How a conservative activist invented the conflict over critical race theory*, *The New Yorker* (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> (quoting Rufo for writing that “‘Critical Race Theory’ is the perfect villain” . . . “[s]trung together, the phrase

familiar rhetoric, Rufo blamed CRT for the preceding summer’s “riots” and mischaracterized a little-known academic framework as an “existential threat” “weaponized” against “core American values.”³⁹ He called on President Trump “to immediately issue an executive order to abolish critical race theory training from the federal government.”⁴⁰

It seems Trump was listening. Within days, the Trump Administration contacted Rufo to collaborate on a response.⁴¹ This union precipitated multiple Executive Branch documents that took aim at antiracism and CRT. The first comprised a memo from Russell Vought, who led President Trump’s Office of Management and Budget and drafted part of Project 2025.⁴² In the memo’s opening lines, Vought asserted that “Executive Branch agencies have spent millions of taxpayer dollars to date ‘training’

‘critical race theory’ connotes hostile, academic, divisive, race-obsessed, poisonous, elitist, anti-American” . . . “[the goal was] to politicize the bureaucracy . . . take some of these essentially corrupted state agencies and then contest them, and then create rival power centers within them.”).

³⁹ Taifha Alexander et al., *Tracking the attack on Critical Race Theory*, CRT FORWARD, UCLA SCHOOL OF LAW, (2023) <https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law-CRT-Report-Final.pdf>. Rufo’s rhetorical assault resuscitated caricatures critics had previously levied against CRT, critical scholars, and critical theory more broadly. *See, e.g.*, Jerome Culp, Jr., *To The Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1998) (“Ten years after its formal beginning, critical race theory is under assault by those inside and outside the legal academy for supposed ugly things contained within the texts that make up the body of its work . . . some of our critics have claimed to find within those multiple-authored texts anti-Semitism, anti-white, anti-white male, anti-Asian and other uncivil byproducts.”).

⁴⁰ Alexander et al., *Tracking the attack on Critical Race Theory*, *supra* note 36.

⁴¹ *Id.*

⁴² *See* Steve Contorno, *Trump Claims Not to Know Who is Behind Project 2025. A CNN Review Found at Least 140 People Who Worked for Him Are Involved*, CNN (July 11, 2024), <https://www.cnn.com/2024/07/11/politics/trump-allies-project-2025/index.html> (“New organizations centered around Trump’s political movement, his conspiracy theories around his electoral defeats and his first-term policies are deeply involved in Project 2025 as well. One of the advisory groups, America First Legal, was started by Miller, a key player in forming Trump’s immigration agenda. Another is the Center for Renewing America, founded by Russ Vought, former acting director of the Office of Management and Budget, who wrote for Project 2025 a detailed blueprint for consolidating executive power.”).

government workers to believe divisive, anti-American propaganda.”⁴³ Vought went on to cite “press reports” of government employees being told “virtually all White people contribute to racism” and being “required to say that they ‘benefit from racism.’”⁴⁴ The memo then specifically directed all federal agencies to:

identify all contracts or other agency spending related to any training on ‘critical race theory,’ ‘white privilege,’ or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil. . . . [A]ll agencies should . . . identify all available avenues to . . . cancel any such contracts and/or divert Federal dollars from these un-American propaganda sessions.

Roughly two weeks later, President Trump signed Executive Order 13950 (the “Trump EO”), titled “Combating Race and Sex Stereotyping.”⁴⁵ Among other mandates, the Trump EO prohibited federal agencies and contractors from “teach[ing], instruct[ing], or train[ing]” employees to “believe any of” nine so-called “divisive concepts.”⁴⁶

Unlike Vought’s memo, the Trump EO did not explicitly identify CRT as an enemy of the state. And absent context, many of the enumerated “divisive concepts” could appear facially reasonable—even capturing standard antidiscrimination norms. For example, the Trump EO prohibited instruction that: “(1) one race or sex is inherently superior to another race or sex”; and that “(6) an individual’s moral character is necessarily determined by his or

⁴³ Russell Vought, Training in the Federal Government, M-20-34 (Sept. 4, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf>.

⁴⁴ *Id.*

⁴⁵ Executive Office of the President. (2020, September 28) (“Trump EO”). Combating race and sex stereotyping. *Federal Register*, 85, 60683, <https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping>; Bryan Metzger & Jake Lahut, *Trump issued an Executive Order on Critical Race Theory after seeing a segment about it on Tucker Carlson’s show*, BUSINESS INSIDER, (Dec. 8, 2021), <https://www.businessinsider.in/politics/world/news/trump-issued-an-executive-order-on-critical-race-theory-after-seeing-a-segment-about-it-on-tucker-carlsons-show-book/articleshow/88152058.cms>.

⁴⁶ Trump EO, *supra* note 42.

her race or sex.”⁴⁷ At face value, this language would seem to support antiracist programming that challenges pervasive racial or gendered biases and stereotypes.⁴⁸ But when read alongside Rufo’s initial broadside and

⁴⁷ *Id.* The full list of “divisive concepts” contained in the Trump EO includes:

The initial list of “divisive concepts,” enumerated below, first appeared in an Executive Order then-President Trump issued in September of 2020:

- (1) one race or sex is inherently superior to another race or sex;
- (2) the United States is fundamentally racist or sexist;
- (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (6) an individual’s moral character is necessarily determined by his or her race or sex;
- (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

The Trump also referenced “race or sex stereotyping” and “race or sex scapegoating” as specific “divisive concepts” defined as follows:

Race or sex stereotyping” means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

Race or sex scapegoating” means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

⁴⁸ If their text privileged over their proponents’ desires, many discriminatory censorship laws should legally insulate educators who discuss CRT or otherwise employ antiracist practices and pedagogy. *See infra* Part II.B.1. A Trump-appointed federal judge expressed this perspective when upholding portions of Oklahoma’s discriminatory censorship law. *See infra* Part IV.B.1(1).

Trump's escalating anti-CRT and anti-antiracist rhetoric,⁴⁹ the Trump EO marked an unmistakable (and publicly understood) attack on CRT and anti-racism writ large.⁵⁰

Reactions from elite institutions reflected this public understanding. As one prominent example, Stanford University responded to the Trump EO by releasing internal guidance that seemed to prohibit any content about “structural or systemic racism,” “reparations,” or “implicit bias resulting in systemic discrimination.”⁵¹ Public backlash with swift; Stanford pulled the document and apologized for overreacting.⁵² Notwithstanding the correction, self-censorship in one of America's most well-resourced institutions revealed the Trump EO's power to stifle even modest anti-racist efforts. Stanford's behavior also revealed an institutional willingness to retract lawful antiracist initiatives in the face of an administration hostile to such projects.

⁴⁹ Cheryl Harris, *What is Critical Race Theory and why is Trump afraid of it?*, THE NATION (Sept. 17, 2020), <https://www.thenation.com/article/politics/trump-critical-race-theory/>; H. Fuchs, *Trump attack on diversity training has a quick and chilling effect*, NEW YORK TIMES (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html> (“An executive order, issued in late September as Mr. Trump was stepping up his charged attacks on Black Lives Matter protesters and ‘political correctness,’ banned the federal government, as well as its contractors, subcontractors and grantees, from offering certain diversity training on racial and gender biases—teachings that the order called ‘divisive’ and a ‘malign ideology.’”); Matthew S. Schwartz, *Trump tells agencies to end trainings on “White Privilege” and “Critical Race Theory”*, NPR (Sept. 5, 2020), <https://www.npr.org/2020/09/05/910053496/trump-tells-agencies-to-end-trainings-on-white-privilege-and-critical-race-theory>.

⁵⁰ Six days after Trump signed the Trump EO, the Office of Management and Budget released another memo that directed the heads of federal agencies to investigate any trainings that included specific terms (including “critical race theory”) and claimed that the Trump Executive Order “sparked widespread concern about the legality of antiracism efforts.” Alexander et al., *Tracking the attack on Critical Race Theory*, *supra* note 36; *see also* Russell Vought, Training in the federal government. Memorandum for heads of executive departments and agencies. Washington, DC: Executive Office of the President, Office of Management and Budget, <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf>.

⁵¹ *See* Alexander et al., *Tracking the attack on Critical Race Theory*, *supra* note 36.

⁵² *Id.*

By March 2021, Rufo had publicly boasted that his anti-CRT talking points buttressed a messaging campaign to discredit antiracism and the inclusionary values it embodies (not a substantive critique of CRT).⁵³ In a subsequent interview with *The Washington Post*, Rufo characterized this approach as “obvious,” elaborating that “[i]f you want to see public policy outcomes you have to run a public persuasion campaign.”⁵⁴ One journalist—reflecting on a series of Rufo tweets—generously described the rightwing activist’s rhetoric as “a form of political marketing.”⁵⁵

More recently, Rufo has urged supporters to redeploy the same anti-CRT playbook to attack the LGBTQ community⁵⁶ and to discredit everything associated with diversity, equity, inclusion (DEI).⁵⁷ Within days of Hamas’

⁵³ Laura Meckler & Josh Dawsey, *Republicans, spurred by an unlikely figure, see political promise in targeting critical race theory*, WASH. POST. (Jun. 21, 2021), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/>. See also Crenshaw, *This Is Not a Drill*, *supra* note 25 at 1715 n.25 (“Much of the well-funded disinformation campaign animating the depiction of CRT as an intellectual boogeyman began after Christopher Rufo self-declared a ‘one-man war against critical race theory.’”).

⁵⁴ *Id.*

⁵⁵ “We have successfully frozen their brand—‘critical race theory’—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category,” he wrote. “The goal is to have the public read something crazy in the newspaper and immediately think ‘critical race theory.’ We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.” Zach Beauchamp, *Chris Rufo’s dangerous fictions*. VOX, (Sept. 10, 2023), <https://www.vox.com/23811277/christopher-rufo-culture-wars-ron-desantis-florida-critical-race-theory-anti-wokeness>

⁵⁶ See Candace Bond-Therault, *The Right Targets Queer Theory*, THE NATION (Apr. 19, 2022), <https://www.thenation.com/article/society/christopher-rufo-queer-theory/>; Trip Gabriel, *He Fuels the Right’s Cultural Fires (and Spreads Them to Florida)*, NY TIMES (Apr. 24, 2022), <https://www.nytimes.com/2022/04/24/us/politics/christopher-rufo-crt-lgbtq-florida.html>.

⁵⁷ See Christopher Rufo, *The DEI Regime*, Substack (July 14, 2022) (“Nothing is more important for the success of American innovation and self-governance than prevailing over a regime that seeks to supplant “life, liberty, and the pursuit of happiness” with “diversity, equity, and inclusion” as the governing principle of the United States.”); Linda Qiu, *No, ‘Wokeness’ Did Not Cause Silicon Valley Bank’s Collapse*, NEW YORK TIMES (March 15, 2023),

Oct. 2023 attack against Israel, Rufo Tweeted the battle plan:

Conservatives need to create a strong association between Hamas, BLM, DSA, and academic ‘decolonization’ in the public mind. Connect the dots, then attack, delegitimize, and discredit. Make the center-left disavow them. Make them political untouchables.⁵⁸

When critics replied that he was “saying the quiet part out loud,” Rufo admitted as much.⁵⁹ This tracks Rufo’s prior rallying cry for allies to “lay siege”⁶⁰ to America’s public institutions—a goal others have recognized as a desire to infiltrate public and private institutions with rightwing collaborators nostalgic for a pre-civil rights America.⁶¹

Rufo has boasted of having made such divisive inroads.⁶² After instigating the Trump EO and seeding a successful anti-CRT smear campaign (perhaps most impressive because Rufo never hid his intentions), Rufo aided

<https://www.nytimes.com/2023/03/15/us/politics/silicon-valley-bank-collapse-woke-fact-check.html> (“A growing chorus of conservative pundits and politicians have said the failure of Silicon Valley Bank was the result of the bank’s “woke” policies, blaming the California lender’s commitments to workplace diversity and environmentally and socially conscious investments.”).

⁵⁸ <https://x.com/realchrisrufo/status/1712938775834185891?lang=en>

⁵⁹ <https://x.com/realchrisrufo/status/1712998691609485455>

⁶⁰ Christopher Rufo, *Laying siege to the institutions*, IMPRIMIS (April 5, 2022), <https://imprimis.hillsdale.edu/laying-siege-to-the-institutions/> (“Why do I say that we need to lay siege to our institutions? Because of what has happened to our institutions since the 1960s . . . You have to fight on terms that you define. In responding to opponents of the Florida bill, for instance, don’t argue against ‘teaching diversity and inclusion,’ but against sexualizing young children . . . Conservatives have for too long been resistant to attacking the credibility of our institutions.”).

⁶¹ See Jennifer Berkshire, *Stuck on the Rufo Road*, THE FORUM (July 18, 2022), <https://forummag.com/2022/07/18/stuck-on-the-rufo-road/> (“In a now familiar exercise, Rufo sketched out his campaign to make CRT toxic as part of a larger propaganda war against public institutions. The ultimate goal, he explained, was essentially to do away with those institutions and redirect school funding to families and individuals based on their ‘values.’”).

⁶² See Ja’han Jones, *Claudine Gay’s Resignation Shows How White Rage Can Cripple College Campuses*, MSNBC (Jan. 3, 2024), <https://www.msnbc.com/the-reidout/reidout-blog/clauidine-gay-harvard-resignation-christopher-rufo-rena132115> (boasting on X of having “SCAPLED” former Harvard President Christine Gay).

the rightwing takeover of New College of Florida.⁶³ In January 2023, Florida Governor Ron DeSantis and the state board of governors appointed seven new members to New College’s board of trustees.⁶⁴ Along with Rufo, other appointees included members of President Trump’s 1776 commission and the president of a DC-based conservative think tank.⁶⁵ Rufo previewed his vision for the board:

We are now over the walls and ready to transform higher education from within . . . our all-star board will demonstrate that public universities, which have been corrupted by woke nihilism, can be recaptured, restructured, and reformed.⁶⁶

The new trustees realized Rufo’s vision. They replaced the New College President with Richard Corcoran (the former commissioner of DeSantis’ Board of Education),⁶⁷ eliminated the Office of Outreach and Inclusive Excellence, altered the faculty handbook, terminated the college’s gender studies program, and denied tenure to five faculty members.⁶⁸ Corcoran also

⁶³ *Anatomy of a political takeover at Florida public college*, ASSOCIATED PRESS ((March 30, 2023), <https://apnews.com/article/desantis-new-college-florida-woke-timeline-5a5bcd78230ddd2a1adb8021fea8a755> (“Gov. Ron DeSantis appoints six new members to 13-member Board of Trustees at New College, packing the board with Republican allies and insiders: Christopher Rufo, conservative activist, senior fellow at the Manhattan Institute and architect of right-wing outrage over critical race theory.”)).

⁶⁴ See Afshan Jafar et al., AM. ASS’N UNIV. PROFESSORS, REPORT OF A SPECIAL COMMITTEE: POLITICAL INTERFERENCE AND ACADEMIC FREEDOM IN FLORIDA’S PUBLIC HIGHER EDUCATION SYSTEM 3 (2023), https://www.aaup.org/file/AAUP_Florida_final.pdf [<https://perma.cc/P42V-44R8>].

⁶⁵ See *id.*

⁶⁶ <https://x.com/realchrisrufo/status/1611407924768956417?lang=en>

⁶⁷ *Richard Corcoran confirmed as New College of Florida’s president*, WUSF NPR (Nov. 9, 2023), <https://www.wusf.org/education/2023-11-09/richard-corcoran-confirmed-new-college-floridas-president> (“Since taking the helm in February, Corcoran has overseen sweeping changes at New College that have included the creation of athletic teams and the elimination of an office that dealt with diversity, equity and inclusion issues. The changes to New College have been facilitated by the school’s Board of Trustees, which was revamped by Gov. Ron DeSantis in January through a slate of conservative appointees.”).

⁶⁸ See Jafar et al., *Political Interference*, *supra* note 57 at 3.

recommended that the board deny tenure to a separate set of faculty members due, in part, to “a renewed focus on ensuring the College is moving towards a more traditional liberal arts institution.”⁶⁹ Consistent with the broader discriminatory censorship campaign, this “renewed focus” reflects the trustees’ desire to “adopt a new ‘classical’ liberal arts curriculum modelled after the conservative Hillsdale College.”⁷⁰

Even before Florida’s GOP staged a coup of their state’s preeminent liberal arts institution, the same individuals were proposing and passing some of the most notorious discriminatory censorship laws in the country. In the next Part, we turn to that effort. But rather than focus on Florida alone, we review the nationwide surge of discriminatory censorship laws. Since January 2021, GOP officials in all levels of government have introduced over 800 discriminatory censorship laws. Most—if not all—trace directly to the Trump EO.

II. THE SPREAD: DISCRIMINATORY CENSORSHIP UNLEASHED

As a formal matter, the Trump EO was short-lived. President Biden rescinded the order during his first week in office.⁷¹ But as a practical matter, the Trump EO lives on. Neither Biden’s rescission nor Rufo’s many concessions slowed the anti-antiracist agenda that inspired the original Trump EO. Even before President Biden assumed office, Trump allies had formed a “network of think tanks and donor groups dedicated to continuing

⁶⁹ *Id.*

⁷⁰ *Id.* at 8. Education journalist Kathryn Joyce has explained that “Hillsdale’s ‘classical education’ model—extolling Western civilization, American exceptionalism and the idea that America was founded on ‘Judeo-Christian’ principles—has become the chief model of what conservatives want to see in education.” Kathryn Joyce, *Tennessee Showdown: Governor’s Big Plan for Right-Wing Charter Schools Sparks Fierce Backlash*, SALON (Aug. 22, 2022), <https://www.salon.com/2022/08/22/tennessee-showdown-governors-big-plan-for-right-wing-charter-schools-sparks-fierce-backlash>. See also Kathryn Joyce, *Salon Investigates: The War on Public Schools is Being Fought from Hillsdale College* (Mar. 16, 2022), <https://www.salon.com/2022/03/16/salon-investigates-the-on-public-schools-is-being-fought-from-hillsdale-college>.

⁷¹ *Id.*

to advance [Trump’s] policy agenda.⁷² One component of this effort entailed repurposing the Trump EO into pre-packaged anti-CRT talking points and model legislation.⁷³

Since January 2021, federal, state, and local government officials have introduced over 800 discriminatory censorship laws.⁷⁴ More than 500 of these laws target K-12 schools—our focus for this Article. The large majority of this subset regulate classroom teaching and/or curricular materials.⁷⁵

Of the more than 500 proposed discriminatory censorship laws targeting K-12 schools, nearly 300 have been passed by state and local officials.⁷⁶

⁷² Sarah Schwartz, *Who’s Really Driving Critical Race Theory Legislation? An Investigation*, EducationWeek (July 19, 2021), <https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07>.

⁷³ *See id.* (“At the core of most of the bills, including the eight signed into law, is language lifted from a September 2020 executive order by former President Donald Trump. But it’s not that simple: Education Week reporting uncovered a complex web of individuals and conservative organizations that are writing model legislation and supporting these state-level bills.”); *see also* Pollock et al., *Supported, silenced, subdued, or speaking up?*, *supra* note 22 at 5 (“These efforts are part of a nationally networked effort to restrict diversity- and inequality-related discussion, learning, and student support in educational settings—while inflaming Americans to battle public schools and one another.”).

⁷⁴ *See* CRTForward, Interactive Map, <https://crtforward.law.ucla.edu/map/> (displaying “807 anti-CRT efforts introduced at the local, state, and federal levels”). For at least two reasons, this figure likely understates the total number of discriminatory censorship laws proposed and passed since January 2021. First, many discriminatory censorship laws are not readily discoverable by researchers. This includes policies adopted by school boards or other local entities that are not automatically uploaded in standard databases. *See* Alexander et al., *Tracking the attack on critical race theory*, *supra* note 36 (describing methodology). Second, even researchers may fail to identify discriminatory censorship laws that are reported by the media. One example is North Carolina’s Senate Bill 364, “An Act to Amend the State Human Resources Act to Prohibit Compelled Speech When an Individual Seeks State Government or Community College Employment,” <https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S364v6.pdf>. Although this law contains a list of prohibited concepts that mirror the Trump EO, it was missing from one of the major indices that tracks discriminatory censorship laws as of December 1, 2023.

⁷⁵ *See* Feingold & Weishart, *supra* note 27.

⁷⁶ *Id.*

Simply by the numbers, it is difficult to overstate the impact of these laws, which directly affect over 1.3 million educators and “over 22 million public school children.”⁷⁷ This amounts to nearly half of the country’s 55 million public school students. In Part III, we detail how these laws undermine student learning and the well-being of all institutional stakeholders. But before turning to impact, we provide a more granular overview of discriminatory censorship laws’ spread and scope.

Although most discriminatory censorship laws trace to the Trump EO, individual laws differ in various respects. To organize and analyze these variations, researchers tend to distinguish between laws based on the three following features: (1) source of law, (2) conduct prohibited, and (3) enforcement mechanism.

A. *Source of Law*

For our purposes, *source of law* refers to the entity that adopts the discriminatory censorship law. As a general matter, we distinguish between federal laws, state laws, and local laws.⁷⁸ As of this writing, GOP lawmakers are responsible for all enacted discriminatory censorship laws.⁷⁹ For that

⁷⁷ See Alexander et al., *Tracking the attack on critical race theory*, *supra* note 24; Young & Friedman, *America’s censored classrooms*, *supra* note 19 (“While it is difficult to guess the total number of educators affected by these laws and policies, a conservative estimate would put the number at approximately 1.3 million public school teachers and 100,000 public college and university faculty.”); National Center for Education Statistics, *Public and private elementary and secondary teachers, enrollment, pupil/teacher ratios, and new teacher hires: Selected years, fall 1955 through fall 2031*, U.S. Department of Education (2022), https://nces.ed.gov/programs/digest/d22/tables/dt22_208.20.asp.

⁷⁸ Within each of jurisdiction, one could also distinguish between legislative and executive (and, arguably, judicial) actions.

⁷⁹ PEN America, which hosts one of the major databases tracking discriminatory censorship laws, includes one state regulation from California that is not attributable to the GOP. See PEN America, Index of Educational Gag Orders <https://airtable.com/appg59iDuPhLPPFp/shrtwubfBUo2tuHyO/tbl49yod7101o0TCk/viw6VOxb6SUYd5nXM?blocks=hide> (last visited July 23, 2024). We do not include that regulation because it does not satisfy our definition of discriminatory censorship. Rather, it incentivizes covered individuals to employ inclusive pedagogical techniques.

reason, the federal government has not adopted any such laws since President Biden assumed office in January 2021.⁸⁰

In absolute numbers, local school districts or school boards are responsible for most discriminatory censorship laws.⁸¹ These local laws generally fall into one of three categories: district policies, resolutions, or statements.⁸² Since 2021, local entities have adopted nearly 170 discriminatory censorship laws targeting K-12 schools.⁸³ In the 2023 calendar year, local entities introduced over 35 such laws.⁸⁴

Unlike state discriminatory censorship laws, which fall exclusively in GOP-controlled states,⁸⁵ many districts in blue and purple states have introduced and adopted local discriminatory censorship laws.⁸⁶ In fact, districts in California, Colorado, North Carolina, and Pennsylvania have passed roughly 40 existing discriminatory censorship laws.⁸⁷

One example of a local discriminatory censorship law in a blue state is Board Policy 6142.4, which the Ramona Unified School District (San Diego,

⁸⁰ Multiple discriminatory censorship laws have been introduced by GOP senators and house members. See Pen America, Index of Educational Gag Orders <https://airtable.com/appg59iDuPhLPPFp/shrtwubfBUo2tuHyO/tbl49yod7101o0TCk/viw6VOxb6SUYd5nXM?blocks=hide> (last visited July 23, 2024).

⁸¹ Launched in 2021, UCLA School of Law’s CRT Forward Tracking Project (CRT Forward) offers the most comprehensive archives of local discriminatory censorship laws. See Alexander et al., *Tracking the attack on Critical Race Theory*, *supra* note 36.

⁸² *Id.*

⁸³ Given the challenge tracking school district and school board policies, this estimate likely understates the total number of local discriminatory censorship laws—and, by extension, the total number of impacted students and educators. See *supra id.* & note 57 (explaining why indices that track local discriminatory censorship laws are likely incomplete).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ For purposes of this Article, we define “blue states” as states in which democrats control both the Executive and Legislative Branch and “purple states” as states in which democrats control the Executive or Legislative Branch.

⁸⁷ See Alexander et al., *Tracking the attack on critical race theory*, *supra* note 24.

CA) adopted in September 2021.⁸⁸ Titled “Civic Education–U.S. History/Government,” the policy mandates that “course outlines and instructional materials . . . shall not impart” any of the “divisive concepts” contained in the Trump EO.⁸⁹ Like other local laws, Board Policy 6142.4 only governs the conduct of schools and individuals within the district.

In absolute numbers, state officials have passed far fewer discriminatory censorship laws. Even so, because state laws regulate all covered entities within the entire state, state discriminatory censorship laws impact a far larger number of students and educators than their local analogues.⁹⁰

The free speech advocacy organization PEN America has played a leading role tracking and analyzing state discriminatory censorship laws.⁹¹ According to PEN, officials in 45 states have introduced over 360 such bills targeting K-12 schools.⁹² Over 90 such bills were introduced in 2023 alone.⁹³ As of November 2023, 21 states had enacted a total of 32 state discriminatory censorship laws regulating K-12 schools. Almost all of these laws come from GOP-controlled states. For the small number of discriminatory censorship laws that exist in Purple states, GOP-controlled legislatures overrode a democratic governor’s veto.⁹⁴

In the introduction, we referenced discriminatory censorship laws from Georgia and Florida that contained language modeled after the Trump EO.⁹⁵

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See, e.g.,* Young & Friedman, *America’s Censored Classrooms*, *supra* note 19.

⁹¹ *Id.* (This total includes three discriminatory censorship laws enacted outside of the legislative process—either through agency or executive action.)

⁹² *See* PEN America, Index of Educational Gag Orders, <https://airtable.com/appg59iDuPhLPPFp/shrtwubfBUo2tuHyO/tbl49yod7101o0TCk/viw6VOxb6SUYd5nXM?blocks=hide> (last visited July 17, 2024).

⁹³ *Id.*

⁹⁴ *Id.* (identifying state discriminatory censorship laws in Arkansas and North Carolina that overcame governor vetoes).

⁹⁵ *See supra* Introduction.

Another example is New Hampshire’s HB2,⁹⁶ which the state’s GOP legislature included within a 2021 state budget bill.⁹⁷ Among other provisions, the law mandates that no public school student “shall be taught, instructed, inculcated or compelled to express belief in, or support for” four banned concepts.⁹⁸ Akin to other state and local discriminatory censorship laws, each of New Hampshire’s four banned concepts trace to the “divisive concepts” in the Trump EO.⁹⁹

⁹⁶ See N.H. REV. STAT. ANN. § 354–A:29 (Westlaw through Ch. 18 of 2022 Reg. Sess.). In May 2024, a federal judge held that New Hampshire’s discriminatory censorship law was unconstitutionally vague. See *infra* Part IV.B.1(2).

⁹⁷ Anti-CRT rhetoric animated the debates preceding HB2’s passage. See Feingold, *Reclaiming CRT*, *supra* note 12 at 751. Frank Edelbut, New Hampshire’s Education Commissioner, rehearsed anti-CRT talking points in an op-ed supporting the bill. See Frank Edelblut, *Teach Children About Racism, Not to be Racists*, N.H. UNION LEADER (June 13, 2021), <https://www.education.nh.gov/news/teach-children-about-racism-not-be-racists> [<https://perma.cc/9DQ3-4RBS>] (“Of course, it is Critical Race Theory that would distort our history, limit our speech through its cancel culture and divide us up by immutable characteristics, ignoring the inherent humanity of each individual.”).

⁹⁸ The specific banned concepts include:

- I. That one’s age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin is inherently superior to people of another age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin;
- II. That an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- III. That an individual should be discriminated against or receive adverse treatment solely or partly because of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin; or
- IV. That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin cannot and should not attempt to treat others without regard to age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.

N.H. REV. STAT. ANN. § 193:40(I)(a)-(d).

⁹⁹ Compare N.H. REV. STAT. ANN. § 193:40(I)(a)-(d) with Trump EO, *supra* note 43.

B. *Conduct Prohibited*

Conduct prohibited refers to a discriminatory censorship law's substantive requirements or prohibitions. As noted above, many of these laws enumerate "divisive concepts" modeled after the Trump EO. Yet even among laws that list otherwise identical "divisive concepts," the specific requirements related to those concepts often vary.

A preliminary note here is warranted. Prevailing accounts about discriminatory censorship laws often clash with what many of these laws, per their text, actually mandate or prohibit.¹⁰⁰ Across academic scholarship and lay discourse, one sees a near-universal assumption that discriminatory censorship laws outlaw any and all instruction of CRT, antiracism and other targeted topics.¹⁰¹ This public understanding is often incorrect.

We are not denying that discriminatory censorship laws buttress a rightwing campaign to prevent students from learning about concepts like structural racism and intersectionality.¹⁰² This purpose is clear. As early as 2021, discriminatory censorship proponents marshaled often vitriolic anti-racist talking points to stigmatize and stifle burgeoning interest in classroom conversations about American racism and related topics.¹⁰³ It became common to hear GOP officials and their allies rehearse manufactured concerns about "critical race theory," "WOKE indoctrination," and "student discomfort."¹⁰⁴ Public officials also invoked discriminatory censorship laws to target antiracist educators who engaged targeted topics in their

¹⁰⁰ See Feingold, *Reclaiming Equality*, *supra* note 15.

¹⁰¹ *Id.*

¹⁰² C. Adams, *Experts call 'Anti-Protest' bills a backlash to 2020's racial reckoning*, *NBC News* (May 18, 2021), <https://www.nbcnews.com/news/nbcblk/experts-call-anti-protest-bills-backlash-2020-s-racial-reckoning-n1267781>.

¹⁰³ See Feingold, *Reclaiming Equality*, *supra* note 15.

¹⁰⁴ Crampton, *GOP sees 'Huge Red Wave' potential by targeting critical race theory*, *Politico* (Jan. 5, 2022), <https://perma.cc/2KYQ-VWA4>; J. Collins, *SC Lawmakers vow to take time on critical race theory rules*, *Charlotte Observer* (Jan. 27, 2022), <https://perma.cc/55TH-AJEJ> ("Other Republicans like Rep. Melissa Oremus said that if they wanted teachers to share personal opinions, they would invite them to dinner. '[F]or us to go into a classroom and tell our children that this happened because of your terrible [W]hite grandfather or great-grandfather, that is just wrong.'").

classrooms.¹⁰⁵ Against this backdrop, one can understand why the media cohered around a narrative that cast discriminatory censorship laws as a blanket ban on CRT and antiracist pedagogy.¹⁰⁶

Even if understandable, that narrative inflates the scope of many such laws. As we explain in greater detail below, many discriminatory censorship laws—per their text—permit classroom conversations about targeted topics. In some instances, discriminatory censorship laws contain language best read as condoning, if not requiring, equality-oriented pedagogy and curriculum—a key point we unpack further below.¹⁰⁷

Moreover, many discriminatory censorship laws contain explicit “safe harbors” that permit teaching content that aligns with state standards. A recent ruling from Oklahoma upheld part of the state’s discriminatory censorship law but concluded that the “safe harbor” severely limited the law’s scope. Specifically, the Trump-appointed district judge explained that “the safe harbor of the Academic Standards limits the scope of each of the directives set forth above, *expressly protecting the teaching of* “concepts that align to” listed *topics that include, and reasonably require discussion of, past and present race and sex discrimination.*”¹⁰⁸

To better appreciate the scope of discriminatory censorship laws, we now turn to PEN America’s taxonomy that categorizes this body of law based on the conduct they prohibit.

¹⁰⁵ E. Bloch, *Duval County teacher Amy Donofrio terminated, settles lawsuit with school district*, FLORIDA TIMES-UNION (Aug. 3, 2021), <https://www.jacksonville.com/story/news/education/2021/08/03/duval-schools-agrees-settlement-lawsuit-regarding-teacher-blm-flag/5477872001/>.

¹⁰⁶ Feingold, *Reclaiming Equality*, *supra* note 15.

¹⁰⁷ *See infra* Part II.B.

¹⁰⁸ *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, ___ F.Supp.3d ___, 2024 WL 3015359, at *10 (W.D. Okla. June 14, 2024) (emphasis added).

1. Laws that Prohibit *Promoting* Certain Concepts

The first category of discriminatory censorship laws *prohibit* teachers from *promoting* specific ideas or concepts.¹⁰⁹ PEN America identifies Florida’s HB7, the “Stop WOKE Act,”¹¹⁰ as an example. HB7 prohibits covered entities and individuals from “subject[ing] any student [to] instruction that *espouses, promotes, advances, [or] inculcates . . .* such student . . . to believe” certain concepts about race, color, national origin, or sex.¹¹¹

The key to HB7 is that it *bans* entities from *promoting* the enumerated concepts. Contrary to popular understandings, HB7 does not prohibit educators from discussing the enumerated concepts in their classroom. Again, contrary to public understanding, HB7 does not prohibit educators from engaging topics just because the conversation might make white students uncomfortable.¹¹²

Rather, per HB7’s plain text, the statute *permits* instruction on targeted topics so long as the educator does not “espouse[], promote[], advance[], [or] inculcate[]” students “to believe” them.¹¹³ We are not suggesting that this nuanced textual reading—even if it yields the most defensible statutory interpretation—insulates educators from a hostile political environment or is so discernable as to avoid due process vagueness concerns. Still, dominant narratives that lack this nuance enable and embolden bad faith actors to weaponize state power against educators—even when those educators comply with state law.

¹⁰⁹ See Young & Friedman, *America’s censored classrooms*, *supra* note 16 (cataloguing discriminatory censorship laws that “prohibit the promotion, endorsement, or inculcation of particular ideas or concepts”).

¹¹⁰ A federal judge enjoined a portion of the “Stop WOKE Act” that applies to higher education. See <https://www.acluf.org/en/press-releases/judge-blocks-floridas-stop-woke-censorship-bill-taking-effect-higher-education/>.

¹¹¹ Florida HB 7 (2022) Individual Freedom, <https://legiscan.com/FL/text/H0007/2022> (emphasis added).

¹¹² Rachel Scully, *Bill to ban lessons making white students feel ‘discomfort’ advances in Florida senate*, THE HILL (Jan. 20, 2022), <https://thehill.com/homenews/state-watch/590554-bill-to-ban-lessons-making-white-students-feel-discomfort-advances-in/>.

¹¹³ HB 7, *supra* note 108.

Another aspect of HB7 should give scholars pause before presuming the law *per se* prohibits educators from teaching about CRT, antiracism, or related concepts. Taken at face value, many of HB7’s enumerated concepts appear to invite classroom conversations and content that engages concepts central to the CRT canon like structural racism, intersectionality, anti-essentialism and implicit biases.¹¹⁴ PEN America has similarly observed many discriminatory censorship laws contain facially neutral language that enables proponents to project a veneer of neutrality—in part to veil what PEN American describes as an ideologically driven project of “compulsory patriotism.”¹¹⁵

Consider Florida’s HB7, which prohibits educators from espousing the viewpoint that: “Members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin.”¹¹⁶ Similar language appeared in the Trump EO and adorns numerous discriminatory censorship laws. The apparent purpose of this language is to manufacture the public (mis)perception that CRT and its adherents condone racial hierarchies. HB7’s text might support Rufo’s anti-CRT smear campaign. But as a factual matter, that text aligns with CRT as an intellectual and political project that aims to discredit and dismantle racial hierarchies in the United States.

Consider the following. By prohibiting educators from espousing the viewpoint that some groups are morally superior to others, HB7 seems to suggest that Florida educators have the right, if not obligation, to affirm the moral dignity of Black trans youth, undocumented Latine immigrants, and Palestinian students. Why? Because the failure to do so, particularly in a climate hostile to individuals with those identities, could implicitly *advance* the viewpoint that Black trans youth, or undocumented Mexican immigrants, or students advocating for Palestinian human rights, are morally inferior to other kids. At a minimum, the statute plainly supports educators who expressly reject the viewpoint that those groups are inferior to others.

¹¹⁴ See generally Athena Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 82 DENVER L. REV. 329 (2006).

¹¹⁵ Jeremy Young et al., *Educational gag orders seek to enforce compulsory patriotism*, PEN America (March 30, 2022), <https://pen.org/update-educational-gag-orders-seek-to-enforce-compulsory-patriotism/>.

¹¹⁶ *Id.*

In a similar vein, this same provision appears to invite, if not require, Florida educators to condemn inherently racist ideologies like white supremacy, “Great Replacement Theory,” islamophobia and antisemitism—all of which rest on the presumption that some groups are morally superior to others.¹¹⁷

Why? Because explicitly condemning Great Replacement Theory, islamophobia or antisemitism rejects the prohibited concept that “members of one race . . . or national origin are morally superior to members of another race . . . or national origin.”¹¹⁸ By extension, one might argue HB7’s implicates the legality of campus monuments that celebrate the Confederacy, its leaders, or others who advocated for slavery or other forms of white supremacist racial hierarchy. One can assume this was not the intent of HB7’s proponents. But whatever their intent, Confederate monuments convey a publicly understood message—particularly for Black Americans—that endorses a white supremacist cause.¹¹⁹ This message violates one of HB7’s banned concept.

In a similar vein, consider discriminatory censorship laws that invoke the Trump EO by prohibiting instruction that promotes “race stereotyping” or “race scapegoating.”¹²⁰ As with the provision discussed above, rightwing

¹¹⁷ See Mike Hixenbaugh, *Laws restricting lessons on racism are making it hard for teachers to discuss the massacre in Buffalo*, NBC News (May 18, 2022) (“One could persuasively argue that the text of the law actually compels teachers in [states like] Texas [and Florida] to affirmatively denounce white supremacist ideologies like great replacement theory. Because great replacement theory or white replacement theory is predicated on a notion of racial hierarchy.”) (quoting Jonathan Feingold).

¹¹⁸ For scholarship on the racialization of Islam and Jewish identity, respectively, see Khaled Beydoun, *AMERICAN ISLAMOPHOBIA* (2018); Antisemitism in History: Racial Antisemitism, <https://encyclopedia.ushmm.org/content/en/article/antisemitism-in-history-racial-antisemitism-18751945>.

¹¹⁹ See L. Britt et al., *Meaning and Impacts of Confederate Monuments in the U.S. South*, 17 *DU BOIS REVIEW* 105 (2020).

¹²⁰ This prohibition on “race stereotyping” tracks language in the Trump EO. See Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-28/pdf/2020-21534.pdf> (“‘Race or sex stereotyping’ means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.”).

activists employ this language to stigmatize antiracism, CRT and related frameworks. The goal is to conceptually associate progressive and inclusionary principles with “racist” practices like stereotyping or scapegoating. This makes sense as a discursive strategy.

But as a legal matter, laws that prohibit race- or gender-based stereotyping or scapegoating should insulate educators who bring CRT into their classroom. Much of the CRT canon—e.g., concepts like structural racism, intersectionality, anti-essentialism and implicit bias—equips students to identify and critique common sense logics that attribute inequality to group-based deficiencies.¹²¹ In other words, if the goal is to avoid stereotyping and scapegoating (as the Trump EO and its progeny condemn), CRT offers educators and students a set of tools uniquely suited to achieve that goal.¹²²

At bottom, many discriminatory censorship laws contain language that *invites* the sort of structural theories of inequality that ground CRT and *prohibits* alternative explanations—e.g., cultural differences—that CRT scholars often denounce as predicated on unfounded racist tropes.¹²³

2. Laws that Prohibit *Including* Certain Concepts

The second category of discriminatory censorship laws *prohibit* educators from *including* specific ideas or concepts in their curriculum.¹²⁴ This type of discriminatory censorship law is far less common than those falling into the first category.¹²⁵

¹²¹ See, e.g., Jerry Kang and Kristen Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465 (2010).

¹²² See Feingold, *Reclaiming Equality*, *supra* note 16 (explaining that the “race stereotyping” ban prohibits educators from “ascrib[ing] character traits” or “values” to “a race,” and observing how that mandate seems to invite educators to expose students to theories that attribute inequality to structural dynamics that, *for example*, unevenly distribute social, political, and economic resources).

¹²³ See *id.*

¹²⁴ Young & Friedman, *America’s censored classrooms*, *supra* note 16 (identifying discriminatory censorship laws that prohibit educators from “‘including,’ ‘discussing,’ or ‘making part of a course’ certain topics or ideas in the curriculum, regardless of how objective or balanced the discussion is.”).

¹²⁵ Between January 2021 and April 2022, GOP lawmakers proposed at least fifteen discriminatory censorship laws that expressly prohibit “Critical Race Theory.” This represented roughly 8% of such bills introduced in that period. See *id.*

One example is Mississippi’s HB 437. The bill would have prohibited public K-12 schools from including any “divisive concept as part of a course of instruction or in a curriculum or instructional material.”¹²⁶ Unlike the first category, HB 437 and similar laws prohibit the mere presence of a banned concept or topic—whether or not the instructor promotes it.

One subset of these laws prohibits instruction of specific texts or concepts. Common targets have included the *New York Times*’ 1619 Project and academic frameworks like “critical race theory” and “structural racism.”¹²⁷

One example is North Dakota HB 1508, which Governor Doug Burgum signed into law in November 2021.¹²⁸ Following the heading “Curriculum – Critical race theory – Prohibited,” HB 1508 recites the following language:

Each school district and public school shall ensure instruction of its curriculum is factual, objective, and aligned to the kindergarten through grade twelve state content standards. A school . . . *may not include instruction relating to critical race theory* in any . . . curriculum offered by the district or school. For purposes of this section, “*critical race theory*” means the theory that racism is not merely the product of learned individual bias or prejudice, but that *racism is systemically embedded in American society* and the American legal system to facilitate racial inequality.¹²⁹

A similar bill is Michigan Senate Bill 460.¹³⁰ Although this bill did not become law, it would have required schools to “ensure that the curriculum provided to all pupils . . . *does not include coverage of the [sic] critical race*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 2021 N.D. Laws, 1st Sp. Sess., Ch. 554 (H.B. 1508) (codified as N.D. CENT. CODE § 15.1-21-05.1 (2021), <https://perma.cc/JXB8-52KY>).

¹²⁹ N.D. CENT. CODE § 05.1 (emphasis added). Others have explained how the Bill text, specifically the ban against instruction “*relating to*” CRT renders the legislation susceptible to constitutional vagueness and overbreadth challenges. See, e.g., Judd Legum, *New North Dakota Law Can’t be Discussed in North Dakota Schools*, POPULAR INFO. (Nov. 15, 2021), <https://popular.info/p/new-north-dakota-law-cant-be-discussed?s=r>. Such sweeping prohibitive language also raises practical questions concerning what would be left in any curriculum about American history or societal arrangements in the United States today.

¹³⁰ S.B. 460, 2021 Leg., 2021-2022 Legis. Sess. (Mich. 2021).

theory, the 1619 project, or any of the following anti-American and racist theories.”¹³¹

When read in concert with Rufo’s anti-CRT “public persuasion campaign,” the discursive function these bills perform becomes apparent. Whether or not legally defensible, the bills’ language taints as educationally improper and immoral texts and modes of analysis that question the legitimacy of present-day inequalities.¹³² This rhetoric traces that contained in the Trump EO and Vought OMB memo, both of which appropriated the language of civil rights to cast antiracism and CRT as anti-American propaganda.¹³³ In this way, discriminatory censorship laws that prohibit “including” targeted topics are facially broader than the category of laws that make “promoting” targeted topics unlawful.

Before turning to the final category of discriminatory censorship laws, one final example warrants mention. Before Florida’s GOP leadership passed the “Stop WOKE Act,” the state’s Department of Education issued a rule that served a similar purpose.¹³⁴ That rule prohibited instruction that “suppress[es] or distort[s] significant historical events, such as . . . slavery, the Civil War and Reconstruction, the Civil Rights Movement and the contributions of women, African American and Hispanic people to our country.”¹³⁵ Out of context, this rule appears unobjectionable; it is hard to fault a requirement that educators not suppress or distort significant historical events. But consistent with the Trump EO and discriminatory censorship laws that rehearse unobjectionable language, other sections of the rule belie its partisan and partial aim. As with the North Dakota and Michigan bills

¹³¹ *Id.*

¹³² North Dakota’s bill accurately associates “critical race theory” with “the theory . . . that racism is systemically embedded in American society.” But by prohibiting instruction of that theory, the law communicates that structural theories of racism are inappropriate because they (purportedly) lack a “factual” or “objective” basis. *Cf.* Angela Onwuachi-Willig, *Roberts’s Revisions*, 137 HARV. L. REV. 192 (2023) (describing how judicial opinions employ narratives that transcend the mere reporting of facts and instead construct and reconstruct reality).

¹³³ See Feingold, *Reclaiming Equality*, *supra* note 12.

¹³⁴ In contrast to this Rule, the Stop Woke Act does not expressly name “Critical Race Theory.”

¹³⁵ 47 Fla. Admin. Reg. 2706 § III(3)(b) (June 14, 2021).

referenced above, the Florida Rule proceeds to identify “the teaching of Critical Race Theory” as an example of instruction that would distort history.¹³⁶ The Rule further describes CRT as “the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems *in order to* uphold the supremacy of white persons.”

We highlight the *italicized* words because they represent a nuanced example of how discriminatory censorship laws caricature CRT. It is accurate that a core CRT tenet is the notion that racism is embedded in American society (including legal systems) and that those systems tend to reproduce a racial regime in which whiteness is on top. But consistent with CRT’s focus on structures and outcomes—and relative disinterest in individual motivations—few who identify with the framework would endorse the “in order to” language. Rather, CRT’s central claim is that absent affirmative interventions that account for racism’s structural dimensions, historical racial hierarchies will endure.¹³⁷ The distinction is subtle. Still, we believe it meaningful to highlight because these subtle shifts feed global misrepresentations—such as the false claim that CRT blames and shames individual white people as “racist.”¹³⁸

The foregoing state bills and Florida Rule reveal one additional reason why it is often premature to describe discriminatory censorship laws as “CRT bans”—even those that expressly outlaw “critical race theory.” If CRT actually “suppress[ed] or distort[ed]” history—as Florida’s Department of

¹³⁶ *Id.* The full language is as follows:

Examples of theories that distort historical events and are inconsistent with State Board approved standards include the denial or minimization of the Holocaust, and the teaching of Critical Race Theory, meaning the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons.

¹³⁷ See Taifha Natalee Alexander & Ahilan Arulanantham, Critical Race Theory Model Measure and Explanatory Memorandum, UCLA School of Law Critical Race Studies, CRT Forward (2024), https://law.ucla.edu/sites/default/files/PDFs/Critical_Race_Studies/CRT-Forward-Model-Measure-Curriculum-070224.pdf.

¹³⁸ See David Smith, *How Did Republicans Turn Critical Race Theory into a Winning Electoral Issue*, THE GUARDIAN (Nov. 3, 2021), <https://www.theguardian.com/us-news/2021/nov/03/republicans-critical-race-theory-winning-electoral-issue>.

Education claimed—it would be consistent to prohibit instruction that distorted the past and ban CRT. But even a cursory review of CRT texts reveals that this broad canon neither “suppress[es]” nor “distorts” the past.¹³⁹ To the contrary, scholars who identify with CRT have long produced work that offers a more comprehensive historical accounting of American society—in part by decentering and disrupting academic traditions that tend to suppress and distort significant historical events (whether intentional or not).¹⁴⁰

3. Laws that Prohibit *Compelling* Certain Concepts

The third category of discriminatory censorship laws *prohibit* educators from *compelling* students to “adopt, affirm, or espouse a specific idea.”¹⁴¹ One example is Idaho’s HB377, which mandates that no public university or school shall “direct or otherwise compel students to personally affirm, adopt, or adhere to” specific prohibited concepts.¹⁴²

In separate work, we explain that this category of law is particularly redundant.¹⁴³ Among other reasons, the Supreme Court has proscribed public institutions from engaging in compulsion and indoctrination.¹⁴⁴ But as with other types of discriminatory censorship laws, the bills falling into this

¹³⁹ And to the extent certain texts may be guilty of suppression or distortion, they are certainly no less so than canonical texts from any other tradition—not to mention Supreme Court opinions. *See generally* Charles Lawrence, *Implicit Bias in the Age of Trump*, 133 HARV. L. REV. 2304 (2020).

¹⁴⁰ *See generally* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PENN. L. REV. 561 (1984); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L. J. 1062 (2022) (critiquing how curriculum and pedagogy common in the first year Property Law class tends to obscure the historical and contemporary relevance of slavery and conquest to our modern real property system).

¹⁴¹ Young & Friedman, *America’s censored classrooms*, *supra* note 16.

¹⁴² *Id.*

¹⁴³ *See* Feingold and Weishart, *Discriminatory Censorship Laws*, *supra* note 27.

¹⁴⁴ *See generally* West Virginia Board of Education v. Barnette, 319 U.S. 624, 641-43 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

category do not appear designed to fill a legal gap. Rather, their language tracks rhetoric from the messaging campaign that Rufo and his allies initiated following the summer of 2020. More precisely, the laws falling into this category amplify rightwing talking points about “WOKE indoctrination” and “parental rights”—that is, language designed to activate a particular voter base and discredit anti-racist values and practices.¹⁴⁵ To this end, scholars like LaToya Baldwin Clark have observed that many of the individuals and entities that rally for “parents’ rights” are not interested in rights for all parents.¹⁴⁶ Rather, the goal is to centralize educational power and control within a specific subset of parents and institutions—those who oppose antiracism, critical engagement around targeted topics, and inclusionary values more generally.¹⁴⁷

C. Enforcement Mechanism

Discriminatory censorship laws also vary in terms of their enforcement mechanism. On one end of the spectrum, some laws lack any specified enforcement mechanism. One example is Kentucky SB 1,¹⁴⁸ a 2022 law that requires schools to provide instruction “consistent with” a series of concepts

¹⁴⁵ See Pollock et al., *supra* note 22; Zach Beauchamp, *Chris Rufo’s Dangerous Fictions*, Vox (Sept. 10, 2023), <https://www.vox.com/23811277/christopher-rufoculture-wars-ron-desantis-florida-critical-race-theory-anti-wokeness>.

¹⁴⁶ LaToya Baldwin Clark, *The critical racialization of parents’ rights*, 132 YALE L. J. 2181 (2022) (“The parents’ rights [framing not only] recreates race contestations, but it changes the terms of the debate from political disagreements about curriculum to foundational struggles over educational control.”) In rhetorical and practical dimensions, parents were thus conscripted in the effort, given “parents’ rights anti-CRT guidebooks” and expected to become “teaching and curriculum watchdogs” entitled to “inspect curricula on demand, investigate individual teacher’s lessons plans without that teacher’s permission, and opt students out of lessons parents disagree with.” *Id.*

¹⁴⁷ *Id.*; see also Tori Otten, *Florida’s War on Books Enters “Goblin Butts Are Sexual” Territory: And of course, Moms for Liberty is Behind the Whole Thing*, The New Republic (Feb. 1, 2024), <https://newrepublic.com/post/178649/moms-liberty-bullies-florida-district-goblin-butt-childrens-book>.

¹⁴⁸ See, e.g., Kentucky SB1, An Act relating to education and declaring an emergency (2022) (punishment not specified).

that reflect or trace to the Trump EO.¹⁴⁹ Notwithstanding this explicit mandate, the law is silent concerning the mode of enforcement or penalty for violations.¹⁵⁰

Among laws that do prescribe penalties or enforcement, variations include a private right of action, loss of state funding for institutions, and professional discipline for educators.¹⁵¹ With respect to professional discipline, penalties range from temporary suspension to termination and loss of professional license. As one example, under New Hampshire’s HB 2, any “educator who is found to have taught or advocated a banned concept may lose not only his or her job, but also the ability to teach anywhere in the state” and be liable for monetary damages.¹⁵² Commenting on these potential penalties, a new Hampshire federal judge that struck down HB 2 opined that “it is difficult to conceive of more serious consequences that could befall a person in a civil proceeding than those that a teacher might face if they are found to have done something that [HB 2] prohibit.”¹⁵³ Even for targeted teachers who ultimately prevail on the merits, the temporary leaves can entail the loss of compensation and benefits while proceedings unfold.¹⁵⁴

In a 2023 report, PEN America observed that discriminatory censorship laws have become increasingly punitive.¹⁵⁵ This escalation included bills that permit multiple punishments for the same alleged violation. Kentucky’s HB

¹⁴⁹ *Id.* (“A public school . . . shall provide instruction and instructional materials that are . . . consistent with the following concepts . . .”).

¹⁵⁰ *See id.*

¹⁵¹ Young & Friedman, *America’s censored classrooms*, *supra* note 16 (“One-third of introduced state legislative measures specify withholding funding as a consequence for violations. Among the 308 introduced state legislative measures, at least one-third (101) propose withholding funding from teachers, schools, and districts for alleged violations. In addition, 14% (46) propose a private cause of action by which individual citizens may sue district officials and teachers (among others) for alleged noncompliance.”).

¹⁵² *Loc. 8027 v. Edelblut*, No. 21-CV-1077-PB, 2024 WL 2722254, at *2 (D.N.H. May 28, 2024).

¹⁵³ *Id.* at *8.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

18 offers one extreme example.¹⁵⁶ The Bill would have granted any “person aggrieved by a violation” a private right of action against “the institution, or any of its agents acting in their official capacities, for damages arising from the violation, including reasonable attorney’s fees and litigation costs.”¹⁵⁷ The bill further specified financial penalties of up to \$100,000 per violation.¹⁵⁸

Exacerbating penalties attached to discriminatory censorship laws, multiple states have enhanced surveillance of educators. This includes measures that require educators to proactively post material and others that “affirmatively require school districts to allow parents to surveil curriculum” and teachers.¹⁵⁹

To summarize, the foregoing overview has outlined the spread and scope of discriminatory censorship laws. In the next Part, we examine the impact of these laws. To do so, we synthesize existing research that has assessed the varied threats discriminatory censorship laws (and the political climates in which they arise) pose to students, educators, public education, and democracy itself.¹⁶⁰ We group these threats into two broad categories: the amplification of *hostile learning environments* and the proliferation of *miseducation* (what we alternatively term “manufactured learning loss”).

¹⁵⁶ Kentucky HB 18, An Act relating to prohibited instruction and declaring an emergency (Prohibiting public K-12 schools from offering “any classroom instruction or discussion, formal or informal, or distribut[ing] any printed or digital material, including but not limited to textbooks and instructional materials, that promotes” any of eight enumerated “concepts.”).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (“Excluding reasonable attorney's fees and litigation costs, any prevailing claimant shall be awarded no less than one thousand dollars (\$1,000) but no more than one hundred thousand dollars (\$100,000) cumulatively per action.”).

¹⁵⁹ Alexander et al., *Tracking the attack on critical race theory*, *supra* note 36.

¹⁶⁰ See Kaylene Stevens, *New law threaten educators who teach history. Where does that leave our democracy?*, COGNOSCENTI (Sept. 28, 2023), <https://www.wbur.org/cognoscenti/2023/09/28/divisive-concept-laws-critical-race-theory-kaylene-stevens>.

III. THE IMPACT: HOSTILE LEARNING ENVIRONMENTS & MISEDUCATION

Discriminatory censorship laws remain a relatively recent phenomenon. Even so, a growing body of scholarship and personal accounts evidence the negative toll these laws have taken on students, educators, and public education writ large.¹⁶¹ Drawing on this research, we now detail how discriminatory censorship laws expose stakeholders to an increased risk of harassment and transform schools into sites of miseducation.

These harms are both universal and particularized. The harms are universal in the sense that they compromise the well-being and education of all students. They are particularized in the sense that discriminatory censorship laws, and the institutional dynamics they engender, are most likely to exact the most harm on students and educators who are from, and who vocally support, targeted groups—that is, people of color and members of the LGBTQ+ community. By extension, one should expect that LGBTQ+ people of color suffer the most under regimes of discriminatory censorship.¹⁶²

The devastating consequences we outline below should not be a surprise. The Trump EO, the weaponization of anti-CRT rhetoric, and the wave of discriminatory censorship laws that followed furthered a calculated campaign to discredit the nation’s modest antiracist turn following the summer of 2020.¹⁶³ Yet in distressing respects, the nation’s largest media

¹⁶¹ See generally Feingold & Weishart, *supra* note 27 (synthesizing three-years of scholarship on discriminatory censorship laws’ scope, spread and impact).

¹⁶² See Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990); Keeanga-Yamahtta Taylor, *Until Black Women Are Free, None of Us Will Be Free*, *NEW YORKER* (July 20, 2020), <https://www.newyorker.com/news/our-columnists/until-black-women-are-free-none-of-us-will-be-free>.

¹⁶³ See Pollock et al., *supra* note 22; Crenshaw, *This is Not a Drill*, *supra* note 28. See also Jon D. Michaels, *Designing A Latter-Day Freedmen's Bureau*, 71 *UCLA L. REV. DISCOURSE* 70, 78–79 (2023) (“There is a trend, initially pushed by the businesslike government crowd but now additionally championed by those most animated by suspicions of the so-called “deep state,” to remove civil service protections for government employees.”) (citing, *inter alia*, Erich Wagner, *Trump Has Endorsed a Plan to Purge the Civil Service of “Rogue Bureaucrats,”* *GOV.*

outlets have struggled to name an open and unapologetic attempt to purge equality-oriented people, principles, and pedagogy from America’s classrooms.¹⁶⁴ This failure is particularly noteworthy given the candid remarks of rightwing activists and consistent refrain from certain academics and civil liberties organizations that “this is not a drill.”¹⁶⁵

Even before Biden assumed office, scholars and activists warned that the Trump EO should not be viewed as a fleeting one-off. The warning was that Trump’s anti-CRT turn foreshadowed predictable backlash to that summer’s racial justice protests—and that rightwing operatives were strategically weaponizing CRT rhetoric as a Trojan Horse to attack the country’s civil rights infrastructure.¹⁶⁶ These early warnings have proven prescient. The same individuals and entities that marshalled anti-CRT rhetoric to justify the earliest discriminatory censorship laws have since shifted their ire and attacks to, *inter alia*, LGBTQ+ community (and trans youth in particular); the academic freedom and free speech rights of university professors; the independence and autonomy of private and public universities; the federal agencies that enforce civil rights laws and anchor our public education system.¹⁶⁷ Those objectives feature prominently as a “centerpiece” of the Project 2025 agenda.¹⁶⁸

EXEC. (July 27, 2022), <https://www.govexec.com/workforce/2022/07/trump-endorsed-plan-purge-civil-service-rogue-bureaucrats/375028>).

¹⁶⁴ See generally L. Meckler & J. Dawsey, *Republicans, spurred by an unlikely figure, see political promise in targeting critical race theory*, *The Washington Post* (June 21, 2021), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/>. This campaign has entered a phase of coordinated attacks on “diversity, equity, and inclusion” personnel, programming, and offices. See Mutua et al., *The War on Higher Education*, *supra* note 25.

¹⁶⁵ See, e.g., Crenshaw, *This is Not a Drill*, *supra* note 28; *Florida Gov. DeSantis leads the GOP’s national charge against public education that includes lessons on race and sexual orientation*, *THE CONVERSATION* (Jan. 18, 2023), <https://theconversation.com/florida-gov-desantis-leads-the-gops-national-charge-against-public-education-that-includes-lessons-on-race-and-sexual-orientation-196369>.

¹⁶⁶ *Id.*

¹⁶⁷ See Athena Mutua, *Reflections on Critical Race Theory in a Time of Backlash*, 100 *DENV. L. REV.* 553 (2023).

¹⁶⁸ See Peter Greene, *What Does Project 2025 Actually Plan For Education?*, *FORBES* (Jul. 15, 2024), <https://www.forbes.com/sites/petergreene/2024/07/13/what-does-project-2025-actually-plan-for-education/>.

The threat discriminatory censorship laws pose to stakeholders and institutions is now undeniable. Yet to date, the Biden Administration and national civil rights organizations have offered limited support to educators and students in censored states and districts.¹⁶⁹ One counter-example came in September 2023 when Biden’s Department of Education appointed its first “Book Ban Czar.”¹⁷⁰ The DOE explained that the Czar “oversee[s] [the Department’s] response to content challenges and [would] take action if it finds that removing materials violated students’ civil rights.”¹⁷¹ This is a welcome intervention from the federal government. But based on our review of existing scholarship and conversations with educators in “free” and “censored” states, there is a prevailing sense that Federal Government has been largely absent from these fights—particularly so when it comes to supporting educators in “censored” states.

Similar sentiment, albeit more muted, applies to national civil rights organizations. Although some of these groups have taken concrete action—including filing federal lawsuits—there is a sense that those groups could do more to support educators on the front lines.¹⁷²

¹⁶⁹ See Feingold & Weishart, *supra* note 27. This is not to suggest that all national organizations have been on the sidelines. Some have spearheaded successful federal lawsuits challenging the constitutionality of state-level discriminatory censorship laws. Still, even successful litigation is rarely sufficient to support the legal, financial, and strategic needs of educators on the front lines. One example of a national organization providing more direct support for a targeted teacher includes the African American Policy Forum, which has led multiple efforts to support teachers who face professional penalty for teaching about racism or communicating that “Black Lives Matter.” See, e.g., Truth Be Told Campaign, African American Policy Forum, <https://www.aapf.org/truthbetold> (last visited January 31, 2024); Intersectionality Matters with Kimberle Crenshaw, Episode 42: Educators Ungagged (Nov. 15, 2021), <https://www.aapf.org/imkc-podcast-episodes>.

¹⁷⁰ L. Jacobson, *Ed dept. hires book ban czar to monitor escalating challenges over content*, *The 74* (Sept. 14, 2023), <https://www.the74million.org/article/education-department-book-bans-matt-nosanchuk-deputy-assistant-secretary/>.

¹⁷¹ *Id.*

¹⁷² See generally Uma Jayakumar & Rit. Kohli, *Silenced and pushed out: The harms of CRT-bans on K-12 teachers*, 46 THRESHOLDS IN EDU. 1 (2023), <https://academyedstudies.files.wordpress.com/2023/03/jayakumarkohlifinal.pdf> (“But the data also suggests an impact on quality of life in the profession and racial climate in schools, especially for teachers who identify as politically liberal.”).

As noted above, the fierce spread of discriminatory censorship laws has already entrenched two public education systems—what we view as a new form of segregation.¹⁷³ Students and educators in “free” districts can expect schools that preach inclusionary values and encourage critical thinking—even if such aspirations are not always realized. Yet nearly half of our public schools now reside in “censored” states or districts. Within these schools, students and educators must navigate “educational” regimes that compel exclusionary values and manufacture learning loss. Or as we describe below, discriminatory censorship regimes instigate hostile learning environments and promote miseducation.

A. *Hostile Learning Environments*

The same individuals who champion discriminatory censorship laws defend Confederate symbols, disparage Black Lives Matter banners, and protest Pride flags.¹⁷⁴ It should be unsurprising therefore that discriminatory censorship laws communicate animus and hostility toward historically subordinated groups. The laws’ communicative power—coupled with their often-vague language and severe penalties—can create unworkable conditions for educators and hostile environments for students.

1. *Unworkable Conditions for Educators*

A growing archive of empirical research and personal anecdotes coalesce around the same conclusion: discriminatory censorship laws create near-unworkable conditions for educators.¹⁷⁵ As PEN America has observed,

¹⁷³ See Pollock et al., *The Conflict Campaign*, *supra* note 25 at ix (“Students’ own rights to learn about [targeted topics] will now be dependent on the local systems they are in, and on whether anyone backs up their teachers — and in some places, on who wins school board elections.”).

¹⁷⁴ Editorial Board, *Pandering to the Base: Florida Protects Confederate Holidays Makes Felons of Protesters*, Orlando Sentinel (Apr. 20, 2021), <https://www.orlandosentinel.com/2021/04/20/pandering-to-the-base-florida-protects-confederate-holidays-makes-felons-of-protesters-editorial/>.

¹⁷⁵ See generally Mica Pollock et al., *Keeping the freedom to include: Teachers navigating “Pushback” and Marshalling “Backup” to Keep Inclusion on the Agenda*, 8 J. LEADERSHIP, EQUITY, & RSCH 1 (2022), <https://journals.sfu.ca/cvj/index.php/cvj/article/view/185>.

“[f]ear is the new watchword in public education.”¹⁷⁶ The reasons are manifold. At bottom, discriminatory censorship laws expose educators to a range of risks including (a) professional penalties, (b) financial precarity, (c) emotional distress, (d) verbal and physical threats, and (e) social ostracization.¹⁷⁷

One source of stress is the combination of vague language and severe penalties that adorn many discriminatory censorship laws.¹⁷⁸ In jurisdictions governed by leaders who openly reject inclusionary values, educators understand that any classroom content concerning targeted topics could incite organized backlash.¹⁷⁹ They also understand that even baseless complaints can expose them to severe penalties including suspension, termination, and loss of license.¹⁸⁰ Even for educators who ultimately prevail in administrative or judicial proceedings, those proceedings can compromise present and future professional opportunities and entail high financial costs (including the loss of pay and benefits).¹⁸¹

To summarize, educators in censored states confront a doubly hostile environment. To one side, they must navigate laws with vague and ambiguous language and severe penalties. At the same time, the individuals empowered to enforce those laws are often openly hostile to even modest

¹⁷⁶ LaFrance & Friedman, *Education Intimidation*, *supra* note 163.

¹⁷⁷ *See id.*; *see also* A. Jochim et al., *Navigating political tensions over schooling: Findings from the fall 2022 American School District Panel survey*, Center on Reinventing Public Education (Jan. 2023), https://crpe.org/wp-content/uploads/ASDP- Navigating-Political-Brief_v6.pdf; A Woo et al., *Walking a fine line—educators’ views on politicized topics in schooling: Findings from the state of the American teacher and state of the American principal surveys*, Rand Corporation (2022), https://www.rand.org/pubs/research_reports/RRA1108-5.html.

¹⁷⁸ *See* Jeffrey Sachs et al., *For educational gag orders, the vagueness is the point*, PEN America (Apr. 28, 2022), <https://pen.org/for-educational-gag-orders-the-vagueness-is-the-point/>.

¹⁷⁹ *See* Pollock et al., *supra* note 22.

¹⁸⁰ *See id.*

¹⁸¹ *See* Angela Dennis, *Teacher Matthew Hawn, fired in critical race theory debate, fights to get his job back*, KNOXVILLE NEWS SENTINEL (DEC. 19, 2021), <https://www.knoxnews.com/story/news/2021/12/20/sullivan-county-teacher-matthew-hawn-fired-critical-race-theory-sue/6508618001/>.

efforts to create more inclusive classrooms and curriculum.¹⁸² The upshot is a professional environment that exposes educators to professional and personal penalties coupled with the inability to ascertain what “crosses the line” from lawful to unlawful conduct.¹⁸³

An episode from South Carolina highlights this dynamic. In an AP Language Arts class, multiple students complained after their teacher assigned Ta-Nehisi Coates’s 2015 memoir *Between the World and Me* and played two short videos about structural racism.¹⁸⁴ One student reported to a local school board member that “[h]earing [the teacher’s] opinion and watching these videos made me feel uncomfortable . . . I actually felt ashamed to be Caucasian.”¹⁸⁵ A separate student complained that they were “incredibly uncomfortable throughout both videos, and was in shock that [the teacher] would do something illegal like this . . . I am pretty sure a teacher talking about systemic racism is illegal in South Carolina.”

These comments reveal a sense of entitlement to challenge basic classroom conversations about racism in America. The latter comment also suggests that the student had internalized an overly broad understanding of the relevant law. The subsequent response from local leaders likely reinforced both the sense of entitlement and the statutory *over*-reading. After receiving the complaint, school officials instructed the teacher to “cease this assignment”—apparently based on the belief that discussing structural racism could violate the state’s discriminatory censorship law or pending legislation.¹⁸⁶ The targeted teacher voiced multiple frustrations and concerns—including that this level of surveillance and interference with

¹⁸² See *supra* Part I.

¹⁸³ Miller et al, *Misunderstanding the campaign against CRT: Absurdity and White supremacy in attacks on teaching and teacher education*, 46 THRESHOLDS 1 (2023) (“The absurdity of CRT bans is the point: the resulting confusion and uncertainty develops an overarching climate of disaster that enables reinscribing White supremacy in public education.”).

¹⁸⁴ See Bristow Marchant, *Midlands teacher’s lessons on racism halted after complaints, citing state law*, THE STATE (June 12, 2023), <https://www.thestate.com/news/local/article276257911.html> (“[S]tudents expressed discomfort with two short videos played in class as preparation for the book: ‘The Unequal Opportunity Race’ and ‘Systemic Racism Explained.’”).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

basic lesson planning will incite fear and push more teachers out of the profession.¹⁸⁷

To appreciate how the students and local officials *over-read* the statute, it is helpful to contrast the students’ comments with the law’s actual text. Contrary to public opinion, the challenged assignment does not appear to violate HB 4300, the underlying law.¹⁸⁸ Most relevant to the students’ stated concerns, HB 4300 prohibits using state funds for “lesson plans, textbooks, instructional materials, or instructional practices that *serve to inculcate* any of the following concepts: . . . any individual *should feel* discomfort, guilt, anguish or any other form of psychological distress on account of his race or sex.”¹⁸⁹

¹⁸⁷ *Id.* (“Contacted by The State for this story, Wood said she fears the policing of teacher’s lessons will end up pushing more teachers out of the profession, which already suffers from a shortage of people going into teaching.”). See also Hannah Natanson, *Her students reported her for a lesson on race. Can she trust them again?* THE WASHINGTON POST, (Sept. 18, 2023), <https://www.washingtonpost.com/education/2023/09/18/south-carolina-teacher-ta-nehisi-coates-racism-lesson/> (“She went on vacation to Ocracoke Island, N.C., in late July, where she tried to sum up her feelings in a journal entry. ‘Teachers are afraid,’ she wrote. ‘Teachers are silent. Teachers cave.’”).

¹⁸⁸ 2023 South Carolina House Bill No. 4300, Section 1.82, https://www.scstatehouse.gov/sess125_2023-2024/appropriations2023/ta23ndx.php.

¹⁸⁹ *Id.* This prohibition tracks language in many of the discriminatory censorship laws and traces to the Trump EO. The full text reads:

For the current fiscal year, of the funds allocated by the Department of Education to school districts, no monies shall be used by any school district or school to provide instruction in, to teach, instruct, or train any administrator, teacher, staff member, or employee to adopt or believe, or to approve for use, make use of, or carry out standards, curricula, lesson plans, textbooks, instructional materials, or instructional practices that serve to inculcate any of the following concepts: (1) one race or sex is inherently superior to another race or sex; (2) an individual, by virtue of his race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (3) an individual should be discriminated against or receive adverse treatment solely or partly because of his race or sex; (4) an individuals moral standing or worth is necessarily determined by his race or sex; (5) an individual, by virtue of his race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (6) an

At first glance, one might read the foregoing language to substantiate the students' understanding that the challenged lesson was "illegal" because it caused emotional distress. But note the italicized terms, which suggest this common reading overstates the statute's scope. It is possible that exposure to material on structural racism made the students feel discomfort.¹⁹⁰ But this feeling alone—that is, the students' subjective experience—does not itself violate the law. To violate the statute, an instructor must use state funds on instructional materials that *serve to inculcate* the view that students *should* feel discomfort or guilt because of their race.¹⁹¹

Translated to the South Carolina classroom, the teacher's use of videos on structural racism only violates the statute if those videos (or the teacher's underlying instruction) instill the view that white students *should* feel racial

individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his race or sex; (7) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by members of a particular race to oppress members of another race; and (8) fault, blame, or bias should be assigned to a race or sex, or to members of a race or sex because of their race or sex.

¹⁹⁰ Some might contend this discomfort can be a pedagogical necessity. . . See, e.g., Esther O. Ohito *Making the Emperor's New Clothes Visible in AntiRacist Teacher Education: Enacting a Pedagogy of Discomfort with White Preservice Teachers*, 49 EQUITY & EXCELLENCE IN EDUC. 454 (2016); Rican Vue, et al., *Feeling the Threat of Race in Education: Exploring the Cultural Politics of Emotions in CRT-Ban Political Discourses*, 46 EDUC. EVAL. & POLICY ANALYSIS, 222, 234 (June 2024).

¹⁹¹ A federal judge reached this conclusion with respect to similar language in an Oklahoma discriminatory censorship law. See *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, 2024 WL 3015359, at *10 (W.D. Okla. June 14, 2024) (“[C]ontrary to Plaintiffs’ concerns, the text of subsection (g) does not prohibit the teaching of subjects involving race or sex merely because they might cause a student to feel discomfort or distress. Take as an example a student who is discomfited upon learning about a historical event in which persons of her race harmed persons of another race. That student’s reaction to the facts of the event would not, absent more, mean that a teacher impermissibly taught that the student ‘*should* feel discomfort . . . on account of . . . her race.’ Id. § 24-157(B)(1)(g) (emphasis added)”).

guilt.¹⁹² The mere fact that a student “feel[s] discomfort, guilt, anguish or any other form of psychological distress” does not violate the statute.¹⁹³

Returning to the South Carolina example, the prevailing over-reading of HB 4300 (coupled with state leadership hostile to inclusionary and fact-based pedagogy) effectively granted White students a veto to cancel material they disliked.¹⁹⁴ This incident also reflects how discriminatory censorship laws have emboldened parents, students, and community members to challenge content and target educators they centers non-White or non-heteronormative perspectives.¹⁹⁵ For the teacher, the complaint and sanction undermined her autonomy and reinforced the risk that follows educators in censored states. Even when a lesson plan complies with the law’s plain text, educators who

¹⁹² There is also a factual question about whether “state funds” were used for the challenged materials.

¹⁹³ Notably, were this the case, then any instruction that causes a student to feel any “psychological distress on account of his race or sex” would be unlawful. Were this the case, the law would not only implicate instruction that makes white students feel uncomfortable. It would also render unlawful any lesson plan that causes students of color or those from the LGBTQ+ any psychological distress based on their “race or sex.” As a formal matter, such a law would invalidate a seemingly endless list of common instructional materials.

Nikole Hannah-Jones, the renowned journalist and creator of the 1619 Project, made a similar observation in January 2022. Over a series of Tweets, Hannah-Jones surfaced the insight that many discriminatory censorship laws—if their language were taken seriously—could be used against discriminatory censorship. See Nikole Hannah-Jones (@NHannahJones), Twitter. (Jan. 19, 2022, 5:30 PM), <https://twitter.com/nhannahjones/status/1483929906732011524/>, (Jan. 19, 2022, 5:42 PM), <https://twitter.com/nhannahjones/status/1483929906732011524/>.

¹⁹⁴ See Isaac Bailey, *SC students afraid to talk about race would fail my college class*, THE STATE (June 18, 2023), <https://www.charlotteobserver.com/opinion/article276363796.html> (“You attended a school that’s more than 80 percent white, and still, you couldn’t handle a lesson on this country’s racial history and present without crying foul. Must this country, the world, forever cater to your every whim or preference?”).

¹⁹⁵ Reflecting this dynamic, the Washington Post reported that “just 11 people” were responsible for over half of attempted book bans in the 2021-2022 school year. See Hannah Natanson, *Objection to sexual, LGBTQ content propels spike in book challenges*, WASHINGTON POST (June 9, 2023), from <https://www.washingtonpost.com/education/2023/05/23/lgbtq-book-ban-challengers/>.

engage targeted topics open themselves to unwanted scrutiny and personal and professional risk.

On multiple occasions, educators and their supporters have asked state officials to clarify the scope of otherwise vague discriminatory censorship laws.¹⁹⁶ In some instances, officials did not respond.¹⁹⁷ Even when officials responded, many guidance documents “simply restate[d] existing legislative language or enumerate[d] various ways that violators will be punished.”¹⁹⁸ PEN America has further reported that officials who “venture into actual interpretation [often] do more harm than good.”¹⁹⁹ Given officials’ broad failure to provide useful guidance, PEN America has concluded that the “vagueness is the point”—that is, state legislatures pass intentionally vague laws because the confusion cultivates a culture of fear and anxiety that empowers anti-antiracist forces and incentivizes educators to self-censor.²⁰⁰

Educators across the country have expressed this precise concern.²⁰¹ As one illustrative example, a New Hampshire teacher characterized the state’s

¹⁹⁶ See Sachs et al., *The Vagueness is the Point*, *supra* note 178.

¹⁹⁷ *See id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* See also *Loc. 8027 v. Edelblut*, No. 21-CV-1077-PB, 2024 WL 2722254, at *10 (D.N.H. May 28, 2024) (“The AG addressed this [interpretation] question in an official opinion, which concluded that implicit bias trainings are not prohibited by the second concept. But, because the AG’s opinion substantially departs from any accepted method of statutory interpretation, it exacerbates, rather than resolves, the significant ambiguity created by the second concept.”).

²⁰⁰ Sachs et al., *The Vagueness is the Point*, *supra* note 178 (“It is worth considering whether all of this—the confusion, the caution, the chilling effect—is intentional. . . . One wonders whether vagueness better suits the interests of the lawmakers pushing educational gag orders. It casts a wider shadow, raises greater alarm, and silences more voices, while also appearing to be less prescriptive. Legislators can appear to be moderate and reasonable—while offloading the hard work of prohibiting ideas and speech onto those enforcing the legislation at state agencies and educational institutions. They can leave educators uncertain about how lessons will be interpreted by potentially hostile students, parents, and government officials, effectively making them second-guess their teaching choices, and producing classrooms ruled by caution, silence, and fear, rather than robust inquiry and debate.”).

²⁰¹ See generally Pollock et al., *The Conflict Campaign*, *supra* note 25 at viii (“Describing feeling ‘terrified’ to teach ‘in this polarized environment,’ some

(since struck down) discriminatory censorship law as “psychological warfare.”²⁰² Concerning the law’s vague mandate, the teacher opined that “[w]ithout clear guardrails about what they can and cannot teach, many educators . . . [will] have to steer clear of difficult topics altogether.”²⁰³ This dynamic predictably adds stress and undermines educator morale—while depriving students access critical information and ideas.²⁰⁴

To reiterate, many discriminatory censorship laws create unworkable conditions because they (a) contain vague and ambiguous language, (b) threaten formal sanction, (c) are enforced by officials hostile to teachers and inclusionary practices.²⁰⁵ These dynamics foster a climate of fear, anxiety and intimidation and incentivize rational teachers and administrators to abandon equality-oriented practices and pedagogy.²⁰⁶

Other dynamics have compounded these effects. Over the same period discriminatory censorship laws began to spread, rightwing groups instigated

teachers indicated that they and colleagues intended to remain silent on an array of issues that they otherwise would have taught, on topics as broad as “race” and “race and gender.” Some said that as teachers were “left wondering” what they could do and “unsure what I am allowed to say and teach,” many were “choosing to avoid” “controversial” topics and specific texts.”).

²⁰² L Duffort, *Critical race theory debate lingers*, VALLEY NEWS (Nov. 29, 2021), <https://www.vnews.com/Schools-deal-with-critical-race-theory-backlash-43771701>.

²⁰³ *Id.*

²⁰⁴ That same New Hampshire teacher noted how the increasingly hostile climate for educators would compromise their students’ ability to learn. *See id.* (“The law in New Hampshire is ‘really frightening,’ Badams said, and will undoubtedly chill discussion in class. ‘If I’m teaching about Thomas Jefferson, how far can I go down the road of: Look at the real irony in the writing of our founding documents, and the deliberation by people who owned slaves, waxing eloquently about liberty?’ he asked.”). Even before GOP officials passed the first state discriminatory censorship bills 2021, “most teachers reported experiencing frequent job-related stress and burnout.” B. Blevins, *Research on equity in civics education*, 46 J. SOC. STUDIES RES. 1 (2022). This toll was most acute for Black teachers, nearly half of whom reported they planned to “leave their jobs by the end of the school year.” *Id.*

²⁰⁵ *See* Sachs et al., *The Vagueness is the Point*, *supra* note 175 (“Everyone involved has a strong incentive to define these terms cautiously: prohibitions will be interpreted as expansively as possible and protections as narrowly as possible. Predictably, the result will be self-censorship by institutions and individuals alike.”).

²⁰⁶ *Id.*

conflicts at local school board meetings—at times directing threats of violence at school board members.²⁰⁷ Some of the same rightwing groups have organized campaigns that target individual educators. One notable example involved Karen Lauritzen, Idaho’s 2023 Teacher of the Year.²⁰⁸ Days after receiving the honor, rightwing outlets branded Lauritzen a “left-wing activist” because “she had expressed support for the LGBTQ+ community and Black Lives Matter on her personal social media accounts.”²⁰⁹ The harassment prompted Lauritzen to flee the state.²¹⁰

This episode highlights the multiple risks educators face and the need for external actors like the federal government and national civil rights organizations to intervene. If a state’s Teacher of the Year is not safe from organized smear campaigns (that cause her to flee the state), it is hard to imagine how any teacher in the state could feel secure. The message that equality-oriented educators are unwelcome trickles down to students as well.²¹¹ When activists chase decorated teachers out of the state for standing in solidarity with Black and LGBTQ+ communities, students from those groups understandably feel under siege as well.

Recent empirical studies and individual accounts reinforce the foregoing. One 2023 Rand study found that 31% of district leaders “reported verbal or written threats against educators about politically controversial topics since

²⁰⁷ See T. Bartlett, T, *Warning, may cause truth decay: Exploring the cannibalizing effect of social digital media and conspiracy theories on democracy and our public schools*, 178 *New Directions for Adult and Continuing Education* 79 (2023) (“Turning Point USA launched the School Board Watchlist (following its watchlist of ‘woke’ university professors) that ‘finds and exposes school board leadership that supports anti-American, radical, hateful, immoral, and racist teachings in their districts.’ The site garners tips provided by the public and then openly provides the ‘evidence’ of woke indoctrination, school board member contact information, links to board meeting documents, and details about when and where to attend the next meeting.”).

²⁰⁸ M. Will, “*I was not done*”: *How politics drove this teacher of the year out of the classroom*, EDWEEK, <https://www.edweek.org/teaching-learning/i-was-not-done-how-politics-drove-this-teacher-of-the-year-out-of-the-classroom/2023/08>.

²⁰⁹ T. Kopan, *Teacher of the ear was supposed to be an honor. Then politics intervened*, BOSTON GLOBE (Aug. 10, 2023), <https://www.bostonglobe.com/2023/08/10/nation/teacher-of-the-year-culture-wars/>.

²¹⁰ *Id.*

²¹¹ See *supra* note 6 and accompanying text; see also *infra* Part III.A.2.

the start of the 2021-22 school year.”²¹² The same report found that 51% of district leaders reported that political polarization “was interfering with their ability to educate students as of fall 2022.”²¹³ This report followed a 2022 survey that yielded similar findings—including that 37% of teachers and 61% of principals “reported being harassed because of their school’s policies on COVID-19 safety measures or for teaching about race, racism, or bias during the first half of the 2021–2022 school year.”²¹⁴

The toxic climate educators must navigate helps to explain increased vacancies in states with outspoken leaders who push harsh discriminatory censorship laws.²¹⁵ As one Florida-based teacher put it: “We’re in Hell and nobody is coming.”²¹⁶ This statement captures two related and compounding dynamics. First, discriminatory censorship laws, and the rightwing actors they embolden, incentivize rational educators to avoid targeted topics for their own self-preservation. Second, front line teachers—particularly in “censored” states—need more support from external entities like the federal government and national civil rights organizations.²¹⁷ The lack of such support all but guarantees educational environments that value exclusion over inclusion and privilege “patriotic obedience” over critical thinking.

Discriminatory censorship laws pose the most acute challenges for teachers in GOP-controlled states.²¹⁸ But evidence suggests that even teachers in free states feel chilled by the anti-teacher and anti-antiracist

²¹² Jochim et al., *Navigating political tensions over schooling*, supra note 118.

²¹³ *Id.*

²¹⁴ Woo, *Walking a fine line*, supra note 118.

²¹⁵ See A. O’Connell-Domenech, *Advocates, Union Rep Blame National Teacher Shortage on Censorship*, THE HILL (Dec. 12, 2022), <https://thehill.com/changing-america/respect/equality/3772671-advocates-union-rep-blame-national-teacher-shortage-on-censorship/>.

²¹⁶ Quote from interview with Florida-based K-12 teacher.

²¹⁷ See *infra* Part IV.B (identifying how external stakeholders like the federal government and national civil rights organizations can better support front line teachers).

²¹⁸ Jochim et al., *Navigating political tensions over schooling*, supra note 118.

climate spreading across the country.²¹⁹ Building on the foregoing, we now outline how discriminatory censorship laws harm students—in part by exposing them to a heightened threat of race- and sex-based harassment.

2. Race- and Sex-Based Harassment of Students

In “censored” states, students face a heightened threat of race- and sex-based harassment because discriminatory censorship laws stigmatize, and chill support for, targeted groups. As noted above, discriminatory censorship greenlights and legitimizes exclusionary rhetoric, attitudes, and practices.²²⁰

With respect to LGBTQ+ students, laws that stigmatize LGBTQ+ identity are associated with a decrease in mental health and an increase in attempted suicide.²²¹ Research further reveals that in censored and free states, there has been an increase in homophobic and transphobic hostility; high percentages of students have reported harassment, assault, or feeling unsafe in school.²²² Scholars have observed that “[e]ven when a [discriminatory censorship] law doesn’t exist, the rhetoric around it creates this environment of hostility, fear, and confusion.”²²³

²¹⁹ See Pollock et al., *The Conflict Campaign*, *supra* note 25 at viii (“[T]eachers in places with *no* state prohibitions also felt a censorship drive by local critics inflamed by broader forces. Some described how local pushback “led by parents” . . . , a misinformed “vocal minority,” or “individuals from outside our community,” created a “chilling” atmosphere for “teaching and learning” and professional development. Others described increasing “hesitancy” about “teaching about race” or diversity-related topics, anticipating local “attack.”).

²²⁰ B. Hawkins, *Scared of school: Even in states with protective laws, LGBTQ students are reporting attacks from other kids—and teachers*, THE 74 (May 24, 2023), <https://www.the74million.org/article/scared-of-school-even-in-states-with-protective-laws-lgbtq-students-are-reporting-attacks-from-other-kids-and-teachers/>.

²²¹ E. Sylvester, *New poll emphasizes negative impacts of anti-LGBTQ policies on LGBTQ youth*, The Trevor Project (Jan. 19, 2023), <https://www.thetrevorproject.org/blog/new-poll-emphasizes-negative-impacts-of-anti-lgbtq-policies-on-lgbtq-youth/>; A.E. Goldberg, *Impact of HB 1557 (Florida’s Don’t Say Gay bill) on LGBTQ+ parents in Florida*, Williams Institute, UCLA School of Law (2023), <https://williamsinstitute.law.ucla.edu/publications/impact-dont-say-gay-parents/>.

²²² Hawkins, *Scared of School*, *supra* note 220.

²²³ *Id.*

Discriminatory censorship regimes also increase the risk of harassment because they effectively coerce well-meaning educators to cease support for students from targeted groups.²²⁴ The combination of personal, financial and professional threats can lead even the most committed individual to alter their behavior in ways detrimental to student well-being—for example, by removing the Black Lives Matter banner hanging in their classroom; ceasing to wear a Rainbow Flag pin; or leaving the district (or profession) altogether.²²⁵ At an institutional level, entire schools or districts might narrow harassment policies or claw back resources for targeted groups.²²⁶

Notably, such policies and resources are often necessary to safeguard students’ civil rights.²²⁷ It might not be surprising, therefore, that multiple “censored” states and districts have recently faced, or continue to face, federal investigations following complaints of anti-Black or anti-LGBTQ+ harassment.²²⁸

²²⁴ D. Lambert, *Temecula Valley Unified CRT ban has created a hostile school environment, lawsuit says*, EDSOURCE (Aug. 2, 2023), <https://edsource.org/2023/temecula-valley-unified-crt-ban-has-created-a-hostile-school-environment-lawsuit-says/695080?amp=1>.

²²⁵ Jayakumar & Kohli, *Silenced and pushed out*, *supra* note 115 (“The quantitative data, in particular, demonstrates that bans contribute to teachers’ burnout/pushout and their desire to take another job in another state. As our findings reveal, the majority of teachers are experiencing additional pressure and stress in the wake of legislative bans that feel like a deceptive attack on education and teacher’s autonomy in making the best pedagogical choices for their students.”).

²²⁶ See Hawkins, *Scared of School*, *supra* note 220.

²²⁷ See Morgon Polikoff et al., *Who wants to say “Gay”? Public opinion about LGBT issues in the classroom*, EdWorkingPaper: 23-838. Annenberg Institute at Brown University (2023), <https://doi.org/10.26300/50rz-tb81> (“For instance, nearly all LGBT students report hearing anti-gay or anti-trans comments in their schools, and more than half report hearing such comments from teachers. LGBT students are also more likely than non-LGBT students to report physical threats or assault, and to report missing school as a consequence of fears related to their identities.”).

²²⁸ L. Jacobson, *Feds: Book removal in Ga. school district may have caused “hostile environment”*, THE 74 (May 22, 2023), <https://www.the74million.org/article/feds-book-removal-in-ga-school-district-may-have-caused-hostile-environment/>; Office of Civil Rights, U.S. Department of Education, *Investigation Letter* (2023, May 19), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf>.

B. Miseducation

We employ the term “miseducation” to capture how discriminatory censorship laws undermine learning in three discrete but compounding respects: (1) by eliminating curricular content that builds critical thinking and inquiry; (2) by adding curricular content that inculcates exclusionary values and distorted histories; and (3) by sowing distrust among students and their teachers—all of which compromises the cultivation of critical thinking skills, democratic dispositions and social cohesion necessary for multiracial democracy. We discuss each component of miseducation below.

1. *Eliminating Content that Promotes Critical Thinking and Inclusionary Values*

The *elimination* of classroom content is straightforward. Discriminatory censorship laws are designed to purge classrooms of curricular and content about racism, gender identity and other targeted topics. As noted, certain laws also expressly ban specific texts (e.g., *The 1619 Project*), academic frameworks (e.g., “critical race theory”), or concepts (e.g., “structural racism”).²²⁹ When coupled with the threats of professional sanction and public scrutiny, discriminatory censorship laws incentivize educators and institutions to avoid targeted topics—even if instruction would be lawful.²³⁰ Examples abound. Beyond the many noted throughout, others include Texas teachers who actively avoid discussing targeted topics;²³¹ a Tennessee teacher who stopped assigning the book *Just Mercy*;²³² and officials in

²²⁹ See *supra* Part II.B.

²³⁰ Olivia B. Waxman, *Anti-‘critical race theory’ laws are working. Teachers are thinking twice about how they talk about race*, TIME (June 30, 2022), <https://time.com/6192708/critical-race-theory-teachers-racism/>.

²³¹ Madeline Will, Catherine Gewertz, Ileana Najarro, & Sarah Schwartz, *What does the critical race theory law mean for Texas classrooms? Teachers speak out*, EDUCATIONWEEK (July 15, 2021), <https://www.edweek.org/teaching-learning/what-does-the-critical-race-theory-law-mean-for-texas-classrooms-teachers-speak-out/2021/07>.

²³² Olivia B. Waxman, *Anti-‘critical race theory’ laws are working. Teachers are thinking twice about how they talk about race*, TIME (June 30, 2022), <https://time.com/6192708/critical-race-theory-teachers-racism/>.

Oklahoma who instructed teachers “to avoid books by authors of color and women authors.”²³³

Litigation has placed into even sharper relief that curricular purges that can follow discriminatory censorship laws. Plaintiffs in Oklahoma, for example, alleged that district leaders “struck texts by Black and women authors from their reading lists,” that teachers “received guidance” to avoid “terms such as ‘diversity’ and ‘white privilege,’” and that “university librarians are afraid to purchase materials related to race and gender.”²³⁴

The predictable result is less learning, less critical inquiry, and less critical thinking. Students lose the bare opportunity to explore complex topics that continue to shape life and conflict in the United States.²³⁵ With a nod to the common refrain that the COVID-19 pandemic produced unintended “learning loss,” one might say discriminatory censorship laws produce “*manufactured* learning loss.”²³⁶

At a more general level, “censored” states deny students access to race-conscious pedagogies that are empirically shown to enhance engagement and learning for all students and close achievement gaps.²³⁷ The loss of race-

²³³ Anita Little, *On the frontlines of the fight against classroom censorship*, ACLU (Sept. 15, 2023), <https://www.aclu.org/news/free-speech/teachers-frontlines-classroom-censorship>.

²³⁴ See Complaint at ¶ 3, https://www.acluok.org/sites/default/files/field_documents/001_-_complaint12.pdf.

²³⁵ Sarah Stitzlein, *Divisive concepts in classrooms: A call to inquiry*, 41 STUDS. PHIL. & EDUC. 595-612 (2022), <https://doi.org/10.1007/s11217-022-09842-8>.

²³⁶ Others dub the campaign “a 21st century iteration of antebellum anti-literacy laws.” Katheryn Russell-Brown, *The Stop Woke Act”: Hb 7, Race, And Florida’s 21st Century Anti-Literacy Campaign*, 47 N.Y.U. REV. L. & SOC. CHANGE 338 (2023). See also Pollock et al., *The Conflict Campaign*, *supra* note 25 at viii (“Some pointed out explicitly how efforts intimidating educators risked restricting opportunities for students to learn — and for adults to learn to support students better.”). Cf. *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021) (“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.’”).

²³⁷ Sade Bonilla et al., *Ethnic studies increases longer-run academic engagement and attainment*, 118 PNAS 37 (2021); Thomas Dee & Emily Penner, *The causal effects of cultural relevance: Evidence from an ethnic studies curriculum*, 54 AM. EDUC. RSCH. J. 127-166 (2017).

conscious pedagogy produces universal and particularized harms. In meaningful respects, learning loss harms everyone—regardless of any individual student’s social identities. At the same time, students from targeted groups suffer discrete harms.²³⁸ Not only are they deprived a more comprehensive and pedagogically-sound curriculum, but they must also navigate demeaning rhetoric and curricular offerings that normalize and rationalize their group’s historical and ongoing subordination.²³⁹

2. *Adding Content that Undermines Critical Thinking and Inclusionary Values*

Miseducation also entails the *addition* of content that whitewashes American history, denigrates nontraditional heteronormative family structures and downplays the contemporary reality of racism in the United States. As noted in the introduction, officials in multiple “censored” states have invoked discriminatory censorship laws to justify new instructional materials that promote colorblind, heteronormative, and pro-Christian Nationalist perspectives.²⁴⁰

Prominent examples include Florida and Arkansas, two states that formally approved content from Hillsdale College (a private Christian

²³⁸ Bonilla et al., *Ethnic studies increases longer-run academic engagement and attainment*, *supra* note 167; Dee & Penner, *The causal effects of cultural relevance*, *supra* note 167.

²³⁹ *Id.*

²⁴⁰ BARRETT SMITH & SARAH STITZLEIN, WHO’S AFRAID OF POLITICAL EDUCATION? THE CHALLENGE TO TEACH CIVIC COMPETENCE AND DEMOCRATIC PARTICIPATION 35 (2023), https://www.researchgate.net/publication/370465642_Classroom_conflict_%27divisive_concepts%27_and_educating_for_democracy (“Teachers are thus required to teach the history of race and racism in the US but forbidden to use the ‘wrong’ materials (for example, the 1619 Project) or come to the ‘wrong’ conclusions (suggesting racism might be systemic and contemporary.”); Jayakumar & Kohli, *Silenced and pushed out*, *supra* note 115; A. White, *The state of education censorship in institutions of higher ed and implications for the field*, American Association of Colleges for Teacher Education (2022), https://naacp.org/sites/default/files/documents/AACTE-Censorship-Report_10.25_final.pdf; L. Lonas, *What is Prager? The conservative education platform now in Florida schools*, Fox59 News (Aug. 8, 2023), <https://fox59.com/news/national-world/what-is-prageru-the-conservative-education-platform-now-in-florida-schools/>.

college) and PragerU—both of which espouse openly rightwing ideologies hostile to antiracist projects, the Movement for Black Lives, and the LGBTQ+ community.²⁴¹ More recently, Oklahoma and Louisiana—two other GOP-led states with discriminatory censorship laws—made national headlines for requiring schools to teach the bible and showcase the ten commandments, respectively.²⁴²

Efforts to infuse public school curriculum with rightwing content is not limited to GOP-controlled states. One district outside of Philadelphia, for example, hired a consultant connected to Hillsdale College and then adopted “a new social studies curriculum that will require teachers to incorporate lessons from the 1776 Curriculum, a controversial K-12 course of study developed by Hillsdale College.”²⁴³ James Grossman, the executive director of the American Historical Association, has described Hillsdale in the

²⁴¹ Hunter Field, *Arkansas Ed secretary raises concerns, requests AP African American coursework*, LITTLE ROCK PUB. RADIO (Aug. 22, 2023), <https://www.ualpublicradio.org/local-regional-news/2023-08-22/arkansas-ed-secretary-raises-concerns-requests-ap-african-american-coursework/>; Mark Oppenheimer, *Inside the right-wing YouTube empire that’s quietly turning millennials into conservatives*, MOTHER JONES (Mar./Apr. 2018), <https://www.motherjones.com/politics/2018/03/inside-right-wing-youtube-turning-millennials-conservative-prageru-video-dennis-prager/>; Anna Ceballos & Summer Brugal, *Conservative Hillsdale College is helping DeSantis reshape Florida education*, TAMPA BAY TIMES (July 5, 2022), <https://www.tampabay.com/news/florida-politics/2022/07/01/conservative-hillsdale-college-is-helping-desantis-reshape-florida-education/>; Kerry Sheridan, *Videos by PragerU, a conservative media company, can be played in Florida classrooms*, NPR (Aug. 11, 2023), <https://www.npr.org/2023/08/11/1193534564/videos-by-prageru-a-conservative-media-company-can-be-played-in-florida-classroom>.

²⁴² See Sarah Mervosh & Elizabeth Dias, *Oklahoma’s State Superintendent Requires Public Schools to Teach the Bible*, The New York Times (June 27, 2024), <https://www.nytimes.com/2024/06/27/us/oklahoma-public-schools-bible.html>; Sara Cline, *New Law Requires All Louisiana Public School Classrooms to Display the Ten Commandments*, AP (June 20, 2024), <https://apnews.com/article/louisiana-ten-commandments-displayed-classrooms-571a2447906f7bbd5a166d53db005a62>.

²⁴³ Judd Legum & Rebecca Crosby, *Pennsylvania school district requires social studies classes to incorporate right-wing propaganda*, POP. INFO. (Sept. 7, 2023), <https://popular.info/p/pennsylvania-school-district-requires> (noting that “Hillsdale’s description of the Founding Fathers’ views on slavery is highly misleading” because the unit mentions nothing about the Founding Fathers’ pro-slavery statements or complicity in the broader institution of slavery).

following terms: “What they’ve done is they’ve simply left stuff out in an attempt to shape a vision of patriotism. What they also are trying to do is replace an approach to teaching that teaches students how to think with an approach that teaches the students what to think.”²⁴⁴

3. *Eroding Student-Teacher Trust*

There is also reason to believe that discriminatory censorship laws will erode social connection among students and their educators. Among other reasons, the climate of fear educators face will hinder ability to build genuine trust and rapport with and among students—a key to fostering academic achievement, socialization, and mutual respect.²⁴⁵ This dynamic will yield negative consequences across local and national communities. Without access to “the full stories and histories of varied groups,” students lack an opportunity to “build capacities for respectful evidence-based dialogue and to develop commitments to robust civil liberties and recognition of the dignity of fellow citizens.”²⁴⁶

This climate of fear and distrust helps to explain why researchers from UCLA’s Institute for Democracy, Education and Access concluded that “US public high schools are increasingly limited in their ability to support” students develop “capacities for respectful evidence-based dialogue and to develop commitments to robust civil liberties and recognition of the dignity

²⁴⁴ Tyler Kingkade, *Conservatives are changing K-12 education, and one Christian college is at the center*, NBC NEWS (July 20, 2023), <https://www.nbcnews.com/news/us-news/hillsdale-college-1776-curriculum-k12-education-conservative-rcna93397>.

²⁴⁵ See Joshua E. Weishart, *The Right to Teach*, 56 U.C. DAVIS L. REV. 817, 877 & n.396 (2022) (“Given the relational nature of education, research overwhelmingly confirms that positive teacher-student relationships are predictive of growth in language and conceptual knowledge and social competence, better classroom behavior and avoidance of anti-social behavior, and increased academic motivation, engagement, and performance.”) (citing the research); see also Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) (“The educational process centers around a continuing relationship between [teachers] and students, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute.”) (quotations omitted); Maria Isabel Pomar & Carme Pinya, *Learning to Live Together. The Contribution of School*, 28 CURRICULUM J. 176, 186 (2017).

²⁴⁶ JOHN ROGERS ET AL., EDUCATING FOR A DIVERSE DEMOCRACY, viii UCLA’s Institute for Democracy, Education, and Access (2022), <https://idea.gseis.ucla.edu/publications/educating-for-a-diverse-democracy/>.

of fellow citizens.”²⁴⁷ And given the uneven access to educational resources nationwide, one might expect these dynamics to exacerbate the “civil opportunity gap between affluent White students, and their low-income and minority peers . . . leaving those who most need empowerment the least opportunity to feel valued as citizens, learn important civic knowledge, and develop key values, skills, and dispositions related to citizenship.”²⁴⁸

IV. BACKLASH TO THE BACKLASH: TOO LITTLE TOO LATE?

In a series of reports released in 2022 and 2023, a UCLA-based research team located discriminatory censorship laws within a highly coordinated and well-funded “conflict campaign.”²⁴⁹ The term “conflict campaign” foregrounds how discriminatory censorship laws (and the rhetoric their proponents employ) further a “nationally fueled, state- and locally enacted effort to restrict and punish race- and diversity-related talk, learning, and student support.”²⁵⁰ According to the research team (and consistent with public statements from rightwing activists like Rufo and Steve Bannon), this conflict campaign entails “a strategic, purposeful effort to anger people about public schooling overall, via a coordinated attack first on a caricatured catchall vision of ‘Critical Race Theory’ in K-12 public schools—motivated in part to gain political power.”²⁵¹

²⁴⁷ *Id.*

²⁴⁸ Brooke Blevins, *Research on Equity in Civics Education*, 46 J. SOC. STUD. RSCH. 1-6 (2022), <https://doi.org/10.1016/j.jssr.2021.12.001>.

²⁴⁹ See Pollock et al., *Supported, silenced, subdued, or speaking up?*, *supra* note 21 at 2; Pollock et al., *The Conflict Campaign*, *supra* note 25 (“We call the anti ‘CRT’ campaign a conflict campaign because it has both manufactured conflict to partisan ends, and exploited real divisions over how to teach about race and for inclusion in U.S. society.”); Rogers et al., *Educating for a Diverse Democracy*, *supra* note 207 (“This ‘conflict campaign’ has been propelled by massive coverage in conservative media, the widespread distribution of advocacy toolkits from coordinated networks of nonprofits and legal organizations, and the cascading energy from hundreds of legislative battles in states and school boards. Explaining the campaign against CRT in spring 2021, Steve Bannon noted, “Hey, this is how we are going to win...50 seats in 2022.”).

²⁵⁰ *Id.*

²⁵¹ *Id.*

As of this writing, we see no indication that the network of think tanks, donors, and officials spearheading this assault on public education will slow.²⁵² If anything, recent developments (including escalating attacks on DEI and school voucher initiatives that reject voter preferences plus the heightened visibility of Project 2025) signal an ongoing resolve to further demonize inclusionary projects and dismantle and defund public education.²⁵³ It therefore remains critical for scholars to continue documenting the spread and impact of this censorial project.

But there is another side to this story. As early as the Trump EO, advocates and activists committed to a more inclusive and democratic society pushed back against the rising tide of campaign of discriminatory censorship. In this final section, we outline some of those efforts—what we term “backlash to the backlash.”

A. Voters Want Pro-Education, Pro-Student Candidates

Discriminatory censorship laws now blanket whole parts of the country. Notwithstanding their ubiquity, increasing evidence suggests that neither discriminatory censorship laws nor the exclusionary values they embody are popular.²⁵⁴ Albeit underreported by the media, disdain for censorship and

²⁵² See generally Kamola, *Manufacturer Backlash*, *supra* note 25.

²⁵³ *Id.*; see also *New York Times*, <https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html>.

²⁵⁴ Young & Friedman, *America’s censored classrooms*, *supra* note 16 (“[T]he general public—parents in particular—are largely supportive of how public schools handle [targeted] topics . . . [A]ccording to a 2022 NPR/Ipsos poll, just 19 percent of parents say that the way their local school discusses race and racism is inconsistent with their values, and just 16 percent say the same about how it handles the impact of slavery. Even the ‘war on woke’—arguably the most provocative rhetoric from today’s culture wars—is not polling well, with only 24 percent of Republican voters prioritizing it over law-and-order issues, and many GOP presidential candidates dropping the term from their campaign lexicons.”); *cf.* Polikoff et al., *Who wants to say “Gay”?*, *supra* note 155 (reviewing survey results that suggest most Americans support teaching LGBT topics in high schools and making LGBT-themed books available to all students, but noting far less support for teaching LGBT topics in elementary school and assigning LGBT-themed books).

support for public schools has translated at the ballot box.²⁵⁵ This trend has been most noteworthy in school board elections.²⁵⁶ In multiple election cycles, voters across the country have rejected candidates who ran on “anti-CRT” and “anti-antiracism” platforms.²⁵⁷ This is a nationwide phenomenon that transcends deep Blue states—stretching from Wisconsin to Illinois and New Hampshire.²⁵⁸ Across these states, candidates campaigning on pro-public school and pro-student values bested challengers who deployed Rufo-like talking points that rehearsed the “threat” posed by Critical Race Theory

²⁵⁵ See Jennifer Berkshire & Jack Schneider, *The GOP’s school board takeover strategy is falling flat*, THE HILL (July 25, 2022), <https://thehill.com/opinion/campaign/3572821-the-gops-school-board-takeover-strategy-is-falling-flat/> (“As it turns out, GOP candidates running on scorched-earth education platforms have fared quite poorly in school board elections. In places like Georgia, Montana, New Hampshire and New York, voters have rejected culture warriors running for school board, often doing so by wide margins.”); F. Cineas, *Where the war on Woke goes from here*, VOX (Sept. 1, 2023), <https://www.vox.com/politics/2023/9/1/23853694/war-on-woke-wokeness-republicans>; M. Mitchell, *What do school board results say about the future of diversity debates in Cincinnati?*, CINCINNATI ENQUIRER (Nov. 8, 2023), <https://www.cincinnati.com/story/news/education/2023/11/08/ohio-school-board-election-results-whats-next-in-the-culture-wars/71472766007/>.

²⁵⁶ See Berkshire & Schneider, *The GOP’s school board takeover strategy is falling flat*, *supra* note 180; E. Dewitt, *Progressive candidates prevail in school board elections despite passionate campaigns on right*, NEW HAMPSHIRE BULLETIN (Mar. 10, 2022), <https://newhampshirebulletin.com/2022/03/10/progressive-candidates-prevail-in-school-board-elections-despite-passionate-campaigns-on-right/>; D. Kronaizl, *How COVID, race, and gender affected the April 5 school board races in Missouri, Oklahoma, and Wisconsin*, NEW HAMPSHIRE BULLETIN (May 31, 2022), <https://news.ballotpedia.org/2022/05/31/how-covid-race-and-gender-affected-the-april-5-school-board-races-in-missouri-oklahoma-and-wisconsin/>.

²⁵⁷ See Berkshire & Schneider, *The GOP’s school board takeover strategy is falling flat*, *supra* note 180.

²⁵⁸ B. Schultz, & G. Mulvihill, *Liberal and moderate candidates take control of school boards in contentious races across US*, AP (Nov. 8, 2023), <https://apnews.com/article/school-board-elections-moms-liberty-progressives-1e439de49b0e8498537484fb031f66a6>.

and transgender students.²⁵⁹ This trend continued in school board elections that occurred in November 2023.²⁶⁰

To be clear, “anti-CRT” candidates continue to prevail in some contests. These outcomes appear most common in school districts that have experienced recent demographic—specifically districts that have seen an increase in residents of color.²⁶¹ Still, the common-sense sentiment that predicted GOP candidates would ride a “red wave” on the back of “parents’ rights” and “anti-CRT” rhetoric never materialized.²⁶²

Some have theorized that voters now recognize that “anti-CRT” candidates are neither pro-school nor pro-student, but rather part of an antidemocratic movement to defund and dismantle public education as we know it.²⁶³ Education journalist Jennifer Berkshire and education historian Jack Schneider have tracked this trend and argue that voters want candidates who champion public schools and vow to keep all students safe.²⁶⁴

²⁵⁹ See Berkshire & Schneider, *The GOP’s school board takeover strategy is falling flat*, *supra* note 180.

²⁶⁰ Schultz & Mulvihill, *Liberal and moderate candidates take control of school boards*, *supra* note 183.

²⁶¹ Alexander et al., *Tracking the attack on Critical Race Theory*, *supra* note 21; Pollock et al., *The Conflict Campaign*, *supra* note 25.

²⁶² See Joan E Greve, ‘Oversold’ parents’ rights issues failed Republican candidates in Virginia, *THE GUARDIAN* (Nov. 8, 2023), <https://www.theguardian.com/us-news/2023/nov/08/republicans-virginia-elections-losses-glenn-youngkin>

²⁶³ See E. Rizzo, *This school board made news for banning books. Voters flipped it to majority Democrat*, *NPR* (Nov. 11, 2023), <https://www.npr.org/2023/11/11/1212185489/election-pennsylvania-school-board>; C Rasanen, *Voters recall West Bonner school board chair and vice chair*, *INLANDER* (Aug. 30, 2023), <https://www.inlander.com/news/voters-recall-west-bonner-school-board-chair-and-vice-chair-26559309>; Mica Pollock et al., *Keeping the freedom to include: Teachers navigating “Pushback” and marshalling “Backup” to keep inclusion on the agenda*, 8 *J. LEADERSHIP, EQUITY, AND RESEARCH* 1 (2022); K. Chenoweth, *Standing up to extremists in Conejo Valley (California)*, *Democracy and Education Podcast* (Feb. 26, 2023), <https://www.assistdemocracy.org/podcast/standing-up-to-extremists-in-conejo-valley>.

²⁶⁴ Berkshire & Schneider, *The GOP’s school board takeover is falling flat*, *supra* note 180; Jennifer Berkshire, *How to fight the Right’s moral panic over parental*

Tracking public sentiment, membership organizations have begun to organize and strategize around these issues.²⁶⁵ One example involves the National Education Association (NEA), the nation’s largest teachers’ union. During a July 2023 gathering in Florida, NEA delegates passed a measure to address “the prevalence of discrimination and violence targeted” at the LGBTQ+ community.²⁶⁶ This measure includes efforts to mobilize against legislative attacks, provide professional development on LGBTQ+ issues, and strengthen contract protections for LGBTQ+ educators.²⁶⁷ NEA President Becky Pringle explained that the NEA convened in Orlando because Florida is “ground zero for shameful, racist, homophobic, misogynistic, xenophobic rhetoric and dangerous actions”²⁶⁸—a reference to the state’s ongoing campaign of discriminatory censorship.²⁶⁹

Multiple Democratic-controlled states have also taken affirmative steps to counter discriminatory censorship—often through legislation that protects students’ right to learn and teachers’ right to teach. One example is Illinois’ HB2789, an anti-book ban measure that directs the state librarian to “adopt the American Library Association’s Library Bill of Rights that indicates materials should not be proscribed or removed because of partisan or doctrinal disapproval . . . and prohibit the practice of banning specific books

rights, THE NATION (May 25, 2023) <https://www.thenation.com/article/society/how-to-fight-the-rights-moral-panic-over-parental-rights/> (“According to the National Education Association, pro-public-education candidates won in many competitive gubernatorial races, including in Arizona, Michigan, Minnesota, Pennsylvania, and Wisconsin, as well as in 71 percent of the school board races the union was tracking throughout the country.”).

²⁶⁵ See, e.g., M. Will, *We say gay: Largest teachers’ union pledges to fight Anti-LGBTQ policies*, EDUCATIONWEEK (July 6, 2023), <https://www.edweek.org/teaching-learning/we-say-gay-largest-teachers-union-pledges-to-fight-anti-lgbtq-policies/2023/07>.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ M. Flannery, *NEA RA 2023: NEA President Becky Pringle calls for action!*, NEA TODAY (July 7, 2023), <https://www.nea.org/nea-today/all-news-articles/nea-ra-2023-nea-president-becky-pringle-calls-action>.

²⁶⁹ See generally Feingold, *Florida Gov. DeSantis leads the GOP’s national charge against public education*, *supra* note 132.

or resources.”²⁷⁰ Illinois also recently passed HB0376, which mandates that public elementary and high schools include a unit of instruction “studying the events of Asian American history, including the history of Asian Americans in Illinois and the Midwest, as well as contributions of Asian Americans toward advancing civil rights from the 19th century onward.”²⁷¹

Massachusetts legislators have proposed similar bills that would promote racially inclusive curriculum in schools.²⁷² Championing one of those bills in a recent op-ed, Massachusetts state representative Tram Nguyen explained that “[t]he children of our Commonwealth deserve to see themselves represented across all subjects of school curricula, especially today.”²⁷³

²⁷⁰ Library Systems-Book Banning, H.B. 2789, 103rd General Assembly (Ill. 2023), <https://www.ilga.gov/legislation/billstatus.asp?DocNum=2789&GAID=17&GA=103&DocTypeID=HB&LegID=147915&SessionID=112>; American Library Association, Library Bill of Rights. <https://www.ala.org/advocacy/intfreedom/librarybill>; T. Sfondeles, *Ban the ban, not the book? Giannoulis caps return with string of legislative wins, including anti-censorship law*, CHICAGO SUN-TIMES (Jun 12, 2023), <https://chicago.suntimes.com/2023/6/12/23755948/book-ban-fight-alexi-giannoulis-anti-censorship-law-legislation-lgbtq-library-school>. Illinois Secretary of State Alexi Giannoulis explained that the bill was meant to be “proactive” in light of rising book bans: “And if you’re going to ban books, you’re not going to get state grants.” *Id.*

²⁷¹ An Act Concerning Education, H.B. 0376, 102nd General Assembly (Ill. 2022), <https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=110&GA=102&DocTypeId=HB&DocNum=0376&GAID=16&LegID=128327&SpecSess=&Session=>

²⁷² An Act to Promote Racially Inclusive Curriculum in Schools, S.288, 193rd Congress (Mass. 2023). <https://malegislature.gov/Bills/193/SD2008>.

²⁷³ Tram Nguyen, *Inclusive Education for a More Compassionate Future*, HKS REV. (Jan. 24, 2024), <https://hksspr.org/inclusive-education-for-a-more-compassionate-future/>. Rep. Nguyen further elaborated that:

Merely teaching about a handful of groups to the exclusion of many diverse communities that have made significant contributions to who we are today fosters ignorance; it also reinforces the myth and misconception that only the visible identities, those that we learn about, helped shape American society and our position as a principled and influential nation. This in turn perpetuates the longstanding culture wars that have been going on for generations and define people’s opinions about who should benefit from our laws and who should be diminished and grateful for what they get, who is entitled to their

In a similar vein, UCLA’s CRT Forward Tracking Project drafted model legislation that protects educators who teach an accurate account of critical race theory (CRT). Beyond providing an accurate portrayal of CRT, the model legislation “prohibits school districts from firing, disciplining, or otherwise engaging in adverse employment action against teachers, administrators, other employees, or contractors who use CRT to instruct, train, or otherwise support student curricular and co-curricular learning.”²⁷⁴ The drafters note that the model legislation may be most useful to Democratic-led states that “wish to ensure students and teachers have access to truthful information about race and systemic racism to build on critical understandings of racial inequality, including its history and its enduring effects.”²⁷⁵

Beyond voter preferences and blue-state legislation, another site of resistance has come in the form of legal challenges. In the past year, multiple federal courts have enjoined or struck down discriminatory censorship laws (or parts thereof). Still, it remains unclear whether even successful litigation can remedy discriminatory censorship.

B. Legal Challenges

Against the surge of discriminatory censorship laws, one might have expected a wave of corresponding legal challenges. Yet to date, relatively few lawsuits have been filed.²⁷⁶

successes and who is undeserving, who should be able to marry, who may openly express their gender identity or participate in competitive sports, and so on.

Id.

²⁷⁴ See Taifha Natalee Alexander & Ahilan Arulanantham, Critical Race Theory Model Measure and Explanatory Memorandum, UCLA School of Law Critical Race Studies, CRT Forward (2024), https://law.ucla.edu/sites/default/files/PDFs/Critical_Race_Studies/CRT-Forward-Model-Measure-Curriculum-070224.pdf.

²⁷⁵ *Id.*

²⁷⁶ See Raquel Muñiz, *Exploring Litigation of Anti-Crt State Action: Considering the Issues, Challenges & Risks in A Time of White Backlash*, 74 SYRACUSE L. REV. 1071, 1079, 1081–82 (2024) (documenting “states prohibiting K-12 school classrooms from engaging in historically-accurate discussions of race and systemic racism” and finding “lawsuits challenging state action were only present in six states: Arizona, Arkansas, Florida, New Hampshire, Oklahoma, and Tennessee.”) (footnotes omitted)

One explanation is that the “historically marginalized communities” targeted by these laws “are less likely to have the material and other resources to file suit” or otherwise face obstacles to mounting time-consuming challenges that are sure to take a “toll on and erode their overall wellbeing.”²⁷⁷ The civil rights organizations that have traditionally represented them signaled early on that they only had the capacity to either “challenge the state bans” (as opposed to local policies) or “defend educators accused of violating the laws.”²⁷⁸ Educators have likewise been disincentivized from bringing suit given the “destabilization of their legal rights,” diminution of their “political power,” and, in this particular context, legitimate “fear of professional repercussions.”²⁷⁹

But an equally plausible, if not more likely, explanation for the initial “paucity and slow pace of legal challenges” reflects the reality that states possess “broad power . . . to shape curriculums” and there remains a “lack of favorable precedent in a relatively unexplored territory of law.”²⁸⁰

Meanwhile, flying under the radar, anti-equality litigants have filed numerous lawsuits that *support* discriminatory censorship and/or *challenge* antiracist policies and practices. At least among the early challenges, pro-censorship lawsuits outnumbered anti-censorship lawsuits.

With few exceptions, every pro- and anti-censorship lawsuit: (i) has been filed in federal court, (ii) asserts free speech and/or equal protection and due process claims, and (iii) remains in trial court or on appeal from a pretrial decision.²⁸¹ Few courts have rendered a final decision on the merits.

²⁷⁷ *Id.* at 1086–88.

²⁷⁸ *Id.* at 1087–88.

²⁷⁹ *Id.* at 1089–90.

²⁸⁰ Hannah Natanson, *Few legal challenges to laws limiting lessons on race, gender*, WASHINGTON POST (Mar. 17, 2023), <https://www.washingtonpost.com/education/2023/03/17/legal-challenges-gender-critical-race-theory/>.

²⁸¹ For analyses of First Amendment, equal protection, and due process federal law claims challenging discriminatory censorship laws, see, e.g.: T. Bissell, *Teaching in the upside down: What anti-critical race theory laws tell us about the First Amendment*, 75 STANFORD L. REV. 205 (2023); B. Fair, *Crying wolf: Neo-patriots, critical race theory, and the constitutional protection of “dangerous” ideas*, 27 UC

We highlight below representative lawsuits filed by anti-censorship plaintiffs and pro-censorship plaintiffs, respectively.

1. *Representative Lawsuits Challenging Discriminatory Censorship*

(1) *Black Emergency Response Team v. Drummond*

In October 2021, a multiracial group of students and educators filed suit challenging HB 1775, Oklahoma’s governing discriminatory censorship law.²⁸² Among other provisions,²⁸³ operative sections prohibit K-12 schools in the state from “requir[ing] or mak[ing] part of a course” eight concepts.²⁸⁴

DAVIS SOCIAL JUSTICE L. REV. 1 (2023); D. Saul, *School curricula and silenced speech: A constitutional challenge to critical race theory bans*, 107 MINN. L. REV. 1311 (2023); D. Salzman, *The constitutionality of orthodoxy: First Amendment implications of laws restricting critical race theory in public schools*, 89 U. CHICAGO L. REV. 1069 (2023). For further insightful analysis on Title VI claims especially, see Osamudia James, *White injury and innocence: On the legal future of antiracism education*, 108 VA L. REV. 1689 (2022).

²⁸² See ACLU, *Black Emergency Response Team v. Drummond*, Court Cases, <https://www.aclu.org/cases/bert-v-oconnor#press-releases>.

²⁸³ HB 1775 also regulates higher education. We do not address that portion of the Act, except to note that the district court also enjoined as unconstitutionally vague aspects of the higher education regulations that prohibited “[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex.” See *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, 2024 WL 3015359, at *6 (W.D. Okla. June 14, 2024).

²⁸⁴ Among other provisions, HB 1775 directs:

No teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make part of a course the following concepts:

- a. one race or sex is inherently superior to another race or sex,
- b. an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously,
- c. an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex,
- d. members of one race or sex cannot and should not attempt to treat others without respect to race or sex,
- e. an individual's moral character is necessarily determined by his or her race or sex,

These provisions place HB 1775 in the category of discriminatory censorship laws the prohibit *inclusion* of content. The prohibit concepts track those appearing in the Trump EO.

The complaint averred that HB 1775’s lead authors “declared that the act’s intent was to prohibit conversations related to ‘implicit bias,’ ‘systemic racism,’ and ‘intersectionality,’ among other topics.”²⁸⁵ With rhetoric common to the Right’s escalating anti-antiracism campaign (and animated the Trump EO and Vought memos), HB 1775’s supporters “disparaged the Black Lives Matter movement . . . drew parallels to the Ku Klux Klan,” and “vilif[ied] concepts with which they disagreed by calling them ‘Marxist,’ ‘un-American,’ and ‘revolutionary’ programs.”²⁸⁶

The plaintiffs further alleged that HB 1775 “silences speech through its vague, overbroad and viewpoint discriminatory terms, and intentionally targets and denies access to ideas aimed at advancing the educational and civic equality of historically marginalized students because of the legislators’ own discomfort and disagreement with certain viewpoints.”²⁸⁷ The complaint also emphasized that HB 1775 undermined K-12 education: “District administrators . . . struck texts by Black and women authors from their reading lists”²⁸⁸ and advised teachers to avoid “terms such as ‘diversity’ and ‘white privilege.’”²⁸⁹

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- f. an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex,
 - g. any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex, or
 - h. meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race.

Okla. Stat. tit. 70, § 24-157(B)(1).

²⁸⁵ Complaint, Bert v. O’Connor ¶ 8, https://www.acluok.org/sites/default/files/field_documents/001_-_complaint12.pdf

²⁸⁶ *Id.*

²⁸⁷ Complaint, Bert v. O’Connor at ¶ 11, https://www.acluok.org/sites/default/files/field_documents/001_-_complaint12.pdf.

²⁸⁸ Specific texts include: *To Kill a Mockingbird*, *Their Eyes Were Watching God*, *I Know Why the Cage Bird Sings*, *Narrative of the Life of Frederick Douglass*, and *A Raisin in the Sun*. See *id.* at ¶ 3.

²⁸⁹ *Id.*

The plaintiffs argued that the law and its implementing regulations were unconstitutional under the First and Fourteenth Amendments.²⁹⁰ On June 14, 2024, the district court issued two related orders.²⁹¹ One disposed of the defendants’ motions to dismiss; the other disposed of the plaintiffs’ request for a preliminary injunction. A full analysis is beyond the scope of this Article, but several rulings from these two orders deserve mention.

First, the court held that the plaintiffs plausibly pleaded their equal protection claim that Oklahoma’s legislature passed HB 1775 “at least in part because of” a racially discriminatory purpose.²⁹²

Second, the court granted a preliminary injunction—on constitutional vagueness grounds—that stripped the term “require” from the statutes introductory verb clause and halted enforcement of two of the eight prohibited concepts.²⁹³ One key variable that informed the court’s vagueness analysis was the fact that K-12 educators faced severe employment consequences for violating the Act.²⁹⁴

²⁹⁰ *See id.* at ¶¶ 156-189 (alleging that the Act is (a) unconstitutionally vague under the Fourteenth Amendment; (b) infringes the students’ First Amendment right to receive information; (c) is overbroad and imposes impermissible viewpoint-based restricts that violate the First Amendment; and (d) violates the Fourteenth Amendment’s equal protection clause).

²⁹¹ *See Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, ___ F.Supp.3d ___, 2024 WL 3015359 (W.D. Okla. June 14, 2024) (ruling on plaintiff’s request for preliminary injunction); *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, 2024 WL 3014659, at *1 (W.D. Okla. June 14, 2024) (ruling on defendants’ motions to dismiss and judgment on the pleadings).

²⁹² *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, 2024 WL 3014659, at *13 (W.D. Okla. June 14, 2024) (listing as relevant to its ruling the plaintiffs’ allegation that the legislature “deviated from its own procedures” and enacted the law “with the purpose to discriminate against students of color by chilling and suppressing Inclusive Speech aimed at enhancing the educational, social, and civic experience of students of color and their families”).

²⁹³ *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, 2024 WL 3015359, at *12–13 (W.D. Okla. June 14, 2024) (granting preliminary injunction with respect to: “the provision: ‘Any orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex is prohibited.’ . . . ; the word “require” in the introductory verb clause in title 70, section 24-157(B)(1) . . . ; subsections (c) and (d) of title 70, section 24-157(B)(1) . . . ; or the Implementing Rules, to the extent they are inconsistent with this Order).

²⁹⁴ *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, 2024 WL 3015359, at *6 (W.D. Okla. June 14, 2024) (noting “the Act’s Implementing Rules

Third, the court found that the remaining six concepts were not unconstitutionally vague.²⁹⁵ Plaintiffs have since appealed this partial denial of their preliminary injunction motion to the Tenth Circuit.²⁹⁶ Because that denial leaves most of the prohibited concepts in effect, it could be viewed as a victory for the Oklahoma legislature.

We caution against such a reading, however, because it overlooks how the court’s reasoning blunts the Act’s efficacy as a tool of discriminatory censorship.²⁹⁷ The plaintiffs claim that the Act’s vague language invites interpretations that would prohibit educators from teaching their students, *e.g.*, about historical and contemporary biases in America; that an institution’s action or inaction can be racist or result in undue oppression; and that past discrimination has resulted in present-day inequalities.²⁹⁸ The

authorize the State Department of Education to suspend or revoke the license or certificate of K-12 School employees found to have violated the Act).

²⁹⁵ Plaintiffs also asserted a claim that the Act violated students’ constitutional right to receive information. But the court concluded separately that such a “right to receive information is a corollary of the speaker’s right to express it,” in this case the regulated speaker being the teacher. *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, 2024 WL 3014659, at *11 n.16 (W.D. Okla. June 14, 2024) Having concluded that teachers have no such “First Amendment right to teacher particular information in the classroom,” the court dismissed the students’ corollary right to receive information claim. *Id.*

²⁹⁶ See *ACLU BERT v. Drummond*” website, *supra* note 285.

²⁹⁷ The court also noted that the Act’s formal “Safe Harbor” limited the Act’s scope. *See id.* (“[T]he safe harbor of the Academic Standards limits the scope of each of the directives set forth above, expressly protecting the teaching of “concepts that align to” listed topics that include, and reasonably require discussion of, past and present race and sex discrimination. . . . These subjects include historical . . . slavery in America and its political and economic consequences. . . . the ratification of the Constitution and the founders’ treatment of enslaved persons and all women . . . the colonization of tribal lands and the United States’ subsequent interactions with American Indians . . . civil rights struggles in America, including Black Codes and Jim Crow Laws . . . the founding of Oklahoma and the effect of federal policies on American Indians during early statehood . . . the disenfranchisement of minorities and racial tensions in twentieth-century America (expressly including the “Tulsa Race Riot” and the internment of Japanese-Americans during World War II); and the “major events, personalities, tactics[,] and effects of the Civil Rights Movement.”. . . the effects of past bias and discrimination on current behavior³⁰ and “ongoing issues including immigration, criminal justice reform, employment, environmental issues, race relations, civic engagement, and education.”).

²⁹⁸ See *Black Emergency Response Team v. Drummond*, No. CIV-21-1022-G, 2024 WL 3015359, at *9 (W.D. Okla. June 14, 2024).

court rejected this argument, concluding that the statute’s plain text does *not* prohibit teaching about these and other topics—all of which one would locate within an antiracist curriculum.²⁹⁹

This analysis illuminates the disjuncture between HB 1775’s plain text (which permits antiracist pedagogy) and the Oklahoma Legislature’s naked goal (to discredit and outlaw antiracist pedagogy). Thus, even as the court partially rejected the plaintiffs’ vagueness claims, the court held that it would be unreasonable to interpret the Act as prohibiting curricular content about racism, gender identity, and other targeted topics. The court’s analysis, by taking seriously HB 1775’s plain language, could potentially insulate inclusionary-oriented K-12 educators from parents or officials who might try to wield HB 1775 against them.³⁰⁰ The plaintiffs believe they are entitled to firmer insulation and additional clarity than the text arguably provide, thus, their appeal to the Tenth Circuit.

(2) *Local 8027, AFT-N.H., AFL-CIO v. Edelblut*

In December 2021, two groups of New Hampshire plaintiffs sued to strike down HB 2, the state’s new discriminatory censorship law,³⁰¹ which falls within all three categories we previously identified, “promoting, including, and compelling” targeted topics. Specifically, HB 2 modified the state’s education and antidiscrimination laws by, *inter alia*, identifying four concepts that public K-12 students may not be “taught, instructed, inculcated or compelled to express belief in, or support for.”³⁰² Tracing to the Trump

²⁹⁹ *See id.* (“Contrary to Plaintiffs’ arguments, the text does not prohibit teaching about historical or current events in which members of one race or sex acted criminally, maliciously, or discriminatorily toward members of another race or sex. Nor does it reasonably preclude teaching that past actions of racism or sexism have resulted in present advantages for members of a certain race or sex or have resulted in present disadvantages for members of a certain race or sex.”).

³⁰⁰ In similar case out of California, a superior court judge denied the plaintiff’s request for a preliminary injunction on similar grounds. *See* <https://www.courthousenews.com/wp-content/uploads/2024/02/Riv06ruling102323-2.pdf> (denying preliminary injunction on vagueness grounds and pointing to Defendant’s declaration that the challenged “Resolution does not interfere with the teaching of ethnic studies, history, or any other subject” and that teachers “can still teach on accurate historical events and individuals, such as Dr. Martin Luther King, the Holocaust, and slavery.”).

³⁰¹ *See* *Loc. 8027 v. Edelblut*, No. 21-CV-1077-PB, 2024 WL 2722254, at *3 (D.N.H. May 28, 2024) (detailing procedural background).

³⁰² *Id.*

EO, those concepts included “[t]hat an individual should be discriminated against or receive adverse treatment solely or partly because of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.”³⁰³

The consolidated lawsuits asserted multiple claims, including that HB 2 was unconstitutionally vague in violation of the Fourteenth Amendment.³⁰⁴ In a May 2024 ruling, the court agreed that HB 2 was unconstitutionally vague and granted the plaintiffs’ summary judgment motion. As with the Oklahoma litigation, the district court noted that HB 2’s severe sanctions raised the stakes for the vagueness analysis.³⁰⁵

Against this backdrop, the court identified three “fatal[]” flaws that rendered the act impermissibly vague: (1) the banned concepts were themselves unclear; (2) HB 2 did not sufficiently explain when classroom discussion of a banned concept qualified as impermissible teaching;³⁰⁶ and

³⁰³ *Id.* The other concepts include:

(a) That one's age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin is inherently superior to people of another age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin;

(b) That an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; . . .

(d) That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin cannot and should not attempt to treat others without regard to age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.

³⁰⁴ *See id.*

³⁰⁵ *See id.* at *7 (noting that educators who violated HB2 could lose their teaching credentials—thus threatening “the loss of their livelihood” and ability “to practice their chosen profession anywhere in the state”—and face monetary damages).

³⁰⁶ *Id.* at *12 (“The Amendments provide that students may not be “taught, instructed, inculcated or compelled to express belief in, or support for” the banned concepts, but they lack clarity as to what it means to “teach” a banned concept.”).

(3) teachers lacked sufficient guidance concerning HB 2’s impact on extracurricular speech.

As to the first flaw, the court recognized that HB 2’s proponents had openly advocated for restricting specific topics like structural racism, implicit bias, and affirmative action.³⁰⁷ But these specific attacks contrasted with the statute, which cast the banned concepts in “general terms” that invited ambiguity.³⁰⁸ Among other examples, the court concluded that it was impossible to discern—from the text itself—whether HB 2 prohibited instruction on topics like implicit bias and affirmative action.³⁰⁹

*(3) Equality Florida v. Florida State Board of Education and
M.A. v. Florida State Board of Education*

Following passage of HB 1557, dubbed by opponents as Florida’s “Don’t Say Gay” law, a group of students, parents, teachers, and organizations filed a pair of lawsuits targeting the law. Plaintiffs took specific aim at the provision prohibiting “[c]lassroom instruction” on “sexual orientation and gender identity” in grades K–3. Plaintiffs contended that the law violates the First Amendment, Fourteenth Amendment equal protection and due process clauses, and Title IX, which prohibits sex discrimination in federally funded education programs and activities. In both cases, the same district court judge dismissed the complaints. The court held that the plaintiffs lacked standing

³⁰⁷ *See id.* at *9 (“Supporters of [HB2] have made no secret of the fact that their aim is to restrict what teachers can say about what plaintiffs call DEI initiatives but supporters of the Amendments call CRT. But rather than take on issues like structural racism, implicit bias, and affirmative action directly, [HB2] employ[s] general terms such as teaching that one race is superior to another, that individuals are inherently racist, and that individuals should not be subject to adverse treatment because of their race. While these banned concepts may appear straightforward at first glance, their ambiguity comes to light when put into practice.”).

³⁰⁸ *Id.* at *12. (“[T]he banned concepts speak only obliquely about the speech that they target and, in doing so, fail to provide teachers with much-needed clarity . . . sows confusion and leaves significant gaps . . . thereby inviting arbitrary enforcement.”).

³⁰⁹ *Id.* at **9-10.

because they could not allege a concrete injury that was fairly traceable to HB 1557 and that could be redressed by enjoining the law’s enforcement.³¹⁰

While those dismissal orders were on appeal in the Eleventh Circuit, the plaintiffs and state agreed to a settlement, with both sides declaring victory³¹¹ Under the terms of the settlement, HB 1557 can be enforced only against the “teaching” of the prohibited topics, not their “mere discussion.”³¹² Teachers would be permitted to respond, for example, to student-initiated discussions of “their identities or family life” or to “provide grades and feedback” to student work that includes the prohibited topics.³¹³

2. *Representative Lawsuits Promoting Discriminatory Censorship*

(1) *Henderson v. School District of Springfield R-12*

During the 2020-21 school year, the Springfield School District held district-wide, mandatory, professional trainings that covered themes of “equity” and “antiracism.” The following school year, two teachers represented by the Southeastern Legal Foundation filed suit, contending that the training violated their First Amendment rights against compelled speech and viewpoint discrimination, chilling their speech in the process.³¹⁴ The court ruled on a pre-trial motion that the teacher-challengers lack legal

³¹⁰ Equal. Fla. v. Florida. State Bd. of Educ., No. 4:22-CV-134-AW-MJF, 2022 WL 19263602 (N.D. Fla. Sept. 29, 2022); M.A. v. Florida State Bd. of Educ., 2023 WL 2631071 (N.D. Fla. Feb. 15, 2023).

³¹¹ Mike Schneider, *Florida teachers can discuss sexual orientation and gender ID under ‘Don’t Say Gay’ bill settlement*, ASSOCIATED PRESS (Mar. 11, 2024), https://apnews.com/article/florida-dont-say-gay-bill-settlement-987904b3e19122d719cf468034746b6e?taid=65ef6f1200a6970001481034&utm_campaign=TrueAnthem&utm_medium=AP&utm_source=Twitter

³¹² See Grace Abels, *PolitiFact FL: Can you ‘say gay’ in school? Explaining a settlement over LGBTQ+ ‘instruction’*, WLRN PUBLIC MEDIA (Mar. 15, 2024), <https://www.wusf.org/courts-law/2024-03-15/politifact-fl-dont-say-gay-settlement-florida-lgbtq-instruction-parental-rights-in-education-desantis>

³¹³ *Id.*

³¹⁴ <https://www.slfliberty.org/wp-content/uploads/sites/12/2021/08/20210818-Complaint-Doc.-1.pdf>

standing to maintain their free speech claims.³¹⁵ Moreover, the court concluded that, even if they could establish standing, the school district did not violate the teachers’ rights by requiring them to attend these trainings.³¹⁶

The court subsequently determined that plaintiffs’ claims were frivolous and awarded the school district defendant over \$300,000 in attorney fees.³¹⁷ At the time of this writing, the case is pending on appeal in the Eight Circuit, where it has been fully briefed and a “freewheeling oral argument” held in February 2024.³¹⁸

(2) *Foote v. Town of Ludlow (D. Mass.)*

Two parents initiated this action alleging “that during the 2020-2021 school year, staff employed by Ludlow Public Schools (1) spoke about gender identity with two of their children, who were then eleven and twelve years old and students at Baird Middle School; (2) complied with the children’s requests to use alternative names and pronouns; and (3) did not share information with Plaintiffs about the children’s expressed preferences

³¹⁵ Henderson v. School District of Springfield R-12, 650 F.Supp.3d 786, 797(W.D. Mo. 2023) (“Plaintiff’s chilled speech and content and viewpoint discrimination claims related to the professional training session fail because Plaintiffs lack the requisite injury-in-fact to show standing.”).

³¹⁶ *Id.* at 802 (“The claim that the district should not conduct training for them to attend on policies applicable at work involving their employment because they disagree with them, however, is untenable. Such a ruling would make administration of a governmental unit such as a large, urban school district wholly unworkable. It would distort the employer-employee relationship. It is a frivolous claim and theory.”)

³¹⁷ Henderson v. Sch. Dist. of Springfield R-12, 2023 WL 2754902, at *1 (W.D. Mo. Mar. 31, 2023) (“This court finds Plaintiffs’ claims to be frivolous. ... Plaintiffs did not allege and no evidence suggested that Defendants enacted any policy or guideline that required Plaintiffs to adhere to a certain viewpoint or articulate a particular message. Crucially, Plaintiffs made clear during the training that they did not agree with principles of equity and anti-racism... Plaintiffs were not fired or demoted for expressing their personal views during the training. Plaintiffs did not lose pay, nor did they experience any adverse or retaliatory employment action whatsoever. Taken together, Plaintiffs’ allegations show not only a lack of injury, but more importantly total lack of a factual basis for any sort of First Amendment claim.”).

³¹⁸ Patrick Dorrian, *School Workers’ DEI Training Appeal Faces Probing 8th Cir.*, BLOOMBERG LAW (Feb. 15, 2024), <https://news.bloomberglaw.com/litigation/school-workers-appeal-over-dei-training-faces-probing-8th-cir>.

regarding their names and pronouns.”³¹⁹ The plaintiffs contended that such policies and practices violated “three different fundamental parental rights protected under the substantive due process clause of the Fourteenth Amendment: (1) the right to direct the education and upbringing of their children (Count I), (2) the right to make medical and mental health decisions for their children (Count II), and (3) the right to family integrity (Count III).”³²⁰

The court dismissed the complaint, finding plaintiffs’ allegations legally insufficient to support substantive due process violations.³²¹ The court noted that dismissal would be warranted in the alternative based on the school district’s qualified immunity defense.³²² At the time of this writing, the case is pending on appeal in the First Circuit.

The preceding cases are representative of other lawsuits that challenge discriminatory censorship laws,³²³ favor discriminatory censorship,³²⁴ as

³¹⁹ Foote v. Town of Ludlow, 2022 WL 18356421, *1 (D. Mass. Dec. 14, 2022).

³²⁰ *Id.* at *4.

³²¹ *Id.* at **7-8.

³²² *Id.* *8 (“Courts avoid deciding issues they don’t have to address. Because the court already granted dismissal because the complaint’s allegations were legally insufficient, it did not have to decide the alternative basis for dismissal that was asserted (i.e., qualified immunity). Nevertheless, the court went out of its way to note that, if it were necessary to decide that issue, it would find dismissal based on qualified immunity as well.”).

³²³ See, e.g., Falls v. Desantis, No. 4:22CV166-MW/MJF, 2023 WL 3568526, at *1 (N.D. Fla. May 19, 2023) (dismissing for lack of standing plaintiffs challenge to board of education rule “prohibiting instruction in critical race theory and 1619 Project,” HB 7’s “six principles of freedom,” “prohibited classroom discussions,” and “amendments to Florida Educational Equity Act”); Updike v. Jonas, 700 F. Supp. 3d 597 (S.D. Ohio 2023) (concluding plaintiffs had standing to challenge school board resolution restricting use of race, socioeconomic class, religion, gender identity, sex, ethnicity, or culture in school activities as violative of First Amendment); Arizona Sch. Bd. Ass’n v. Arizona, 501 P.3d 731 (Ariz. 2022) (upholding state law challenge to discriminatory censorship laws that failed to comport with state constitution title requirement and single-subject rules).

³²⁴ See, e.g., Menders v. Loudoun Cnty. Sch. Bd., 65 F.4th 157 (4th Cir. 2023); B.L. v. Fetherman, No. CV 22-3471, 2023 WL 3004853 (D.N.J. Apr. 18, 2023); Auslander v. Tredyffrin/Easttown Sch. Dist., 630 F. Supp. 3d 674 (E.D. Pa. 2022); Scarpellino v. Freeman, No. 3:22-CV-1130 (CSH), 2024 WL 1109116 (D. Conn.

well as lawsuits challenging LGBTQ+ discrimination³²⁵ and supporting LGBTQ+ discrimination.³²⁶ Albeit beyond the scope of this Article, we also note that litigants have brought several parallel lawsuits challenging book bans³²⁷ and defending book bans.³²⁸

Finally, we note that there have been administrative and school board-level hearings bearing on discriminatory censorship laws. One example involves Amy Donofrio, a Florida teacher who prevailed in a recent hearing after state officials attempted to strip her professional license for flying a Black Lives Matter flag outside her classroom.³²⁹

3. *Alternative Litigation Strategies*

Before concluding with our recommendations, we offer one word of caution. Even as some legal victories arrive, little evidence suggests that

Mar. 14, 2024); *Parents' Choice Tennessee v. Golden*, No. M202201719COAR3CV, 2024 WL 1670663 (Tenn. Ct. App. Apr. 18, 2024); *Deemar v. Board of Educ. City of Evanston/Stokie*, No. 1:21-cv-3466 (N.D. Ill.); *Clark v. Democracy Prep Pub. Schs.*, 2:20-cv-02324-APG-VCF (D. Nev.); *Ibanez v. Albemarle Cnty. Sch. Bd.*, 80 Va. App. 169, 897 S.E.2d 300 (2024); *South Carolina Freedom Caucus v. Lexington Cnty. Sch. Dist. One* (D. S.C.); *MARS Area Sch. Dist. v. Pennsylvania* (W.D. Pa.).

³²⁵ See, e.g., *Cousins v. Sch. Bd. of Orange Cnty., Fla.*, 687 F. Supp. 3d 1251 (M.D. Fla. 2023).

³²⁶ See, e.g., *Tatel v. Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295 (W.D. Pa. 2022), clarified, 2023 WL 3740822 (W.D. Pa. May 31, 2023); *Kaltenbach v. Hilliard City Sch.*, No. 2:23-CV-187, 2024 WL 1831079 (S.D. Ohio Apr. 19, 2024).

³²⁷ See, e.g., *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, F.Supp.3d, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024); *OCR Complaint-Forsyth County Schools (Ga.)* (May 2023); *C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist.*, 619 F. Supp. 3d 906, 909 (E.D. Mo. 2022), appeal dismissed, No. 22-2885, 2023 WL 2180065 (8th Cir. Jan. 17, 2023); *L. H. v. Indep. Sch. Dist.*, No. 4:22-CV-00801-RK, 2023 WL 2192234 (W.D. Mo. Feb. 23, 2023); *Missouri Ass’n of Sch. Librarians v. Baker* (Mo. 2023); *Florida Education Ass’n v. Florida* (Div. Admin. Hearings, March 2023); *OCR Complaint-Keller Independent School District (Tex.)* (August 2022); *Fayetteville Pub. Libr. v. Crawford Cnty., Arkansas*, No. 5:23-CV-05086, 2023 WL 4845636 (W.D. Ark. July 29, 2023).

³²⁸ See, e.g., *In re: A Court of Mist and Fury and In re: Gender Queer, a Memoir*, No. CL22-1985 (Va.).

³²⁹ Nandhini Srinivasan, *Jacksonville teacher wins license fight after Florida targeted her for flying Black Lives Matter flag*, THE TRIBUTARY (Jun. 17, 2024), <https://jaxtrib.org/2024/06/15/jacksonville-teacher-allowed-to-keep-license-after-florida-targeted-her-for-flying-black-lives-matter-flag/>

existing litigation strategies will swiftly and decisively remedy the harm discriminatory censorship laws have caused.³³⁰ One reason is that lawsuits can take years to conclude. Reflecting this reality, several of the recent district court decisions are coming nearly 3-years after lawsuits were initially filed. Thus, even when injunctions arrive, they provide no relief to the students during the preceding years of litigation.

More structurally, even when lawsuits succeed, it is often difficult—if not impossible—to repair the damage that has already been done.³³¹ One example involves a lawsuit that challenged a 2010 Arizona law the state’s GOP passed to undermine a successful Mexican-American Studies class in the Tucson Unified School District.³³² Seven years’ later, the plaintiffs ultimately prevailed—but not before the school district had eliminated the program.³³³ PEN America offered the following reflections on this “successful” litigation:

The seven-year delay illustrates perhaps the greatest danger of these educational gag orders: that even when justice ultimately prevails, the time and resources required to get

³³⁰ Natanson, *Few legal challenges to laws limiting lessons on race, gender, supra* note 199.

³³¹ C. Acosta & A. Mir, *Empowering young people to be critical thinkers: The Mexican American studies program in Tucson*, 34 VOICES IN URBAN EDUCATION (2012) (“In 2010, Arizona legislators enacted HB 2281, which banned schools from teaching classes that ‘promote resentment toward a race or class of people; are designed primarily for pupils of a particular ethnic group; advocate ethnic solidarity instead of the treatment of pupils as individuals’; or advocate ‘the overthrow of the United States government.’ . . . the record of how HB 2281 had been both drafted and applied was replete with racist language and procedural irregularities. For example, the superintendent who enforced the law wrote blog posts that said things like: ‘MAS [Mexican-American Studies] = KKK in a different color’ and ‘The Mexican-American Studies classes use the exact same technique that Hitler used in his rise to power.’”).

³³² See Hank Stephenson, *TUSD board majority sidesteps effort to resurrect aspects of Mexican American Studies*, ARIZONA DAILY STAR (Jan. 31, 2018), <https://tucson.com/news/local/tusd-board-majority-sidesteps-effort-to-resurrect-aspects-of-mexican-american-studies/article> (“Mexican American Studies began as one of many conditions required to prove the district was working to improve the academic achievement of minority students and to settle the district’s decades-old desegregation order.”).

³³³ See *id.*

there can block students from being educated on a wide range of topics in American history, society, and literature and deprive them of information and ideas that could strengthen their understanding of race, sex, ethnicity, and other fault lines.³³⁴

We offer these remarks not as an argument against litigation. Rather, we mean to highlight the limits of traditional legal strategies and, accordingly, to invite stakeholders to explore alternative legal and non-legal strategies.

Given federal deference to state and local policymaking, one direction to take litigation is to “assert the highest legal authority for an affirmative right to democratic education: state constitution education clauses,” together with the state equivalents of free speech, due process, and equal protection clauses.³³⁵ Litigants might also consider how to leverage state statutes or regulations. One recent California challenge brought by the public interest legal organization Public Counsel takes this strategy and leverages state constitutional guarantees.³³⁶ Although a superior court judge denied the plaintiff’s request to enjoin the challenged resolution,³³⁷ the case remains a use model—particularly for blue-state litigants interested in challenging a local discriminatory censorship law.

Another legal strategy entails invoking discriminatory censorship laws for progressive ends—for example, to defend educators who discuss targeted

³³⁴ PEN America, Educational Gag Orders, <https://pen.org/report/educational-gag-orders/>.

³³⁵ See Joshua Weishart, *In the education culture war, don’t overlook state constitutions*, BRENNAN CENTER FOR JUSTICE (Mar. 6, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/education-culture-war-dont-overlook-state-constitutions> (“[F]ederal court precedent favoring local control of schools and federalism in education—as well as jurisdictional limitations—may well upend these lawsuits.”).

³³⁶ Diana Lambert, *Temecula Valley Unified CRT ban has created a hostile school environment, lawsuit says*, EDSOURCE (Aug. 2, 2023), <https://edsource.org/2023/temecula-valley-unified-crt-ban-has-created-a-hostile-school-environment-lawsuit-says>.

³³⁷ See Hillel Aron, *Judge Won’t Block Southern California School District’s CRT Ban*, Courthouse News Service (Feb. 23, 2024), <https://www.courthousenews.com/judge-wont-block-southern-california-school-districts-crt-ban/>.

topics or to demand more racially inclusive pedagogy.³³⁸ This counterintuitive approach privileges a discriminatory censorship law’s plain text over the rhetoric of its authors.³³⁹ As discussed above, the facially neutral antidiscrimination mandates and “safe harbors” contained in many discriminatory censorship laws invite interpretations that permit, if not require, classroom conversations about targeted topics. Multiple courts, including a Trump-appointed district judge in Oklahoma,³⁴⁰ have supported this reasoning in recent opinions.³⁴¹ These rulings should encourage pro-education advocates to pursue this new pathway to counter rightwing efforts to arbitrarily wield discriminatory censorship laws against disfavored educators.

CONCLUSION

Discriminatory censorship laws are wreaking havoc on educators, students, and public education writ large. Yet contrary to their ubiquity across the country, these laws—and the exclusionary values they embody—are widely unpopular. Still, little suggests rightwing backlash will slow absent an equally organized, resourced and committed response. In this spirit, we conclude by offering recommendations directed at specific stakeholders—each of whom is well-positioned to close ranks around critical thinking, inclusive curricula, and the basic dignity of all school community members.

We urge Congress to hold hearings on discriminatory censorship laws and the threats they pose to students, teachers, and public education writ large.

We urge the United States Department of Education to (a) provide legal guidance for educators; (b) to initiate investigations to protect the civil rights of students and educators in “censored” states and districts; and (c) to create more streamlined mechanisms for students and educators to file complaints with the U.S. Department of Education’s Office for Civil Rights when

³³⁸ See Feingold, *Reclaiming Equality*, *supra* note 12.

³³⁹ This is not to suggest that the public statements of public officials are irrelevant. Such statements can support equal protection-styled challenges by providing evidence of discriminatory intent and animus. But as a matter of statutory interpretation, it is common practice to privilege the statutory text.

³⁴⁰ See *supra* Part IV.1(1).

³⁴¹ *Id.*

discriminatory censorship laws create hostile environments or otherwise violate federal civil rights.

We urge state legislators to (a) enact legislation that requires or affirmatively permits antiracist, inclusive, and culturally sensitive pedagogy and curriculum³⁴²; and (b) enact laws modeled after the American Library Association’s Library Bill of Rights, such as IL HB2789, which prohibit the removal of material because of partisan or doctrinal disapproval and the banning of specific books or resources.

We urge State Departments of Education and Local School Officials to (a) Develop and disseminate clear guidance that identifies, with precision, what any governing discriminatory censorship law prohibits and what it permits; and (b) Review existing guidance or issue new guidance that reinforces that federal law creates an affirmative obligation for schools to provide an inclusive, safe education free from race-based and sex-based harassment—protections that extend to LGBTQ+ students and educators.

We urge national Civil Rights, Civil Liberties, and Education Advocacy Groups to: (a) create a national hotline to provide educators with immediate up-to-date legal information and guidance; (b) establish a legal defense fund to cover targeted educators’ legal expenses and lost compensation and benefits pending disciplinary proceedings; (c) create a network of pro bono legal and public relations services for targeted educators; and (d) Prepare and disseminate curricular materials that enable educators to teach targeted topics without violating discriminatory censorship laws yet still provide a comprehensive and truthful account of the subject.

We urge progressive legal organizations to develop new litigation strategies that, for example, (a) employ discriminatory censorship laws to defend equality-oriented educators and pedagogy; and (b) assert state constitutional rights, statutes, or regulations to challenge discriminatory censorship laws.

³⁴² See, e.g., MA H588, “An Act teaching anti-racism in Massachusetts schools” and MA S288, “An Act to Promote Racially Inclusive Curriculum in Schools.” UCLA School of Law’s CRT Forward Tracking Project has also released model legislation that protects educators who teach their students an accurate account of critical race theory. See Alexander & Arulanantham, *supra* note 273.

We urge all champions of public education and multiracial democracy to close ranks around the millions of students and front-line educators who must now navigate regimes of discriminatory censorship.