

## **Support HB 61 – Repeal New Hampshire’s Unconstitutional and Unjust Banned Concepts Act**

HB 61 would repeal 2021’s “banned concepts act” and would replace it with language that helps ensure that educators can have frank and open discussions on race and gender.

**The banned concepts act restricts the ability of New Hampshire teachers to give our students a full picture of America’s history.** We are better as a state and community when we can have hard conversations and learn from them. That means learning about the history of racism and continued racial inequality. Unfortunately, because of the banned concepts act teachers are unable to cover important topics like slavery, implicit bias, or have students read classic books unless they want to risk professional discipline or lawsuits from parents who don’t like what’s in their curriculum. It’s important that our kids learn both the good parts of American history as well as the bad, to get a complete picture of who we are as a country. HB 61 will better ensure that this critical instruction can occur without penalty.

**The banned concepts act should be repealed because it is vague.** The banned concepts act is so unclear and vague that it fails to provide necessary guidance to educators about what they can and cannot include in their courses. Multiple courts have enjoined similarly worded laws on vagueness grounds.<sup>i</sup> In addition, the State been unwilling or unable to answer basic questions about whether specific texts are prohibited under the Act – a tactic that has the effect of maximizing the law’s chilling effect. This ambiguity invites arbitrary and discriminatory enforcement.

**The penalties for violations of the vague banned concepts act are severe.** The banned concepts act states that a violation of its provisions “shall be considered a violation of the educator code of conduct that justifies disciplinary sanction by the state board of education.”<sup>ii</sup> Penalties under the code of conduct can include loss of licensure, which is tantamount to the career death penalty. And this penalty can occur even if the violation was not willful and, instead, where the teacher’s interpretation of the law was reasonable. Another remedy for a perceived violation is a civil action in Superior Court against a government entity (including a school district) – which would implicate the teacher or employee – for damages and equitable relief, including an injunction to stop the instruction of or training on the banned concept.<sup>iii</sup> The private right of action afforded to “[a]ny person aggrieved by an act made unlawful” under the banned concepts act serves to compound the chilling effect of the law.<sup>iv</sup> For example, under RSA 193:40 III, student (or the parent of a student) assigned a book perceived as being prohibited by the banned concepts act could file a Superior Court lawsuit. HB 61 will help ensure that teachers are able to cover important topics like slavery, implicit bias, or have students read classic books without fear of punishment.

**Discussions and instruction on race and gender are critical to an informed community and a sense of belonging.** Conversations about race, gender, and DEI concepts provide a multitude of benefits for students and society at large. Student body diversity – and the resultant diversity in views and perspectives that flows from such diverse students’ participation – improves critical thinking and problem solving, increases cross-racial understanding, reduces stereotypes and prejudices, and develops leadership and critical thinking skills and many other skills necessary to thrive in an increasingly diverse society.<sup>v</sup> These benefits manifest for all students.

**Discussions of race and gender are particularly important as New Hampshire rapidly becomes more diverse.** The 2020 census indicated that – while New Hampshire’s population grew by a modest 4.6% during the past decade – the number of residents who are people of color increased by 74.4% to 176,900 in 2020. Black, Brown, and other people of color now represent 12.8% (176,900) of the state’s population compared to 7.5% (101,400) in 2010. This diversity is particularly prevalent in the southern

part of New Hampshire. For example, the population of Manchester and Nashua was 98% white in 1980 according to census data. Manchester now is 80% white. Nashua now is 79% white. As the Carsey School of Public Policy at the University of New Hampshire explained, “children are at the leading edge of the state’s growing diversity.”<sup>vi</sup> The *Union Leader* also recently reported that “more than 2 of every 5 children in Manchester and Nashua hail from families of color,” and that, “[i]n 30 years, Manchester’s youngest generation has shifted from 94% White in 1990 to 57% last year.”<sup>vii</sup> Instruction on race and gender, including DEI concepts, serves to close existing opportunity gaps and inequalities faced by students of color in New Hampshire and other historically marginalized groups. It also helps these students to feel a better sense of belonging in New Hampshire.

**Support HB 61 – New Hampshire students must have the opportunity to learn about racism to help our state heal from the wounds of the past, so we can create a brighter future for our children.**

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<sup>i</sup> New Hampshire’s Banned Concepts law essentially contains four of the ten “banned concepts” that were in President Donald Trump’s September 22, 2020 Executive Order. The Executive Office of the President’s September 28, 2020 memorandum implementing this Order specifically referenced the third banned concept (which is in New Hampshire’s banned concepts act)—namely, that “an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously”—and made clear that it was targeting trainings that, for example, used the phrases “white privilege,” “intersectionality,” “systemic racism,” “racial humility,” and “unconscious bias.” On December 22, 2020, a federal court partially enjoined the Executive Order, in part, on the ground that the plaintiffs were likely to succeed on their vagueness challenge. See *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543 (N.D. Cal. 2020). The district court found that the Executive Order’s banned concepts are “so vague that it is impossible for Plaintiffs to determine what conduct is prohibited.” Despite this decision in *Santa Cruz*, the banned concepts act in New Hampshire includes 4 of the 10 banned concepts from President Trump’s Executive Order. And similar banned concepts in Florida have been preliminarily enjoined on vagueness grounds. (See *Honeyfund.com, Inc., et al v. Desantis*, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at \*35 (N.F. Fla. Aug. 18, 2022) (in addressing regulation on private employers, stating: “Concept 4 is even worse, bordering on unintelligible. Under that provision, employers cannot endorse the view that ‘[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.’”); *Pernell, et al. v. Fla. Bd. of Governors*, No. 4:22cv304-MW/MAF, 2022 U.S. Dist. LEXIS 208374, at \*129 (N.F. Fla. Nov. 17, 2022) (in addressing regulation on colleges and universities, stating: “For example, concept four is mired in obscurity, bordering on the unintelligible. Under that provision, educators cannot endorse the view that ‘[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.’”)).

<sup>ii</sup> See RSA 193:40, IV.

<sup>iii</sup> See RSA 354-A:34 (“Any person aggrieved by an act made unlawful under this subdivision may pursue all remedies available under RSA 354-A, RSA 491 ....”) (emphasis added); RSA 193:40 III (“Any person claiming to be aggrieved by a violation of this section [government teaching banned concepts in schools], including the attorney general, may initiate a civil action against a school or school district in superior court for legal or equitable relief ....”).

<sup>iv</sup> See RSA 354-A:34.

<sup>v</sup> See, e.g., Roslyn Arlin Mickelson, *Research Brief: School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence* 5, Nat’l Coal. On Sch. Diversity (Oct. 2016), <https://files.eric.ed.gov/fulltext/ED571629.pdf>.

<sup>vi</sup> Kenneth Johnson, “Modest Population Gains, but Growing Diversity in New Hampshire with Children in the Vanguard,” *Carsey School of Public Policy* (Aug. 30, 2021), <https://carsey.unh.edu/publication/modest-populationgains-but-growing-diversity-in-new-hampshire-with-children-in-vanguard>.

<sup>vii</sup> Michael Cousineau, “NH Grows More Diverse, Faces Call For Change,” *Union Leader* (Dec. 19, 2021), [https://www.unionleader.com/news/business/whats\\_working/nh-grows-more-diverse-faces-call-forchange/article\\_8c1cfc2d-73c1-51f3-9a5d-939525c3c21e.html](https://www.unionleader.com/news/business/whats_working/nh-grows-more-diverse-faces-call-forchange/article_8c1cfc2d-73c1-51f3-9a5d-939525c3c21e.html).