

The Anti-“Critical Race Theory” Campaign – Classroom Censorship and Racial Backlash by Another Name

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This Article explores the rise of the anti-“critical race theory” movement, arguing that it is backlash to progress towards racial justice. Instruction on racism, culturally relevant teaching methods, and critical race theory—collectively, race conscious instruction—improve students’ comprehension, engagement, analytical skills, and social development. Conservatives attacked race conscious instruction under the banner of “critical race theory,” intentionally misrepresenting the pedagogical approaches to strike fear in a vocal minority troubled by the loss of societal control. This Article tracks the evolution of the anti-“critical race theory” movement from a one-man crusade to political rallying cry across the country, as well as efforts to erase race conscious instruction at the federal or state level. Conservatives stoked hysteria about “critical race theory” in workplaces and schools to maintain (and expand) political power, favoring inaccurate representations and a narrow gloss of patriotism over well-researched pedagogical approaches and honest engagement about systems of oppression. Then, they offered censorship as a solution to the manufactured emergency, introducing legislation in 45 states to limit instruction on systemic racism and sexism in schools, known as educational gag orders. This Article analyzes the scope of educational gag orders, compares the various approaches to censorship and enforcement, and identifies the resultant culture of fear and intimidation. Finally, this Article builds upon the author’s experience challenging educational gag orders through litigation in Florida, Oklahoma, and New Hampshire under the First and Fourteenth Amendments.

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I. INTRODUCTION

“Ignorance allied with power is the most ferocious enemy justice can have.”
– James Baldwin

Since the racial reckoning of 2020 following the killings of George Floyd, Breonna Taylor, and Ahmaud Arbery, references to “critical race theory” in schools have become a rallying cry for conservatives who seek to keep students ignorant of racism and oppression in America. I use quotations because the phrase “critical race theory” has been co-opted by conservatives to misleadingly reference a range of speech describing race, the systemic nature of racism, and anti-racism efforts. Critical race theory is a framework primarily utilized in higher education to track and challenge the ways racism is built into American institutions.¹ Critical race theorists do not teach students to hate any group, seek to divide Americans, or reduce complex identi-

¹ *Race, Reform & Retrenchment Revisited: Can States Ban Learning About Our Full History?*, AM. BAR ASS'N AND AFR. AM. POL'Y FORUM (Feb. 2, 2022), <https://www.americanbar.org/content/dam/aba/administrative/crsj/webinar/february-2022/aapf-crt-resources-feb2022.pdf> [<https://perma.cc/Y6C6-LNMM>]; Gary Peller, *Opinion: I've Been a Critical Race Theorist for 30 Years. Our Opponents Are Just Proving Our Point for Us*, POLITICO (June 30, 2022), <https://www.politico.com/news/magazine/2021/06/30/critical-race-theory-lightning-rod-opinion-497046> [<https://perma.cc/S74M-Y8K4>].

ties only to racial classifications.² But, this fight isn’t limited to critical race theory. Conservatives seek to erase *all* meaningful discussions of race or racism in schools, including (1) classroom instruction on systemic discrimination that helps students process the events they study and the world around them; (2) culturally responsive teaching, which builds upon students’ lived experiences to further academic engagement, develop positive social identity, and foster critical thinking skills; and (3) critical race theory.³ Collapsing these three concepts, collectively “race conscious instruction,” under the banner of “critical race theory” is a deliberate effort by conservatives to minimize the wide range of speech they seek to censor.

Legislation prohibiting race conscious instruction has been introduced in 45 states since January 2021.⁴ Censorship efforts spread like wildfire in 2022, with the number of bills introduced increasing by more than 250 percent compared to 2021.⁵ By January 2022, 35 percent of all primary and secondary (K-12) students, or 17.7 million students, attended districts that experienced some form of a local campaign to end “critical race theory” in classrooms.⁶ These efforts were not limited to K-12 classrooms; 30 percent of 2021 classroom censorship bills and 39 percent of 2022 classroom censorship bills applied to higher education.⁷ This movement has significantly reduced, or altogether silenced, discussions of racism and sexism in classrooms, essentially operating as an educational gag order on these topics.

As a former teacher and attorney currently litigating the constitutionality of educational gag orders in Florida, Oklahoma, and New Hampshire, I strongly believe that any discussions of classroom censorship must begin with the impact on students and establish why it is important to continue to incorporate race conscious instruction in schools. The Supreme Court has recognized that public schools play an important role “in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.”⁸ Contrarily, the current classroom censorship campaign deprives students of the opportunity to accurately understand the

² Mica Polluck, John Rogers, Alexander Kwako, Andrew Matschiner, Reed Kendall, Cicely Bingener, Erika Reece, Benjamin Kennedy, & Jaleel Howard, *The Conflict Campaign: Exploring Local Experiences of the Campaign to Ban “Critical Race Theory” in Public K-12 Education in the U.S., 2020-2021*, UCLA/IDEA PUBLICATIONS 1 (2022), <https://idea.gseis.ucla.edu/publications/the-conflict-campaign/> [https://perma.cc/6W9Z-ZU8J].

³ Jenny Muñiz, *Culturally Responsive Teaching: A 50-State Survey of Teaching Standards*, PEN AM. 1, 9 (Mar. 2019), <https://files.eric.ed.gov/fulltext/ED594599.pdf> [https://perma.cc/E4HT-E6RQ].

⁴ *PEN America Index of Educational Gag Orders*, PEN AM. (Mar. 16, 2023), https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxBY73v23zpyr0/edit#gid=267763711 [https://perma.cc/W9KJ-N8V9].

⁵ Jeremy Young & Jonathan Friedman, *America’s Censored Classrooms: Key Findings*, PEN AM. (Aug. 17, 2022), <https://pen.org/report/Americas-censored-classrooms/> [https://perma.cc/K5WZ-WUEV].

⁶ Polluck et al., *supra* note 2, at 11.

⁷ Young et al., *supra* note 5.

⁸ *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

multicultural society in which they live and its history, while reinforcing the dominant, white male narratives that discount, and often completely exclude, the perspectives of people who identify as Black, Indigenous, People of Color (BIPOC), Lesbian, Gay, Bisexual, Transsexual, Queer (LGBTQ+), and/or women. To effectuate this goal, educational gag orders violate the constitutional rights of students and educators alike.

The push to keep students and future generations ignorant of the historical and current manifestations of racism in America is, in my view, a thinly veiled attempt of a vocal minority of predominantly white people to maintain control amidst shifting demographics.⁹ This issue is not clearly split along racial lines; not all white people are perpetuating these efforts. Furthermore, not all white people are racist, despite the institutional privilege their race affords. A small group, however, is using classroom censorship as a pawn in their game to hoard control and to prevent societal progress. In 2017, for the first time in the history of this country, white students became the minority in public schools.¹⁰ The percentage of white public school students dropped from 61 percent in 2000 to 48 percent in 2017.¹¹ “Rapid demographic change is the strongest single predictor of whether or not districts have been impacted” by anti-“critical race theory” efforts.¹² The districts where white student enrollment declined by 18 percent or more were three times more likely to be impacted by a push to remove “critical race theory” from schools than districts with less rapid demographic shifts.¹³ Districts impacted by anti-“critical race theory” efforts are more likely to be racially mixed or majority white and located in communities that are politically contested (no presidential candidate won more than 49 percent of the vote in the 2020 election).¹⁴ The hysteria about “critical race theory” in schools isn’t motivated by a desire to improve the academic success and social development of students; I argue it is racial gaslighting, primarily driven by a fear of a vocal minority that white people are losing societal control, stoking concerns that have persisted for centuries.

Throughout America’s history, hard-fought progress towards racial justice has been immediately followed by retrenchment to perpetuate the hierarchies of the status quo. After the emancipation of enslaved people, states passed the Black Codes, laws to control formerly enslaved people through

⁹ Press Release, United States Census Bureau, *2020 Census Statistics Highlight Local Population Changes and Nation’s Racial and Ethnic Diversity* (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html> [<https://perma.cc/TN8C-KNXR>].

¹⁰ *The Condition of Education 2020: Racial/Ethnic Enrollment in Public Schools*, NAT’L CENTER FOR EDUC. STAT. 1, 1 (2020), https://nces.ed.gov/programs/coe/pdf/coe_cge.pdf [<https://perma.cc/A9YU-AJMF>].

¹¹ *Id.*

¹² Polluck et al., *supra* note 2, at 93.

¹³ *Id.* at 11.

¹⁴ *Id.*

the restriction of their independence and economic autonomy.¹⁵ Reconstruction also ushered in the Jim Crow era of sanctioned terror on Black communities.¹⁶ The War on Drugs, an affirmative attack on Black communities, trailed the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.¹⁷ After the historic turnout of young voters and voters of color in the 2008 election of President Barack Obama, state legislatures and election officials passed a number of restrictions on voting. In an effort to limit access to the polls, at least 25 states narrowed voter identification laws, circumscribed voter identification policies, and/or shortened the early voting period.¹⁸ Research demonstrated that strict voter identification laws, limitations on Sunday voting, longer wait times on Election Day, and polling place consolidation disproportionately harmed voters of color.¹⁹ These efforts redoubled following the heightened voter turnout and unprecedented votes by mail during the 2020 presidential election. States passed laws that restricted the availability of mail ballots, implemented stricter signature requirements or voter identification for mail ballots, and limited in-person voting.²⁰ They also aggressively purged voter rolls, eliminated same day registration, and prevented the addition of polling places and early voting days.²¹

The pattern of progress followed by retrenchment continued with the 2020 racial reckoning. After George Floyd’s murder in May 2020, protests in support of racial justice occurred across the world. In the weeks following Floyd’s death, approximately 15 to 26 million people in the United States reported that they protested, making Black Lives Matter the largest movement in America’s history.²² On a single day, half a million people attended

¹⁵ *Black Codes*, HISTORY.COM (Jan. 1, 2022), <https://www.history.com/topics/black-history/black-codes> [<https://perma.cc/5BLA-XJ3U>].

¹⁶ Olivia B. Waxman, *The Legacy of the Reconstruction Era’s Black Political Leaders*, TIME (Feb. 7, 2022, 4:16 PM), <https://time.com/6145193/black-politicians-reconstruction/> [<https://perma.cc/4BXV-YGDB>].

¹⁷ Candace Watts Smith, *After the Civil Rights Era, White Americans Failed to Support Systemic Change to End Racism. Will They Now?*, THE CONVERSATION (Aug. 13, 2020, 8:10 AM), <https://theconversation.com/after-the-civil-rights-era-white-americans-failed-to-support-systemic-change-to-end-racism-will-they-now-141954> [<https://perma.cc/KS3M-Z3PQ>].

¹⁸ *Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> [<https://perma.cc/WU4Z-5SFY>]; *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america> [<https://perma.cc/S5GX-HK95>]; see, e.g., H.B. 538, 2021 Leg. Sess. (Ala. 2021); S.B. 643, 90th Leg. Sess. (Ark. 2015); S.B. 1485, 55th Leg. Sess. (Ariz. 2021); S.B. 90, 2021 Leg. Sess. (Fla. 2021); S.B. 202, 2021 Leg. Sess. (Ga. 2021); S.B. 169, 2021 Leg. Sess. (Mont. 2021); H.B. 75, 66th Leg. Sess. (Wyo. 2021); S.F. 413, 2021 Leg. Sess. (Iowa 2021); H.B. 176, 2021 Leg. Sess. (Mont. 2021).

¹⁹ *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color> [<https://perma.cc/3Y6H-UWVP>].

²⁰ *Voting Laws Roundup: May 2021*, *supra* note 18.

²¹ *Id.*

²² Larry Buchanan, Quoctrung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/N5L4-729J>].

Black Lives Matter protests in nearly 550 places across the United States.²³ Black Lives Matter protests were held in over 40 percent of counties.²⁴ Soon thereafter, at least 90 bills were introduced in 35 states to restrict protestors and/or civil disobedience, including bills to make it illegal to insult police while extending immunity to drivers who hit protestors with their cars.²⁵ Many bills targeted tactics used by movements led by people of color.²⁶ This legislation will likely be “disproportionately enforced against movements by people of color or focused on issues of racial and social justice.”²⁷

The first section of this article discusses the efforts to advance racial justice that precipitated this backlash; highlights the value of race conscious instruction; and describes the difference in the three forms of race conscious instruction. The second section demonstrates how the anti-“critical race theory” movement is a politically motivated attack that is at odds with the best interests of students. In an effort to thwart progress towards racial justice, conservatives intentionally misrepresented critical race theory as a threat to white people and democracy; demanded censorship to remedy this contrived threat; and coordinated federal and state-based strategies to silence speech that addresses inequality. The third section focuses on educational gag orders, and outlines the scope and type of censorship, enforcement mechanisms, and the resultant culture of fear and intimidation to coerce compliance. The fourth and final section analyzes litigation challenging the ways this censorship violates the First and Fourteenth Amendment rights of educators and students.

II. EFFORTS TO ADVANCE RACIAL JUSTICE

a. Changes in Workplaces & Schools After the 2020 Racial Reckoning

After the killings of George Floyd, Breonna Taylor, and Ahmaud Arbery in 2020, a short-lived racial reckoning ensued that sought to incorporate anti-racism into workplaces and schools. Grounded at home due to widespread COVID-19 closures, Americans saw the horrific violence Black people face daily from police and private citizens. The racial disparities of

²³ *Id.*

²⁴ *Id.*

²⁵ See Devin Dwyer, *George Floyd Protests Trigger Wave of GOP ‘Anti-Riot’ Laws*, ABC NEWS (Apr. 29, 2021, 9:07 PM), <https://abcnews.go.com/Politics/george-floyd-protests-trigger-wave-gop-anti-riot/story?id=77365229> [<https://perma.cc/P39C-TBLE>]; Crimes and Punishments; rioting; making certain acts unlawful; codification; effective date, H.B. 1674, 2021 Leg. Sess. (Okla. 2021) (immunizing Oklahoma drivers from criminal or civil liability for the injury or death of a protestor if “fleeing from a riot . . . under a reasonable belief that fleeing was necessary to protect the motor vehicle operator from serious injury or death.”).

²⁶ See Nora Benavidez, James Tager, & Andy Gottlieb, *Closing Ranks: State Legislators Deepen Assaults on the Right to Protest*, PEN AM., <https://pen.org/closing-ranks-state-legislators-deepen-assaults-on-the-right-to-protest/> [<https://perma.cc/DT2Y-4FW8>] (last visited Sept. 6, 2022).

²⁷ *Id.*

the pandemic, where Black people were three times more likely to die of COVID-19,²⁸ coupled with violence at the hands of police highlighted systemic inequalities of Black life.²⁹ Support for the Black Lives Matter movement skyrocketed, with two-thirds of Americans expressing some form of agreement.³⁰

Many sectors of society responded to the growing public demand to confront systemic racial inequality. In the private sector, companies pledged support for the Black Lives Matter movement, donated to organizations dedicated to addressing racial justice, and committed to fostering inclusive working environments.³¹ Various companies announced intentional efforts to increase the racial diversity of staff, leadership, and merchandise partners.³² Other companies vowed to provide anti-racism training within their workplaces.³³ These efforts were not misplaced. Diverse companies have more than double the cash flow per employee and inclusive teams perform 30 percent better in high-density environments.³⁴ Diverse and inclusive organizations have increased collaboration, innovation, and engagement.³⁵ They are significantly more likely to make better decisions, to bring products to market, and to capture new markets.³⁶

Many schools and educators responded to concerns about racial justice by incorporating curricula, instruction, and training that addressed systemic inequality.³⁷ Demand for anti-racist materials, instruction, and conversations increased, and these topics were discussed more at conferences for educa-

²⁸ Ed Pilkington, *Black Americans Dying of Covid-19 at Three Times the Rate of White People*, THE GUARDIAN (May 20, 2020, 12:50 PM), <https://www.theguardian.com/world/2020/may/20/black-americans-death-rate-covid-19-coronavirus> [https://perma.cc/788T-VCMN].

²⁹ Michelle Garcia, *The Monumental Impact of George Floyd's Death on Black America*, NBC NEWS (May 25, 2021, 10:52 AM), <https://www.nbcnews.com/news/nbcblk/monumental-impact-george-floyds-death-black-america-rcna1021> [https://perma.cc/4ZSP-VLPY].

³⁰ Juliana Menasce Horowitz, *Support for Black Lives Matter Declined After George Floyd Protests, but has Remained Unchanged Since*, PEW RSCH. CTR. (Sept. 27, 2021), <https://www.pewresearch.org/fact-tank/2021/09/27/support-for-black-lives-matter-declined-after-george-floyd-protests-but-has-remained-unchanged-since/> [https://perma.cc/UDQ3-HFGR]. This number dropped to 55 percent by June 2020 and has remained stable since. *Id.*

³¹ Yume Murphy, *One Year After #BlackoutTuesday, What Have Companies Really Done for Racial Justice?*, VOX (June 2, 2021, 8:30 AM) <https://www.vox.com/the-goods/22463723/blackout-tuesday-blm-sephora-starbucks-nike-glossier> [https://perma.cc/S7U6-W98U].

³² *Id.*

³³ *Id.*

³⁴ Kellie Wong, *Diversity and Inclusion in the Workplace: Benefits and Challenges*, ACHIEVERS (Sept. 14, 2020), <https://www.achievers.com/blog/diversity-and-inclusion/> [https://perma.cc/ZTN8-PRQE].

³⁵ *The Importance of Inclusion in the Workplace*, KORN FERRY, <https://www.kornferry.com/insights/featured-topics/diversity-equity-inclusion/the-importance-of-inclusion-in-the-workplace> [https://perma.cc/GCW6-DUD8] (last visited Sept. 7, 2022).

³⁶ *See id.*

³⁷ *See* Muñoz, *supra* note 3, at 6-7; Daniella Silva, *Amid a racial reckoning, teachers are reconsidering how history is taught*, NBC NEWS (Aug. 8, 2020), <https://www.nbcnews.com/news/us-news/amid-racial-reckoning-teachers-are-reconsidering-how-history-taught-n1235806> [https://perma.cc/XK94-5R8A].

tors.³⁸ Educators created new courses focused on oppression and social justice while others intentionally incorporated BIPOC perspectives into the curricula to reflect students' identities.³⁹ There was renewed debate about the classroom materials and lesson plans from The 1619 Project, a Pulitzer Prize winning initiative that shows the continuing legacy of slavery and traces social inequalities in traditions and modern institutions back to slavery.⁴⁰ Connecticut required high schools to provide African American Studies, Latino Studies, and Native American Studies in the social studies curriculum.⁴¹ Delaware required all K-12 public schools to teach a Black history curriculum.⁴² Illinois mandated instruction on Asian American history, including the internment of Japanese Americans.⁴³ The California Department of Education approved an ethnic studies curriculum that required high school students to complete a one semester course in ethnic studies before graduation.⁴⁴ The College Board introduced an Advanced Placement African American Studies course to earn credit at approximately 35 colleges.⁴⁵

Additionally, polls indicated that the overwhelming majority of Americans believed that schools should teach students about racism. In a 2022 study, 87 percent of parents agreed that “lessons about the history of racism prepare children to build a better future for everyone as opposed to feeling

³⁸ See Silva, *supra* note 37; see also Kara Arundel, *Study: George Floyd's murder sparked teacher demand for anti-racist resources*, K-12 DIVE (June 23, 2021), <https://www.k12dive.com/news/study-floyds-murder-sparked-teacher-demand-for-anti-racist-resources/602225/> [<https://perma.cc/955C-W98B>]; Daylyn Gilbert, *Racial Reckoning Within the Classroom*, HARV. POL. REV. (Jan. 6, 2021), <https://harvardpolitics.com/racial-reckoning-classroom/> [<https://perma.cc/B49F-B664>].

³⁹ See Silva, *supra* note 37; see also *How the Murder of George Floyd Changed K-12 Schooling: A Collection*, EDUC. WK., <https://www.edweek.org/leadership/how-the-murder-of-george-floyd-changed-k-12-schooling-a-collection> [<https://perma.cc/UVU4-Q8AZ>] (last visited Sept. 7, 2022).

⁴⁰ See *The 1619 Project*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/5KV4-TC8D>]; Jake Silverstein, *The 1619 Project and the Long Battle Over U.S. History*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/11/09/magazine/1619-project-us-history.html> [<https://perma.cc/BB5Q-3TMT>].

⁴¹ See National Education Association & the Law Firm Alliance, *The Very Foundation of Good Citizenship: The Legal and Pedagogical Case for Culturally Responsive and Racially Inclusive Public Education for All Students*, NAT'L EDUC. ASS'N (Sept. 29, 2022) <https://www.nea.org/sites/default/files/2022-09/lfaa-nea-white-paper.pdf> [<https://perma.cc/KME5-NANG>].

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See Lily Button, *Gov. Gavin Newsom signs AB 101, requiring ethnic studies courses in public high schools*, THE DAILY CALIFORNIAN (Oct. 12, 2021), <https://www.dailycal.org/2021/10/12/newsom-signs-ab-101-requiring-ethnic-studies-in-public-high-schools/> [<https://perma.cc/2SDX-DD>]; Assembly Bill No. 101, Pupil instruction: high school graduation requirements: ethnic studies (Oct. 8, 2021), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20210220AB101 [<https://perma.cc/8Q9L-D5MV>].

⁴⁵ See Olivia B. Waxman, *African-American History Finally Gets Its Own AP Class—And Historians Say It's More Important Than Ever*, TIME (Sept. 1, 2022), <https://time.com/6207652/ap-african-american-history-class/> [<https://perma.cc/9HTV-NCM8>].

that lessons about racism are harmful to children.”⁴⁶ One 2021 study found that more than 70 percent of Americans agreed that high schools should teach the impacts of slavery (78 percent) and racism (73 percent).⁴⁷ Another 2021 study concluded “[m]ore than 60 percent of American parents want their kids to learn about the ongoing effects of slavery and racism as part of their education.”⁴⁸ Almost one in four parents believed that instruction about racism should begin in kindergarten and a majority agreed it should start in elementary school.⁴⁹ While conservatives frame their censorship efforts as a parents’ rights movement, these studies demonstrate that this campaign is driven by a vocal minority.

b. Race Conscious Instruction that Preceded the 2020 Racial Reckoning

i. Instruction on Racism

Instruction about racism has always been necessary in classrooms to accurately portray history and society and to equip students to process the world around them. It is part of good teaching. School-aged children are able to process discussions about race and racial discrimination. A study found that adults typically underestimate children’s capacity to understand race by about four and a half years.⁵⁰ Pretending racism does not exist reinforces the salience of discrimination and perpetuates bias. Instead of avoiding discussions of race, children who “learn to talk about race and ethnicity constructively . . . develop empathy for others, learn about new perspectives, understand their own identity, avoid engaging in practices that reproduce structural inequality, and even exhibit less racial bias.”⁵¹ Furthermore, “lessons teaching about racism, and about successful challenges to it, improve racial attitudes among White children, allowing them to see how racism affects everybody and offering a vision for addressing it,” and lead students to value racial fairness and to engage in less stereotyping.⁵² Ignoring race alto-

⁴⁶ See *Most parents want classrooms to be places of learning, not political battlegrounds*, Ipsos (Sept. 21, 2022), <https://www.ipsos.com/en-us/news-polls/most-parents-want-classrooms-be-places-learning-not-political-battlegrounds> [<https://perma.cc/NT9C-Q8K3>].

⁴⁷ See *Reuters/Ipsos Poll: Critical Race Theory*, Ipsos (July 15, 2021), <https://www.ipsos.com/en-us/news-polls/reuters-ipsos-poll-critical-race-theory-07152021> [<https://perma.cc/T5SX-REEA>].

⁴⁸ Erin Richards & Alia Wong, *Parents want kids to learn about ongoing effects of slavery – but not critical race theory. They’re the same thing*, USA TODAY (Sept. 10, 2021), <https://www.usatoday.com/story/news/education/2021/09/10/crt-schools-education-racism-slavery-poll/5772418001/> [<https://perma.cc/7M63-HQLQU7YD-RT5WJ>].

⁴⁹ See *id.*

⁵⁰ Jessica Sullivan, Leigh Wilton, & Evan P. Apfelbaum, *Adults delay conversations about race because they underestimate children’s processing of race*, 150 J. EXPERIMENTAL PSYCH. GEN. 395, 1 (2021) (citations omitted).

⁵¹ *Id.*; see also GENEVA GAY, CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH, AND PRACTICE 15 (2d ed. 2010).

⁵² Christine E. Sleeter and Miguel Zavala, *What the Research Says About Ethnic Studies*, NAT’L EDUC. ASS’N <https://www.nea.org/sites/default/files/2020-10/What%20the%20Research>

gether has a negative impact. “Colorblindness is associated with a greater level of prejudice, both unconscious/implicit and conscious/explicit, and is often used as a justification for inequality.”⁵³

Students need to discuss racism to process current and historical events. When I taught about the Fourteenth Amendment in Political Science class, there was no way to accurately discuss the circumstances precipitating the law without addressing racism and inequalities in society. Why else would a law be passed to secure and protect the constitutional rights of Black people if they were never subordinated? Why didn’t the Bill of Rights apply to Black people when the country was founded? Students need context to process current events, including racially motivated violence and the rescission of historically afforded constitutional protections. For example, a white supremacist gunned down ten people and injured eleven more in a supermarket in a Black neighborhood in Buffalo, New York because he “care[d] for the future of the White race.”⁵⁴ In the wake of this tragedy, students asked questions that would require discussion of racism.⁵⁵ Erasing race and racism from classroom discussions reduces racial violence to “bad men doing bad things,” distorting the nature of racism as “de-institutionalized and disconnected from the maintenance of racial inequities in the U.S.”⁵⁶ A study of elementary and middle school textbooks underscored the need for this instruction, as racial violence was devoid of context for the ways social, economic, and political systems supported racism.⁵⁷

The focus on systemic, as opposed to individual, discrimination is crucial. The threat motivating the anti-“critical race theory” movement is not that a student will think one individual person who lived hundreds of years ago was racist; it is that the student will see the current manifestations of that racism throughout America’s institutions. The lens encouraged by the movement is not race neutral, despite representations to the contrary. Their con-

%20Says%20About%20Ethnic%20Studies.pdf [https://perma.cc/577Q-5ARM] (last accessed June 15, 2023); National Education Association & the Law Firm Alliance, *supra* note 41 at 15.

⁵³ Nicholas Sorensen, Biren (Ratmesh) A. Nagda, Patricia Gurin, & Kelly E. Maxwell, *Taking a “Hands On” Approach to Diversity in Higher Education: A Critical-Dialogic Model for Effective Intergroup Interaction*, 9 ANALYSES OF SOC. ISSUES AND POL. POL’Y 3, 15 (2009) (citations omitted).

⁵⁴ Minyvonne Burke, *Buffalo shooting suspect said he carried out attack ‘for the future of the White race,’ federal complaint says*, NBC NEWS (June 16, 2022), <https://www.nbcnews.com/news/us-news/buffalo-shooting-suspect-said-carried-attack-future-white-race-federal-rena33886> [https://perma.cc/T7AK-E92T].

⁵⁵ 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), <https://www.nbcnews.com/news/us-news/buffalo-shooting-teachers-racism-laws-rena29500>.

⁵⁶ Christopher L. Busey, Kristen E. Duncan, & Tianna Dowie-Chin, *Critical What What? A Theoretical Systematic Review of 15 Years of Critical Race Theory Research in Social Studies Education, 2004-2019*, REV. OF EDUC. RSCH. (July 19, 2022), <https://journals.sagepub.com/doi/abs/10.3102/00346543221105551?journalCode=Rera> [https://perma.cc/D2EF-VJ7Q]; Keffrelyn D. Brown & Anthony L. Brown, *Silenced Memories: An Examination of the Sociocultural Knowledge on Race & Racial Violence in Official School Curriculum*, EQUITY & EXCELLENCE IN EDUC. 147 (2010).

⁵⁷ See Brown et al., *supra* note 56, at 150.

cern is not that any student will feel uncomfortable discussing oppression; BIPOC students have long felt uncomfortable about their portrayal (or lack thereof) in educational spaces. These efforts distort, and often altogether erase, the lived experiences of BIPOC people in an ill-conceived effort to protect white students from guilt.

Instruction about systemic racism is fundamental for processing the country in which we live. Today’s students will not question, as I did, whether they will live to see a Black president or vice president, or whether a Black woman will ever become a justice on the Supreme Court. Proclamations that this country is a post-racial society have inevitably followed each of these accomplishments. Without a doubt, representation matters. However, representation does not erase racism. The monumental presidency of Barack Obama was followed by that of Donald Trump, who implemented policies and made statements to denigrate Blacks, Latinx, Native Americans, Muslims, Jews, immigrants, women, and people with disabilities.⁵⁸ Students need to understand how a Black person can hold the nation’s highest office and simultaneously be more than three times more likely to be killed in a police encounter.⁵⁹ Without the ability to discuss racism and other systemic inequalities, today’s students will lack the tools to dismantle these institutions.

ii. *Culturally Responsive Teaching Methods*

To respond to the growing call to promote racial justice, many schools and educators increased their reliance on culturally responsive (or relevant) teaching, well-established pedagogical approaches identified in the 1990s.⁶⁰ Instead of limiting instruction to the white male narrative, culturally responsive teaching uses “the cultural knowledge, prior experiences, frames of reference, and performance styles of ethnically diverse students to make learning encounters more relevant to and effective for them.”⁶¹ Culturally responsive teaching prepares students to:

Reflect on one’s cultural lens; recognize and redress bias in the system; draw on students’ culture to shape curriculum and instruction; bring real-world issues into the classroom; model high expect-

⁵⁸ See David A. Graham et al., *An Oral History of Trump’s Bigotry*, THE ATL. (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/> [<https://perma.cc/DE98-KH2X>].

⁵⁹ See Felicia Moore *more than three times as likely as white people to be killed during a police encounter*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (June 24, 2020), <https://www.hsph.harvard.edu/news/hsph-in-the-news/blacks-whites-police-deaths-disparity/> [<https://perma.cc/ZZ96-A7HN>].

⁶⁰ See Felicia Moore Mensah, *Culturally Relevant and Culturally Responsive: Two Theories of Practice for Science Teaching*, 58 SCIENCE AND CHILDREN 10 (Mar./Apr. 2021) (noting that the terms “culturally responsive teaching” and “culturally relevant teaching” are used interchangeably).

⁶¹ GAY, *supra* note 51, at 31.

tations for all students; promote respect for student differences; collaborate with families and the local community; [and] communicate in linguistically and responsive ways.⁶²

Culturally responsive teaching prioritizes academic success and social development.⁶³ It values students' histories while inviting them to combine their knowledge and skills into learning.⁶⁴ Student engagement and learning improved through "a wide range of positive outcomes such as academic achievement and persistence, improved attendance, greater interest in school, among other outcomes."⁶⁵ Culturally responsive teaching results in higher grade point averages, school attendance rates, standardized test scores, and graduation rates for all students.⁶⁶ Various studies found improved literature, math, science, and history proficiency and engagement when instruction was based on cultural and social experiences.⁶⁷

Culturally responsive teaching cultivates a strong racial identity, which has been linked to "higher self-esteem, academic attitudes, well-being, and the ability to navigate discrimination."⁶⁸ Positive self-identification with an ethnic-racial group does not require, or even encourage, hostility towards other groups.⁶⁹ To the contrary, adolescents who are secure in their ethnic-racial identity are more interested in learning about and befriending people of other groups.⁷⁰

While culturally relevant teaching aids all students, some students are disproportionately harmed by its exclusion. BIPOC students and students with intersecting identities, such as social class, English proficiency, disability status, and LGBTQ+ status especially "benefit from 'mirrors' that allow them to view themselves, their experiences, and their communities in school."⁷¹

⁶² Muñiz, *supra* note 3, at 13.

⁶³ *See id.* at 7.

⁶⁴ *See* Mensah, *supra* note 60, at 12.

⁶⁵ Muñiz, *supra* note 3, at 11.

⁶⁶ *See* National Education Association & the Law Firm Alliance, *supra* note 41, at 9, 14.

⁶⁷ *See* Summer Wood & Robin Jocius, *Combatting "I Hate This Stupid Book!": Black Males and Critical Literacy*, 66 *READING TEACHER* 661, 664 (2013); Brittany Aronson & Judson Laughter, *The Theory and Practice of Culturally Relevant Education: A Synthesis of Research Across Content Areas*, 86 *REV. OF EDUC. RSCH.* 163, 188-91 (2016).

⁶⁸ Muñiz, *supra* note 3, at 11.

⁶⁹ *See* Saul Mcleod, *Allport's Intergroup Contact Hypothesis: Its History And Influence*, *SIMPLY PSYCH.* (Feb. 8, 2023), <https://www.simplypsychology.org/contact-hypothesis.html> [<https://perma.cc/84ZH-KCLY>].

⁷⁰ *See* Deborah Rivas-Drake, *Identities Aren't Going Away, Nor Should They*, *PSYCH. TODAY* (Mar. 17, 2019), <https://www.psychologytoday.com/us/blog/american-me-american-we/201903/identities-arent-going-away-nor-should-they> [<https://perma.cc/CS5H-6WFH>].

⁷¹ Muñiz, *supra* note 3, at 11; *see also* Aronson & Laughter, *supra* note 67, at 178-96.

iii. Critical Race Theory

Critical race theory has been misrepresented as harmful rhetoric for students to justify the exclusion of all race conscious instruction in schools. In the 1980s, Kimberlé Crenshaw, Neil Gotanda, Stephanie Phillips and other scholars built on the work of Derrick Bell and Alan Freeman in the 1970s to center race in intellectual inquiry.⁷² They coined the term critical race theory, which Crenshaw described as,

[A] way of seeing, attending to, accounting for, tracing and analyzing the ways that race is produced, the ways that racial inequality is facilitated, and the ways that our history has created these inequalities that now can be almost effortlessly reproduced unless we attend to the existence of these inequalities.⁷³

Critical race theory is more than a passing reference to race, racism, or even systemic racism. It focuses on the ways that legal rules facilitate the social construction of race by using whiteness as a normative baseline for colorblind analysis.⁷⁴ “If one is not permitted to see the social consequences of policies in terms of race, then the disparate racial effects of policies simply become invisible. . . . The way to end racial subordination is to end it in fact, not to define it away.”⁷⁵ Critical race theory focuses on the “deconstruction of oppressive structures and discourses, reconstruction of human agency, and construction of equitable and socially just relations of power.”⁷⁶ Key tenets include 1) recognition that race is socially constructed, not a biological reality; 2) acknowledgement that racism is embedded in systems and institutions that replicate racial inequality; 3) acceptance of the systemic nature of racism as responsible for racial inequality instead of reducing racism to a few bad apples; and 4) recognition of the relevance of the lived experiences of people of color, including storytelling and scholarship.⁷⁷ Impor-

⁷² Gloria Ladson-Billings, *Just What Is Critical Race Theory and What’s It Doing in a Nice Field Like Education?* 11 INT’L J. OF QUALITATIVE STUD. IN EDUC. 7, 10 (1998); Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door”* 49 UCLA L. REV. 1343, 1345 (2002).

⁷³ *Race, Reform & Retrenchment Revisited*, *supra* note 1.

⁷⁴ Kimberlé Williams Crenshaw, *Race Liberalism and the Deradicalization of Racial Reform*, 130 HARV. L. REV. 2298, 2318 n. 96 (2017).

⁷⁵ Peller, *supra* note 1.

⁷⁶ Ladson-Billings, *supra* note 72, at 9.

⁷⁷ Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASS’N (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/ [<https://perma.cc/JWS6-WZJB>]; *see also* Ladson-Billings, *supra* note 72, at 11-12 (enumerating the following tenets of critical race theory: 1) exposing the various permutations of racism; 2) integrating the experience of oppressions through storytelling to analyze the myths, presuppositions, and received wisdoms; 3) acknowledging the need for sweeping reforms beyond the incrementalism available under current legal paradigms; and 4) recognizing that civil rights legislation has primarily benefitted white people so it is more fruitful to focus on the areas where the interests of white and BIPOC people converge.).

tantly, critical race theorists do not “teach ‘hate’ of any social group, nor seek to ‘divide’ Americans, nor oversimplify complex identities.”⁷⁸

Per its terms, critical race theory is targeted towards higher education and legal discourse. Discerning the limitations of civil rights approaches to “transforming racial power in American society [is] a complex critique that wouldn’t fit easily into a K-12 curriculum.”⁷⁹

While instruction on racism, culturally relevant teaching, and critical race theory are not interchangeable terms, squabbling over whether a lesson is actually critical race theory misses the point. The classroom censorship efforts to exclude “critical race theory” are not limited to the actual tenets of the framework or to the educational settings where it is taught. The anti-“critical race theory” movement is an unprecedented effort to remove *all* discussions of race from schools.⁸⁰ Characterizing the enemy as “critical race theory” is just political propaganda designed to minimize the scope of this attack. I do not believe that any of these instructional methods should be excluded from all classrooms. Schools and educators at all levels should discuss race, racism, and oppression. These are not taboo topics that warrant banishment from classrooms altogether or restriction to the highest levels of academic achievement.

III. THE ANTI-“CRITICAL RACE THEORY” MOVEMENT

a. Intentional misrepresentations of “critical race theory”

Momentum in the racial justice movement ignited misplaced concerns within a vocal minority that progress towards racial justice comes at the expense of white people and “critical race theory” became the scapegoat. At the extreme, some believe the “great replacement” theory that BIPOC groups “are part of a plot designed to undermine or ‘replace’ the political power and culture of white people.”⁸¹ The perceived social threat is not only based on the changing racial demographics; it is bolstered by the increasing public voice of BIPOC groups in spheres of power where they were previ-

⁷⁸ Polluck et al., *supra* note 2.

⁷⁹ Peller, *supra* note 1.

⁸⁰ See, e.g., Debra Hale-Shelton, *Conway School Board Considering Frightening Policy to Ban Teaching of Dozens of Concepts*, ARKANSAS TIMES (Oct. 24, 2022), <https://arktimes.com/arkansas-blog/2022/10/24/conway-school-board-considering-frightening-policy-to-ban-teaching-of-dozens-of-concepts> [<https://perma.cc/4HXN-Y8WA>]; 5.5.2 *Use or Display of Instructional Materials*, <https://arktimes.com/wp-content/uploads/2022/10/5.5.2-Use-Or-Display-Of-Instructional-Materials-3.pdf> [<https://perma.cc/5YWT-2YH9>] (Conway School Board proposing the censorship of over 80 tenets of “critical race theory” in primary and secondary schools).

⁸¹ *The ‘Great Replacement’ Theory, Explained*, NAT’L IMMIGR. F., <https://immigrationforum.org/wp-content/uploads/2021/12/Replacement-Theory-Explainer-1122.pdf> [<https://perma.cc/DR4Y-WE62>].

ously invisible, such as politics and business.⁸² The danger posed by adherents to this principle, a vocal minority attempting to preserve the power of white people, cannot be overstated.⁸³

Stoking these concerns in the attack against “critical race theory” propelled independent journalist Christopher Rufo from relative obscurity to prominence with conservatives, including engagements with the White House, members of Congress, and governors; a senior position with the Manhattan Institute, an influential think tank; appointment to the Board of Trustees during a hostile takeover of a Florida liberal arts college;⁸⁴ and countless media appearances. As discussed further below, Rufo manufactured the frenzy about “critical race theory” through appearances on Fox News claiming that white people, particularly white men, were under attack in governmental diversity trainings and, by extension, education.⁸⁵ Rufo co-opted “critical race theory” to reference any racial ideology that examined social institutions and human psychology through the lens of race.⁸⁶ He misleadingly described “equity,” “social justice,” “diversity and inclusion,” and “culturally responsive teaching” as euphemisms for “critical race the-

⁸² See Katheryn Russell-Brown, “*The Stop WOKE Act*”: *H.B. 7, Race, and Florida’s 21st Century Anti-Literacy Campaign*, N.Y. UNIV. R. OF L. & SOC. CHANGE (forthcoming) (manuscript at 14) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219891) [<https://perma.cc/X9QL-N5MF>]). Prof. Russell-Brown contends that the attack on “critical race theory” is frontlash to resist “[t]he feared change. . . [stemming from] an increase in a particular racial group’s population size, an increase in political power, an increase in their media presence, or an increase in a racial group’s cultural relevance.” *Id.* at 18. Whether framed as frontlash or backlash, the anti-“critical race theory” movement spawned from concerns about the progress towards racial justice; *see id.*

⁸³ See Monique Beals, *Buffalo Shooting Pushes ‘Great Replacement Theory’ into National Spotlight*, THE HILL (May 15, 2022), <https://thehill.com/policy/national-security/3489423-buffalo-shooting-pushes-great-replacement-theory-into-national-spotlight/> [<https://perma.cc/5WPC-FS6M>] (noting that Payton Gendron cited the great replacement theory in an online manifesto before he killed 13 people in a Buffalo, New York grocery store in an area with a significant Black population).

⁸⁴ See Press Release, Governor Ron DeSantis, *Governor Ron DeSantis Appoints Six to the New College Board of Trustees* (Jan. 6, 2023), <https://www.flgov.com/2023/01/06/governor-ron-desantis-appoints-six-to-the-new-college-of-florida-board-of-trustees/> [<https://perma.cc/LS9D-RFZC>].

⁸⁵ See *Nuclear Lab Execs Forced to Deconstruct Their “White Male Culture”*: *Christopher Rufo on Fox News*, FOX NEWS CHANNEL (Aug. 14, 2020), <https://video.foxnews.com/v/6180994318001#sp=show-clips> [<https://perma.cc/J4TZ-NVNV>] (video of Christopher Rufo on Tucker Carlson Tonight); The Heritage Found., *Critical Race Theory Has Infiltrated the Federal Government: Christopher Rufo on Fox News*, YOUTUBE (Sept. 2, 2020), <https://www.youtube.com/watch?v=RBXRdWfIV7M> [<https://perma.cc/J4TZ-NVNV>] (video of Christopher Rufo on Tucker Carlson Tonight); *see also* Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [<https://perma.cc/A2A3-GENU>]; Trip Gabriel, *He Fuels the Right’s Cultural Fires in Florida*, N.Y. TIMES (Apr. 24, 2022), <https://www.nytimes.com/2022/04/24/us/politics/christopher-rufo-crt-lgbtq-florida.html> [<https://perma.cc/3MTL-TA7C>]; Sam Dorman, *Chris Rufo calls on Trump to end critical race theory ‘cult indoctrination’ in federal government*, FOX NEWS (Sept. 1, 2020), <https://www.foxnews.com/politics/chris-rufo-race-theory-cult-federal-government> [<https://perma.cc/27NY-EZNC>].

⁸⁶ Wallace-Wells, *supra* note 85.

ory,” which sought, on his telling, “race-based redistribution of wealth, group-based rights, active discrimination, and omnipotent bureaucratic authority.”⁸⁷ He warned that “white fragility,” “unconscious bias,” and “white supremacy” were terms associated with critical race theory.⁸⁸ Rufo’s (intentional) error was that he conflated antiracist efforts with anti-white rhetoric. To be anti-racist or to support racial justice does not mean someone is anti-white. He depicted “critical race theory” as a synonym for what he views as reverse racism.⁸⁹

Rufo’s use of “critical race theory” and the adoption of the term by conservatives is a caricature of the actual definition, with intentional distortions at every turn.⁹⁰ He inaccurately claimed “critical race theory” teaches that all white people are racist, even though its focus is on systemic and institutional policies, not individual bigotry.⁹¹ “Critical race theory” was mischaracterized as instruction to teach students to hate America, in fabricated contrast to “patriotic” education.⁹² Ironically, this misrepresentation assumes that anyone who knows the truth about America’s sordid history with race would hate this country, begging the question whether Rufo and conservatives are themselves ignorant of the history they wish to ex-

⁸⁷ Christopher F. Rufo, *The Courage of Our Convictions: How to Fight Critical Race Theory*, CITY J. (Apr. 22, 2021), <https://www.city-journal.org/how-to-fight-critical-race-theory> [<https://perma.cc/Y56S-KQSM>].

⁸⁸ *Id.* Other terms associated with “critical race theory” include “Civics; Social Emotional Learning (SEL); Culturally responsive teaching; Abolitionist teaching; Affinity groups; Antiracism, Anti-bias training; Anti-blackness, Anti-meritocracy; Obfuscate meritocracy; Centering or de-centering; Collective guilt; Colorism; Conscious and unconscious bias; Critical ethnic studies; Critical pedagogy; Critical self-awareness; Critical self-reflection; Cultural appropriation/misappropriation; Cultural awareness; Cultural competence; Cultural proficiency; Cultural relevance; Cultural responsiveness; Culturally responsive practices; De-centering whiteness; Deconstruct knowledge; Diversity focused; Diversity training; Dominant discourses; Educational justice; Equitable; Equity; Examine ‘systems;’ Free radical therapy; Free radical self/collective care; Hegemony; Identity deconstruction; Implicit/Explicit bias; Inclusivity education; Institutional bias; Institutional oppression; Internalized racial superiority; Internalized racism; Internalized white supremacy; Interrupting racism; Intersection; Intersectionality; Intersectional identities; Intersectional studies; Land acknowledgment; Marginalized identities; Marginalized/Minoritized/Under-represented communities; Microaggressions; Multiculturalism; Neo-segregation; Normativity; Oppressor vs. oppressed; Patriarchy; Protect vulnerable identities; Race essentialism; Racial healing; Racialized identity; Racial justice; Racial prejudice; Racial sensitivity training; Racial supremacy; Reflective exercises; Representation and inclusion; Restorative justice; Restorative practices; Social justice; Spirit murdering; Structural bias; Structural inequity; Structural racism; Systemic bias; Systemic oppression; Systemic racism; Systems of power and oppression; Unconscious bias; White fragility; White privilege; White social capital; White supremacy; Whiteness; [and] Woke.” See Polluck, et al., *supra* note 2, at 40-41.

⁸⁹ Peller, *supra* note 1; Jasmine Geonzon & Madeleine Davidson, *By the Numbers: A Year of Conservative Media Fearmongering Over “Critical Race Theory.”* MEDIA MATTERS FOR AM. (Dec. 28, 2021, 9:12 AM) <https://www.mediamatters.org/critical-race-theory/numbers-year-conservative-media-fearmongering-over-critical-race-theory> [<https://perma.cc/J2PU-ASDH>].

⁹⁰ See Polluck, et al., *supra* note 2, at 3.

⁹¹ Wallace-Wells, *supra* note 85; see *Race, Reform & Retrenchment Revisited*, *supra* note 1.

⁹² See Polluck et al., *supra* note 2, at 37.

clude or driven by their own abhorrence for America. Rufo exaggerated that “critical race theory” was once limited to universities and academic journals but now can be found throughout the government, schools, and companies.⁹³ According to Rufo, “critical race theory” is an amorphous bogeyman present everywhere in American society. Conservative politicians, including former President Trump and members of his administration, adopted this framing.⁹⁴

Distorting the meaning of “critical race theory” wasn’t enough; Rufo sought to make the term a scapegoat for *all* societal ills. After rejecting “political correctness,” “cancel culture,” and “woke” as terms to attack, Rufo concluded, “‘critical race theory’ [was] the perfect villain. . . [and] a promising political weapon . . . [because] its connotations [were] all negative to most middle-class Americans. . . and ‘critical race theory’ connote[d] hostile, academic, divisive, race-obsessed, poisonous, elitist, anti-American.”⁹⁵ Rufo advertised that debates over “critical race theory” allowed conservatives “to politicize the bureaucracy” and “create rival power centers within [corrupted state agencies].”⁹⁶ Celebrating the success of his campaign against “critical race theory,” Rufo wrote,

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.⁹⁷

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.⁹⁸

b. Censorship of discussions of race and sex discrimination in the workplace

After they manufactured panic over the alleged indoctrination of “critical race theory” in workplaces (and later, classrooms), conservatives offered

⁹³ See Rufo, *supra* note 87.

⁹⁴ See President Donald Trump, *Remarks at the White House Conference on American History* (Sept. 17, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-conference-american-history/>. [<https://perma.cc/97LX-N6BJ>]; *OMB Director of White House’s Crackdown on “Critical Race Theory,”* FOX BUSINESS (Sept.23, 2020), <https://video.foxbusiness.com/v/6193906908001#sp=show-clips> [<https://perma.cc/KV3T-44SX>] (video of Russell Vought on Fox Business).

⁹⁵ Wallace-Wells, *supra* note 85.

⁹⁶ *Id.*

⁹⁷ Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 3:14 PM), <https://twitter.com/realchrisrufo/status/1371540368714428416> [<https://perma.cc/N7RV-256V>].

⁹⁸ Christopher F. Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 3:17 PM), <https://twitter.com/realchrisrufo/status/1371541044592996352> [<https://perma.cc/GYF2-G6GY>].

censorship as a solution.⁹⁹ Rufo leveraged Twitter and Fox News to exaggerate examples of “critical race theory” in the federal government, which fabricated an urgency to justify the extraordinary censorship he sought.¹⁰⁰ On August 12, 2020, Rufo tweeted that executives from Sandia National Laboratories, which researched and developed nuclear weapons, attended a mandatory training called “White Men’s Caucus on Eliminating Racism, Sexism, and Homophobia in Organizations” to expose their white privilege and to deconstruct white male culture.¹⁰¹ In reality, the program was voluntary and participants volunteered various assumptions about white men, but Rufo ignored the positive terms and instead highlighted the most negative associations.¹⁰² Additionally, he inaccurately claimed that participants were forced “to write letters of apology to women and people of color” when they were instead asked to explain the meaning of the event.¹⁰³ Rufo characterized the training as a “race-segregated, taxpayer-funded session”¹⁰⁴ and announced a goal to “pass legislation to ‘abolish critical race theory’ in the federal government.”¹⁰⁵ He appeared on Fox News’ Tucker Carlson Tonight and declared a “one man war against critical race theory.”¹⁰⁶ Hyperbolically, Rufo asserted that “critical race theory” had spread under the radar “like wildfire” from schools to the federal government.¹⁰⁷ On September 1, 2020, Rufo appeared on Tucker Carlson Tonight again and advanced unsupported claims that “critical race theory” infiltrated various government agencies.¹⁰⁸ According to Rufo, a diversity trainer for the Treasury Department said in a seminar that America was fundamentally a white supremacist country; “virtually all white people [upheld] the system of racism and white superiority.”¹⁰⁹ However, the document prepared for the Treasury training did not

⁹⁹ See Polluck, et al., *supra* note 2, at 6.

¹⁰⁰ See Laura Meckler & Josh Dawsey, *Activist Christopher Rufo Fuels GOP’s Critical Race Theory Fight*, WASHINGTON POST (June 21, 2021, 6:22 PM), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/> [<https://perma.cc/823W-Z9QC>].

¹⁰¹ Christopher F. Rufo (@realchrisrufo), TWITTER (Aug. 12, 2020, 1:40 PM), <https://twitter.com/realchrisrufo/status/1293603172842221570> [<https://perma.cc/S9TX-H7TD>]; Christopher F. Rufo (@realchrisrufo), TWITTER (Aug. 12, 2020, 1:41 PM), <https://twitter.com/realchrisrufo/status/1293603545522900993> [<https://perma.cc/NZ6C-B8P9>].

¹⁰² Christopher F. Rufo (@realchrisrufo), TWITTER (Aug. 12, 2020, 1:43 PM), <https://twitter.com/realchrisrufo/status/1293604006904782849> [<https://perma.cc/MP3L-HKRV>]; see also Meckler & Dawsey, *supra* note 100; Christopher Rufo, *Nuclear Consequences*, CHRISTOPHER-RUFO.COM (Aug. 12, 2020), <https://christopherrufo.com/nuclear-consequences/> [<https://perma.cc/D7VY-QF5B>].

¹⁰³ Meckler & Dawsey, *supra* note 100; see also FOX NEWS CHANNEL, Aug. 14, 2020, *supra* note 85; Rufo, *Nuclear Consequences*, *supra* note 102.

¹⁰⁴ Christopher F. Rufo (@realchrisrufo), TWITTER (Aug. 12, 2020, 1:55 PM), <https://twitter.com/realchrisrufo/status/1293607106822594561> [<https://perma.cc/6FJ7-6SDM>].

¹⁰⁵ Christopher F. Rufo (@realchrisrufo), TWITTER (Aug. 12, 2020, 1:40 PM), <https://twitter.com/realchrisrufo/status/1293603172842221570> [<https://perma.cc/3B7Z-7DCB>].

¹⁰⁶ FOX NEWS CHANNEL, (Aug. 14, 2020) *supra* note 85.

¹⁰⁷ *Id.*

¹⁰⁸ FOX NEWS CHANNEL, Sept. 1, 2020, *supra* note 85.

¹⁰⁹ *Id.*

make these assertions and it did not ask [w]hite people to accept ‘their white racial superiority.’”¹¹⁰ Rufo asserted that the Federal Bureau of Investigation was holding weekly seminars on intersectionality “that reduce[d] people to a network of racial, gender and sexual orientation identities [that] intersect in complex ways and determine[d] whether you are an oppressor or oppressed.”¹¹¹ He added that white straight men were at the top of the “pyramid of evil” and that people were being judged based on their group identity.¹¹² The training flier he posted did not support these claims.¹¹³

In response to his own spurious claims, Rufo challenged then President Trump to unilaterally end the use of “critical race theory”:

And I’d like to make it explicit, the President or the White House, it’s within their authority and power to immediately issue an executive order abolishing critical race theory trainings from the federal government. And I call on the President to immediately issue this executive order and to stamp out this destructive, divisive, pseudoscientific ideology at its root.¹¹⁴

The White House heeded Rufo’s call. Rufo said Mark Meadows, President Trump’s Chief of Staff, called the next day to share that the President saw Rufo’s segment and instructed Meadows to take action.¹¹⁵ Meadows asked Rufo to consult and Rufo flew to Washington D.C. soon after to contribute to an executive order to censor federal contractors’ discussions of “critical race theory.”¹¹⁶ Just three days after the Fox News segment aired, Office of Management and Budget Director Russell Vought issued a memorandum directing heads of executive departments and agencies to cancel funding for any trainings or propaganda that teach “critical race theory,” “white privilege,” “that the United States is an inherently racist or evil country or [sic] that any race or ethnicity is inherently racist or evil.”¹¹⁷ Within days, government officials began canceling events in accordance with this directive.¹¹⁸

On September 22, 2020, President Trump issued Executive Order 13950, entitled “Combating Race and Sex Stereotyping,” (“EO 13950” or

¹¹⁰ Meckler & Dawsey, *supra* note 100.

¹¹¹ FOX NEWS CHANNEL (Sept. 1, 2020), *supra* note 85.

¹¹² *Id.*

¹¹³ See Meckler & Dawsey, *supra* note 100; Christopher Rufo, *The Federal Bureau of Intersectionality*, CHRISTOPHERRUFO.COM (Oct. 6, 2021), <https://christopherrufo.com/the-federal-bureau-of-intersectionality/> [https://perma.cc/TCT9-GP7R].

¹¹⁴ FOX NEWS CHANNEL (Sept. 1, 2020), *supra* note 85.

¹¹⁵ Wallace-Wells, *supra* note 85; Am. Legis. Exch. Council, *Workshop: Against Critical Theory’s Onslaught: Reclaiming Education and the American Dream*, YOUTUBE (Dec. 7, 2020), <https://youtu.be/yxzLohOPEr8> [https://perma.cc/3LEG-6CUZ].

¹¹⁶ Wallace-Wells, *supra* note 85; Meckler & Dawsey, *supra* note 100.

¹¹⁷ Memorandum from Russell Vought, Director of the Office of Management and Budget, on Training in the Federal Government (Sept. 4, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf> [https://perma.cc/856Q-VEEX].

¹¹⁸ Meckler & Dawsey, *supra* note 100.

“the Order”).¹¹⁹ That the Order parroted many of Rufo’s claims should be no surprise given Rufo assisted in drafting it.¹²⁰ The Order posited that workplace diversity trainings “perpetuate[] racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint.”¹²¹ Most of the examples in the purpose section pertained to systemic racism though the Order’s exclusions were much broader. The Order did not separately explain its prohibition on discussions of systemic sexism. It instead decried the notion “that racial and sexual identities are more important than our common status as human beings and Americans.”¹²² The exclusion of discussions of systemic sexism without further explanation ironically invites the type of inquiry into the intersection of race and sex discrimination, a concept coined as “intersectionality” by Professor Crenshaw, that the Order prohibited from trainings.¹²³

Executive Order 13950 announced a list of so-called “divisive” concepts that were prohibited from instruction, training, or courses for the United States Uniformed Services and from workplace trainings by government contractors that “inculcate” employees.¹²⁴

“Divisive concepts” means the concepts that

- (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

¹¹⁹ Combatting Race and Sex Stereotyping, Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020), *revoked by* Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order 13985, 86 Fed. Reg. 7009 (Jan 20, 2021).

¹²⁰ Wallace-Wells, *supra* note 85.

¹²¹ Exec. Order No. 13950, *supra* note 119, § 1.

¹²² *Id.*

¹²³ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. OF CHICAGO LEGAL FORUM 139 (1989).

¹²⁴ Exec. Order No. 13950, *supra* note 119, §§ 2(a), 3, 4.

- (9) meritocracy traits such as hard work ethic are racist or sexist, or were created by a particular race to oppress another race.¹²⁵

Executive Order 13950 also established a hotline and directed the Department of Labor, through the Office of Federal Contract Compliance Programs (OFCCP), to investigate complaints.¹²⁶ Noncompliance could result in the cancellation, termination, or suspension of the contract, in whole or in part, and the contractor could be declared ineligible for further government contracts.¹²⁷ The contractor could also be subjected to other sanctions authorized in Executive Order 11246, including the publication of their name or recommendation that the Equal Employment Opportunity Commission begin proceedings against the contractor under Title VII of the Civil Rights Act of 1964.¹²⁸

The Northern District of California issued a nationwide preliminary injunction on December 22, 2020 that enjoined the government from enforcing EO 13950’s requirements for government contractors and federal grants.¹²⁹ The court noted that EO 13950 impermissibly restricted “a federal contractor’s ability to use its own funds, to train its own employees, on matters that potentially have nothing to do with the federal contract.”¹³⁰ The Court also held sections of the Order were so vague that it is “impossible for Plaintiffs to determine what conduct is prohibited.”¹³¹ For example, the Order did not define what it meant for a federal contractor to “inculcate in its employees” the prohibited concepts or for a federal grantee to “use federal funds to ‘promote’” prohibited concepts.¹³²

EO 13950 did not limit discussion in academic instruction if the concepts were presented in an “objective manner and without endorsement.”¹³³ In fact, the order conceded that the “divisive” concepts “may be fashionable in the academy.”¹³⁴ However, parallel efforts to censor discussions of race and sex discrimination in classrooms were underway.

c. Federal censorship efforts to exclude race conscious instruction before the 2020 election

The current classroom censorship movement began at the federal level and attempted to mandate an inaccurate portrayal of America’s history with race deemed to be patriotic by conservatives. Despite statements that stu-

¹²⁵ *Id.* at § 2(a).

¹²⁶ *Id.* § 4(b).

¹²⁷ *Id.* § 4(a)(3).

¹²⁸ *Id.*

¹²⁹ *Santa Cruz Lesbian and Gay Cmty. Ctr. v. Trump*, 508 F.Supp.3d 521, 550 (N.D. Cal. 2020).

¹³⁰ *Id.* at 541-42.

¹³¹ *Id.* at 543.

¹³² *See id.*

¹³³ Exec. Order No. 13950, *supra* note 119, § 10(b).

¹³⁴ *Id.* § 1.

dents must learn “the history of slavery and its role and impact on the development of our country,”¹³⁵ on July 23, 2020, Senator Tom Cotton (R-Arkansas) sponsored S. 4292, the Saving American History Act of 2020, to prohibit the use of federal funds or professional development grants for K-12 schools or districts that taught The 1619 project.¹³⁶ The bill stalled in the Senate Committee on Health, Education, Labor, and Pensions and was reintroduced by seven senators in 2021.¹³⁷

Despite the dearth of evidence that critical race theory is taught in primary and secondary schools, President Trump initiated efforts to defend “the legacy of America’s founding, the virtue of America’s heroes, and the nobility of the American character.”¹³⁸ He also claimed that the Smithsonian Institute published “critical race theory” in a document that “alleged [sic] concepts such as hard work, rational thinking, the nuclear family, and belief in God were not values that unite all Americans, but were instead aspects of ‘whiteness.’”¹³⁹

On November 2, 2020, President Trump issued Executive Order 13958, entitled “Establishing the President’s Advisory 1776 Commission” to ensure patriotic education is “provided to the public at national parks, battlefields, monuments, installations, landmarks, cemeteries, and other places important to the American Revolution and the American founding. . . .”¹⁴⁰ The Commission would counter claims of systemic racism in America.¹⁴¹ The Commission’s public report on the “core principles of America’s founding” was widely panned by historians.¹⁴²

Conservatives at all levels of government followed President Trump’s lead and referenced “critical race theory” during speeches to engage their audiences. Rufo spoke to two dozen members of Congress about “critical race theory” and advised on or drafted language for more than ten bills.¹⁴³ The 2020 election halted anti-“critical race theory” efforts at the federal level.

¹³⁵ Frank E. Lockwood, *Bill by Sen. Tom Cotton Targets Curriculum on Slavery*, ARK. DEMOCRAT GAZETTE (July 26, 2020), <https://www.arkansasonline.com/news/2020/jul/26/bill-by-cotton-targets-curriculum-on-slavery/> [<https://perma.cc/Z6GM-UVX2>].

¹³⁶ Press Release, Senator Tom Cotton, *Cotton Bill to Defund 1619 Project Curriculum* (July 23, 2020), <https://www.cotton.senate.gov/news/press-releases/cotton-bill-to-defund-1619-project-curriculum> [<https://perma.cc/GNF9-SV35>].

¹³⁷ *Id.*; Press Release, Senator Tom Cotton, *Cotton, McConnell, Colleagues Introduce Bill to Defund 1619 Project Curriculum* (June 14, 2021), <https://www.cotton.senate.gov/news/press-releases/cotton-mcconnell-colleagues-introduce-bill-to-defund-1619-project-curriculum> [<https://perma.cc/GNF9-SV35>].

¹³⁸ President Donald Trump, *supra* note 94.

¹³⁹ *Id.*

¹⁴⁰ Establishing the President’s Advisory 1776 Commission, Exec. Order No. 13958, 86 Fed. Reg. 7009, § 2(c)(iv) (Jan. 20, 2021).

¹⁴¹ *Id.* §1.

¹⁴² *Id.*

¹⁴³ Wallace-Wells, *supra* note 85.

d. State-based classroom censorship strategy after the 2020 election

Conservatives mobilized a state-based strategy to continue the attack on “critical race theory” in schools following the 2020 election and the revocation of Executive Orders 13950 and 13958 on President Biden’s first day of office.¹⁴⁴ Most of the classroom censorship bills introduced across the country were based on (or directly copied from) EO 13950, federal legislation, or model legislation written by a few conservative organizations.¹⁴⁵ After the 2020 election, the American Legislative Exchange Council (ALEC), a conservative non-profit known for its closed door meetings with politicians and its production of model legislation adopted by states, hosted a training with the Heritage Foundation, a conservative think tank, at its annual summit to advocate for state legislation to counter The 1619 Project and “critical race theory” in classrooms and workplaces.¹⁴⁶ Attendees were encouraged to demand transparency for curriculum in public schools and to look out for diversity trainings in schools.¹⁴⁷

The Ethics and Public Policy Center created model state-level legislation entitled The Partisanship Out of Civics Act.¹⁴⁸ The proposed legislation prohibited compelled “discuss[ions of] current events or widely debated and currently controversial issues of public policy or social affairs” and required any discussions to “explore such issues from diverse and contending perspectives.”¹⁴⁹ In addition to banning educators from being compelled “to affirm a belief in the so-called systemic nature of racism, or like ideas, or in the so-called multiplicity or fluidity of gender identities, or like ideas, against his or her sincerely held religious or philosophical convictions,” the law would prevent instruction or training on a list of concepts that largely mirrored those in EO 13950.¹⁵⁰ Similarly, standards, curricula, lesson plans, textbooks, instructional materials, or instructional practices, could not incul-

¹⁴⁴ Exec. Order No. 13950, *supra* note 119; Exec. Order No. 13958, *supra* note 140; Max Eden, *Biden Has Embraced “Critical Race Theory”—but You Can Still Fight It*, N.Y. Post (Jan. 26, 2021), <https://www.manhattan-institute.org/biden-has-embraced-critical-race-theory-but-you-can-still-fight-it> [<https://perma.cc/P8BT-Q8DA>].

¹⁴⁵ PEN America, EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH, 26, <https://pen.org/report/educational-gag-orders/> [<https://perma.cc/H897-72SV>].

¹⁴⁶ American Legislative Exchange Council, *Workshop: Against Critical Theory’s Onslaught: Reclaiming Education and the American Dream*, YOUTUBE at 18:40 (Dec. 7, 2020), <https://youtu.be/yzLohOPEr8> [<https://perma.cc/C4A9-3LU3>]; Molly Jackman, *ALEC’s Influence Over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/> [<https://perma.cc/8M5R-ENMJ>].

¹⁴⁷ *Id.*

¹⁴⁸ Stanley Kurtz, *The Partisanship Out of Civics Act*, NATIONAL ASSOCIATION OF SCHOLARS (Feb. 15, 2021), <https://www.nas.org/blogs/article/the-partisanship-out-of-civics-act> [<https://perma.cc/A5TB-LQ3S>].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

cate the divisive concepts, including two specifically targeted at The 1619 Project.¹⁵¹

Fox News reinforced Rufo's public persuasion campaign and resultant hysteria by flooding its network with nonstop mentions of "critical race theory." Fox News referenced "critical race theory" more than 3,900 times in 2021.¹⁵² Rufo appeared on Fox News more than 50 times since July 2020.¹⁵³ The extensive media coverage misled viewers to believe that "critical race theory" was a widespread, urgent threat.¹⁵⁴

Manhattan Institute, another conservative think tank, developed model legislation for the regulation of "critical race theory" in schools in August 2021 and for transparency in school training and curriculum in December in that same year.¹⁵⁵ In October 2021, Rufo released a "critical race theory" briefing book for parents and policymakers with instructions to win the so-called "language war," to use stories to build arguments, and to organize.¹⁵⁶

In addition to "critical race theory" bans, Rufo pushed conservatives to pass curriculum transparency bills. He issued a model curriculum transparency policy for governors and state legislators.¹⁵⁷ In a series of tweets, Rufo outlined his goal for 2022: to pass curriculum transparency bills in 10 states "requiring public schools to make all teaching materials easily available to parents via internet."¹⁵⁸ Rufo explained that this strategy would "bait the Left into opposing 'transparency,' which [would] raise the questions: what are they trying to hide?"¹⁵⁹ According to Rufo, "[t]he strategy here is to use a non-threatening, liberal value—'transparency'—to force ideological actors to undergo public scrutiny. It's a rhetorically-advantageous position and, when enacted, will give parents a powerful check on bureaucratic power."¹⁶⁰

¹⁵¹ *Id.*

¹⁵² Geonzon et al., *supra* note 89.

¹⁵³ *Id.*

¹⁵⁴ PEN America, *supra* note 145, at 30.

¹⁵⁵ James Copland, *How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation*, MANHATTAN INSTITUTE (Aug. 2021), <https://media4.manhattan-institute.org/sites/default/files/copland-crt-legislation.pdf> [<https://perma.cc/YJ7X-KXY9>]; Christopher Rufo, James R. Copland & John Ketcham, *A Model for Transparency in School Training and Curriculum*, MANHATTAN INSTITUTE (Dec. 1, 2021), https://media4.manhattan-institute.org/sites/default/files/MI_rufo_copland_ketcham_model_legislation.pdf [<https://perma.cc/Y8XL-LKXP>].

¹⁵⁶ Christopher Rufo, *Critical Race Theory Briefing Book*, https://christopherrufo.com/crt-briefing-book/?mc_cid=340fbeafe6&mc_eid=f645157ebf [<https://perma.cc/X9YV-2XY9>] (last accessed Feb. 13, 2023); Christopher F. Rufo (@realchrisrufo), TWITTER (Oct. 18, 2021, 11:31 AM), <https://twitter.com/realchrisrufo/status/1450122451073961995?lang=EN> [<https://perma.cc/9QTC-AQFB>].

¹⁵⁷ Rufo et al., *supra* note 156.

¹⁵⁸ Christopher F. Rufo (@realchrisrufo), TWITTER (Jan. 7, 2022, 12:56 PM), <https://twitter.com/realchrisrufo/status/1479512380400803843> [<https://perma.cc/6RLJ-K37K>].

¹⁵⁹ Christopher F. Rufo (@realchrisrufo), TWITTER (Jan. 7, 2022, 1:13 PM), <https://twitter.com/realchrisrufo/status/1479516522896781312> [<https://perma.cc/P5NP-L295>].

¹⁶⁰ Christopher F. Rufo (@realchrisrufo), TWITTER (Jan. 7, 2022, 1:10 PM), <https://twitter.com/realchrisrufo/status/1479515716822781952> [<https://perma.cc/B67R-F3EL>].

Republicans followed Rufo’s lead, especially once the campaign against “critical race theory” mobilized voters. In a statement on the Senate floor, Senate Minority Leader McConnell (R-Kentucky) said, “The fact that woke bureaucrats are this terrified by transparency proves exactly, exactly why parents deserve it.”¹⁶¹ Noting the political benefits associated with the removal of “critical race theory” from schools, Steve Bannon, former Trump advisor, said, “This is the Tea Party to the 10th power . . . I look at this and say ‘Hey, this is how we are going to win.’ I see 50 [House Republican] seats in 2022. Keep this up.”¹⁶² Rep. James Comer (R-Kentucky) said “I think that Republicans have a great issue with education. . . . [W]e’re going to campaign on that all through 2022, and in 2023, that’s how we’re going to govern.”¹⁶³ The gubernatorial election of Republican Glenn Youngkin in Virginia over incumbent Democrat Terry McAuliffe confirmed for many that “critical race theory” was a winning electoral issue.¹⁶⁴ On the campaign trail, Youngkin promised to ban “critical race theory.”¹⁶⁵ Recognizing that education was a top issue for its voters, Jim Banks (R-Indiana), Chairman of the Republican Study Committee, shared lessons learned from Virginia on election night.¹⁶⁶ Half of the items he listed to empower parents pertained to “critical race theory.”¹⁶⁷

The momentum to challenge “critical race theory” in schools continued after the 2020 election. The first legislation to prohibit the teaching of “critical race theory” was signed in Idaho in April 2021.¹⁶⁸ Montana, Tennessee, and the Florida Board of Education outlawed instruction on “critical race theory” and/or The 1619 Project shortly thereafter.¹⁶⁹ In late May 2021, 1776 Project, a political action committee (PAC) dedicated to electing school

¹⁶¹ 168 CONG. REC. S727 (daily ed. Feb. 16, 2022) (statement of Sen. Mitch McConnell).

¹⁶² Theodoric Meyer, Maggie Severns, Meridith McGraw, *‘The Tea Party to the 10th Power’: Trumpworld Bets Big on Critical Race Theory*, POLITICO (June 23, 2021), <https://www.politico.com/news/2021/06/23/trumpworld-critical-race-theory-495712> [https://perma.cc/29DN-6R49].

¹⁶³ Nicole Gaudino, *Rep. Steve Scalise and 15 Other Republicans Lay out Their Plan to Use Controversies Over the Teaching of Race and Gender in Schools to Beat Democrats in 2022*, BUS. INSIDER (Dec. 17, 2021, 3:46 PM), <https://www.businessinsider.com/republicans-2022-elections-critical-race-theory-education-culture-wars-scalise-2021-12> [https://perma.cc/M82H-2Y6W].

¹⁶⁴ David Smith, *How Did Republicans Turn Critical Race Theory Into a Winning Electoral Issue?*, THE GUARDIAN (Nov. 3, 2021, 2:28 PM), <https://www.theguardian.com/us-news/2021/nov/03/republicans-critical-race-theory-winning-electoral-issue> [https://perma.cc/89AW-78G5].

¹⁶⁵ Memorandum from Chairman Jim Banks to the Republican Study Committee (Nov. 2, 2021), https://banks.house.gov/uploadedfiles/final_virginia.pdf [https://perma.cc/ULY7-Y8PA].

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ H.B. 377, 66 Leg. 1st Reg. Sess. (Idaho 2021).

¹⁶⁹ Press Release, Austin Knudsen, Montana Attorney General, Attorney General Knudson Issues Binding Opinion on Critical Race Theory (May 27, 2021), <https://dojmt.gov/attorney-general-knudsen-issues-binding-opinion-on-critical-race-theory/> [https://perma.cc/5ULV-5NPX]; S.B. 623, 2021 Leg. Sess. (Tenn. 2021); FLORIDA ADMIN. CODE r. 6A-1.094124 (2021).

board members who would abolish “critical race theory” and The 1619 Project in public schools, was launched.¹⁷⁰ Rufo reportedly “described ‘the fight against critical theory’ as ‘the most successful counterattack against B[lack] L[ives] M[atter] as a political movement.’”¹⁷¹

IV. EDUCATIONAL GAG ORDERS

a. Scope

The impact of the campaign against “critical race theory” in schools cannot be underestimated; almost 700 efforts to exclude “critical race theory” have been identified at the local, state, and federal levels.¹⁷² Almost 300 bills to restrict instruction have been introduced in 45 state legislatures since January 2021.¹⁷³ Over 25 laws were passed in 17 states.¹⁷⁴ The classroom censorship movement grew in 2022 with the introduction of 137 bills to limit instruction and training in K-12 schools, higher education, and state agencies and institutions, 250 percent higher than 2021.¹⁷⁵ Introduction of classroom censorship legislation continued in 2023.¹⁷⁶

Similar to EO 13950, early legislation prohibited discussion of “divisive concepts” pertaining to race and sex discrimination in classrooms. Forty-two of the initial 54 bills restricted concepts stemming from Trump’s executive order.¹⁷⁷ Eleven bills specifically excluded materials from The 1619 Project and nine mentioned “critical race theory.”¹⁷⁸ Twenty-one bills introduced in 2021 applied to higher education, including three that became law.¹⁷⁹ The focus on higher education spread in 2022, with 39 percent targeting colleges and universities and four new laws.¹⁸⁰ The literature, curriculum, and historical accounts banned by these bills silenced the voices of women, BIPOC, and LGBTQ+ people.¹⁸¹

¹⁷⁰ 1776 PROJECT PAC, <https://1776projectpac.com/> [<https://perma.cc/4R2G-U4LX>] (last visited July 1, 2022); Stef W. Kight, *Scoop: New Conservative PAC Targets School Board Elections*, AXIOS (May 24, 2021), <https://www.axios.com/2021/05/25/pac-critical-race-theory-school-board-election> [<https://perma.cc/4PTX-EDYV>].

¹⁷¹ Daniel Golden, *It’s Making Us More Ignorant*, THE ATLANTIC (Jan. 3, 2023), <https://www.theatlantic.com/ideas/archive/2023/01/ron-desantis-florida-critical-race-theory-professors/672507/> [<https://perma.cc/K98A-7B72>].

¹⁷² UCLA School of Law Critical Race Studies, CRT Forward Tracking Project, <https://crtforward.law.ucla.edu/> [<https://perma.cc/VSY3-Y8LA>] (last visited Oct. 15, 2022).

¹⁷³ PEN America, *supra* note 4.

¹⁷⁴ PEN America, *supra* note 4; Young et al., *supra* note 5.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ PEN America, *supra* note 145, at 8.

¹⁷⁸ PEN America, *supra* note 145, at 9.

¹⁷⁹ PEN America, *supra* note 145, at 29.

¹⁸⁰ Young et al., *supra* note 5.

¹⁸¹ PEN America, *supra* note 145, at 4.

Educational gag orders introduced in 2022 also targeted a broader scope of instruction than the initial legislation.¹⁸² Efforts to exclude LGBTQ+ issues and identities from classrooms were coupled with the movement to censor instruction or curricula that would advance racial justice.¹⁸³ The classic example is Florida’s House Bill 1557, known as the “Don’t Say Gay” law due to its prohibition on classroom instruction on sexual orientation or gender identity.¹⁸⁴ Other states, like Tennessee, required schools to provide any curriculum involving sexual orientation or gender identity to parents before instruction and permitted parents to opt out of those lessons.¹⁸⁵ Additionally, social-emotional learning, which “teaches students how to manage their emotions, how to make good decisions, how to collaborate and how to understand themselves and others better,”¹⁸⁶ has also been targeted as a “new variant of the ‘CRT-virus.’”¹⁸⁷ The Florida Department of Education mentioned “the unsolicited addition of social emotional learning” as a reason it rejected more than 40 percent of its math textbooks in 2022 and explicitly prohibited these principles in social studies instructional materials.¹⁸⁸

Outside of legislation, state censorship of classroom discussions continued through attorney general’s opinions, governor’s pledges, state education rules, and executive orders.¹⁸⁹ Conservatives pressured school boards, edu-

¹⁸² PEN America, *supra* note 4.

¹⁸³ *Id.*

¹⁸⁴ H.B. 1557, 2022 Leg. Sess. (Fla. 2022) (prohibiting instruction on sexual orientation or gender identity from kindergarten to third grade); *see* H.B. 1069, Fla. 2023 Legislature (expanding prohibitions classroom instruction from kindergarten to eighth grade and permitting instruction in high school if “age appropriate”).

¹⁸⁵ H.B. 529, 112th Leg. Sess. (Tenn. 2021).

¹⁸⁶ Meg Anderson, How Social-Emotional Learning Became a Frontline in the Battle Against CRT, NPR (Sept. 26, 2022), <https://www.npr.org/2022/09/26/1124082878/how-social-emotional-learning-became-a-frontline-in-the-battle-against-crt> [<https://perma.cc/CZR9-UMYF>].

¹⁸⁷ Shane Harris, *New Variant of the “CRT-virus”: “Social-Emotional Learning”*, ASSOCIATION OF MATURE AMERICANS (Apr. 5, 2022), <https://amac.us/new-variant-of-the-crt-virus-social-emotional-learning/> [<https://perma.cc/PWN8-TVQ8>].

¹⁸⁸ Press Release, Fla. Dep’t. of Educ., Florida Rejects Publishers’ Attempts to Indoctrinate Students (Apr. 15, 2022), <https://www.fldoe.org/newsroom/latest-news/florida-rejects-publishers-attempts-to-indoctrinate-students.stml> [<https://perma.cc/UMB4-AKWB>]; Fla. Dep’t. of Educ., Specifications for the 2022-2023 Florida Instructional Materials Adoption K-12 Social Studies, <https://www.fldoe.org/core/fileparse.php/5574/urlt/SocialStudies-IM-Spec.pdf> [<https://perma.cc/L2DT-9BJ6>] (last visited Oct. 22, 2022).

¹⁸⁹ PEN America, *supra* note 145, at 26; Press Release, *supra* note 187; Michael Lee, *Noem Signs ‘1776 Pledge to Save Our Schools’ to Restore ‘Patriotic Education’*, WASHINGTON EXAMINER (May 4, 2021); Rule 6A-1.094124, *Required Instruction Planning and Reporting*, FLA. BD. OF EDUC. (July 26, 2021), <https://www.flrules.org/gateway/ruleNo.asp?id=6A-1.094124> [<https://perma.cc/H4G2-YZQN>]; Exec. Order 2022-02, State of South Dakota (Apr. 5, 2022), <https://governor.sd.gov/doc/GovNoem-K12CRT-EO.pdf> [<https://perma.cc/2EKG-NF6M>]; Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth, Exec. Order 1 (2022), Commonwealth of Virginia Office of the Governor (Jan.15, 2022), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-1-Ending-the-Use-of-Inherently-Divisive-Concepts.pdf> [<https://perma.cc/W8WJ-28JD>].

cators, university regents, and state education agencies to censor discussions of race and sex discrimination.¹⁹⁰ PACs formed to elect school board officials who support classroom censorship.¹⁹¹

b. Type of censorship

While educational gag orders are motivated by a common purpose, they are not structured uniformly. PEN America, a non-profit that tracks and analyzes educational gag orders introduced across the country, identified three ways states censor discussion of race and gender discrimination in classrooms: (1) prohibit all references (“inclusion”), (2) prohibit efforts to compel students to believe in enumerated concepts (“compulsion”), or (3) prohibit educators from promoting any of the enumerated concepts (“promotion”).¹⁹² As discussed below, the ACLU has filed litigation challenging each form of censorship.

i. Inclusion of prohibited concepts

In its purest form, educational gag orders altogether prohibited classroom discussions of race and sex discrimination.¹⁹³ For instance, Oklahoma’s House Bill 1775 stated “[n]o teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make [the divisive concepts from EO 13950] part of a course.”¹⁹⁴ This legislation would prevent an educator from introducing research supporting the existence of implicit bias. In the higher education context, the law prohibited “any mandatory gender or sexual diversity training or counseling” as well as “[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex.”¹⁹⁵ While most states banned concepts listed in EO 13950, Tennessee Senate Bill 623 and House Bill 2570 restricted additional concepts from instruction, curriculum, seminars, workshops, trainings, or orientations.¹⁹⁶ Seventy-seven percent of educational gag orders banned the inclusion of concepts in 2021 but only 40 percent in 2022.¹⁹⁷

ii. Compulsion to believe prohibited concepts

After the earliest educational gag orders, the next wave of legislation attempted to evade constitutional challenge by technically permitting discus-

¹⁹⁰ PEN America, *supra* note 145, at 5.

¹⁹¹ *Id.*

¹⁹² Young et al., *supra* note 5.

¹⁹³ *Id.*

¹⁹⁴ H.B. 1775, 2021 Leg. Sess. (Okla. 2021).

¹⁹⁵ *Id.*

¹⁹⁶ S.B. 623, *supra* note 169; H.B. 2670, 2022 Leg. Sess. (Tenn. 2022).

¹⁹⁷ Young et al., *supra* note 5.

sion of these concepts but including expansive limitations on the introduction of this material. One method was to prohibit schools or educators from requiring students to believe restricted concepts.¹⁹⁸ This type of legislation stated that discussion of the restricted concepts was permissible as long as students are not required to agree with the concepts. This form of censorship would allow an educator to teach students about implicit bias as long as students are not required to agree that it exists. For example, New Hampshire’s House Bill 2 prohibited any “pupil in public [primary or secondary] school” from being “taught, instructed, inculcated or compelled to express belief in, or support for” an enumerated list of concepts and announced similar restrictions on public employers.¹⁹⁹ In practice, the level of engagement with prohibited concepts that constitutes compulsion is unclear, so educators continue to avoid these topics. A teacher could introduce research on implicit bias, but what student activity could they assign that would not be interpreted as compulsion? Would requiring students to argue in favor of the concept in a classroom debate or to write an essay on the merits of the concept cross the line? Prohibitions on the compulsion of concepts constituted 16 percent of educational gag orders in 2021 and 28 percent in 2022.²⁰⁰

iii. Promotion of Prohibited Concepts

Other educational gag orders restricted educators from promoting prohibited concepts.²⁰¹ This legislation would permit an educator to teach about implicit bias as long as they did not suggest that theories supporting its existence or manifestations were valid. Florida’s Stop Wrongs to Our Kids and Employees (“Stop W.O.K.E.”) Act bans compulsion and promotion. It prohibited subjecting students at all levels of education or employees to “training or instruction that espouses, promotes, advances, inculcates, or compels” belief in an enumerated list of restricted concepts that mirrors EO 13950.²⁰² The Stop W.O.K.E. Act specified that the law “may not be construed to prohibit discussion of the [restricted] concepts. . . as part of a course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts.”²⁰³ An educator could explain the concept of implicit bias but may not lead students to deduce its validity based on research. The teacher could either suggest that it is unclear whether implicit bias exists or argue, despite research to the contrary, that implicit bias is not real.

¹⁹⁸ PEN America, *supra* note 145, at 9.

¹⁹⁹ H.B. 2, 2021 Leg. Sess. (N.H. 2021).

²⁰⁰ Young et al., *supra* note 5.

²⁰¹ *Id.*

²⁰² H.B. 7, 2022 Leg. Sess. (Fla. 2022).

²⁰³ *Id.*

state funding was included as a punishment in 26 percent of 2021 and 2022 classroom censorship bills.²¹³ Professional discipline was a punishment in 15 percent of 2021 classroom censorship bills and 22 percent of 2022 counterparts.²¹⁴

Various educational gag orders created private rights of action for students, parents, and even unrelated parties to sue schools for violations and authorized suits by attorney general or county attorney.²¹⁵ This approach, borrowed from state legislation that authorizes suits against medical providers, and even drivers, who facilitate abortion or trans care, has never been utilized in education.²¹⁶ Civil suits rose in popularity as a penalty, from 19 percent in 2021 classroom censorship bills to 35 percent in 2022.²¹⁷ On the whole, the bills introduced in 2022 were more punitive than the 2021 legislation, with higher fines, escalated professional discipline, and broader standing for civil suits.²¹⁸ In addition to the aforementioned punishments, some unsuccessful 2022 bills even proposed criminal charges for noncompliance.²¹⁹

A number of so-called transparency bills were introduced after the educational gag orders to police educators for compliance by requiring classroom materials to be posted online.²²⁰ These bills generally required educators to post curricula and instructional materials.²²¹ Some bills went even further and would allow parents to opt out of lessons or assignments.²²² Several bills were introduced to monitor teachers, under the guise of transparency. Indiana House Bill 1231 proposed requiring “each school corporation or applicable school to adopt a policy to allow a taxpayer to observe classroom instruction *at any time* requested by the taxpayer.”²²³ At least four states allowed or required video cameras in classrooms, but these laws were

²¹³ Young et al., *supra* note 5.

²¹⁴ *Id.*

²¹⁵ PEN America, *supra* note 145, at 47; H.B. 2, 2021 Leg. (N.H. 2021).

²¹⁶ S.B. 8, 87th Leg. Sess. (Tex. 2021); TEX. HEALTH AND SAFETY CODE § 171.001 (2021); H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

²¹⁷ Young et al., *supra* note 5.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Breccan F. Thies, 2022: *Republicans Across America Push For Classroom Transparency, Democrats Try to Keep Parents in the Dark*, BREITBART (Feb. 23, 2022), <https://www.breitbart.com/politics/2022/02/23/2022-republicans-across-america-push-for-classroom-transparency-democrats-try-to-keep-parents-in-the-dark/> [<https://perma.cc/C69H-SG38>].

²²¹ Dale Chu, *The Curriculum Transparency Trap*, THOMAS B. FORDHAM INSTITUTE (Feb. 2, 2022) <https://fordhaminstitute.org/national/commentary/curriculum-transparency-trap> [<https://perma.cc/B84Q-G8ZL>].

²²² *Id.*; see also Claudette Riley, *Critical Race Theory Opponents Back Classroom Cameras, School Choice, Attendance Strikes*, SPRINGFIELD NEWS-LEADER (July 28, 2021), <https://www.news-leader.com/story/news/education/2021/07/28/critical-race-theory-opponents-urge-springfield-missouri-parents-fight-back-classroom-cameras-school/8074174002/> [<https://perma.cc/86QL-H6VJ>].

²²³ H.B. 1231, 2022 Leg. Reg. Sess. (Ind. 2022).

typically limited to the special education context.²²⁴ The expanded focus of these efforts to include general education classrooms in the context of censorship is clear: intimidation of educators. A Mississippi bill that would require cameras in classrooms was introduced to “hold[] teachers accountable” for teaching “critical race theory.”²²⁵ A Florida bill would require educators to wear microphones and classrooms to be livestreamed or recorded for review and objections from parents.²²⁶ They are thinly veiled efforts to further the chilling effect of the educational gag orders.²²⁷

d. Resultant culture of fear & intimidation

Once described as the “marketplace of ideas,” schools have become instructional minefields due to the hysteria around “critical race theory.”²²⁸ A Texas study of classroom censorship laws found that they resulted in “weakened quality curriculum; lower teacher, staff, and student morale; limited real-world learning and leadership opportunities for students; and threats to students’ civil rights and safe school climates.”²²⁹ More than half of educators surveyed restricted discussions, curriculum, or content as a result of the laws, despite a desire from students to learn about censored topics.²³⁰ “[N]early two thirds [of educators surveyed] said their students specifically request lessons on race, history, current events and forms of discrimination that they have experienced.”²³¹ More than half of educators reported that the laws negatively impacted their relationships with students, parents, or colleagues, and described feeling “pervasive fear,” “judgment and distrust,”

²²⁴ Joe Kelley, *Texas, Georgia, Louisiana All Approve Installation of Cameras in Public School Classrooms*, NEWSBREAK (Aug. 24, 2021), <https://www.newsbreak.com/news/2350656047850/texas-georgia-louisiana-all-approve-installation-of-cameras-in-public-school-classrooms> [https://perma.cc/5NGL-GHEU]; Barnini Chakraborty, *Parents and Teachers at Odds Over Push for Cameras in Classrooms*, WASHINGTON EXAMINER (Aug. 23, 2021), <https://www.washingtonexaminer.com/news/parents-teachers-at-odds-push-cameras-classrooms> [https://perma.cc/4P3K-49MM]; H.B. 614, 2016 Leg. Sess. (Ga. 2016); S.B. 261, 2022 Leg. Sess. (W.V. 2022); TEX. ED. CODE § 29.022; S.B. 86, 2021 Leg. Sess. (La. 2021).

²²⁵ J.T. Mitchell, *Mississippi representative wants cameras in public school classrooms*, SUPER TALK MISSISSIPPI MEDIA (Jan. 17, 2022), <https://www.supertalk.fm/mississippi-representative-wants-cameras-in-public-school-classrooms/> [https://perma.cc/77XU-UD9T].

²²⁶ H.B. 1055, 2022 Leg. Sess. (Fla. 2022).

²²⁷ The ACLU strongly supports transparency from government bodies but no student or teacher should be placed under nonstop surveillance. Examining teachers under a microscope to “catch” them violating laws inevitably chills speech.

²²⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

²²⁹ Intercultural Development Research Association, *IDRA Presents Preliminary Findings Showing Negative Impact of Classroom Censorship*, IDRA (Aug. 19, 2022), <https://www.idra.org/resource-center/17-states-have-classroom-censorship-policies/> [https://perma.cc/48KT-386E].

²³⁰ Intercultural Development Research Association, *Recent State Policy on Curriculum Leads to Classroom Censorship in Schools* (July 26, 2022), <https://www.idra.org/wp-content/uploads/2022/07/7.26.22-Testimony-Monitoring-SB3-Interim-Charge.pdf> [https://perma.cc/TT7S-MEMY].

²³¹ *Id.*

and a “chilling effect” on teaching.²³² Educators and students also stated that they felt less safe in schools, as they did not feel comfortable reporting discrimination in schools or discussing racially motivated violence in society.²³³

In another study of almost 300 educators across the country, educators, particularly educators of color, described “hostile environments for discussing issues of race and racial inequality and more broadly, diversity, equity, and inclusion” (DEI) due to subgroups of vocal parents and politicians.²³⁴ Educators faced constant surveillance, scrutiny and second-guessing.²³⁵ They “preventatively delet[ed] topics from classrooms or trainings to avoid conflict.”²³⁶ They were pressured to stop their DEI efforts.²³⁷ They felt “terrified, confused and/or demoralized.”²³⁸

The threat against educators isn’t imagined; conservatives unleashed a campaign of terror in the name of “critical race theory.” Various states established websites or hotlines to report educators.²³⁹ Moms for Liberty New Hampshire offered a \$500 bounty for the first person who caught a public school teacher breaking the law prohibiting instruction on “critical race theory.”²⁴⁰ Anxious about violations of the law (and wrongful accusations), educators censored themselves, avoiding topics involving racism or sexism, even if they were not prohibited by the law, solidifying the chilling effect of these laws.

Furthermore, the quest to eradicate “critical race theory” has prompted a resurgence of McCarthy era book bans extending far beyond books that address issues of race. According to the American Library Association, there were more than 330 book challenges in the fall of 2021, double the challenges in all of 2020.²⁴¹ In 2022, bills were introduced to exclude books that address LGBTQ+ issues or identities and to penalize access to materials that referenced sex or sexuality.²⁴² A Texas state representative requested that the Texas Education Agency ban 850 books due to their perceived focus on race

²³² *Id.*

²³³ *Id.*

²³⁴ Polluck et al., *supra* note 2, at 11, 54.

²³⁵ *Id.* at 8.

²³⁶ *Id.* at 12; 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/> [<https://perma.cc/HZ25-THFM>].

²³⁷ Polluck et al., *supra* note 2, at 8.

²³⁸ *Id.*

²³⁹ Young et al., *supra* note 5 (noting a tipline for classroom censorship violations in West Virginia and Virginia and similar proposals in Alaska, New Jersey, and Oklahoma).

²⁴⁰ Moms for Liberty NH (@Moms4LibertyNH), TWITTER (Nov. 12, 2021, 9:28 AM), <https://twitter.com/Moms4LibertyNH/status/1459166253084467205> [<https://perma.cc/2Z4L-DF99>].

²⁴¹ Josh Moody, *How K-12 Book Bans Affect Higher Education*, INSIDE HIGHER ED (Feb. 10, 2022), <https://www.insidehighered.com/news/2022/02/10/how-k-12-book-bans-affect-higher-education> [<https://perma.cc/Y59U-MTWS>].

²⁴² Young & Friedman, *supra* note 5; S.B. 1142, 2022 Leg. Sess. (Okla. 2022); S.B. 1654, 2022 Leg. Sess. (Okla. 2022).

and sexuality.²⁴³ Foundational instructional materials like Harper Lee's *To Kill A Mockingbird*, Alice Walker's *The Color Purple*, or Toni Morrison's *The Bluest Eye* have been targeted as well as recently added culturally relevant texts.²⁴⁴ Book bans disproportionately excluded marginalized and underrepresented people, such as BIPOC, women, and LGBTQ+ authors.²⁴⁵

Educational gag orders also produced a culture of fear and intimidation in higher education. Educators were forced to decide to censor discussions of racism and sexism in their classroom instruction, exams, and/or research or to decline to offer courses altogether.²⁴⁶ Reducing the number of race-related courses offered may dissuade students from studying these academic programs, "delegitimize race scholarship and race scholars," and "encourage skepticism of work done by scholars with race-related expertise. . . [by classifying] race scholarship as *racist*, biased, and as a form of indoctrination."²⁴⁷ The impact will be felt most acutely by faculty without tenure and "faculty of color who are disproportionately engaged in race-related scholarship and teaching" and may trigger academic flight from states with educational gag orders.²⁴⁸ Students, particularly those majoring in social sciences, reported concerns that they will not learn the full scope of information necessary for their career because educators will avoid topics that could violate the law, even when widely accepted in their discipline.²⁴⁹

The impact of educational gag orders in higher education was not limited to classroom instruction. As a result of these laws, colleges and universities cancelled or modified mandatory diversity and sexual harassment trainings for students.²⁵⁰ In Florida, the educational gag order laid the groundwork for Gov. Ron DeSantis' plan to block all funding for DEI initiatives in higher education.²⁵¹

²⁴³ Brian Lopez, *Texas House committee to investigate school districts' books on race and sexuality*, THE TEXAS TRIBUNE (Oct. 26, 2021), <https://www.texastribune.org/2021/10/26/texas-school-books-race-sexuality/> [https://perma.cc/F2RJ-Z8JM].

²⁴⁴ Kate Cray, *The Books Briefing: The Fight Over What Kids Can Read*, THE ATLANTIC (Apr. 8, 2022), <https://www.theatlantic.com/books/archive/2022/04/banned-books-critical-race-theory-1619-project/620394/> [https://perma.cc/3FSA-UMMF]; Moody, *supra* note 240.

²⁴⁵ *Id.*

²⁴⁶ Russell-Brown, *supra* note 82, at 32; Declaration of University of Oklahoma Chapter of American Association of University Professors at ¶ 14, *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-01022 (W.D. Okla. Oct. 29, 2021).

²⁴⁷ Russell-Brown, *supra* note 82, at 32-33.

²⁴⁸ *Id.* at 33; Declaration of University of Oklahoma Chapter of American Association of University Professors at ¶ 14, *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-01022 (W.D. Okla. Oct. 29, 2021).

²⁴⁹ Declaration of Black Emergency Response Team at ¶ 13, *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-01022 (W.D. Okla. Oct. 29, 2021).

²⁵⁰ H.B. 1775, 2021 Leg. Sess. (Okla. 2021); Ian Richardson, *Iowa Gov. Kim Reynolds signs law targeting critical race theory, says she's against 'discriminatory indoctrination'*, DES MOINES REGISTER (June 9, 2021) <https://www.desmoinesregister.com/story/news/politics/2021/06/08/governor-kim-reynolds-signs-law-targeting-critical-race-theory-iowa-schools-diversity-training/7489896002/> [https://perma.cc/CW8R-WJEX].

²⁵¹ Andrea Chu, *DeSantis unveils higher education plan to remove 'indoctrination' from state universities*, WTSP (Jan. 31, 2023), <https://www.wtsp.com/article/news/politics/desantis->

Teaching informed my perspective on the remarkable threat these censorship efforts pose and motivated my desire to utilize my legal skills as a racial justice attorney to challenge educational gag orders. The next section of this article pivots from the details of the classroom censorship campaign to litigation as a method to counter it.

V. LITIGATION CHALLENGING EDUCATIONAL GAG ORDERS

I am a member of the team of racial justice and First Amendment attorneys at the ACLU that leads litigation and investigations to challenge educational gag orders around the country. Our team filed the first challenge in the country to an educational gag order in Oklahoma with the ACLU of Oklahoma, Lawyers’ Committee for Civil Rights Under Law, and Schulte, Roth & Zabel LLP.²⁵² The team also filed a challenge to the higher education provisions of Florida’s Stop W.O.K.E. Act with the ACLU of Florida, NAACP Legal Defense Fund, and Ballard Spahr.²⁵³ Finally, the team serves as co-counsel in a consolidated New Hampshire challenge brought by the ACLU of New Hampshire, the National Education Association and the American Federation of Teachers, the two largest teachers unions, and a number of other organizations.²⁵⁴ We worked in partnership with coalitions of national and state organizations engaged in or considering similar litigation, which were invaluable resources to track developments across the country, discuss arguments and obstacles to litigation, ensure consistent framing, and coordinate efforts.

Litigation is an important tool but only one strategy to counter classroom censorship; policy, organizing, advocacy, and public education efforts also play integral roles. Because I am currently litigating challenges to educational gag orders, I will share the lessons learned from this method and explain the legal claims we have brought.

university-college-plan-woke-indoctrination/67-2a4fbf3c-32c9-44bb-a23e-daa1e0eb495b [https://perma.cc/UB89-4F85]; S.B. 266, Higher Education, 2023 Fla. Leg. Session (Fla. 2023).

²⁵² *Black Emergency Response Team*, No. 5:21-cv-01022 (W.D. Okla. filed Oct. 19, 2021); Press release, ACLU, *ACLU of Oklahoma, Lawyers Committee File Lawsuit Challenging Oklahoma Classroom Censorship Bill Banning Race and Gender Discourse* (Oct. 19, 2021, 11:30 AM), <https://www.aclu.org/press-releases/aclu-aclu-oklahoma-lawyers-committee-file-lawsuit-challenging-oklahoma-classroom> [https://perma.cc/FT7P-R3FL].

²⁵³ *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. filed Aug. 18, 2022); Press Release, ACLU, *Florida Educators and Students File Lawsuit Challenging “Stop W.O.K.E.” Censorship Law* (Aug. 18, 2022, 9:15 AM), <https://www.aclu.org/press-releases/florida-educators-and-students-file-lawsuit-challenging-stop-woke-censorship-law?redirect=press-releases/florida-educators-and-students-file-lawsuit-challenging-stop-woke-censorship-bill>. [https://perma.cc/X96MN6C3]. The case name was subsequently amended to *Pernell v. Lamb*.

²⁵⁴ *Mejia v. Edelblut*, No. 1: 21-cv-01077 (D.N.H. filed Dec. 20, 2021); Ethan Dewitt, *ACLU Joins NEA to File Second Lawsuit Against ‘Divisive Concepts’ Law*, N.H. BULLETIN (Dec. 20, 2021, 2:10 PM), <https://newhampshirebulletin.com/briefs/aclu-joins-nea-to-file-second-lawsuit-against-divisive-concepts-law/> [https://perma.cc/X5P5-52SD]. *Mejia* was consolidated with another challenge: *Local 8027 v. Edulbut*, No. 21-CV-01077 (D.N.H.).

*a. Lessons learned**i. Racial justice context*

Centering racial justice within the classroom censorship litigation is crucial. We described local or statewide racial justice efforts.²⁵⁵ We also incorporated statements from government officials about the speech and social progress they hoped to thwart with the legislation to contextualize claims as backlash to advances towards racial justice and the racial reckoning of 2020.²⁵⁶ Litigation presents an opportunity to uplift the narratives of a diverse group of plaintiffs who have experienced the harm disproportionately inflicted on marginalized groups.

Proponents of educational gag orders misleadingly use terms and phrases commonly associated with anti-discrimination laws and concepts historically supported by civil rights advocates to effectuate their discriminatory goals.²⁵⁷ The context for this censorship has been intentionally misrepresented by conservatives as an effort to protect students and their First Amendment rights amidst a cultural debate. For example, Florida's Stop W.O.K.E. Act redefined discrimination to include the promotion or compulsion of the prohibited concepts. The State claimed its censorious legislation was merely an extension of federal anti-discrimination law, which has been found not to violate the First Amendment.²⁵⁸ Noting that federal anti-discrimination law regulates conduct while the educational gag order regulated speech, the court said, "Defendants try to dress up the State of Florida's interest as a public employer and educator as prohibiting discrimination in university classrooms, but this does not give Defendants a safe harbor in which to enforce viewpoint-based restrictions targeting protected speech."²⁵⁹

ii. Impact on students

Our litigation highlighted the effect on students as a central theme. Education should serve the best interests of students; it should not sway dramatically from election to election. Instead, politically motivated censorship deprives students of an accurate, comprehensive education, critical thinking skills, and social development opportunities. Because the political posturing about educational gag orders debates ideology, litigation should re-center the

²⁵⁵ Amended Complaint, *Black Emergency Response Team*, No. 5:21-cv-01022, (W.D. Okla. Nov. 9, 2021); Amended Complaint, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Dec. 9, 2022).

²⁵⁶ *Id.*

²⁵⁷ Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 41, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022).

²⁵⁸ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 97-98, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022); Transcript of Preliminary Injunction Proceedings at 89:18-90:5, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Oct. 13, 2022).

²⁵⁹ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 97-99, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022).

focus on students. The risk educational gag orders pose to students cannot be overemphasized, as they attend school for limited periods of time and may never learn the information denied to them by the classroom censorship movement.

iii. Individual consideration of each educational gag order & its impact

Classroom censorship measures often share core motivations, but there is no universal litigation strategy because all educational gag orders are not equal. The impact of educational gag orders must be assessed through the plain text of the legislation and consideration of its impact, through outreach to educators and students.

The ACLU classroom censorship litigation team works with co-counsel to conduct extensive investigations before filing litigation to ensure challenges accurately reflect the experience of educators and students. During the investigation phase, the role of the lawyers is to listen in order to identify the various impacts of the classroom censorship measure. In the challenge to Florida’s Stop W.O.K.E. Act, we represented individual professors and one student. In the litigation involving Oklahoma’s House Bill 1775, we represented a number of organizational plaintiffs that focused on education and/or served BIPOC communities. These organizations were comprised of students, educators, and/or parents in addition to individual plaintiffs. Identification of defendants is also not a cursory exercise. At least one court parsed the traceability and redressability factors of Article III standing finely to dismiss defendants that lacked enforcement authority and to deny a motion for preliminary injunction that required “multiple layers of inferences.”²⁶⁰

The legal claims should be based on the respective text and impact of the educational gag orders. Section III described a range of classroom censorship that prohibits the inclusion, compulsion, and/or promotion of concepts related to racial justice. Legal claims depend on the type of censorship and the educational setting. The scope of constitutional infringement may hinge on whether the plaintiff is an educator or student and whether they are

²⁶⁰ Order Granting in Part and Denying in Part Motion to Dismiss, *Falls v. DeSantis*, No. 4:22-cv-00166 (N.D. Fla. July 8, 2022) (dismissing claims against party that lacked “any enforcement authority” for educational gag order); *see* Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 69-85, *Pernell*, No. 4:22-cv-304, (N.D. Fla. Nov. 17, 2022) (finding Plaintiffs’ allegations established traceability and redressability at the motion to dismiss stage while noting a heightened burden to prove standing later in the case); *see* Order Denying Preliminary Injunction in Part, *Falls*, No. 4:22-cv-00166 (N.D. Fla. June 27, 2022) (denying motion for preliminary injunction against Board of Education where Plaintiffs argued that the Board of Education’s withholding of funding for classroom censorship violations would cause the school board to withhold funding or otherwise pressure teachers at those schools); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (noting that a plaintiff must establish “that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision.”).

in primary, secondary, or higher education. It is imperative to distinguish the rights asserted on behalf of, and harms experienced by, students and educators.

iv. Importance of timing

Decisions pertaining to when to file, including whether to bring a pre- or post-enforcement challenge, also depend on the scope and impact of the educational gag order. Curricular changes, instructions to avoid topics or terminology, removal of books, circumscribed standards, and any chilling effect may begin before a law goes into effect. While pre-enforcement challenges may circumvent (or at least limit) constitutional infringement, opponents may frame the challenge as a hyperbolic characterization of the scope of the law.²⁶¹ A court may be reluctant to recognize the broad impact of classroom censorship laws. For example, the University of Oklahoma argued that House Bill 1775 did not impact its classroom instruction or academic study at all, despite contradictory evidence from educators and students.²⁶² By prioritizing post-enforcement actions to show constitutional violations in the application of the law, advocates can demonstrate the impact of the laws. The downside is that students and educators experience constitutional deprivation. Ultimately, the team filed a pre-enforcement challenge in Florida and a post-enforcement action in Oklahoma.

Additionally, the timing of litigation within the school year could matter. Our pre-enforcement litigation filed before the school year was challenged as premature while our post-enforcement action filed after the beginning of the school year was attacked as an impractical effort to upend established plans for the academic year.²⁶³

b. Legal claims

Educational gag orders generally utilize vague, sweeping language and create a larger context of intimidation to silence discussions of race and sex discrimination in classrooms. This type of censorship runs directly counter to the Supreme Court's observation that, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."²⁶⁴ This section highlights constitutional claims under the First and

²⁶¹ See Defendants, Board of Regents for the University of Oklahoma, Michael Cawley, Frank Keating, Phil Albert, Natalie Shirley, Eric Stevenson, Anita Holloway and Rick Nagels', Motion to Dismiss Plaintiffs' Amended Complaint & Brief in Support at 6-10, *Black Emergency Response Team*, No. 5:21-cv-01022 (W.D. Okla. Nov. 23, 2021).

²⁶² *Id.* at 9.

²⁶³ Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 41, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022); Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 4, *Black Emergency Response Team*, No. 5:21-cv-01022 (W.D. Okla. Dec. 16, 2021).

²⁶⁴ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

Fourteenth Amendments brought by the ACLU classroom censorship litigation team. The list of claims is by no means exhaustive. State statutes and constitutions may offer greater protections than federal constitutional rights.

At the time of writing, all of our classroom censorship litigation is ongoing. Our team argued Florida’s Stop W.O.K.E. Act violated educators’ right to speak free of viewpoint-based discrimination, students’ right to learn free of viewpoint-based discrimination, the vagueness protections of the Fourteenth Amendment, and the Equal Protection Clause.²⁶⁵ We obtained a preliminary injunction blocking the State from enforcing the higher education provisions of the Stop W.O.K.E. Act. The order was issued on the viewpoint-based discrimination, right to information, and vagueness grounds.²⁶⁶ The State appealed the order to the Eleventh Circuit Court of Appeals.²⁶⁷ In Oklahoma, the team argued that House Bill 1775 was unconstitutionally vague, a violation of students’ right to receive information, an overbroad and viewpoint-based restriction on academic freedom, and motivated by a racially discriminatory purpose.²⁶⁸ We are awaiting orders on outstanding motions to dismiss, for preliminary injunction, and for judgment on the pleadings. We challenged New Hampshire’s House Bill 2 as unconstitutionally vague.²⁶⁹ Our claims survived a motion to dismiss.

i. First Amendment Claims

Students and educators have First Amendment rights in the school environment. “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁷⁰ However, expression of these rights may be limited.²⁷¹ Judicial intervention in the public education system, particularly with the daily operation of schools, is discouraged unless basic constitutional rights are implicated, especially free speech and inquiry.²⁷²

²⁶⁵ Complaint at ¶¶ 211-42, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Aug. 18, 2022).

²⁶⁶ See Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 130, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022). The court issued a joint order for *Pernell* and *Novoa*, *et al. v. Diaz, et al.*, a case filed by the Foundation for Individual Rights and Expression, though the cases were not consolidated. The preliminary injunction on the right to information claim was issued in *Novoa*, but not *Pernell*, due to standing.

²⁶⁷ On appeal, *Pernell* (case no. 22-12992) was consolidated with *Novoa* (case no. 22-13994).

²⁶⁸ Amended Complaint at ¶¶ 156-89, *Black Emergency Response Team*, No. 5:21-cv-01022 (N.D. Okla. Nov. 9, 2021).

²⁶⁹ Complaint at ¶¶ 154-59, *Mejia*, No. 1: 21-cv-01077 (D. N.H. Dec. 20, 2021).

²⁷⁰ *Tinker*, 393 U.S. at 506; see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

²⁷¹ See *Hazelwood Sch. Dist.*, 484 U.S. at 266, 271; *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 568 (1968) (recognizing educators cannot “constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.”).

²⁷² *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968).

The breadth of First Amendment protections differs for students and educators and depends on the learning environment. It is axiomatic that local and state authorities largely control public education.²⁷³ However, primary and secondary educators have less control than their higher education counterparts over what they teach. Students are vulnerable due to their age and are captive audiences because school attendance is compulsory.²⁷⁴ School districts and state school boards set curricular standards to ensure consistency.²⁷⁵

The scope of educators' First Amendment rights to challenge state policies has been hotly contested in our classroom censorship litigation. Notably, "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."²⁷⁶ The Supreme Court has wrestled with the appropriate standard to apply when considering the First Amendment rights of educators and public employees more broadly.

We argued that the court must balance the interests of educators and the state when determining whether the government may "curtail the speech of its employees" through educational gag orders.²⁷⁷ In *Pickering v. Board of Education of Township High School District 205, Will County*, a teacher was dismissed after he wrote a letter to a local newspaper criticizing a proposed tax increase to build new schools.²⁷⁸ The Supreme Court sought to "balance the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."²⁷⁹ The Court first considered whether the public employee spoke pursuant to their official duties and then whether they spoke on a matter of public concern.²⁸⁰ The Court also noted that the letter did not impede his "proper performance of his daily duties in the classroom" or "interfer[e] with the regular operation of the school generally."²⁸¹ Ultimately, the Court held, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."²⁸² The Supreme Court clarified, in *Connick v. Myers*, that the *Pickering* balancing test only applied to a public employee's speech if it pertained to "a matter of public concern [as] determined by the content, form, and context of a given statement, as re-

²⁷³ *Id.* at 104.

²⁷⁴ *Mayer v. Monroe Cnty. Comm. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

²⁷⁵ *Id.* at 479-80; *see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

²⁷⁶ *Connick v. Myers*, 461 U.S. 138, 142 (1983).

²⁷⁷ *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

²⁷⁸ *Pickering v. Bd. of Ed. of Twp. High Sch. Dist.*, 391 U.S. 563, 563 (1968).

²⁷⁹ *Id.* at 568.

²⁸⁰ *Id.* at 563; *see Garcetti v. Cebellanos*, 547 U.S. 410, 418 (2006).

²⁸¹ *Pickering*, 391 U.S. at 572-73.

²⁸² *Id.* at 574.

vealed by the whole record.”²⁸³ Speech that “can be fairly considered as relating to any matter of political, social, or other concern to the community, or [sic] a subject of general interest and of value and concern to the public” is considered a matter of public concern under *Pickering-Connick*.²⁸⁴

On the other hand, states sought to enforce educational gag orders by arguing educators’ speech not entitled to First Amendment protection.²⁸⁵ In *Garcetti v. Ceballos*, the Supreme Court again considered whether public employees had a First Amendment right to speak on matters of public concern.²⁸⁶ “The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”²⁸⁷ The Court held, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employee discipline.”²⁸⁸ The *Garcetti* court expressly noted that employee-speech jurisprudence, and its opinion, may implicate additional constitutional interests when applied to academic scholarship or classroom instruction, but declined to decide the applicability of that analysis.²⁸⁹

Disagreement about the scope of educators’ First Amendment rights has arisen most acutely in *Pernell*, our challenge to the higher education provisions of Florida’s Stop W.O.K.E. Act. We argued that *Garcetti* proscribed the speech rights of K-12 teachers but did not apply in higher education, where students are adults, a position adopted by various circuit courts.²⁹⁰ Instead, the Eleventh Circuit follows a case-by-case approach announced in *Bishop v. Aronov*, a case that affirmed a university’s prohibition on a professor’s speech about religious views during his instruction on exercise physiology.²⁹¹ The *Bishop* court balanced,

(1) “the context,” (2) “the University’s position as a public employer which may reasonably restrict the speech rights of employees more readily than those of other persons,” specifically with

²⁸³ *Connick v. Myers*, 461 U.S. 131, 147-48 (1983).

²⁸⁴ *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014).

²⁸⁵ Defendants’ Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 10-18, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022); Defendants’ Response and Objection to Plaintiffs’ Motion for Preliminary Injunction at 4, *Emergency Response Team v. O’Connor* No. 5:21-cv-01022 (W.D. Okla. Dec. 16, 2021).

²⁸⁶ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

²⁸⁷ *Lane*, 134 S. Ct. at 2379.

²⁸⁸ *Garcetti*, 547 U.S. at 418; see *Pickering*, 391 U.S. at 563.

²⁸⁹ *Garcetti*, 547 U.S. at 425.

²⁹⁰ Plaintiffs’ Reply in Support of Their Motion for a Preliminary Injunction at 3, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Oct. 4, 2022); see *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021); *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550, 564-65 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402, 411-412 (9th Cir. 2014); *Buchanan v. Alexander*, 919 F.3d 847, 852-53 (5th Cir. 2019) (considering the constitutionality of a university professors’ speech under *Pickering*, not *Garcetti*).

²⁹¹ 926 F.2d 1066 (11th Cir. 1991).

respect “to reasonably control[ing] the content of its curriculum, particularly that content imparted during class time,” and (3) “the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment.”²⁹²

Despite the fact that the Supreme Court reserved judgment on whether *Garcetti* applied to higher education, the State of Florida astonishingly argued that all classroom instruction is government speech, so educators had no First Amendment rights: “Where, as here, a State prescribes or restricts the curricular instruction taught in its schools and the in-class conduct of its educators, nothing but government speech is in play, and the First Amendment has no application.”²⁹³ In support of its argument, the State of Florida pointed to a Third Circuit opinion written by then Judge Samuel Alito concluding, “a public university professor does not have a First Amendment right to decide what will be taught in the classroom.”²⁹⁴

Ultimately, the district court in *Pernell* held *Bishop* was the applicable standard in the Eleventh Circuit and declined the State’s invitation to extend *Garcetti* to higher education.²⁹⁵ Upon balancing, the court concluded that the First Amendment rights of educators outweighed the state’s interest in “targeting pure expression to combat racism.”²⁹⁶ Eliminating educators’ First Amendment rights under *Garcetti* would have authorized complete, unprecedented control over instruction by the State, making students vulnerable pawns for politicians who wish to manipulate their learning.²⁹⁷

In addition to the question of whether educators have a First Amendment right to teach the information prohibited by educational gag orders, the proper standard for the state’s exclusion of this information has been at issue. The Supreme Court recognized, in *Hazelwood School District v. Kuhlmeier*, that student expression can be limited for “legitimate pedagogical concerns” in primary and secondary schools.²⁹⁸ “It is only when the decision to censor a . . . vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students’ constitutional rights.”²⁹⁹ The Supreme Court has not determined whether this standard applies at the university level as

²⁹² Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 89-90, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022) (quoting *Bishop*, 926 F.2d at 1074-75).

²⁹³ Defendants’ Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 17, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022).

²⁹⁴ *Edwards v. Calif. Univ. of Penn.*, 156 F.3d 488, 491 (3d Cir. 1998).

²⁹⁵ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 30, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022).

²⁹⁶ *Id.* at 106-07.

²⁹⁷ See Transcript of Merged Preliminary Injunction Proceedings at 32:12-16, *Pernell*, No. 4:22-cv-304, and *Novoa v. Diaz*, No. 4:22-cv-324 (N.D. Fla. Oct. 13, 2022), 32:12-16 (emphasizing that without the *Pickering* balancing test, adopted by *Bishop*, 926 F.2d at 1074-75), the state could require professors to read from transcripts verbatim in classrooms because it would have “absolute control” over what they say and how they say it.).

²⁹⁸ 484 U.S. 260, 273 (1988).

²⁹⁹ *Id.* at 273.

well.³⁰⁰ Educational gag orders should fail this test because they serve no legitimate pedagogical purpose. They merely limit discussion of discrimination, censoring viewpoints the legislature disfavors, instead of preventing actual discriminatory acts.

When considering First Amendment claims, courts are particularly concerned with voluntary self-censorship of protected speech, known as “chill.” “The threat of sanctions may deter almost as potently as the actual application of sanctions. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.”³⁰¹ The government’s burden is higher because educational gag orders chilled “speech before it happens.”³⁰²

The ACLU classroom censorship litigation team identified four ways educational gag orders violate the First Amendment: 1) viewpoint-based restriction, 2) encroachment on students’ right to information, 3) infringement upon academic freedom, and 4) overbreadth.

1. *Right to be free of viewpoint-based restriction*

In our classroom censorship litigation, the parties disagree over whether educational gag orders regulate the content of courses or the viewpoints expressed therein. The state’s ability to limit speech depends on this distinction. Content discrimination permits the State to set boundaries in a limited public forum it created, so the State may decide to exclude discussion of certain topics or a class of speech.³⁰³ In *Rosenberger v. Rectors and Visitors of the University of Virginia*, the Supreme Court explained,

[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and [the Supreme Court has] permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.³⁰⁴

The Court continued, “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”³⁰⁵

³⁰⁰ See *id.* n.7.

³⁰¹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (internal citations omitted); see *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (emphasizing that uncertain meanings cause people to “steer far wider of the unlawful zone than if the boundaries of forbidden areas are clearly marked.”) (internal citations omitted).

³⁰² *U.S. v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 468 (1995).

³⁰³ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995).

³⁰⁴ *Id.* at 833.

³⁰⁵ *Id.*

To justify content discrimination, the exclusion must serve a compelling government interest and be narrowly tailored towards that end.³⁰⁶

The government may not limit speech based on the message it conveys or target particular viewpoints on a subject; such viewpoint discrimination is presumed to violate the First Amendment.³⁰⁷ While it has some discretion, the State cannot discriminate against speech that otherwise fits within the forum's limitations because of its viewpoint.³⁰⁸ For example, a public university can decide not to offer a course, but it cannot authorize the course then cherry pick instruction from certain viewpoints.³⁰⁹ Restrictions may not be based on the government's hostility or favoritism towards a message.³¹⁰ The principal inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."³¹¹

We argued that educational gag orders are viewpoint-based restrictions, and thus subject to heightened scrutiny, because they blatantly authorize certain viewpoints about race and sex discrimination and prohibit others. Based on EO 13950, Oklahoma's House Bill 1775 and Florida's Stop W.O.K.E. Act excluded instruction that supported the existence of systemic racism and sexism while permitting denials.³¹² For example, both acts prohibited instruction that a person "by virtue of his or her race or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously."³¹³ This provision would not allow instruction on the pervasiveness of unconscious bias or white privilege, despite decades of research support.³¹⁴ It would require educators to abandon established, foundational principles in their discipline or to inaccurately portray them as actively debated. Similarly, Florida and Oklahoma banned instruction that "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."³¹⁵ While educators could not teach about the need for affirmative action or other initiatives to remedy past racial discrimi-

³⁰⁶ *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

³⁰⁷ *Rosenberger*, 515 U.S. at 828-89; *see Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n of N. Y.*, 447 U.S. 530, 537 (1980)); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

³⁰⁸ *Rosenberger*, 515 U.S. at 829-30.

³⁰⁹ *See Widmar*, 454 U.S. at 277.

³¹⁰ *R.A.V.*, 505 U.S. at 386; *see Rosenberger*, 515 U.S. at 828.

³¹¹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1981); *see Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (When determining content neutrality, courts consider "whether the government has adopted a regulation of speech without reference to the content of the regulated speech.").

³¹² *See H.B. 7, 2022 Leg. Sess. (Fla. 2022); H.B. 1775, 2021 Leg. Sess. (Okla. 2021).*

³¹³ *H.B. 7, 2022 Leg. Sess. (Fla. 2022); H.B. 1775, 2021 Leg. Sess. (Okla. 2021).*

³¹⁴ Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 28-29, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. Aug. 24, 2022).

³¹⁵ *H.B. 1775, 2021 Leg. Sess. (Okla. 2021); H.B. 7, 2022 Leg. Sess. (Fla. 2022).*

nation, they could condemn these measures.³¹⁶ These laws forbade teaching that “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.”³¹⁷ This restriction limited educators’ ability to introduce research demonstrating that implicit bias is built into these concepts and the decades of disciplinary consensus amongst academics on these topics, but would permit an educator to teach the opposite, despite these positions being long-discredited.³¹⁸ Beyond the text of educational gag orders, the legislative histories indicated an expressed intention to exclude certain types of speech supporting the existence of “privilege,” “oppression,” “systemic racism,” “diversity,” “implicit bias,” “equity,” “white supremacy,” “whiteness,” and “intersectionality.”³¹⁹

We also argued that the very title of Florida’s censorship law, the Stop W.O.K.E. Act, indicates its viewpoint discriminatory intention to exclude “woke” speech, which is defined as “alert to racial or social discrimination or injustice.”³²⁰ Silencing disfavored views about racism or sexism is certainly not a compelling governmental interest and the sweeping language of educational gag orders to effectively exclude most, if not all, classroom discussions of race or sex is not narrowly tailored.

The State of Florida claimed the right to regulate the viewpoints on the subject matter of courses as part of the “content of the education it provides,” consistent with *Rosenberger*.³²¹ According to the State, “anything professors utter in a state university classroom during ‘in-class instruction’ is government speech, and thus, the government can both determine the content of that speech and prohibit the expression of certain viewpoints.”³²² The State relied on case-specific language in *Bishop* that the university must have the “final say” in a disagreement with a professor about the content of

³¹⁶ Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 30, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Aug. 24, 2022).

³¹⁷ H.B. 1775, 2021 Leg. Sess. (Okla. 2021); H.B. 7, 2022 Leg. Sess. (Fla. 2022).

³¹⁸ Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 31-32, *Pernell*, Case No. 4:22-cv-304 (N.D. Fla. Aug. 24, 2022).

³¹⁹ See, e.g., *2/1/22 House State Affairs Committee* at 01:02:00-01:02:29.070, THE FLORIDA CHANNEL (Feb. 1, 2022), <https://thefloridachannel.org/videos/2-1-22-house-state-affairs-committee> [<https://perma.cc/R46A-UTK7>]; Amended Complaint at ¶¶ 44 n. 10, 120 n. 49, *Black Emergency Response Team v. O’Connor* No. 5:21-cv-01022 (W.D. Okla. Nov. 9, 2021) (quoting Press Release, *Bill Prohibiting “Critical Race Theory” Curriculum Passes House*, Okla. H.R. (Apr. 29, 2021), <https://bit.ly/3vTcDSh> [<https://perma.cc/CRM7-YKQP>]); April 29th Okla. House Session at 12:35:59-12:36:15 PM; April 29th House Session at 12:08:20 PM (Rep. Humphrey); Okla. S. 44, 58th Leg. 1st Reg. Sess. (April 21, 2021, 11:29:19-11:29:23 PM) (Sen. Bullard), <https://oksenate.gov/live-chamber> [<https://perma.cc/T9XK-7BBU>].

³²⁰ *Woke*, OXFORD ENGLISH DICTIONARY (3d ed. 2017), <https://public.oed.com/appeals/woke/> [<https://perma.cc/U99P-9VWL>] (last visited Jun. 14, 2023).

³²¹ Defendants’ Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 9, 27, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022).

³²² Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 19, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022).

a course.³²³ Implicit in this argument is the assumption that all powers attributed to public universities also belong to the State, presenting a larger question of whether courts should defer to the whims of politicians in the same way as the judgment of educational professionals.

The district court, in *Pernell*, rejected the State's attempts to conflate viewpoint and content discrimination and clarified that viewpoint discrimination is a "more blatant" and "egregious form of discrimination."³²⁴ Describing the Stop W.O.K.E. Act as "positively dystopian," the court agreed that the law was an unconstitutional viewpoint restriction: "The law officially bans professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints."³²⁵ The court emphasized that the law prevented inviting a guest speaker to argue the merits of affirmative action in a debate, even in a law school course.³²⁶ The law limited educators to discussing affirmative action as a "historical fact" or to condemning it.³²⁷ While the court deferred to the State's "curricular decision to permit instructors to discuss these concepts in its university classroom," there was no authority requiring deference to the State's viewpoint-based restrictions.³²⁸ The court was unequivocal: "[T]he State of Florida, as an employer and educator, cannot restrict university employees from expressing a disfavored viewpoint about a matter within the established curriculum while instructing on that curriculum."³²⁹

2. *Right to information*

According to the Supreme Court, the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society."³³⁰ The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ."³³¹

Students' right to receive information is not limited to messages that the government approves. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . [S]chool officials cannot suppress 'expressions of feeling with

³²³ *Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir 1991).

³²⁴ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 14, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015)).

³²⁵ *Id.* at 2.

³²⁶ *Id.* at 9.

³²⁷ *Id.* at 10.

³²⁸ *Id.* at 95.

³²⁹ *Id.* at 107.

³³⁰ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citation omitted) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)); see *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J. concurring). The First Amendment protects the sender and recipient of information; see also *Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26, v. Pico*, 457 U.S. 853, 867 (1982).

³³¹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

which they do not wish to contend.”³³² Access to ideas “prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”³³³ While local school boards have “significant discretion to determine the content of their school libraries,” they cannot exercise the discretion “in a narrowly partisan or political manner.”³³⁴ In *Board of Education, Island Trees Union Free School District No. 26, v. Pico*, the Supreme Court considered if suppression of ideas was the motivation behind the removal of library books: “If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners’ decision, then petitioners have exercised their discretion in violation of the Constitution.”³³⁵

We argued that educational gag orders violate the students’ right to information by removing topics from classroom discussion for partisan or political purposes. This effort is not driven by pedagogical concerns. To the contrary, research showed that students perform better as a result of the instruction on systemic discrimination and culturally responsive teaching techniques that are excluded by educational gag orders. A high school student plaintiff in Oklahoma explained the way that House Bill 1775’s exclusion of culturally relevant texts reduced their ability to engage and inhibited their ability to learn: “I find it most difficult to connect with subjects and materials when texts lack depth or nuance, or adequate representation of historically marginalized communities.”³³⁶ The student desired to learn about “the histories of BIPOC communities in a more historically accurate manner . . . [and] to learn more about systemic racism and critical race theory.”³³⁷ The student added that instruction was necessary “for all students to understand that oppression is something that is experienced on a structural level, rather than just on an individual basis, so they can begin to think critically about how to combat it when they come across it.”³³⁸ The student noted the importance of this instruction for high school students, writing, “we are at the age where some of us are about to become adults and others already are, making any effort, to shield us from critical issues impacting the ‘real world,’ [is] infantilizing.”³³⁹ Ultimately, a court need not agree that cultur-

³³² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

³³³ *Pico*, 457 U.S. at 868.

³³⁴ *Id.* at 870; *see also* *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943) (“Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.”).

³³⁵ *Pico*, 457 U.S. at 871 (footnote omitted).

³³⁶ Declaration of the S.L. at ¶ 6, *Black Emergency Response Team v. O’Connor* No. 5:21-cv-01022 (W.D. Okla. Oct. 29, 2021).

³³⁷ *Id.* at ¶ 10.

³³⁸ *Id.* at ¶ 12.

³³⁹ *Id.* at ¶ 13.

ally responsive education is desirable in order to recognize the state's censorship as unconstitutionally motivated.³⁴⁰

Most of the case law establishing students' right to information pertains to high school, but we asserted this right on behalf of higher education students in Florida and Oklahoma because the harms of educational gag orders were so pronounced. A higher education student plaintiff in Florida was concerned that the content of her (1) Race & Minority Relations and (2) Religion, Race, & Ethnicity courses would be circumscribed as a result of the Stop W.O.K.E. Act.³⁴¹ She "fear[ed] that [her] professor[s] will not be able to provide all of the information they have in past versions of the course and might water down the views they express about race."³⁴² The plaintiff worried that the professor would be unable to advance central concepts and to fulfill its course objective to analyze how society was structured to benefit or disadvantage people of a certain race or ethnicity.³⁴³ Similarly, a member of the Black Emergency Response Team at the University of Oklahoma (OU), an organizational plaintiff, considered transferring to out-of-state universities due to concerns about the value of social science degrees if she could not engage meaningfully with critical race theory.³⁴⁴ Student plaintiffs in Florida and Oklahoma explained that the educational gag orders would negatively impact campus culture by reducing cultural competence, invalidating diverse narratives, and prompting the departure of valuable educators who are unwilling to limit their instruction.³⁴⁵

The State of Florida argued students had no right to receive information because "public university curriculum. . . is pure government speech that does not implicate the First Amendment."³⁴⁶

The *Pernell* court agreed that the Stop W.O.K.E. Act violated students' right to information. It held that students had a right to receive the information that educators had a First Amendment right to share.³⁴⁷ "[T]he right to receive information comes from both the *sender's* right to provide it and the *receiver's* rights under the First Amendment."³⁴⁸ According to the court, the student's right flows from the educators' right to provide information, it was

³⁴⁰ See *Pico*, 457 U.S. at 871.

³⁴¹ Declaration of Johana Dauphin in Support of Plaintiffs' Motion for a Preliminary Injunction at ¶¶ 18-21, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. Aug. 24, 2022) [*hereinafter* Dauphin].

³⁴² *Id.* at ¶ 21.

³⁴³ *Id.* at ¶¶ 18-21, 24.

³⁴⁴ Declaration of the Black Emergency Response Team at ¶¶ 16-17, *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-01022 (W.D. Okla. Oct. 29, 2021).

³⁴⁵ *Id.* at ¶¶ 15-18; Dauphin, *supra* note 341, at ¶¶ 25-26.

³⁴⁶ Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 19-20, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022).

³⁴⁷ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 31, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022). The preliminary injunction issued by the court did not include the right to information claim in *Pernell* because our student plaintiff's professors did not represent an intention to censor instruction.

³⁴⁸ *Id.*

not an independent right and could not exceed the educators’ right.³⁴⁹ Notably, the court required evidence that the educator teaching the course “will have their speech chilled or will be forced to self-censor” instruction to establish standing.³⁵⁰

3. *Infringement upon academic freedom*

Courts recognize that colleges and universities need broad discretion over their instruction because censorship would “cast a pall of orthodoxy over the classroom.”³⁵¹ Academic freedom, a “special concern of the First Amendment,”³⁵² protects the ability of a university “to make academic judgments as to how to best allocate scarce resources or ‘to determine for itself on academic grounds, who may teach, what may be taught, and who may be admitted to study’” in higher education.³⁵³ It covers the dissemination of ideas, even when offensive.³⁵⁴ Academic freedom has been widely recognized but it has never proclaimed to be a stand-alone right.³⁵⁵

Courts consistently and passionately emphasize the importance of academic freedom in higher education.³⁵⁶ In *Keyishian*, the Supreme Court stressed, “The Nation’s future depends on 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 authoritarian selection.’”³⁵⁷ Similarly, in *Sweezy v. New Hampshire*, the Supreme Court held,

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made.³⁵⁸

³⁴⁹ *Id.* at 31-32.

³⁵⁰ *Id.*

³⁵¹ *Keyishian v. Bd. of Regents of Univ. of New York*, 385 U.S. 589, 603 (1967); *see also* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

³⁵² *Keyishian*, 385 U.S. at 603.

³⁵³ *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

³⁵⁴ *See* *Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 670 (1973); *Adler v. Bd. of Educ. of New York*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting); *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

³⁵⁵ *See* Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 15, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022).

³⁵⁶ *See, e.g.,* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

³⁵⁷ *Keyishian*, 385 U.S. at 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943)).

³⁵⁸ *Sweezy*, 354 U.S. at 250; *see also* *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

The Court emphasized the importance of academic freedom for the social sciences, where it observed, “few, if any principles are accepted as absolutes. . . . Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”³⁵⁹

Courts agree that academic freedom is essential but have been less clear about the scope of academic freedom. While academic freedom undoubtedly covers institutions of higher education,³⁶⁰ there has been less discussion of whether individual educators can assert violations of academic freedom. In *Sweezy*, the court recognized an “unquestionabl[e]” invasion of a professor’s academic freedom when he was held in contempt for refusal to answer questions about his beliefs in Communism and a lecture he delivered to students.³⁶¹ The court also included language that suggested the academic freedom belonged to institutions: “[t]he essentiality of freedom in the community of American universities is almost self-evident.”³⁶² Justice Frankfurter’s concurrence focused on the institutional nature of academic freedom without expressly addressing its application to individuals.³⁶³

Academic freedom has traditionally been recognized in higher education, not K-12 classrooms.³⁶⁴ States and local school boards exercise considerable discretion when operating public schools by establishing curricula, setting instructional standards, and administering exams to ensure consistency of instruction. Nevertheless, schools must comply with the requirements of the First Amendment.³⁶⁵ Courts do not intervene into the daily operation of school systems unless constitutional values are directly and sharply implicated.³⁶⁶

³⁵⁹ *Sweezy*, 354 U.S. at 250.

³⁶⁰ The cases asserting academic freedom on behalf of colleges and universities involved challenges to state action and did not directly address the applicability of the doctrine to individual educators; see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (characterizing academic freedom as “[t]he freedom of a university to make its own judgments as to education. . . .”); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (describing the Court’s “reluctance to trench on the prerogatives of state and local educational institutions and [its] responsibility to safeguard their academic freedom. . . .”); *Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring).

³⁶¹ *Sweezy*, 354 U.S. at 243-44, 250.

³⁶² *Id.* at 250.

³⁶³ *Id.* at 262-67; *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring).

³⁶⁴ Some courts have recognized academic freedom in the K-12 context as well. See *Cary v. Bd. of Ed. of Adams-Arapahoe Sch. Dist. 28-J, Aurora, Colo.*, 427 F. Supp. 945, 955 (D. Colo. 1977), *aff’d*, 598 F.2d 535 (10th Cir. 1979); see also *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) (discussing the academic freedom of a K-12 teacher to assign a reading with a controversial word); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (finding infringement of K-12 teacher’s right to academic freedom).

³⁶⁵ *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)); see *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968).

³⁶⁶ *Epperson*, 393 U.S. at 104.

In Oklahoma and Florida, we argued that restricted instruction in higher education was an unconstitutional infringement on academic freedom. The OU chapter of the American Association of University Professors, one of our organizational plaintiffs, described that the law chilled its members from introducing the discussions, topics, and materials that are necessary for the full scope of their courses.³⁶⁷ It discouraged them from researching sexism and racism.³⁶⁸ At least one educator was instructed not to test on critical race theory and several educators changed their teaching and/or curriculum on racism, whiteness, gender, sexuality, oppression, and colonialism to comply with the law.³⁶⁹ Various educators excluded topics and texts pertaining to these topics from the curriculum altogether.³⁷⁰ The intrusion of educational gag orders into higher education classrooms unconstitutionally limited educators’ ability to fulfill their ethical obligation to teach to the standard of their disciplines.

Despite this evidence, the State of Oklahoma argued that House Bill 1775 did not affect classroom instruction or academic study.³⁷¹ Additionally, the State maintained that academic freedom only belonged to the institution, asserting that the university has discretion to decide “what classes it should offer and what academic requirements it should implement.”³⁷²

Like House Bill 1775 in Oklahoma, the Stop W.O.K.E. Act compromised established academic freedom principles. Professor Plaintiffs were concerned that they could no longer teach texts or lead classroom instruction establishing the effect of systemic racism and sexism, white supremacy, patterns of discriminatory laws and practices, and the ways racism is embedded in the criminal legal system without violating the Stop W.O.K.E. Act.³⁷³ Various professors explained that, in accordance with the foundational principles of their disciplines, they ordinarily teach concepts that directly contravene the viewpoints in the Stop W.O.K.E. Act, including that concepts like meritocracy, colorblindness, neutrality, and objectivity have racist or sexist origins.³⁷⁴

The State of Florida proclaimed the important role of academic freedom but attempted to undermine the impact of this principle.³⁷⁵ The State argued that academic freedom is held by universities, not individuals, and that aca-

³⁶⁷ Declaration of the University of Oklahoma Chapter of American Association of University Professors at ¶¶ 9, 12-14, 16, 18, 21-22, *Black Emergency Response Team v. O’Connor*, No. 5:21-cv-01022 (W.D. Okla. Oct. 29, 2021).

³⁶⁸ *Id.* at ¶ 8.

³⁶⁹ *Id.* at ¶¶ 13-14, 21.

³⁷⁰ *Id.* at ¶ 14.

³⁷¹ Defendants’ Response and Objection to Plaintiffs’ Motion for Preliminary Injunction at 6, *Black Emergency Response Team*, No. 5:21-cv-01022 (W.D. Okla. Dec. 16, 2021).

³⁷² *Id.* at 2.

³⁷³ Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 11-14, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304, (N.D. Fla. Aug. 24, 2022).

³⁷⁴ *Id.* at 15, 25, 32-33.

³⁷⁵ Defendants’ Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 14-15, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022).

democratic freedom only protects the autonomy of institutions of higher learning from the judiciary, not the State.³⁷⁶ Under *Bishop*, according to the State, educators “have no independent right of academic freedom to control curriculum.”³⁷⁷ The State’s effort to conflate the powers of the university with those of the State continued here. The State argued that *Bishop*’s case-specific pronouncement that educators always lose in disputes with the university about the content of curriculum or courses means educators cannot win a disagreement against the State.³⁷⁸

The *Pernell* court rejected the State of Florida’s attempts to minimize academic freedom. Noting the irony of the State’s position, the court declared “under this Act, professors enjoy ‘academic freedom’ so long as they express only those viewpoints of which the State approves.”³⁷⁹ The court considered the interest in academic freedom to be “of the highest degree” because educators sought to avoid orthodoxy of viewpoints imposed by the State, unlike the professor’s interest in *Bishop*.³⁸⁰ The court clarified that, while a weighty consideration in the *Bishop* balancing, academic freedom is not an independent First Amendment right in the Eleventh Circuit.³⁸¹

4. *Overbreadth*

An educational gag order may be invalidated as overbroad under the First Amendment “if a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.”³⁸² As an initial matter, courts consider whether the statute covers constitutionally protected speech and/or conduct.³⁸³ Next, courts carefully consider the substantiality of the overbreadth, especially when conduct, not just speech, was implicated.³⁸⁴ They also weigh the risk of “selective enforcement against unpopular causes.”³⁸⁵ As a general matter, one impermissible application is not sufficient to invalidate a law for overbreadth.³⁸⁶ Additionally, the overbreadth inquiry is not limited to improperly proscribed conduct.³⁸⁷

³⁷⁶ *Id.* at 17-18.

³⁷⁷ *Id.* at 16.

³⁷⁸ Transcript of Merged Preliminary Injunction Proceedings at 44:04-12, *Pernell*, No. 4:22-cv-304, and *Novoa v. Diaz*, Case No. 4:22-cv-324 (N.D. Fla. Oct. 13, 2022).

³⁷⁹ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 2, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022).

³⁸⁰ *Id.* at 105.

³⁸¹ *Id.*

³⁸² *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 449 (2008)).

³⁸³ *Id.* at 474 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

³⁸⁴ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

³⁸⁵ *NAACP v. Button*, 371 U.S. 415, 435 (1963).

³⁸⁶ *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

³⁸⁷ *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 756 (1988) (quoting *Freedman v. Maryland*, 380 U.S. 51, 56 (1965)).

Courts are concerned by the chilling effect of overbroad statutes. “[T]he very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose conduct may be unprotected.”³⁸⁸ Inherent in this fact-specific inquiry is a determination of whether the danger of infringement on First Amendment protections is realistic and not just conceivable.³⁸⁹ Courts are especially concerned where the statute’s overbreadth limited conduct and speech.³⁹⁰ Due to the chilling effect of overbroad statutes, facial challenges may proceed.³⁹¹

Educational gag orders are susceptible to overbreadth challenges. Oklahoma House Bill 1775 instructed schools not to require or make restricted concepts part of a course.³⁹² The law had a chilling effect on all discussions of race or sex in classrooms. For example, Oklahoma House Bill 1775 prohibited educators from “making the concept that ‘one race or sex is inherently superior to another race or sex’” part of a course.³⁹³ This provision excluded all discussions of racism and sexism in instruction, making it impossible to contextualize history, such as slavery or the Jim Crow era. It also prevented discussion about the lived experiences of marginalized people who continue to experience these effects. Beyond classroom discussions, this law prohibits the introduction of curricula or instructional materials too. The potential for selective enforcement is undeniable, given the expressed goal of legislators to exclude discussions that promoted anti-racism, racial justice, or DEI.³⁹⁴

ii. *Fourteenth Amendment Claims*

Our classroom censorship litigation team challenged educational gag orders as unconstitutionally vague and intentional discrimination, in violation of the Fourteenth Amendment. Unlike the First Amendment rights, the scope of these claims does not vary in the primary, secondary, or higher education context.

I. *Vagueness*

An educational gag order violates the Fourteenth Amendment’s due process protections when (1) its prohibitions are not clear to people of ordinary intelligence or (2) it permits or encourages arbitrary and discriminatory

³⁸⁸ *Members of City Council of City of Los Angeles*, 466 U.S. at 798.

³⁸⁹ *Id.* at 801.

³⁹⁰ *New York v. Ferber*, 458 U.S. 747, 770 (1982).

³⁹¹ *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)

³⁹² H.B. 1775, 2021 Leg. Sess. (Okla. 2021).

³⁹³ *Id.*

³⁹⁴ Press Release, Rob Standridge, *Sen. Standridge Issues Statement Thanking Fellow Members for Supporting HB 1775* (Apr. 22, 2021), <https://oksenate.gov/press-releases/standridge-issues-statement-thanking-fellow-members-supporting-hb-1775> [https://perma.cc/JM3U-QHZD].

enforcement.³⁹⁵ The fact that an educator may be able to describe some discussions that fall within the provision's scope does not make it constitutional.³⁹⁶ The Supreme Court struck down an ordinance in *Hynes v. Mayor and Council of the Borough of Oradell* for reasons that likely apply to educational gag orders.³⁹⁷ First, the ordinance was void for vagueness because its application to certain circumstances or groups was unclear.³⁹⁸ Second, the ordinance did not "sufficiently specify what those within its reach must do in order to comply."³⁹⁹ Finally, the ordinance failed to "provide explicit standards for those who apply it."⁴⁰⁰ In facial vagueness challenges, courts consider whether a law or enactment impacts a "substantial amount of constitutionally protected conduct."⁴⁰¹

Vagueness concerns are heightened where First Amendment concerns are also at issue.⁴⁰² Voluntary self-censorship of constitutionally protected conduct, recognized as chill, is actionable under the vagueness doctrine. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."⁴⁰³ Educators have consistently reported avoiding certain topics that they would normally discuss with students because they were not sure of the parameters of educational gag orders.

The potential for arbitrary and discriminatory enforcement leaves educational gag orders vulnerable to vagueness challenges. Plaintiffs challenging the higher education provisions of Oklahoma House Bill 1775 and the Stop W.O.K.E. Act in Florida expressed concern that BIPOC and/or LGBTQ+ professors would become targets for complaints under these laws because they were perceived as less objective when they discussed race or sex.⁴⁰⁴ High school educators challenging New Hampshire's House Bill 2

³⁹⁵ *Hill v. Colorado*, 530 U.S. 703, 732 (2000); see *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982); *City of Chicago v. Morales*, 537 U.S. 41, 59-64 (1999).

³⁹⁶ See *Johnson v. United States*, 576 U.S. 591, 602 (2015); Memorandum and Order at 30-31, *Local 8027 v. Edelblut*, No. 1:21-cv-01077 (D.N.H. Jan. 12, 2023).

³⁹⁷ 425 U.S. 610 (1976).

³⁹⁸ *Id.* at 621.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 622.

⁴⁰¹ *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494-95 (1982).

⁴⁰² *Hynes*, 425 U.S. at 620.

⁴⁰³ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

⁴⁰⁴ Declaration of the University of Oklahoma Chapter of American Association of University Professors at ¶ 7, *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-01022 (W.D. Okla. Oct. 29, 2021); Declaration of Jennifer Sandoval in Support of Plaintiffs' Motion for a Preliminary Injunction at ¶ 20, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. Aug. 24, 2022) (noting the risks "particularly for gender-nonconforming and darker-skinned professors who are perceived differently when they talk about gender and race"); Declaration of Shelley Park in Support of Plaintiffs' Motion for a Preliminary Injunction at ¶ 35, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Aug. 24, 2022); Declaration of Dana Thompson Dorsey in Support of Plaintiffs' Motion for a Preliminary Injunction at ¶ 58, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Aug. 24, 2022).

noted that the law lacked enforcement standards or procedures to substantiate violations, various state entities had independent enforcement authority, and the likelihood that the law was enforced in a discriminatory manner based on statements from the Commissioner of Education.⁴⁰⁵

Courts found that the prohibited concepts of educational gag orders in Florida and New Hampshire, as well as the restricted concepts of EO 13950, were unconstitutionally vague. The district court, in *Pernell*, recognized the higher education provision of the Stop W.O.K.E. Act are unconstitutionally vague.⁴⁰⁶ The State argued that the prohibited concepts are not vague because they use plain language and words found in the dictionary.⁴⁰⁷ The court determined the wording of some of the prohibited concepts was vague, describing them as “mired in obscurity, bordering on unintelligible. . . [and] resulting in a cacophony of confusion.”⁴⁰⁸ For example, concept four included a triple negative: “educators *cannot* endorse the view that ‘[m]embers of one race, color, sex, or national origin *cannot and should not* attempt to treat others *without* respect to race, color, sex, or national origin.’”⁴⁰⁹ Alternatively, the State used the Plaintiffs’ declarations to argue that they understood the terms in the prohibited concepts.⁴¹⁰ While this may be true in the abstract, context matters. The court held that a generalized understanding of objectivity does not clarify the application of the law or implementing regulation to future instruction or training.⁴¹¹

Relying on Eleventh Circuit precedent, the *Pernell* court required each Plaintiff to “show that (1) he seriously wishes to speak; (2) such speech would arguably be affected by the challenged prohibition, but the rules are at least arguably vague as they apply to him; and (3) there is at least a minimal probability that the rules will be enforced if they are violated.”⁴¹² The court also found that the clause stating that the prohibited concepts may be discussed in courses objectively and without endorsement—a so-called savings clause—was also vague because the meaning of this provision is “utterly ambiguous.”⁴¹³ The court “construe[d] ‘objective’ to mean ‘expressing or

⁴⁰⁵ Plaintiff’s Joint Memorandum of Law in Opposition to Defendants’ Motion to Dismiss at 23-39 *Local 8027 v. Edelblut*, No. 1:21-cv-01077 (D.N.H. May 20, 2022).

⁴⁰⁶ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 125, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022); Preliminary Injunction, Honeyfund.com, Inc. v. DeSantis, No. 4:22-CV-227 (N.D. Fla. Aug. 18, 2022) (finding the workplace provisions of the Stop W.O.K.E. Act to be unconstitutionally vague for many of the same reasons).

⁴⁰⁷ Defendants’ Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 25-26, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022).

⁴⁰⁸ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 114, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022).

⁴⁰⁹ *Id.* at 114; H.B. 7, 2022 Leg. Sess. (Fla. 2022).

⁴¹⁰ Defendants’ Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 27, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022).

⁴¹¹ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 116, *Pernell* No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022).

⁴¹² *Id.* at 82-83; see Harrell v. Fla. Bar, 608 F.3d 1251, 1254 (11th Cir. 2010).

⁴¹³ Order Granting in Part and Denying in Part Motions for Preliminary Injunction at 83, 119, *Pernell* No. 4:22-cv-304 (N.D. Fla. Nov. 17, 2022).

dealing with facts or conditions as perceived without distortion of personal feelings, prejudice, or interpretation.”⁴¹⁴ However, the State attempted to redefine “objective” to only permit critique, not approval.⁴¹⁵ The court emphasized that this definition did not comport with common sense. Because this clause covered all of the prohibited concepts, the court held that the entire law was impermissibly vague.⁴¹⁶ Finally, the court mentioned the potential for arbitrary enforcement. The lack of “explicit standards to circumscribe enforcement of ‘objectivity,’” particularly with controversial concepts enumerated in the law, permits the State to weaponize the term to discredit viewpoints it does not like.⁴¹⁷

The Plaintiffs’ vagueness claim survived the motion to dismiss in our New Hampshire challenge.⁴¹⁸ The court emphasized the paramount “need for clarity” because the law had “explicit viewpoint-based speech limitations that [sic] arguably affect[ed] both the curricular and extracurricular speech of public primary and secondary school teachers,” the law “authorize[d] severe consequences for a violator,” and the law “fail[ed] to incorporate a scienter requirement.”⁴¹⁹ According to the court, House Bill 2 “does not give teachers fair notice of what they can and cannot teach;” requires them “to teach topics that potentially implicate several of the banned concepts;” and sanctions harsh penalties, including termination and loss of teaching credentials, “for speech that [teachers] do not intend to advocate a banned concept . . . [or] for speech that is later deemed to violate the amendments only by implication.”⁴²⁰ For example, educators are required to teach the historical existence of racial discrimination but would face sanctions if they mentioned remedies for past discrimination, such as reparations.⁴²¹ Particularly concerned that a teacher could unknowingly violate the law, the court asked “If a high school teacher attempts to explain the diversity argument to her class during a discussion of [the race-conscious admissions case before the Supreme Court], will she face sanctions for teaching a banned concept? We simply don’t know.”⁴²² In allowing the claims to proceed, the court clarified that it did not require the Plaintiffs to establish that all of the law’s applications were unconstitutional.⁴²³

When enjoining the enforcement of the EO 13950 nationwide, a California court expressed many of the same concerns. It noted that a contractor

⁴¹⁴ *Id.* at 119.

⁴¹⁵ *Id.* at 116-18.

⁴¹⁶ *Id.* at 125.

⁴¹⁷ *Id.* at 124-25.

⁴¹⁸ Memorandum and Order at 42, *Local 8027 v. Edulbut*, No. 21-CV-01077 (D.N.H. Jan. 12, 2023).

⁴¹⁹ *Id.* at 32-33.

⁴²⁰ *Id.* at 37.

⁴²¹ *Id.* at 38.

⁴²² *Id.* at 35-36.

⁴²³ *Id.* at 30-31.

was prohibited from inculcating [restricted concepts] in its employees.”⁴²⁴ The court held that “[t]he line between teaching or implying (prohibited) and informing (not prohibited) was ‘so murky, enforcement of the ordinance poses a danger of arbitrary and discriminatory application.’”⁴²⁵ Educational gag orders that permitted discussion but not endorsement of restricted concepts are subject to the same analysis.

2. *Equal Protection: Racial Discriminatory Purpose*

Violations of the Equal Protection Clause of the Fourteenth Amendment require proof of (1) racially discriminatory intent or purpose by a legislature or administrative body and (2) an actual discriminatory effect.⁴²⁶ Courts first determine if the legislation is neutral on its face or if it makes a race-based classification, whether overt or covert, then evaluate the existence of invidious racial discrimination based on the adverse effects of the law.⁴²⁷ Racial discrimination does not have to be the only, primary, or dominant concern; judicial deference is not justified when it was *a* motivating factor in a decision.⁴²⁸ Discriminatory purpose requires more than volition or awareness of consequences; it means the decision maker took an action “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”⁴²⁹ Courts conduct a fact specific inquiry into circumstantial and direct evidence to ascertain discriminatory intent.⁴³⁰ In *Arlington Heights*, the Supreme Court considered five non-exhaustive factors to identify “a clear pattern, unexplainable on grounds other than race . . . from the effect of the state action even when the governing legislation appeared neutral on its face:” (1) the impact of the challenged law, (2) historical background of the decision, (3) specific sequence of events leading up to the challenged decision, (4) procedural and substantive departures, and (5) legislative or administrative history, including contemporaneous statements by members of the decision making body, minutes of meetings, or reports.⁴³¹ Courts look for evidence of disparate impact, or when the adverse effect is felt more heavily on one race than another, but this finding is insufficient on

⁴²⁴ *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543 (N.D. Cal. 2020).

⁴²⁵ *Id.* at 544 (quoting *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011)).

⁴²⁶ *See* *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (noting that plaintiffs “were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group” to establish an equal protection claim); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”); *see also* *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

⁴²⁷ *See* *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979).

⁴²⁸ *Vill. of Arlington Heights*, 429 U.S. at 265-66.

⁴²⁹ *Pers. Adm’r of Massachusetts*, 442 U.S. at 279.

⁴³⁰ *Vill. of Arlington Heights*, 429 U.S. at 266.

⁴³¹ *Id.* at 266-68.

its own to establish a violation under the Equal Protection Clause.⁴³² Ultimately, “the Fourteenth Amendment guarantees equal laws, not equal results.”⁴³³ Circuits have added and/or collapsed these factors.⁴³⁴ Laws motivated by a racial purpose are subject to strict scrutiny, and the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.⁴³⁵

The Ninth Circuit’s equal protection analysis in *Arce v. Douglas* is instructive for educational gag orders.⁴³⁶ In *Arce*, the Arizona legislature passed House Bill 2281, which eliminated a Mexican American Studies (MAS) program to provide culturally relevant curriculum in Tucson public schools.⁴³⁷ Critics of MAS claimed the program promoted ethnocentrism and racism against white people.⁴³⁸ The law prohibited any courses or classes that would “[p]romote the overthrow of the United States government . . . [p]romote resentment toward a race or class of people . . . [a]re designed primarily for pupils of a particular ethnic group . . . or [a]dvocate for ethnic solidarity instead of the treatment of pupils as individuals.”⁴³⁹

The court applied the *Arlington Heights* factors to evaluate if the statute was racially discriminatory.⁴⁴⁰ In finding a disparate impact, the court noted that people of Mexican or Latinx descent comprised 60 percent of students in the district and 90 percent of students in the MAS program.⁴⁴¹ The court looked for evidence of “camouflaged” discriminatory intent based on contemporaneous statements from legislators and the Attorney General that the program created “racial warfare” and taught that “the white man’s evil,” as well as the administrative history, the court found that the law targeted the MAS program.⁴⁴² An audit of more than a third of high school MAS courses found no evidence that the “courses promoted resentment towards a race or class of people, nor that they were necessarily designed for pupils of a particular ethnic group, as all students were welcomed into the program.”⁴⁴³ However, the Superintendent of Public Instruction disregarded this finding and commissioned another study of MAS course materials and the program website and concluded that the MAS program violated H.B. 2281.⁴⁴⁴ The

⁴³² *Id.* at 265-56; *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (“in order to succeed, the *Bandemer* plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”).

⁴³³ *Pers. Adm’r of Massachusetts*, 442 U.S. at 273.

⁴³⁴ *See, e.g., Greater Birmingham Ministries v. Secretary of State of Alabama*, 992 F. 3d 1299 (11th Cir. 2021).

⁴³⁵ *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

⁴³⁶ *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015).

⁴³⁷ *Id.* at 973.

⁴³⁸ *Id.* at 973-74.

⁴³⁹ *Id.* at 973 (quoting *Ariz. Revised Statutes* § 15-112 (A)(2011)).

⁴⁴⁰ *Id.* at 978-81.

⁴⁴¹ *Id.* at 978.

⁴⁴² *Id.* at 978-80; *González v. Douglas*, 269 F. Supp. 3d 948, 955 (D. Ariz. 2017).

⁴⁴³ *Arce v. Douglas*, 793 F.3d 968, 980 (9th Cir. 2015).

⁴⁴⁴ *Id.*

Arce court held that there was “at least a plausible inference that racial animus underlay the passage of the legislation.”⁴⁴⁵ It ultimately struck down one provision of the law on First Amendment grounds because it “threaten[ed] to chill the teaching of ethnic studies courses . . . without furthering the legitimate pedagogical purpose of reducing racism.”⁴⁴⁶ It upheld a different provision of the law that did “not restrict . . . class discussions.”⁴⁴⁷ On remand, in *González v. Douglas*, the court found discriminatory intent on behalf of the legislature.⁴⁴⁸ It was particularly moved by contemporaneous statements from legislators that demonstrated the racial animus motivating the decision to enact the bill, including that the MAS “teaches ‘ethnic chauvinism,’” and that students were “dissed [sic] for being white.”⁴⁴⁹ The court also highlighted (1) the disproportionate impact on Latinx students, who comprised the overwhelming majority of students enrolled in MAS courses and, according to an expert, particularly benefited from the program; (2) its historical background, including the history of racial segregation into the twentieth century and successful desegregation lawsuits; (3) that the bill targeted one program in a single school district and the existence of statutes to address the purported wrongs with the MAS program, which provided evidence towards the sequence of events and procedural and substantive departures; and (4) overtly discriminatory statements in the legislative history.⁴⁵⁰ The court flagged the use of derogatory code words to reference Mexican Americans, including “un-American,” “radical,” and “communist.”⁴⁵¹ The court additionally focused on discriminatory enforcement of the law against the MAS program and concluded that the passage and enforcement of the law were motivated by racial animus.⁴⁵²

Based on the factual circumstances, the litigation teams in Oklahoma and Florida brought equal protection challenges to the educational gag orders. Failure to provide race conscious instruction “can have a significant effect on students whose stories or life experiences are not regular lessons or educational materials.”⁴⁵³ Student plaintiffs in Florida and Oklahoma emphasized the erasure of BIPOC perspectives from courses and curriculum due to the educational gag orders, and expressed concerns about increased hostility towards Black students on campus, including an uptick in the use of racial slurs towards them.⁴⁵⁴

⁴⁴⁵ *Id.* at 979.

⁴⁴⁶ *Id.* at 986.

⁴⁴⁷ *Id.* at 985.

⁴⁴⁸ *González*, 269 F. Supp. 3d at 955, 969 (D. Ariz. 2017).

⁴⁴⁹ *Id.* at 965, 967.

⁴⁵⁰ *Id.* at 965-67.

⁴⁵¹ *Id.* at 967.

⁴⁵² *Id.* at 968-69, 72.

⁴⁵³ National Education Association & the Law Firm Alliance, *supra* note 41, at 17.

⁴⁵⁴ Dauphin, *supra* note 340, at 25, *Pernell v. Fla. Bd. of Governors*, No. 4:22-cv-304 (N.D. Fla. Aug. 24, 2022); Decl. of Black Emergency Response Team at ¶¶ 16-18, *Black Emergency Response Team v. O’Connor*, No. 5:21-cv-01022 (N.D. Okla. Oct. 29, 2021).

In Florida, our litigation team argued that the Stop W.O.K.E. Act intentionally discriminated against Black educators and students. Black educators were more likely to be hired for untenured positions and to teach courses related to race. For example, Black educators comprised the majority of faculty in African American Studies departments at three Florida universities.⁴⁵⁵ Black students would be denied access to race-related instruction.⁴⁵⁶ “Florida’s history of systemic racism, anti-Black violence, and the suppression of Black participation in civil and social arenas” provided context for the passage of the Stop W.O.K.E. Act.⁴⁵⁷ The litigation team pointed to the issuance of anti-racism statements by departments in colleges and universities across the state and racial justice protests led by Black students, educators, and activists as important events in the sequence preceding the Stop W.O.K.E. Act.⁴⁵⁸

The team also noted that the Florida legislature passed two other laws to thwart progress towards racial justice before the Stop W.O.K.E. Act: House Bill 1, which “increased criminal penalties for various protest activities,” and Senate Bill 90, a voting law that targeted “the very voting methods used by most Black Floridians.”⁴⁵⁹ In accordance with the law’s name, an attack on “woke” speech, various state officials described their “intent to curtail speech about white privilege, [c]ritical [r]ace [t]heory, and systemic racism.”⁴⁶⁰ The procedural and substantive irregularities included adoption of prohibited concepts from EO 13950 more than a year after they were enjoined by a federal court, lack of evidence of indoctrination of students, failure to consult with educators on the bill, and the rushed inclusion of enforcement language authorizing the withholding of funds to universities in a budget appropriation bill.⁴⁶¹ Taken together, we argued that these factors established that the Stop W.O.K.E. Act in Florida was passed to target Black educators and students, with a racially discriminatory purpose and effect.

In Oklahoma, the litigation team highlighted H.B. 1775’s intentional discrimination against students of color. The team introduced Oklahoma’s history of racial and gender discrimination, as well as the recent racist incidents on OU’s campus that prompted the university to require students to attend a mandatory diversity course that was no longer required after H.B. 1775.⁴⁶² Racial justice protests across the state led students, educators, and parents to demand an increase in culturally responsive education, which is

⁴⁵⁵ Plaintiffs’ Opposition to Defendants’ Motion to Dismiss at 19, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Oct. 4, 2022).

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 22.

⁴⁵⁸ *Id.*

⁴⁵⁹ Complaint at ¶ 95, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Aug. 18, 2022).

⁴⁶⁰ Plaintiffs’ Opposition to Defendants’ Motion to Dismiss at 25, *Pernell*, No. 4:22-cv-304 (N.D. Fla. Oct. 4, 2022).

⁴⁶¹ *Id.* at 26.

⁴⁶² Amended Complaint at ¶¶ 13, 186, *Black Emergency Response Team v. O’Connor* at ¶¶ 13, 186, No. 5:21-cv-01022 (W.D. Okla. Nov. 9, 2021).

important in the historical context for the educational gag order’s exclusion of this instruction.⁴⁶³ The exclusion of speech “to enhance the educational, social and civic experiences of students of color” will “disparately harm students of color, with compounded harms for students of color who also identify as women, girls, and LGBTQ+.”⁴⁶⁴ Oklahoma legislators departed from procedural norms in order to pass the classroom censorship bill before the close of the session. They missed the filing deadline for new legislation so they picked an unrelated bill about plans for medical emergencies at schools’ athletic events and completely replaced the content to instead exclude discussions of race and sex discrimination from classrooms and school trainings.⁴⁶⁵ Legislators in Oklahoma encouraged others to support educational gag orders in order to keep references to “Black Lives Matter,” “white supremacy,” “intersectionality” or “wokeness” out of schools.⁴⁶⁶ The statements often revealed racial and partisan motivations. The examples also demonstrated the targeted nature of the speech; legislators did not mention the racist rhetoric espoused by white people as inappropriate for classrooms.

At the time of writing, neither court has ruled on the equal protection claims.

VI. CONCLUSION

Rufo reportedly “described ‘the fight against critical theory’ as ‘the most successful counterattack against B[lack] L[ives] M[atter] as a political movement.’⁴⁶⁷ While the anti-“critical race theory” movement has spread quickly and continues to evolve, I remain encouraged that this fight is not over. Classroom censorship is not a foregone conclusion. Parents and advocates organized across the country to defeat proposed classroom censorship litigation during the 2022 legislative cycle, even in conservative states like Indiana and South Carolina. The resistance movement also drew upon the voices and skillsets of students, policy advocates, lawyers, educators, researchers, communications specialists, and politicians. Their success often resulted from collaboration between historically marginalized groups and is a direct testament to the power of organizing.

Additionally, litigation appears to be a promising avenue to challenge educational gag orders. We won early victories in our classroom censorship litigation, including the issuance of a preliminary injunction blocking enforcement of the higher education provisions of Florida’s Stop W.O.K.E. Act

⁴⁶³ *Id.* ¶¶ 13, 78.

⁴⁶⁴ *Id.* ¶ 184.

⁴⁶⁵ H.B. 1775, 2021 Leg. Sess. (Okla. 2021).

⁴⁶⁶ Amended Complaint (W.D. Okla. Nov. 9, 2021); Press release, *supra* note 387.

⁴⁶⁷ Daniel Golden, *It’s Making Us More Ignorant*, THE ATLANTIC (Jan. 3, 2023), <https://www.theatlantic.com/ideas/archive/2023/01/ron-desantis-florida-critical-race-theory-prosors/672507/> [https://perma.cc/K98A-7B72].

and the survival of our claims against motions to dismiss in Florida and New Hampshire. I hope courts will continue to recognize how educational gag orders violate the constitutional rights of students and educators.

While litigation is an important tool in this fight, it has limitations. As an initial matter, litigation takes time. Attorneys need to listen to people impacted by educational gag orders, identify legal claims based on a close review of the legislation, obtain evidence to support the claims, draft and file legal documents, and adhere to the scheduling order set by the court. None of these things can happen overnight. Furthermore, litigation cannot keep pace with the breakneck speed of conservatives seeking to remove race-conscious instruction in schools. In less than five months in Florida, Gov. DeSantis required institutions in the State University System to report all activities involving DEI or critical race theory;⁴⁶⁸ appointed new Board of Trustees members, including Rufo, in a hostile takeover of New College, a liberal arts college to conduct a “top-down restructuring” of the institution;⁴⁶⁹ and rejected the College Board’s Advanced Placement African-American History course, stating that it “significantly lacks educational value.”⁴⁷⁰ Governor DeSantis also introduced a legislative proposal that became Senate Bill 266, which he signed into law, to broaden the attack on higher education.⁴⁷¹ Whereas the Stop W.O.K.E. Act prohibited training or instruction on certain topics, S.B. 266 expands those prohibitions to curriculum on these concepts “or that is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.”⁴⁷² Notably, it forbids the use of state or federal funds for programs or campus activities that advocate for DEI or “promote or engage in political or social activism.”⁴⁷³ Consistent with the New College takeover, S.B. 266 vests power in the state university president to fire the provost, deans, and all full-time faculty.⁴⁷⁴ Finally, the law prohibits universities from issuing statements, foreclosing their ability to affirm their support for stu-

⁴⁶⁸ Caroline Downey, *DeSantis Admin Orders State Universities to Report DEI, CRT Spending*, NATIONAL REVIEW (Jan. 4, 2023), <https://www.nationalreview.com/news/desantis-admin-orders-state-universities-to-report-dei-crt-spending/> [<https://perma.cc/VW4G-M27N>].

⁴⁶⁹ Benjamin Wallace-Wells, *What Is Ron DeSantis Doing to Florida’s Public Liberal Arts College?*, THE NEW YORKER (Feb. 22, 2023), <https://www.newyorker.com/news/the-political-scene/what-is-ron-desantis-doing-to-floridas-public-liberal-arts-college> [<https://perma.cc/7ES6-UVAC>].

⁴⁷⁰ Aaron Navarro, *DeSantis defends rejecting African American studies course, says it’s “indoctrination,”* CBS NEWS (Jan. 23, 2023), <https://www.cbsnews.com/news/ron-desantis-african-american-history-florida-press-conference-today-2023-01-23/> [<https://perma.cc/8W93-N3F5>].

⁴⁷¹ Press Release, Governor Ron DeSantis, *Governor DeSantis Elevates Civil Discourse and Intellectual Freedom in Higher Education* (Jan. 31, 2023), <https://www.flgov.com/2023/01/31/governor-desantis-elevates-civil-discourse-and-intellectual-freedom-in-higher-education/> [<https://perma.cc/6XSB-KHQ6>].

⁴⁷² S.B. 266, 2023 Fla. Leg. Session (Fla. 2023).

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

dents of color or to vocalize the importance of DEI as they did during the racial reckoning of 2020, and requires post-tenure review of higher education faculty in a campaign to use intimidation to force compliance.⁴⁷⁵ A parallel attack on gender identity ensued: the Florida legislature expanded the Don’t Say Gay law’s blanket proscriptions on instruction about sexual orientation or gender identity to eighth grade instead of early education and only permits instruction in high school if it is deemed age appropriate.⁴⁷⁶ It also banned the use of personal titles and pronouns in K-12 education while mandating instruction that sex is “binary, stable, and unchangeable.”⁴⁷⁷ Litigation cannot be the only tool to resist these efforts. Beyond the time considerations, litigation offers a limited scope of relief. As a former teacher, I believe all students deserve race conscious instruction. However, no court has recognized this belief as a constitutional right. At best, our legal claims prevent the most censorious actions by states. Litigation is an insufficient tool to craft an affirmative position on what race conscious instruction belongs in schools.

Though imperfect, litigation is one of many methods we must utilize to fight for racial justice and race conscious instruction in schools. While daunting, I believe that we will ultimately succeed.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Florida Board of Education approves ‘Don’t Say Gay’ expansion*, NBC NEWS (Apr. 19, 2023), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/dont-say-gay-expansion-requested-desantis-approved-rcna80467> [<https://perma.cc/668N-75PT>].

⁴⁷⁷ H.B. 7, 2022 Leg. Sess. (Fla. 2022).

