NOTES

A STUDENT'S FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION IN THE AGE OF ANTI-CRT AND "DON'T SAY GAY" LAWS

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Over the last few years, numerous states and school boards have passed laws aimed at limiting curricula related to diverse communities. Anti-Critical Race Theory and "Don't Say Gay" laws have threatened to restrict the teaching of race and LGBTQ issues in K-12 schools. These laws are troubling from a policy standpoint because inclusive curricula ensure that students receive a proper education and are taught in a supportive school environment. They are also likely an infringement upon a student's First Amendment right to receive information, first recognized in Board of Education v. Pico*, and, as such, courts have begun to entertain constitutional claims against curricular restrictions. However, there is no binding precedent on this issue, and the circuits are split as to what standard they should use when addressing these challenges.*

This Note argues that courts should follow the approach developed by the Ninth Circuit in Arce v. Douglas*. Courts should extend* Pico *beyond its library context to hold that students have a First Amendment right to receive information in the curriculum they are taught. In evaluating whether a curriculum decision violates this right, courts should apply the standard laid out in* Hazelwood School District v. Kuhlmeier*: Courts should first require that state and local educational bodies justify that their curriculum restriction decisions were motivated by a "legitimate pedagogical concern" and courts should then inquire if such restrictions are "reasonably related" to that concern. This standard properly respects the deference states and localities are due in educational matters, while protecting students' constitutional free speech rights. The standard also follows basic requirements of constitutional law: requiring justifications, reasonableness in those justifications, and proper process.*

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INTRODUCTION

"Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

—Sweezy v. New Hampshire, 1957[1]

[1] 354 U.S. 234, 250 (1957).

On May 7, 2021, Governor Kevin Stitt signed House Bill 1775 (H.B. 1775),[2] making Oklahoma the third state to ban Critical Race Theory (CRT) or related antiracism concepts in public schools.[3] H.B. 1775 prohibits the use of eight "concepts" related to race and sex in instructional materials.[4] The statute's vague language[5] has had a chilling effect, precluding educators from teaching the full range of history and literature that aims to inform students about diverse communities and systemic racism. Oklahoma's third largest school district, for example, allegedly removed several books about race, such as *To Kill a Mockingbird*, and books by Black authors, such as *A Raisin in the Sun* and *Narrative of the Life of Frederick Douglass*, from its curriculum.[6] Students in Oklahoma of all backgrounds have suffered as a result. S.L., an eleventh-grade student who identifies as a Black woman, was eager to learn about systemic racism and the perspectives of Black scholars commonly excluded from school curricula.[7] A.A., a ninth-grade student who identifies as a white male, had wished to broaden his worldview through greater access to diverse texts discussing race and gender.[8] H.B. 1775, however, has limited both students' ability to receive the education they desire.

Not to be outdone, Florida Governor Ron DeSantis identified another target for censorship. On March 28, 2022, he signed House Bill 1557 (H.B. 1557)[9] into law, better known as Florida's "Don't Say

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[2] H.B. 1775, 58th Leg., 1st Reg. Sess. (Okla. 2021) (enacting new law to ban schools from making certain race- and sex-related concepts part of curriculum). The provision is codified at Okla. Stat. tit. 70, § 24-157(B)(1) (2023).

[3] *See* Robby Korth, *FAQ: What We Know About Teaching Since Oklahoma's So-Called Critical Race Theory Ban Went into Effect*, StateImpact Okla. (Sept. 8, 2022, 6:00 AM), https://stateimpact.npr.org/oklahoma/2022/09/08/faq-what-we-know-about-teaching-since-oklahomas-so-called-critical-race-theory-ban-went-into-effect [https://perma.cc/JL7B-Z262] (explaining that, while H.B. 1775 does not explicitly mention Critical Race Theory, it is often called an anti-CRT bill because the concepts it bans are associated by rightwing pundits with CRT); Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, Ed. Week (June 13, 2023), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/44NB-YQPH] (describing efforts in over forty states since January 2021 to restrict teaching CRT or issues of racism and sexism).

[4] *See infra* notes 55, 54–62 and accompanying text (describing the eight "concepts" banned by H.B. 1775 in detail).

[5] *See infra* notes 55, 58–62 and accompanying text (discussing the difficulty of interpretation of what the eight "concepts" actually prohibit as a result of their vague language).

[6] Amended Complaint at 2, 31–32, Black Emergency Response Team v. O'Connor, No. 5:21-cv-1022-G (W.D. Okla. Nov. 9, 2021) [hereinafter BERT Amended Complaint].

[7] *Id.* at 12, 33–34.

[8] *Id.* at 9–10, 32.

[9] H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (codified at Fla. Stat. § 1001.42(8)(c)3 (2023)).

Gay" law.[10] H.B. 1557 has a similar goal as Oklahoma's anti-CRT law: to chill the discussion of LGBTQ issues in public schools. And the law has worked, harming straight and LGBTQ Florida students alike. Since the statute's passage, M.A., a gay high school junior, fears that LGBTQ affinity groups will be shut down[11] after experiencing difficulty in persuading a teacher to serve as an advisor to the school's Gay-Straight Alliance.[12] Another student, S.S., a lesbian high school senior, was told by a teacher that LGBTQ "'behavior' should be kept 'behind closed doors.'"[13] Teachers too have had to adjust their speech in the shadow of the law. One changed a lesson plan about Sally Ride—the first American woman to fly in space—to omit the fact that Ride was a lesbian.[14] A second teacher used to intervene when she heard her elementary school students use the term "gay" as an insult to educate them on what the term means; now she fears she can no longer engage in this type of social teaching.[15]

Debates around anti-CRT statutes[16] and "Don't Say Gay" laws have gripped school boards and state legislatures around the country over the last few years.[17] As of November 2023, forty-five states have

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[10] Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay*,' NPR (March 28, 2022, 2:33 PM), https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis [https://perma.cc/RJ6P-X27A].

[11] Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss at 12, M.A. v. Fla. State Bd. of Educ., No. 4:22-cv-00134-AW-MJF (N.D. Fla. July 27, 2022) [hereinafter M.A. Florida Plaintiff's Motion to Dismiss Memorandum].

[12] Second Amended Complaint at 33, M.A. v. Fla. State Bd. of Educ., No. 4:22-cv-00134-AW-MJF (N.D. Fla. Oct. 27, 2022).

[13] M.A. Florida Plaintiff's Motion to Dismiss Memorandum, *supra* note 11, at 12.

[14] Lori Rozsa, *Florida Teachers Race to Remake Lessons as DeSantis Laws Take Effect*, Wash. Post (July 30, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/07/30/florida-schools-desantis-woke-indoctrination [https://perma.cc/X6VR-RHAP].

[15] Sarah Mervosh, *Back to School in DeSantis's Florida, as Teachers Look over Their Shoulders*, N.Y. Times (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/desantis-schools-dont-say-gay.html [https://perma.cc/7PN6-AB3D].

[16] Some states explicitly ban or name CRT in their statutes. *See, e.g.*, Idaho Code § 33-138(2) (2023); N.D. Cent. Code § 15.1-21-05.1 (2023). Other states, like Oklahoma, do not mention CRT and prefer to ban certain "concepts" related to race, even though the inspiration for the laws clearly stems from a distaste for CRT. *See, e.g.*, Okla. Stat. tit. 70, § 24-157(B)(1) (2022); Iowa Code §§ 261H.8, 279.74 (2023); Tenn. Code Ann. § 49-6-1019 (2023); Tex. Educ. Code Ann. § 28.0022(a) (2023). For this reason, I use the phrase "anti-CRT" statutes to capture all laws that aim to restrict the teaching of racial diversity. For a taxonomy of CRT-related laws, see Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. Rev. 723, 729–35 (2022) (classifying CRT-related bills into three categories: "Facial CRT Bans," "CRT Gestures," and "CRT Silent"). For a discussion of the origin of the "divisive concepts" banned by many anti-CRT statutes, see *infra* notes 48–50 and accompanying text.

[17] *See, e.g.*, Lauren Camera, *Federal Lawsuit Poses First Challenge to Ban on Teaching Critical Race Theory*, U.S. News (Oct. 20, 2021, 3:57 PM), https://www.usnews.com/news/education-news/articles/2021-10-20/federal-lawsuit-poses-first-challenge-to-ban-on-

proposed anti-CRT legislation, and twenty-one states have passed legislation or regulations imposing restrictions on antiracism curricula.[18] In addition, eleven states either explicitly censor discussion of LGBTQ people and issues through "Don't Say Gay" laws or place restrictions on how schools can discuss those topics.[19] Given the well-documented benefits of inclusive curricula and a supportive school environment, these laws are alarming[20]: By censoring inclusive curricula, they prohibit public education from fulfilling its role as the primary building block for a democratic, civil society.[21]

In addition to the above-mentioned policy failures, anti-CRT and "Don't Say Gay" laws present contested legal issues. Controversies over school curricula are not new, and courts have repeatedly considered challenges to instruction on sexual education, evolution, and climate change over the past fifty years.[22] Common challenges have included alleged Establishment Clause or Free Exercise violations,[23] or substantive due process violations of parents' rights to direct their children's education.[24] Teachers, parents, and students are now following

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teaching-critical-race-theory [https://perma.cc/BS69-MNPE] (explaining that "[c]ritical race theory has since [2019] roiled Republicans in statehouses" and that the debate has spread to school boards across the country); Kate Sosin, *In Some States, Versions of 'Don't Say Gay' Bills Have Been Around for Awhile*, PBS (Apr. 21, 2022, 4:22 PM), https://www.pbs.org/newshour/nation/in-some-states-versions-of-dont-say-gay-bills-have-been-around-for-awhile [https://perma.cc/R4T5-YC5D] (noting that at least twenty states introduced "Don't Say Gay" laws in 2022).

18 Jonathan Feingold & Joshua Weishart, Nat'l Educ. Pol'y Ctr., How Discriminatory Censorship Laws Imperil Public Education 10 (2023), https://nepc.colorado.edu/sites/default/files/publications/PB%20Feingold-Weishart.pdf [https://perma.cc/6YHB-BL66].

19 *See LGBTQ Curricular Laws*, Movement Advancement Project, https://www.lgbtmap.org/equality_maps/curricular_laws [https://perma.cc/7CWR-9FCJ] (noting that seven states have laws explicitly requiring school curricula to censor discussion of LGBTQ people or issues, and that four more states have restrictions on how school curricula can discuss "homosexuality").

20 *See infra* Section I.B (describing the benefits of inclusive curricula and a supportive school environment).

21 *See infra* Section I.B (describing the importance of public education to democracy and civil society).

22 *See* Julie Underwood, *Under the Law: The Legal Balancing Act over Public School Curriculum*, 100 Phi Delta Kappan 74, 74–75 (2019), https://doi.org/10.1177/0031721719834035 [https://perma.cc/35BJ-P77H] (listing curricular challenges that courts have considered in the last fifty years).

23 *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 581–82 (1987) (challenging a Louisiana law that mandated balanced teaching of creationism and evolution as violative of the Establishment Clause); Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008) (alleging that the curriculum materials inclusive of gay persons was violative of Free Exercise rights); Cal. Parents for the Equalization of Educ. Materials v. Torlakson, 973 F.3d 1010, 1013 (9th Cir. 2020) (denying parents' challenge of depiction of Hinduism in California curriculum through, *inter alia*, Free Exercise and Establishment Clause claims).

24 Parents have brought challenges on Due Process grounds alleging that curriculum changes violate their fundamental right to make decisions regarding the "care, custody, and

in this tradition by contesting the legality of anti-CRT[25] and "Don't Say Gay" laws,[26] bringing a variety of civil rights claims.

Two claims in particular hold promise for student plaintiffs: (1) First Amendment claims for violations of a student's right to receive information and (2) Fourteenth Amendment claims for Equal Protection violations. The two claims can be interconnected, as evidence of one violation can assist in providing evidence of the other.[27] However, this Note will limit its scope to the First Amendment claims for three reasons. First, Equal Protection claims can be difficult to substantiate given the difficulty of proving discriminatory intent;[28] in contrast, the First Amendment right to receive information analysis allows courts to consider evidence beyond discriminatory animus.[29] Second, Equal Protection claims may fare well against anti-CRT laws, given courts' acceptance of race as a suspect classification,[30] but may not be an effective tool against "Don't Say Gay" laws because courts have been reluctant to recognize sexual orientation as deserving of heightened

control of their children," Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion), as first recognized in *Meyer v. Nebraska*, 262 U.S. 390, 398–400 (1923) (finding that the right of parents to educate their children as they find suitable is within the liberty protected by the Fourteenth Amendment) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (upholding the "liberty of parents and guardians to direct the upbringing and education of children under their control"). The parents' rights argument has potent political appeal. Florida's "Don't Say Gay" law, for example, is formally titled the "Parental Rights in Education" bill. *See* Diaz, *supra* note 10. However, these claims are rarely successful, as several circuits have recognized that while parents have the right to control their children's educational forum—public school, private school, or homeschool—they do not have the right to prescribe a public school's curriculum once they send their children there. *See Parker*, 514 F.3d at 102 (describing circuit court cases that have upheld this limitation on the parental right); *accord Torlakson*, 973 F.3d at 1020 ("[T]he substantive due process right 'does not extend beyond the threshold of the school door.'" (internal citation omitted)).

25 *See, e.g.*, Amended Complaint at 1, Black Emergency Response Team v. O'Connor, No. 5:21-cv-1022-G (W.D. Okla. Nov. 9, 2021) (challenging Oklahoma's law restricting discussion of eight race- and gender-related "concepts" in schools on First and Fourteenth Amendment grounds); Local 8027, AFT-N.H. v. Edelblut, No. 21-cv-1077-PB (D.N.H. Jan. 12, 2023) (alleging that New Hampshire's restrictions on how teachers can instruct on societal discrimination violates their First Amendment right to free speech); Falls v. DeSantis, No. 4:22-cv-00166-MW-MJF (N.D. Fla. May 19, 2023) (seeking injunction against Florida's laws prohibiting instruction in CRT for violating First and Fourteenth Amendments).

26 *See, e.g.*, M.A. v. Fla. State Bd. of Educ., No. 4:22-cv-00134-AW-MJF (N.D. Fla. Feb. 15, 2023) (challenging Florida's "Don't Say Gay" law for violation of First Amendment); Cousins v. Sch. Bd. of Orange Cnty., No. 6:22-cv-01312-WWB-LHP (M.D. Fla. Aug. 16, 2023) (suing Florida county school board for violating students' First and Fourteenth Amendment rights by enforcing Florida's "Don't Say Gay" law).

27 *See infra* Sections IV.B.2 and IV.C.

28 *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011) (discussing the difficulty of the discriminatory intent standard in Equal Protection law).

29 *See infra* Section IV.B.2.

30 Yoshino, *supra* note 28, at 756.

scrutiny.[31] Therefore, developing the First Amendment claim can better help students aiming to challenge a broader swath of restrictive curriculum laws. Third, the First Amendment theory of a "right to receive information" is underdeveloped in the law and in scholarship,[32] unlike Equal Protection claims.[33] Given the likelihood that anti-CRT and "Don't Say Gay" statutes will continue to face legal challenges, this Note aims to develop the First Amendment claim by examining how courts should balance state interests in controlling educational affairs and students' rights to receive information.

Currently, there is no binding precedent that guides lower courts in assessing a right to receive information claim. Consequently, circuits have split on which standard to apply to such claims, relying on differing interpretations of the Supreme Court's attempts to mark the boundaries of students' First Amendment rights.[34] In 1969, the Court declared in *Tinker v. Des Moines Independent Community School District*[35] that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[36] A plurality of the Court in 1982 then recognized in *Board of Education v. Pico*[37] that a student's First Amendment rights include a "right to receive information and ideas"[38] that is infringed upon when a school board improperly removes books from school libraries in a "narrowly partisan or political manner."[39] In 1988, however, the Court in *Hazelwood School District v. Kuhlmeier*[40] also acknowledged that school authorities can restrict certain types of

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[31] *Id*.

[32] Of course, some scholars have discussed the right to receive information claim, and this Note builds on their work. *See, e.g.*, Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths about Homosexuality as a Violation of the First Amendment*, 60 Brook. L. Rev. 1599, 1642–43 (1995) (arguing that laws restricting the discussion of homosexuality in schools would be deemed unconstitutional if challenged under a First Amendment right to receive information claim); Jason Persinger, *The Harm to Student First Amendment Rights When School Boards Make Curricular Decisions in Response to Political Pressure: A Critique of* Griswold v. Driscoll, 80 U. Cin. L. Rev. 249 (2011) (analyzing circuit cases addressing the conflict between a school's discretion in regulating its curriculum and students' right to receive information); Joshua Gutzmann, Essay, *Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools*, 106 Minn. L. Rev. Headnotes 333, 348 (2022) (noting that challengers to anti-CRT laws can allege violations of their First Amendment right to receive information).

[33] For a recent account analyzing the intersection between anti-CRT laws, antiracism education, and the Equal Protection Clause, see Osamudia James, *White Injury and Innocence: On the Legal Future of Antiracism Education*, 108 Va. L. Rev. 1689 (2022).

[34] *See infra* Section III.

[35] 393 U.S. 503 (1969).

[36] *Id.* at 506.

[37] 457 U.S. 853 (1982) (plurality opinion).

[38] *Id.* at 867 (internal citation omitted).

[39] *Id.* at 870–71.

[40] 484 U.S. 260 (1988).

student speech rights if the school's actions are "reasonably related to legitimate pedagogical concerns."[41]

The circuit courts, in trying to apply these precedents to curriculum challenges, have split on the appropriate standard to use.[42] Five circuits, led most recently by the First and Fifth Circuits, have decided that curricula restrictions should be virtually unreviewable for First Amendment purposes, given the significant deference courts should show states and localities when they make educational decisions.[43] Three other circuits, led by the Ninth Circuit, have opted to balance states' interests against student free speech rights—an approach that allows more thorough consideration of curriculum challenges.[44]

This Note argues that courts should follow the approach developed by the Ninth Circuit in *Arce v. Douglas*.[45] Courts should extend *Pico* beyond its library context to hold that students have a First Amendment right to receive information in the curriculum they are taught. In evaluating whether a curriculum decision violates this right, courts should apply the *Arce* standard: Courts should first require that state and local educational bodies justify that their curriculum restrictions were motivated by a "legitimate pedagogical concern" and courts should then inquire if such restrictions are "reasonably related" to that concern.[46] This standard properly respects the deference states and localities are due in educational matters, while protecting students' constitutional free speech rights. The standard also follows basic requirements of constitutional law: requiring justifications, reasonableness in those justifications, and proper process.

This Note proceeds in four parts. Part I starts with a brief account of the harms imposed by curricula restrictions, the scope of anti-CRT and "Don't Say Gay" laws, and the policy advantages of inclusive curricula in K-12 schools. Part II discusses the Supreme Court's contradictory precedents on student speech and how those precedents inform lower courts' analyses of challenges to curriculum restrictions. Part III then explores the circuit split that exists in analyzing these challenges. Finally, Part IV argues that the Ninth Circuit's approach in *Arce* is correct as a matter of constitutional law and demonstrates how the *Arce* standard can be applied in practice to invalidate anti-CRT and "Don't Say Gay" laws.

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41 *Id.* at 273.
42 *See infra* Part III.
43 *See infra* Section III.A.
44 *See infra* Section III.B.
45 793 F.3d 968 (9th Cir. 2015).
46 *Id*. at 983.

I
The Importance of Inclusive Curricula in K-12 Schools

The proliferation of anti-CRT and "Don't Say Gay" legislation imposes significant harms on students across the country, warranting thorough examination of these laws and the benefits of inclusive curricula. Section I.A addresses the scope of anti-CRT and "Don't Say Gay" laws. Section I.B then offers policy points for courts to consider when evaluating curriculum restrictions.

A. The Wide Sweep of Anti-CRT and "Don't Say Gay" Laws

Efforts to ban CRT arose as a backlash to antiracism trainings that many schools implemented after the murder of George Floyd in the summer of 2020.[47] In response to complaints about these initiatives, President Trump issued an executive order banning federal trainings that taught any of nine "divisive concepts."[48] This executive order prompted states to create their own laws, and many of them, including Oklahoma, copied almost all of these "divisive concepts" verbatim as their own definitions for banned classroom topics.[49] Since September 2020, local, state, and federal government entities across the country have introduced 783 anti-CRT measures.[50]

All this has occurred even though CRT is rarely, if ever, taught in K-12 schools.[51] Critical Race Theory is an advanced academic discipline, most often taught in universities and law schools, that teaches that race is a social construct and that racial bias is inherent to American

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47 *See* Sarah Schwartz, *Who's Really Driving Critical Race Theory Legislation? An Investigation*, Educ. Week (July 19, 2021), https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07 [https://perma.cc/79VZ-XUR8] (noting that supporters of anti-CRT legislation attribute the increase in classroom discussion of racism and police brutality to the George Floyd murder).

48 Hannah Daigle, *Critical Race Theory Through the Lens of* Garcetti v. Ceballos, 20 First Amend. L. Rev. 230, 244 (2022); Combating Race and Sex Stereotyping, Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).

49 BERT Amended Complaint, *supra* note 6, at 48 ("H.B. 1775 copied eight of the nine banned concepts verbatim from EO 13950."); *see also* Schwartz, *supra* note 47 (finding much of the language in these laws to be "lifted" from the September 2020 Executive Order).

50 *CRT Forward Tracking Project*, UCLA Sch. of L. Critical Race Stud. Program, https://www.crtforward.law.ucla.edu [https://perma.cc/AT9H-NBQH].

51 *See* Tiana Headley, *Laws Aimed at Critical Race Theory May Face Legal Challenges*, Bloomberg L. News (July 7, 2021), https://news.bloomberglaw.com/us-law-week/laws-curbing-critical-race-theory-may-face-legal-challenges [https://perma.cc/CA2V-59MT] (noting that laws restricting classroom discussion of race may be vulnerable to First Amendment vagueness and overbreadth challenges and Fourteenth Amendment racial animus challenges).

institutions and law.[52] In popular parlance, however, CRT has become a catch-all buzzword for pedagogy that focuses on marginalized and diverse communities—pedagogy that some conservative politicians and parents find objectionable and seek to ban through anti-CRT statutes.[53]

So, if anti-CRT laws are not actually addressing CRT, then what are they banning? Return to Oklahoma's H.B. 1775, a law whose statutory provisions are emblematic of other states' laws and the concepts that they have banned.[54] Some of H.B. 1775's eight banned concepts seem at first to be innocuous or even laudable: Educators are banned from teaching that "one race or sex is inherently superior to another race or sex"; that "an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex"; and that "an individual's moral character is necessarily determined by his or her race or sex."[55] Though, read in conjunction with the following provisions, the danger of these concepts becomes clear: They allow lawmakers to hide their true discriminatory purposes behind a veil of colorblindness.[56]

Other parts of the law are more obviously problematic. One provision—barring teachings that "an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously"[57]—could outlaw instruction on implicit bias. Another banned concept—that "meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to

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52 The term is often attributed to legal scholar Kimberlé Crenshaw. *See, e.g.*, Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. Times (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html [https://perma.cc/376F-GMRP].

53 *See* Ed Kilgore, *DeSantis Enlists Litigious Parents for Anti-Woke Crusade*, Intelligencer (Dec. 15, 2021), https://nymag.com/intelligencer/2021/12/desantis-stop-woke-act-lets-parents-sue-schools-for-crt.html [https://perma.cc/UD5D-Q958] (explaining Florida Governor DeSantis's "Stop WOKE Act" and its private enforcement mechanism); *see also* Daigle, *supra* note 48, at 232 ("[C]onservative states often use CRT as an all-encompassing umbrella term that covers seemingly any racial issue.").

54 *See, e.g.*, Iowa Code §§ 261H.8, 279.74 (2023) (containing a near-identical list); Tenn. Code Ann. § 49-6-1019 (2023) (same); Tex. Educ. Code Ann. § 28.0022(a) (West 2023) (same).

55 Okla. Stat. tit. 70, § 24-157(B)(1)(a), (c), (e) (2023).

56 Oklahoma has used this type of argument already in its litigation strategy. *See* Response of Defendants to Motion for Preliminary Injunction at 1–2, Black Emergency Response Team v. O'Connor, No. 21-cv-01022-G (W.D. Okla. Dec. 16, 2021) [hereinafter BERT Defendants' Response Motion] (citing § 24-157(B)(1)(e) alongside Martin Luther King Jr.'s "I Have a Dream" speech to bolster the argument that H. B. 1775 was passed to protect children from race discrimination in school curriculums).

57 Okla. Stat. tit. 70, § 24-157(B)(1)(b) (2023).

oppress members of another race"[58] —relies on a pretextual argument that could excuse away systemic discrimination.[59]

And still other concepts in the law are more vague and could potentially proscribe a wide array of teaching materials, such as the ban on teaching that "members of one race or sex cannot and should not attempt to treat others without respect to race or sex"; that "an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex"; or that "any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex."[60] These provisions have caused the most confusion for teachers.[61] In fact, in providing guidance to its teachers on the provision mandating that "members of one race or sex cannot and should not attempt to treat others without respect to race or sex," one Oklahoma school district openly admitted, "Unfortunately, no one truly knows what this means or can come to an agreement on its meaning."[62]

"Don't Say Gay" laws have also emerged at a rapid pace. In 2022 alone, 319 anti-LGBTQ school bills were introduced in thirty nine states.[63] As of February 2024, seven states censor discussion of LGBTQ people throughout all school curricula, four states restrict how schools can discuss "homosexuality" in specific curricula, and five states require parental notification of LGBTQ-inclusive curricula and allow parents to opt their children out of any perceived LGBTQ-inclusive lessons.[64]

The purpose of "Don't Say Gay" laws is simpler than that of anti-CRT statutes. Florida's H.B. 1557, for example, explicitly states that its aim is to "prohibit[] classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner."[65] It

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[58] *Id.* § 24-157(B)(1)(h).

[59] *See, e.g.,* Note, *"Trading Action for Access": The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156, 2156–57 (2008) (discussing how the "myth of meritocracy" obscures individuals' understanding of structural discrimination); David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 639–41, 650–51 (2019) (describing how "white innocence" ideology justifies racial inequality and conflates white privilege with notions of merit).

[60] OKLA. STAT. tit. 70, § 24-157(B)(1)(d), (f), (g) (2023).

[61] *See* Plaintiffs' Consolidated Reply in Support of Their Motion for a Preliminary Injunction at 4–6, Black Emergency Response Team v. O'Connor, No. 21-cv-01022-G (W.D. Okla. Jan. 13, 2022) [hereinafter BERT Plaintiffs' Reply Brief] (collecting examples of how teachers have struggled to understand and apply the law).

[62] BERT Amended Complaint, *supra* note 6, at ex. 1.

[63] MOVEMENT ADVANCEMENT PROJECT, UNDER FIRE: THE WAR ON LGBTQ PEOPLE IN AMERICA 5 (2023). This figure is a noticeable increase from 2020, when only fifty-nine bills were introduced in twenty-two states. *Id.*

[64] *LGBTQ Curricular Laws*, *supra* note 19.

[65] FLA. STAT. § 1001.42 (2023).

does so by stating that "[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students."[66] Other states have enacted similar provisions.[67] This statutory language, though, is unclear, as what constitutes "classroom instruction" in the lower grades or what is "age-appropriate" in the upper grades is not defined.[68] And that ambiguity has already been exploited, as Florida's Board of Education expanded the law's scope in April 2023 to prohibit the teaching of sexual orientation or gender identity in all grades unless limited exceptions apply.[69]

Given the vague language of anti-CRT and "Don't Say Gay" laws, the practical effect of these statutes is to chill the expression of ideas surrounding racism and sexual orientation in the classroom. Debates around CRT have devolved in some localities into calls to burn books, and in others as an opportunity to limit students' access to information on landmark historical events, such as the Holocaust and the Civil Rights Movement.[70] Though these incidents represent the extremes of these laws' effects, civil rights advocates have noted that anti-CRT statutes can challenge a teacher's ability to accurately teach U.S. historical events or discuss important literary works because of the difficulty in knowing exactly what ideas these laws are prohibiting.[71] "Don't Say Gay" laws too have forced teachers to omit lessons about gay historical figures

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66 Fla. Stat. § 1001.42(8)(c)3 (2023).

67 Alabama's "Don't Say Gay" law, for instance, prohibits teachers from "engag[ing] in classroom discussion or provid[ing] classroom instruction regarding sexual orientation or gender identity in a manner that is not age appropriate or developmentally appropriate." House Bill 322 (codified at Ala. Code § 16-40A-5 (2022)).

68 *See generally* Fla. Stat. § 1001.42 (2023).

69 Kiara Alfonseca, *So-Called 'Don't Say Gay' Rules Expanded Through 12th Grade in Florida*, ABC News (Apr. 19, 2023 11:10 AM), https://abcnews.go.com/Politics/called-dont-gay-rules-expanded-12th-grade-florida/story?id=98691183 [https://perma.cc/WX2Z-9UM7].

70 *See, e.g.,* John Haltiwanger, *Virginia School Board Members Call For Books to be Burned Amid GOP's Campaign Against Schools Teaching About Race and Sexuality*, Bus. Insider (Nov. 10, 2021), https://www.businessinsider.com/virginia-school-board-members-call-for-books-to-be-burned-2021-11 [https://perma.cc/CET8-XYW7] (discussing how the Spotsylvania County School Board in Virginia voted to remove "sexually explicit" books from school libraries and some members advocated for burning the removed books); Camera, *supra* note 17 (noting that after the Texas anti-CRT statute was passed, a school administrator directed teachers who teach about the Holocaust to teach "opposing" perspectives); Jake Epstein, *The First Complaint Filed Under Tennessee's Anti-Critical Race Theory Law was Over a Book Teaching About Martin Luther King Jr.*, Insider (Nov. 29, 2021), https://www.insider.com/tennessee-complaint-filed-anti-critical-race-theory-law-mlk-book-2021-11 [https://perma.cc/3LM4-EXZ5] (describing how a conservative group protested books showing photos of segregated water fountains and discussing Ruby Bridges).

71 Camera, *supra* note 17.

and have led schools to ban books featuring LGBTQ characters.[72] As a result, these laws scare teachers and students away from discussions that they have the right to engage in, and provide a cover for those who are not comfortable discussing or learning about the true state of racism, homophobia, and transphobia in this country.

B. Policy Justifications for Inclusive Curricula

Inclusive curricula—accounting for the experiences of students from a wide array of backgrounds—have several documented benefits. First, inclusive curricula ensure students receive an education truly reflective of the world around them. Second, they create a supportive learning environment for students from marginalized backgrounds that facilitates improved academic performance. Third, inclusive curricula bring public education closer to its ideal of producing a democratic, civil society.

Anti-CRT statutes entrench state literature and history standards that are already dominated by white experiences.[73] Scholars have long noted that K-12 school curricula largely avoid discussions of race, and when racism is discussed, it is often presented as a historical matter, attributable to individualistic bad acts, as opposed to structural inequalities.[74] In one recent study, only half of the students surveyed reported having opportunities to discuss race and racism "sometimes or a great deal" in school.[75] The same is true for LGBTQ students who are accustomed to seeing mostly heterosexual perspectives centered in their studies. As of February 2024, only six states require LGBTQ inclusion in their state curricular standards.[76] In its recent National

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[72] *See* Julian Shen-Berro, *Book Challenges May Have 'Chilling Effects' on New LGBTQ Books in School Libraries, Study Finds*, Chalkbeat (Jan. 11, 2023), https://www.chalkbeat.org/2023/1/11/23549266/book-challenges-bans-school-library-collections-lgbtq-race [https://perma.cc/3PB4-TU7N] (documenting an increase in book challenges and finding that school districts with these challenges are less likely to have LGBTQ books); *see also* Rozsa, *supra* note 14 (describing the effect of this law on Florida schools).

[73] *See* Samantha Washington, *Diversity in Schools Must Include Curriculum*, Century Found. (Sept. 17, 2018), https://tcf.org/content/commentary/diversity-schools-must-include-curriculum [https://perma.cc/78M7-RA28] (arguing that the existing AP curriculum is heavily Eurocentric, and that the Board's decision to narrow the scope of the AP World History exam will exacerbate this imbalance).

[74] Keffrelyn D. Brown, *Race, Racial Cultural Memory and Multicultural Curriculum in an Obama "Post-Racial" U.S.*, 18 Race, Gender & Class 123, 126–28, 130 (2011).

[75] *See* Camera, *supra* note 17 (discussing a report written by the education organization America's Promise Alliance and the Boston University affiliated Center for Promise and GradNation).

[76] *LGBTQ Curricular Laws*, *supra* note 19; *see also* Sabia Prescott, *Six States Have now Passed LGBTQ+ Inclusive Curriculum Legislation—Each with a Different Definition Of 'Inclusion*,' New Am. (June 17, 2021), https://www.newamerica.org/education-policy/

School Climate Survey, GLSEN found that only about 16% of LGBTQ students received instruction that included positive representations of LGBTQ people and issues.[77] When asked if they had access to LGBTQ content in curricular materials, the same percentage of students said that these topics were included in "only a few" of their readings; only 0.4% of students reported that LGBTQ topics were included in many of their readings.[78] Anti-CRT and "Don't Say Gay" laws are harmful because they perpetuate this lack of diversity in school curricula.

When curricula do incorporate the perspectives of marginalized communities, students from those communities experience boosts in personal and academic performance. Scholars have shown time and again that culturally inclusive curricula have led to improvements in various areas, including student motivation, interest and engagement in school content, and self-esteem.[79] A study by Professors Thomas Dee and Emily Penner found that participation in a San Francisco pilot program of ethnic studies courses increased student attendance rates by 21% and GPA by 1.4 points.[80] It is for these reasons that implementation of culturally inclusive curricula has been touted as one way to close the academic achievement gap between white students and Black and Hispanic students.[81]

LGBTQ students similarly need and benefit from inclusive curricula.[82] LGBTQ youth are at higher risk of depression and suicide than their peers and face high rates of bullying in school.[83] LGBTQ

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edcentral/six-states-have-now-passed-lgbtq-inclusive-curriculum-legislationeach-with-a-different-definition-of-inclusion [https://perma.cc/CWU4-R5C5] (describing the differing strategies states have to implement LGBTQ-inclusive curricula).

77 Joseph G. Kosciw, Caitlin M. Clark & Leesh Menard, GLSEN, The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools 49 (2022), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf [https://perma.cc/L9ES-XLFW].

78 *Id.* at 49–50.

79 *See* Brittany Aronson & Judson Laughter, *The Theory and Practice of Culturally Relevant Education: A Synthesis of Research Across Content Areas*, 86 Rev. Educ. Rsch. 163, 197 (2016) (listing studies from the last twenty years publishing these various findings).

80 Thomas S. Dee & Emily K. Penner, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum*, 54 Am. Educ. Rsch. J. 127, 129 (2017).

81 Audrey Kim, *A Culturally Rich Curriculum can Improve Minority Student Achievement*, Thomas B. Fordham Inst. (Feb. 18, 2016), https://fordhaminstitute.org/national/commentary/culturally-rich-curriculum-can-improve-minority-student-achievement [https://perma.cc/E7QQ-XJ2N].

82 The information that follows is from a recent survey of LGBTQ students. For a slightly older, but insightful look at the struggles LGBTQ students have faced from the 1990s through the early 2010s, see Jacob Colling, Comment, *Approaching LGBTQ Students' Ability to Access LGBTQ Websites in Public Schools from a First Amendment and Policy Perspective*, 28 Wis. J. L. Gender & Soc'y 347, 352–56 (2013).

83 Jason D. P. Bird, Lisa Kuhns & Robert Garofalo, *The Impact of Role Models on Health Outcomes for Lesbian, Gay, Bisexual, and Transgender Youth*, 50 J. Adolescent Health 353,

students who experienced discrimination based on their sexual orientation or gender identity are more likely to miss school and perform poorer academically.[84] LGBTQ students who participated in LGBTQ-inclusive curricula, however, are less likely to miss school and more likely to feel connected to their peers and to feel safer in their schools.[85] Most striking, in GLSEN's most recent National School Climate Survey, 67% of LGBTQ students who were taught an LGBTQ-inclusive curriculum stated that their classmates were at least somewhat accepting of LGBTQ people, as compared to 35% of LGBTQ students who were not taught an inclusive curriculum.[86]

Lastly, inclusive curricula reflect public education's role in American democracy,[87] a role stressed by the Supreme Court itself. When outlawing school segregation in *Brown v. Board of Education*, Chief Justice Warren called education the "very foundation of good citizenship" and American schools "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[88] In the decades since *Brown*, the Court has reiterated that schools are vital for "prepar[ing] citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[89] In its most recent school speech case, the Court stressed the importance of public schools as the "nurseries of democracy."[90] And although this flowery rhetoric is dicta to which the Supreme Court's doctrine on education law has never quite lived up,[91] these statements signal a long-

353 (2012); *see also* KOSCIW ET AL., *supra* note 77, at xvi (discussing how 76% of LGBTQ students experienced verbal harassment and 31% experienced assault within the last year due to their sexual orientation or gender identity).

84 *See* KOSCIW ET AL., *supra* note 77, at xviii–xix (reporting that LGBTQ students who faced discrimination at school were two-to-three times as likely to miss school, two times as likely not to pursue post-secondary education and had an average GPA of 2.76–2.83 compared to less-discriminated students with an average GPA of 3.13–3.15); *see also* Michelle L. Page, *Teaching in the Cracks: Using Familiar Pedagogy to Advance LGBTQ-Inclusive Curriculum*, 60 J. ADOLESCENT & ADULT LITERACY 677, 677–78 (2017).

85 Page, *supra* note 84, at 678.

86 KOSCIW ET AL., *supra* note 77, at xxi–xxii.

87 *See* Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 737 (2019) ("[T]he ideas and information [education] shares with students are of special constitutional importance because they are critical for the maintenance of our democratic institutions.").

88 347 U.S. 483, 493 (1954).

89 Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) (declaring public education as "necessary to the maintenance of a democratic political system").

90 Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021).

91 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (rejecting the argument that education is a fundamental right in a case in which the Court found that

held belief that permeates American society: Public education is the great equalizer, necessary to our democracy's survival, because it is available to all students regardless of background.[92]

Because of the benefits conferred by inclusive curricula, it is imperative that courts analyze challenges to curriculum restrictions through a lens that centers students' rights to free speech. Access to inclusive curricula is important to ensure that students receive an accurate education, students are taught in a supportive school environment, and that our public education system continues to have a role in facilitating a democratic society. Students in states with anti-CRT and "Don't Say Gay" laws, however, are missing out on these benefits and have begun to challenge these laws as violating their First Amendment right to receive information.[93] Having laid a foundation for the policy implications of inclusive curricula and statutes restricting access to them, this Note now turns to the legal framework through which challenges to curriculum restrictions should be analyzed.

II
The Supreme Court's Framework for Student Speech

The Supreme Court has left unsettled the question of what standard should be used for challenges to curriculum restrictions. Instead, the Supreme Court's student speech cases are full of contradiction. On the one hand, the Supreme Court has recognized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[94] On the other, this bold pronouncement does not capture the nuance that student speech rights are restricted by a school's role in inculcating students with community values.[95] A plurality of the Court further declared that included in a student's free speech rights is the right to receive information, at least when it comes to accessing library books.[96] And yet, the Court has also allowed schools

inequalities in the finance system of Texas public schools did not violate the Fourteenth Amendment's Equal Protection Clause); Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (restricting a district court's right to remedy desegregation across school district lines in a case that limited courts' abilities to limit the retrenchment of school segregation caused by white flight).

92 Roslin Growe & Paula S. Montgomery, *Educational Equity in America: Is Education the Great Equalizer?*, 25 Pro. Educator 23, 23 (2003) (describing education as a "great equalizer" because of its capacity to provide access to all, regardless of background).

93 *See infra* Section IV.C.

94 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

95 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that the First Amendment permits school restriction of speech that "undermine[s] the school's basic educational mission").

96 Bd. of Educ. v. Pico, 457 U.S. 853, 868–69 (1982) (plurality opinion).

to restrict speech that bears the imprimatur of the school if its decision is "reasonably related to legitimate pedagogical concerns."[97] This Part examines these contradictions more closely, as they lay the groundwork for the curriculum challenge standards created by the circuit courts.

A. Tinker *and the Nature of Students' First Amendment Rights in Schools*

The modern era of student free speech cases starts in 1969 with *Tinker v. Des Moines Independent Community School District*,[98] which "represent[s] the high-water mark of judicial protection of student speech."[99] In siding with student activists who wore black armbands to protest the Vietnam War, the *Tinker* Court recognized that students maintain free speech rights inside their schools.[100] These rights, however, are not coextensive with the free speech rights shared by adults and must be construed "in light of the special characteristics of the school environment."[101] When recognizing a student's First Amendment rights, the *Tinker* Court acknowledged its long line of cases that "emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safegaurds, to prescribe and control conduct in the school."[102] One of these cases was *Epperson v. Arksansas*, which directed courts not to intervene in conflicts arising from the daily operation of school systems unless those conflicts "directly and sharply implicate basic constitutional values."[103] This edict in *Epperson*—and then cited in *Tinker*—sets out the delicate balance that underpins all student speech cases: the interplay between students' First Amendment rights and states' and localities' broad authority to manage school affairs.[104]

Nearly twenty years later, *Bethel School District No. 403 v. Fraser*[105] articulated another reason that student speech rights cannot be as expansive as adults' First Amendment rights: Students' speech rights conflict with the central role public schools play in transmitting

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97 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

98 *Tinker*, 393 U.S. 503.

99 James E. Ryan, *The Supreme Court and Public Schools*, 86 Va. L. Rev. 1335, 1348 (2000).

100 *Tinker*, 393 U.S. at 504, 506.

101 *Id.* at 506.

102 *Id.* at 507 (first citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968); and then citing Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

103 *Epperson*, 393 U.S. at 104.

104 *See* Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 Wake Forest L. Rev. 211, 271 (2013).

105 478 U.S. 675, 683–84 (1986).

values necessary to the development of an informed citizenry.[106] In *Fraser*, a student challenged his school's decision to suspend him for a supposedly "lewd and indecent speech" he gave at a student assembly, alleging that the decision violated his free speech rights.[107] In upholding the school's actions, the Court emphasized that one of the objectives of public education is the "inculcat[ion of] fundamental values" and that the power to determine what type of speech is inappropriate in the classroom or elsewhere on school grounds rests with the school board.[108] This holding was the first effort by the Court to dial back the strength of students' First Amendment rights, as it recognized the wide authority school officials have in regulating what happens inside schoolhouse doors.[109] *Tinker* and *Fraser* thus set the stage for an equally contradictory set of cases that apply more directly in the curriculum context.

B. Pico *and* Hazelwood*: The Right to Receive Information and Speech Bearing the Imprimatur of the School*

The Supreme Court has decided only two cases that directly relate to students' First Amendment challenges to state and local curriculum decisions. First, a plurality of the Court recognized a student's right to receive information in *Board of Education v. Pico*, a challenge to a school board's decision to remove books from its school libraries.[110] In *Pico*, the school board at issue ordered nine books removed from its libraries because the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy" and noted its "moral obligation" to protect children from this "moral danger."[111] In the process of its decision, the board substantially rejected the report of a committee it set up to make recommendations on what the board should do with these books: The board decided to remove all nine books from the libraries, rather than affirming the nuanced position that the committee took—removing only two books, retaining five, and holding mixed opinions on the rest.[112]

A plurality of the Court, led by Justice Brennan, recognized that state and local discretion over education was limited by First Amendment

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106 *See also* Ryan, *supra* note 99, at 1339–40 (describing how many scholars believe that the "inculcative model" of education explains the student speech doctrine).

107 *Fraser*, 478 U.S. at 681–86 (1986).

108 *Id.* at 681, 683 (alteration in original) (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)).

109 *See* Bowman, *supra* note 104, at 269 (describing the Court's holding in *Fraser* as a "further exception" to students' speech rights).

110 457 U.S. 853, 868–69 (1982) (plurality opinion).

111 *Id.* at 857 (alterations in original).

112 *Id.* at 856–58.

constraints in the library context and that the removal of books from a library "directly and sharply implicate[s]" the First Amendment rights of students.[113] The plurality reiterated that the Constitution protects the "right to receive information and ideas" in a variety of contexts because it is a necessary predicate to a person's meaningful exercise of the right to free speech and free press.[114] This right to receive information and ideas applies to students because access to ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[115] Therefore, while school boards still have a significant amount of discretion in regard to the content of school libraries, that discretion is abused if it is exercised in a "narrowly partisan or political manner" to suppress ideas.[116]

When the plurality applied this standard to the board's actions, it suggested that the school board's decision to remove the nine challenged books violated the First Amendment for two reasons.[117] First, the school board removed the books based on its personal values and morals.[118] Second, the board ignored the recommendations of its own advisory committee, which was composed of unbiased librarians and teachers and followed a standardized decisionmaking procedure; the plurality found that departing from that procedure increased the Court's suspicion that the board had acted in an irregular way.[119] Importantly, only four justices agreed that removing a book for viewpoint discrimination would violate the First Amendment, as Justice White concurred in judgment only and did not reach the First Amendment issue.[120] Thus, the case is not binding precedent, and its persuasive effect differs among the circuit courts.[121]

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113 *Id.* at 866.

114 *Id.* at 867–68. The plurality drew on a number of precedents to find support for the notion that there is a "right to receive information" under the First Amendment, most notably, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

115 *Pico*, 457 U.S. at 867–68 (plurality opinion).

116 *Id.* at 870–71.

117 *See id.* at 872. *Pico* has a strange procedural posture. The case rose to the Court after the court of appeals reversed the district court's finding of summary judgment for the school board. *Id.* at 859–61. Justice White only concurred in the judgment and did not join the plurality's opinion. *See id.* at 883 (White, J., concurring in judgment). The plurality therefore did not resolve the case on the merits but affirmed the circuit court's holding that there was a genuine issue of fact that precluded summary judgment. *Id.* at 872 (plurality opinion). *See* Bowman, *supra* note 104, at 263 (discussing the breakdown of judicial support for the Court's opinion in *Pico*).

118 *Pico*, 457 U.S. at 872–74 (plurality opinion).

119 *Id.*

120 *See id.* at 883 (White, J., concurring in judgment) (remanding the case for trial so the district court could make findings on fact and law).

121 *See* Bowman, *supra* note 104, at 263–64 (discussing the different ways the First, Fifth, and Eleventh Circuits have assessed the precedential value of *Pico*).

As a further limitation to the impact of *Pico*, Justice Brennan was careful to cabin the reach of the holding; the case did not compel the Court to pass judgment on a school board's decision around required curriculum materials, but only on the removal of voluntary library books.[122] In fact, the plurality differentiated the rights school boards have in choosing curricular materials from its holding on decisions involving library books: "Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."[123] In the plurality's view, the broad discretion that local school boards have when managing school affairs is at its apex in the curriculum setting, given that curriculum choices allow the school to inculcate community values.[124] However, school libraries serve a distinct function, since they are places of "voluntary inquiry" where students can explore ideas on their own.[125] This seemingly arbitrary line between the library and curriculum contexts would come to divide circuit courts.[126]

The second Supreme Court case relied upon by circuits considering curriculum restrictions is *Hazelwood School District v. Kuhlmeier*,[127] where the Court distinguished between student speech that "happens to occur on the school premises," which falls under *Tinker*, and speech that bears the "imprimatur of the school," which takes place during "school-sponsored . . . expressive activities."[128] For the latter type of speech, the Court established the *Hazelwood* standard: Schools may regulate and even restrict speech that bears the "imprimatur of the school" as long as their actions are "reasonably related to legitimate pedagogical concerns."[129] Applying this standard to the case before it, the Court upheld editorial decisions that a principal had made to a student newspaper because it was produced as part of the school's journalism curriculum and the changes were reasonably related to a legitimate interest in protecting the privacy interests of other students.[130]

The *Hazelwood* Court based its new standard on its belief in a school's role in ensuring students learn and are not exposed to inappropriate materials.[131] Here, the Court again, quoting *Brown v.*

122 *Pico*, 457 U.S. at 861–62 (plurality opinion).
123 *Id.* at 869.
124 *Id.* at 863–64, 869–70.
125 *Id.* at 869; *see also* Ryan, *supra* note 99, at 1351.
126 *See infra* Section III.
127 484 U.S. 260 (1988).
128 *Id.* at 271.
129 *Id.* at 271, 273.
130 *Id.* at 276.
131 *Id.* at 271.

Board of Education, reiterated the value-setting role that schools play: Schools are "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[132] Therefore, courts should only intercede on behalf of students' First Amendment rights when a school's decision to censor curricular speech "has no valid educational purpose."[133]

When viewed together, these cases do not directly instruct lower courts on how they should handle First Amendment challenges to curricular restrictions, but several themes emerge. On the one hand, the Court has recognized that states and school boards have significant discretion to regulate school affairs, in part due to their role in inculcating students with community values. On the other, the Court has also held that this discretion is limited by students' First Amendment rights, which, according to the *Pico* plurality, includes a right to information at least in the school library context. And the Court attempted to balance these interests by establishing the *Hazelwood* standard. However, the contradictions apparent in these cases and the ambiguity about how they apply to curriculum challenges have led to different approaches at the circuit level.

III
The Circuit Split on Curriculum Challenges: Deference v. Balance

Over the past forty-five years, eight circuits have decided non-religious First Amendment cases where students have challenged a state or local school board curriculum restriction. The eight circuits generally employ two tests to adjudicate these issues. First, five circuits recognize that states and school boards have almost unfettered discretion to decide curricular matters absent a clear constitutional violation. The two most recent circuit decisions applying this test, coming from the Fifth and First Circuits, reference this discretion and the government speech doctrine to reject student plaintiffs who wish to rely on *Hazelwood* or *Pico*.[134] The competing approach—adopted by the Ninth, Eleventh, and, to some extent, Eighth Circuits—is to extend the *Pico* right to receive information to curricular decisions and adopt *Hazelwood* to require that

132 *Id.* at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

133 484 U.S. 260, 273 (1988).

134 *See* Griswold v. Driscoll, 616 F.3d 53 (1st Cir. 2010); Chiras v. Miller, 432 F.3d 606 (5th Cir. 2005); *see also* Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981); Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300 (7th Cir. 1980); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976).

state actors' curriculum decisions be reasonably related to a "legitimate pedagogical concern."[135] These two approaches grant differing levels of deference to state and local bodies and result in varying levels of protection for a student's right to receive information. This Part will explore these two different sides to the circuit split.[136]

A. Chiras *and* Griswold*: Deference and the Government Speech Doctrine*

In *Chiras v. Miller*, the Fifth Circuit considered a challenge from a textbook author and a high school student that the State Board of Education's (SBOE) refusal to include an environmental science textbook on its approved textbook list violated their First Amendment rights.[137] After initial administrative decisions that recommended accepting the textbook, the SBOE voted not to adopt the book and proffered no reasons for its decision.[138] The plaintiffs claimed the SBOE improperly engaged in viewpoint discrimination. The circumstantial evidence offered in support included three comments by SBOE members suggesting that they rejected the textbook because it listed economic growth as a cause of environmental problems and did not espouse a position friendly to conservatives and oil and gas industry groups.[139]

The Fifth Circuit ultimately rejected the claims from both the author and student. Turning first to the textbook author's claim, the court deemed the SBOE's decision not to approve the textbook as government speech.[140] The court further held that state and local governments retain wide discretion in education matters and, when choosing curriculum under this authority, they must necessarily choose a viewpoint to

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135 *See* Arce v. Douglas, 793 F.3d 968 (9th Cir. 2015); Virgil v. Sch. Bd., 862 F.2d 1517 (11th Cir. 1989); *see also* Pratt v. Indep. Sch. Dist., 670 F.2d 771, 777 (8th Cir. 1982) (requiring a "substantial and reasonable governmental interest" in a decision preceding *Hazelwood*).

136 This Note primarily deals with the circuit court split because the district courts have not handled many First Amendment challenges based on a student's right to receive information against a state or school board curriculum decision. Few district courts have dealt with these claims outside the eight appellate cases cited in this section, *González v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017)—referenced below in Section IV—and cases filed in the last two years challenging anti-CRT and Don't Say Gay laws. *See supra* Introduction. For two other examples, see Borger v. Bisciglia, 888 F. Supp. 97 (E.D. Wis. 1995) (applying *Hazelwood* to uphold school's decision not to screen *Schindler's List* as part of the curriculum); Esquivel v. San Francisco Unified School Dist., 630 F. Supp. 2d 1055 (N.D. Cal. 2008) (upholding school district's decision to terminate the JROTC program as not violative of *Pico* or *Hazelwood*).

137 *Chiras*, 432 F.3d at 607.

138 *Id.* at 609–10.

139 *Id.*

140 *Id.* at 618.

promote their own values.[141] Therefore, *Hazelwood* did not apply, and the textbook author had no cognizable First Amendment claim.[142] In analyzing the student's claim, the Fifth Circuit held that "students have no constitutional right to compel the Board to select materials of their choosing" because the *Pico* plurality had limited the right to receive information to the context of school libraries and explicitly suggested that it did not apply in the curriculum context.[143] Therefore, the "SBOE [could] permissibly exercise a wide degree of discretion in performing its traditional function of selecting a curriculum which promotes the state's chosen educational policy."[144]

Similarly, in *Griswold v. Driscoll*, the First Circuit considered a challenge from students, teachers, and other interested individuals to changes to a curriculum guide issued by the State Board of Elementary and Secondary Education.[145] The Board had created an advisory curriculum guide on genocide and human rights issues that went through several rounds of revisions and featured material on the Armenian genocide.[146] In its final iteration, the Board revised the guide and removed "contra-genocide perspectives" that were favored by Turkish-American groups.[147] The student plaintiffs claimed that the removal of these perspectives violated their First Amendment right to learn free from viewpoint discrimination.[148] In an opinion written by Justice Souter, sitting by designation after his retirement from the Supreme Court, the First Circuit held that *Pico* should not be extended to limit the discretion of state authorities in setting a curriculum.[149] Justice Souter based his decision on three "strands" of Supreme Court case law: cases addressing the role schools play in inculcating values, the wide discretion states and local bodies are afforded when operating public schools, and the development of the government speech doctrine.[150]

Under the First and Fifth Circuit frameworks, courts afford state entities virtually unfettered discretion to enact curricula as they see fit. In this vein, these circuits are consistent with the pre-*Hazelwood* decisions in the Third, Sixth, and Seventh Circuits.[151]

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141 *Id.* at 614–15.
142 *Id.* at 615–18.
143 *Id.* at 619–20.
144 *Id.* at 620.
145 616 F.3d 53, 54–56 (1st Cir. 2010).
146 *Id.* at 54–55.
147 *Id.* at 55–56.
148 *Id.*
149 *Id.* at 59.
150 *Id.* at 58–59.
151 *See, e.g.*, Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1302–06 (7th Cir. 1980) (upholding a challenge to the removal of books and courses from a curriculum); Seyfried v.

B. Arce*: The Requirement of Legitimate Pedagogical Concern*

The second approach, favored by a minority of circuit courts, applies the *Hazelwood* test to student challenges of curriculum restrictions, a test exemplified by the Ninth Circuit in *Arce v. Douglas*.[152] At issue in *Arce* was an Arizona law that banned certain ethnic studies classes from school curricula—a law which was primarily being enforced against the Tucson School District's Mexican American Studies program.[153] The Ninth Circuit first held that student plaintiffs raised a viable Equal Protection claim because there was sufficient evidence that the statute was at least partially motivated by an intent to discriminate against students based on their race or national origin.[154] And second, the court found that part of the statute was facially overbroad in violation of students' First Amendment rights.[155]

In ruling with the plaintiffs on their First Amendment claim, the Ninth Circuit held that students maintained a First Amendment right to receive ideas in the context of curriculum development.[156] The court then decided to adopt the reasoning in *Hazelwood* that state bodies may only restrict a student's access to curricular materials when those limitations are "reasonably related to legitimate pedagogical concerns."[157] In declining to grant the state even greater discretion in conducting its educational affairs, the court cited *Pico*, holding that the unfettered discretion favored by the First and Fifth Circuits "has the potential to substantially hinder a student's ability to develop the individualized insight and experience needed to meaningfully exercise her rights of speech, press, and political freedom."[158] Applying this standard to the Arizona law at issue, the court found that the statute's threat of chilling the teaching of ethnic studies courses did not further the legitimate

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Walton, 668 F.2d 214, 216–17 (3d Cir. 1981) (upholding the cancellation of a student theatrical production because the conflict did not "directly and sharply implicate" the students' rights (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 578–80 (6th Cir. 1976) (upholding a school board's decision not to approve certain textbooks due to the school board deserving discretion unless they "cast a pall of orthodoxy over the classroom" (quoting Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967))).

152 793 F.3d 968 (9th Cir. 2015).

153 Specifically, H.B. 2281 banned classes that: (1) "Promote the overthrow of the United States government," (2) "Promote resentment toward a race or class of people," (3) "Are designed primarily for pupils of a particular ethnic group," or (4) "Advocate ethnic solidarity instead of the treatment of pupils as individuals." *Id.* at 973 (quoting Ariz. Rev. Stat. Ann. §15-122).

154 *Arce*, 793 F.3d at 977.

155 *Id.* at 986.

156 *Id.* at 981.

157 *Id.* at 983 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

158 *Id.* at 983.

pedagogical purpose the statute was supposedly designed to further, which was to prohibit courses that promote racism. Therefore, the court held part of the statute unconstitutional.[159]

Two other circuits have adopted similar standards, with mixed results in favor of both students and school boards. In *Virgil v. School Board of Columbia County*,[160] the Eleventh Circuit was the first and only circuit for over twenty-five years to apply the *Hazelwood* test to a curricular challenge brought by a student.[161] In assessing a school board's removal of a book from its curriculum, the court found that the board was motivated to remove the book because of its references to sexuality and its vulgar language, amounting to a legitimate pedagogical concern.[162] The court then extensively cited multiple passages from the book and analyzed the ages of the students in the affected class to determine that this decision was reasonably related to that concern.[163]

The Eighth Circuit established a similar standard before *Hazelwood* or *Pico* was decided in *Pratt v. Independent School District No. 831*.[164] In striking down a school board decision to remove two film materials from school curricula, the court held that school boards must establish a "substantial and reasonable government interest" for interfering with a student's right to receive information.[165] In applying its standard, the Eighth Circuit thoroughly analyzed the school board's proferred justifications for its decision before discrediting them. The court did not believe the school board truly removed the films due to their violence—as the board claimed it did—because the court determined that the film did not contain gratuitous violence and the board had never previously been concerned with violence in its curricula.[166] The court instead determined that the board acted out of fear that the content posed a threat to students' religious beliefs and family values, which was an impermissible government interest.[167]

In these three cases, the Ninth, Eleventh, and Eighth Circuits found a better method to analyze curriculum challenges. These circuits did not abandon the deference that states deserve in educational areas. Rather, they recognized that in addition to this deference, states still have an

159 Arce v. Douglas, 793 F.3d 968, 986 (9th Cir. 2015).

160 862 F.2d 1517, 1522 (11th Cir. 1989).

161 *See* Bowman, *supra* note 104, at 248 (discussing how, as of 2013, only two circuits had employed the *Hazelwood* test to curricular cases—the Eleventh Circuit in *Virgil* and the Ninth Circuit in a challenge brought by a non-student plaintiff).

162 *Virgil*, 862 F.2d at 1522–23.

163 *Id.* at 1523–25.

164 670 F.2d 771 (8th Cir. 1982).

165 *Id.* at 777.

166 *Id.* at 777–78.

167 *Id.* at 778–79.

obligation to uphold constitutional rights,[168] which in their judgment included the right to receive information in curricular contexts. These three circuits then held that the best way to properly balance these competing interests was to adopt the *Hazelwood* test (or, in the case of the Eighth Circuit, a test substantially similar to *Hazelwood*). Further, it is notable that in these three cases, the outcomes were more balanced than those resulting from the First and Fifth Circuit framework: The student plaintiffs won in *Pratt* and *Arce*, and the defendant school board won in *Virgil*. These results suggest that the *Arce* approach is more favorable to students' rights, but not so much so that this standard risks replacing local expertise with judicial judgments.[169] Therefore, as explored below in Section IV, the *Arce* approach is the more appropriate judicial standard for curriculum challenges because it balances students' rights and state interests.

IV
A Curriculum Challenge Standard that Better Balances School and Student Interests

The approach that better centers students' rights to access diverse curricula is one that follows the model laid out by the Ninth Circuit in *Arce*. At the outset, courts should extend the *Pico* right to receive information to cover curricular contexts. Then, in considering challenges to that right, courts should make a two-step inquiry. First, they should require that state and local educational bodies justify that their curriculum restriction decisions were motivated by a "legitimate pedagogical concern."[170] Second, courts should then inquire if such restrictions are "reasonably related" to that legitimate pedagogical concern.[171]

This Part explains why the *Arce* standard is the best one to properly protect students' rights, while not impermissibly intruding on the state's mandate to control educational matters. Section IV.A starts by discussing what the First and Fifth Circuits got wrong in *Griswold* and *Chiras*: They created a standard that was too deferential

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168 *See, e.g.*, *id.* at 779 ("In sum, while we are mindful that our role in reviewing the decisions of local school authorities is limited, we also have an obligation to uphold the Constitution to protect the fundamental rights of all citizens.").

169 *See, e.g.*, Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1525 (11th Cir. 1989) ("We decide today only that the Board's removal of these works from the curriculum did not violate the Constitution . . . . [W]e do not endorse the Board's decision . . . . However, having concluded that there is no constitutional violation, our role is not to second guess the wisdom of the Board's action.")

170 *See supra* note 157 and accompanying text.

171 *Id.*

to states and localities and improperly applied the government speech doctrine. Section IV.B then explains why the Ninth Circuit got it right in *Arce*: It created a standard that requires a justification, analyzes the reasonableness of that justification, and considers the process by which the curriculum decision was made. Lastly, Section IV.C demonstrates how the *Arce* standard can be used in practice by applying it to a current anti-CRT statute.

A. Refuting the First and Fifth Circuits

1. The Limits of Deference

If the *Arce* standard were applied nationwide, it would need to be employed carefully to find the right balance of respecting students' constitutional rights and states' interests in deciding educational matters as they see fit. This standard is one that aims not to flood the courts and call every curricular decision into question. However, it is also one that does not blindly defer to state authorities at the risk of harming students' rights, as the Fifth and First Circuits' approaches do.

Both the Fifth and First Circuits heavily emphasized the importance of deference to states in their decisions. In *Chiras*, the Fifth Circuit began its analysis by stating that, "Any discussion of the constitutionality of a state's decision to reject a textbook for its public schools must begin with the recognition that the states enjoy broad discretionary powers in the field of public education. Central among these discretionary powers is the authority to establish public school curricula."[172] The First Circuit similarly relied on two deferential strands of case law in *Griswold*: one that emphasized a school's role in instilling fundamental values in its students and another that acknowledged the considerable discretion generally afforded to states and local school boards in educational matters.[173] The circuits' deferential instincts are understandable given the Supreme Court's belief that education is mostly the domain of states.[174] However, the First and Fifth Circuits have gone too far in granting excessive deference to local authorities.

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[172] Chiras v. Miller, 432 F.3d 606, 611 (5th Cir. 2005) (upholding the State Board of Education's refusal to include an environmental science textbook on its approved textbook list).

[173] Griswold v. Driscoll, 616 F.3d 53, 58 (1st Cir. 2010) (rejecting challenges to the State Board's advisory curriculum guide).

[174] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities.").

By closing the courthouse doors on students' right to receive information claims, the First and Fifth Circuits have strayed from doctrinal lessons in education and constitutional case law that urge courts to correct states on educational matters when important constitutional rights are at stake. Certainly, the most famous example is *Brown v. Board of Education*.[175] But courts have also stepped in to prohibit schools from ordering students to say the pledge of allegiance,[176] to block schools from sponsoring school prayer,[177] and to constrain states from inhibiting the teaching of evolution[178] or mandating the teaching of creationism.[179] The student speech cases also limit state deference by finding that schools can infringe on a student's free speech rights only under certain circumstances.[180] These cases stand for the principle that a student retains speech rights, but these rights are not unlimited.[181] Yet there is a necessary corollary to this principle: In applying the First Amendment to the school context, states and localities retain their discretion in educational matters, but this discretion is also not unlimited. The *Arce* standard respects this caselaw by recognizing that a student's right to receive information is fundamental, but not absolute—just as states' and localities' discretion to set curriculum is important but not boundless.

The *Arce* standard also follows the tradition set out in *Carolene Products* of limited judicial intervention into the political process when constitutional rights are at stake.[182] As the Supreme Court has stated in other contexts, constitutional rights should not be subject to a majority vote.[183] Instead, courts play an important role in our democracy by checking the political process and striking down majoritarian decisions that upend constitutional rights. Ensuring that curricula properly represent diverse communities also promotes democratic values by preparing students to be well-informed, future citizens.[184] Thus, judicial intervention into curricular decisions is as justified as the courts' regular interventions into disputes over voting and the democratic process—to

175 *Brown*, 347 U.S. 483.

176 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

177 Engel v. Vitale, 370 U.S. 421, 421 (1962).

178 *Epperson*, 393 U.S. at 97.

179 Edwards v. Aguillard, 482 U.S. 578, 578 (1987).

180 *See supra* Section II.

181 *See* Bowman, *supra* note 104, at 230–31 (discussing the Court's student speech cases).

182 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.").

183 *Cf.* Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 736–37 (1964) (striking down an apportionment plan that violated one person, one vote, even though it was passed through a voter initiative).

184 *See supra* notes 87–92 and accompanying text.

fix an issue in the political process with the hope that the political process can then realign and properly police itself moving forward.[185] Under the *Arce* standard, state legislatures and local school boards would still play the primary role in setting education policy, and, ideally, the democratic process would be the primary channel to overturn restrictive curriculum decisions. However, in states and localities where the majority is unwilling to protect these rights, courts have a duty to fulfill their role as a counter-majoritarian check on the political process by striking down restrictions that undermine a student's right to receive information. The *Arce* standard therefore does not represent a radical jurisprudential shift, but rather a new application of a traditional exercise of judicial power.

In contrast to the approach followed by the First and Fifth Circuits, the *Arce* standard employs deference sparingly. The first prong of the *Arce* inquiry requires courts to largely defer to a state's conception of "legitimate pedagogical concern," as they have in the past.[186] If courts follow the case law, they would not be free to substitute states' decisions for their own pedagogical concerns; instead, they would only strike down justifications that were overtly partisan or post-hoc.[187] In the second prong, where courts assess if the concern is reasonably related to the curricular decision at hand, deference would also limit, but not eliminate, the analysis courts would undertake: Courts would not ask if the curriculum decision matches their own policy preferences, but rather analyze if the justification provided and decision made are in accordance.[188] If they are, then courts must defer to that policy decision, absent evidence of pretext or procedural irregularity.[189] However, the *Arce* standard can only employ the proper balance of deference if one other aspect of the First and Fifth Circuit's reasoning is rejected: the classification of curriculum decisions as government speech.

2. The Inapplicability of the Government Speech Doctrine

In addition to their deference rationale, the First and Fifth Circuits relied on the government speech doctrine in *Griswold* and *Chiras*.[190]

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185 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87, 102–03 (1980) (arguing for a "participation-oriented, representation-reinforcing" model of judicial review that supports representative democracy by policing the means by which representatives are chosen and ensuring those representatives truly are representative); *see also Carolene Prods.*, 304 U.S. at 152 n.4 (suggesting that judicial review could be appropriate when reviewing restrictions on the right to vote).

186 *See infra* Section IV.B.1.

187 *See infra* notes 214–15 and accompanying text.

188 *See infra* Section IV.B.2.

189 *See infra* Sections IV.B.2, IV.B.3.

190 *See infra* notes 193–99 and accompanying text.

The doctrine holds that when the government wishes to speak, it has the right to do so without fear of First Amendment challenges of viewpoint discrimination.[191] An application to public schools may, at first, seem obvious given that public schools are government entities and have a large amount of discretion in setting the message that they want their students to learn.[192] The Fifth and First Circuits certainly seem to have bought into that argument.

In applying the government speech doctrine in *Chiras*, the Fifth Circuit relied upon several Supreme Court precedents that suggested that the government speech doctrine could apply to educational institutions when they determine the content of the education they provide.[193] The court decided that when the State Board of Education creates a curriculum, it is acting under Texas law "to promote the state's chosen message through the Board's educational policy" and, in doing so, it is necessary for the Board to exercise editorial judgment over which textbooks to choose.[194] Thus, the choice of curriculum is government speech, and the textbook author, one of the plaintiffs in the suit, had no First Amendment claim to assert.[195] Importantly, however, the Fifth Circuit only used the government speech doctrine to block the textbook author's claim, not the student's—stating that the government speech holding "does not necessarily preclude . . . [the student's] asserted right . . . to receive the information in [the] textbook from the school."[196] While the Fifth Circuit went on to deny the student's claim on other grounds, *Chiras* suggests that the government speech doctrine should not be a barrier to claims predicated on a right to receive information.[197]

As for the First Circuit, it did not offer a convincing explanation for why the government speech doctrine should apply to permit

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191 *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (describing how the Free Speech Clause restricts government regulation of private speech but not government speech because the government has the right to "speak for itself" (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000))); *see also* Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 33 (2017) (discussing how government speech is not subject to the viewpoint neutrality requirement).

192 *See supra* Section IV.A; *see also* Bowman, *supra* note 104, at 249–50 (presenting some arguments for why government speech could apply to schools).

193 Chiras v. Miller, 432 F.3d 606, 612–15 (5th Cir. 2005) (first citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); and then citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998)).

194 *Id.* at 614–15.

195 *Id.* at 618.

196 *Id.*; *see also id.* ("Our conclusion that the SBOE's selection and use of textbooks in public school classrooms is government speech and not a forum for First Amendment purposes means only that [the textbook author] may not assert a cognizable right of access to the approved list of textbooks.").

197 *Id.* at 620.

the curriculum restriction in *Griswold*. The court simply cited the doctrine as one of three that persuaded it against extending *Pico* to curriculum settings.[198] In fact, Justice Souter did not explicitly hold that the curriculum guide in question was government speech; he instead acted cautiously because the government speech doctrine was in its "adolescent state of imprecision."[199] Therefore, while both the First and Fifth Circuits found some appeal in the government speech doctrine's applicability to curriculum challenges, both cases indicate the courts' hesitancy in relying too heavily on the doctrine.

The courts' reluctance is for good reason. As Professor Kristi Bowman argues, though the government speech doctrine may seem like a good fit for school curriculum decisions, it should not be applied in this context.[200] Allowing schools to be unassailable in their curriculum choices would undermine the mission of public schools to prepare students to be citizens in our democratic society.[201] As noted above, the Court has never recognized that school speech is unlimited; in fact, it has time and again rejected school decisions that would compel certain views about religion and patriotism.[202] The Court has been protective of students' speech and what students learn because it has recognized the fundamental role that schools play in exposing students to new ideas and preparing them to live in a diverse society.[203] If the government had the right to be unreasonably restrictive in its discretion about what ideas it exposes students to, it would be failing in this duty. Thus, the doctrine would pair poorly with the goal of exposing students to the diverse views that exist in a democratic society. Instead of unlimited viewpoint discrimination under a government speech model, a better fit would be limited viewpoint discrimination under the *Arce* standard.

B. The Strengths of the Arce *Standard*

In contrast to the First and Fifth Circuits, the *Arce* standard is preferred not only because it limits state discretion but also because it furthers important principles of constitutional law. This Section discuss the two parts of the *Arce* standard in turn: the requirement that states

198 Griswold v. Driscoll, 616 F.3d 53, 58–59 (1st Cir. 2010).

199 *See id.* at 59 n.6 ("We need not decide that the Guide is government speech to resolve this case, but . . . while the doctrine is still at an adolescent stage of imprecision, it would run counter to the thrust of Supreme Court authority . . . to extend Pico's even less precise rule to . . . school curriculums." (citation omitted)).

200 *See* Bowman, *supra* note 104, at 214 (arguing that of all the possible education applications, government speech should only attach to teachers' instructional speech).

201 *Id.* at 250–51.

202 *See supra* notes 175–81 and accompanying text.

203 *See supra* notes 88–91 and accompanying text.

and localities justify that their curriculum restriction decisions were motivated by a "legitimate pedagogical concern" and the requirement that this justification be "reasonably related" to that concern.[204] It then turns to a third, implicit part of the test that courts may consider helpful under the reasonableness requirement: the process by which states and localities came to their decision.

1. The Justification Requirement

The first step under *Arce* is that states and localities must prove that a "legitimate pedagogical concern" motivated their curriculum decision.[205] This justification requirement is important to promote non-arbitrary decisionmaking and accountability. If one of the benefits of a deferential standard is that the political process exists to hold state and local officials accountable, then the public needs to know why political actors decided to act the way they did. In addition, because curriculum decisions can often involve vague standards about what is or is not allowed, clear justifications allow teachers and students to know exactly what type of speech is permitted, limiting the chill on speech that will inevitably result from even proper curriculum restrictions.[206]

Justifying state action is a concept well-established throughout constitutional law,[207] and its application to curriculum cases finds support in several of the cases discussed above. For example, the *Pico* plurality found that the school board's failure to give reasons for its decision was evidence that the school board had acted improperly in removing the books from its library.[208] Further, in *Pratt*, the Eighth Circuit held that the First Amendment requires a school board to act such that the "reasons for its decision are apparent to those affected" and by failing to state reasons for its curriculum restriction, the board had "failed to clearly inform students and teachers what it was proscribing."[209]

In assessing if a justification is a "legitimate pedagogical concern," courts can find guidance in the case law. Justifications that courts

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204 Arce v. Douglas, 793 F.3d 968, 983 (9th Cir. 2015).

205 *Id.*

206 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603–04 (1967) ("When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone. . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed.").

207 *See, e.g.*, Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994) ("[C]onstitutional adjudication . . . is about defining the kind of reasons that are impermissible justifications for state action in different spheres.").

208 Bd. of Educ. v. Pico, 457 U.S. 853, 873 (1982) (plurality opinion).

209 Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 778–79 (8th Cir. 1982).

have accepted as valid pedagogical concerns include: a desire to shield students from content that contains overly sexual content;[210] an intention to suppress excessively vulgar[211] or sexual[212] language; and an educational goal of reducing racism in schools.[213] On the other hand, *Pico* teaches that states and localities cannot assert a legitimate pedagogical concern that is "narrowly partisan or political."[214] And *Pratt* teaches that a justification must be given at the time of the curricular decision, and courts should not accept post-hoc rationales.[215] However, a justification alone is not sufficient to ensure a student's rights are protected; courts must also critically analyze that justification.

2. The Reasonableness Requirement and Rooting Out Pretext

The second step under *Arce* is that courts must examine if the curricular decision is "reasonably related" to the justification given.[216] Like the justification requirement, a reasonableness inquiry finds support throughout other strands of constitutional law.[217] This step involves carefully analyzing justifications for state action to ensure they make sense given the nature of the restricted curricular material, requiring a fact-specific inquiry into the material. This approach finds basis in *Arce*, *Virgil*, and *Pratt*, where each court's decision included a careful analysis of the restricted curricula to determine if the material truly was removed for racist, vulgar, or violent reasons.[218]

Another aspect of this analysis, however, is not only to determine if the stated justification is relevant to the challenged context, but also to analyze if in fact that justification is pretext for impermissible animus.[219] In this way, the reasonableness requirement under the First

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210 Seyfried v. Walton, 668 F.2d 214, 215–16 (3d Cir. 1981).

211 Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1518 (11th Cir. 1989).

212 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

213 Arce v. Douglas, 793 F.3d 968, 985 (9th Cir. 2015).

214 Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982) (plurality opinion).

215 The school board in *Pratt* removed curricular films but gave no justification for their decision at the time. Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 774 (8th Cir. 1982). When litigation started, the school board attempted to assert that they removed the film because it contained an undue emphasis on violence. *Id.* at 775. The Eighth Circuit repeatedly signaled disapproval of this post-hoc reasoning, mentioning that it was only given when the district court asked. *See id.* at 777–79 (noting that the school board gave no reasons at the time of its decision).

216 *Arce*, 793 F.3d. at 983.

217 *See* Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. Rev. 1143, 1192 (2022) ("Constitutional law isn't just about the giving of justifications; . . . courts usually evaluate whether a challenged program actually furthers its supposed justification.").

218 *See supra* Section III.B.

219 Impermissible animus here could encompass traditional suspect classifications governed by Equal Protection Clause jurisprudence, like race and national origin, but could

Amendment framework may overlap significantly with an inquiry into discriminatory intent under an Equal Protection claim, and a finding of discriminatory intent could indicate that a curricular decision is not reasonably related to a legitimate pedagogical concern.

A recent example of this type of analytical overlap emerged in *González v. Douglas*,[220] a 2017 follow-up to *Arce*, when the case was on remand from the Ninth Circuit. In this continuation of the challenge against Arizona's law to prohibit ethnic studies courses, the district court cited *Pico* for its holding that a plaintiff may establish a First Amendment violation "by proving that the reasons offered by the state, though pedagogically legitimate on their face, in fact serve to mask other illicit motivations."[221] Such reasons could include narrowly partisan, political, or racist purposes, as a majority of the justices in *Pico* recognized.[222]

Applying this close analysis to the facts at hand, the district court found that the stated purpose of the Arizona law—reducing racism in schools—was pretextual.[223] The court first came to this conclusion by citing the same evidence it had used to determine that there was discriminatory intent under the Fourteenth Amendment[224]—circumstantial evidence using the five *Arlington Heights* factors.[225] The circumstantial evidence in this case included a key state legislator's racist blog comments made around the time of the bill's passage and legislative history that contained overtly discriminatory statements.[226] However, for the First Amendment claim, the court looked beyond racially discriminatory intent. It considered a legislator's statements that demonstrated that the statute was passed "to make political gains."[227] Those statements included descriptions of his "'eternal' 'war' against the" Tucson ethnic studies program, which "expose[d] his lack of

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also include broader protections against statutes motivated by animus against any definable group. *See* Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (striking down a federal law passed with the interest in discriminating against hippies); *see* Yoshino, *supra* note 28, at 760 (arguing that *Moreno* stands for the notion that "legislation motivated by animus, by nature against reason," cannot be considered rational).

220 269 F. Supp. 3d 948 (D. Ariz. 2017).

221 *Id.* at 972 (citing Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion)).

222 *See id.* at 972–73 (citing *Pico*, 457 U.S. at 870–71, 907) (explaining that the four-member plurality and Justice Rehnquist in dissent separately held these beliefs).

223 *Id.* at 973.

224 *Id.* at 972–73 ("The same evidence supporting the conclusion that defendants violated plaintiffs' Fourteenth Amendment rights also supports the conclusion that defendants enacted and enforced [the statute] for illicit reasons, rather than out of pedagogical concern.").

225 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

226 *González*, 269 F. Supp. 3d at 965–67.

227 *Id.* at 973–74.

interest in the welfare of [Tucson] students, who would be the focus of legitimate pedagogical concern if one existed."[228] The court concluded that the purported justification for the statute, reducing racism, was not only unsupported by the evidence but also was mere pretext for the legislature's racially discriminatory and political purposes.[229] Thus, the ban on ethnic studies not only violated the Equal Protection Clause but also violated the students' First Amendment right to receive information because of the lack of a legitimate pedagogical purpose for the law.[230]

González provides an instructive model for courts to conduct a thorough examination of a state's justifications to ensure they are not pretextual. The *González* court demonstrates that it is proper to consider many pieces of evidence in looking for ulterior motives, both in and outside formal legislative history records. The case also shows that while the First and Fourteenth Amendment claims overlap at times, the First Amendment framework may allow courts to consider additional evidence that an Equal Protection claim would not find relevant—such as evidence of bare partisanship. One other factor may be relevant to this inquiry and indicate the presence of a pretextual justification: evidence of an irregular decisionmaking process.

3. The Importance of Process

A final consideration courts should examine when applying the *Arce* standard is the process by which the state or school board made its curriculum decision. Although not formally a component of the *Arce* two-part test, a procedural analysis could be part of the broader reasonableness inquiry for three reasons.

First, constitutional law has generally allowed the judiciary to forgo its deference to political actors and intervene when the political process for a substantive decision has been irregular.[231] Second, a procedural inquiry could be a welcome tool as it allows courts to assess the propriety of curricular decisions along an apolitical axis. And third, procedural analyses are already evident in the curriculum challenge cases. In *Pico*, for example, the plurality admitted that its holding may have come out differently if the school board "had employed established, regular, and facially unbiased procedures" for reviewing

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228 *Id.* at 974.

229 *Id.*

230 *See id.* at 972–74.

231 *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (suggesting that heightened judicial scrutiny is warranted when the political process has been unable to repeal undesirable legislation); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 269 (1977) (holding that departures from usual procedures can be evidence of discriminatory purpose in the context of Equal Protection claims).

the challenged books in question.[232] Instead, the plurality found that "evidence on this [procedural] issue sheds further light on the issue of [the school board's] motivations."[233] Similarly, the First Circuit invoked procedural reasons as to why it upheld the state board's revisions of the curriculum guide in *Griswold*.[234] Justice Souter differentiated the case from *Pico*, noting that the curriculum revisions before him were made by the same authority who included them earlier, whereas in *Pico*, an external school board irregularly intervened in decisions it does not normally make.[235] Without the "missing step" of "a superior official overruling the authority that determines content in the normal course," there was no specter of "official suppression of ideas."[236]

So, what should courts look for when determining proper process? Under a procedural inquiry, no specific procedure should be expected of decisionmakers; rather, evidence that a decisionmaker deviated from its own established procedure for a curricular decision should create a suspicion that the decisionmaker has acted impermissibly. In cases involving school boards, courts should look to see if the school boards first tasked a committee of subject matter experts, such as teachers or librarians, to analyze the challenged material and present a recommendation to the board. If the board then decided to reject the experts' recommendations, as in *Pico*, courts may wish to be critical about assessing why the school board deviated from the process it set out.[237] Where state actors are the decisionmakers, courts should similarly analyze the process used to ensure that normal procedures are followed.

González demonstrates one example of what this inquiry could look like at the state level. In coming to its conclusion that there was circumstantial evidence of discriminatory intent in the anti-ethnic studies Arizona law, the *González* court considered the fact that the statute was passed to target a single ethnic studies course in use in one school district.[238] Using the state defendants' testimony, the court noted that this was unusual because the state would typically address an alleged problem with one school program on the local level, not

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232 Bd. of Educ. v. Pico, 457 U.S. 853, 874 (1982) (plurality opinion).

233 *Id.*

234 Griswold v. Driscoll, 616 F.3d 53, 57–58 (1st Cir. 2010) (citing *Pico*, 457 U.S. at 856, 860, 862, 871, 874–75).

235 *Id.*

236 *Id.*

237 *Compare* Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 779 (8th Cir. 1982) (siding with the student plaintiffs in a case where the school board disregarded the recommendation of its advisory committee and did not explain its disagreement with the committee) *with* Virgil v. Sch. Bd. of Columbia Cnty., 862 F.2d 1517, 1519 (11th Cir. 1989) (finding for the school board despite the fact that it disagreed with the recommendations of its advisory committee).

238 González v. Douglas, 269 F. Supp. 3d 948, 966 (D. Ariz. 2017).

through a statewide law.[239] Beyond this example, one could also imagine that a legislature or state body passing a statute through an atypical legislative process or in a rushed timeframe could be evidence of irregular procedure. Such an argument will be made in Section IV.C as I demonstrate how all three aspects of the *Arce* standard can be applied today to an anti-CRT law.[240]

C. Anti-CRT and "Don't Say Gay" Statutes Under the Arce *Standard*

To demonstrate how the *Arce* standard would apply to a current restrictive curriculum decision, this Note concludes by applying the standard to Oklahoma's anti-CRT statute, H.B. 1775. Assume that the Tenth Circuit, under which Oklahoma falls, has adopted the *Arce* standard and reviews arguments that are currently being presented regarding the constitutionality of H.B. 1775.[241] While I limit this section to an application of an anti-CRT statute, the same analysis could apply to "Don't Say Gay" laws as well; in fact, some plaintiffs have already asserted similar arguments.[242]

Student plaintiffs would start by alleging that H.B. 1775 violates their right to receive information because the statute has chilled expression in their classrooms and restricted their access to books portraying communities of color and diverse perspectives.[243] To counter this allegation, the state would need to show that H.B. 1775's restriction on the teaching of divisive concepts was reasonably related to a legitimate pedagogical purpose.[244]

To do so, Oklahoma has argued that the law's legitimate pedagogical purpose is "protecting children from race and sex discrimination in school curriculum."[245] A court would likely defer to this justification under *Arce*—in fact, it matches the purported pedagogical concern that was accepted in that case: reducing racism in schools.[246] Next, to prove that H.B. 1775 is reasonably related to that pedagogical concern, the state

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239 *Id.*

240 *See infra* notes 257–61.

241 As this Note heads to publication, the district court considering the challenge to H.B. 1775 has yet to issue a substantive order on the legal issues in the case. *See generally* Black Emergency Response Team v. O'Connor, No. 5:21-cv-1022-G (W.D. Okla. filed Nov. 9, 2021). Even if the district court rejects the arguments below in the instant case, I provide the analysis in this Section to demonstrate how the *Arce* standard can be applied to any set of facts in challenges to other anti-CRT or "Don't Say Gay" statutes.

242 *See* M.A. Florida Plaintiff's Motion to Dismiss Memorandum, *supra* note 11.

243 *See supra* notes 6–8 and accompanying text.

244 *See supra* notes 205–06 and accompanying text.

245 BERT Defendants' Response Motion, *supra* note 56, at 2.

246 *See supra* note 213 and accompanying text.

has argued that legislators were motivated to vote for the bill because they had heard from constituents who were worried about CRT in their schools.[247] Therefore, the state passed a law that prevented schools from teaching children that "character is necessarily determined by his or her race or sex," along with other racist and sexist concepts.[248]

Plaintiffs, however, have a strong counterargument that H.B. 1775 is not reasonably related to a legitimate pedagogical concern. First, plaintiffs have attacked the direct relevance of the asserted reason H.B. 1775 was passed. They have alleged that there is no evidence in the legislative record to substantiate any of the racism that the law is meant to address.[249] They have also argued that the Act's vague language in fact undermines the alleged interest in curbing discrimination by instead chilling any discussion about racism, preventing students from learning about discrimination and the ways to address it.[250] A court could easily analogize to *Arce* and find that a law, such as H.B. 1775, restricting speech about diverse communities cannot be reasonably justified by a purported rationale to prevent racism.[251]

In addition, plaintiffs could present evidence that suggests that the state's asserted justification is pretextual and the statute was enacted for impermissible racial and political reasons. Several times during debate on the bill, state legislators used racist or coded language when expressing why they supported it.[252] On one occasion, a representative compared Black Lives Matter (BLM) to the Ku Klux Klan, and in response, the co-sponsor of H.B. 1775 agreed that BLM met the definition of a "terrorist group."[253] Another representative showed his support for the bill by stating, "Police brutality is a lie. . . . Those are the kind of lies that we must end."[254] A court could easily determine that as in *González*, this context indicates not only an Equal Protection violation, but also a First Amendment violation.[255]

Finally, the plaintiffs have also argued that H.B. 1775 was passed through an irregular procedure. First, making a similar argument to that made by the *González* court,[256] plaintiffs have pleaded that H.B. 1775 is

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247 *See* BERT Defendants' Response Motion, *supra* note 56, at 5 (citing testimony from several sources and flagging locations in associated exhibits).

248 *Id.* at 1 (citing OKLA. STAT. tit. 70, § 24-157(B)(1)(e) (2023)).

249 BERT Amended Complaint, *supra* note 6, at 56.

250 BERT Plaintiffs' Reply Brief, *supra* note 61, at 16.

251 *See supra* note 159 and accompanying text.

252 *See* BERT Amended Complaint, *supra* note 6, at 52–54 (collecting legislator statements).

253 *Id.* at 54.

254 *Id.*

255 *See supra* notes 220–30 and accompanying text.

256 *See supra* notes 238–40 and accompanying text.

irregular because it is a rare instance where the state has interfered in the typically local nature of curriculum decisions.[257] Second, the legislature took an unusual approach when passing the bill. H.B. 1775 was originally introduced in January 2021 with an entirely different purpose: ensuring that schools were prepared for medical emergencies.[258] In March 2021, two state legislators co-opted the bill, changing its title and provisions to its current form.[259] When lawmakers agreed that the rewritten bill violated the legislature's "germaneness" rule, Republicans voted to suspend this rule to enable the bill to proceed and ultimately pass.[260] Third, even the regulations implementing H.B. 1775 went through a rushed process to be enacted. When the State Board of Education was considering the regulations at a board meeting, one member of the board critiqued the process because the regulations were handed to board members only minutes before the meeting started.[261] The process was so "rushed and unorthodox" that the board was forced to revote on the enacted regulations a month later to fix technical errors.[262] All of these procedural anomalies could be used in conjunction with the evidence above to determine that Oklahoma's given justification is pretextual and conclude that the statute was actually motivated by improper racial animus and partisan considerations.

In sum, it is likely that a court would find that H.B. 1775 fails the *Arce* standard because the statute is not "reasonably related to a legitimate pedagogical concern" and improperly restrains a student's First Amendment right to receive information. In fact, if a court is at all uncertain as to this conclusion, it should look no further than *Pico* itself. *Pico* explicitly considered that students' First Amendment rights would be violated if a school board, "motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration."[263] This concern is no longer hypothetical; it is a reality to which students in Oklahoma and other states with anti-CRT laws can

257 BERT Amended Complaint, *supra* note 6, at 57 ("70 O.S. § 18-101 states that 'maximum public autonomy and responsibility for public education should remain with the local school districts and the patrons of such districts.'").

258 *Id.* at 49.

259 *Id.*

260 House Rules of the Oklahoma House of Representatives, 58th Leg. §§ 7.6(d), 8.13 (2021–22); *see also* Matt Trotter, *GOP Lawmakers Send Stitt Bill to Ban Critical Race Theory in Oklahoma Schools*, Tulsa Pub. Radio (Apr. 29, 2021), https://www.publicradiotulsa.org/local-regional/2021-04-29/gop-lawmakers-send-stitt-bill-to-ban-critical-race-theory-in-oklahoma-schools#stream/0 [https://perma.cc/F4AJ-R24E].

261 BERT Amended Complaint, *supra* note 6, at 59–60.

262 *Id.* at 61.

263 Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982) (plurality opinion).

attest.[264] It is time for courts to heed the prescient warning of the *Pico* plurality and put a stop to these unconstitutional violations of students' rights.

Conclusion

As an increasing amount of state legislatures and local school boards debate measures to restrict school curricula in the name of banning CRT and restricting access to LGBTQ issues, courts will continue to hear lawsuits challenging the constitutionality of these statutes. However, there is no binding precedent on the issue, and the circuit courts have developed different analytical tests—many of which have not been revisited in over twenty years. Courts will need to revamp the standards they use to consider challenges to curriculum restrictions. When they do so, they should look to the *Arce* framework and the Supreme Court's case law in *Hazelwood* and *Pico* for guidance. Courts should extend *Pico* and recognize that a student's First Amendment right to receive information encompasses inclusive curricula. When reviewing limitations on that right, courts should demonstrate deference to state and local officials in curricular decisions. But they should also follow *Arce* to require that states and localities are making decisions that are reasonably related to legitimate pedagogical concerns, that those reasons are sincere and not pretextual, and that government officials do not skirt regular procedures to implement the results they want.

Students have a lot at stake in these curriculum battles. As adults debate political boogeymen in the heat of the newest culture war, students risk losing access to empowering inclusive curricula that ensure better academic performance and provide a nuanced understanding of their country's history and the diverse communities comprising American society. At risk is the loss of the fully informed and culturally compassionate citizenry needed to propel our democratic society forward. Students have a right to receive information in inclusive curricula, and courts must ensure that this right is properly protected in the legal battles ahead.

264 *See supra* note 6 and accompanying text (discussing how the third largest school district in Oklahoma has removed books by Black authors and about race from its curriculum).