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NOTE

THE ATTACK ON CRITICAL RACE THEORY IN SCHOOLS: AN ANALYSIS OF OKLAHOMA HOUSE BILL 1775 AND FREE SPEECH IN THE CLASSROOM

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I. Introduction

In the American public educational system, "[e]ducation is primarily a State and local responsibility" with little oversight from the federal government.[1] The last few years have seen state and local leaders turn the public education system into their own political playground, creating more division and confusion for educators, parents, and

* Juris Doctor candidate, Oklahoma City University School of Law, May 2024. This Note is dedicated to all of the educators in my life, especially my grandmother, Jennie Smith, who encouraged my love for learning from the very beginning. I also dedicate this work to my parents Troy and Kathy, the rest of my family, and my friends, who have been constant sources of support throughout my law school journey. Thank you for being there for me every step of the way. A special thank you to my faculty supervisor, Professor Marc Blitz, for his guidance during this project. Finally, thank you to the members of OCU Law Review for making this publication possible.

* This Note references active litigation and is current as of December 9, 2023.

1. *The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html (last visited Dec. 11, 2023).

students. Since January 2021, thirty-five states have introduced over one hundred new bills regulating the content of public school curriculum in relation to race, gender, and sexual orientation.[2] These new state policies vary, but they serve a similar purpose for many of the legislators authoring these bills: to rid the classroom of Critical Race Theory—or what these legislators perceive Critical Race Theory to be—under the guise of forging an environment of equality.

Critical Race Theory (or "CRT") is defined as "an academic and legal framework that denotes that systemic racism is part of American society."[3] Early Critical Race Theory scholars rooted their framework in the following tenets:

> the belief that racism is a fundamental part of American society, not simply an aberration that can be easily corrected by law; that any given culture constructs its own social reality in its own self-interest, and in the United States this means that minorities' interests are subservient to the system's self-interest; and that the current system, built by and for white elites, will tolerate and encourage racial progress for minorities only if this promotes the majority's self-interest.[4]

This theory developed within the legal community during the 1970s and 1980s as a response to the belief that the Civil Rights Movement had accomplished its goal and ended racism in the United States.[5] More specifically, Critical Race Theory "challenges the ability of conventional legal strategies to deliver social and economic justice and specifically calls for legal approaches that take into consideration race as a nexus of American life."[6]

Kimberlé Williams Crenshaw, the professor accredited with giving Critical Race Theory its name, has been quoted as saying

2. Terry Gross, *From slavery to socialism, new legislation restricts what teachers can discuss*, NPR (Feb. 3, 2022), https://www.npr.org/2022/02/03/1077878538/legislation-restricts-what-teachers-can-discuss.

3. *Critical Race Theory Frequently Asked Questions*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/critical-race-theory-faq/ (last visited Dec. 11, 2023).

4. *Id.*

5. *Id.*

6. Chris Demaske, *Critical Race Theory*, FREE SPEECH CTR. (Aug. 7, 2023), https://www.mtsu.edu/first-amendment/article/1254/critical-race-theory.

> "[Critical Race Theory] is 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."[7]

Despite Critical Race Theory developing in the 1970s, most Americans had never heard of it until presidential candidates in 2020 began using it in their stump speeches around the country.[8] Since the term Critical Race Theory entered the common vernacular, its meaning has become distorted.

Critical Race Theory rests on the idea that systems and practices within American society are deeply embedded with racism due to the manner in which they were created, not because individual Americans are inherently racist.[9] However, many people, especially those authoring the pieces of legislation banning Critical Race Theory, struggle to separate themselves from those systems and view the theory as calling all white people inherently racist.[10] Jennifer Victor, a political scientist at George Mason University, stated in an interview with PBS that "Republicans' focus on critical race theory is a part of [a] cycle of backlash. Critical Race Theory is a convenient, although largely misplaced, villain for anyone seeking to challenge the idea that racism is systemic in American society."[11]

Many Republican-controlled state legislatures around the country have implemented, or are trying to implement, legislation that bans what they believe is Critical Race Theory. Critics of Critical Race Theory allege that the theory "leads to negative dynamics, such as a focus on group

7. Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html.

8. *Id.*

9. Rashawn Ray & Alexandra Gibbons, *Why are states banning critical race theory?*, BROOKINGS INST. (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/.

10. *Id.*

11. Adam Kemp, *Some Oklahoma teachers say they're 'walking on eggshells.' Will this midterm* race *help?*, PBS NEWS HOUR (Oct. 31, 2022), https://www.pbs.org/newshour/politics/teachers-say-the-future-of-education-is-on-the-ballot-in-oklahoma-midterms.

identity over universal, shared traits; divides people into 'oppressed' and 'oppressor' groups; and urges intolerance."[12] These laws have targeted "discussions about systemic racism, ban[ned] the truthful teaching of American history, and reverse[d] progress toward racial justice."[13] Professor Crenshaw has said that these laws and the surrounding "rhetoric allows for racial equity laws, demands[,] and movements to be framed as aggression and discrimination against white people."[14] The attacks on Critical Race Theory seem to stem "from fear among critics that students—especially white students—will be exposed to supposedly damaging or self-demoralizing ideas."[15]

On May 7, 2021, Governor Stitt signed an emergency education bill known as Oklahoma House Bill 1775 ("H.B. 1775") into law, thus authorizing it to go into effect on July 1, 2021.[16] H.B. 1775 expressly states concepts related to diversity topics that are now prohibited from being taught in the classroom or included in trainings put on by public schools.[17] This Note will analyze this new restriction in the classroom. Parts II, III, and IV will describe H.B. 1775 and the public reaction to its passage. Part V will present legislation or executive orders passed in other states that have a similar purpose to H.B. 1775. Part VI will look at the challenges brought against the law in federal court. Part VII will address the constitutionality of the bill and its implementation.

II. Background: Oklahoma House Bill 1775

Representative Sherrie Conley and Senator David Bullard authored H.B. 1775 with twenty-nine other legislators signing on as co-authors.[18] After passing in both the House and Senate, the bill was signed into law by Governor Stitt on May 7, 2021, and went into effect less than two months later.[19] H.B. 1775 was codified in Title 70, Section 24-157 of the

12. Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUCATIONWEEK (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05.

13. *Critical Race Theory Frequently Asked Questions*, *supra* note 3.

14. Fortin, *supra* note 7.

15. Sawchuk, *supra* note 12.

16. *Bill Information for H.B. 1775*, OKLA. STATE LEGISLATURE, http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201775&Session=2100 (last visited Dec. 11, 2023).

17. OKLA. STAT. tit. 70, § 24-157 (2021).

18. *Bill Information for H.B. 1775*, *supra* note 16.

19. *Id.*

Oklahoma State Statutes.[20] This law broadly restricts the manner in which public schools can address diversity in the classroom or in trainings presented to the faculty and staff. The law prevents colleges and universities within the Oklahoma State System of Higher Education from requiring students to participate in diversity training and from presenting racial or gender bias training.[21] The Oklahoma State System of Higher Education includes "two research universities, [ten] regional universities, one public liberal arts university and [twelve] community colleges" that are impacted by the passage of H.B. 1775.[22] Additionally, the law lists eight concepts any "teacher, administrator or other employee of a school district, charter school or virtual charter school" are prevented from presenting to students or employees.[23] The law sets up a requirement for the Oklahoma State Board of Education to create rules for enforcement of the provisions of the law.[24]

Several of the co-authors of H.B. 1775 released statements or made public comments throughout the legislative process that shed light on the possible intent behind the implementation of the bill. When H.B. 1775 was initially introduced in January 2021, it created emergency medical preparedness measures for public schools.[25] During a reading of H.B. 1775 in committee, Senator David Bullard presented a change to the bill to "prohibit the indoctrination requirements from schools to teach or to engage in training, orientation, or theory that promotes stereotyping . . . or guilt for race or sex which are having enormous effects in our schools[.]"[26] When asked to provide a list of schools conducting this type of training, Senator Bullard refused to state the names of schools or curriculums that would require this legislation.[27]

To circumvent a ruling that this new version of the bill was ineligible to be heard, House Republicans voted to suspend rules for H.B. 1775 to

20. OKLA. STAT. tit. 70, § 24-157 (2021).

21. OKLA. STAT. tit. 70, § 24-157(A)(1) (2021).

22. About the State System of Higher Education, OKLA. STATE REGENTS FOR HIGHER EDUC., https://www.okhighered.org/state-system/ (last visited Dec. 11, 2023).

23. OKLA. STAT. tit. 70, § 24-157(B)(1) (2021).

24. OKLA. STAT. tit. 70, § 24-157(B)(2) (2021).

25. H.B. 1775, 58th Legis., 1st Sess. (Okla. 2021), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/hB/HB1775%20INT.PDF (as introduced, Jan. 20, 2021).

26. *Hearing on H.B. 1775 Before the S. Comm. on Educ.*, 58th Leg., 1st Reg. Sess. (Okla. 2021) (statements of Sen. David Bullard, Member, S. Comm. on Educ.).

27. *Id.*

proceed.[28] This departure from procedure allowed for an amendment to avoid the standard process and make its way to a floor vote. Even though no legislator sponsoring H.B. 1775 provided proof of the necessity of this legislation, H.B. 1775 passed both chambers and was sent to Governor Stitt to be signed into law on May 7, 2021.[29]

On April 22, 2021, Senator Rob Standridge released a statement after the Senate passed H.B. 1775.[30] In his statement, Senator Standridge made claims that "teacher training, using terms like whiteness, institutionalized racism, and white supremacy, are leading children to judge each other more by the color of their skin than the content of their character."[31] In a separate statement released on April 30, 2021, Senator Bullard claimed that "too many schools and institutions have stopped focusing on high quality education and instead have turned to a policy of indoctrination," when he was praising the passage of H.B. 1775.[32] Another co-author of H.B. 1775, Representative Kevin West, was quoted as saying that "[t]his bill says that we're not going to teach people because of their race or their sex they are inherently evil for something they had nothing to do with."[33]

Throughout the legislative process, this bill faced vocal opposition from politicians, individual educators, and major school districts across the state. The Chair of the Oklahoma City Public Schools School Board stated that "at its core, it's just a flagrant attempt to limit conversations

28. Matt Trotter, *GOP Lawmakers Send Stitt Bill to Ban Critical Race Theory In Oklahoma Schools*, PUB. RADIO TULSA (Apr. 29, 2021, 6:29 PM), https://www.publicradiotulsa.org/local-regional/2021-04-29/gop-lawmakers-send-stitt-bill-to-ban-criticalrace-theory-in-oklahoma-schools#stream/0.

29. H.B. 1775, 58th Legis., 1st Sess. (Okla. 2021), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/hB/HB1775%20INT.PDF (as signed by Gov. Stitt, May 7, 2021).

30. Press Release, Rob Standridge, Senator, Oklahoma Senate, Sen. Standridge issues statement thanking fellow members for supporting H.B. 1775 (Apr. 22, 2021, 4:16 PM), https://oksenate.gov/press-releases/sen-standridge-issues-statement-thanking-fellow-members-supporting-hb-1775?back=/press-releases/2021-04%3Fpage%3D1.

31. *Id.* (internal quotations omitted).

32. Press Release, David Bullard, Senator, Oklahoma Senate, Sen. Bullard Statement on Final Passage of H.B. 1775 (Apr. 30, 2021, 12:09 PM), https://oksenate.gov/press-releases/sen-bullard-statement-final-passage-hb-1775?back=/node%3Fauthenticity_token%3D1%26commit%3D1%26country_code_display%3D1%26email%3D1%26page%3D89%26phone%3D1%26subscription_type%3D1%26utf8%3D1%2527.

33. Patrina Adger, *Bill would restrict teaching of certain 'critical race theories'*, KOCO NEWS (May 6, 2021, 5:32 PM), https://www.koco.com/article/bill-would-restrict-teaching-of-certain-critical-race-theories/36357102.

about race and accurate history, and mostly because it makes Americans that look like me – white – feel uncomfortable."[34] The superintendent of Oklahoma City Public Schools also stated that H.B. 1775 "appears to be a solution looking for a problem which does not exist."[35]

In addition to the American Civil Liberties Union's opinion that the bill violates the First Amendment rights of students and educators, they have qualms with the way the bill is written. In the ACLU's opinion, "H.B. 1775 is so poorly drafted – in places it is literally indecipherable – that districts and teachers have no way of knowing what concepts and ideas are prohibited."[36] Other political activists believe that this bill is an "attempt to silence the experience and perspectives of Black, Indigenous, and LGBTQ+ people, and other groups who have long faced exclusion and marginalization in our institutions, including our schools."[37]

III. Prohibited Concepts

Most of the text of H.B. 1775 is focused on concepts to be barred from public and charter schools. These eight concepts include: (1) "one race or sex is inherently superior to another race or sex,"[38] (2) "an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously,"[39] (3) "an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex,"[40] (4) "members of one race or sex cannot and should not attempt to treat others without respect to race or sex,"[41] (5) "an individual's moral character is necessarily determined by his or her race

34. *Id.*

35. Nuria Martinez-Keel & Carmen Forman, *Bill forbidding schools from teaching critical race theory divides Oklahoma educators, politicians*, THE OKLAHOMAN (May 6, 2021 6:00 AM), https://www.oklahoman.com/story/news/education/2021/05/06/oklahoma-billbanning-critical-race-theory-in-schools-divides-educators/4944150001/.

36. Press Release, American Civil Liberties Union, 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.

37. *Id.*

38. OKLA. STAT. tit. 70, § 24-157(B)(1)(a) (2021).

39. OKLA. STAT. tit. 70, § 24-157(B)(1)(b) (2021).

40. OKLA. STAT. tit. 70, § 24-157(B)(1)(c) (2021).

41. OKLA. STAT. tit. 70, § 24-157(B)(1)(d) (2021).

or sex,"[42] (6) "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,"[43] (7) "any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex,"[44] and (8) "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."[45] To provide guidance to teachers and school districts as to how to abide by the new legislation, the Oklahoma State Board of Education issued Emergency Rules for H.B. 1775.[46]

The six pages of rules issued by the Oklahoma State Board of Education specify prohibitions for schools to follow to guarantee compliance with H.B. 1775 and the manner in which the Board will investigate complaints.[47] The eight specific prohibitions expand on the banned concepts listed in the text of the bill itself.[48] Some of these prohibitions restrict the contracts that districts can enter into; the money that districts can apply for or receive; the diversity, equity, and inclusion programs districts can implement; and the trainings districts can offer.[49] These rules also give parents the "right to inspect curriculum, all instructional materials[,] . . . classroom assignments, and lesson plans" for compliance with the new legislation.[50] Further, these rules establish policies for investigations and accreditation consequences for a breach of the statute.[51] Specifically, the accreditation guidelines state that a school failing to comply with the prohibitions would have their accreditation lowered to Accredited With Deficiency.[52] If a school fails to remedy its compliance, then the school can drop to Accredited With Probation and Nonaccredited in the subsequent two years of the initial drop in accreditation.[53]

The text of H.B. 1775 and the rules issued by the State Department of Education do not mention Critical Race Theory by name, but the term is

42. OKLA. STAT. tit. 70, § 24-157(B)(1)(e) (2021).
43. OKLA. STAT. tit. 70, § 24-157(B)(1)(f) (2021).
44. OKLA. STAT. tit. 70, § 24-157(B)(1)(g) (2021).
45. OKLA. STAT. tit. 70, § 24-157(B)(1)(h) (2021).
46. OKLA. ADMIN. CODE § 210:10-1-23 (2021).
47. *Id*.
48. *Id.*
49. *Id*.
50. OKLA. ADMIN. CODE § 210:10-1-23(e) (2021).
51. OKLA. ADMIN. CODE § 210:10-1-23 (2021).
52. OKLA. ADMIN. CODE § 210:10-1-23(h)(1) (2021).
53. *Id.*

routinely invoked in discussions surrounding the new law. The text of H.B. 1775 is substantially similar to the text of Executive Order 13950 which was issued by President Trump days after he spoke about Critical Race Theory in September 2020.[54] Representative Kevin West, a coauthor of H.B. 1775, stated while speaking about the bill that "Critical Race Theory prescribes a revolutionary program that would overturn the principles of the Declaration [of Independence] and destroy the remaining structure of the Constitution."[55] During debate on H.B. 1775, when asked to provide examples of the curriculum that the bill sought to ban, Representative West's response was simple: "critical race theory and CT3[.]"[56] Finally, after H.B. 1775 was passed, Senator Nathan Dahm tweeted: "Just got a call from @GovStitt that he signed H.B.1775 which would prohibit our students from being forced to learn the racist, Marxist concepts known as #CriticalRaceTheory. This is a huge win in stopping this indoctrination."[57] These comments and others show that Oklahoma legislators believed that they were banning Critical Race Theory from the curriculum in all public schools and universities in the State of Oklahoma.

In the two years since the passage of H.B. 1775, there have been multiple school districts that have faced accreditation issues due to this legislation. Most notably, Mustang Public Schools and Tulsa Public Schools faced scrutiny from the Oklahoma State Department of Education.[58] On July 28, 2022, the State Board of Education voted for both

54. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020), https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping.

55. Livestream: House of Representatives First Regular Session of the 58th Legislature, Day 50, held by the Oklahoma House of Representatives (Apr. 29, 2021) https://sg001-harmony.sliq.net/00283/harmony/en/PowerBrowser/PowerBrowserV2/20210429/-1/30671?startposition=20210429123245&mediaEndTime=20210429124245&viewMode=2&globalStreamId=3.

56. Livestream: House of Representatives First Regular Session of the 58th Legislature, Day 50, held by the Oklahoma House of Representatives (Apr. 29, 2021) https://sg001-harmony.sliq.net/00283/harmony/en/PowerBrowser/PowerBrowserV2/20210429/-1/30671?startposition=20210429112507&mediaEndTime=20210429113507&viewMode=2&globalStreamId=3.

57. Nathan Dahm (@NathanDahm), TWITTER (May 7, 2021, 5:34 PM), https://twitter.com/nathandahm/status/1390797145222127621?s=46&t=5tpHsKP7LhC1lo2x6d5ppA.

58. Eesha Pendharkar, *Two Okla. Districts Get Downgraded Accreditations for Violating State's Anti-CRT Law*, EDUCATIONWEEK (Aug. 2, 2022), https://www.edweek.org/leadership/two-okla-districts-get-downgraded-accreditations-for-violating-states-anti-crt-law/2022/08.

school districts to be downgraded to Accredited With Warning, which is a step further than the Department of Education's guidelines.[59]

Tulsa's drop in accreditation stemmed from a teacher's complaint over staff training on implicit bias in August of 2021.[60] Mustang, on the other hand, self-reported a possible violation out of an abundance of caution.[61] Before the board meeting, it was recommended that Mustang only be demoted to Accredited With Deficiency, but four of the six board members decided to apply a stricter punishment.[62] In August 2023, Tulsa Public Schools faced another possible accreditation drop, which would have caused Oklahoma's largest school district to lose its accreditation.[63] After the resignation of its superintendent, Deborah Gist, the Oklahoma State School Board decided to place Tulsa Public Schools at Accredited With Deficiencies.[64] While this newer threat to Tulsa Public Schools' accreditation was not rooted in a violation of H.B. 1775, the school district might not have been at risk without this legislation going into effect two years ago.

IV. Educators' Reactions

After the passage of H.B. 1775, many educators across the state vocalized their opinions on the impact that this legislation would have on their classrooms. The president of the Oklahoma Education Association stated that the implementation of H.B. 1775 "creates significant concerns among teachers and staff, who may now be afraid to teach portions of the State Standards in fear of retaliation."[65] When speaking about H.B. 1775, Sean McDaniel, superintendent of Oklahoma City Public Schools, said

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. John Hayes, *'This is serious': Tulsa Public Schools accreditation in limbo ahead of school year*, KTUL (Aug. 9, 2023), https://ktul.com/news/local/this-is-serious-tulsa-public-schools-accreditation-in-limbo-ahead-of-school-year.
64. Deena Zaru, *Board approves accreditation of Tulsa Public Schools amid culture war with Republican officials*, ABC News (Aug. 24, 2023), https://abcnews.go.com/US/school-board-approves-accreditation-tulsa-public-schools-after/story?id=102530340.
65. Janice Francis-Smith, *Oklahoma teachers living in fear over restrictive state law*, J. Rec. (Sept. 16, 2022), https://journalrecord.com/2022/09/16/oklahoma-teachers-living-in-fear-over-restrictive-state-law/.

> [w]e have teachers across the district who we trust to make decisions – sometimes life and death decisions – on behalf of our students each and every day . . . Surely we can continue to trust our educators to guide these difficult yet necessary conversations with our students inside of their classrooms."[66]

Cecilia Robinson-Woods, the superintendent of Millwood Public Schools, said in a statement that she believes "the development of this bill [was] done without the input, one, of educators and, two, of people of color."[67] She went on to say that "[p]eople of color are not asking for anything other than empathy, and you can't understand our story if we can't share it."[68]

One of the larger impacts that bills like H.B. 1775 have on educators is the confusion that they cause. These laws "are so vaguely written that it's unclear what they affirmatively cover."[69] Due to the way that bills banning Critical Race Theory are written, it is unknown if vital events in United States history—like the Tulsa Race Massacre—are still allowed to be discussed. While the policing of these bills would be difficult due to the sheer number of classrooms affected, "educators fear that such laws could have a chilling effect on teachers who might self-censor their own lessons out of concern for parent or administrator complaints."[70] These bills do not only affect what history or social studies teachers are able to cover in their curriculum, but can also spill over into bans in subjects like English, psychology, and specialty courses.[71] These implications are also apparent throughout the debates in Florida over the inclusion of classes like A.P. Psychology and A.P. African American Studies.[72]

The vague nature of the legislation has led to increased confusion and fear for educators surrounding what they can and cannot say in the

66. Nuria Martinez-Keel & Carmen Forman, *Bill forbidding schools from teaching critical race theory divides Oklahoma educators, politicians*, THE OKLAHOMAN (May 6, 2021, 6:00 AM), https://www.oklahoman.com/story/news/education/2021/05/06/oklahoma-bill-banning-critical-race-theory-in-schools-divides-educators/4944150001/.

67. *Id.*

68. *Id.*

69. Sawchuk, *supra* note 12.

70. *Id.*

71. *Id.*

72. Sarah Mervosh, *In a Reversal, A.P. Psychology May Be Allowed in Florida Schools After All*, N.Y. TIMES (Aug. 4, 2023), https://www.nytimes.com/2023/08/04/us/florida-ap-psychology.html.

classroom. An elementary school teacher from Deer Creek feels like she is "walking on eggshells" in the classroom.[73] The teacher went on to say that she and her colleagues "have to evaluate everything [they are] teaching, even though [they] know what best practices are or should be."[74] A high school English teacher said that he "felt like [H.B. 1775] was a shot at teachers like [him] who really want to see Black and brown kids really do something with their lives."[75] A former Norman High School English teacher, who resigned due to controversy surrounding her compliance with H.B. 1775, stated that she believes that if teachers are doing their jobs, then it's a matter of *when* an allegation of violating H.B. 1775 arises rather than a matter of *if*.[76] She also stated that school districts have been placed into a rough position by this legislation and that "[t]he law has done exactly what it was intended to do."[77]

V. Laws in Other Jurisdictions

Many states around the country have passed similar laws to ban the teaching of what they believe to be Critical Race Theory in schools. Most of the state legislatures that pass these laws are dominated by members of the Republican Party. Some of the states that have passed these laws include Florida, New Hampshire, Tennessee, Arkansas, and Texas. A few of these laws, much like Oklahoma's, have been challenged in federal court.

A. Florida

On April 22, 2022, Governor of Florida, Ron DeSantis, signed Florida

73. Kemp, *supra* note 11.

74. *Id.*

75. Tyler Kingkade & Antonia Hylton, *Oklahoma's anti-critical race theory law violates free speech rights, ACLU suits says*, NBC NEWS (Oct. 20, 2021, 12:35 PM), https://www.nbcnews.com/news/us-news/oklahoma-critical-race-theory-lawsuit-aclu-rcna3276.

76. Wendy Suares, *'I am a walking H.B. 1775 violation': Former Norman teacher discusses book ban controversy*, FOX 25 (Aug. 24, 2022, 8:54 PM), https://okcfox.com/news/local/summer-boismier-norman-public-schools-critical-race-theory-brooklyn-public-library-qr-code-house-bill-1775-oklahoma-teacher-resigned-education-books.

77. *Id.*

House Bill 7 ("H.B. 7") into law.[78] This bill prohibits employers and educators from conducting trainings or lessons that promotes any of the following beliefs: (1) "[m]embers of one race, color, sex, national origin, or sex are morally superior to members of another race, color, national origin, or sex[;]"[79] (2) "[a] person, by virtue of his or her race, color, national origin, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously[;]"[80] (3) "[a] person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex[;]"[81] (4) "[m]embers of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex[;]"[82] (5) "[a] person, by virtue of his or her race, color, national origin, or sex bears responsibility for, or should be discriminated against or receive adverse treatment because of actions committed in the past by other members of the same race, color, national origin, or sex[;]"[83] (6) "[a] person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion[;]"[84] (7) "[a] person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex[;]"[85] and (8) "[s]uch virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex."[86]

This legislation was challenged in *Falls v. Corcoran*.[87] In that case, the plaintiffs sought a declaratory judgment confirming that the legislation

78. Press Release, Ron DeSantis, Governor of Florida, DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.

79. H.B. 7, 2022 Leg. (Fla. 2022).

80. *Id*.

81. *Id*.

82. *Id*.

83. *Id*.

84. *Id*.

85. *Id*.

86. *Id.*

87. Complaint at 24, Falls v. Corcoran, No. 4:22-CV-00166 (N.D. Fla. Apr. 22, 2022).

was a violation of the Free Speech Clause of the First Amendment and was unconstitutionally vague in violation of the Fourteenth Amendment, as well as an order that prevented the defendants from enforcing the law as written.[88] The complaint alleged that the legislation's "provisions are so vague that they fail to put a reasonable person on notice of what is prohibited and would cause people of common intelligence to guess at its meaning and differ as to its application."[89] The plaintiffs also alleged that the legislation provisions were "unconstitutional viewpoint-based restrictions on speech that regulate the speech of Florida's teachers and business owners in violation of their First Amendment Rights."[90]

On July 8, 2022, Chief Judge Walker issued an Order Granting In Part and Denying In Part Motion to Dismiss.[91] This dismissed the plaintiffs' claims against Governor DeSantis as he was not a proper defendant.[92] It also dismissed some of the plaintiffs' claims against various defendants for lack of standing but allowed others to proceed.[93] On September 8, 2022, the defendants' Motion for Partial Summary Judgment was denied.[94] In May 2023, the court dismissed the case without prejudice for lack of standing at the time of filing.[95] Prior to issuing a final disposition in this case, the court issued a preliminary injunction on the enforcement of the statutes by the Florida Board of Governors of the State University System in a separate challenge to the legislation.[96]

B. New Hampshire

On April 8, 2021, the New Hampshire legislature passed House Bill 544 ("H.B. 544"). This law (also known as the Divisive Concepts Act) presents ten concepts that the legislature deemed to be divisive and

88. *Id.*

89. *Id*.

90. *Id*. at 5.

91. Order Granting In Part and Denying In Part Motion to Dismiss at 22, Falls v. Corcoran, No. 4:22-CV-00166 (N.D. Fla. July 8, 2022).

92. *Id*.

93. *Id*.

94. Order Denying Motion for Partial Summary Judgment at 1, Falls v. Corcoran, No. 4:22-CV-00166 (N.D. Fla. Sept. 8, 2022).

95. Order Dismissing Case For Lack Of Jurisdiction at 24, Falls v. Corcoran, No. 4:22-CV-00166 (N.D. Fla. May 19, 2023).

96. Order Granting In Part And Denying In Part Motions For Preliminary Injunction at 136, Pernell v. Florida Board of Governors Of The State University System, et al., No. 4:22-CV-00304 (N.D. Fla. Nov. 17, 2022).

prohibits those concepts from being used in curriculum or training provided by a state agency or political subdivision.[97] These concepts include: (1) "[o]ne race or sex is inherently superior to another race or sex;"[98] (2) "[t]he state of New Hampshire or the United States is fundamentally racist or sexist;"[99] (3) "[a]n individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;"[100] (4) "[a]n individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;"[101] (5) "[m]embers of one race or sex cannot and should not attempt to treat others without respect to race or sex;"[102] (6) "[a]n individual's moral character is necessarily determined by his or her race or sex;"[103] (7) "[a]n 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;"[104] (8) "[a]ny individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex;"[105] (9) "[m]eritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race;"[106] and (10) "[a]ny other form of race or sex stereotyping or any other form of race . . . scapegoating."[107]

This legislation was challenged in federal court in *Local 8027, AFT-New Hampshire, AFL-CIO v. NH Department of Education, Commissioner*. In their complaint, the plaintiffs sought preliminary and permanent injunctive relief against the Divisive Concepts Act and a declaration that the Act was a violation of the Due Process Clause of the Fourteenth Amendment.[108] The plaintiffs also alleged that the statute was "unconstitutionally vague on its face and as applied to plaintiffs because it fails to provide fair notice of what educators can and cannot include in

97. H.B. 544, 167th Gen. Ct., Reg. Sess. (N.H. 2021).
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*.
106. *Id*.
107. *Id*.
108. Complaint for Injunctive Relief at 2, Local 8027, AFT-New Hampshire, AFL-CIO v. NH Department of Education, Commissioner, No. 1:21-CV-01077 (D. N.H. Dec. 20, 2021).

their courses, and because it invites arbitrary and discriminatory enforcement."[109] On January 12, 2023, Judge Barbadoro granted in part and denied in part the motion to dismiss.[110] Judge Barbadoro dismissed part of the plaintiffs' First Amendment claim, but the plaintiffs' vagueness claims were not dismissed.[111]

In his order, Judge Barbadoro found that the principles established in *Garcetti v. Ceballos* applied to kindergarten through twelfth-grade teachers, and that those teachers were not protected by the First Amendment for their curricular speech.[112] However, Judge Barbadoro found that the enacted legislation violated the First Amendment because it restricted the extracurricular speech of teachers and thus violated their rights as private citizens.[113] As for the plaintiffs' challenge to the legislation based on vagueness, Judge Barbadoro found that the legislation's "vague terminology, lack of a scienter requirement, and the possibility that teachers could be found liable for teaching banned concept by implication, leave both teachers and enforcers to guess what speech the [legislation] prohibit[s]."[114] As of December 2023, this case is still in the discovery stage of litigation and has a hearing on a motion for summary judgment set for January 2024.

C. Tennessee

On May 25, 2021, Tennessee's version of an anti-Critical Race Theory bill took effect. Like bills in other states, this legislation prohibits educators from including certain concepts in their curriculum.[115] These prohibited concepts include the following fourteen ideas: (1) "[o]ne race or sex is inherently superior to another race or sex;"[116] (2) "[a]n individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously;"[117] (3) "[a]n

109. Complaint for Injunctive Relief at 60, Mejia v. Edelblut, No. 1:21-CV-01077 (D. N.H. Dec. 20, 2021).

110. Memorandum and Order at 43, Local 8027, AFT-New Hampshire, AFL-CIO v. Edelblut, (No. 1:21-CV-01077), 2023 WL 171392 (D. N.H. Jan. 12, 2023).

111. *Id*.

112. *Id*. at 15-16 (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

113. *Id*. at 17.

114. *Id.* at 42.

115. TENN. CODE ANN. §49-6-1019 (2021).

116. TENN. CODE ANN. §49-6-1019(A)(1) (2021).

117. TENN. CODE ANN. §49-6-1019(A)(2) (2021).

individual should be discriminated against or receive adverse treatment because of the individual's race or sex;"[118] (4) "[a]n individual's moral character is determined by the individual's race or sex;"[119] (5) "[a]n individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;"[120] (6) "[a]n individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex;"[121] (7) "[a] meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress members of another race or sex;"[122] (8) "[t]his state or the United States is fundamentally or irredeemably racist or sexist;"[123] (9) "[p]romoting or advocating the violent overthrow of the United States government;"[124] (10) "[p]romoting division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people;"[125] (11) "[a]scribing character traits, values, moral or ethical codes, privileges, or beliefs to a race or sex, or to an individual because of the individual's race or sex;"[126] (12) "[t]he rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups;"[127] (13) "[a]ll Americans are not created equal and are not endowed by their Creator with certain unalienable rights, including life, liberty, and the pursuit of happiness;"[128] and (14) "[g]overnments should deny to any person within the government's jurisdiction the equal protection of the law."[129]

This Bill, like others passed across the country, pulls many of the newly prohibited concepts from the Executive Order issued by President Trump in 2020. President Trump's Executive Order named nine "divisive concepts" that the federal government, the military, and government contractors were prevented from including in training sessions.[130] This

118. TENN. CODE ANN. §49-6-1019(A)(3) (2021).
119. TENN. CODE ANN. §49-6-1019(A)(4) (2021).
120. TENN. CODE ANN. §49-6-1019(A)(5) (2021).
121. TENN. CODE ANN. §49-6-1019(A)(6) (2021).
122. TENN. CODE ANN. §49-6-1019(A)(7) (2021).
123. TENN. CODE ANN. §49-6-1019(A)(8) (2021).
124. TENN. CODE ANN. §49-6-1019(A)(9) (2021).
125. TENN. CODE ANN. §49-6-1019(A)(10) (2021).
126. TENN. CODE ANN. §49-6-1019(A)(11) (2021).
127. TENN. CODE ANN. §49-6-1019(A)(12) (2021).
128. TENN. CODE ANN. §49-6-1019(A)(13) (2021).
129. TENN. CODE ANN. §49-6-1019(A)(14) (2021).
130. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020),

Executive Order has subsequently been struck down on vagueness claims and was revoked by an Executive Order issued by President Biden in 2021.[131]

D. Arkansas

On January 10, 2023, Arkansas Governor Sarah Huckabee Sanders issued Executive Order 23-05, calling it the Executive Order to Prohibit Indoctrination and Critical Race Theory in Schools.[132] This Order states that "Critical Race Theory . . . is antithetical to the traditional American values of neutrality, equality, and fairness."[133] It also authorizes the Secretary of the Department of Education to "remove the prohibited indoctrination" from the "rules, regulations, policies, materials, or communications of the Department of Education[.]"[134] Prohibited indoctrination is defined as the ideas that "[p]eople of one color, creed, race, ethnicity, sex, age, marital status, familial status, disability, religion, national origin, or any other characteristic protected by federal or state law are inherently superior or inferior" to one another and that "[a]n individual should be discriminated against or receive adverse treatment solely or partly because of the individual's color, creed, race, ethnicity, sex, age, marital status, familial status, disability, religion, national origin, or any other characteristic protected by federal or state law."[135]

After the Executive Order was signed, many community members expressed their displeasure with it, including professors at the University of Arkansas. One political science professor stated that "by not teaching [Critical Race Theory], you are erasing history . . . you are being intellectually dishonest, and you're going to cripple the American public by not letting them see and understand the roots of some of the problems

https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping.

131. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021), https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government.

132. Ark. Exec. Ord. No. 23-05 (Jan. 10, 2023) https://governor.arkansas.gov/wp-content/uploads/EO-23-05-Prohibit-Indoctrination.pdf.

133. *Id*.

134. *Id*.

135. *Id*.

of America."[136]

E. Texas

On September 1, 2021, Texas House Bill 3979 ("H.B. 3979") took effect. Like the bills in other states, this legislation names eight concepts that are now prohibited from being included in curriculum. These concepts include: (1) "one race or sex is inherently superior to another race or sex;"[137] (2) "an individual, by virtue of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;"[138] (3) "an individual should be discriminated against or receive adverse treatment solely or partly because of the individual's race or sex;"[139] (4) "members of one race or sex cannot and should not attempt to treat others without respect to race or sex;"[140] (5) "an individual's moral character, standing, or worth is necessarily determined by the individual's race or sex;"[141] (6) "an individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;"[142] (7) "any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of the individual's race or sex;"[143] and (8) "meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a members of a particular race to oppress members of another race."[144]

This Bill passed along party lines while facing vocal opposition from Democrats and approximately seventy education, business, and community groups.[145] The legislators who fought for the passage of this Bill "expressed concerns that teachers are unfairly blaming white people for historical wrongs and distorting the founding fathers'

136. Cooper Grant, *UA students, faculty react to CRT ban in Arkansas public schools*, ARK. TRAVELER (Sept. 21, 2023), https://www.uatrav.com/news/article_763438de-b71a-11ed-acaa-03ba897a13f8.html.

137. H.B. 3979, 87th Leg., 87 Reg, Sess. (Tex. 2021).

138. *Id*.

139. *Id*.

140. *Id*.

141. *Id*.

142. *Id*.

143. *Id*.

144. *Id*.

145. Patrick Svitek, *Texas public schools couldn't require critical race theory lessons under bill given House approval*, TEX. TRIB. (May 11, 2021, 5:00 PM), https://www.texastribune.org/2021/05/11/critical-race-theory-texas-schools-legislature/.

accomplishments."[146] The Texas chapter of the American Federation of Teachers commented that "[t]he bill is part of a national movement by conservatives trying to sow a narrative of students being indoctrinated by teachers."[147]

VI. The Challenge to Oklahoma House Bill 1775

A. Preliminary Injunction

On October 19, 2021, *Black Emergency Response Team v. O 'Connor* was filed in the United States District Court for the Western District of Oklahoma, challenging the constitutionality of Oklahoma H.B. 1775 under the First and Fourteenth Amendments of the United States Constitution.[148] The American Civil Liberties Union on behalf of several interested organizations, educators, and students filed this complaint seeking a preliminary injunction and declaration that the legislation is unconstitutional.[149] The complaint alleged that there is no "legitimate pedagogical justification" for the content restrictions in H.B. 1775.[150] Additionally, it alleged the statute is "vague, overbroad, and viewpoint discriminatory."[151] Plaintiffs further alleged that the "suppression of speech [caused by this statute] robs students of the information, ideas, and instructional approaches that result in the type of robust dialogue and analytical thinking that courts have long recognized are essential to the preservation of American's democratic system."[152]

In an amended complaint, the plaintiffs alleged that H.B. 1775 is contrary to key principles in American society.[153] They believed that this legislation's "censorship of speech rests upon illicit motives and inflicts disparate harm: H.B. 1775 was enacted with the particular intent of harming historically marginalized students, and the Act has had its

146. Kate McGee, *Texas "critical race theory" bill limiting teaching of current events signed into law*, TEX. TRIB. (June 15, 2021, 6:00 PM), https://www.texastribune.org/2021/06/15/abbott-critical-race-theory-law/.

147. *Id.*

148. Complaint at 6, Black Emergency Response Team v. O 'Connor, No. 21-CIV-1022-G (W.D. Okla. Oct. 19, 2021).

149. *Id*. at 1.

150. *Id*.

151. *Id*.

152. *Id*. at 2-3.

153. Amended Complaint at 19, Black Emergency Response Team v. O 'Connor, No. 21-CIV-1022-G (W.D. Okla. Nov. 9, 2021).

intended effect."[154] The plaintiffs' argument that the text of the legislation was overbroad, vague, and viewpoint discriminatory rests on the plain text of H.B. 1775.[155] The plaintiffs argued that the lack of defined terms within the text of H.B. 1775 leads to confusion for educators, administrators, students, and parents regarding what exactly the legislation prohibits and allows to be included in the curriculum at various levels of public instruction.[156] Throughout the complaint, plaintiffs alleged that "through utilization of vague terms with a harsh enforcement mechanism, H.B. 1775 chills permissible speech by teachers who are uncertain whether their instruction could lead students to inquire about a prohibited concept."[157]

In their answer, defendants denied either in part or in full each allegation made by the plaintiffs.[158] The defendants also asserted the following affirmative defenses: "[p]laintiffs fail to state a claim upon which relief can be granted, [p]laintiffs lack standing, Governor Stitt is not a proper party, and defendants are immune from suit."[159] In the defendants' Response to Motion for Preliminary Injunction, the defendants alleged that the plaintiffs were not likely to prevail on the merits of their claims and that the court should deny the preliminary injunction.[160] The defendants stated that "to succeed on a facial challenge in the First Amendment context, [the plaintiffs] must at least demonstrate that a substantial number of H.B. 1775's applications are unconstitutional as judged in relation to its plainly legitimate sweep."[161] The defendants went on to state that the plaintiffs "fail[ed] to demonstrate the First Amendment protects the conduct prohibited by H.B. 1775."[162] When addressing the vagueness claim, the defendants further alleged that the "[p]laintiffs' motion challenges as vague isolated words or phrases . . . without attempting to define them or interpret them in their broader context."[163] As of the writing of this Note, the Western District of Oklahoma has yet to rule on the

154. *Id*.
155. *Id*.
156. *Id*. at 33.
157. *Id*.
158. Answer to Amended Complaint, Black Emergency Response Team v. O 'Connor, No. 21-CIV-1022-G (W.D. Okla. Nov. 23, 2021).
159. *Id*. at 14.
160. Response of Defendants [1-18] to Motion for Preliminary Injunction at 11, Black Emergency Response Team v. O 'Connor, No. 21-CIV-1022-G (W.D. Okla. Dec. 16, 2021).
161. *Id*. at 12.
162. *Id*.
163. *Id*. at 18.

requested preliminary injunction.

B. Continued Litigation

On January 25, 2023, over one year after the initial filing of the complaint, the State filed a Motion for Judgment on the Pleadings.[164] The State argued that the plaintiffs failed to state plausible claims for unconstitutional vagueness under the First Amendment right to receive information, that H.B. 1775 is an overbroad restriction, or that H.B. 1775 was enacted with a discriminatory purpose.[165] The plaintiffs disputed these arguments in their Response to State Defendants' Motion for Judgment on the Pleadings.[166] The defendants argued that the plaintiffs claimed that there was a "First Amendment right for a student to be taught any specific concept or for a teacher to teach any specific concept."[167] However, in their response, the plaintiffs stated that the defendants' claim was not true; the plaintiffs instead asserted "that the state may not *constrict* students' access to information when those restrictions are not reasonably related to a legitimate pedagogical interest or are based on illicit motives."[168]

VII. Analysis of Oklahoma House Bill 1775

As evidenced by the aforementioned pending litigation, constitutional concerns that arise from legislation like Oklahoma H.B. 1775 include: the First Amendment rights of educators and students in the classroom; and the vague, overbroad nature of these bills. Many lawsuits across the country challenging these laws are still pending, so there is no clear answer to the constitutionality of these restrictions. However, there is still enough case law in this area to guide an analysis of the constitutionality of these bills.

164. State Defendants' Motion for Judgment on the Pleadings, Black Emergency Response Team v. O 'Connor, No. 21-CIV-01022-G (W.D. Okla. Jan. 25, 2023).

165. *Id*. at 2.

166. Plaintiffs' Response to State Defendants' Motion for Judgment on the Pleadings at 8, Black Emergency Response Team v. O 'Connor, No. 21-CIV-01022-G (W.D. Okla. Feb. 24, 2023).

167. State Defendants' Motion for Judgment on the Pleadings, *supra* note 164, at 3.

168. Plaintiffs' Response to State Defendants' Motion for Judgment on the Pleadings, *supra* note 166, at 14.

A. First Amendment Concerns

First, as noted in *University of California v. Bakke*, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[169] This freedom includes the "liberty from restraints on thought, expression, and association in the academy" in addition to the "freedom to make decisions about how and what to teach."[170] The Supreme Court has said that "access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society."[171]

In *Tinker v. Des Moines Independent Community School District*, the Court restated its view of the First Amendment's protections in schools.[172] The Court stated that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[173] However, the *Tinker* Court also recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[174] This dichotomy between freedom and restriction is the key to determining whether legislation like H.B. 1775 is constitutional.

The Court also stated in *Tinker* that for "school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[175] This line seems, at least on its face, to point in favor of those challenging these regulations. In a similar vein, the Court in *Hazelwood School District v. Kuhlmeier* found that the First Amendment is invoked when censorship "has no valid educational purpose."[176] One of the main

169. Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).
170. Bd. of Regents v. Southworth, 529 U.S. 217, 237 (2000) (Souter, J., concurring).
171. Bd. of Educ. v. Pico, 457 U.S. 853, 868 (1982).
172. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
173. *Id.* at 506.
174. *Id.* at 507.
175. *Id.* at 509.
176. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

arguments against the constitutionality of laws like H.B. 1775 is that the restrictions do not have a valid pedagogical purpose. If a court finds that argument persuasive, then those against these restrictions have a strong case for the unconstitutionality of the curriculum restrictions.

In *Board of Education*, *Island Trees Union Free School District No. 26 v. Pico*, while ruling on the constitutionality of banning particular books, the Court stated that "[o]ur Constitution does not permit the official suppression of ideas."[177] The Court held that "school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[178] Many of the comments made by politicians before, during, and after the passage of H.B. 1775 give the perception that these restrictions were enacted because they disagree with the way diversity and inclusion-based curriculum makes them feel. These comments bolster the argument that there was not a pedagogical purpose for restrictions, and that any pedagogical purpose they might put forward is just a pretext for another motive.

Various circuit courts have used the framework from these prior cases to find that students have a free speech interest in their curriculum. In 2004, the Tenth Circuit found that a pedagogical concern can be overridden by the courts when an educator's "methodology was a sham pretext for an impermissible ulterior motive."[179] The Ninth Circuit in 2015, when looking at a ban on ideas about race in curriculum for kindergarteners through twelfth graders, held that "the state may not remove materials otherwise available in a local classroom unless its actions are reasonably related to legitimate pedagogical concerns."[180] Additionally, the Eleventh Circuit used *Hazelwood* to reject the idea that school officials have an unrestricted right to control kindergarten through twelfth-grade curriculum.[181]

Those in favor of the curriculum restrictions point to cases like *Epperson v. Arkansas*, which held that the State has an "undoubted right to prescribe the curriculum for its public schools."[182] However, the State

177. *Pico*, 457 U.S. at 871.
178. *Id.* at 872 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642).
179. Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2004).
180. Arce v. Douglas, 793 F.3d 968, 983 (9th Cir. 2015).
181. Virgil v. School Bd. of Columbia Cnty., 862 F.2d 1517, 1522 (11th Cir. 1989).
182. Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

of Oklahoma does not cite the full sentence that the quote comes from in its defense.[183] The rest of the sentence states that the right to determine curriculum "does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."[184] While cases like *Epperson* and *Keyishian v. Board of Regents* find that the "State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees," there are still limits on how far those restrictions may go.[185]

The existing case law on the First Amendment rights of teachers and students in the classroom and in relation to their curriculum suggests that the challenges to the constitutionality of the restrictions are plausible. However, with the current Court's recent actions in mind, a First Amendment claim against curriculum restrictions might be difficult to muster. A vagueness argument could be more effective for the challengers than a freedom of speech claim.

B. Vagueness

The constitutional concern at the center of the vagueness doctrine is the requirement that Congress "write[s] statutes that give ordinary people fair warning about what the law demands of them."[186] When the courts are presented with a vague law, their role "under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again."[187] The general rule is that a law is "void for vagueness if its prohibitions are not clearly defined."[188] However, when First Amendment rights are impacted, "[s]tricter standards of permissible statutory vagueness may be applied."[189] In *Hill v. Colorado*, the Court found that a statute is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[190] H.B. 1775 and other similar pieces of legislation face legitimate challenges on vagueness grounds due

183. *Id*.
184. *Id*.
185. *Id.* (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 605-606 (1967)).
186. United States v. Davis, 139 S. Ct. 2319, 2323 (2019).
187. *Id*.
188. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
189. Dr. John's, Inc. v. City of Roy, 465 F.3d 1150, 1157 (10th Cir. 2006).
190. Hill v. Colorado, 530 U.S. 703, 732 (2000).

to the way that they are constructed.

There have been multiple cases recently where federal courts have at least preliminarily ruled that a vagueness claim against these types of regulations could succeed. In a lawsuit challenging an H.B. 1775 analogue in New Hampshire, a federal district court denied a motion to dismiss the vagueness challenge to the law.[191] The court found that the statute in question was subject to a higher-level vagueness review because the banned concepts involved First Amendment rights.[192] Another federal district court preliminarily enjoined the execution of a similar statute in Florida because of the similar vagueness concerns seen in New Hampshire and Oklahoma.[193] Additionally, a federal district court in California preliminarily enjoined sections of Executive Order 13950, which H.B. 1775 and similar pieces of legislation were based on, due to the vagueness claims it faced.[194]

In *Johnson v. United States*, the Court stated that "our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."[195] The Court referenced two prior cases to illustrate the precedent behind the holding: *United States v. L. Cohen Grocery Co*. and *Coates v. Cincinnati*.[196] These two cases, decided fifty years apart, both found a law void for vagueness even though there was at least one situation that would reasonably fall within the restrictions of the statute.[197] The Court reaffirmed its position in *Sessions v. Dimaya*, where it stated that "*Johnson* made clear that our decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'"[198] Additionally, both the Seventh and Ninth Circuits have issued opinions relying on *Johnson* and the cases that followed. The Seventh Circuit stated that *Johnson* ended "the notion—found in any number of pre-*Johnson* cases—that a litigant

191. Memorandum and Order, *supra* note 110.

192. *Id.* at 33.

193. Honeyfund.com, Inc. v. Desantis, 622 F.Supp.3d 1159, 1185 (N.D. Fla. Aug. 18, 2022).

194. Santa Cruz Lesbian & Gay Cnty. Ctr. v. Trump, 508 F.Supp.3d 521, 550 (N.D. Cal. 2020).

195. Johnson v. United States, 576 U.S. 591, 602 (2015).

196. *See* United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921); *see also* Coates v. Cincinnati, 402 U.S. 611 (1971).

197. *Id.*

198. Sessions v. Dimaya, 138 S. Ct. 1204, 1215 (2018) (quoting *Johnson*, 576 U.S. at 602).

must show that the statute in question is vague in all of its applications in order to successfully mount a facial challenge."[199]

In the context of First Amendment claims, the Court has relaxed its requirement that "ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'"[200] The Court has also said that "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."[201] The Court has allowed a "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." However, the Court rejected this position in the recent case of *Sessions v. Dimaya*.[202] In *Dimaya*, the Court vehemently stated that the same standard for void for vagueness claims should be used for both civil and criminal cases.[203] Therefore, courts should not give a higher tolerance for vagueness in civil cases than they do in criminal cases when deciding whether a statute should be void for vagueness.

The text of H.B. 1775 and the rules promulgated by the Oklahoma State Department of Education leave ample room for interpretation by educators, parents, and students. The broad nature of the curriculum restrictions make it difficult for educators to know whether what they teach is in compliance with the new law. The constitutional importance of citizens having fair notice and fair enforcement of laws puts H.B. 1775 at great risk of being found void for vagueness. If educators are unable to determine what is permitted versus what is prohibited, then they arguably do not have fair notice of the restriction. While none of the lawsuits making void for vagueness claims against legislation like H.B. 1775 have been decided as of the writing of this Note, it appears to be the most likely path for the challengers to win their cases.

VIII. Conclusion

The increased polarization of political parties in the United States and

199. United States v. Cook, 914 F.3d 545, 553 (7th Cir. 2019).

200. United States v. Williams, 553 U.S. 285, 304 (2008) (quoting Vill. of Hoffman Est. v. Flipside, Hoffman Est., Inc., 455 U.S. 489, 494-495 (1982)).

201. *Flipside*, 455 U.S. at 498.

202. *Id.* at 498-99.

203. *Dimaya* at 1213.

the recent politicizing of the classroom resulted in the passage of legislation across the country. This legislation restricted the ability to teach curriculum related to diversity, equity, and inclusion within the kindergarten through twelfth grade classroom, the college classroom, and in trainings related to public education. In Oklahoma specifically, the legislature passed H.B. 1775 to ban eight concepts related to race and gender from being included in curriculum, trainings, and orientations in public schools across the state. From the time it was authored, H.B. 1775 has faced criticism from various groups including teachers, students, and parents.

The primary challenges made against H.B. 1775 and similar laws around the country have been on First Amendment and vagueness claims. While the First Amendment challenges have the potential of being successful, these claims must face the fact that curriculum is generally left in the purview of state and local officials. It seems that the vagueness challenges have a clearer path to viability, as the restrictions generally do not define the concepts banned and the Bill leaves educators uncertain as to whether their lessons are allowed. Because these laws around the country are still in active litigation, it remains unclear which of these arguments—if any—will be deemed enough by the courts to strike down bills that are wreaking havoc on our nation's public education system.