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## ARTICLE

### **THE ANTI-TRUTH MOVEMENT IN CONTEXT: RETHINKING THE FIGHT FOR TRUTH AND INCLUSIVE EDUCATION**

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#### ABSTRACT

*The right to access information and freely express oneself is among the cornerstones of our democracy and Black political power. The racial justice uprisings of 2020 saw an expansion of Black political participation and power, as millions of Black Americans and allies protested police murders, advocated for equitable healthcare and economic policies, and demanded more inclusive curricula in schools and universities. This expansion of power was met with a concerted backlash that followed a recurring cycle of racial progress and retrenchment dating back to Reconstruction. This Article will discuss that backlash, describe how anti-truth efforts at the state and local level have eroded Black political power in K-12 and higher education, and assess strategies for fighting back.*

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## INTRODUCTION

The anti-truth movement targets efforts for racial justice by placing significant restrictions on how students and educators can learn about and discuss American and global history, systemic racism, and structures of oppression.<sup>1</sup> Since January 2021, state and private actors within the anti-truth movement have enacted policies in over forty states to restrict access to curricular materials and in-class instruction on these topics.<sup>2</sup>

Anti-truth laws are intended to limit instruction and discussion in schools and universities, deny students access to texts that discuss discrimination and systemic oppression, and ultimately, present a one-sided view of American history and life.<sup>3</sup>

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1. See *In Defense of Truth*, LEGAL DEF. FUND, <https://www.naacpldf.org/truth/> [<https://perma.cc/F3VJ-FYUA>]. The anti-truth movement refers to coordinated attacks on truth and efforts to deny our nation's legacy of racism, including state laws that may ban or restrict what students can learn about history and systemic discrimination. See *id.*

2. PEN AMERICA, REPORT TO THE UNITED NATIONS COMMITTEE ON CIVIL AND POLITICAL RIGHTS 3 (2023), <https://pen.org/wp-content/uploads/2023/09/PEN-America-US-CCPR-Submission.pdf> [<https://perma.cc/CL6A-6MPH>].

3. See *id.* at 2–4.

In doing so, they seek to deny an entire generation access to a truthful, accurate, and full education.

Attacks on truthful education and access to history are not new: following the expansion of Black political power during Reconstruction, the Daughters of the Confederacy and other proponents of the Lost Cause lobbied for textbooks that described slavery as non-violent and even pleasant for enslaved peoples and that obscured the causes of the Civil War.<sup>4</sup> The modern anti-truth movement has progressed in much the same way. Efforts to suppress Black voter turnout emerged in response to increased Black civic participation in 2020, including historic Black voter turnout in the 2020 election, a wave of Black-led racial justice demonstrations and protests in 2020, and increased development of and engagement with racially inclusive and culturally competent curricula across K-12 schools and higher education institutions.<sup>5</sup> For example, state legislatures targeted Black access to the ballot by enacting laws designed to curtail Black political participation and advance racial gerrymandering.<sup>6</sup> State actors also targeted Black protest and expression by enacting laws that criminalized the right to protest and by funding law enforcement's capacity to suppress those

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4. See Scott Morris, *Racist Textbooks Endured, Presenting Alternate 'History' to Alabama Students for 70 Years*, BIRMINGHAMWATCH (Sept. 2, 2020), <https://birminghamwatch.org/racist-textbooks-endured-presenting-alternate-history-alabama-students-70-years/> [https://perma.cc/7MF4-8BU8]; Scott Morris, *Daughters of Confederacy Put Up Statues, Indoctrinated Generations, Historians Say*, BIRMINGHAMWATCH (July 7, 2020), <https://birminghamwatch.org/daughters-confederacy-put-statues-indoctrinated-generations-historians-say/> [https://perma.cc/P6XB-TAL4]. The Lost Cause movement seeks to defend the cause of the Confederacy and promote a false history that erases the atrocities of slavery. Emily R. Larrabee, Note, *Violence in the Name of the Confederacy: America's Failure to Defeat the Lost Cause*, 14 DREXEL L. REV. 451, 459–60 (2022). The Daughters of the Confederacy formed during the the Civil War and Confederate soldiers; the group still exists today and continues to advance Lost Cause ideology. *Id.* at 463.

5. See *Critical Race Theory: Frequently Asked Questions*, LEGAL DEF. FUND, <https://www.naacpldf.org/critical-race-theory-faq/> [https://perma.cc/FH4X-LJN7].

6. See, e.g., *Allen v. Milligan*, 599 U.S. 1, 9–13 (2023) (affirming lower court order striking down Alabama's 2021-enacted congressional map that violated the Voting Rights Act of 1965 by diluting Black political power); *S.C. State Conf. of the NAACP v. Alexander*, 649 F. Supp. 3d 177, 197–200 (D.S.C. 2023) (enjoining South Carolina's congressional map as discriminatory and denying Black voters their rights), *on appeal*, *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 477 (2023).

protests.<sup>7</sup> Attacks on accurate and racially inclusive curricula are the latest stage of this coordinated backlash.

The goals of the anti-truth movement extend far beyond restricting information in schools and universities. By limiting accurate discussions of history and modern racism and fostering educational environments that are hostile to Black students and educators, this movement aims to deny Black Americans access to public education and undermine public education as a whole. At the K-12 level, the anti-truth movement seeks to defund public education, including by sowing distrust of public schools and support for broader defunding efforts, and to push Black students and other students of color out of public schools that primarily serve white students.<sup>8</sup> In higher education, the anti-truth movement seeks to limit students' exposure to materials that discuss race and to push out scholars who teach on and research these issues.<sup>9</sup> Overall, anti-truth proponents seek to roll back the impact of *Brown v. Board of Education*<sup>10</sup> by reducing opportunities for cross-racial and inter-racial understanding.<sup>11</sup> In doing so, they hope to undermine progress gained since the racial justice uprisings of 2020.<sup>12</sup>

During the 2021 legislative session, which saw the first wave of modern anti-truth efforts, most anti-truth bills followed a similar model. Nearly every bill proposed that session—whether targeted at K-12 education, higher education, or both—

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7. See *Dream Defs. v. Governor of Fla.*, 57 F.4th 879, 883–85 (11th Cir. 2023) (enjoining anti-protest law as overbroad, vague, and preventing plaintiffs from exercising their right to protest); Grace Manthey, Frank Esposito & Amanda Hernandez, *Despite 'Defunding' Claims, Police Funding Has Increased in Many US Cities*, ABC NEWS (Oct. 16, 2022, 8:34 AM), <https://abcnews.go.com/US/defunding-claims-police-funding-increased-us-cities/story?id=91511971> [<https://perma.cc/WL88-7666>]; Laurie Woods, *Defund the Police? Actually, Police Salaries Are Rising in Departments Across the U.S.*, U.S. NEWS (June 29, 2021, 1:11 PM), <https://www.usnews.com/news/cities/articles/2021-06-29/police-salaries-are-rising-in-departments-across-the-us> [<https://perma.cc/X62K-FBR4>].

8. See *infra* Section I.C.

9. See *infra* Section I.B.

10. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that racial segregation in education facilities violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).

11. See *Critical Race Theory*, *supra* note 5.

12. See *id.*

targets a list of so-called divisive concepts that either mirrored or adapted concepts first appearing in former President Donald Trump's Executive Order on Combating Race and Sex Stereotyping.<sup>13</sup> These concepts are often poorly defined and reflect hostility toward honest discussions of oppression, affirmative action, systemic bias, and other topics related to race, racism, sex, and privilege.<sup>14</sup> Some bills include additional restrictions on the discussion of the role of race and racism in the country's founding.<sup>15</sup> Often, the bills lack context, definitions, or examples of the types of instruction they seek to target.<sup>16</sup> Despite this lack of clarity, the bills purport to demand objectivity in instruction, often in a manner that is inconsistent with proper pedagogy and undermines educators' ability to teach in a dynamic environment.<sup>17</sup> While some of these bills lack clear enforcement structures, others provide for specific discipline of educators, require schools or state agencies to enact implementing regulations, or prohibit states and localities from spending public funding on targeted instruction.

As this Article discusses the anti-truth movement and its impacts, it will reference anti-truth legislation in five states:

- (1) Florida: House Bill 7 ("HB 7") prevents instructors from endorsing, advancing, or promoting its list of divisive concepts in either K-12 or higher education and requires schools to

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13. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (March 20, 2024), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/9684-HSP2>]; See Exec. Order No. 13,950, 85 Fed. Reg. 60683 § 2(a) (Sept. 22, 2020).

14. See *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 542–45 (N.D. Cal. 2020) (granting preliminary injunction against Executive Order 13,950 because "divisive concepts" were void for vagueness and likely to impermissibly restrict speech).

15. See, e.g., S.B. 3, 2022 Leg., 87th Sess. § 28.0022(a)(4)(A)(viii) (Tex. 2022) ("[A] teacher, administrator, or other employee of a state agency, school district, or open-enrollment charter school may not: . . . with respect to their relationship to American values, slavery and racism are anything other than deviations from, betrayals of, or failures to live up to, the authentic founding principles of the United States, which include liberty and equality . . .").

16. See generally S.B. 3.

17. See, e.g., *id.* § 28.0022(1)–(2) (stating a teacher who chooses to discuss a "widely debated and currently controversial issue of public policy or social affairs . . . shall explore that topic objectively and in a manner free from political bias").

establish and use a complaint mechanism.<sup>18</sup> Schools that fail to meet these requirements may lose significant funding.<sup>19</sup> Senate Bill 266 prevents public colleges and universities from using state and federal funding for Diversity, Equity, and Inclusion (“DEI”) programs or for other activities that would violate HB 7;<sup>20</sup>

- (2) Texas: Senate Bill 3 (“SB 3”), originally passed as House Bill 3979 but later amended, targets a similar list of divisive concepts, bars educators from “requir[ing] an understanding of The 1619 Project,” and removes information about civil rights, Black leaders, the genocide of indigenous peoples, the history of white supremacy, and other concepts from the state’s K-12 social studies curriculum;<sup>21</sup>
- (3) Georgia: House Bill 1084 (“HB 1084”) targets a list of divisive concepts that mirrors Executive Order 13950 and requires districts to adopt implementing structures, including complaint resolution policies allowing students and parents to file a report when school staff “act upon, promote, or encourage” the divisive concepts;<sup>22</sup>
- (4) Indiana: House Bill 1134 incorporates the same list of divisive concepts, and creates

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18. See H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022).

19. S.B. 2524, 124th Leg., Reg. Sess. (Fla. 2022) (revising, for example, “the goals of the Florida Center for Nursing[,]” “the requirements for school district and charter school capacity determinations [, and]” “Department of Education duties under the Family Empowerment Scholarship Program,” as well as “establishing the distribution methodology that early learning coalitions must use to distribute school readiness program funds to eligible providers[,] . . . creating the Driving Choice Grant Program within the department for specified purposes relating to the transportation of certain students[,]” and “establishing the Linking Industry to Nursing Education (LINE) Fund for specified purposes”).

20. See S.B. 266, 2023 Leg. (Fla. 2023).

21. S.B. 3, 87th Leg., 2d Spec. Sess. (Tex. 2022).

22. H.B. 1084, 156th Gen. Assemb., Reg. Sess. (Ga. 2022).

curriculum review committees comprised of parents and community members who could reject materials not “representative of the community’s interests;”<sup>23</sup> and

- (5) South Carolina: in 2022, South Carolina proposed several pieces of anti-truth legislation, including House Bill 4392 (“H 4392”).<sup>24</sup> These bills aim to prevent educators from using instructional or training materials that “serve to inculcate” divisive concepts in K-12 education, including those found in Executive Order 13950 and the idea that “slavery and racism are anything other than deviations from, betrayals of, or failures to live up to, the authentic founding principles of the United States, which include liberty and equality.”<sup>25</sup>

Each of these bills was advanced in response to—and with the goal of suppressing—Black political participation and power, particularly by restricting truthful discussions of historic and current systems of racial injustice.<sup>26</sup>

Some of these bills, including Florida’s HB 7, have been applied to restrict honest, accurate curricula.<sup>27</sup> Others, like South Carolina’s H 4392, were defeated in the legislature.<sup>28</sup> Still others, including Texas’ SB 3 and Georgia’s HB 1084, passed but have

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23. H.B. 1134, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022).

24. H.R. 4392, 124th Gen. Assemb., Reg. Sess. (S.C. 2021); Mary Green, *State Superintendent Cautions Lawmakers as They Consider Controversial Education Bills*, LIVE 5 NEWS (Feb. 17, 2022, 4:09 AM), <https://www.live5news.com/2022/02/17/state-superintendent-cautions-lawmakers-they-consider-controversial-education-bills/> [<https://perma.cc/MQ72-GQML>] (discussing H.4325, H.4343, H.4392, H.4605, and H.4799).

25. H.R. 4392, 124th Gen. Assemb., Reg. Sess. (S.C. 2021).

26. *See In Defense of Truth*, *supra* note 1.

27. *See, e.g.*, *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1288 (N.D. Fla. 2022) (granting a preliminary injunction of HB 7, including because the law discriminates against viewpoints in support of race and sex consciousness.).

28. *H 4392 General Bill*, *By Bennett and Jones*, S.C. LEG., <https://www.scstatehouse.gov/bill-search.php?billnumbers=4392&session=124&summary=B> [<https://perma.cc/D8KF-CEAZ>].

seen little enforcement.<sup>29</sup> Nevertheless, each bill has fostered growing anti-truth sentiment that continues to undermine public education and foster environments that are increasingly hostile to Black students, other students of color, and queer students.

#### I. ANTI-TRUTH HARMS AND THE LIMITATIONS OF LITIGATION IN THE FIGHT FOR TRUTH

Pro-truth advocates—students, professors, education leaders, and other defenders of truth in education—are fighting back by filing litigation that challenges anti-truth laws under constitutional provisions such as the First Amendment and the Due Process Clause. For example, professors and students in Florida filed suit<sup>30</sup> in August 2022 to challenge Florida’s HB 7 (also known as the Stop WOKE Act) alleging that it violates the First and Fourteenth Amendments.<sup>31</sup> The Plaintiffs aim to vindicate the rights of educators and students in higher education to receive, teach, and accurately discuss topics relating to race, racism, and oppression.<sup>32</sup> In doing so, they hope to restore Black, brown, and queer visibility in the Florida’s college classrooms and affirm students’ and professors’ right to teach and learn about race, gender, and sexuality.<sup>33</sup>

Some of the greatest harms inflicted by anti-truth laws, however, are not caused by their enforcement and cannot be stymied through litigation. Anti-truth laws aim to stifle increased Black political participation and queer visibility by pushing Black and queer students out of public education institutions and by reducing funding for schools that predominantly serve

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29. See S.B. 3, 87th Leg., 2d Spec. Sess. (Tex. 2021); H.B. 1084, 156th Gen. Assemb., Reg. Sess. (Ga. 2022).

30. At least one of the authors represents the plaintiffs in this litigation. See *Pernell*, 641 F. Supp. 3d at 1218.

31. *Id.* at 1233.

32. See generally *id.*

33. See *id.*

Black students.<sup>34</sup> Anti-truth laws accomplish these twin goals through the enforcement of their terms, but also by inspiring rhetoric that spurs prejudice and drives further anti-truth actions.<sup>35</sup> This Part of the Article describes how that rhetoric inflicts dignitary harms upon Black, brown, and queer students, inspires harassment of educators, spurs the passage of local anti-truth measures, and fuels increased efforts to defund public education. Advocates must consider whether litigation is the most effective means to combat these harms and the broader anti-truth backlash to Black political participation. Additionally, this Part of the Article continues by describing the pitfalls of litigation to challenge anti-truth laws, advising advocates on how best to avoid them, and identifying bills and regulations that were seemingly drafted to evade judicial review.

#### A. Dignitary and Communal Harms

When legislators pass anti-truth laws, they send a clear message to students and educators: Black and queer stories, histories, and identities are not given equal weight in society, are not fit to be taught in schools, and may even be deemed inappropriate.<sup>36</sup>

The Equal Protection Clause and federal civil rights laws recognize that the harm of discrimination flows not only from denial of access to public services and institutions, but from the humiliation and degradation people experience when they receive differential treatment on the basis of their race, gender, or sexual orientation. For example, the Supreme Court's landmark decision to overturn legal segregation in public schools was driven, in part, by the Court's recognition that legally sanctioned discrimination "generates a feeling of inferiority as to [the targeted group's] status in the community that may affect

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34. See *In Defense of Truth*, *supra* note 1; *Nation's Largest LGBTQ Advocacy Group Joins Equality Florida in Issuing Updated Florida Travel Advisory*, EQUAL. FLA. ACTION, INC. (May 23, 2023), <https://eqfl.org/updated-travel-advisory-HRC> [<https://perma.cc/SNU3-5S5U>].

35. See *In Defense of Truth*, *supra* note 1.

36. Ishena Robinson, *The History They Don't Want You to Know*, LEGAL DEF. FUND (Feb. 25, 2022), <https://www.naacpldf.org/war-on-truth-history/> [<https://perma.cc/L8LX-MNA7>].

their hearts and minds in a way unlikely ever to be undone.”<sup>37</sup> Similarly, in its decision in *Strauder v. West Virginia* overturning a law that barred Black people from serving on juries, the Supreme Court observed that discriminatory measures which target Black people are “practically a brand upon them, affixed by the law, an assertion of their inferiority.”<sup>38</sup> Justice Frank Murphy invoked these principles in his prescient dissent to the Court’s decision in *Korematsu v. United States*, which upheld the internment and oppression of Japanese-Americans during World War II.<sup>39</sup> Condemning the Court, Justice Murphy urged that to “give constitutional sanction” to racial and ethnic discrimination “is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual.”<sup>40</sup>

Anti-truth measures similarly communicate the inferiority of the communities whose stories they censor. For example, Black students in York County, Pennsylvania, where public school officials removed books discussing race and racism, described the dignitary and stigmatic harms inflicted by anti-truth book bans.<sup>41</sup> Renee Ellis, a high school student in York County, saw herself and her experiences reflected in the Black protagonists written by Angie Thomas, Jason Reynolds, and other Black authors.<sup>42</sup> When books by those same authors were targeted by anti-truth advocates, Ellis felt targeted by her own community.<sup>43</sup> She shared that “[w]hen those books that you’ve read and that impacted you so greatly are challenged, it really stings.”<sup>44</sup> Ellis’ classmate, Aaryan Rawal, similarly observed

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37. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

38. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

39. *Korematsu v. United States*, 323 U.S. 214, 233–43 (1944) (Murphy, J., dissenting).

40. *Id.* at 240.

41. See Georgia Davis, ‘It Really Stings’: Students Fighting Book Bans Talk About the Harm They Cause, TFA: ONE DAY (Aug. 10, 2022), <https://www.teachforamerica.org/one-day/top-issues/book-bans-school-libraries> [<https://perma.cc/E9V8-N7LY>]. In its discussion of local anti-truth measures, this article uses the term “book ban” to describe policies that restrict students’ access to books about race and gender, including removals for review. *Id.*; see also *Book Bans: Frequently Asked Questions*, PEN AM., <https://pen.org/book-bans-frequently-asked-questions/> [<https://perma.cc/22VD-2MX3>].

42. Davis, *supra* note 41.

43. *Id.*

44. *Id.*

that “[a] student cannot learn if they do not feel heard and if they do not feel represented.”<sup>45</sup> By censoring representative texts and labeling those texts divisive or inappropriate, anti-truth advocates and legislators infringe upon the dignity of Black, brown, and queer students and educators and undermine their political power.

Worse, these dignitary harms carry measurable mental health impacts. Individuals who face discrimination or perceive that they are being treated differently because of their race experience negative impacts on physiological and psychological functioning.<sup>46</sup> These reactions induced by discrimination drive adverse changes in mental health functioning, including anxiety and depression, and impair functioning in school and at work.<sup>47</sup> Anti-truth measures in particular may cause Black students to feel shame about their identities and may cause feelings of isolation, stress, and imposter syndrome.<sup>48</sup> Students like Rawal report that these mental health impacts impair their ability to learn and to fight back against anti-truth and other discriminatory measures.<sup>49</sup> In short, anti-truth measures inflict dignitary harm that compromises Black and queer students’ well-being and ability to build political power.

These harms beget additional, exponential harms by spurring similar discriminatory actions against Black and queer students and educators. As the Supreme Court recognized in *Strauder*, discriminatory measures that target Black people are “a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”<sup>50</sup> Anti-truth measures send a message

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45. *Id.*

46. See David R. Williams & Ruth Williams-Morris, *Racism and Mental Health: The African American Experience*, 5 *ETHNICITY & HEALTH* 243, 243 (2000) (“[E]xperiences of discrimination are a source of stress that can adversely affect mental health.”).

47. David R. Williams, Jourdyn A. Lawrence, Briggette A. Davis & Cecilia Vu, *Understanding How Discrimination Can Affect Health*, 54 *HEALTH SERV. RSCH.* 1374, 1383 (2019).

48. Krystal Jagoo, *Book Banning Is on the Rise—And It Can Look a Lot Like Oppression*, VERYWELLMIND, <https://www.verywellmind.com/mental-health-ramifications-of-book-bans-5218929> [https://perma.cc/SS8M-R2MP] (Apr. 7, 2022).

49. See Davis, *supra* note 41.

50. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

that Black people, queer people, or other communities are inferior; these measures undermine the idea that those communities are worthy of inclusion in other aspects of American life.<sup>51</sup>

### 1. *Texas*

Anti-truth measures and rhetoric at the state level inspire discriminatory policies at the local level. Texas provides an illustrative case study. Texas SB 3 passed in 2021 without meaningful enforcement mechanisms or sanctions for educators who violated the law's provisions.<sup>52</sup> To date, SB 3 has not been applied to justify the discipline or termination of educators who teach so-called "divisive concepts." The law has, however, inspired anti-truth measures throughout Texas, including anti-truth actions that are not explicitly required by or easily traceable to SB 3.<sup>53</sup>

Following the passage of SB 3, Texas State Representative Matt Krause, Chairman of the Texas House Committee on General Investigating, issued a list of 850 books "that might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex" and requested that all Texas school districts report how many copies of each book they held in their library and classroom collections.<sup>54</sup> The letter contained no mention of SB 3 and the investigation was not authorized by the bill.<sup>55</sup> Nevertheless, several

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51. See Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 671 (2005).

52. See, e.g., S.B. 3, 87th Legis., Reg. Sess. (Tex. 2021).

53. See, e.g., Letter from Matt Krause, Chair, Tex. H.R. Comm. on Gen. Investigating, to Lily Laux, Deputy Comm'r Sch. Programs, Tex. Educ. Agency—(Oct. 25, 2021), (available at <https://static.texastribune.org/media/files/965725d7f01b8a25ca44b6fde2f5519b/krauseletter.pdf> [<https://perma.cc/399P-WSXL>]) [hereinafter Letter from Matt Krause]; Kasey Meehan, Tasslyn Magnusson, Sabrina Baëta & Jonathan Friedman, *Banned in the USA: The Mounting Pressure to Censor*, PEN AMERICA, <https://pen.org/report/book-bans-pressure-to-censor/> [<https://perma.cc/ZW7U-WUYM>].

54. Letter from Matt Krause, *supra* note 53; see also Bill Chappell, *A Texas Lawmaker Is Targeting 850 Books That He Says Could Make Students Feel Uneasy*, NPR (Oct. 28, 2021, 1:00 PM), <https://www.npr.org/2021/10/28/1050013664/texas-lawmaker-matt-krause-launches-inquiry-into-850-books> [<https://perma.cc/84QE-MG53>].

55. See Letter from Matt Krause, *supra* note 53.

districts complied with the request.<sup>56</sup> In January 2022, school officials in Granbury Independent School District (“ISD”) removed dozens of books in boxes labeled, “Krause List.”<sup>57</sup> Granbury Superintendent Dr. Jeremy Glenn, referring to Rep. Krause’s list, directed librarians specifically target for removal books related to LGBTQ inclusion, including titles listed in the district’s card catalog as containing and tagged with “gay” or “gender.”<sup>58</sup>

Other Texas school districts followed suit. In addition to Granbury, school officials in Keller, Carroll, Grapevine-Colleyville, and Mansfield Independent School Districts updated their book review policies or began to use those policies in new ways to review and remove books related to race, racism, sexual orientation, and gender identity.<sup>59</sup> Some of the removed books include *The Bluest Eye* by Toni Morrison, *The Diary of Anne Frank*,

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56. See, e.g., Chris Tackett, *Granbury ISD Is “Reviewing” Books*, MEDIUM (Feb. 7, 2022), <https://cjackett.medium.com/granbury-isd-is-reviewing-books-a0579c36588e#> [<https://perma.cc/43XG-35AS>].

57. Christopher Tackett (@cjackett), X (Jan. 27, 2022, 2:50 PM), <https://twitter.com/cjackett/status/1486788612511383553> [<https://perma.cc/TE5R-9QKA>].

58. Letter from Kathryn Huddleston, Staff Att’y, Am. C.L. Union of Tex., to Off. of C.R., U.S. Dep’t of Educ. 1–2 (July 8, 2022) (available at [https://www.aclutx.org/sites/default/files/aclutx\\_granbury\\_isd\\_title\\_ix\\_complaint.pdf](https://www.aclutx.org/sites/default/files/aclutx_granbury_isd_title_ix_complaint.pdf) [<https://perma.cc/8HLH-HRR7>]).

59. Brian Lopez, *Keller School Officials Order 41 Books – Including the Bible and an Anne Frank Adaptation – Off of Library Shelves*, TEX. TRIB. (Aug. 16, 2022, 4:00 PM) <https://www.texastribune.org/2022/08/16/keller-isd-removes-books/> [<https://perma.cc/N3UZ-QN7V>]; Hannah Johnson, *Carroll ISD Adopts New Book Policy for Classrooms, Libraries*, CMTY. IMPACT (July 29, 2022, 3:13 PM), <https://communityimpact.com/dallas-fort-worth/grapevine-colleyville-southlake/education/2022/07/29/carroll-isd-adopts-new-book-policy-for-classrooms-libraries/> [<https://perma.cc/4KRW-RQ33>]; Valeria Olivares & Talia Richman, *Grapevine-Colleyville Passes Limits on CRT, Books and Bathrooms*, DALLAS MORNING NEWS (Aug. 23, 2022, 12:29 AM), <https://www.dallasnews.com/news/education/2022/08/22/grapevine-colleyville-debates-limiting-lessons-on-race-gender-books-and-bathrooms/> [<https://perma.cc/6SP2-SC72>]; *Mansfield ISD Considers Plan to Ban Books in School Libraries*, FOX4 KDFW (May 17, 2023, 7:50 AM), <https://www.fox4news.com/news/mansfield-isd-considers-plan-to-ban-books-in-school-libraries/> [<https://perma.cc/7PLP-H6S3>]. Meghan Mangrum, *Southlake Superintendent Says District Hasn’t Banned Book by Grandson of Former Slave*, DALLAS MORNING NEWS (Aug. 25, 2022, 1:21 PM), <https://www.dallasnews.com/news/education/2022/08/24/southlake-superintendent-says-district-hasnt-banned-book-by-grandson-of-former-slave/> [<https://perma.cc/B2CY-PCMQ>].

and *All Boys Aren't Blue* by George M. Johnson.<sup>60</sup> In total, twelve school districts in Texas banned 625 books in 2022–23.<sup>61</sup>

Worse, some Texas school districts capitalized on anti-truth rhetoric to rollback anti-discrimination measures and pass policies targeting marginalized students. In Carroll ISD,<sup>62</sup> for example, Board members and district officials capitalized on the anti-truth wave to strike gender and sexual orientation from the district's non-discrimination statement in December 2022, arguing that the language was "divisive."<sup>63</sup> Seven months later, in July 2022, the Carroll ISD Board adopted a student handbook that mirrored the Texas Association of School Board's model handbook with key exceptions: the proposed handbook removed all examples of harassment on the basis of race, disability, and gender and removed all language about discrimination on the basis of gender identity and sexual orientation.<sup>64</sup> The same month, the Board adopted two new policies that targeted LGBTQ students by prohibiting teachers from requiring the use of gender-affirming pronouns, including to correct a student who deadnames another student or intentionally refers to that student by an incorrect pronoun, and prohibiting the use of restrooms that reflect a student's gender identity.<sup>65</sup> This mass rollback of protections for marginalized students was fueled by

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60. Brian Lopez, *Texas Has Banned More Books than any Other State, New Report Shows*, TEX. TRIB (Sept. 19, 2022, at 5:00 AM), <https://www.texastribune.org/2022/09/19/texas-book-bans/> [<https://perma.cc/RB45-UW4A>].

61. Kasey Meehan et al., *supra* note 53.

62. At least one of the authors represents the complainants in an OCR complaint against Carroll ISD.

63. See Brooke Rogers, *Carroll ISD to Change Non-Discrimination Statement, Eliminating Gender, Sexual Orientation, Religion*, CBS TEX. (Dec. 13, 2022, 5:33 PM), <https://www.cbsnews.com/texas/news/carroll-isd-to-change-non-discrimination-statement-eliminating-gender-sexual-orientation-religion/> [<https://perma.cc/T2JZ-VB3J>] (reporting the decision by the Carroll ISD school board to limit the identities protected in their non-discrimination statement).

64. *CISD Is Updating Its Student Code of Conduct – What Students Need to Know*, SOUTHLAKE ANTI-RACISM COAL., <https://www.southlakearc.com/post/cisd-is-updating-its-student-code-of-conduct-what-students-need-to-know> [<https://perma.cc/8KUZ-MU5U>] (July 22, 2023).

65. *Carroll ISD Board Votes to Change Bathroom, Pronoun Policies*, NBC DFW, <https://www.nbcdfw.com/news/local/carroll-isd-board-votes-to-change-bathroom-pronoun-policies/3302601/> [<https://perma.cc/X3GT-C6ZU>] (July 25, 2023, 11:36 AM).

Texas' anti-truth law but has evolved far beyond the restrictions contained in that law.

### B. *Impact on Educators*

Educators are also uniquely harmed by anti-truth laws and the dignitary harms that those laws inflict. As a result, Black educators and educators who study race and queer studies are being pushed out of schools and universities. While the majority of principals and educators in K-12 public schools do not support anti-truth measures, educators experience harassment and targeted censorship from politicians, school officials, and even parents.

Across race and location, fifty-four percent of educators believe that there should not be legal limits on classroom conversations related to "racism, sexism, and other topics that some people disagree about" in the classroom.<sup>66</sup> Less than one quarter of educators believe that states should be able to impose legal limits on classroom conversations.<sup>67</sup> Still, about one in four principals and one in six teachers reported that they were harassed about school policies related to the teaching of race, racism, or bias during the first half of the 2021–22 school year.<sup>68</sup> A report released by the Government Accountability Office in 2022 found that this climate has contributed to a "[n]egative perception of the teaching profession and perceived lack of support for current teachers" that posed significant recruitment and retention challenges.<sup>69</sup> Black educators, queer educators, and educators committed to teaching about race, racism, and queer stories have been particularly impacted by these retention challenges.<sup>70</sup>

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66. ASHLEY WOO, REBECCA L. WOLFE, ELIZABETH D. STEINER, SY DOAN, REBECCA ANN LAWRENCE, LISA BERDIE, LUCAS GREER, ALLYSON D. GITTENS & HEATHER L. SCHWARTZ, *WALKING A FINE LINE – EDUCATORS' VIEWS ON POLITICIZED TOPICS IN SCHOOLING* 2, 9 (2022).

67. *Id.* at 9-10.

68. *Id.* at 16.

69. U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105180, *K-12 EDUCATION: EDUCATION SHOULD ASSESS ITS EFFORTS TO ADDRESS TEACHER SHORTAGES* (2022).

70. See Marc Levy, *Burnout, Low Pay and Politics Are Driving away Teachers. Turnover Is Soaring for Educators of Color*, ASSOCIATED PRESS, <https://apnews.com/article/teacher-retirement-quit-job-b0c39ec0d4320e12f2767a342e503f85> [https://perma.cc/3JRX-ZHTX] (Aug. 2, 2023, 10:34

Unable to teach or discuss the topics that are important to them, educators report that they are being forced out in “what educators and experts describe as a brain drain of those who are most committed to fighting racism in schools.”<sup>71</sup>

Black educators in Texas, including principals and superintendents, have been targeted by anti-truth advocates, some of whom have no ties to the districts they target. For example, James Whitfield, the first Black principal of the Texas high school where he worked, was forced to resign in 2021 when a former School Board candidate accused him of pushing Critical Race Theory during a Grapevine-Colleyville Independent School District Board meeting.<sup>72</sup> Whitfield wrote a letter to the community in June 2020 regarding the police murders of George Floyd, Breonna Taylor, and Ahmaud Arbery, urging that “[e]ducation is the key to stomping out ignorance, hate, and systemic racism.”<sup>73</sup> When Whitfield came under fire for the letter a year later, the district did not support him, but instead negotiated a settlement for his resignation that placed him on paid administrative leave until 2023.<sup>74</sup>

Other Texas school districts took action to restrain educators from commenting on the hostile climate in their districts or criticizing anti-truth action in the district. In Southlake, Carroll ISD officials added a provision to educator contracts requiring educators to agree “to not disparage, criticize, or defame the

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AM); Matt Lavietes, *‘I Cannot Teach in Florida’: LGBTQ Educators Fear Fallout from New School Law*, NBC NEWS (Apr. 1, 2022, 10:17 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/-cannot-teach-florida-lgbtq-educators-fear-fallout-new-school-law-rcna22106> [<https://perma.cc/GCK5-PBAE>].

71. Tyler Kingkade, *Critical Race Theory Battles Are Driving Frustrated, Exhausted Educators out of Their Jobs*, NBC NEWS (July 12, 2021, 4:32 AM), <https://www.nbcnews.com/news/us-news/critical-race-theory-battles-are-driving-frustrated-exhausted-educators-out-n1273595> [<https://perma.cc/EE5B-LKX6>].

72. Brian Lopez, *North Texas Principal Resigns to End Fight over Whether He Was Teaching “Critical Race Theory,”* TEX. TRIB. (Nov. 10, 2021, 5:00 PM), <https://www.texastribune.org/2021/11/10/colleyville-principal-critical-race-theory/> [<https://perma.cc/RVW5-Q42P>] [hereinafter Lopez, *North Texas Principal Resigns*].

73. Brian Lopez, *How a Black High School Principal Was Swept into a “Critical Race Theory” Maelstrom in a Mostly White Texas Suburb*, TEX. TRIB., <https://www.texastribune.org/2021/09/18/colleyville-principal-critical-race-theory/> [<https://perma.cc/GC49-FRXC>] (Sept. 20, 2021) [hereinafter Lopez, *Black High School Principal*].

74. Lopez, *North Texas Principal Resigns*, *supra* note 72.

District, and its employees or officials, to the media.”<sup>75</sup> Similarly, Houston ISD adopted new language prohibiting educators from using “social media or any communication platform . . . to communicate false or misleading information . . . particularly if designed to damage the school or district’s reputation.”<sup>76</sup> These measures, and the harassment that educators face, foster a hostile work environment for Black educators<sup>77</sup> at a time when more than 3,000 Texas schools—about seventy-five percent of which serve Black students—are without even a single Black educator.<sup>78</sup>

These issues are not unique to Texas. In Florida, a teacher was fired after displaying a Black Lives Matter banner in her classroom.<sup>79</sup> A Tennessee high school social studies teacher faced discipline and potential termination after assigning a Ta-Nehisi Coates essay about President Donald Trump and played a spoken-word poem that discussed white privilege.<sup>80</sup> In Missouri, a diversity coordinator, who was the only Black administrator in her district, was forced to resign because of the severity of threats she received about her work from parents and anti-truth advocates.<sup>81</sup>

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75. Mike Hixenbaugh, *Teachers in Southlake, Texas, Asked to Sign ‘Non-Disparagement’ Agreements*, NBC NEWS, <https://www.nbcnews.com/news/us-news/southlake-texas-teachers-non-disparagement-agreements-rcna26480> [https://perma.cc/F72H-PAT3] (Apr. 28, 2022, 7:21 PM).

76. Press Release, Am. Fed’n of Teachers, *Educators Decry Latest Gag Orders from HISD Superintendent Mike Miles* (Aug. 22, 2023), <https://www.aft.org/press-release/educators-decry-latest-gag-orders-hisd-superintendent-mike-miles> [https://perma.cc/2DMQ-WYHD].

77. See Vilissa Thompson, *As Burnout Worsens for Educators, Black Teachers Face Intersecting Challenges*, PRISM (Oct. 24, 2022), <https://prismreports.org/2022/10/24/black-teachers-face-burnout-challenges/> [https://perma.cc/H6KL-MBLX].

78. Libby Seline, *Texas Has Thousands of Schools Without a Black Teacher. Here’s How San Antonio Stacks Up.*, SAN ANTONIO EXPRESS-NEWS (Mar. 30, 2023), <https://www.express-news.com/news/education/article/black-teachers-san-antonio-17864710.php> [https://perma.cc/45SH-6DQY].

79. Brigid Kennedy, *The Critical Race Theory Fight Is Leading to Educator ‘Brain Drain’*, THE WK. (July 12, 2021), <https://theweek.com/us/1002526/the-critical-race-theory-fight-is-leading-to-educator-brain-drain> [https://perma.cc/F49J-HPB7].

80. *Id.*

81. *See id.*

The University of Florida<sup>82</sup> similarly provides an illustrative example of how anti-truth sentiment has impacted educators at the post-secondary level. In the wake of anti-truth bills and the rise in anti-truth rhetoric, faculty members who conduct race-related research report that they must “consistently evaluate whether their teaching and scholarship run afoul of [anti-]CRT legislation.”<sup>83</sup> As a result of the legislation, many Florida faculty began “considering whether to include content they’ve taught for years,” even where robust teaching of the subject matter requires discussing that content.<sup>84</sup> Faculty report that they cannot rely on university officials to protect their interests and that the university’s “public cowardice” in challenging anti-truth assaults like Florida H.B. 7 “impedes [their] ability to recruit, retain, and do this work.”<sup>85</sup> In this way, anti-truth measures and the sentiment they inspire push out Black educators, queer educators, and educators teaching about race and queer studies and remove key supports for Black, brown, and queer students.

### *C. Efforts to Defund Public Education*

The impact of anti-truth sentiment reaches beyond book and curricular restrictions, chilling of classroom conversations, and harassment of students and educators. Anti-truth rhetoric has also seeded increased support for school vouchers, fueling mass divestment from public education. This attack on public education funding is a key component of anti-truth advocates’ backlash against Black political power and queer visibility: where advocates have failed to push Black, brown, and queer students out of school districts, they aim to reduce funding for those

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82. The University of Florida is a defendant in *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022).

83. KATHERYN RUSSELL-BROWN & RYAN MORINI, A WAY FORWARD: UF RACE SCHOLARS ON SUPPORT, OBSTACLES, AND THE NEED FOR INSTITUTIONAL ENGAGEMENT 10 (2021).

84. Ryan Need, *I’m a Professor and the ‘Stop Woke’ Act Creates a Climate of Fear for Florida Educators*, TAMPA BAY TIMES, <https://www.tampabay.com/opinion/2022/08/16/im-a-professor-at-uf-and-the-stop-woke-act-creates-a-climate-of-fear-for-educators-column/> [https://perma.cc/F4RE-SW5L] (Aug. 16, 2022).

85. RUSSELL-BROWN & MORINI, *supra* note 83, at 20.

districts by diverting that funding to private schools that predominantly serve white students.<sup>86</sup>

This strategy is not new. In the wake of *Brown v. Board of Education*'s landmark decision to overturn school segregation and subsequent orders to school districts to integrate, states began to propose and adopt school voucher programs to help white families avoid integration.<sup>87</sup> Instead of sending their tax dollars to public schools that would soon be integrated by Black students, white families could now divert those dollars to fund private "segregation academies," accessible only to white students.<sup>88</sup> The impact on public school funding was devastating: in Prince Edward County, Virginia, for example, officials allocated only \$189,000 to integrated public schools in 1964, more than \$500,000 less than the school board requested in 1955 before *Brown*'s mandate to desegregate with "all deliberate speed."<sup>89</sup> In contrast, county officials allocated \$375,000 to be used for "tuition grants to students attending either private nonsectarian schools in the County or public schools charging tuition outside the County."<sup>90</sup> These voucher dollars were, in effect, only available to white students.<sup>91</sup>

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86. See, e.g., *Vouchers*, NAT'L EDUC. ASS'N (Dec. 2, 2021), <https://www.nea.org/advocating-for-change/action-center/our-issues/vouchers> [<https://perma.cc/Y86K-Y2WD>] ("Vouchers take scarce funding from students in public schools and give those resources to unaccountable private schools."); Jongyeon Ee, Gary Orfield & Jennifer Teitell, *Private Schools in American Education: A Small Sector Still Lagging in Diversity* 8–9 (Mar. 5, 2018) (unpublished working paper) (on file with UCLA) (suggesting private schools have a disproportionately and increasingly white student body); Andrew Prokop, *The Conservative Push for "School Choice" Has Had Its Most Successful Year Ever*, VOX (Sept. 11, 2023, 8:35 AM), <https://www.vox.com/politics/23689496/school-choice-education-savings-accounts-american-federation-children> [<https://perma.cc/4MNQ-A3CE>] ("Conservative activists saw opportunity. 'It is time for the school choice movement to embrace the culture war,' the Heritage Foundation's Jay Greene and James Paul wrote in 2022."); see also Chris Ford, Stephenie Johnson & Lisette Partelow, *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS (July 12, 2017), <https://www.american-progress.org/article/racist-origins-private-school-vouchers/> [<https://perma.cc/Z2T9-H4KT>] (discussing the racist origins of voucher programs and their current effect of increasing racial segregation in schools).

87. See Ford et al., *supra* note 86.

88. *Id.*

89. *Id.*; Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and Brown*, 90 VA. L. REV. 1667, 1680–81, 1690 (2004).

90. Ford et al., *supra* note 86 (quoting Turner, *supra* note 89, at 1690).

91. See *id.*

During the 2023 legislative session, approximately half of all states proposed and/or considered school voucher legislation, an increase from prior years.<sup>92</sup> In addition, twenty-two states have enacted tax credit voucher programs that reduce the available tax revenue for public schools and twelve states have established education savings account (ESA) voucher programs that can be used to fund homeschooling or admission to a private school.<sup>93</sup> In Florida, for example, legislators advanced an ESA voucher program that would cost the state four billion dollars in line-item appropriations and deplete funds available for public school districts.<sup>94</sup>

In a backlash to Black political power, participation, and ability to mobilize for inclusive education, anti-truth advocates have proposed, and at times demanded, public school vouchers as a “solution” to the problem of classroom conversations about race. Self-proclaimed anti-CRT advocate Christopher Rufo called for the decentralization of education and urged states to adopt school choice measures as a response to critical race theory, and a means to prevent exposure to “substandard schools controlled by leftist ideologues.”<sup>95</sup> Rufo argued that “[u]niversal school choice – meaning that public education funding goes directly to parents rather than schools – would fix that.”<sup>96</sup> These sentiments have been echoed by organizations like the Georgia Public Policy Foundation and the Heritage Foundation, which urged the school choice movement to “embrace the culture war” as a means to fuel support for school voucher programs.<sup>97</sup>

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92. Iris Hinh, *CTR. ON BUDGET POL'Y PRIORITIES, STATE POLICYMAKERS SHOULD REJECT K-12 SCHOOL VOUCHER PLANS* 5 (Mar. 21, 2023), <https://www.cbpp.org/sites/default/files/3-16-23sfp.pdf> [<https://perma.cc/9P5A-5JWF>].

93. *Id.* at 4.

94. *Id.* at 5–6.

95. Christopher F. Rufo, *Laying Siege to the Institutions*, 51 *IMPRIMIS*, APR./MAY 2022, <https://imprimis.hillsdale.edu/laying-siege-to-the-institutions/> [<https://perma.cc/33DZ-R6RZ>] [hereinafter Rufo, *Laying Siege to the Institutions*]; see also *Critical Race Theory Briefing Book*, CHRISTOPHER F. RUFO (Feb. 14, 2023), <https://christopherrufo.com/p/crt-briefing-book> [<https://perma.cc/4B3P-P2N9>].

96. Rufo, *Laying Siege to the Institutions*, *supra* note 95.

97. See JAY GREENE & JAMES PAUL, HERITAGE FOUND., *TIME FOR THE SCHOOL CHOICE MOVEMENT TO EMBRACE THE CULTURE WAR* (2022), <https://www.heritage.org/sites/default/files/2022-02/BG3683.pdf> [<https://perma.cc/ED4N-JQL6>] [<https://perma.cc/75JP-YJE6>];

This rhetoric reached state capitols, where legislators invoked it to advance school voucher programs. Oklahoma legislators proposed a school choice program called the “Freedom from Racial Discrimination Scholarship” that would provide scholarships to “students who have concerns related to the teaching of gender or race diversity concepts.”<sup>98</sup> In Kansas, legislators proposing ESA voucher programs invoked “critical race theory” and invited parents to testify about their objections to schools teaching “themes of LGBTQ tolerance, implicit bias, white privilege and white fragility.”<sup>99</sup> This rhetoric reached the U.S. Senate, where Senator James Lankford introduced a 2022 resolution stating that school vouchers can “combat destructive ideologies like Critical Race Theory.”<sup>100</sup> This drive to defund public schools may inflict the deepest wounds on public education but, critically, it is neither required by anti-truth laws or traceable to the text of those laws.

*D. Litigation Against Anti-Truth Laws: Obstacles to Facial and As-Applied Challenges*

As discussed above, anti-truth harms do not always flow from the bills themselves but are often inspired by the anti-truth sentiment those bills inspire. In these instances, litigation may not be an effective tool to redress the injuries inflicted by the anti-truth movement. However, even when harm flows from the language or provisions of an anti-truth law, litigation targeting those laws has unique limitations.<sup>101</sup> To better

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Athan Clark, *Georgia Should Follow North Carolina and Adopt Universal School Choice*, GA. PUB. POL'Y FOUND. (Oct. 5, 2023), <https://www.georgiapolicy.org/news/georgia-should-follow-north-carolina-and-adopt-universal-school-choice/> [https://perma.cc/LX89-G39R].

98. S. 1172, 58th Leg., 2d Sess. (Okla. 2022).

99. Sherman Smith & Tim Carpenter, *Kansas Lawmakers Rebrand Complaints with Public Education in Push for 'School Choice'*, KAN. REFLECTOR (Jan. 30, 2022, 3:50 AM), <https://kansasreflector.com/2022/01/30/kansas-lawmakers-rebrand-complaints-with-public-schools-in-push-for-school-choice/> [https://perma.cc/PB83-WEY5].

100. S. Res. 493, 117th Cong. (2022).

101. See generally Tess Bissell, *Teaching in the Upside Down: What Anti-Critical Race Theory Laws Tell Us About the First Amendment*, 75 STAN. L. REV. 205, 209–11 (2023) (discussing the litigation challenges K-12 teachers may face if bringing First Amendment challenges against these anti-truth laws).

understand these challenges, this Section reviews litigation against two of Florida's anti-truth laws, identifies the pitfalls that impeded the plaintiffs' ability to challenge those laws, and discusses the particular pitfalls of litigating against laws that lack meaningful enforcement mechanisms or evidence.

To effectively challenge anti-truth laws on their face, and prior to specific enforcement, advocates should be prepared to establish standing by showing a concrete injury, traceability, and redressability. Specifically, advocates must be prepared to show that the anti-truth injuries they assert are traceable to the conduct of the defendants, that those injuries can be redressed by court intervention, and/or that they create a threat of enforcement that would lead a reasonable person to self-censor.<sup>102</sup>

The nature of these anti-truth laws poses unique standing challenges. Where the harm that advocates seek to challenge is not caused by an anti-truth law's specific enforcement, but by the dignitary harm inflicted by the law or the climate of discriminatory conduct that the law inspires, prospective plaintiffs may be unable to establish traceability.<sup>103</sup> A challenge to Florida's HB 1557,<sup>104</sup> also known as the Don't Say Gay Law,<sup>105</sup> was dismissed on these very grounds.<sup>106</sup> As the district court noted:

[t]he principal problem is that most of Plaintiffs' alleged harm is not plausibly tied to the law's *enforcement* so much as the law's very *existence*. Plaintiffs contend the law's passage, the sentiment behind it, the Legislators' motivation, and

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102. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733–34 (2008); *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1271–72 (11th Cir. 2006).

103. See *Equality Fla. v. Fla. State Bd. of Educ.*, No. 4:22-cv-134-AW-MJF, 2022 U.S. Dist. LEXIS 240375 at \*8 (N.D. Fla. Sept. 29, 2022).

104. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

105. Dana Goldstein, *Opponents Call It the 'Don't Say Gay' Bill. Here's What It Says.*, NY TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html> [<https://perma.cc/56WZ-DVVV>].

106. *Equality Fla.*, 2022 U.S. Dist. LEXIS 240375 at \*7, \*30.

the message the law conveys all cause them harm.

But no injunction can unwind any of that.<sup>107</sup>

Because plaintiffs could not tie their alleged harm to Defendants' enforcement of the law itself, they could not establish standing.<sup>108</sup>

The court identified specific facts and assertions that undermined plaintiffs' traceability and redressability arguments. First, plaintiffs "allege[d] that the law's 'harmful effects' were 'already manifest' even before the law became effective—before, that is, it even *could* be enforced."<sup>109</sup> Those "harms predating a statute's enforcement were not caused by the statute's enforcement," the court found, nor could they be redressed by precluding that enforcement.<sup>110</sup> Plaintiffs also described how the law inspired students and parents to engage in discriminatory conduct and caused schools officials to begin restricting and chilling educator speech.<sup>111</sup> However, the court found that an injunction precluding the law's enforcement would not remedy harms caused by the community and "school officials were acting in line with whatever sentiment they thought was underlying [the bill's] passage."<sup>112</sup>

Advocates should also be wary of bringing litigation against anti-truth laws that contain no enforcement mechanisms. Where an anti-truth law contains no enforcement scheme and where state officials have neither adopted regulations that target educators for enforcement or otherwise taken enforcement action, prospective plaintiffs will likely be unable to establish an injury or the traceability of that injury to state actors.<sup>113</sup> The Northern District of Florida denied a preliminary injunction

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107. *Equality Fla.*, 2022 U.S. Dist. LEXIS 240375 at \*8.

108. *Id.* at \*8, \*21.

109. *Id.* at \*9.

110. *Id.*

111. *See id.* at \*11, \*13.

112. *Id.* at \*10.

113. *See, e.g.,* *NFC Freedom, Inc. v. Diaz*, No. 4:23-cv-360-MW/MAF, 2023 U.S. Dist. LEXIS 197500 at \*7–29, \*41–42 (N.D. Fla. Nov. 3, 2023).

seeking to enjoin Florida's SB 266<sup>114</sup> because of this very issue.<sup>115</sup> There, the court found that SB 266 contained no enforcement provisions targeting educators, and because plaintiffs provided no evidence that defendants intended to promulgate enforcing regulations, the court found that plaintiffs had failed to establish standing at the preliminary injunction stage.<sup>116</sup> Cautioning future litigants, the court advised that plaintiffs could establish a concrete and traceable injury in a challenge to a law targeting free speech by "point[ing] to a law that directly targets them with disciplinary action" or "to an implementing regulation . . . that enforces a challenged statute and orders the decisionmakers to punish violators."<sup>117</sup> "[I]n the absence of either . . . a plaintiff could point to other evidence that the defendants intend to enforce the statute at issue against their speech in the very manner that they fear."<sup>118</sup>

As previously discussed, anti-truth laws that lack enforcement schemes may still inflict harm—harm that cannot be challenged by litigation. For example, Alabama's 2021 anti-truth regulation contains no enforcement hook.<sup>119</sup> The Board of Education Resolution, as codified in Alabama's Administrative Code, "prohibits each local board of education from offering K-12 instruction that indoctrinates students in social or political ideologies or theories that promote one race or sex above another."<sup>120</sup> However, neither the regulation nor the resolution confer a private right of action, describe how violations of the regulation should be reported, identify individuals responsible for enforcement, or grant local or state officials the authority to discipline or sanction educators who violate the regulation.<sup>121</sup>

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114. S.B. 266, 2023 Leg., Reg. Sess. (Fla. 2023).

115. See *NFC Freedom, Inc.*, 2023 U.S. Dist. LEXIS 197500 at \*2–3.

116. *Id.* at \*20–26.

117. *Id.* at \*41.

118. *Id.* at \*41–42.

119. ALA. ADMIN. CODE r. 290-040-040-.02 (2022).

120. *Id.*

121. ALABAMA STATE BOARD OF EDUCATION RESOLUTION DECLARING THE PRESERVATION OF INTELLECTUAL FREEDOM AND NON-DISCRIMINATION IN ALABAMA'S PUBLIC SCHOOLS (2021), <https://www.alabamaachieves.org/wp-content/uploads/2021/08/ALSBOE-Resolution->

The regulation nevertheless impacts students and has spurred further anti-truth action. A+ Education Partnership, an organization that advocates for public school students and teachers, noted that this policy and the public conversation around it “can have negative impacts on students who belong to marginalized communities or have different life experiences than their peers.”<sup>122</sup> LOCAL Alabama, a group that formed just one month after the Alabama Board of Education passed the anti-truth resolution, conducted outreach during 2022 and 2023 to collect “specific, documentable examples” of violations, including curricular materials that discussed “[d]ivisive concepts or critical race theory” (targeted by the anti-truth resolution).<sup>123</sup> The group intended to share those examples with the Alabama Board of Education and Alabama Attorney General.<sup>124</sup> Neither of these harms have been addressed by litigation against the regulation.

However, even when the threat of enforcement appears more credible, advocates may be unable to establish standing if the enforcement of the anti-truth measure requires too many diffuse steps or depends on other third parties. In *Falls v. DeSantis*, the Northern District of Florida denied a preliminary injunction seeking to enjoin Florida’s HB 7.<sup>125</sup> Because the threat of enforcement Plaintiffs cited depended upon the State Board of Education taking action against school districts, and those schools taking subsequent action against teachers, the court found that

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Declaring-the-Preservation-of-Intellectual-Freedom-and-Non-Discrimination-in-AL-Public-Schools.pdf [https://perma.cc/KPL7-UC8L]; ALA. ADMIN. CODE r. 290-040-040-.02 (2022).

122. Letter from Mark E. Dixon, President, A+ Educ. P’ship, to Kay Ivey, Governor, Ala. & Ala. State Bd. of Educ. (Aug. 11, 2021) (available at <https://aplusala.org/blog/2021/08/11/a-shares-concerns-about-critical-race-theory-ban-with-alboe/> [https://perma.cc/GC9M-A9YX]).

123. Trisha Powell Crain, *Alabama Political Group Gathering Evidence of Alleged Violations of School Gender Identity, CRT Rules*, AL.COM, <https://www.al.com/educationlab/2022/08/alabama-political-group-gathering-evidence-of-alleged-violations-of-school-gender-identity-crt-rules.html> [https://perma.cc/WR8C-U8NW] (Aug. 11, 2022, 12:02 PM); see *Alabama for Truth in Education*, LEGAL DEF. FUND, <https://www.naacpldf.org/truth-2/alabama-pro-truth/> [https://perma.cc/FDS8-VE7C] (describing Alabama’s anti-truth resolution).

124. Crain, *supra* note 123.

125. *Falls v. DeSantis*, 609 F. Supp. 3d 1273, 1277 (N.D. Fla. 2022). On May 19, 2023, this case was dismissed for lack of standing. *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2023 U.S. Dist. LEXIS 87714, at \*4–5 (N.D. Fla. May 19, 2023).

plaintiffs' theory "requires too many inferential leaps" and "requires the Court to stack multiple layers of inferences."<sup>126</sup>

Plaintiffs and pro-truth advocates will likely be unable to show facts sufficient to maintain standing in states where officials have taken no action to enforce their anti-truth laws against schools, school districts, or educators. In Alabama, for example, community members reported three incidents of "critical race theory" to state officials responsible for enforcing the state's anti-truth regulation.<sup>127</sup> One complaint regarding a diversity and inclusion training was accepted by the state for investigation, but has yielded no result.<sup>128</sup> Two other complaints, which alleged that Black History Month programming violated the anti-truth regulation, were rejected by the superintendent and by the very state board member who championed the anti-truth regulation.<sup>129</sup> Speaking publicly, Superintendent Eric Mackey stated that, "[h]aving a Black history program is not CRT."<sup>130</sup> Tennessee, similarly, has received one complaint that curricular content invoked "critical race theory" and violated the state's anti-truth law.<sup>131</sup> Tennessee officials declined to respond to the complaint.<sup>132</sup> In addition, some states have received few or no complaints about conduct or curricular material that violates their anti-truth laws, in part because their laws provide no mechanism for such complaints. Georgia and Texas, for example, passed anti-truth laws that contain no clear enforcement mechanisms.<sup>133</sup> Neither state has received publicly

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126. *Falls*, 609 F.Supp. 3d at 1283.

127. See Trisha Powell Crain, *Alabama Officials Receive Complaints About Black History Month as State Debates CRT Legislation*, AL.COM, <https://www.al.com/news/2022/02/alabama-officials-receive-complaints-about-black-history-month-as-state-debates-crt-legislation.html> [https://perma.cc/H2AY-68A7] (Feb. 3, 2022, 6:21 PM).

128. *Id.*

129. *Id.*

130. *Id.*

131. Gloria Oladipo, *Tennessee Declines to Act on First Complaint Under New Law Banning Critical Race Theory*, THE GUARDIAN (Nov. 30, 2021, 12:00 AM), <https://www.theguardian.com/world/2021/nov/30/tennessee-education-department-declines-to-act-critical-race-theory-complaint> [https://perma.cc/HNH9-8FR3].

132. *Id.*

133. See H.B. 3979, 87th Legis., Reg. Sess. (Tex. 2021); S.B. 3, 87th Legis., Reg. Sess. (Tex. 2021); H.B. 1084, Gen. Assemb., Reg. Sess. (Ga. 2022); Resolution, Ga. State Bd. of Educ. (2021),

available complaints about violations of those laws. This discussion does not, of course, account for independent enforcement actions that individual school districts take to enforce their own anti-truth policies.

Plaintiffs and pro-truth advocates may overcome these pitfalls by showing that the anti-truth laws they challenge contain clear enforcement mechanisms or when, as in *Pernell*, those laws have been applied to restrict or censor certain information.<sup>134</sup> In addition, advocates seeking to challenge anti-truth laws should gather facts showing that, but for the anti-truth law, the restricted material would be offered by the school. For example, in *Novoa v. Diaz*, a case consolidated with *Pernell* which also challenges Florida's HB 7, the district court found that a student established standing under the heightened standard applied to plaintiffs' preliminary injunction when he presented evidence that he intended to enroll in a course and that the professor teaching that course intended to teach restricted concepts.<sup>135</sup> In contrast, a student who failed to present evidence that her teacher intended to teach the restricted concepts was unable to demonstrate a sufficiently concrete injury to establish standing at the preliminary injunction stage.<sup>136</sup> Similarly, in a challenge to Florida's Don't Say Gay law, the district court found that Plaintiffs would need to allege that the school district in question would permit teachers to teach the lessons but for the anti-truth law.<sup>137</sup> By showing that the school or specific educator intended to offer the restricted material prior to the enforcement

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[https://simbli.eboardsolutions.com/meetings/TempFolder/Meetings/SBOE%20Resolution%20for%20Consideration%20-%202021-0602\\_1274907gatr1okglkrhw11e22drtt1g.pdf](https://simbli.eboardsolutions.com/meetings/TempFolder/Meetings/SBOE%20Resolution%20for%20Consideration%20-%202021-0602_1274907gatr1okglkrhw11e22drtt1g.pdf) [https://perma.cc/3BZH-XSNS]; see also Schwartz, *supra* note 13.

134. See *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1230 n.3, 1242–43 (N.D. Fla. 2022) (deciding that the plaintiff's First Amendment rights supersede the state's ability to limit free speech inside the classroom).

135. *Id.* at 1245.

136. *Id.*

137. *Equal Fla. v. Fla. State Bd. of Educ.*, No. 4:22-cv-134-AW-MJF, 2022 U.S. Dist. LEXIS 240375, at \*11–12 (N.D. Fla. Sept. 29, 2022); see also *Falls v. DeSantis*, 609 F. Supp. 3d 1273, 1283 (N.D. Fla. 2022) (denying a preliminary injunction due to standing issues with traceability and redressability).

or threat of enforcement of the anti-truth law, advocates can shore up their traceability and redressability arguments.<sup>138</sup>

## II. ALTERNATIVE STRATEGIES FOR ADVANCING TRUTH AND BUILDING POWER

Given the limitations of challenging anti-truth legislation through litigation, this Part offers three alternative strategies for preventing and remedying anti-truth harm. All three strategies center students and educators, highlighting the tangible harms they experience under anti-truth policies and advancing their demands for books, curricula, and spaces that reflect and affirm their identities. First, advocates should engage in legislative advocacy against proposed anti-truth legislation and in support of affirmative pro-truth legislation. Public opinion polling indicates that a majority of Americans oppose book bans and support truthful teaching about American history, including slavery and racism.<sup>139</sup> Advocates should continue harnessing this pro-truth sentiment to defeat anti-truth legislation and advance legislation prohibiting book bans and requiring inclusive curriculum. Second, advocates should consider filing Title VI and Title IX challenges to anti-truth policies through administrative complaints with the Department of Education's Office of Civil Rights ("OCR").<sup>140</sup> Recent guidance and resolutions from OCR have embraced the theory that the presence of anti-truth laws can contribute to a hostile environment, providing a promising

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138. See *Equal. Fla.*, 2022 U.S. Dist. LEXIS 240375, at \*11–12.

139. See Akilah Alleyne, *Book Banning, Curriculum Restrictions, and the Politicization of U.S. Schools*, CTR. FOR AM. PROGRESS (Sept. 19, 2022), <https://www.americanprogress.org/article/book-banning-curriculum-restrictions-and-the-politicization-of-u-s-schools/> [<https://perma.cc/XL25-QSBY>]; Fred Backus & Anthony Salvanto, *Big Majorities Reject Book Bans*, CBS NEWS (Feb. 22, 2022), <https://www.cbsnews.com/news/book-bans-opinion-poll-2022-02-22/> [<https://perma.cc/8HEX-LSAP>].

140. Because the U.S. Department of Justice ("DOJ") can also investigate Title VI and Title IX allegations, advocates may consider filing a complaint with DOJ and OCR simultaneously. See, e.g., *Pennridge Discrimination Complaint*, UNIV. OF PA. PENN CAREY L. 6 (Nov. 15, 2023), <https://www.law.upenn.edu/live/files/12855-pennridge-discrimination-complaint-11152023> [<https://perma.cc/VD2A-6UPG>].

model for future challenges.<sup>141</sup> Finally, pro-truth advocates should invest in community-based efforts to mitigate anti-truth harms. Across states, local organizing efforts have successfully responded to and remedied these harms, reversing book bans, electing pro-truth school board members, and creating alternative spaces for delivering affirming, pro-truth curriculum.<sup>142</sup> These grassroots interventions build community power and offer hope for long lasting pro-truth spaces.

### A. Legislative Advocacy

May 2023 polling indicates that sixty-nine percent of all Americans oppose legislation banning books.<sup>143</sup> There is also broad support for “[t]eaching about the history of slavery, racism, and segregation in public schools.”<sup>144</sup> Advocates should mobilize this pro-truth majority to counter the vocal minorities, such as groups like Moms for Liberty, who support anti-truth legislation.<sup>145</sup> In South Carolina, for example, advocates successfully defeated a slate of anti-truth bills in 2022.<sup>146</sup> The ProTruth SC Coalition<sup>147</sup>—founded by civil rights organizations and education groups, organized students, parents, teachers, academics

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141. OFF. FOR C.R., U.S. DEP’T OF EDUC., OCR COMPLAINT NO. 04-22-1281, RESOLUTION AGREEMENT FORSYTH COUNTY SCHOOLS (2023) [hereinafter OCR-FORSYTH RESOLUTION].

142. See, e.g., Eesha Pendharkar, *What Happened When Students Led Fights to Reverse Book Bans*, EDUC. WK. (July 18, 2023), <https://www.edweek.org/teaching-learning/what-happened-when-students-led-fights-to-reverse-book-bans/2023/07> [https://perma.cc/KQ2S-ZXP7]; Molly Farrar, *Book ‘Ban’ Reversed in North Attleborough After Community Reacts*, BOSTON.COM (Jan. 24, 2024), <https://www.boston.com/news/local-news/2024/01/24/book-ban-reversed-in-north-attleborough-after-community-reacts/> [https://perma.cc/U8V9-6LST].

143. IPSOS, PUBLIC POLL FINDINGS AND METHODOLOGY: NPR/IPSOS POLL ON EDUCATION 15 (2023), <https://www.ipsos.com/sites/default/files/ct/news/documents/2023-05/NPR%20Education%20Topline%206.2.23%20FINAL%20PDF.pdf> [https://perma.cc/HFS7-BTAF].

144. *Id.* at 16 (reporting 79% support).

145. *Moms for Liberty*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/moms-liberty> [https://perma.cc/R2ZL-XTLF].

146. See, H.R. 4392, 124th Gen. Assemb., Reg. Sess. (S.C. 2021).

147. The NAACP LDF is a member of this coalition. *About Us*, PROTRUTH S.C., <https://www.protruthsc.org/> [https://perma.cc/Q3WK-MHNX].

and other advocates to mount a powerful opposition to Moms for Liberty and other anti-truth groups supporting the bills.<sup>148</sup>

Stakeholders in the Coalition provided testimony at hearing on the anti-truth bills, raising concerns about their constitutionality by explaining the language was both overbroad and vague, especially with respect to the inaccurate definition of Critical Race Theory.<sup>149</sup> Stakeholders also made clear that the anti-truth bills were a brazen attempt to whitewash history in a state with a shameful and lasting legacy of racial subjugation.<sup>150</sup> Black parents and teachers explained that their voices and perspectives were ignored in the development of the bills.<sup>151</sup> Testimony included specific examples of how bills would tangibly harm students of color by making it illegal to discuss current events that impact children of color and their families and would prevent teaching of the necessary historical context for empathy and understanding.<sup>152</sup> Finally, members of the Coalition emphasized that the anti-truth bills were a distraction and impediment to real, pressing issues in the state's education system that should be the focus of the legislature's attention, including teacher shortages and unequal distribution of resources.<sup>153</sup> After months of advocacy, pro-truth legislators successfully ran out the clock, and the bills were not put up for a final vote.<sup>154</sup>

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148. See Paul Bowers, *In Honor of Banned Books Week: A Map of South Carolina Book Bans and Challenges*, ACLU OF S.C. (Oct. 5, 2023, 10:30 AM), <https://www.aclusc.org/en/news/honor-banned-books-week-map-south-carolina-book-bans-and-challenges> [https://perma.cc/X2TX-SWMM].

149. See Videotape: *Hearing on H.R. 4343, H.R. 4392, H.R. 4605, H.R. 4799 and H.R. 4325 Before the H. Comm. on Educ. & Pub. Works, 2022 Leg., 124th Sess. (S.C. 2022)*, at 3:30–3:37 (testimony of Josh Malkin, Senior Advoc. Strategist, ACLU of S.C., on Feb. 16, 2022, 1:15 PM), <https://www.scstatehouse.gov/video/archives.php> [https://perma.cc/NUC5-AYUQ].

150. See *id.* at 1:21–1:26 (testimony of Zahra Mion, Pol'y & Rsch. Assoc., NAACP Legal Def. Fund).

151. *Id.* at 2:39–2:45 (testimony of Dr. Gloria Swindler Boutte, Assoc. Dean, Univ. of S.C.).

152. See *id.* at 4:48–4:53 (testimony of Octavia Edwards, parent).

153. See *id.* at 1:26–1:30, 4:06–4:13; 4:36–4:41 (testimony of Dr. Janelle Rivers, League of Women Voters of S.C., Dr. Sabra Custer, Am. Ass'n of Univ. Professors, and Robert Lominack, Richland Cnty. Educ. Partners).

154. See Seanna Adcox, *A Look at What the SC Legislature Did and Didn't Do in 2022*, POST & COURIER (May 15, 2022), <https://www.postandcourier.com/politics/a-look-at-what-the-sc>

Pro-truth advocates were similarly successful in Indiana in 2022. The proposed anti-truth legislation would have prohibited teaching the eight “divisive concepts” in President Trump’s Executive Order and allowed parent-led committees to veto curriculum.<sup>155</sup> But the legislation encountered vocal opposition from a diverse coalition that included “religious leaders, [local] school boards, youth advocates, civic groups, small businesses[,] . . . and hundreds of educators.”<sup>156</sup> Teachers provided testimony that the bill would “stifle classroom conversations” and prevent their ability to teach history accurately.<sup>157</sup> One senator’s comments drew national attention after he suggested that teachers teach Nazism neutrally, and he eventually recanted his statements.<sup>158</sup> Ultimately, advocates persuaded lawmakers that the bill was flawed and might exacerbate the growing teacher shortage in the state.<sup>159</sup> One Republican senator who voted against the bill noted that he heard from superintendents and “numerous” teachers opposed to the bill.<sup>160</sup> The bill died after its sponsor declined to bring it forward for a vote.<sup>161</sup>

The South Carolina and Indiana examples demonstrate that advocates can defeat anti-truth bills by mobilizing students and educators in opposition. In addition to highlighting the potential unconstitutionality of the bills, campaigns should emphasize the tangible harms of the legislation to students’ ability to learn and teachers’ ability to teach. Advocates should refocus

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legislature-did-and-didnt-do-in-2022/article\_a9c29cec-d2c6-11ec-8265-5f01c337f392.html [https://perma.cc/HL8M-8CDN].

155. Aleksandra Appleton, *Indiana’s ‘Divisive Concepts’ Bill Dies in the Senate*, CHALKBEAT (Feb. 28, 2022, 7:20 PM), <https://www.chalkbeat.org/indiana/2022/2/28/22955665/indiana-divisive-concepts-bill-curriculum-restrictions-update-senate/> [https://perma.cc/A78B-MG6N]; Aleksandra Appleton & Stephanie Wang, *How Indiana’s Anti-CRT Bill Failed Even with a GOP Supermajority*, CHALKBEAT (Mar. 10, 2022, 4:29 PM), <https://www.chalkbeat.org/indiana/2022/3/10/22971488/indiana-divisive-concepts-anticrt-bill-failed-gop-supermajority/> [https://perma.cc/UP7Q-ZKB3].

156. Appleton & Wang, *supra* note 155.

157. *Id.*

158. *Id.*

159. *See id.*

160. *Id.*

161. *Id.*

the legislature's attention on the longstanding and critical education issues in the state.

Despite these successes, pro-truth legislative advocates should be aware that lawmakers have abandoned anti-truth measures aimed at race and racism to ensure the passage of anti-LGBTQ measures.<sup>162</sup> While Indiana advocates defeated the anti-truth divisive concepts and parental control legislation, the state banned transgender girls from playing girls' sports in the same term.<sup>163</sup> Similarly, while advocates in Alabama defeated a divisive concepts bill in 2022, lawmakers instead passed a bill restricting LGBTQ topics in elementary school classrooms.<sup>164</sup> These legislative tradeoffs highlight the importance of intersectional advocacy to make clear that students are harmed by restrictions on curriculum about race and gender, and LGTBQ+ students of color are harmed by both.<sup>165</sup>

In addition to defeating anti-truth proposals, advocates can protect truth in education by advancing pro-truth laws and policies that prohibit censorship. As anti-truth efforts become more localized, legislation regulating book bans by local libraries and schools may help stymie such censorship. California and Illinois have led the way on this front,<sup>166</sup> and a bill is pending in New Jersey.<sup>167</sup> In June 2023, Illinois passed legislation which makes funding for public libraries in the state contingent on their adoption of a library bill of rights which prohibits the exclusion or removal of materials because of "partisan or

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162. See *id.*; Rebecca Griesbach, 'Divisive Concepts' Bill Returns to Alabama Legislature, Called 'Slap in the Face', AL.COM, <https://www.al.com/educationlab/2023/04/divisive-concepts-bill-returns-to-alabama-legislature-called-slap-in-the-face.html> [<https://perma.cc/EB8G-X4DL>] (Apr. 13, 2023, 1:54 PM).

163. Appleton & Wang, *supra* note 155.

164. Griesbach, *supra* note 162; H.B. 322, 2022 Leg., Reg. Sess. (Ala. 2022).

165. See Mark Joseph Stern, *How the War on Critical Race Theory Revived Anti-Gay Activism in Schools*, SLATE (Mar. 2, 2022, 2:50 PM), <https://slate.com/news-and-politics/2022/03/critical-race-theory-dont-say-gay-florida-lgbtq.html> [<https://perma.cc/87VY-RPD7>].

166. *California Bans Book Bans and Textbook Censorship in Schools*, CA.GOV (Sept. 25, 2023), <https://www.gov.ca.gov/2023/09/25/california-bans-book-bans-and-textbook-censorship-in-schools/> [<https://perma.cc/P89U-BRNM>]; Press Release, Ill., Gov. Pritzker Signs Bill Making Illinois First State in the Nation to Outlaw Book Bans (June 12, 2023), <https://www.illinois.gov/news/press-release.26575.html> [<https://perma.cc/DB6U-NPV9>].

167. S. 3907, 220th Leg., Reg. Sess. (N.J. 2023).

doctrinal disapproval.”<sup>168</sup> A bill pending in the New Jersey legislature is similar but requires that school boards, in addition to public libraries, adopt a library bill of rights.<sup>169</sup> The California statute, signed into law in September 2023, is targeted more specifically at anti-truth efforts in public education.<sup>170</sup> It prohibits school boards in the state from banning a “textbook, instructional material, or curriculum on the basis that it contains inclusive and diverse perspectives.”<sup>171</sup> The state can fine school boards that violate the law, and the state superintendent of public education can purchase instructional materials for school districts at the local school board’s expense.<sup>172</sup>

Pro-truth advocates should also advance affirmative legislation to strengthen inclusive, culturally responsive curricula. Before this latest wave of anti-truth legislation, advocates made progress advancing legislation to enable culturally responsive curriculum and ethnic studies courses.<sup>173</sup> All states embed some key culturally responsive teaching competencies into their teaching standards, and 46 states expect teachers to promote respect for student diversity.<sup>174</sup> Alaska and Washington have gone further by creating stand-alone teaching standards to

168. H.B. 2789, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023); Claire Savage, ‘First of Its Kind’ Illinois Law Will Penalize Libraries that Ban Books, ASSOCIATED PRESS (June 12, 2023, 5:12 PM), <https://apnews.com/article/book-ban-library-lgbtq-illinois-f5516941473e474712eaaafda084de76> [<https://perma.cc/3KWG-F3GM>]; see Orlando Mayorquin, *To Fight Book Bans, Illinois Passes a Ban on Book Bans*, N.Y. TIMES (June 13, 2023), <https://www.nytimes.com/2023/06/13/us/illinois-book-bans-schools-public-libraries.html> [<https://perma.cc/9SZY-N5F8>].

169. S. 3907, 220th Leg., Reg. Sess. (N.J. 2023); Vanessa Murdock, *Legislation Proposed in New Jersey State Senate Aims to Ban Book Banning*, CBS NEWS (May 31, 2023, 6:47 PM), <https://www.cbsnews.com/newyork/news/new-jersey-legislation-prohibiting-book-banning/> [<https://perma.cc/83U6-MW75>].

170. CAL. EDUC. CODE § 51501 (West 2023); see Jonathan Franklin, *New California Law Bars Schoolbook Bans Based on Racial and LGBTQ Topics*, NPR (Sept. 26, 2023, 4:39 PM), <https://www.npr.org/2023/09/26/1201804972/california-gov-newsom-barring-book-bans-race-lgbtq> [<https://perma.cc/4HSD-DFU4>].

171. CAL. EDUC. CODE § 51501(b) (West 2023); see Franklin, *supra* note 170.

172. Franklin, *supra* note 170; CAL. EDUC. CODE §§ 1240, 60150 (West 2023).

173. See JENNY MUÑIZ, CULTURALLY RESPONSIVE TEACHING: A 50-STATE SURVEY OF TEACHING STANDARDS 20–21 (2019); Wayne Au, *California Vetoed Ethnic Studies Requirements for Public High School Students, but the Movement Grows*, THE CONVERSATION (Nov. 25, 2020, 8:36 AM), <https://theconversation.com/california-vetoed-ethnic-studies-requirements-for-public-high-school-students-but-the-movement-grows-148486> [<https://perma.cc/RSH6-546E>].

174. MUÑIZ, *supra* note 173.

support teachers' development of the knowledge and skills necessary for culturally responsive teaching, and other states should be pushed to follow suit.<sup>175</sup>

Similarly, in the last decade, ethnic studies laws and policies have passed in California, Oregon, Connecticut, Nevada, Virginia, Vermont, Indiana, and Texas.<sup>176</sup> Six states also require the inclusion of LGBTQ people in history texts.<sup>177</sup> These pro-truth policies serve as prophylactic tools against anti-truth measures. In Texas, for example, ethnic studies courses are the product of more than a decade of advocacy by educators, scholars, and community organizers who forced the State Board of Education to adopt Mexican American and African American Studies courses.<sup>178</sup> The courses were finally authorized statewide in 2019 and 2020, and enrollment has skyrocketed.<sup>179</sup> Thus, even as the Texas legislature continued to pass anti-truth measures, more than 18,000 students accessed critical ethnic studies instruction in 2022–23.<sup>180</sup>

It is too soon to know whether anti-censorship laws will be enforced against anti-truth efforts in school districts and libraries. Still, these statutes, along with ethnic studies law and policies, help to address the dignitary harm of anti-truth measures by asserting that inclusive and diverse materials belong in libraries and schools. They also give cover and protection to teachers and librarians seeking to provide access to commonly banned books.<sup>181</sup> Finally, they provide critical support to

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175. *Id.* at 17–18.

176. *Au, supra* note 173.

177. Sabia Prescott, *Six States Have Now Passed LGBTQ+ Inclusive Curriculum Legislation—Each with a Different Definition of 'Inclusion'*, NEW AM. (June 17, 2021), <https://www.newamerica.org/education-policy/edcentral/six-states-have-now-passed-lgbtq-inclusive-curriculum-legislation-each-with-a-different-definition-of-inclusion/> [https://perma.cc/Z5YH-FSJN].

178. See Maribel Falcón, *'Never Without a Fight:' How Texas Has Stood Up for Ethnic Studies*, REMEZCLA (May 18, 2020), <https://remezcla.com/features/culture/tejas-the-fight-for-ethnic-studies/> [https://perma.cc/Q39Y-NSAC]; 19 TEX. ADMIN. CODE § 113.50–.51 (2024).

179. See 19 TEX. ADMIN. CODE § 113.50–.51 (2024); *Teacher FTE Counts and Course Enrollment Reports*, TEX. EDUC. AGENCY, <https://rptsvr1.tea.texas.gov/adhocrpt/adfte.html> [https://perma.cc/J4FA-3LV8] (Dec. 17, 2023) (providing access to Texas teacher and enrollment data by course going back to the 2012–13 school year).

180. See *Teacher FTE Counts and Course Enrollment Reports, supra* note 179.

181. See *supra* notes 168–75 and accompanying text.

students, parents, and advocates fighting book bans at the local level, who can cite the law or policy as reason why a school board should reject calls from anti-truth advocates to restrict books and instructional materials.<sup>182</sup> In this way, anti-censorship and inclusive curriculum policies can be an important tool for empowering and sustaining community-based pro-truth efforts.

### B. *Administrative Complaints*

Existing antidiscrimination law provides a promising alternative framework for challenging anti-truth harms. Educational programs and activities receiving federal funding are subject to Title VI of the Civil Rights Act of 1964 (“Title VI”), which prohibits discrimination on the basis of race, color, or national origin,<sup>183</sup> and Title IX of the Educational Amendments of 1972, (“Title IX”) which prohibits discrimination on the basis of sex.<sup>184</sup> Under both statutes, an educational institution that is, or should be, aware of possible harassment must take immediate and appropriate steps to investigate.<sup>185</sup> If the investigation reveals a hostile environment, the institution must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects.<sup>186</sup> OCR enforces both statutes and their implementing regulations and provides an alternative venue for advocates to bring hostile environment claims to address

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182. *See infra* Section II.B–C.

183. Civil Rights Act of 1964, 42 U.S.C. § 2000(d); *see Race, Color, or National Original Discrimination*, U.S. DEP’T OF EDUC. OFF. FOR C.R. (May 11, 2023), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html> [<https://perma.cc/L7RJ-8H2E>].

184. Education Amendments of 1972, 20 U.S.C. § 1681; *Sex Discrimination*, U.S. DEP’T OF EDUC. OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html> [<https://perma.cc/99U5-PR5U>] (Aug. 19, 2021).

185. *Race, Color, or National Original Discrimination*, *supra* note 183; *Sex Discrimination*, *supra* note 184.

186. *Race, Color, or National Original Discrimination*, *supra* note 183; *see Sex Discrimination*, *supra* note 184.

anti-truth harms.<sup>187</sup> Administrative complaints to OCR may provide benefits that are not available via litigation.<sup>188</sup>

First, the hostile environment frame captures a range of harms, including dignitary harms, that may not be actionable in litigation and, therefore, more accurately captures the anti-truth harms experienced by marginalized students.<sup>189</sup> Anti-truth policies are designed to erase the histories and lived experiences of marginalized students, so it is by design that they create hostile environments for these very students. Research confirms that restrictions on diverse, culturally responsive curriculum negatively impact students of color, LGBTQ students, religious minorities, and other students enrolled in public schools.<sup>190</sup> Educational approaches that do not critically engage with racism and discrimination, but instead “emphasize respect and tolerance for all individuals . . . without acknowledging present-day racism and discrimination,” are correlated with decreased student awareness of racism.<sup>191</sup> Widespread student awareness of present racism acts as a buffer, reducing the likelihood that students will engage in racial harassment and that students of color will experience school-based discrimination and related academic and mental health consequences.<sup>192</sup> Strong racial

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187. See *Overview of the Agency*, U.S. DEP’T OF EDU, <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> [<https://perma.cc/4MPV-P2YH>] (Mar. 24, 2023).

188. See *id.*

189. See *supra* Section I.A.

190. See generally Christy M. Byrd, *Does Culturally Relevant Teaching Work? An Examination from Student Perspectives*, 6 SAGE OPEN 1 (2016) (examining the relationship between culturally relevant teaching and both academic outcomes and ethnic-racial identity development).

191. See *id.* at 6.

192. See *id.* at 6–7; Tabbye M. Chavous, Debra Hilken Bernat, Karen Schmeelk-Cone, Cleopatra H. Caldwell, Laura Kohn-Wood & Marc A. Zimmerman, *Racial Identity and Academic Attainment Among African American Adolescents*, 74 CHILD DEV. 1076, 1086 (2003); Oseela N. Thomas, Cleopatra Howard Caldwell, Nkeshia Faison & James S. Jackson, *Promoting Academic Achievement: The Role of Racial Identity in Buffering Perceptions of Teacher Discrimination on Academic Achievement Among African American and Caribbean Black Adolescents*, 101 J. EDUC. PSYCH. 420, 422–23 (2009); Thomas Dee & Emily Penner, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum 4–5* (Nat’l Bureau of Econ. Rsch., Working Paper No. 21865, 2016), [https://www.nber.org/system/files/working\\_papers/w21865/w21865.pdf%20](https://www.nber.org/system/files/working_papers/w21865/w21865.pdf%20)

[<https://perma.cc/ESQ4-UB9F>]; Ellen Eliason Kisker, Jerry Lipka, Barbara L. Adams, Anthony Rickard, Dora Andrew-Ihrke, Eva Evelyn Yanez & Ann Millard, *The Potential of a Culturally Based Supplemental Mathematics Curriculum to Improve the Mathematics Performance of Alaska Native and Other Students*, 43 J. FOR RSCH. MATHEMATICS EDUC. 75, 78, 100 (2012); Nolan L. Cabrera,

identity is also a protective factor for students enrolled in schools with hostile or negative school climates. Removing this buffer increases the likelihood that students of color will experience racial harm and will suffer academically and emotionally.<sup>193</sup> Thus, where anti-truth harm is happening in an educational institution, advocates should consider whether a hostile environment claim can be pursued.

Second, the OCR complaint process offers procedural advantages as compared to litigation. Administrative complaints eliminate the standing issues with litigation because a complainant to OCR need not be a victim of discrimination, but may complain on behalf of another person or group.<sup>194</sup> This allows advocates and membership organizations to bring complaints about school-wide or district-wide harm, thus removing the burden on individual students to come forward or serve as named complainants.<sup>195</sup> Moreover, OCR's complaint process encourages early, voluntary resolution.<sup>196</sup> School districts are incentivized to enter into a resolution agreement with OCR to avoid a finding of noncompliance, resulting in faster relief for complainants in school districts open to resolution.

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Jeffrey F. Milem, Ozan Jaquette & Roland W. Marx, *Missing the (Student Achievement) Forest for All the (Political) Trees: Empiricism and the Mexican American Studies Controversy in Tucson*, 51 AM. EDUC. RSCH. J. 1084, 1102–06 (2014); Tyrone Howard & Clarence L. Terry, Sr., *Culturally Responsive Pedagogy for African American Students: Promising Programs and Practices for Enhanced Academic Performance*, 22 TEACHING EDUC. 345, 346–47 (2011).

193. Cf. Sheretta T. Butler Barnes, Seanna Leath, Amber Williams, Christy Byrd, Rona Carter & Tabbye M. Chavous, *Promoting Resilience Among African-American Girls: Racial Identity as a Protective Factor*, 89 CHILD DEV. 552, 568 (2018) (finding a connection between racial identity and increased achievement among African American adolescent girls).

194. U.S. DEPT'T OF EDUC. OFF. FOR C.R., HOW TO FILE A DISCRIMINATION COMPLAINT WITH THE OFFICE FOR CIVIL RIGHTS (2010), <https://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf> [<https://perma.cc/6CJ2-JNTD>] [hereinafter HOW TO FILE OCR COMPLAINT]; see *supra* Section I.D.

195. HOW TO FILE OCR COMPLAINT, *supra* note 194.

196. U.S. DEPT'T OF EDUC. OFF. FOR C.R., CASE PROCESSING MANUAL 16–18 (2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<https://perma.cc/5LKE-QRBT>] [hereinafter CASE PROCESSING MANUAL]. Section 302 of OCR's case processing manual establishes that “[a]llegation(s) under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegation(s) and OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement.” *Id.* (emphasis in original).

Third, OCR's resolution agreements may offer more comprehensive and systemic relief than mere enjoinder of a statute or policy, including tangible pro-truth remedies to address harm. OCR Resolution Agreements routinely require district-wide policy changes designed to remedy harm and prevent discrimination, even where the initiating complainant is an individual student.<sup>197</sup> For example, a 2018 agreement resolving a Tile VI complaint alleging a racially hostile environment required the school district to: (1) draft an OCR-approved anti-harassment statement to be distributed to students, parents, and staff, including a statement indicating that counseling and educational resources would be available to victims of harassment and harassers; (2) provide training to teachers, administrators, and counselors on how to recognize and appropriately respond to incidents of racial discrimination; and (3) provide age-appropriate training for students on what constitutes racial discrimination, how to recognize it, and the importance of reporting discrimination so it can be addressed.<sup>198</sup> Another agreement required conducting climate surveys and analyzing results to identify needed reforms and creating a task force of parents, community members, students, and district staff to recommend and implement strategies for improving school climate.<sup>199</sup>

Finally, current institutional dynamics make OCR an appealing venue. Unlike the challenges facing civil rights litigation in federal courts, OCR's recent guidance and sensitivity to book removals demonstrate that it is open to addressing anti-truth harm.<sup>200</sup> OCR has clearly rejected the anti-truth argument that

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197. See CASE PROCESSING MANUAL, *supra* note 196, at 18.

198. OFF. FOR C.R., U.S. DEP'T OF EDUC., NO. 06171978, RESOLUTION AGREEMENT: CLEAR CREEK INDEPENDENT SCHOOL DISTRICT 1, 2-3 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06171978-b.pdf> [<https://perma.cc/J349-V5M7>].

199. OFF. FOR C.R., U.S. DEP'T OF EDUC., NO. 06141580, RESOLUTION AGREEMENT: KERENS INDEPENDENT SCHOOL DISTRICT 1, 4-5 (2015), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06141580-b.pdf> [<https://perma.cc/Q2X3-XH3W>].

200. See Press Release, U.S. Dep't of Educ., U.S. Department of Education's Office for Civil Rights Resolves Investigation of the Removal of Library Books in Forsyth County Schools in Georgia (May 19, 2023), <https://www.ed.gov/news/press-releases/us-department-education-office-civil-rights-resolves-investigation-removal-library-books-forsyth-county-schools-georgia> [<https://perma.cc/FM7J-ZWQP>].

diversity, equity, and inclusion policies constitute reverse discrimination against white students.<sup>201</sup> Amidst the rise of these charges by Moms for Liberty and other anti-truth advocates, OCR reaffirmed in January 2023 that school policies intended to further diversity, equity, accessibility, and inclusions “are not generally or categorically prohibited under Title VI. . . . [n]or do these activities categorically create a hostile environment on the basis of race.”<sup>202</sup> The guidance reiterated that such policies may in fact be required to remedy harassment, noting that “in agreeing to resolve OCR investigations into whether they have violated Title VI, schools and colleges have implemented diversity, equity, and inclusion activities . . . to remedy potential different treatment of students, provide remedial measures to address harassing conduct, assist in remedying other forms of discrimination on the basis of race, and foster a more positive and inclusive school climate.”<sup>203</sup> Moreover, OCR has embraced the pro-truth argument that efforts to remove books and materials by and about people of color and LGBTQ people may constitute a hostile environment in violation of Title VI and Title IX.<sup>204</sup> OCR has appointed a deputy assistant secretary to focus on book bans and censorship issues,<sup>205</sup> and issued a novel findings letter and resolution agreement with Forsyth County Schools

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201. See Press Release, U.S. Dep’t of Educ., U.S. Department of Education’s Office for Civil Rights Issues Resource on Race and School Programming (Aug. 24, 2023), <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-issues-resource-race-and-school-programming> [https://perma.cc/F43D-NLBR].

202. OFF. FOR C.R., U.S. DEP’T OF EDUC., FACT SHEET: DIVERSITY & INCLUSION ACTIVITIES UNDER TITLE VI 1–2 (2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tv-dia-202301.pdf> [https://perma.cc/P88P-6RTJ].

203. *Id.* at 2.

204. Dan Fotoples, *OCR Finds Book Ban Created Hostile Environment Under Title IX and Title VI*, ASS’N OF TITLE IX ADM’RS, <https://www.atixa.org/blog/ocr-finds-book-ban-created-hostile-environment-under-title-ix-and-title-vi/> [https://perma.cc/FQ3L-7JPP]; Letter from Jana L. Erickson, Program Manager, Dep’t of Educ., Off. for C.R., to Jeff Bearden, Superintendent, Forsyth Cnty. Schs. 6 (May 19, 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf> [https://perma.cc/9WEL-W3JT] [hereinafter Erickson Letter]; OCR FORSYTH RESOLUTION, *supra* note 141, at 1.

205. Linda Jacobson, *Ed Dept. Hires Book Ban Czar to Monitor Escalating Challenges Over Content*, THE 74 (Sept. 14, 2023), <https://www.the74million.org/article/education-department-book-bans-matt-nosanchuk-deputy-assistant-secretary/> [https://perma.cc/E8N9-6WRX].

recognizing that book removals may violate students' federal civil rights.<sup>206</sup>

Pro-truth advocates should capitalize on the Forsyth County Schools Resolution to challenge anti-truth policies in other school districts. Forsyth County Schools is a large public school district north of Atlanta, serving more than 55,000 students, who are 49% White, 27% Asian, 15% Hispanic, 5% Black, 4% two or more races, and less than 1% American Indian or Alaska Native and Hawaiian or Pacific Islander.<sup>207</sup> According to OCR's investigation, the District began receiving complaints about books parents deemed inappropriate in the Fall of 2021.<sup>208</sup> One parent group asked the District to separately shelve LGBTQ books and place stickers on them.<sup>209</sup> In January 2022, the District rejected that request, concluding it might lead to increased bullying and deter student use of the media center, but did instruct school principals to restrict student access to fifteen books.<sup>210</sup> The email to principals stated that the books were being removed for "sexual explicitness," and not for "LGBTQI+ content or moral dilemma issues."<sup>211</sup>

During a February 2022 school board meeting, parents called for the removal of additional books about gender identity and sexual orientation and "made negative comments about diversity, inclusion, and critical race theory."<sup>212</sup> Student speakers testified about how the book removals "made the environment more harsh for students" and "expressed the belief that the District does not care about diversity."<sup>213</sup> During the summer of 2022, a District committee voted to return seven of the removed books to the media center.<sup>214</sup> Based on these facts, OCR

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206. Fotoples, *supra* note 204.

207. *About Us*, FORSYTH CNTY. SCHS., <https://www.forsyth.k12.ga.us/Page/502> [<https://perma.cc/3M5G-8GH2>].

208. Erickson Letter, *supra* note 204, at 4.

209. *Id.*

210. *Id.* at 4–5.

211. *Id.* at 5.

212. *Id.*

213. *Id.* at 5–6.

214. *Id.* at 6.

concluded that the “District received notice that its . . . book screening process may have created a hostile environment for students, yet the District’s responsive steps related to the book screening process were not designed to, and were insufficient to, ameliorate any resultant racially and sexually hostile environment.”<sup>215</sup> OCR specifically noted that the District had not addressed the impact of the book removals with students.<sup>216</sup>

The District elected to voluntarily resolve the complaint pursuant to Section 302 of OCR’s Case Processing Manual.<sup>217</sup> The Resolution Agreement requires the District to post a statement making clear that: (1) “the District did not remove any book based on the sex, gender, gender identity, sexual orientation, race, national origin or color of the book’s author or characters;” (2) “the District strives to provide a global perspective and promote diversity by including in school libraries materials about and by authors and illustrates of all cultures and that the District’s book review criteria for library books includes evaluating whether books promote diversity by including materials about and by authors and illustrators of all cultures;” (3) “an acknowledgement that the environment surrounding removal of books may have impacted students;” (4) “any student who feels impacted the environment surrounding the removal of books can contact the District’s Title IX/Title VI Coordinator for supportive measures.”<sup>218</sup> The Agreement also obligates the District to administer a school climate survey, analyze the results, develop, and implement an approved plan to address concerns and improve climate.<sup>219</sup>

OCR’s determination of a hostile environment and of facts sufficient to require a resolution agreement sets a helpful standard, making clear that a school district can violate students’ rights under Title VI and Title IX even when it asserts that it is not removing books for “LGBTQI+ content or moral dilemma

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215. *Id.*

216. *Id.* at 6–7.

217. *Id.* at 2.

218. See OCR-FORSYTH RESOLUTION, *supra* note 141, at 1.

219. *Id.* at 3.

issues” and ultimately returns books to shelves.<sup>220</sup> Districts often justify these policies by citing parental rights or the limits of First Amendment protections in the school context,<sup>221</sup> but this OCR finding steers clear of both of those issues, focusing on harm to students and the correlation between book reviews and harassment on the basis of protected class. Thus, even if book review policies are constitutional under the First Amendment, they may nevertheless violate federal anti-discrimination law by creating a hostile environment.

OCR’s finding letter relied heavily on school board meeting records, both for evidence of hostility and harassment by anti-truth parents and advocates, and for evidence of the hostile environment, citing multiple students’ comments at board meetings to support its conclusion that the District’s book review process violated students’ rights.<sup>222</sup> The letter also cites local news coverage and opinion pieces by students and alumni,<sup>223</sup> including an op-ed by a senior who wrote that the school district’s book removals “ostracize[] the marginalized communities who were represented in many of those books” and “tells [them] that they are not welcomed or accepted.”<sup>224</sup> This highlights the need to support and encourage students, parents and alumni to testify at school board meetings about the concrete harms of anti-truth district policies.

The OCR complaint strategy is not without its drawbacks. As a federal agency within the Department of Education, OCR leadership, priorities, and policies shift with new presidential administrations. For example, during the Obama administration, OCR focused on systemic conditions, issuing guidance

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220. See Erickson Letter, *supra* note 204, at 5; OCR-FORSYTH RESOLUTION, *supra* note 141.

221. See, e.g., Olivia Empson, *Book Bans Use ‘Parental Rights’ as Cover to Attack Civil Liberties, Democrat Warns*, THE GUARDIAN (Dec. 21, 2023, 12:00 PM), <https://www.theguardian.com/us-news/2023/dec/21/book-bans-democrat-warning-maxwell-frost> [<https://perma.cc/G7UF-XE5X>].

222. See Erickson Letter, *supra* note 204, at 5–7.

223. *Id.* at 5 n.6.

224. Maureen Downey, *Forsyth Student: Book Bans in Libraries Don’t Serve Students*, ATLANTA J.-CONST. (Feb. 8, 2022), <https://www.ajc.com/education/get-schooled-blog/forsyth-student-book-bans-in-libraries-dont-serve-students/OD4X3A6XVRDSVOR5VQTVO3TAMI/> [<https://perma.cc/FKU7-LPU7>] (publishing an opinion piece by high school senior, Damian Galvan).

that racial disparities in discipline could violate federal law and investigating instances of systemic bias.<sup>225</sup> Under the Trump administration, the Department of Education withdrew the discipline guidance, removed procedures for establishing systemic bias, and undercut the rights of transgender students.<sup>226</sup> More recently, OCR has been overwhelmed with record numbers of complaints. OCR received 18,804 complaints in 2022, which, according to assistant secretary Catherine Lhamon, was “the highest that we’ve ever seen in the history of the Office of Civil Rights.”<sup>227</sup> As OCR struggles to keep up with what Lhamon described as a “crushing workload,” complaint resolution times may continue to increase, leaving students vulnerable without relief.<sup>228</sup> Indeed, the over 2,500 pending Title VI OCR complaints have been under investigation for, on average, nearly three years.<sup>229</sup> As such, advocates should consider OCR complaints as part of a multi-faceted campaign that may also include litigation, legislative advocacy, and community-based interventions.

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225. See Evie Blad, *New Federal School Discipline Guidance Addresses Discrimination, Suspensions*, EDUC. WK. (Jan. 8, 2014), <https://www.edweek.org/teaching-learning/new-federal-school-discipline-guidance-addresses-discrimination-suspensions/2014/01> [https://perma.cc/NBR7-XKP4].

226. Kenneth K. Wong, *Trump’s Administrative Presidency and Its Effort to Weaken Federal Oversight in Public Education*, BROOKINGS INST. (Oct. 12, 2020), <https://www.brookings.edu/articles/trumps-administrative-presidency-and-its-effort-to-weaken-federal-oversight-in-public-education/> [https://perma.cc/Y863-VPUS].

227. Naaz Modan, *OCR Changes Approach to Complaints Amid Record High Volume*, K-12 DIVE (Apr. 14, 2023) [hereinafter Modan, *OCR Changes*], <https://www.k12dive.com/news/OCR-changes-approach-complaints-record-high-volume/647699/> [https://perma.cc/9H38-5STT]; Naaz Modan, *Office for Civil Rights Fielded More Title IX Complaints than Any Other Kind in Fiscal 2022*, K-12 DIVE (May 1, 2023) [hereinafter Modan, *Title IX Complaints 2022*], <https://www.k12dive.com/news/OCR-title-ix-complaints-top-others-2022/649114/> [https://perma.cc/S46N-FJSS].

228. Modan, *OCR Changes*, *supra* note 227; see also Talia Richman, *North Texas Families Still Await Action Years After Reporting Discrimination at Schools*, DALLAS MORN. NEWS (Mar. 14, 2024), <https://www.dallasnews.com/news/education/2024/03/14/north-texas-families-frustrated-by-lengthy-investigation-time-for-civil-rights-complaints/> [https://perma.cc/5ZNX-NKEY].

229. *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of January 12, 2024 7:30am Search*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/print/about/offices/list/ocr/docs/investigations/open-investigations/tvi.html> [https://perma.cc/98AK-AWJ8] (data updated monthly).

### C. Community-Based Efforts

Pro-truth advocates should also invest in community-based efforts to mitigate anti-truth harms and build alternative pro-truth spaces. Participating in and supporting these efforts combats dignitary harms by sending a message that Black, LGBTQ, and other marginalized students are valued and by challenging discriminatory actions that may be spurred by anti-truth laws.

Students confronting anti-truth harm in York County, Pennsylvania successfully reversed a book ban and, in the process, built power for further pro-truth advocacy. In the summer of 2020, the York County School District's diversity committee compiled a list of books and resources for students following George Floyd's murder and the nationwide racial justice uprisings.<sup>230</sup> Some parents complained, raising concerns that such materials would make their children feel guilty for being white, and the school board voted unanimously to ban the list of anti-racist resources in November 2020.<sup>231</sup> Educators, parents, students, and alumni spoke out against the ban, calling on the school board to reject censorship and embrace diversity in the district.<sup>232</sup> Authors of books on the banned list also spoke out. At one school board meeting, author Brad Meltzer criticized the board for banning two of his children's books.<sup>233</sup> "When you're banning Dr. King and Rosa Parks, you're on the wrong side of history," he said.<sup>234</sup> Panther Anti-Racist Union, a student-led group dedicated to diversity, equity, and inclusion, organized

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230. Tina Locurto, *Central York School District Reverses Diversity Book Ban: 'We Have Heard You,'* YORK DISPATCH, <https://www.yorkdispatch.com/story/news/education/2021/09/20/central-york-school-district-reverses-diversity-ban-we-have-heard-you/5791229001/> [https://perma.cc/3SWN-JCJB] (Jan. 14, 2022, 10:38 AM); Isabella Grullón Paz & Maria Cramer, *How Students Fought a Book Ban and Won, for Now*, N.Y. TIMES (Oct. 2, 2021), <https://www.nytimes.com/2021/10/02/us/york-pennsylvania-school-books.html> [https://perma.cc/ZT24-2KET].

231. Paz & Cramer, *supra* note 230.

232. *Id.*

233. Timothy Bella, *Pa. School District Ends Ban on List of Books by or About People of Color After Student Backlash*, WASH. POST (Sept. 25, 2021, 8:30 AM), <https://www.washingtonpost.com/education/2021/09/24/pennsylvania-school-book-ban-diversity/> [https://perma.cc/5ZNY-5DGE] (noting that the banned books were titled: "I am Rosa Parks" and "I am Martin Luther King, Jr.").

234. *Id.*

protests and drew national attention to the ban.<sup>235</sup> In September 2021, “[t]he school board voted unanimously to reinstate the diversity resource list.”<sup>236</sup>

Reflecting on the successful campaign, teachers and PARU co-advisors Ben Hodge and Patricia Jackson explained that the protests and rallies demonstrated to the board that calls for censorship were coming from a small minority of parents.<sup>237</sup> In 2020, complaints from a few parents “drown[ed] everything else out,” Hodge explained, and “the administration and board only heard that side and nobody else was providing the other side of that narrative and what the actual truth was.”<sup>238</sup> This is emblematic of book ban battles nationally.<sup>239</sup> But as York County students, teachers, alumni, former board members, and even local union representatives joined the chorus of voices against the bans and expressed shame and sadness over the district’s actions, the board “backed down . . . because it became very clear that the voices of 2020 were not representing the actual full part of the community.”<sup>240</sup> Jackson explained that “[k]eeping the children front and center” was critical to the success of the campaign.<sup>241</sup> “I had learned . . . from the civil rights movement, it was really the children who won the battle, not necessarily Dr. Martin Luther King and his entourage. The children won the day.”<sup>242</sup> Teachers and community members in York “provide[d] a foundation for the children to fall back on”

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235. See Delphie Backs, *Anatomy of a Failed Book Ban*, SAMPOSONIA WAY MAG. (July 7, 2022), <https://cityofasylum.org/sampsonia-way-post/anatomy-of-a-failed-book-ban/> [https://perma.cc/EU58-Y5P5].

236. Locurto, *supra* note 230.

237. See Cyril Mychalejko, *Teachers, Students and the Central York Community Defeated a Racist Book Ban in Their School District*, BUCKS CNTY. BEACON (Sept. 22, 2022), <https://buckscountybeacon.com/2022/09/teachers-students-and-the-central-york-community-defeated-a-racist-book-ban-in-their-school-district/> [https://perma.cc/6RUM-R87S].

238. *Id.*

239. Hannah Natanson, *Objections to Sexual, LGBTQ Content Propels Spike in Book Challenges*, WASH. POST, <https://www.washingtonpost.com/education/2023/05/23/lgbtq-book-ban-challenges/> [https://perma.cc/88PF-A6LN] (June 9, 2023, 6:15 PM).

240. Mychalejko, *supra* note 237.

241. *Id.*

242. *Id.*

to “wipe [their] tears, give them a hug and send them back out in the fray.”<sup>243</sup>

In Round Rock, Texas, Black parents have organized since 2015 to address racial disparities in the Round Rock Independent School District.<sup>244</sup> After a school resource officer was “accused of choking and pushing a 14-year-old Black student to the ground,” parents formed Round Rock Black Parents Association to advocate for Black students, families, and educators in their efforts to ensure “Black children have access to an equitable and inclusive education.”<sup>245</sup> Round Rock Black Parents Association prepares parents to advocate at the classroom, campus, and district levels, and “successfully lobbied the school district for \$2 million to create an Office of Equity, Diversity, and Inclusion.”<sup>246</sup> They also work closely with local community partners, including Asian Americans for Justice and Black Student Unions.<sup>247</sup> When the school district proposed banning *Stamped: Racism, Antiracism, and You* by Ibram X. Kendi, Round Rock Black Parents Association organized parents to speak at school board meetings about the importance of diverse literature.<sup>248</sup>

One of the directors of Round Rock Black Parents Association was elected to the Round Rock Independent School District’s Board of Trustees in 2020.<sup>249</sup> Tiffanie Harrison, a Round Rock ISD graduate and teacher at Round Rock High School, ran on a

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243. *Id.*

244. *See Communities Leading Change: Black Parents Find Strength in Unity*, WALTON FAM. FOUND., <https://www.waltonfamilyfoundation.org/communities-leading-change#round-rock-black-parents-association> [<https://perma.cc/287C-ELHP>].

245. *Id.*; *see also Our Work*, ROUND ROCK BLACK PARENTS ASS’N, <https://www.roundrockblackparents.org/our-work> [<https://perma.cc/5TYG-7VJC>] (listing blog posts that discuss the work of the Association).

246. *Communities Leading Change: Black Parents Find Strength in Unity*, *supra* note 244.

247. *Id.*

248. Tat Bellamy-Walker, *Meet the Moms of Color from Texas Fighting Book Bans at Their Kids’ Schools*, NBC NEWS (Feb. 2, 2022, 7:26 AM), <https://www.nbcnews.com/news/nbcblk/meet-moms-color-texas-fighting-book-bans-kids-schools-rcna13701> [[perma.cc/29V7-PHB9](https://perma.cc/29V7-PHB9)].

249. *Tiffanie Harrison*, ROUND ROCK INDEP. SCH. DIST., <https://roundrockisd.org/about-rrisd/board-of-trustees/tiffanie-harrison/> [<https://perma.cc/FLQ8-A2UP>]; *Meet the Team*, ROUND ROCK BLACK PARENTS ASS’N, <https://www.roundrockblackparents.org/who-we-are> [<https://perma.cc/7JHB-SGG7>].

racial equity platform and was only the second Black female trustee in 107 years of the district.<sup>250</sup> She was reelected in 2022, fighting off a challenge from a candidate backed by Round Rock One Family, a conservative group advocating for anti-truth issues including the teaching of “biological male-female differences” and “the prevention of critical race theory from being taught in taxpayer-funded schools.”<sup>251</sup> While campaigning, Harrison promoted pro-truth efforts and as a trustee, Harrison has increased community engagement and transparency.<sup>252</sup>

Community advocates are also addressing anti-truth dignitary harm in affirming, alternative spaces, in the spirit of the Civil Rights Movement’s Freedom Schools.<sup>253</sup> In the spring of 1964, the Student Nonviolent Coordinating Committee created the Freedom School curriculum and set up 41 Freedom Schools across Mississippi, teaching a two-part curriculum on citizenship and Black history.<sup>254</sup> Freedom School students studied Black resistance and literature by Black authors, and they went on to leadership roles in the Mississippi Freedom Democratic Party and the Civil Rights Movement more broadly.<sup>255</sup> In places where anti-truth efforts have made accurate and affirming

250. *About Tiffanie*, TIFFANIE HARRISON FOR RRISD SCH. BD. PLACE 6, <https://www.tiffanie4rrisd.com/about-tiffanie> [<https://perma.cc/3CRF-DEBY>]; Melanie Torre, *Round Rock Teacher Announces Run for School Board*, CBS AUSTIN, <https://cbsaustin.com/news/local/round-rock-teacher-announces-run-for-school-board> [<https://perma.cc/SHE8-QZCG>] (July 20, 2020, 6:48 PM).

251. Fernanda Figueroa, *3 Round Rock School Board Members Win Reelection Bids*, AUSTIN AM.-STATESMAN, <https://www.statesman.com/story/news/local/round-rock/2022/11/09/3-round-rock-trustees-have-leads-after-early-voting-results/69611239007/> [[perma.cc/WMS5-PZ7L](https://perma.cc/WMS5-PZ7L)] (Nov. 10, 2022, 11:01 AM).

252. *See Tiffanie Nichole Harrison*, RUN FOR SOMETHING, <https://directory.runforsomething.net/candidate/1226/harrison-tiffanie/> [<https://perma.cc/UZ8S-QYUL>]; Brooke Sjoberg, *Round Rock ISD Board Exploring New Ways to Connect with Community*, CMTY. IMPACT, <https://communityimpact.com/austin/round-rock/education/2023/04/21/round-rock-isd-board-exploring-new-ways-to-connect-with-community/> [[perma.cc/8B24-2NGD](https://perma.cc/8B24-2NGD)] (Apr. 21, 2023, 12:37 PM).

253. *See Tamica Jean-Charles*, *Today’s Racial, Social Tensions Prompt a Revival of Yesteryear’s ‘Freedom Schools,’* YOUTH TODAY (July 17, 2023), <https://youthtoday.org/2023/07/todays-racial-social-tensions-prompt-a-revival-of-yesteryears-freedom-schools/> [<https://perma.cc/6BLA-D8PL>].

254. *The Freedom Schools Movement*, SNCC LEGACY PROJECT, <https://sncclegacyproject.org/the-freedom-schools-movement/> [<https://perma.cc/E92K-L9KF>].

255. *Id.*

curriculum inaccessible for students, community advocates are working to create alternative spaces that, like the Mississippi Freedom Schools, allow marginalized students to see themselves reflected in educational materials and express themselves freely.<sup>256</sup>

The Association for the Study of African American Life and History, an organization founded in 1915 and dedicated to the creation and dissemination of Black history, held its annual conference in Jacksonville, Florida in 2023 in an effort “to defend the teaching of Black History in the state” and “to support the educators and scholars who are teaching or want to teach Black History, to buy from Black-owned businesses and vendors who come to the conference, and to provide space for networking and community.”<sup>257</sup> Black churches in Florida are also stepping in to provide pro-truth instruction. Faith in Florida, a coalition of religious institutions, formed in response to Florida’s legislation prohibiting the teaching of Critical Race Theory and dismantling DEI programs.<sup>258</sup> The coalition created a “Black History / Black Students Toolkit,”<sup>259</sup> and faith leaders across denominations signed up to use it in sermons, Sunday school classes, and Bible study sessions.<sup>260</sup> By September 2023, more than 260 faith institutions have taken the coalition’s pledge to teach Black history, including not just Black congregations, but also synagogues, Catholic churches, and mosques.<sup>261</sup>

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256. See Jean-Charles, *supra* note 253.

257. *Why We Are Going to Florida for Our Conference*, ASS’N FOR THE STUDY OF AFR. AM. LIFE & HIST. (Mar. 2023), <https://asalh.org/document/why-we-are-going-to-florida-for-our-conference/> [https://perma.cc/GP6P-4642].

258. *Black History*, FAITH IN FLA., <https://www.faithinflorida.org/blackhistory> [https://perma.cc/ZM34-AJD6]; see Danielle Prieur, *Faith Leaders Step Up to Teach Black History in Florida with African American History Toolkit*, CENT. FLA. PUB. MEDIA (July 28, 2023, 6:00 AM), <https://www.wmfe.org/education/2023-07-27/faith-in-florida-african-american-history-toolkit> [https://perma.cc/AJ6H-6K7K]; *About Us*, FAITH IN FLA., <https://www.faithinflorida.org/aboutus> [https://perma.cc/HL7K-PYHZ].

259. *Black History*, *supra* note 258.

260. Brittany Shammass, *After Florida Restricts Black History, Churches Step Up to Teach It*, WASH. POST (Sept. 24, 2023, 6:00 AM), <https://www.washingtonpost.com/nation/2023/09/24/florida-black-history-churches-teaching/> [https://perma.cc/BS6F-PXPD].

261. *Id.*

Across the country, students have formed banned book clubs to read the books prohibited in their classrooms in curriculum.<sup>262</sup> With support from Round Rock Black Parents Association, middle school students formed the Round Rock Black Students Book Club, meeting monthly on Zoom to discuss books like *Ghost* and *Miles Morales: Spider Man* by frequently banned author Jason Reynolds.<sup>263</sup> The student founders explain that book club conversations address topics “like racial discrimination and bias, [which are] easier to talk about . . . when they happen to characters in a book.”<sup>264</sup> In nearby Austin, Texas, two high school students in Leander Independent School District founded Vandegrift Banned Book Club, which chooses books from the district’s list of banned books and meets monthly to discuss the book’s themes and “prepare a statement arguing for the book’s reinstatement.”<sup>265</sup> The Club read “None of the Above,” a book about an intersex high school student, banned by the school district because of “strong language and sexual references.”<sup>266</sup> A club member notes that the school district’s book bans are “creating a very small image of what people are supposed to look like in the world.”<sup>267</sup> In Southlake, Texas, where the Department of Education’s Office of Civil Rights has multiple open investigations into harassment and discrimination based on race, sex, and gender,<sup>268</sup> students formed the

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262. See, e.g., Kiara Alfonseca, *School Culture Wars Push Students to Form Banned Book Clubs, Anti-Censorship Groups*, ABC NEWS (Oct. 2, 2023, 9:28 AM), <https://abcnews.go.com/US/school-culture-wars-push-students-form-banned-book/story?id=103377259> [https://perma.cc/5D8H-Y52T]; Danielle Campoamor, *How Some Students Are Fighting Back Against Book Bans in Their Schools*, TODAY (Feb. 1, 2022, 5:13 PM), <https://www.today.com/parents/teens/banned-book-clubs-rcna13965> [https://perma.cc/C7VT-642F].

263. Samantha Facciolo, *Meet the Teens Fighting Book Bans with Banned Book Clubs*, READER’S DIG., <https://www.rd.com/article/banned-book-club/> [https://perma.cc/DGN4-449G] (Oct. 3, 2023).

264. *Id.*

265. *Id.*

266. *Id.*; Hannah Natanson, *Teens Fight for the Right to Read with ‘Banned-Book Clubs’ and Lawsuits*, WASH. POST (May 3, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/05/03/teens-books-ban-clubs-protest/> [https://perma.cc/F3AR-VM8K].

267. Natanson, *supra* note 266.

268. Meghan Mangrum, *Southlake Schools Now Face 8 Investigations into Alleged Retaliation, Discrimination*, DALL. MORNING NEWS (Feb. 9, 2023, 6:07 PM), <https://www.dallasnews.com/news/education/2023/02/09/southlake-schools-now-face-8-investigations-into->

Unlocked Library club to read books that have been challenged or banned.<sup>269</sup> The group's book list includes Tony Morrison's *The Bluest Eye*, George Johnson's *All Boys Aren't Blue*, and Tanehisi Coates' *Between the World and Me*.<sup>270</sup> "People say kids can get these books outside of school," explained the student-founder, "but I gain a lot more insight about what I'm reading if I'm having discussions with people I care about[.] It's important to see yourself represented."<sup>271</sup>

### CONCLUSION

As the anti-truth movement develops, we will undoubtedly see new attacks on the right to access and share truthful information in schools. These attacks may consist of new legislative proposals, executive actions, school board policies, or public campaigns. Although the specific contours of these proposals remain to be seen, pro-truth advocates can still marshal a variety of tools to fight back against these efforts.

First, pro-truth advocates should capitalize on the broad support for racially inclusive, accurate teaching in schools. Advocacy should highlight the benefits of such teaching for our multi-racial democracy in contrast with the anti-truth's repressive, harmful aims. Second, where anti-truth proposals have already been enacted, pro-truth advocates can assess whether litigation may be viable. Pro-truth litigation is best suited to address concrete enforcement activity, or likely enforcement activity, but is limited in its ability to address the many other dignitary and stigmatic harms flowing from anti-truth proposals. Third, advocates looking to engage with new anti-truth

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alleged-retaliation-discrimination/ [https://perma.cc/3W2X-FR7F]. At least one of the authors represents the complainants in an OCR complaint against Carroll ISD.

269. Adriana De Alba, *Carroll ISD Students Launch On-Campus Club for Banned Books*, WFAA, <https://www.wfaa.com/article/news/education/carroll-isd-students-launch-club-banned-books/287-125d69e7-d937-4f0b-928c-5949cbd71fb8> [https://perma.cc/HH6G-YS9C] (Oct. 2, 2023, 9:43 PM).

270. *The Books*, THE UNLOCKED LIBR., <https://sites.google.com/view/the-illegal-library/banned-readings?authuser=0>, [https://perma.cc/5WHA-K775].

271. Elizabeth Campbell, *Southlake Carroll Students Respond to Book Bans by Forming Club to Read Them*, FORT WORTH STAR-TELEGRAM (Oct. 13, 2023, 6:00 AM), <https://www.star-telegram.com/news/local/education/article280123789.html> [https://perma.cc/YE4C-G7ZB].

proposals, or proposals which may not be best addressed by litigation, should start by amplifying the voices and perspectives of those most impacted, particularly students and educators. Impacted community members can work with pro-truth advocates to propose pro-truth legislative proposals and engage in local actions such as school board advocacy or community-based education.

Because so many anti-truth measures are aimed at attacking the dignity of Black people and other marginalized groups, it is imperative that pro-truth activities center and affirm their experiences.