

# BOOK BANS UNDER A HOSTILE ENVIRONMENT THEORY

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## ABSTRACT

Amid increasingly divisive culture wars, schools are confronted with unprecedented pressures to ban books that discuss or address topics related to race, gender, and sexuality. Celebrated titles exploring these themes, like Toni Morrison's *The Bluest Eye* and Maia Kobabe's *Gender Queer*, have been banned in over a hundred school districts across the nation. Depriving young, underrepresented readers of these books, and similar titles, robs them of an opportunity to see themselves represented through these literary works; and for some, it severs a critical lifeline for self-affirmation. Targeted book bans create a hostile environment in which students who reveal their sexual orientation and gender identity, or simply exist in their own skin, risk stigma and exposing themselves to discrimination. Further, the bans limit students' learning opportunities and deprive them of quality education; studies show that banning diverse or inclusive books is associated with poor academic performance, deficient critical thinking and social awareness skills, and decreased reading engagement.

This Note explores the prospect of challenging book bans as a civil rights violation. Specifically, it addresses whether racially or sexually motivated book bans create a hostile learning environment in violation of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. This Note advocates for an extension of the hostile environment theory and ultimately concludes that because book bans target statutorily protected characteristics, they can pose a legally sufficient limitation on students' learning so as to violate federal anti-discrimination laws.

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INTRODUCTION<sup>1</sup>

Many would like to think segregation is a vice of the past.<sup>2</sup> Yet, the same animus that fueled this discriminatory practice continues to seep into contemporary institutions under a different guise. In the 1970s, when segregation practices were increasingly scrutinized, educators switched to using discretionary discipline to subject Black and Brown students to harsher punishments.<sup>3</sup> Even

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1. It is important to acknowledge that this Note is being published within the first several months of the Trump administration, at a time when the landscape of federal civil rights enforcement is shifting significantly and rapidly. Since President Trump entered office in January 2025, the Department of Education and the Department of Justice have adopted markedly narrower interpretations of Title VI and Title IX, particularly concerning protections for LGBTQ+ students and racially inclusive curricula. These administrative retrenchments have undermined key civil rights protections in education, making it less likely that federal agencies will pursue or recognize hostile environment claims stemming from book bans. It is precisely because of this rollback of rights by the executive branch that it is now more urgent than ever for courts to embrace and expand interpretations of Title VI and Title IX. Judicial recognition of hostile environment claims in this context is essential to safeguarding the rights of students of color and LGBTQ+ students and ensuring that public education remains inclusive, equitable, and legally protected against discrimination. However, because of the rapid and regressive changes unfolding under the Trump administration, the arguments advanced in this Note should be read carefully and adjusted as necessary to respond to evolving administrative positions and judicial interpretation.

2. See Richard Rothstein, *Brown v. Board at 60: Why Have We Been So Disappointed? What Have We Learned?*, ECON. POLY INST. (Apr. 17, 2014), <https://files.epi.org/2014/EPI-Brown-v-Board-04-17-2014.pdf> [<https://perma.cc/64AL-R87Z>] (discussing how although *Brown v. Board of Education* aimed to primarily desegregate American schools, among other institutions, it was least successful in integrating education); see also Katherine Schaeffer, *U.S. Public School Students Often Go to Schools Where at Least Half of Their Peers Are the Same Race or Ethnicity*, PEW RES. CTR. (Dec. 21, 2021), <https://www.pewresearch.org/short-reads/2021/12/15/u-s-public-school-students-often-go-to-schools-where-at-least-half-of-their-peers-are-the-same-race-or-ethnicity> [<https://perma.cc/T82Q-M97Q>] (explaining that during “the 2018–19 school year . . . 79% of White elementary and secondary public school students went to schools where at least half of their peers were also White,” while “more than half of Hispanic students (56%) and 42% of Black students also attended schools where half the students or more shared their race or ethnicity”); Richard Rothstein, *Modern Segregation*, ECON. POLY INST. (Mar. 6, 2014), <https://www.epi.org/publication/modern-segregation> (documenting modern segregation practices affecting the education system) [<https://perma.cc/8HAN-UJ9C>].

3. See generally Nancy L. Arnez, *Implementation of Desegregation as a Discriminatory Process*, 47 J. NEGRO EDUC. 28 (1978) (“Ironically, the

after the exposure of such disparate discipline practices, schools overburdened students with racial microaggressions, limiting students' learning experience.<sup>4</sup> Now, as progressive educators attempt to remedy these effects by teaching Critical Race Theory (CRT) and gender and sexuality studies, opponents are waging a war on books.<sup>5</sup> Today's book bans are a new manifestation of the same discriminatory animus that existed at the inception of the Civil Rights Movement.

Books serve as timeless repositories of collective wisdom and diverse perspectives. In particular, literary works by and about Black, Indigenous, and other People of Color (BIPOC),<sup>6</sup> as well as LGBTQ+ communities, enrich the literary landscape by promoting inclusive education, offering counter-narratives, and increasing visibility for underrepresented groups.<sup>7</sup> For example, seminal works like Michelle Alexander's *The New Jim Crow*<sup>8</sup> and Audre Lorde's *Sister Outsider*<sup>9</sup>

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desegregation of schools has had deleterious results for Black children . . . [including] disproportionate number of suspensions, expulsions, and pushouts to disciplinary policies and procedures . . .”).

4. Dotun Ogunyemi et al., *Microaggressions in the Learning Environment: A Systematic Review*, 13 J. DIVERSITY HIGHER EDUC. 97, 97–119 (2020).

5. Ariana Figueroa, *LGBTQ Community, People of Color in the Crosshairs of Banned Book Movement*, NJ MONITOR (Apr. 18, 2022), <https://newjerseymonitor.com/2022/04/18/lgbtq-community-people-of-color-in-the-crosshairs-of-banned-book-movement> [<https://perma.cc/JC9S-44UE>].

6. Although targeted book bans affect all BIPOC communities, this Note primarily examines the experiences of Black communities. Despite this limited scope, this Note acknowledges the common challenges BIPOC individuals face, particularly with overcoming institutional barriers in education. Given these intersecting circumstances, a Title VI hostile environment theory can be applied to challenge racially or ethnically motivated book bans that also target non-Black literature. Title VI broadly protects individuals from discrimination based on race, color, or national origin in schools or education programs that receive federal funding. 42 U.S.C. § 2000d.

7. See Crystal L. Keels, *Resisting Dominant Narratives*, SPLC LEARNING FOR JUST. (Sept. 19, 2022), <https://www.learningforjustice.org/magazine/resisting-dominant-narratives> [<https://perma.cc/DM86-WEGP>] (discussing the power of books to counter dominant narratives); see also generally, Crystal L. Keels, *Freedom to Read, Freedom to Learn*, SPLC LEARNING FOR JUST., <https://www.learningforjustice.org/freedom-to-read-freedom-to-learn> [<https://perma.cc/KE48-5GXT>] (explaining how BIPOC and LGBTQ+ titles promote diverse perspectives, inclusive education, and uplifting history).

8. Colin Grant, *The New Jim Crow by Michelle Alexander Review – Clear-Eyed and Distressing*, GUARDIAN (July 23, 2019), <https://www.theguardian.com/books/2019/jul/23/new-jim-crow-mass-incarceration-in-age-colourblindness-michelle-alexander-review> [<https://perma.cc/M65D-FHJ5>]

offer readers the opportunity to engage in critical learning and to unlearn distorted narratives. These books both amplify the voices of underrepresented communities and serve as catalysts for social justice and equity.<sup>10</sup> Banning similarly diverse and inclusive books is a direct attack on the progress and identities of BIPOC and LGBTQ+ communities.

As schools attempted a racial reckoning in the wake of George Floyd's murder,<sup>11</sup> a network of conservative advocacy groups waged an unyielding campaign to ban books from school libraries that they alleged were too "divisive."<sup>12</sup> Although depriving students of the benefits of impactful literary works is not a new phenomenon, the movement has reached historic highs over the past several years.<sup>13</sup>

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("[T]his distressing book offers important lessons for all societies that claim colour-blindness but enact policies that scapegoat marginalised groups.").

9. Antoinette Nwandu, *Reading Audre Lorde's "Sister Outsider" After Charlottesville*, L.A. REV. OF BOOKS (Oct. 30, 2017), <https://lareviewofbooks.org/article/reading-audre-lordes-sister-outsider-after-charlottesville> [<https://perma.cc/H8ZN-K8K4>] ("*Sister Outsider*, proves as necessary and powerful a tool in the canon of contemporary progressive theory as it was when first published in 1984.").

10. See, e.g., Carolyn Copeland, *Ten Years Later, 'The New Jim Crow' Continues to Reshape the Way We Organize Around Criminal Justice*, PRISM (Jan. 6, 2020), <https://prismreports.org/2020/01/06/ten-years-later-the-new-jim-crow-continues-to-reshape-the-way-we-organize-around-criminal-justice> [<https://perma.cc/8JQB-NQH7>] ("[N]o single book was more directly responsible for reshaping how the American public understands race and mass incarceration than Michelle Alexander's *The New Jim Crow*.").

11. Marisa Iati, *What Is Critical Race Theory, and Why Do Republicans Want to Ban It in Schools*, WASH. POST (May 29, 2021), <https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/> (on file with the *Columbia Human Rights Law Review*).

12. See Akilah Alleyne, *Book Banning, Curriculum Restrictions, and the Politicization of U.S. Schools*, AM. PROGRESS (Sept. 19, 2022), <https://www.americanprogress.org/article/book-banning-curriculum-restrictions-and-the-politicization-of-u-s-schools> [<https://perma.cc/4R26-AKEF>]; see also, Valerie Strauss, *This Wave of Book Bans Is Different from Earlier Ones*, WASH. POST (Feb. 10, 2022), <https://www.washingtonpost.com/education/2022/02/10/book-bans-maus-bluest-eye/> (on file with *Columbia Human Rights Law Review*) (discussing conservative groups' rising calls for book bans following the George Floyd protests).

13. In 2022, the American Library Association (ALA) received 1,269 demands to restrict or remove books from their libraries, making it "the highest number of attempted book bans since ALA began compiling data about censorship in libraries more than 20 years ago." *Surge in Book Challenges Press Kit*, AM. LIBR. ASS'N (Nov. 22, 2021), <http://www.ala.org/news/mediapresscenter/presskits/surge-book-challenges-press-kit> [<https://perma.cc/VCY2-3XHT>].

From July 2021 to June 2023, PEN America's Index of School Book Bans documented 5,894 instances of book bans across 247 public school districts.<sup>14</sup> That number nearly doubled in the 2023–2024 school year, during which PEN America recorded 10,046 instances of book bans in U.S. public school classrooms and libraries, affecting 4,231 unique book titles and the works of over 2,880 authors, illustrators, and translators.<sup>15</sup> Of the 1,091 most commonly banned works, over 44% included characters of color or discussed race and racism, and 39% contained LGBTQ+ characters or themes.<sup>16</sup> Many of these commonly banned books also cover topics relating to health and well-being for students, with 38% discussing mental health.<sup>17</sup>

This recent trend raises multiple concerns. First, it seeks to impose restrictions on students' learning opportunities based on the preferences of a slim minority—only 12% of Americans support book removals,<sup>18</sup> and only 1% of these removals are initiated by students.<sup>19</sup>

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14. Sabrina Baëta & Kasey Meehan, *Spineless Shelves, Two Years of Book Banning*, PEN AM. (Dec. 14, 2023) [hereinafter *Spineless Shelves*], <https://pen.org/spineless-shelves> [<https://perma.cc/F5FX-23GB>]. PEN America is a leading organization in tracking and reporting on book bans across the nation. The non-profit's Index of School Book Bans provides a comprehensive list of books banned since 2021. The Index tracks four types of school book bans: bans from school libraries, bans from classrooms, bans from both libraries and classrooms, and bans that are pending investigation. PEN America records these bans based on publicly reported data, school district websites, school board minutes, as well as reports from local and advocacy partners. Yet, because censorship efforts are generally underreported or nearly impossible to quantify, PEN America acknowledges it likely undercounts the true numbers of book bans across the nation. *Book Bans Frequently Asked Questions*, PEN AM., <https://pen.org/book-bans-frequently-asked-questions> [<https://perma.cc/7PE3-GZ4Z>].

15. *Banned in the USA: Beyond the Shelves*, PEN AM. (Nov. 1, 2024) [hereinafter *Beyond the Shelves*], <https://pen.org/report/beyond-the-shelves/> [<https://perma.cc/3Z4L-BB8L>]. To compare these statistics with those during the previous year, see Kasey Meehan et al., *Banned in the USA: The Mounting Pressure to Censor*, PEN AM. (Sept. 21, 2023) [hereinafter *The Mounting Pressure to Censor*], <https://pen.org/report/book-bans-pressure-to-censor> [<https://perma.cc/HX6E-N3SR>] (describing book ban trends for the 2022–2023 school year, which included 3,362 bans affecting 1,557 unique titles and over 1,480 authors, illustrators, and translators).

16. *Beyond the Shelves*, *supra* note 15.

17. *Id.*

18. *Review of Recent Book Ban Polls and Voter Surveys*, EVERY LIBR. INST. (Jan. 27, 2023), [https://www.everylibraryinstitute.org/review\\_recent\\_book\\_ban\\_polls](https://www.everylibraryinstitute.org/review_recent_book_ban_polls) (on file with the *Columbia Human Rights Law Review*). Consider also, the Washington Post's finding that out of over a thousand book challenges, nearly 60% were filed by just

Second, it creates easy avenues for objecting to books and materials under the pretext that they contain “inappropriate” or “harmful” content.<sup>20</sup> The so-called inappropriate or harmful content primarily refers to the mere inclusion of characters of color, discussions of race and racism, and/or portrayals of LGBTQ+ characters and experiences.<sup>21</sup> Finally, it fosters a hostile atmosphere in which LGBTQ+ and BIPOC students are singled out for expressing their sexual orientation and gender identity, or simply existing in their skin color.<sup>22</sup>

This Note proposes harnessing federal anti-discrimination civil rights laws to challenge targeted school book bans. Specifically, it explores whether these bans, under certain circumstances, create an unlawful hostile environment under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. As recipients of federal financial assistance, public schools and school districts are subject to Title VI and Title IX mandates.<sup>23</sup> Title VI prohibits discrimination on the basis of race, color, and national origin.<sup>24</sup> Schools violate Title VI when they create or fail to correct a

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eleven people. Hannah Natanson, *The Post Reviewed 1,000 School Book Challenges. Here's What We Found*, WASH. POST (Dec. 23, 2023), <https://www.washingtonpost.com/education/2023/12/23/post-reviewed-1000-school-book-challenges-heres-what-we-found/> (on file with the *Columbia Human Rights Law Review*).

19. *Censorship by the Numbers* (infographic), AM. LIBR. ASS'N OFF. FOR INTELL. FREEDOM [hereinafter *Censorship by the Numbers*], <https://www.ala.org/news/sites/ala.org.news/files/content/2022-OIF-censorship-by-the-numbers-large.jpg> [<https://perma.cc/D5M5-W96X>].

20. *The Mounting Pressure to Censor*, *supra* note 15.

21. *Id.*

22. For example, in Georgia, one student stated that Forsyth County Schools District's decision to remove LGBTQ+ titles immediately made the school environment harsher for students. Forsyth County School (Georgia), *Forsyth County Board of Education Regular Meeting, February 15, 2022*, YOUTUBE (Feb. 15, 2022) [hereinafter *Forsyth County Board*], [https://www.youtube.com/watch?v=nFDUsXmKw1s&ab\\_channel=ForsythCountySchools%28Georgia%29](https://www.youtube.com/watch?v=nFDUsXmKw1s&ab_channel=ForsythCountySchools%28Georgia%29) (last visited Oct. 8, 2024). At a school board meeting on the district's decision to remove diverse books, the student testified that people like him who are not in the closet are watching their safe spaces disappear and that he is sick of being fearful at school. *Id.* Another South Asian student testified that it is hard for her to find books with main characters who are of her race; she knows that people of other minority backgrounds have the same struggle and banning books written with diversity silences mainly minority voices. She further noted that the school's decision to remove diverse books communicated that it did not care about diversity. *Id.*

23. 42 U.S.C. § 2000d; 20 U.S.C. § 1681.

24. 42 U.S.C. § 2000d.



hostile environment based on harassment for which the school has actual or constructive notice.<sup>25</sup> Title IX prohibits discrimination on the basis of sex and sexual orientation.<sup>26</sup> Sex-based harassment creates a hostile environment when “the conduct is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the school’s program.”<sup>27</sup> Book banning, by targeting protected classes and interfering with students’ learning, creates a hostile environment in violation of these statutes.

This Note proceeds in three parts. Part I situates the recent wave of book bans within the broader history of censorship in American education and explains why constitutional challenges have proven inadequate. Part II outlines how traditional hostile environment theories under Title VI and Title IX function and have been adapted to address non-harassing, yet discriminatory, conduct in administrative proceedings.<sup>28</sup> Part III proposes extending these civil rights doctrines to recognize discriminatory book removals as the

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25. Racial Incidents and Harassment Against Students at Education Institutions; Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994) [hereinafter Racial Incidents and Harassment Against Students].

26. 20 U.S.C. § 1681; *see also* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021) [hereinafter Enforcement of Title IX] (clarifying that the Department of Education interprets Title IX’s prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity). As discussed in more detail below, recent executive orders and administrative actions under the Trump administration have cast doubt on whether protections for sexual orientation and gender identity remain encompassed within Title IX, challenging the broader understanding adopted during prior administrations and by some courts. *See infra* note 171.

27. Off. of C.R., *Sex-Based Harassment*, U.S. DEP’T OF EDUC. [hereinafter *Sex-Based Harassment*], <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html> [<https://perma.cc/5H3Q-NPL9>].

28. This Note employs the terms “non-harassment conduct,” “pretextual conduct,” and “covert harassment” interchangeably to refer to actions or inactions that create a hostile environment but that might not constitute overt harassment of individuals. Overt harassment conduct is characterized by direct and obvious harassment or discrimination, typically in the form of verbal or physical abuse and intimidation. For the purposes of this Note, “non-harassment conduct” refers to facially neutral policies or actions—such as the selective removal of books—that are discriminatorily administered to materially disadvantage students based on protected characteristics. As discussed *infra*, current Title VI and Title IX hostile environment theory only recognizes the former as actionable conduct. This Note argues that courts must extend hostile environment law to reflect the reality that discriminatory exclusionary practices—not just direct harassment—create barriers to education and violate federal civil rights statutes.

actionable creation of a hostile environment. Using a case study from a school district where such discrimination has occurred, Part III closes by applying the extension of the law to argue that the school district's decision to ban a book by and about a Black individual creates an unlawful hostile learning environment.

### I. BANNING BOOKS AND IDENTITIES

Book banning is not a new phenomenon.<sup>29</sup> The ongoing practice traces back to the early colonial era,<sup>30</sup> spans through the Reconstruction era,<sup>31</sup> and has now experienced a significant uptick following the mass protests over George Floyd's murder in 2020.<sup>32</sup> As early as the 1850s, multiple southern states outlawed works expressing anti-slavery sentiments.<sup>33</sup> Harriet Beecher Stowe's *Uncle Tom's Cabin*, which exposed the injustices of slavery, was one of the first novels to be banned.<sup>34</sup> During the Jim Crow era, confederate groups successfully led campaigns to censor textbooks that did not paint a sympathetic view of the South.<sup>35</sup> A century later, in 1973, Congress passed the Comstock Act which made it illegal to possess or mail materials deemed "obscene" or "immoral."<sup>36</sup> The laws were designed to ban content about sexuality and birth control and censor discourse around women's sexual liberation.<sup>37</sup>

The new wave of censorship preserves these trends through different means. Today's book bans still disproportionately target

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29. Amy Brady, *The History (and Present) of Banning Books in America*, LITERARY HUB (Sept. 22, 2016), <https://lithub.com/the-history-and-present-of-banning-books-in-america> [<https://perma.cc/QA6A-XQYC>].

30. Erin Blakemore, *The History of Book Bans—and Their Changing Targets—in the U.S.*, NAT'L GEOGRAPHIC (Apr. 24, 2023), <https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states> [<https://perma.cc/W42L-3NZZ>].

31. *Id.* (discussing book bans in the wake of the Civil War).

32. Deborah Barfield Berry, *'It's an Act of Resistance:' Groups Ramp up Efforts in the Fight to Stop Book Bans*, USA TODAY (Dec. 29, 2023), <https://www.usatoday.com/story/news/nation/2023/12/29/more-groups-are-launching-projects-to-stop-the-rise-of-book-bans/72008712007> [<https://perma.cc/QBH5-SPAC>].

33. Blakemore, *supra* note 30.

34. Brady, *supra* note 29.

35. Blakemore, *supra* note 30.

36. *Id.*

37. *Id.* (explaining, for example, how such laws rendered informative pamphlets like Margaret Sanger's *Family Limitation* inaccessible).

race, gender, and sexuality related content.<sup>38</sup> But in addition to legislation, challengers now use new removal tactics—most notably, turning schools into battlegrounds—to achieve sweeping censorship.<sup>39</sup> Among the banned books tracked by PEN America, the most frequently banned titles across the country are *Gender Queer* by Maia Kobabe and *The Bluest Eye* by Toni Morrison.<sup>40</sup> Other common targets are works featuring queer and/or nonbinary protagonists, including *All Boys Aren't Blue* by George M. Johnson, a young adult memoir-manifesto about Johnson's journey growing up as a queer Black man.<sup>41</sup> Further, books promoting antiracism education, such as Angie Thomas' novel *The Hate U Give*, also face widespread restriction under a misleading rhetoric that they cause “indoctrination.”<sup>42</sup> Organizations like No Left Turn in Education and Moms for Liberty continue to mobilize with political groups to remove similar books from school libraries.<sup>43</sup> By the end of 2021, there were at least 165 local and national groups whose missions aimed to “disrupt lessons on race and gender.”<sup>44</sup> This rising attack on diverse

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38. *Book Ban Data*, AM. LIBR. ASS'N., <https://www.ala.org/advocacy/bbooks/book-ban-data> [<https://perma.cc/H88N-2XRT>].

39. See *infra* Section I.B (describing new censorship tactics including swarming school board meetings, politicizing books, and threatening school officials, teachers, and librarians).

40. *Spineless Shelves*, *supra* note 14.

41. *Id.*

42. Betsy Gomez, *Banned Spotlight: The Hate U Give*, BANNED BOOKS WK. (Sept. 6, 2018), <https://bannedbooksweek.org/banned-spotlight-the-hate-u-give> [<https://perma.cc/8493-H7FB>] (quoting one critic as stating that books like *The Hate U Give*, which features a storyline navigating the issue of racialized police violence, promote “almost an indoctrination of distrust of police”).

43. Kiara Alfonseca, *How Conservative and Liberal Book Bans Differ Amid Rise in Literary Restrictions*, ABC NEWS (Jan. 12, 2023), <https://abcnews.go.com/US/conservative-liberal-book-bans-differ-amid-rise-literary/story?id=96267846> [<https://perma.cc/G8Z3-3PLW>]; see also Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (Jan. 30, 2022), <https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html> (on file with the *Columbia Human Rights Law Review*) (describing the organizations' tactics, including politicizing books and education, to push for censorship); Tyler Kingkade et al., *Critical Race Theory Battle Invades School Boards – with Help from Conservative Groups*, NBC NEWS (June 15, 2021), <https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794> [<https://perma.cc/2TNU-4ZLY>] (discussing No Left Turn in Education's backing from prominent Republican political figures).

44. Kingkade et al., *supra* note 43.

and inclusive books is a representation of the concerted effort to continue oppressing BIPOC and LGBTQ+ communities.

A. Historical Overview: Book Bans as Tools of Political and Social Repression

Written works have shaped U.S. politics since its founding. Thomas Paine’s *Common Sense* served as a rallying cry, declaring the case for independence and influencing the trajectory of the American Revolution.<sup>45</sup> From the Federalist Papers, which promoted the ratification of the U.S. Constitution, to seminal works in Black literature such as W.E.B Du Bois’ *The Soul of Black Folk*—the cornerstone of CRT<sup>46</sup>—books continued to play a crucial role in shaping American political thought.<sup>47</sup> Both Paine and Du Bois’ works left an indelible mark on American history, calling for the independence of a people, shaping public discourse, influencing policy decisions, and contributing to the evolution of the nation’s political landscape. Today, only one of them is subject to censorship; *The Souls of Black Folk* remains banned in prisons, along with many other books by Black authors centered on Black experiences.<sup>48</sup>

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45. Patrick J. Kiger, *How Thomas Paine’s ‘Common Sense’ Helped Inspire the American Revolution*, HIST. (July 11, 2023), <https://www.history.com/news/thomas-paine-common-sense-revolution> [https://perma.cc/BU92-EQFC].

46. CRT is an academic legal framework that regards racism as an American social construct. It views racism not simply as the result of individual bias and prejudice, but as a systemic phenomenon embedded in American society, laws, and institutions. KIMBERLÉ CRENSHAW ET. AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995). The theory rejects the philosophy of “colorblindness” that many of the political right, including book ban proponents, advance. Ishena Robinson, *Anti-CRT Mania and Book Bans Are the Latest Tactics to Halt Racial Justice*, LEGAL DEF. FUND, <https://www.naacpldf.org/critical-race-theory-banned-books> [https://perma.cc/MJ94-5HHA]; see also generally *Critical Race Theory: Frequently Asked Questions*, LEGAL DEF. FUND, <https://www.naacpldf.org/critical-race-theory-faq> [https://perma.cc/N6KG-F27A] (providing a compilation of pertinent resources related to the CRT framework and activism).

47. See *Books That Shaped America*, LIBR. OF CONG. (Jan. 21, 2013), <https://www.loc.gov/item/prn-13-005> [https://perma.cc/QVG3-UTKF] (naming both works on the Library of Congress’ “Books that Shaped America” list).

48. See *Banning Books in Prison*, EQUAL JUST. INITIATIVE (Jan. 7, 2020), <https://eji.org/news/banning-books-in-prisons> [https://perma.cc/V4ST-FX89] (listing *Souls of Black Folk* among other works including Bryan Stevenson’s *Just Mercy* and Barack Obama’s *Dreams from My Father* that are banned by state and federal prisons).

Although the reasons for book bans targeting Black titles have varied over the years, their common thread remains the same: prejudice. For years, the U.S. government has successfully passed oppressive education legislation intended to marginalize an under-resourced fraction of Black people.<sup>49</sup> These measures were designed to obstruct access to education, ensuring that Black people were not only barred from picking up books but also from acquiring the knowledge embedded within them, particularly regarding their own history.<sup>50</sup> Today's book bans join the growing list of instances of anti-Black violence that further "codify anti-blackness in the DNA of America."<sup>51</sup>

Targeted books often challenge prevailing norms, question authority, or present perspectives that differ from those in power.<sup>52</sup> It is no surprise then that books written by BIPOC authors or books addressing themes related to BIPOC experiences face significant censorship.<sup>53</sup> In recent years, anti-CRT mania prompted a new purge targeting Black authors and perspectives.<sup>54</sup> The misapplications of

49. See *supra* notes 29–37 and accompanying text (discussing post-Reconstruction backlash and Jim Crow era suppression).

50. See Colette Coleman, *How Literacy Became a Powerful Weapon in the Fight to End Slavery*, HISTORY.COM (June 17, 2020), <https://www.history.com/news/nat-turner-rebellion-literacy-slavery> [<https://perma.cc/9GWU-NE9T>] (discussing the ways in which southern states pursued efforts to restrict Black Americans' literacy to maintain slavery).

51. Phelton Moss, *Book Bans: An Act of Policy Violence Promoting Anti-Blackness*, NAACP: THE CRISIS (May 15, 2023), <https://naacp.org/articles/book-bans-act-policy-violence-promoting-anti-blackness> [<https://perma.cc/83KQ-YNAJ>].

52. See Glenn C. Alchuler & David Wippman, *The Instructive History of Book Bans*, HILL (Jan. 21, 2024), <https://thehill.com/opinion/education/4419652-the-instructive-history-of-book-bans> [<https://perma.cc/VCA9-M9WR>] (discussing previous campaigns that targeted books for being "subversive," "un-American," "anti-Christian," and "Communist").

53. Of the total instances of book bans PEN America documented between July 1, 2021, and June 30, 2023, 2,152 of banned titles featured prominent characters of color or themes related to race or racism. *Spineless Shelves*, *supra* note 14.

54. Madeline Will, *Calls to Ban Books by Black Authors Are Increasing Amid Critical Race Theory Debates*, EDUC. WEEK (Sept. 30, 2021), <https://rb.gy/trwcm> [<https://perma.cc/W5HK-S6SV>]; see also *Book Bannings Targeting Black Authors and Perspectives Are Skyrocketing*, EVERYLIBRARY (Feb. 7, 2023), [https://action.everylibrary.org/book\\_bannings\\_targeting\\_black\\_authors\\_and\\_perspectives\\_are\\_skyrocketing](https://action.everylibrary.org/book_bannings_targeting_black_authors_and_perspectives_are_skyrocketing) [<https://perma.cc/4845-TLQE>] ("In the last six years, the book banning movement has increased significantly. A substantial amount of the ire is directed at Black authors and works highlighting Black stories."). Two of the top three most targeted books during the period of 2021 to 2023—*The Bluest Eye*

the academic term “CRT” often result in wholesale bans on books that do not teach CRT but are merely written by Black authors and about Black experiences.<sup>55</sup> In the carceral system, prisons frequently place bans on literature that discusses race and civil rights, often on the grounds that such texts “threaten to disrupt a prison’s social order.”<sup>56</sup> *The New Jim Crow* by Michelle Alexander, perhaps the most prominent critique of the carceral state, continues to be banned from federal prisons because officials deem it to be a “security threat” filled with “racial overtures.”<sup>57</sup>

Whether through its carceral state or education system, the U.S. government has historically engaged in the deliberate suppression of Black voices.<sup>58</sup> While some censorship can be justified on various grounds,<sup>59</sup> the disproportionate suppression of Black

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and *All Boys Aren't Blue*—are by Black authors, have Black protagonists, and center on Black experiences. *Spineless Shelves*, *supra* note 14. These censorship efforts are removing Black perspectives from an already scarce Black literary landscape. According to a report on diversity in children’s literature, only 953 of 3,453 (approximately 9%) books are by and/or about Black people. *Books by and/or About Black, Indigenous and People of Color 2018–*, COOP. CHILDREN’S BOOK CTR. AT THE SCH. OF EDUC., UNIV. OF WIS.–MADISON (May 4, 2023), <https://ccbc.education.wisc.edu/literature-resources/ccbc-diversity-statistics/books-by-and-or-about-poc-2018> [<https://perma.cc/R486-5U5V>]. For a list of Black-authored books that have been targeted for censorship, see *Banned Books by Black Authors*, ACLU OF MASS., <https://www.aclum.org/en/banned-books-black-authors> [<https://perma.cc/4BRJ-HQBJ>].

55. See, e.g., Tat Bellamy-Walker, *Book Bans in Schools Are Catching Fire. Black Authors Say Uproar Isn't About Students*, NBC NEWS (Jan. 6, 2022), <https://www.nbcnews.com/news/nbcblk/book-bans-schools-are-catching-fire-black-authors-say-uproar-isnt-stud-rcna10228> [<https://perma.cc/7GMU-SK8U>] (discussing Texas’ attempt to ban children’s books by Jerry Craft, an award-winning Black author and illustrator, under the pretense that his books teach CRT); see also Robinson, *supra* note 46 (detailing recent efforts to ban books under the guise that they are promoting CRT).

56. James Tager, *Literature Locked Up: How Prison Book Restriction Policies Constitute the Nation’s Largest Book Ban*, PEN AM. (Sept. 24, 2019), <https://pen.org/literature-locked-up-prison-book-bans-report> [<https://perma.cc/L3Y7-DUZF>].

57. Jonah E. Bromwich, *Why Are American Prisons So Afraid of This Book?*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/new-jim-crow-book-banprison.html> (on file with the *Columbia Human Rights Law Review*).

58. Diann Cameron Kelly & Rani Varghese, *Four Contexts of Institutional Oppression: Examining the Experiences of Blacks in Education, Criminal Justice and Child Welfare*, 28 J. HUM. BEHAV. SOC. ENV’T 874, 874–88 (2018).

59. Censorship, particularly when aimed at banning racist or anti-Black books is often justified as a measure to combat racism. Such censorship seeks to eliminate literature that perpetuates harmful stereotypes and discriminates

authors, at its core, reflects a systematic effort to stifle Black counter-narratives.<sup>60</sup> The political agenda is even more evident in the targeting of books that engage with issues central to the Black struggle for civil rights. A touchstone of the Civil Rights Movement, *The Autobiography of Malcolm X* by Malcolm X and Alex Haley, was initially suppressed as part of a national effort to destabilize the social movement.<sup>61</sup> The book, now on the Library of Congress' list of "Books that Shaped America," was decried for its anti-white statements.<sup>62</sup> In recent years, complainants have targeted Ta-Nehisi Coates' National Book Award winner, *Between the World and Me*. While otherwise acclaimed as "a searing meditation on what it means to be black in America,"<sup>63</sup> opponents label the novel as anti-police.<sup>64</sup>

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against underrepresented communities. See e.g., Hannah Nathanson, *Students Hated 'To Kill a Mockingbird.' Their Teachers Tried to Dump It*, WASH. POST (Nov. 3, 2023), <https://www.washingtonpost.com/education/2023/11/03/to-kill-a-mockingbird-book-ban-removal-washington/> (on file with the *Columbia Human Rights Law Review*). However, the justification for censoring books that uplift Black voices under the rhetoric that they are "divisive" or "inappropriate" is much more contentious. Proponents of such censorship often argue that these books could sow discord or offend certain sensibilities, but for the various reasons discussed throughout this Note, their reasons lack merit, as they are often pretextual. See *Race and Censorship in America*, ACLU OHIO (Sept. 25, 2013), <https://www.acluohio.org/en/news/race-and-censorship-america> [<https://perma.cc/UM64-SGF5>].

60. Consider, for example, that while Upton Sinclair's *The Jungle* gained praise for shedding light on government corruption in the early twentieth century, Lorraine Hansberry's *A Raisin in the Sun*, the first Broadway play written by a Black woman, which examines housing segregation in Chicago, was censored due to its raw portrayal of racial and socioeconomic struggles. See DAWN B. SOVA, BANNED PLAYS: CENSORSHIP HISTORIES OF 125 STAGE DRAMAS 222 (2004) (noting that opponents sought to censor Hansberry's written work for material that was deemed "too provocative for white audiences"); see also, Christopher Klein, *How Upton Sinclair's "The Jungle" Led to US Food Safety Reforms*, HIST. (May 10, 2023), <https://www.history.com/news/upton-sinclair-the-jungle-us-food-safety-reforms> [<https://perma.cc/2PSN-YXDL>] (discussing the book's impact on the meatpacking industry).

61. Jena Hinton, *Literary Rebels: Five Banned Book Authors Connected to the Village*, VILL. PRES. (Nov. 21, 2022), <https://www.villagepreservation.org/2022/11/21/literary-rebels-banned-books> [<https://perma.cc/LA4H-K49X>].

62. *Id.*

63. Ta-Nehisi Coates, *Between the World and Me*, TA-NEHISI COATES, <https://ta-nehisicoates.com/books/between-the-world-and-me> [<https://perma.cc/JF6M-RN3C>].

64. Paul Farrell, *Pentagon's Equity Chief Is Slammed for Praising "Social Justice" Book for Kids by Anti-Cop Author That Labelled 9/11 First Responders "Not Human" And "Menaces" - As Probe Continues Over Her "Anti-White" Tweets*,

Objectors similarly attack Thomas' *The Hate U Give* and Jason Reynolds and Brendan Kiely's *All American Boys*—both young adult novels about racism and police brutality in America.<sup>65</sup> When books that critique systemic racism or advocate for social justice are banned, the role of censorship in controlling the narrative surrounding race, history, and power dynamics in the U.S. is clear.

## B. Recent Trends: Schools as Battlegrounds for Culture Wars

Despite the evolving progressive perspectives of the century, conservative groups<sup>66</sup> persist in their attempts to censor books. Most recently, they have added schools to their target forums, transforming school libraries into the new battleground for contentious debates about what kind of information should be available to children.<sup>67</sup> Parents and administrators clash over issues often centering on race, gender, sexuality, and historical perspectives.<sup>68</sup>

Over the 2021–2022 school year, a network of conservative groups launched a concerted effort to directly pressure schools to censor their libraries.<sup>69</sup> This attack came immediately after the mass protests that swept the nation in the wake of the murder of George

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DAILY MAIL (Oct. 17, 2022), <https://www.dailymail.co.uk/news/article-11323849/Pentagons-equity-chief-praised-book-labels-9-11-responders-not-human-menaces.html> [<https://perma.cc/7DC2-2RGD>].

65. Maya Pottiger, *Now Even Police Are Getting Black Books Banned*, OBSERVER (Jan. 21, 2022), <https://sacobserver.com/2022/01/now-even-police-are-getting-black-books-banned> [<https://perma.cc/7J4H-YZPW>].

66. James Factora, *These Are the Far Right-Groups Leading the Book Ban Explosion*, THEM (Sept. 21, 2023), <https://www.them.us/story/book-bans-conservative-advocacy-groups> [<https://perma.cc/S4HZ-GBLF>]. The conservative groups discussed in this Note are the pro-ban advocacy organizations, like Moms for Liberty and Parents' Rights in Education, that far-right politicians strongly support and use as conduits to pass broader "educational intimidation bills." *Id.*

67. See generally *The Mounting Pressure to Censor*, *supra* note 15 (describing the growing pressure on schools to remove books from their libraries and classrooms).

68. See, e.g., Eric Benninghoff, *Board, Parents Debate Censorship of Books in Hamilton County Schools Libraries*, NEWS CHANNEL 9 (Oct. 22, 2021), <https://newschannel9.com/news/local/school-board-parents-join-debate-over-whether-books-in-hcs-libraries-should-be-censored> [<https://perma.cc/XXH4-CPVM>] (excerpting exchanges between parents and administrators during a board meeting about how certain books end up in the school's libraries and classrooms).

69. Jonathan Friedman, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022) [hereinafter *The Growing Movement to Censor*], <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools> [<https://perma.cc/2D5G-SM3U>].



Floyd.<sup>70</sup> As educational institutions attempted a true reckoning with the role that race and racism play in American history and society, those opposed to social justice-driven initiatives pushed back ferociously.<sup>71</sup> PEN America identified at least fifty groups involved in pushing for book bans, eight of which had at least three hundred local or regional chapters.<sup>72</sup> These groups first compiled lists of books to challenge.<sup>73</sup> They then employed tactics such as “swarming school board meetings,” “demanding newfangled rating systems for libraries,” “using inflammatory language about ‘grooming’ and ‘pornography,’” and even lodging criminal complaints against school officials, teachers, and librarians.<sup>74</sup>

This conservative movement aimed to remove books that delve into race, racism, and slavery, mirroring a broader legislative campaign to enact educational gag orders.<sup>75</sup> For example, after receiving complaints from parents about the list of diversity committee resources, the Central York School District school board in Pennsylvania unanimously decided to ban several biographies of activists of color, including Malala Yousafzai and Supreme Court Justice Sonia Sotomayor.<sup>76</sup> That ban also censored hundreds of books

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70. Strauss, *supra* note 12.

71. *Id.*

72. *The Growing Movement to Censor, supra* note 69.

73. *Id.*

74. *Id.*; see also Kingkade et al., *supra* note 43 (describing challengers swarming school board meetings in Nevada, Rhode Island, and Maine).

75. Between January and September 2021, twenty-four legislatures across the U.S. introduced fifty-four separate bills intended to restrict teachings of race and gender in K–12 schools, higher education, and state agencies and institutions. Around the same time, Political Action Committees (PAC) emerged to pressure school boards and district leaders to ban the teaching of “divisive” concepts. The PACs, with support from recruited parents, led campaigns against elected school board members who opposed book bans, including by reportedly harassing school administrators and disrupting school meetings. Kingkade et al., *supra* note 43; see also *Censorship by the Numbers, supra* note 19 (noting targeted challenges “are evidence of a growing, well-organized, conservative political movement, the goals of which include removing books about race, history, gender identity, sexuality, and reproductive health from America’s public and school libraries that do not meet their approval”).

76. Eesha Pendharkar, *What Happened When Students Led Fights to Reverse Book Bans*, EDUC. WEEK (July 18, 2023), <https://www.edweek.org/teaching-learning/what-happened-when-students-led-fights-to-reverse-book-bans/2023/07> [<https://perma.cc/9L2G-4YBN>]; see also *Central York Banned Book List* (infographic), WPMUCDN.COM, <https://cpb-us-w2.wpmucdn.com/blogs.socsd.org/dist/0/461/files/2021/09/YC-Banned-List->

with protagonists of color, including Grace Lin's *A Big Mooncake for Little Star*, a children's picture book featuring Asian characters and themes.<sup>77</sup> For BIPOC students in the district, many of the banned books had helped them with developing "self-love" and "normaliz[ing] diversity," and it hurt them to see these "necessary resources" stripped from their school libraries.<sup>78</sup> Similarly, Duval County Public Schools in Florida decided against distributing sets of the *Essential Voices Classroom Libraries*, a diverse and inclusive collection of books, citing concern over their content.<sup>79</sup> Ultimately, since they mobilized en masse, the conservative network contributed to bans for at least half of the books removed during the 2021–2022 school year.<sup>80</sup>

While the initial push for book bans primarily aimed to suppress conversations on race and racism, this effort has evolved in the last couple of years to include a heightened attack on LGBTQ+ issues and identities.<sup>81</sup> Complaints about diversity and inclusion initiatives now coincide with demands to eliminate books that depict LGBTQ+ individuals or themes.<sup>82</sup> This includes books considered to feature "sexual" content, including titles on reproductive health and sex education.<sup>83</sup> The uptick in book ban demands followed Florida's new "Parental Rights in Education" law, also known as the "Don't Say Gay" law,<sup>84</sup> as well as efforts in other states to censor discussions

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Infographic\_REVISED.pdf [<https://perma.cc/WHS6-6SDF>] (listing the banned materials including the biographies of Yousafzai and Justice Sotomayor).

77. *The Growing Movement to Censor*, *supra* note 69.

78. Michel Martin, *2 Students Who Helped Reverse Their High School's Book Ban*, NPR (Nov. 7, 2021), <https://www.npr.org/2021/11/07/1053387447/2-students-who-helped-reverse-their-high-schools-book-ban> [<https://perma.cc/GQN7-FB7J>].

79. Kelly Jensen, *Duval County Public Schools Bought Dozens of New Books. They're Sitting Indefinitely in Storage.*, BOOK RIOT (Aug. 25, 2022), <https://bookriot.com/duval-county-public-schools-book-removal> [<https://perma.cc/F93Q-X48N>].

80. *The Growing Movement to Censor*, *supra* note 69.

81. Matt Lavietes, *Over Half of 2022's Most Challenged Books Have LGBTQ Themes*, NBC NEWS (Apr. 25, 2023), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/half-2022s-challenged-books-lgbtq-themes-rcna81324> [<https://perma.cc/VD56-G986>]. This Note aims to draw a connection between these recent anti-LGBTQ+ tactics and suppression schemes historically used against Black communities.

82. *Id.*

83. *The Growing Movement to Censor*, *supra* note 69.

84. The Don't Say Gay law refers to H.B. 1557, signed into law in 2022, that prohibits classroom instruction on sexual orientation and gender identities for students in kindergarten through third grade. In May 2023, Florida also passed H.B. 1069, which extends the prohibition through eighth grade and tacks

of LGBTQ+ identities in schools.<sup>85</sup> Many of the books are banned under the pretext that they contain “inappropriate content.”<sup>86</sup> Between April and June 2022, a third of all book bans logged by PEN America featured LGBTQ+ identities.<sup>87</sup> During this brief timeframe, nearly two-thirds of all banned books in PEN America’s Index addressed sexual health related content.<sup>88</sup>

Those calling for these book bans single out LGBTQ+ titles by characterizing them as “obscene.”<sup>89</sup> Obscenity is a category of speech unprotected by the First Amendment.<sup>90</sup> To be obscene, a written work, “taken as a whole,” must depict sexual conduct “in a patently

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on new restrictions including prohibiting the use of pronouns, expanding book banning procedures, and limiting health instruction. Andrew Atterbury, *Florida House Passes Parental Rights Bill Restricting Pronouns in Schools*, POLITICO (Mar. 31, 2023), <https://www.politico.com/news/2023/03/31/florida-house-parental-rights-bill-pronouns-lgbtq-00089971> [<https://perma.cc/E3X9-N4F7>].

85. In Kansas City, Missouri Grain Valley High School’s school board instructed its teachers to remove all cards and stickers that showed support to LGBTQ+ students. According to school administrators, rainbow stickers that read “safe space for all” were “inappropriate” to create “a safe, collaborative and inclusive environment.” Scott Gleeson, *Kansas City High School Board Bans LGBTQ Support Stickers and Cards, Prompting Backlash*, USA TODAY (Apr. 28, 2022), <https://www.usatoday.com/story/news/education/2022/04/28/missouri-school-bans-lgbtq-support-stickers/9568238002/> [<https://perma.cc/P8FR-JTNB>]. In Maryland, the Carroll County School Board voted to develop a policy to address the use of rainbow Pride flags inside public school buildings. School board members contended that the flags represented political symbols and displaying them in schools went against the school system’s political neutrality policy. Cameron Goodnight, *Carroll County School Board to Develop New Policy on Political Symbols*, WASH. POST (Apr. 19, 2022), [https://www.washingtonpost.com/local/carroll-county-school-board-to-develop-new-policy-on-political-symbols/2022/04/19/6d17f19e-bf88-11ec-9b0a-38a983a2edcb\\_story.html](https://www.washingtonpost.com/local/carroll-county-school-board-to-develop-new-policy-on-political-symbols/2022/04/19/6d17f19e-bf88-11ec-9b0a-38a983a2edcb_story.html) (on file with *Columbia Human Rights Law Review*). Texas school districts have similarly removed from library shelves numerous books with LGBTQ+ and other themes. The state’s Republican Party demanded the legislature pass legislation “more comprehensive than the Florida law that prohibits instruction in sexual orientation and gender identity in public schools.” Valerie Strauss, *Texas GOP to Schools: Use Live Ultrasounds to Show a “Preborn Child”*, WASH. POST (June 21, 2022), <https://www.washingtonpost.com/education/2022/06/21/texasgop-schools-teach-about-preborn-child/> (on file with the *Columbia Human Rights Law Review*).

86. *The Mounting Pressure to Censor*, *supra* note 15.

87. *The Growing Movement to Censor*, *supra* note 69.

88. *Id.*

89. *Id.*

90. *Obscenity*, U.S. DEP’T OF JUST. CRIM. DIV. (Aug. 11, 2023), <https://www.justice.gov/criminal/criminal-ceos/obscenity> [<https://perma.cc/V7G5-86VL>].

offensive way” and “lack[] serious literary, artistic, political, or scientific value.”<sup>91</sup> The targeted books, many of which do not depict sexual content and which have achieved bestseller status or received the highest literary honors, are unlikely to meet this high legal threshold. Moreover, some of them contain nothing more “obscene” than the mere suggestion of a same-sex couple.

To demonstrate, *And Tango Makes Three* is a children’s story about a penguin with two fathers; the book is based on the true story of two male penguins at New York City’s Central Park Zoo who adopted and raised an orphaned penguin.<sup>92</sup> Yet, book ban proponents labeled it as obscene, with some claiming it was not suitable for children.<sup>93</sup> This is true of numerous other books featuring LGBTQ+ themes or characters.<sup>94</sup> In these instances, the term “obscenity” is being stretched beyond its legal definition and used as an inflammatory slogan to restrict content. Many of the materials currently being removed under the pretext of “obscenity” have no connection to the sexually explicit or intentionally provocative content historically associated with the term.

The rising attacks on LGBTQ+ titles reveal that calls for their removal are, in essence, attempts to suppress and erase the identities and experiences of the LGBTQ+ community. For many young

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91. *Miller v. California*, 413 U.S. 15, 24 (1973). The *Miller* test is the leading authority for analyzing obscenity claims. Although prior to *Miller*, courts relied on *Roth v. United States*, 345 U.S. 476 (1965), which provided that states could regulate obscene materials, the Supreme Court overruled *Roth* in creating a uniform federal standard in *Miller*, 413 U.S. at 22–25.

92. *And Tango Makes Three*, SIMON & SCHUSTER, <https://www.simonandschuster.com/books/And-Tango-Makes-Three/Justin-Richardson/9781481446952> [<https://perma.cc/B98P-3MUX>].

93. Elizabeth A. Harris & Alexandra Alter, *Authors and Students Sue Over Florida Law Driving Book Bans*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2023/06/20/books/book-bans-florida-tango-makes-three.html> (on file with *Columbia Human Rights Law Review*). One of the most frequently banned books, *Gender Queer*, has also been labeled “obscene” and “pornographic” by groups seeking its removal. See Anna Miller, *Federal Agencies Are Sexualizing Idaho Libraries*, IDAHO FREEDOM FOUND. (Apr. 13, 2022), <https://idahofreedom.org/federal-agencies-are-sexualizing-idaho-libraries> [<https://perma.cc/2ENG-SEF8>].

94. See Summer Lopez, *The Extreme New Tactic in the Crusade to Ban Books*, TIME (May 8, 2023), <https://time.com/6277933/state-book-bans-publishers> [<https://perma.cc/F57D-2NBB>] (“Across the country, charges of obscenity and ‘porn in schools’ are being used to ban classics like Toni Morrison’s *The Bluest Eye* and Margaret Atwood’s *The Handmaid’s Tale*, claiming the presence of any sexual content in a book makes it illicit and harmful to minors.”).

students, books offer a safe space for exploration and self-discovery.<sup>95</sup> Only one in three LGBTQ+ youth come from affirming households.<sup>96</sup> With LGBTQ+ youth often experiencing isolation, books may be the only way they can access stories that validate their identity.<sup>97</sup> As one student protesting book banning in her school shared: “As I’ve struggled with my own identity as a queer person, it’s been really, really important to me that I have access to these books. And I’m sure it’s really important to other queer kids. You should be able to see yourself reflected on the page.”<sup>98</sup>

Schools must resist categorical bans on books that tackle issues related to race, sexual orientation, and gender identity. Memoirs like *Sister Outsider* by Audre Lorde and *When They Call You a Terrorist: A Black Lives Matter Memoir* by Patrisse Cullors and Asha Bandele provide powerful insights into the intersections of race,

95. See, e.g., Amelia Abraham, ‘Solace, Joy and a Lifeline’: Why Queer Literature Is Vital for People Growing up LGBTQ+, PENGUIN (Feb. 5, 2020), <https://www.penguin.co.uk/articles/2020/02/why-queer-literature-is-vital-for-people-growing-up-lgbtq> [<https://perma.cc/528P-QVJ9>] (offering perspectives from three individuals about how LGBTQ+ books helped them find their identity); see also Learning Network, *What Students Are Saying About Banning Books from School Libraries*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/learning/students-book-bans.html> (on file with *Columbia Human Rights Law Review*) (sharing students’ views on the benefits of inclusive and diverse literature, including one gay student who shared, “[b]ecause of how I can relate to these pieces of literature, it helps me know that I am not the only one to go through this, and there are others who share my story”).

96. *National Survey on LGBTQ Youth Mental Health*, TREVOR PROJECT (2021), <https://www.thetrevorproject.org/survey-2021> [<https://perma.cc/B4Z2-6XXZ>].

97. Coming-of-age stories, such as George Johnson’s *All Boys Aren’t Blue*, that delve into LGBTQ+ themes provide readers with narratives that resonate with their own experiences. This allows them to navigate questions of identity, relationships, and acceptance through the characters they encounter in literature. See, e.g., KB Brookins, *The Queer Survival and Coming-of-Age Book I Needed as a Child*, SCALAWAG MAG. (Nov. 13, 2023), <https://scalawagmagazine.org/2023/11/all-boys-arent-blue-review> [<https://perma.cc/4GRB-8M4V>] (reviewing GEORGE JOHNSON, *ALL BOYS AREN’T BLUE* (2020)) (describing the book as “necessary” and “vital” to youth and adults). Recent studies also show that learning about LGBTQ+ topics at school is associated with significantly lower odds of suicide risk among LGBTQ+ students. *LGBTQ Youth Suicide Prevention in Schools*, TREVOR PROJECT (Aug. 19, 2021), <https://www.thetrevorproject.org/research-briefs/lgbtq-youth-suicide-prevention-in-schools> [<https://perma.cc/SY93-6V4K>].

98. Mike Hixenbaugh, *Banned: Books on Race and Sexuality Are Disappearing from Texas Schools in Record Numbers*, NBC NEWS (Feb. 1, 2022), <https://www.nbcnews.com/news/us-news/texas-books-race-sexuality-schools-rca13886> [<https://perma.cc/4L2K-D7C4>].

sexuality, and activism. These targeted books, along with others like them, offer narratives of resilience, empowerment, and social justice that are critical for increasing visibility for historically oppressed communities. Removing these books from school libraries denies students the opportunity, within an educational context, to engage with the real-world challenges faced by impacted communities. This ultimately hinders their ability to develop critical thinking skills and social awareness.<sup>99</sup>

### C. Legal Issues: Constitutional Considerations and Limitations

Litigating against book bans involves complex constitutional issues. In response to the rising attack on diverse and inclusive books, impacted communities rushed to courts to challenge book bans by invoking their First Amendment rights to receive and express ideas.<sup>100</sup> Although book bans raise fundamental First Amendment concerns, the Supreme Court's vague stance on their merits complicates the pursuit of constitutional claims. For public school libraries, *Board of Education v. Pico* is the guiding case.<sup>101</sup> In a plurality decision, the Court declared that "local school boards have broad discretion in the management of school affairs" and that discretion "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."<sup>102</sup> In practice, this vague standard affords school boards broad discretion to make

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99. See *infra* Section III.B (discussing how sweeping bans on BIPOC and LGBTQ+ titles severely limit students' ability to learn).

100. See, e.g., Complaint, Fayetteville Public Library v. Crawford Cnty. et al., No. 23-cv-05086 (W.D. Ark. June 6, 2023) (challenging book bans as First Amendment violations); Complaint, Book People Inc. et al. v. Wong, No. 23-cv-00858 (W.D. Tex. July 25, 2023) (challenging book bans as First Amendment violations).

101. Bd. of Educ. v. Pico, 457 U.S. 853 (1982). The controversy in *Pico* centered around nine books in a public school library in Island Trees Union Free School District in New York. Members of the school board "gave an 'unofficial direction' that the listed books [including *The Best Short Stories by Negro Writers* by Langston Hughes and *Black Boy* by Richard Wright] be removed from the library shelves." *Id.* at 857. When explaining their decision to remove these books, the school board "characterized the removed books as 'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,' and concluded that '[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.'" *Id.*

102. *Id.* at 853.

decisions that prioritize purported “community values” at the expense of promoting access to information.<sup>103</sup>

The *Pico* plurality specifies that a governing body cannot remove materials merely because they go against its members’ personal political or social views, but it does not address materials that are removed for content deemed vulgar or inappropriate.<sup>104</sup> The Justices discussed at length the tension between First Amendment rights and the broad discretion traditionally afforded to schools; however, they did not reach a clear majority that would prevent future censorship by governing bodies.<sup>105</sup> While the Court found in favor of the plaintiff, the decision contained seven different opinions.<sup>106</sup> Lower courts’ attempts to apply *Pico* have been as divisive and unguided as the Court’s decision.<sup>107</sup> Absent clearer guidance from the Court, *Pico* continues to fall short of guaranteeing students’ constitutional rights to access books in schools.<sup>108</sup>

With unclear prospects for First Amendment challenges, litigants are increasingly seeking recourse through the Fourteenth

103. *Id.* at 864.

104. *Id.* at 872.

105. *See id.* at 864 (noting that school boards have control over public school libraries, so long as they exercise that control within the bounds of the First Amendment).

106. Justice Brennan wrote the main plurality opinion, which anti-book ban litigants harness to affirm students’ rights to access books in school libraries. *Id.* at 855. Justice Blackmun wrote a concurring opinion. *Id.* at 875 (Blackmun, J., concurring in part and concurring in the judgment). Justice White wrote an opinion concurring in the judgment. *Id.* at 883 (White, J., concurring in the judgment). Then Chief Justice Burger—joined by Justices Powell, Rehnquist, and O’Connor—dissented, rejecting students’ right to access particular books. *Id.* at 885 (Burger, C.J., dissenting). Justice Powell dissented separately. *Id.* at 893 (Powell, J., dissenting). Justice O’Connor, likewise, wrote a short separate dissent. *Id.* at 921. (O’Connor, J., dissenting). Finally, Justice Rehnquist—joined by Justices Burger and Powell—wrote a dissenting opinion, stating that students do not have the right to access anything beyond what their educators think is necessary. *Id.* at 907 (Rehnquist, J., dissenting).

107. Jensen Rehn, *Battlegrounds for Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV. 1405, 1423–26 (2023) (discussing the various ways in which federal circuit court of appeals decided banned-book cases post-*Pico*). Circuit courts are largely split on the evidentiary standard of *Pico*; the *Pico* plurality requires lower courts to consider “the motivation behind a school board’s decision to ban a book.” *Id.* While some circuits, like the Fifth Circuit, have stayed within the “motivation” standard, others, including the Eleventh Circuit, have developed their own factual inaccuracy test to supplement *Pico*’s motivation evaluation. *Id.*

108. For a more in-depth discussion on how First Amendment protections fail, see *id.*

Amendment's Equal Protection Clause. In May 2023, a collective of authors, parents, and anti-book ban advocates filed a lawsuit against a Florida school district for removing ten race and LGBTQ+ related books.<sup>109</sup> They argued that the removals violated the Equal Protection Clause "because the books being singled out for possible removal are disproportionately books by non-white and/or LGBTQ authors, or which address topics related to race or LGBTQ identity."<sup>110</sup> Their claim, however, proved unfruitful.<sup>111</sup>

To prevail on an Equal Protection claim, a plaintiff must show that the challenged action was motivated by a racially discriminatory intent or purpose and resulted in a discriminatory impact.<sup>112</sup> Courts first determine if the policy is neutral on its face or if it makes a race-based classification, then evaluate the existence of racial discrimination based on the adverse effects of the policy in practice.<sup>113</sup> In considering the constitutionality of decisions related to curriculum and educational materials under Equal Protection grounds, courts tend to give broad deference to educational institutions.<sup>114</sup> This

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109. Complaint, *PEN Am. Ctr. Inc. v. Escambia Cnty. Sch. Dist.* (N.D. Fla. May 17, 2023) (No. 23-cv-10385) [hereinafter *PEN Am. Complaint*]; Jo Yurcaba, *Penguin Random House and Florida Parents Sue School District Over Book Bans*, NBC NEWS (May 17, 2023), <https://www.nbcnews.com/nbc-out/out-news/penguin-random-house-florida-parents-sue-school-district-book-bans-rcna84706> [<https://perma.cc/P97M-VYEG>]. As of December 2023, the district removed 2,868 copies of 1,607 unique books for review to comply with the state's Don't Say Gay laws. Reshma Kirpalani & Hannah Natanson, *The Lives Upended by Florida's School Book Wars*, WASH. POST (Dec. 21, 2023), <https://www.washingtonpost.com/education/2023/12/21/florida-school-book-bans-escambia-county> (on file with the *Columbia Human Rights Law Review*).

110. *PEN Am. Complaint*, *supra* note 109, at 4.

111. In January 2024, the Northern District of Florida dismissed plaintiffs' Equal Protection claims finding that they had not sufficiently pleaded a disparate impact claim. Order on Mot. to Dismiss, *PEN Am. Ctr. Inc. v. Escambia Cnty. Sch. Dist.* (N.D. Fla. Jan. 12, 2024) (No. 23-cv-10385).

112. See *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (noting that plaintiffs "were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" to establish an Equal Protection claim); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

113. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979).

114. The Supreme Court recognizes and respects institutions' academic freedom to pursue their education objectives. In its view, interfering with academic decisions would be "[t]o impose. . . [a] strait jacket" on academic



makes it difficult to successfully challenge book bans under the Fourteenth Amendment.

Given the substantial barriers to success under the First and Fourteenth Amendments, civil rights statutes offer a more promising avenue for relief. Title VI and Title IX provide robust frameworks for challenging discrimination in schools, and their hostile environment doctrines offer a pathway to address the harms caused by targeted book bans. The next Part explores how these statutes, properly interpreted, can be harnessed to protect students' rights and dismantle exclusionary censorship practices.

## II. A HOSTILE ENVIRONMENT THEORY

Title VI and Title IX prohibit policies and practices that create a hostile environment within the education context.<sup>115</sup> Schools violate Title VI or Title IX when they create or fail to correct a hostile environment stemming from conduct that is sufficiently serious so as to deny or limit a student's ability to participate in or benefit from the school's program.<sup>116</sup> Traditionally, actionable conduct under Title VI and Title IX has been limited to overt harassment such as verbal and/or physical abuse. However, as will be discussed in this Part, recent efforts and decisions by the Department of Education's Office of Civil Rights (OCR)—the administrative office responsible for enforcing civil rights laws in educational institutions that receive federal funding—signal that non-harassment conduct, such as discriminatory enforcement of facially neutral policies, may also be actionable under Title VI and Title IX. This Part provides a history of the hostile environment theory and an outline of the *prima facie* elements of Title VI and Title IX hostile environment claims. It then discusses the law's recent developments, including new efforts to extend it to apply to non-harassment conduct.

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institutions. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *see also* *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”) (citation omitted); *Sweezy*, 354 U.S. at 263 (1957) (Frankfurter, J., concurring) (recognizing “four essential freedoms of a university ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study’”).

115. 42 U.S.C. § 2000d; 20 U.S.C. § 1681.

116. *Sex-Based Harassment*, *supra* note 27.

### A. The Rise of the Hostile Environment Theory

The hostile environment theory emerged within the framework of Title VII of the Civil Rights Act of 1964 to address workplace discrimination.<sup>117</sup> Title VII gives employees a private right of action to challenge employment discrimination based on race, color, religion, sex, and national origin.<sup>118</sup> Today, the statute is widely recognized to govern employment conduct that is both overt and pretextual.<sup>119</sup> However, redress for the pretextual type of harassment was not available until 1971, when the Fifth Circuit recognized for the first time that pretextual discrimination may be actionable conduct under Title VII.<sup>120</sup>

In *Rogers v. EEOC*, a petitioner of Spanish heritage filed a Title VII complaint with the Equal Employment Opportunity Commission (EEOC) claiming wrongful termination and seeking redress for enduring harassment by her co-workers and for having her patient contact restricted through a system of “patient segregation” because of her Spanish surname.<sup>121</sup> The district court denied her petition on the grounds that the connection between the employer’s discriminatory environment and the complainant’s sensibilities was too attenuated.<sup>122</sup> The Fifth Circuit disagreed, finding that the “relationship between an employee and his working environment is of such significance as to be entitled to statutory protection.”<sup>123</sup> In order to effectuate the purpose of Title VII, the court held that the statute must be read liberally to prohibit the “practice of creating a working environment [that is] heavily charged with ethnic or racial discrimination.”<sup>124</sup> Citing Congress’ intention to define discrimination in the broadest terms, the court decided to validate the

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117. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding for the first time that a claim of a hostile environment is a form of discrimination actionable under Title VII).

118. 42 U.S.C. § 2000e.

119. See generally Jamie Bishop et al., *Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, 22 GEO. J. GENDER & L. 369 (2021) (providing a detailed overview of the statute, including an analysis of the two types of sex-discrimination cases: disparate treatment and disparate impact); see also *supra* note 28 (distinguishing overt and pretextual harassment).

120. *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971).

121. *Id.* at 240–41.

122. *Rogers v. E.E.O.C.*, 316 F. Supp. 422, 425 (E.D. Tex. 1970) (determining that there was “no showing that she is ‘aggrieved’ in the sense contemplated by [the statute]”).

123. *Rogers*, 454 F.2d at 238.

124. *Id.*

petitioner's claim.<sup>125</sup> Since then, Title VII has been expanded to apply to discriminatory conduct “that is sufficiently severe or pervasive” as to create a hostile work environment.<sup>126</sup>

The Title VII hostile work environment theory is now widely applied in the education context to claims brought under Title VI and Title IX.<sup>127</sup> A hostile learning environment exists when an institution's conduct causes students to feel threatened or intimidated, or to experience multiple incidents of discrimination, thereby interfering with their learning.<sup>128</sup> In reviewing these claims, courts follow the Title VII scheme and assess the severity and pervasiveness of the discriminatory conduct.<sup>129</sup>

#### B. The Traditional Theory: Harassing Conduct as a Limiting Factor in Students' Ability to Learn

Although the exact elements of a hostile environment claim under Title VI and Title IX differ across circuits, courts tend to find conduct actionable when a federally funded school creates or is responsible for discriminatory conduct that is sufficiently serious to deny or limit a student's access to education.<sup>130</sup> In both Title VI and

125. *Id.*

126. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

127. *See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (interpreting Title IX as prohibiting hostile environment harassment in cases involving employees of educational institutions); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., Okl.*, 334 F.3d 928, 934 (10th Cir. 2003) (holding that a school district could be held liable under Title VI for failing to respond adequately to racially hostile behavior); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir.1998) (finding that a school district may violate Title VI if there is a racially hostile environment, the district had notice of the problem, and it failed to respond adequately).

128. *See* Off. of C.R., *Fact Sheet: Harassment Based on Race, Color, or National Origin on School Campuses*, U.S. DEP'T OF EDUC. (July 2, 2024) [hereinafter *Fact Sheet: Harassment Based on Race*], <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-race-color-national-origin-202407.pdf> [<https://perma.cc/ZM97-4N2C>]; Off. of C.R., *Fact Sheet: U.S. Department of Education's 2024 Title IX Final Rule Overview*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf> [<https://perma.cc/TAQ8-F2CT>].

129. For examples of courts borrowing Title VII language and analysis to evaluate Title VI discrimination claims, see *Davis*, 526 U.S. at 650; *Bryant*, 334 F.3d at 934; and *Monteiro*, 158 F.3d at 1033.

130. *See, e.g., Bryant*, 334 F.3d at 934 (articulating a four-part test necessary to sustain a Title VI claim, which requires that an education institution: “(1) had actual knowledge of, and (2) was deliberately indifferent to (3)

Title IX cases, claimants must make a prima facie showing of discriminatory conduct to form the basis of their claim.<sup>131</sup> If the claimant can demonstrate the prima facie elements, it creates a presumption of discrimination, shifting the burden to the recipient school to provide a legitimate, nondiscriminatory reason for its actions or to show that it took appropriate corrective measures.<sup>132</sup> Although book bans, in and of themselves, do not qualify as harassment under the traditional analysis,<sup>133</sup> this Section will still discuss the ways in which book bans create a hostile environment since extending the law to include the pretextual and/or non-harassment conduct of book bans, as discussed in Part II.C below, would still follow the prima facie scheme.

### 1. Title VI Hostile Prima Facie Analysis

Title VI states “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>134</sup> While the prohibition applies broadly to

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harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school”).

131. Title VI Legal Manual, U.S. DEP’T OF JUST., § 6, at 17 [hereinafter Title VI Legal Manual], <https://www.justice.gov/crt/book/file/1364106/dl?inline> [<https://perma.cc/VEK7-FYDT>]; Title IX Legal Manual, U.S. DEPT. OF JUST. [hereinafter Title IX Legal Manual], <https://www.justice.gov/crt/title-ix> [<https://perma.cc/AM7J-8KEG>]. The prima facie analysis in Title VI and Title IX is modeled after the Title VII burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). See also *Cannon v. University of Chicago*, 441 U.S. 677, 694–98 (1979) (showing that Congress intended Title IX to be interpreted and applied as Title VI has been).

132. Title VI Legal Manual, *supra* note 131, § 6, at 19; Title IX Legal Manual, *supra* note 131.

133. See *Fact Sheet: Harassment Based on Race*, *supra* note 128 (defining harassing conduct as “verbal abuse, graphic or written statements, physical assault, or other conduct that may be threatening, harmful, or humiliating” and providing as examples of harassing conduct: teachers touching a Black student’s hair, students being subjected to repeated use of racial slurs and insults, and immigrant students being ridiculed for their accents). Book banning, as a conduct by itself (i.e., without the resultant harassment), does not rise to the level of “threatening, harmful, or humiliating” contemplated by this definition, and thus would not be actionable under the traditional analysis.

134. 42 U.S.C. § 2000d. In the context of education, financial assistance includes federal grants and loans, as well as the sale, lease, or use of federal

federally funded programs, Title VI's application to public elementary and secondary schools is "particularly significant."<sup>135</sup> And although the text of the statute does not explicitly mention "harassment," a school's deliberate indifference to a racially harassing environment can violate Title VI.<sup>136</sup>

A recipient of federal funding violates Title VI if it (1) engaged in or is responsible for conduct that created a racially hostile environment that is "sufficiently severe, pervasive, or persistent" to limit a student's learning; (2) knew or reasonably should have known about the alleged hostile environment (i.e. actual or constructive notice); and (3) fails to take adequate steps reasonably calculated to address the discriminatory conduct.<sup>137</sup> To obtain relief, claimants can file administrative complaints with OCR or sue in federal court.<sup>138</sup> Courts review hostile environment claims under Section 601 of Title VI, which prohibits intentional discrimination.<sup>139</sup> Unlike enforcement by OCR, seeking recourse through federal action requires a showing that a school district, once aware of an alleged hostile environment, responded with deliberate indifference.<sup>140</sup>

i. Severe, Pervasive, or Persistent Standard

A racially hostile environment exists when there is racially discriminatory conduct that is "sufficiently severe, pervasive or

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property. The prohibition applies to states, political subdivisions thereof, or private agencies, institutions, or organizations to whom federal financial assistance is extended. 34 C.F.R. § 100.13(f)(1).

135. JARED P. COLE, CONG. RSCH. SERV., IF12455, RACE DISCRIMINATION AT SCHOOL: TITLE VI AND THE DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS (2023), <https://sgp.fas.org/crs/misc/IF12455.pdf>. [<https://perma.cc/9GHE-SL66>].

136. *Id.*

137. Racial Incidents and Harassment Against Students, *supra* note 25.

138. Unfortunately, only a fraction of cases reported to the OCR are ever resolved. In 2016, only 57 out of 2,439 Title VI complaints resulted in a resolution. In 2019, over 1,500 Title VI complaints remained pending under OCR investigation. Cory Collins, *Saving Title VI*, S. POVERTY L. CTR. LEARNING FOR JUST. (2019), <https://www.learningforjustice.org/magazine/spring-2019/saving-title-vi> [<https://perma.cc/4B3W-BF5R>].

139. Title VI Legal Manual, *supra* note 131, at 28. Section 601 does not extend to conduct that has a racially disparate impact. *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 287 (1978). Administrative agencies bear the exclusive authority for enforcing the disparate-impact regulations promulgated under Section 602 of Title VI. *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001).

140. *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644, 650 (1999)).

persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.”<sup>141</sup> When OCR evaluates the severity, pervasiveness, and persistence of a racially hostile environment, it examines the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of the persons involved.<sup>142</sup> Courts additionally require proof that the defendant intentionally permitted the existence of a hostile environment.<sup>143</sup>

To show that a defendant acted intentionally, a plaintiff must demonstrate that the defendant facilitated and/or maintained a hostile educational environment.<sup>144</sup> The choice to take no action can qualify as an intentional act.<sup>145</sup> The Tenth Circuit’s decision in *Bryant v. Independent School District No. I-38*, for example, affirms that “when administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable under § 601.”<sup>146</sup>

Plaintiffs may prove intentional facilitation of a hostile environment by pointing to circumstantial evidence.<sup>147</sup> In many cases, circumstantial evidence will show that a seemingly innocuous, race-neutral practice is discriminatorily enforced against a racial class.<sup>148</sup>

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141. Racial Incidents and Harassment Against Students, *supra* note 25.

142. *Id.*

143. *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., Okl.*, 334 F.3d 928, 931–33 (10th Cir. 2003).

144. *Id.* at 933.

145. *Bryant*, 334 F.3d at 933 (“Choice implicates intent. It is inapposite [to] hold that maintenance of a hostile environment is never intentional. Such a broad holding would permit school administrators to sit idly, or intentionally, by while horrible acts of discrimination occurred on their grounds by and to students in their charge.”); *see also* *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (reasoning that “[a] school where this sort of [discriminatory] conduct occurs unchecked is utterly failing in its mandate to provide a nondiscriminatory educational environment”).

146. *Bryant*, 334 F.3d at 933.

147. Title VI Legal Manual, *supra* note 131, § 6, at 4–5.

148. *See, e.g.*, *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 703–05 (9th Cir. 2009) (finding that the statistical evidence was sufficient to create inference of intent where race-neutral precondition to receiving municipal services served to exclude Latino-majority neighborhoods); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 806 (N.D. Ohio 2003) (finding that “disparate impact, history of the state action, and foreseeability and knowledge of

Courts and enforcement agencies often look to the *Arlington Heights* framework to investigate cases of intentional discrimination.<sup>149</sup> *Arlington Heights* instructs courts and agencies to consider “the impact of the official action,” including whether “it bears more heavily on one race than another.”<sup>150</sup> Although the framework is traditionally applied to Title VI intentional discrimination claims, its analytical structure is equally relevant for determining whether a defendant intentionally permitted the existence of a hostile environment.<sup>151</sup>

ii. Notice

A school is required to address harassing conduct if it has actual or constructive notice of the hostile environment.<sup>152</sup> A school receives actual notice when a concerned or affected person, such as a student, parent, or staff member, files a grievance or complains to a school official, or when the school is made aware of the harmful conduct through an indirect source such as media reports.<sup>153</sup> A school receives constructive notice “if, upon reasonably diligent inquiry in

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the discriminatory onus placed upon the complainants” was sufficient circumstantial evidence to raise an intentional discrimination claim); *McCoy v. Canterbury*, No. 3:10-0368, 2010 WL 5343298, at \*5 (S.D. W. Va. Dec. 20, 2010), *aff’d*, 428 Fed. App’x 247 (4th Cir. 2011) (finding that a series of “discrete episodes” adversely affecting protected classes can raise a plausible inference of discriminatory intent).

149. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). The *Arlington Heights* factors include: statistics demonstrating a clear pattern of discriminatory effect; the historical background of the decision and other decisions on comparable matters; the sequence of events leading up to the decision, as compared to other decisions on comparable matters; departures from normal procedures or substantive conclusions; relevant legislative or administrative history; and consistent pattern of actions of decision-makers that impose much greater harm on minorities than on non-minorities. *Id.*

150. *Arlington Heights*, 429 U.S. at 266.

151. At its core, *Arlington Heights* offers a flexible, fact-intensive approach to uncovering discriminatory purpose by examining circumstantial evidence such as the sequence of events leading to the challenged action, deviations from normal procedures, and the historical context of the decision. *Id.* These same indicators are critical to determining whether a school’s conduct—such as the targeted removal of books—reflects intentional creation or facilitation of a hostile environment under Title VI. Since hostile environment claims often turn on whether the recipient institution knowingly permitted or fostered a discriminatory environment, *Arlington Heights* provides a useful evidentiary framework to assess whether facially neutral actions were in fact motivated by race- or sex-based animus.

152. Title VI Legal Manual, *supra* note 131, at 28.

153. Racial Incidents and Harassment Against Students, *supra* note 25.

the exercise of reasonable care, it should have known of the discrimination.”<sup>154</sup> In some cases, the pervasiveness, persistence, or severity of the racial harassment may be enough to infer notice.<sup>155</sup> In other cases, OCR considers whether “the incident involved explicitly racial conduct or whether the circumstances indicated that . . . the recipient should have recognized that the conduct was in fact, or was reasonably likely to have been, racial.”<sup>156</sup>

Book bans are generally highly publicized. For example, the recent campaigns for book bans in Georgia, Texas, and North Carolina garnered widespread news coverage.<sup>157</sup> Those opposing the bans also expressed their grievances directly to school officials or shared testimony during board meetings about the school’s harmful practice.<sup>158</sup> Some additionally spoke to news outlets and took their complaints online.<sup>159</sup> These reactions are sufficient to put a district on actual notice that its book bans are creating a hostile environment for students.<sup>160</sup>

### iii. Recipient’s Response

The appropriate response to a racially hostile environment must be tailored to fully redress the discriminatory conduct at the

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154. *Id.*

155. *Id.*

156. *Id.*

157. *See, e.g.,* Jeff Amy, *Georgia School District Is Banning Books, Citing Sexual Content, After Firing a Teacher*, AP NEWS (Aug. 22, 2023), <https://apnews.com/article/library-book-bans-explicit-content-georgia-school-4ebc873ca36ae398a2c3bc506db578c2> [<https://perma.cc/6GHC-ZX89>] (covering book bans in Georgia); Jeremy Shwartz, *Book Bans in Texas Spread as New State Law Takes Effect*, TEX. TRIBUNE (Oct. 11, 2023), <https://www.texastribune.org/2023/10/11/texas-library-book-bans> [<https://perma.cc/C4WA-XNJH>] (covering book bans in Texas); Abigail Keller, *“The Right Side of History:” North Carolina School Districts Face Book Challenges*, DAILY TAR HEEL (Oct. 10, 2023), <https://www.dailytarheel.com/article/2023/10/city-book-bans-across-north-carolina> [<https://perma.cc/6C5P-K2M8>] (covering book bans in North Carolina).

158. *See, e.g.,* *Forsyth County Board*, *supra* note 22.

159. *See, e.g.,* Damian Galvan, *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/F4VW-FA2L>] (mentioning a student’s blog post about his experience dealing with book bans at his school).

160. *See infra* Section II.C.1 (discussing OCR’s finding that Forsyth County Schools District received sufficient notice that its book bans created a hostile environment).



institution and prevent future recurrence.<sup>161</sup> Some circuits treat the failure to respond as deliberate indifference.<sup>162</sup> The Supreme Court in *Davis v. Monroe County Board* explained that a school district is “deemed ‘deliberately indifferent’ . . . where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”<sup>163</sup>

Accordingly, a school district’s actions in response to the book screening process are inappropriate when they are not designed to, or are insufficient to, ameliorate any resultant racially hostile environment. For example, in Georgia, OCR concluded that, despite Forsyth County School District’s effort to curtail the removal of race-conscious books, board meetings conveyed the impression that books were being screened to exclude diverse authors and characters, leading to increased fears and possibly harassment.<sup>164</sup>

## 2. Title IX Hostile Environment Prima Facie Analysis

Title IX prohibits discrimination on the basis of sex and sexual orientation.<sup>165</sup> Much like actionable conduct under Title VI,

161. Racial Incidents and Harassment Against Students, *supra* note 25.

162. The Third, Tenth, and Ninth Circuits maintain this position. *See, e.g.*, *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 271–73 (3d Cir. 2014) (indicating that plaintiffs may establish a school district’s liability under Title VI for racially motivated student assignments through a deliberate indifference theory); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., Okl.*, 334 F.3d 928, 934 (10th Cir. 2003) (holding that “deliberate indifference to known instances of student-on-student racial harassment is a viable theory in a Title VI intentional discrimination suit”); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir.1998) (finding that a school district may violate Title VI if there is a racially hostile environment, the district had notice of the problem, and it failed to respond adequately).

163. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 630 (1999).

164. According to OCR’s investigation, the district’s responsive steps “were not designed to, and were insufficient to, ameliorate any resultant racially and sexually hostile environment.” OCR Report, Forsyth County Schools, OCR Complaint No. 04-22-1281 at 6 (May 19, 2023) [hereinafter OCR Report on Forsyth County Schools], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf> [https://perma.cc/VGT6-F2F4]. OCR also pointed to student comments at the board meeting such as concerns that “the book ban immediately made the environment more harsh for students.” *Id.* at 5. According to OCR, this put the district on sufficient notice and the district failed to respond appropriately. *Id.* at 5–6.

165. 20 U.S.C. § 1681; Enforcement of Title IX, *supra* note 26. As discussed above, evolving policies under the Trump administration have unsettled prior

sex-based harassment creates a hostile environment if the conduct is sufficiently serious so as to deny or limit a student's ability to participate in or benefit from the school's program.<sup>166</sup> A Title IX hostile environment arises when the alleged conduct is (1) unwelcome; (2) because of the victim's protected class status; (3) attributable to the institution; and (4) severe or pervasive enough to change the conditions of learning, as judged by both (a) an objective standard and (b) a subjective standard.<sup>167</sup>

#### i. Unwelcome Conduct

Unwelcome conduct is best understood as conduct that is "undesirable or offensive."<sup>168</sup> To determine whether conduct is unwelcome, adjudicators examine "the record as a whole" and "the totality of circumstances."<sup>169</sup> In most book ban cases, testimony from students and parents will demonstrate that the removals are undesirable and offensive.<sup>170</sup>

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interpretations of Title IX, particularly with respect to whether it encompasses protections for sexual orientation and gender identity.

166. *Sex-Based Harassment*, *supra* note 27.

167. Practical Law Labor & Employment, *Harassment*, THOMSON REUTERS: PRACTICAL LAW (Practice Note 9-502-7844) [hereinafter Harassment Practice Note], [https://www.westlaw.com/9-502-7844?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1.0](https://www.westlaw.com/9-502-7844?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1.0) (on file with the *Columbia Human Rights Law Review*). Because their statutory prohibitions against sex discrimination are similar, Title VII jurisprudence is frequently used as a guide to inform Title IX. *See, e.g.*, *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983) (noting that proof of purposeful discrimination is a necessary element of a valid claim under Title VI of the Civil Rights Act of 1964 (per concurring opinions of Justice Powell and Justice O'Connor and dissenting opinion of Justice Stevens)); *Torres v. Pisano*, 116 F.3d 625, 630 n.3 (2d Cir.1997) ("Title VII principles apply in interpreting Title IX."); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–17 (4th Cir. 2020) ("Although *Bostock* interprets [Title VII], it guides our evaluation of claims under Title IX.").

168. *Sample Language and Definitions of Prohibited Conduct for a School's Sexual Misconduct Policy*, WHITE HOUSE TASK FORCE (Apr. 2014), <https://www.justice.gov/ovw/page/file/910276/dl?inline> [<https://perma.cc/9BFD-QRRF>].

169. For example, in the Title VII context, the EEOC is charged with analyzing "the record as a whole and at the totality of the circumstances." 29 C.F.R. § 1604.11(b).

170. *See Forsyth County Board*, *supra* note 22 (highlighting student testimonies about unwelcome book bans in their school district); *see also* Learning Network, *supra* note 95 (gathering student opinions on book bans). Students' comments included: "[t]his is nothing less than a display of homophobia,

ii. Based on Gender Identity and/or Sexual Orientation<sup>171</sup>

To establish a hostile environment claim, the unwelcome conduct must also be based on protected class status, which under Title IX includes gender identity and sexual orientation.<sup>172</sup> As discussed in Part I, most books banned under the pretext that they contain “inappropriate sexual content” are those by and about LGBTQ+ individuals. This disparate impact evidence may be used as

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transphobia, and any other kind of hate based on gender and sexual identity from those advocating to remove these books”; “banning books is an overall loss for a school or library, it only limits human growth”; “it silences . . . groups, . . . communities; . . . people, resulting in making them not feel valid, or even humanized”; “banning these books would be one of the worst ideas ever.” *Id.*

171. While this Note refers to Title IX as prohibiting discrimination on the basis of sexual orientation and gender identity, that interpretation is currently in flux. In *Bostock v. Clayton County*, the U.S. Supreme Court held that Title VII’s prohibition on sex discrimination includes discrimination based on sexual orientation and gender identity. *Bostock v. Clayton County*, 590 U.S. 644 (2020). Following that decision, many courts and federal agencies applied similar reasoning to Title IX. Tom Miller, *Legal Challenges to New Title IX Regulations Begin, Blocking Legal Protections for Gender Identity in Education*, BOSTON LAW BLOG (July 1, 2024), <https://www.bostonlawyerblog.com/legal-challenges-to-new-title-ix-regulations-begin-blocking-legal-protections-for-gender-identity-in-education-2/> [<https://perma.cc/C88D-TZ7D>] (explaining that numerous federal courts and agencies, including the Department of Education and Department of Justice, interpreted *Bostock* to apply to Title IX). However, recent executive orders and administrative actions under the Trump administration have sought to narrow these protections, casting doubt on whether sexual orientation and gender identity are still firmly protected categories under Title IX. This legal uncertainty was further amplified by the January 2025 decision in *State of Tennessee v. Cardona*, in which the U.S. District Court for the Eastern District of Kentucky vacated the Biden administration’s 2024 regulations that had explicitly expanded Title IX protections to include discrimination based on gender identity and sexual orientation. *State of Tennessee v. Cardona*, No. 2: 24-072-DCR (E.D. Ky. Jan. 9, 2025). The court held that the Department of Education had exceeded its authority under Title IX by redefining sex discrimination to encompass gender identity. *Id.* As a result, the ruling effectively reinstated the 2020 Title IX regulations, which do not explicitly protect against discrimination based on gender identity or sexual orientation—leaving LGBTQ+ students with potentially fewer protections and underscoring that this area of law remains unsettled and subject to significant change. Susan D. Friedfel, Michelle E. Phillips, Carol R. Ashley, & Maria P. Vitullo, *What Schools Need to Know After Court Vacates Title IX Regulations Nationally*, JACKSONLEWIS (Jan. 10, 2025), <https://www.jacksonlewis.com/insights/what-schools-need-know-after-court-vacates-title-ix-regulations-nationally> [<https://perma.cc/P9Q4-AMBA>].

172. Harassment Practice Note, *supra* note 167.

circumstantial evidence to show that anti-LGBTQ+ sentiments motivate book bans.

Other pertinent evidence could include comments from school boards suggesting that the removals were prompted by sexist, homophobic, or transphobic ideologies. To illustrate, in campaigning for the removal of LGBTQ+ titles in a Texas school district, the superintendent of the district announced: “There are two genders. There’s male and there’s female. And I acknowledge that there are men that think they’re women, and there are women that think they’re men.”<sup>173</sup> He further asserted, regarding books on “how to become transgender,” “there’s no place for it in our libraries.”<sup>174</sup> Similar conduct treading on students’ sexual orientation or gender identity and expression is sufficient to show that the unwelcome conduct is one based on protected status.

### iii. Attributable to the District

For conduct to be actionable under Title IX, it must be attributable to the district. “Attributable” means that the district knew or should have been aware of the harassing conduct and failed to take corrective action.<sup>175</sup> In the case of book bans, a district could be held accountable if it knew or should have known that targeting LGBTQ+ books would infringe on students’ rights to participate in the educational environment and failed to intervene.

### iv. Severe or Pervasive

Unwelcome behavior rises to the level of unlawful harassment if it is severe or pervasive.<sup>176</sup> In a Title IX claim, this inquiry considers whether the conduct unreasonably interferes with a student’s ability to participate in and benefit from the program or creates an intimidating, hostile, or offensive learning environment.<sup>177</sup>

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173. Nina Golgowski, *Feds Open Investigation into Texas Schools After Removal of LGBTQ Books*, HUFFPOST (Dec. 20, 2022), [https://www.huffpost.com/entry/doe-civil-rights-probe-texas-granbury-schools\\_n\\_63a1e557e4b04414304b7858](https://www.huffpost.com/entry/doe-civil-rights-probe-texas-granbury-schools_n_63a1e557e4b04414304b7858) [<https://perma.cc/Z6KA-CHU8>].

174. *Id.*

175. *See, e.g.*, Harassment Practice Note, *supra* note 167 (employing similar language within the Title VII context).

176. *Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/harassment> [<https://perma.cc/7762-GYHW>].

177. *See, e.g.*, 29 C.F.R. § 1604.11(a) (employing similar language for a Title VII hostile environment analysis).

The severity and pervasiveness of book bans are best demonstrated by circumstantial or impact evidence. The burden of proof, here, compared to the Title VI standard, may be easier to meet because it considers both subjective and objective evidence.<sup>178</sup> Objectively, impact evidence may be used to show that students who identify as LGBTQ+ are disproportionately affected by the book bans. Subjectively, students who identify as LGBTQ+ may affirm that book banning is hostile and contributes to the stigma and isolation that LGBTQ+ communities face.

C. An Extension of the Theory in Administrative Proceedings: Non-Harassment Conduct as a Limiting Factor in Students' Ability to Learn

Although hostile environment theory cases have traditionally dealt with overt forms of discrimination, such as verbal or physical harassment,<sup>179</sup> recent decisions by OCR signal a shift. OCR indicates that conduct other than overt harassment, such as pretextual conduct, may qualify as creating a hostile environment.<sup>180</sup> In January 2022, OCR opened an investigation into a Texas school district after the ACLU of Texas filed an administrative complaint alleging that book removals in the district constituted unlawful sex discrimination under Title IX.<sup>181</sup> Similarly, in Georgia, OCR investigated a school district after parents and students complained that certain targeted book bans discriminated against students on the basis of sex and

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178. Harassment Practice Note, *supra* note 167.

179. See, e.g., *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655 (2d Cir. 2012) (finding a hostile environment due to physical violence, threat, and verbal harassment, including racial slurs and derogatory terms); *Doe v. Galster*, 768 F.3d 611 (7th Cir. 2014) (addressing Title VI and Title IX claims based on allegations of bullying, name calling, and scuffles); *Hill v. Blount Cnty. Bd. of Educ.*, 203 F. Supp. 3d 871 (E.D. Tenn. 2016) (dealing with student-on-student nationality-based discrimination of two high school students).

180. These litigants claim that antiracism curricula contribute to a hostile environment. They invoke CRT and intersectionality studies as harmful ideological teachings that promote racial animosity toward white people. See *infra* text accompanying notes 181–206 (discussing these cases). This Note rejects their allegations and questions their merits but agrees with their proposition that non-harassment conduct may plausibly create a hostile learning environment.

181. Letter from Kathryn Huddleston, Staff Att’y, ACLU of Texas to U.S. Dep’t of Educ. (July 8, 2022) [hereinafter Granbury ISD Administrative Complaint], [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/366B-Q3PY].

race.<sup>182</sup> While OCR's investigation in the Texas case is still pending, the office reached a settlement agreement in the Georgia case that suggests that the district's book bans enabled a hostile environment.<sup>183</sup> This Section will review both cases and discuss the merits and limits of their hostile environment claims in order to demonstrate how courts could similarly extend hostile environment theory to account for the harmful nature of book bans.

### 1. OCR's Investigation in Texas

In January 2022, Granbury Independent School District's (ISD) superintendent instructed district librarians to pull books regarding "the transgender, LGBTQ" from Granbury ISD shelves, asserting that "there's no place for it in our libraries."<sup>184</sup> Without delay, librarians in the district removed dozens of books related to LGBTQ+ themes and characters.<sup>185</sup> In response to the superintendent's inflammatory comments and targeted removals, the ACLU of Texas filed a complaint with OCR urging the agency to investigate Granbury ISD for violations of Title IX.<sup>186</sup>

To show the discriminatory purpose animating the removals, the ACLU of Texas pointed to correspondence by a school board trustee, in reference to LGBTQ+ titles, that included the words "gay" and "gender" highlighted in descriptions of the books.<sup>187</sup> According to

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182. OCR Report on Forsyth County Schools, *supra* note 164.

183. *See id.* at 7 ("In light of these communications and actions, OCR is concerned a hostile environment may have arisen that the District needed to ameliorate."); *see also* Resolution Agreement, Forsyth County Schools, Complaint No. 04-22-1281 (May 19, 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-b.pdf> [<https://perma.cc/3HW4-AW6S>] (setting out the agreement provisions).

184. Gologowski, *supra* note 173.

185. Mike Hixenbaugh & Jeremy Schwartz, *A Texas Superintendent Ordered Librarians to Remove LGBTQ-Themed Books. Now the Federal Government Is Investigating.*, PROPUBLICA, NBC NEWS, & TEX. TRIBUNE (Dec. 20, 2022), <https://www.propublica.org/article/texas-banned-books-library-granbury-lgbtq> [<https://perma.cc/QA78-LK7X>].

186. Granbury ISD Administrative Complaint, *supra* note 181. According to the complaint, "the superintendent, in comments he never repudiated, denied the existence of transgender and nonbinary people, saying, 'There are two genders. There's male and there's female.'" *Id.* at 1. The complaint warned: "The message is clear: these students should 'hide' their full selves in order to be accepted in Granbury ISD." *Id.*

187. *Id.* at 2. The complaint notes, "[a] school board trustee sent the Granbury ISD Superintendent, Dr. Jeremy Glenn, pictures of books from

the complaint, the superintendent subsequently texted with district employees regarding these books, stating “[w]e need our librarians to have a since [sic] of urgency.”<sup>188</sup> Then, in a meeting with the district librarians, he referred to “the expectation from our board” in instructing them to remove books with LGBTQ+ characters and themes.<sup>189</sup> The ACLU of Texas argued the text exchange suggested that “the board trustee’s inquiry was at least a contributing factor to Granbury ISD’s decision to remove the books.”<sup>190</sup>

At a school board meeting following the book bans, the superintendent explained that the books were removed from the libraries for “sexually explicit” or “pornographic” content.<sup>191</sup> But the superintendent previously made remarks that Granbury is “a very, very conservative community” in which LGBTQ+ youth who do not conform had “better hide it.”<sup>192</sup> Students, particularly transgender and nonbinary students, attested to the hostile environment created by his remarks and the ensuing removals of LGBTQ+ titles. A nonbinary senior at Granbury High School, who protested the removals, said the superintendent’s remarks made them feel unsafe and unwelcome at school.<sup>193</sup> For them, the bans were an attempt not only to suppress LGBTQ+ experiences, but to erase their very existence.<sup>194</sup>

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Granbury ISD’s online card catalog, apparently inquiring as to whether they were in fact in Granbury ISD libraries. All books related to LGBTQ+ inclusion.” *Id.*

188. *Id.* The ACLU of Texas claims that “Granbury ISD school board trustees evinced preoccupation with LGBTQ+ books on Granbury library shelves, and the Granbury ISD superintendent indicated multiple times that he was acting at the board’s direction.” *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 4.

192. Richard Hall, *They Were Trying to Erase Us: Inside a Texas Town’s Chilling Effort to Ban LGBT+ Books*, INDEP. (Apr. 26, 2023), <https://www.independent.co.uk/news/world/americas/texas-book-bans-granbury-lgbt-b2324468.html> [<https://perma.cc/6GHC-ZX89>]. According to the ACLU of Texas, these comments, and the resultant restriction of LGBTQ+ books, constituted discriminatory conduct under Title IX and fostered “a pervasively hostile atmosphere for LGBTQ+ students.” Granbury ISD Administrative Complaint, *supra* note 181, at 1.

193. Hixenbaugh & Schwartz, *supra* note 185.

194. Hall, *supra* note 192 (“They were trying to erase us,’ [Lou] Whiting [said] . . . ‘The first step ever taken throughout history when it comes to genocide is lack of representation . . . You take away the literature, you take away art, you take away representation of culture . . .”).

Although in this instance, those seeking book removals made their motivations obvious by voicing the quiet part aloud, OCR's decision to open an investigation signals that book banning generally may be plausibly challenged as a civil rights violation.<sup>195</sup> According to ProPublica, the agency's investigation into Granbury ISD was the first of its kind tied explicitly to the nationwide campaign to ban LGBTQ+ titles.<sup>196</sup>

## 2. OCR's Resolution in Georgia

Around the same time, Georgia's Forsyth County Schools removed eight books from its media centers due to "sexually explicit content."<sup>197</sup> According to the school district, the decision was a response to a months-long series of complaints from parents and community members about inappropriate content and a request from a parent group to separately shelve and tag LGBTQ+ books in school libraries.<sup>198</sup> Some of their concerns were due to "personal/family preference, morals and beliefs," while others were about sexual explicitness.<sup>199</sup> Relatedly, some parents also criticized the school's broader diversity and inclusion efforts and CRT.<sup>200</sup>

Students revolted against the book bans at a district school board meeting in February 2022, highlighting the adverse impacts of the removals.<sup>201</sup> In response, OCR stepped in to assess whether the

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195. In late 2022, an agency spokesperson confirmed the investigation was pursuant to the district's Title IX obligations, but there have not been any updates since. Hixenbaugh & Schwartz, *supra* note 185. If the investigation finds that the removals rose to discriminatory conduct under Title IX, the agency can require the district to make policy changes and submit to federal monitoring. *Id.*

196. *Id.*

197. *Forsyth County Schools Bans 8 Books They Say Are Inappropriate for Students*, WSB-TV NEWS (Feb. 2, 2022), <https://www.wsbtv.com/news/forsyth-county-schools-bans-8-books-they-say-are-inappropriate-students/P4QQ36S3ZNEUXGCLN3RXLU3JWU> [<https://perma.cc/9HNQ-LXXE>].

198. OCR Report on Forsyth County Schools, *supra* note 164, at 4.

199. *Id.* at 5.

200. *Id.*

201. Students testified that they felt fearful at school and were witnessing their safe spaces disappear. *Forsyth County Board*, *supra* note 22. They also expressed their beliefs that the district does not care about diversity and uplifting silenced minority voices. *Id.* Separately, in a blog post, another student wrote, "The impact of losing such inclusionary books . . . that reflects the arc of their lives poses a risk to the lives of our youth." Galvan, *supra* note 159. He explained, "Books serve as a safe way for students to discover themselves, their interests and their passions. . . . [They] allow youth to have a dialogue internally that they might feel awkward or scared to talk about with adults or peers." *Id.*



library book screening process was discriminatory in violation of Title VI and Title IX. The agency shared that “the District received notice that its media center book screening process may have created a hostile environment for students,” and ultimately found that Forsyth County Schools’ response was insufficient to “ameliorate any resultant racially and sexually hostile environment.”<sup>202</sup>

OCR noted that comments at school board meetings “conveyed the impression that books were being screened to exclude diverse authors and characters, including people who are LGBTQI+ and authors who are not white, leading to increased fears and possibly harassment.”<sup>203</sup> In light of these circumstances, the agency concluded that “a hostile environment may have arisen that the District needed to ameliorate.”<sup>204</sup> In May 2023, OCR entered into a resolution agreement with the school district after determining that the district fell short of its obligations under Title VI and Title IX.<sup>205</sup>

This resolution agreement signals OCR’s commitment to protecting students’ civil rights amid increasing attacks on students’ access to diverse literature. The agency recognized that the challengers’ attempts to separately shelve LGBTQ+ titles under the guise of “inappropriate content” was pretext to limit LGBTQ+ students’ access to these books. It also recognized that public comments at the school board meeting treaded on gender identity, sexual orientation, and diversity, suggesting that those characteristics were considered in the district’s screening.<sup>206</sup>

OCR’s hostile environment analysis in the Georgia and Texas cases demonstrates that conduct other than overt harassment may

202. OCR Report on Forsyth County Schools, *supra* note 164, at 6.

203. *Id.* at 6–7. As an example, OCR referred to a student’s comments at the February meeting that the school environment became harsher in the aftermath of the removals. The student shared fears about attending school, and evidence reviewed by OCR investigators indicated that other students voiced similar views. *Id.* at 7.

204. *Id.* at 7.

205. A resolution agreement is made pursuant to Section 302 of OCR’s Case Processing Manual. Section 302 states that allegations under investigation may be resolved at any time when, prior to the completion of the investigation, the recipient expresses an interest in resolving the allegations 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. OFF. FOR CIV. RTS., U.S. DEP’T OF EDUC., CASE PROCESSING MANUAL (2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<https://perma.cc/6HUY-KD8G>].

206. OCR Report on Forsyth County Schools, *supra* note 164, at 6–7.

reasonably create a hostile environment in violation of Title VI and Title IX. Although this may seem like a departure from the traditional hostile environment analysis under these statutes, OCR's approach appropriately recognizes that what schools make available or unavailable can also create a hostile environment. Courts should similarly recognize that removing or restricting access to diverse books in schools can result in a hostile environment.

### III. DIFFERENT PRACTICE, SAME DISCRIMINATION

On the theory that Title VI and Title IX also prohibit non-harassment conduct, courts may readily find that the recent calls to remove BIPOC and LGBTQ+ titles are pretextual conduct that violate these communities' civil rights. When schools remove books about race, gender, and sexuality, in a way that undermines students' learning and contributes to discrimination against BIPOC and LGBTQ+ communities, they in effect foster a hostile environment. Section III.A will make the case for an extension for the law that prohibits pretextual discrimination. Section III.B will then show how book banning—a form of pretextual discrimination—limits students' access to education so as to create a hostile environment for protected classes. Finally, Section III.C will apply this extension of the hostile environment doctrine to a current book banning case in North Carolina.

#### A. Pretextual Conduct Gives Rise to a Hostile Environment

In the same way that courts interpret Title VII hostile environment theory to address overt and covert harassment, they should harness Title VI and Title IX to curb pretextual conduct. When the *Rogers* court pioneered the hostile environment theory under Title VII, it did so primarily to respond to changing circumstances in the workplace.<sup>207</sup> It recognized that obvious forms of disparate treatment were increasingly manifesting themselves in less blatant and seemingly race-neutral practices.<sup>208</sup> Instead of firing employees based on a protected characteristic, employers would

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207. *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971) (“Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events . . . . But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.”).

208. *Id.*

express their animus by passing them over for a promotion or making them feel unwelcome in the office.<sup>209</sup>

The same trend is unfolding in the education context. Instead of using racial slurs and physical harassment to prevent students like Ruby Bridges from attending schools as occurred in the 1960s,<sup>210</sup> institutions today tell students that books discussing their identities are offensive and/or have no place in schools.<sup>211</sup> Underrepresented students today are unable to get redress for this similarly discriminatory conduct because courts have yet to recognize that the selective targeting of books in schools is pretextual conduct that can create a hostile environment for BIPOC and LGBTQ+ students. This is especially true given the increase in bans aimed at LGBTQ+ and Black literature.

Since the Fifth Circuit's revolutionary decision, courts now regularly accept that Title VII broadly applies to both obviously discriminatory and pretextual conduct so long as the conduct limits or interferes with protected groups' work performance and ability to progress in their careers.<sup>212</sup> In *Meritor*, the canonical Supreme Court case on Title VII hostile environment, the Court noted that Title VII's language evinces Congress' intent "to strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>213</sup> In a later case, *Harris v. Forklift System*, the Court explained Title VII "comes into play before the harassing conduct leads to a nervous breakdown."<sup>214</sup> It held that although Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, the statute is not limited to such conduct.<sup>215</sup> The applicable standard

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209. See *EEOC History: 1964–1969*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/history/eeoc-history-1964-1969> (on file with the *Columbia Human Rights Law Review*) (noting that "some employers' ability and aptitude tests and other selection devices for hiring and promotion [were] being used to maintain pre-Act patterns of racial exclusion and discrimination").

210. See Shay Dawson, *Ruby Bridges Biography*, NAT'L WOMEN'S HIST. MUSEUM, <https://www.womenshistory.org/education-resources/biographies/ruby-bridges> [<https://perma.cc/R24D-J74P>] (detailing Ruby Bridges' life, including her role as the first Black student to enter an all-white school in the South following the *Brown v. Board of Education* decision mandating desegregation in schools).

211. See *supra* Section I.B.

212. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986) (both holding that discriminatory conduct rises to a hostile environment if it is sufficiently severe or pervasive to limit an individual's performance).

213. *Meritor*, 477 U.S. at 64.

214. *Harris*, 510 U.S. at 22 (citing *Meritor*, 477 U.S. at 67).

215. *Id.*

requires an objective and subjective analysis of the alleged hostile environment, but need not involve an inquiry into whether the conduct is “psychologically injurious.”<sup>216</sup> The Court further underscored that even absent these psychological effects, discriminatory conduct “can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”<sup>217</sup> In other words, any conduct motivated by discriminatory animus, in and of itself, offends the tenets of Title VII. And if the conduct impairs a person’s performance or prospects, it is abridging that person’s civil liberties.

Since courts often borrow from the Title VII scheme in interpreting Titles VI and IX, their applications of hostile environment law under these statutes should also address pretextual conduct. Title VI and Title IX’s essence is to broadly protect against racially and sexually motivated discrimination.<sup>218</sup> This purpose is effectuated when courts accept that the discriminatory practices that Congress sought to curb through these statutes persist under a different guise. Removing or restricting LGBTQ+ and race-conscious literature is akin to limiting students’ access to education through segregation.<sup>219</sup> Segregation restricted access to certain facilities, schools, and resources based on race and sex, thereby undermining the goal of equal access to learning opportunities.<sup>220</sup> Segregated schools often received fewer resources and inferior educational opportunities compared to their counterparts.<sup>221</sup> Book bans reflect the

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216. *Id.*

217. *Id.*

218. For both Title VI and Title IX, the “purpose” section describes avoiding discriminatory practices in education programs as a principal objective. Title IX Legal Manual, *supra* note 131; Title VI Legal Manual, *supra* note 131, at 1–3.

219. Although segregation is a severe and distinct form of discrimination marked by the physical separation of people, its aims to create a caste system and limit students’ educational opportunities survive its spatial separation characteristics. See Raymond Pierce, *What About School Desegregation? Considering New Strategies Around Race and Education*, FORBES (May 16, 2023), <https://www.forbes.com/sites/raymondpierce/2023/05/16/what-about-school-desegregation-considering-new-strategies-around-race-and-education> [https://perma.cc/E9F2-U5M6] (discussing new inequities flowing from pre-*Brown* segregation efforts).

220. Janel George, *Past Is Prologue: African American’s Pursuit of Equal Educational Opportunity in the United States*, AM. BAR ASS’N (May 16, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future/past-is-prologue](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/past-is-prologue) (on file with the *Columbia Human Rights Law Review*).

221. *Id.*

same attempts to perpetuate inequality by institutionalizing discriminatory practices. By removing books that reflect and address the experiences of BIPOC and LGBTQ+ students, schools are exacerbating the existing, pervasive disparities in resources affecting these communities, which can materially harm their educational outcomes. Targeted bans often detract from students' performance, discourage students from engaging with available opportunities, and keep them from advancing in their academic pursuits.<sup>222</sup>

This dangerous pattern calls for harnessing Title VI and Title IX to prevent future civil rights violations. Book bans can lead to a myriad of detrimental psychological effects, and Title VI and Title IX must be employed proactively to avoid a "nervous breakdown."<sup>223</sup> Under the extension of the law, plaintiffs would still need to prevail on the prima facie elements to show that certain conduct created a hostile environment.<sup>224</sup> But instead of having to show overt forms of harassment, plaintiffs can meet their evidentiary burden by demonstrating that pretextual conduct, such as the targeted ban of books relating to BIPOC and LGBTQ+ identities, severely limited their learning.

#### B. Targeted Book Bans Limit Students' Learning

The principal and heaviest burden under the prima facie elements for a hostile environment is proving that the alleged conduct is severe and pervasive.<sup>225</sup> To prevail under the severe and pervasive element, plaintiffs must show that the alleged conduct limits or interferes with students' learning.<sup>226</sup> These plaintiffs could point to recent studies showing that book banning contributes to poor academic performance, deficient critical thinking and social awareness skills, and decreased reading engagement. A 2023 survey of more than 1,500 educators revealed that restricting book access decreased students' engagement in reading.<sup>227</sup> More than a third of educators also noted that book bans discouraged students' critical

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222. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993); see also *infra* Section III.B (discussing these adverse impacts).

223. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

224. See *supra* Section I.B.

225. See *supra* Sections II.B.1.a, II.B.2.d.

226. *Id.*

227. FIRST BOOK RSCH. & INSIGHTS, EDUCATOR INSIGHTS ON THE CONVERSATION AROUND BANNED BOOKS 1 (2023), <https://firstbook.org/wp-content/uploads/2023/10/2023-Banned-Books-Survey-Results.pdf> [<https://perma.cc/5FSP-8BPQ>].

thinking, and 78% reported that students read more when given the choice to read banned books.<sup>228</sup> Alternatively, when schools added diverse books to their classroom libraries, students' reading scores increased to three points higher than national annual expected averages.<sup>229</sup> Collective classroom reading time also increased by four hours per week on average.<sup>230</sup> Classrooms that added bilingual and LGBTQ+ titles reported the greatest improvements.<sup>231</sup>

Studies reveal that increasing access to diverse books in schools<sup>232</sup> increases the amount of time that children spend reading, which in turn positively impacts students' learning outcomes.<sup>233</sup> The

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228. *Id.* at 2–3.

229. FIRST BOOK RSCH. & INSIGHTS, THE IMPACT OF DIVERSE CLASSROOM LIBRARY 4 (2023), <https://firstbook.org/wp-content/uploads/2023/09/2023-Impact-of-a-Diverse-Classroom-Library-FINAL-9-6-23.pdf> [<https://perma.cc/7FZE-3WZY>].

230. *Id.*

231. *Id.* The report notes that for every additional bilingual book that educators added to their classroom library, student reading assessment scores improved by seven points on average. For every additional LGBTQ+ book that educators added to their classroom library, student reading assessment scores improved by 4.5 points on average. *Id.*

232. Supporters of book bans argue that books by and about BIPOC and LGBTQ+ communities do not need to be in schools because students can access them elsewhere, such as in public libraries. Dave Seminara, *The Left Twists the Meaning of "Book Ban"*, CITY J. (June 26, 2023), <https://www.city-journal.org/article/the-left-twists-the-meaning-of-book-ban> [<https://perma.cc/P746-57PM>]. However, access to public libraries can vary significantly depending on race and socioeconomic factors. In some cases, Black students face barriers such as limited funding for libraries in predominantly Black neighborhoods, fewer library branches in these areas, or reduced access due to transportation challenges. See Maisy Card, *School Libraries Are Vital to Black and Latinx Students*, SCH. LIBR. J. (Aug. 12, 2019), <https://www.slj.com/story/School-Libraries-Are-Vital-to-Black-and-Latinx-Students> [<https://perma.cc/D9PB-EZZW>] (noting that the public library in Black and Latinx students' neighborhood was closed for most of that year, making the school library the only accessible library to these students).

233. Increased reading expands vocabulary, improves literacy skills, and boosts academic success. See Yu-han Ma & Wen-ying Lin, *A Study on the Relationship Between English Reading Comprehension and English Vocabulary Knowledge*, 2015 EDUC. RSCH. INT'L 1 (Dec. 26, 2014), <https://pdfs.semanticscholar.org/dced/fed7c10d28204676c58f31c6dd01835742b2.pdf> [<https://perma.cc/A4N2-WFTH>] (finding that children who read more have a more extensive vocabulary); Christy Whitten et al., *The Impact of Pleasure Reading on Academic Success*, 2 J. MULTIDISCIPLINARY GRADUATE RSCH. 48 (2016) (finding that students who read for pleasure achieved higher grades in English, mathematics, science, and history). Reading also cultivates creativity and stimulates cognitive development. *Reading For Pleasure Early in Childhood Linked to Better Cognitive Performance and Mental Wellbeing in Adolescence*,

National Education Association and the Law Firm Anti Racism Alliance found that students exposed to culturally responsive and racially inclusive education achieved better academic outcomes.<sup>234</sup> Its 2022 report, which quotes almost a dozen studies over the past three decades, notably found that students of color who participate in ethnic studies are “more academically engaged, develop a stronger sense of self-efficacy and personal empowerment, perform better academically and graduate at higher rates.”<sup>235</sup>

On the other hand, limiting access to culturally relevant books results in a “detrimental effect on academic success.”<sup>236</sup> Educational materials often reflect and amplify only limited aspects of American culture, which can have the effect of reinforcing stereotypes. If children are consistently exposed to materials that negatively represent their identity, they will likely internalize these social messages and develop poor self-esteem.<sup>237</sup> Beyond limited literary exposure, this negative messaging, exacerbated by the lack of positive messages through diverse and inclusive literature, can create adverse psychological effects.<sup>238</sup>

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UNIV. OF CAMBRIDGE (June 28, 2023), <https://www.cam.ac.uk/research/news/reading-for-pleasure-early-in-childhood-linked-to-better-cognitive-performance-and-mental-wellbeing> [https://perma.cc/7ERU-CFT8]. Finally, reading leads to better health outcomes; studies recently found that people who read for pleasure have better overall mental health and longer life expectancy. *Id.*; see also Anvi Bavishi et al., *A Chapter a Day – Association of Book Reading with Longevity*, 164 SOC. SCI. & MED. 44 (2016) (finding that book readers had a significant survival advantage over non-book readers).

234. *The Very Foundation of Good Citizenship: The Legal and Pedagogical Case for Culturally Responsive and Racially Inclusive Public Education for All Students*, NAT'L EDUC. ASS'N & LAW FIRM ANTIRACISM ALL. (Sept. 29, 2022), <https://www.nea.org/sites/default/files/2022-09/lfaa-nea-white-paper.pdf> [https://perma.cc/9SPX-RNGS].

235. *Id.*

236. *Id.*

237. JAMIE CAMPBELL NAIDOO, ASS'N FOR LIBR. SERVS. TO CHILD., THE IMPORTANCE OF DIVERSITY IN LIBRARY PROGRAMS AND MATERIAL COLLECTIONS FOR CHILDREN 3 (2014), [https://www.ala.org/sites/default/files/alsc/content/ALSCwhitepaper\\_importance%20of%20diversity\\_with%20graphics\\_FINAL.pdf](https://www.ala.org/sites/default/files/alsc/content/ALSCwhitepaper_importance%20of%20diversity_with%20graphics_FINAL.pdf) (on file with the *Columbia Human Rights Law Review*).

238. *Id.*; see also Orion Rummler, *Book Bans Internalize ‘Shame’ For Young LGBTQ+ People, Advocates Say. Here’s How They’re Pushing Back*, THE 19TH (Feb. 23, 2023), <https://19thnews.org/2023/02/book-bans-lgbtq-reading> [https://perma.cc/B7L4-KVTB] (discussing the effects of anti-LGBTQ rhetoric amid recent push to pass restrictive legislation like Florida’s “Don’t Say Gay”

Students initiate just 1% of censorship efforts,<sup>239</sup> but they are disproportionately affected by such efforts. By allowing a small percentage of book challengers to deprive whole schools and districts full of young—particularly, underrepresented—readers of diverse perspectives, opponents are robbing the next generation of high-quality education and creating significant gaps in knowledge.<sup>240</sup>

### C. Targeted Book Bans Create a Hostile Learning Environment: Case Study

If courts accept the premise that book bans are pretext, then they may find that a North Carolina school board's decision to remove the book, *Stamped: Racism, Antiracism, and You*, created a hostile environment under Title VI. *Stamped* is a young adult, New York Times bestseller that follows and deconstructs the history of racism in America.<sup>241</sup> Following the prima facie elements, this Section will illustrate how litigants can successfully challenge the book's removal under the reformed hostile environment law discussed in Sections II.A and II.B.

On August 10, 2023, the New Hanover County Board of Education voted to remove *Stamped* from the district's curriculum.<sup>242</sup>

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laws); Maya Pottinger, *What Message Do Book Bans Send to Black Students?*, WORD IN BLACK (Sept. 20, 2022), <https://wordinblack.com/2022/09/what-message-do-book-bans-send-to-black-students> [https://perma.cc/WL67-5PPH] (commenting that book bans reinforce notions of inferiority that Black and Brown students already experience).

239. *Censorship by the Numbers*, supra note 19.

240. See Anna Gifty Opoku-Agyeman, *The Heavy Cost of Banning Books About Black Children*, TIME (June 2, 2023), <https://time.com/6284174/book-bans-black-children-publishing> [https://perma.cc/K8H7-QTBW] (describing book bans' detrimental effects on Black children's early childhood education); see also *What Students Are Saying About Banning Books from School Libraries*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/learning/students-book-bans.html> (on file with the *Columbia Human Rights Law Review*) (compiling students' nuanced views from around the United States and Japan on book bans, including that book banning is a form of discrimination; it limits thinking and perspectives students need to access; it is not effective; and there are better ways to handle sensitive subjects).

241. The book is an adaptation from Ibram X. Kendi's original text *Stamped from the Beginning: The Definitive History of Racist Ideas* and written specifically for young readers ages twelve and up. *Stamped: Racism, Antiracism, and You*, IBRAM X. KENDI, <https://www.ibramxkendi.com/stampedbook> [https://perma.cc/K2PR-CNCY].

242. Rachel Keith, *Unpacking the Removal of "Stamped" by the New Hanover County Board of Education*, WHQR PUB. MEDIA (Sept. 8, 2023) [hereinafter *Unpacking the Removal of "Stamped"*], <https://www.wunc.org/2023->



The challenge came from Katie Gates, a parent of a former student, who concluded the book was inappropriate for classroom instruction after having read only ten pages.<sup>243</sup> She alleged that the book promotes anti-American and anti-biblical sentiments.<sup>244</sup> She disparaged the authors for their critique of the lack of representative literature, dubbing it as “deceiving” and “a perceived intent to manipulate.”<sup>245</sup>

One of Gates’ main qualms about the book is its impact on white students.<sup>246</sup> She argued that it teaches white guilt and promotes separatism.<sup>247</sup> She further criticized the book as a CRT text, erroneously arguing that “CRT teaches oppression and classifies oppressors and oppressed creating a divided society” and “vilifies our Founding Fathers and Heroes.”<sup>248</sup> Although, as a parent, Gates may have objections to the books her own daughter reads, her calls for sweeping bans on books that grapple with race are unjustified.<sup>249</sup>

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09-08/unpacking-the-removal-of-stamped-by-the-new-hanover-county-board-of-education [https://perma.cc/2KCL-CG2N].

243. See Rachel Keith, “*Stamped*” Out? *The Battle to Remove an AP-English Book from a New Hanover County School*, WHQR PUB. MEDIA (Jan. 31, 2023) [hereinafter “*Stamped*” Out?], <https://www.whqr.org/local/2023-01-31/stamped-out-the-battle-to-remove-an-ap-english-book-from-a-new-hanover-county-school> [https://perma.cc/X4MQ-8WRH] (“This book is CRT, and it needs to be removed as an assigned resource at Ashley High School. I had a chance to flip through the 1st 10 pages this morning . . . and here’s a few telling quotes.”).

244. See *id.* (“This book contains Marxist ideology, inaccurate reframing of history, untruths, and disrespect for our nation and the Bible.”). In an email to her daughter’s teacher, Gates demanded the following: “Teach from the classics, teach classic principles. Please do not bring political, controversial texts into the classroom.” *Id.*

245. Her comments referred to a line where Reynolds writes, “I wish I learned history at your age, but there were no books telling the complete truth.” *Id.*

246. See Rachel Keith, *1 Parent Is Responsible for a Book Ban in North Carolina*, WHQR PUB. MEDIA (Sept. 8, 2023), <https://www.whqr.org/national/2023-09-08/1-parent-is-responsible-for-a-book-ban-in-north-carolina> [https://perma.cc/6RCM-LTRQ] (“They brainwash the reader that all the white people are racist and are to blame for everything wrong in America. How do you think these claims make everyday average white students required to read this book feel?”).

247. *Id.*

248. *Id.*

249. According to local reporters, Gates’ challenge against *Stamped* was not her first; over the years, she has consistently claimed that the district is indoctrinating students with left-leaning ideologies, primarily in the form of literature discussing race and racism. See “*Stamped*” Out?, *supra* note 243. At a July 2021 school board meeting, Gates said certain social studies programs leave

Similarly charged comments would qualify the resultant ban as actionable pretextual conduct under the extension of the law.

As detailed in the previous section, the first and critical element of a prima facie hostile environment claim under Title VI is a showing of severe, pervasive, or persistent hostile conduct. To prevail on this element, a claimant must show that the recipient school intentionally permitted the existence of a hostile environment.<sup>250</sup> And as discussed in Part I, the *Arlington Heights* framework, which instructs courts to consider “the impact of the official action,” including whether “it bears more heavily on one race than another,”<sup>251</sup> is relevant for showing the defendant’s facilitation of a hostile environment.

New Hanover County Board of Education’s decision overwhelmingly affects Black students. Failure to provide race-conscious materials can have a significant detrimental effect on Black students.<sup>252</sup> It strips them of a high-quality and holistic education that engages in critical thinking and encourages academic success.<sup>253</sup> New Hanover County took it even further by rubberstamping attacks that the book is “un-American,” “Marxist,” and a tool for deception, indoctrination, and misinformation.<sup>254</sup> This decision ensued even though most of the community and nearly all of the Black participants at the school board meeting overwhelmingly supported keeping the book.<sup>255</sup> The board’s action undoubtedly sends a harmful message to Black students that their voices, history, and perspectives are not valued. Under this Note’s proposed extension of hostile environment law, the targeted and adverse impact on Black students’

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the door open for schools “to abuse the teaching of civics and history by [teaching] social emotional learning and critical race theory concepts like equity and implicit bias.” *Id.* She claims these teachings “indoctrinate and categorize our kids and they divide not unify.” *Id.*

250. *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., Okl.*, 334 F.3d 928, 933 (10th Cir. 2003)

251. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

252. See Opoku-Agyeman, *supra* note 240 (detailing book bans’ harmful impacts on Black children’s early childhood education).

253. *Id.*

254. “*Stamped*” *Out?*, *supra* note 243.

255. Rachel Keith & James Watson, *The Public Weighs in on “Stamped: Racism, Antiracism, and You,”* WHQR PUB. MEDIA (Aug. 2, 2023) [hereinafter *The Public Weighs In*], <https://www.whqr.org/local/2023-08-02/the-public-weighs-in-on-stamped-racism-antiracism-and-you> [https://perma.cc/6PAP-WPHF].

learning would be sufficient to show the severity and pervasiveness of the pretextual conduct.

It also bears reemphasizing that Gates initially called for the removal of the book after reading a mere ten pages.<sup>256</sup> Both the school and district's review committees had previously rejected her complaint, finding that the book comported with the school's curriculum standards.<sup>257</sup> Despite the committees' findings, the school board voted to remove the book from its classroom curriculum.<sup>258</sup>

A school board in Pickens County, South Carolina, made the same decision when it voted to remove *Stamped* from its libraries, overruling both the school and district committees' decision to keep it on the shelves.<sup>259</sup> There, the Fourth Circuit vacated the district court's refusal to order the school to reshelve the book, siding with plaintiffs' contention that the board's decision was politically motivated.<sup>260</sup> In the case of New Hanover County, the board's decision

256. Gates complained that *Stamped*'s citations did not accurately support source material, even though the district review committee found that they did. See "*Stamped*" *Out?*, *supra* note 243; Rachel Keith, *New Hanover County School Board Will Now Decide "Stamped" Book Challenge*, WHQR PUB. MEDIA (June 27, 2023), <https://www.whqr.org/local/2023-06-27/new-hanover-county-school-board-will-now-decide-stamped-book-challenge> [<https://perma.cc/J9J4-G9ZE>]. Gates also noted the book's "inflammatory language . . . and promoti[on of] political activists like Angela Davis, a known communist (the book really glorifies her), Malcolm X, and Black Lives Matter" as "unproductive to an open and honest conversation on history and inappropriate for a classroom setting." The district committee maintained that students are not expected to take on any perspective in any instructional material that they read. *Id.*

257. See "*Stamped*" *Out?*, *supra* note 243. In its report, the district's review committee concluded, "[t]his book is an argument. Students taking the AP Language test will be expected to write an argument and to interpret and analyze [one]." It added, "we must take into account the original author who did the research is a specialist in African American history. . . . Students can then choose to either emulate or avoid the tactics used in a text when they craft their own arguments." *Id.*

258. Rachel Keith, *NHC School Board Temporarily Removes the "Stamped" from the District's Classrooms*, WHQR PUB. MEDIA (Sept. 1, 2023) [hereinafter *NHC School Board Temporarily Removes*], <https://www.whqr.org/local/2023-09-01/nhc-school-board-temporarily-removes-the-stamped-from-the-districts-classrooms> [<https://perma.cc/VQC6-9VGW>].

259. Dustin George, *NAACP Joins Lawsuit Against Upstate School District*, WSPA (Apr. 28, 2023), <https://www.wspa.com/news/local-news/naacp-joins-lawsuit-against-upstate-school-district> [<https://perma.cc/DC49-LBR5>].

260. David Ferrara, *Pickens County District Faces Setback in Fight to Ban Book from School Shelves*, POST & COURIER (Oct. 16, 2023), <https://www.postandcourier.com/greenville/news/pickens-county-district-faces->

to remove the book over the school and district's rejection based on this one parent's objection similarly lacks legitimate reasoning.<sup>261</sup> Such politically motivated and unreasoned decisions are pertinent evidence that suggest discriminatory intent under *Arlington Heights* and would support a hostile environment claim under this Note's proposed doctrine.<sup>262</sup>

The last two prima facie elements, notice and recipient's response, are also likely to be met. Students, North Carolina's NAACP, members of the Black community, and allies organized demonstrations to protest the removal of the book.<sup>263</sup> Concerned groups also attended the board's August 2023 meeting to express their grievances and specifically asked the district to reshelve the book.<sup>264</sup> Participants spoke about what kind of message the book ban sends Black students, underscoring the hostile environment created by the removal of the book.<sup>265</sup> These complaints are sufficient to put the school on notice. Yet, the board's responsive step, to make the removal temporary, is likely insufficient to ameliorate the resultant

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setback-in-fight-to-ban-book-from-school-shelves/article\_dd0bfdb4-6c2b-11ee-a31d-3b96aca49007.html [https://perma.cc/K7WB-GKZV].

261. Much like in the Georgia case, Gates' suggestive language and persistent stance on anti-racist education implies that *Stamped* was removed to suppress conversations about race and limit students' access to ideas that Gates and the conservative school board personally or politically opposed. *NHC School Board Temporarily Removes*, *supra* note 258 (noting that the vote fell mostly along party lines, with four of the Republican members—Josie Barnhart, Pete Wildeboer, Pat Bradford, and Melissa Mason—voting to remove the book). Gates challenged the book as inappropriate for her daughter's AP course although the governing College Board's rules specifically dictate that "parents do not define which college-level topics are suitable within AP courses." *See "Stamped" Out?*, *supra* note 243. And even though schools have considerable curricular control, the Supreme Court's decision in *Pico* provides that a board may not exercise that authority to silence views based on its political and partisan preferences. *Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982).

262. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977); Title VI Legal Manual, *supra* note 131, at 9–13. *See also* Kennedy v. Schoenberg, Fisher & Newman, Ltd., 140 F.3d 716, 723 (7th Cir. 1998) (showing that even isolated comments may constitute direct evidence of discrimination if they are "contemporaneous with the [adverse action] or causally related to the [adverse action] decision making process") (citations omitted).

263. *Unpacking the Removal of "Stamped"*, *supra* note 242.

264. *Id.*; *The Public Weighs In*, *supra* note 255.

265. *Unpacking the Removal of "Stamped"*, *supra* note 242.

racially hostile environment given that the harm persists as long as the removal remains in place.<sup>266</sup>

These factors, substantiated with additional circumstantial evidence and student anecdotes, support the claim that the removal of *Stamped* in New Hanover County creates a hostile environment for Black students. The totality of the circumstances establishes that it was Gates' and the board's objections to the opinions contained in the book, not the book's educational suitability, that drove the decision to remove it. Rather than embracing the diverse perspectives that exist on the important and unavoidable issue of race in America, the board simply voted to remove a book because it contained ideas about racism and America that a sole white parent and a primarily white board wanted to suppress.

The circumstances in the North Carolina school district, as well those in Texas and Georgia discussed in Section II.C, evince that the recent calls for book bans are mere pretext. By giving weight to the loud minority of objectors, these districts created easy avenues for challenging diverse and inclusive books under the guise that they contain "inappropriate" or "harmful" content. Each district decided to remove books based on the preferences of a few parents and at the expense of most students who wanted access to the targeted books. Through their actions, these schools singled out an already under-resourced community of BIPOC and LGBTQ+ students and fostered a hostile environment that limited their access to education. In line with the statutes' aims to broadly protect against racially and sexually motivated discrimination, Title VI and Title IX hostile environment theory should account for the pretextual nature of these targeted book bans.

## CONCLUSION

Book bans are nothing new in American history, and neither is their discriminatory purpose. However, recent tactics targeting schools for a purge on books discussing race and LGBTQ+ themes under the pretext that they are "divisive" and "inappropriate" create new civil rights implications that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 should be interpreted to address. As recipients of federal funding, schools are

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266. See OCR Report on Forsyth County Schools, *supra* note 164, at 6 (finding Forsyth County Schools' cursory efforts to respond to calls for book bans insufficient to "ameliorate any resultant racially and sexually hostile environment").

required to protect students against a hostile environment pursuant to Title VI and Title IX. By disproportionately targeting books that discuss race, gender, and sexuality, schools severely limit LGBTQ+ and BIPOC students' learning opportunities and contribute to the discrimination that these communities already face. Their pretextual conduct erodes basic education principles, removes vital resources for student learning, and violates Title VI and Title IX by enabling—indeed, facilitating—a hostile environment.