September 2, 2021

The Honorable Ken Paxton,
Attorney General Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548
Via email: opinion.committee@oag.texas.gov

Re: RQ-0421-KP (Letter Brief from Civil Rights Organizations)

Dear Attorney General Paxton:

The Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, Texas Appleseed and the undersigned organizations submit this letter brief to assist your office with interpreting federal and state constitutional and statutory provisions pursuant to Representative James White's (HD 19) letter requesting an opinion on the lawfulness of "'anti-racism' teachings or CRT [critical race theory] practices" (the "Request").[1] As this letter describes more fully below, CRT and antiracism education are *approaches* to learning about the role of race and racism in the past and present. They are not a set curriculum or policy as Representative White mispresents. Because the requested assessment of "'anti-racism' teachings or CRT practices" would require the Attorney General to speculate what CRT and antiracism education are and how they may be applied, the Attorney General should refrain from issuing an opinion consistent with its prior refusals to opine on such questions.[2]

Furthermore, nothing about CRT and antiracism education constitutes intentional discrimination against any group of people. Indeed, CRT and antiracism approaches were conceived as efforts *to acknowledge and address racism and discrimination against Black people and other people of color*, which, of course, benefit everyone, regardless of their race. These efforts, among others, are critical to addressing long overdue educational inequalities for underserved students of color. Following the national awakening on racial injustice last summer and a year of largely remote learning that exacerbated racial inequities in education for students of color, schools and educators across Texas and the nation began exploring in earnest how to better understand the history of inequality in this country, its present-day consequences, and current forms of discrimination on the basis of race. These efforts included the use of antiracism approaches and other racial equity work and training. As civil rights organizations with

[1] Letter from Texas State Representative James White to Attorney General Ken Paxton, dated Aug. 3, 2021, RQ-0421-KP, File No. ML-48984-KP, I.D. No. 48984.
[2] *See, e.g.,* Tex. Att'y Gen. KP-0092 (2016), at 3 (declining to opine on the personal liability of the tax assessor-collector for funds held in the custody of the appraisal district as the question depended on various factors that could not be ascertained in the opinion process).

combined experiences spanning over 100 years advocating for racial equality and justice for historically marginalized people of color, we submit that there is no basis in law or fact to characterize CRT and antiracism—or racial equity and inclusion measures labeled properly or improperly as CRT or antiracism—as running afoul of the Fourteenth Amendment's Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and the Texas Constitution's Equal Rights Amendment.

An Attorney General opinion that censors racially inclusive and antiracist teaching in the broad terms sought by Representative White's request would be a severe misinterpretation and misapplication of the law that not only contradicts the history and spirit of these civil rights protections, but would also suppress educational efforts in Texas that are both lawful and critically necessary to advance educational objectives, repel racism, prepare students to work, live, and succeed in a growingly diverse world, and build good citizenship that values the experiences and contributions of all Americans. Moreover, deliberately impeding these important efforts could be evidence of a violation of federal and state equal protection and anti-discrimination provisions by intentionally disadvantaging and harming children of color.

Accordingly, the undersigned respectfully urge the Attorney General to decline to issue an opinion or, alternatively, issue an opinion finding that CRT and antiracism education do not violate the Equal Protection Clause, Title VI and the Texas Equal Rights Amendment.

I. Truth, Equity, and Inclusion are Essential for a Quality Public Education that Serves All Children.

State Representative White's Request is premised on a false mischaracterization of CRT and antiracism as "radicalized ideologies that in some instances advocate for clear segregation and separate treatment based on race." However, nothing in CRT and antiracism promotes or advocates for racial segregation and racial hierarchies; to the contrary, they are both firmly opposed to them and instead urge honest, candid conversations about our nation's history of state-sponsored segregation and the persistent denial of equal opportunities based on race so that we can fully address them.

There is a tragic irony when state legislators prioritize banning efforts to provide a more accurate and inclusive teaching of American history rather than tackling the longstanding failures of our educational system to many children of color, who do not receive the quality public education that they deserve. Indeed, the Request's bald mischaracterization and disparagement of CRT and antiracism reveal an acute misunderstanding of both concepts and reinforce the need for better education on racial justice issues among students and lawmakers. Further, suggesting that the U.S. Constitution, Title VI of the Civil Rights Act of 1964, or the Texas Constitution prohibit important classroom conversations about the racism of our past and present and its connections to today's inequalities underscores the exigency of accurately and comprehensively teaching the reasons these laws were enacted and why they are still needed.

The crisis of racial inequities in our public education system is widely known and well-documented. Black students in Texas are approximately "13% of the total student population but have the highest dropout rate, are most likely to be referred to special education programs, and

have the lowest scores on standardized tests across all grades and all subjects."[3] In addition, "Latinas/os and Chicanas/os [in Texas] have the largest proportion of adults without any academic credentials and the smallest proportion with bachelor's degrees and beyond," as compared to all other racial groups, and "23% percent of Latina/o and Chicana/o Texans indicated that they had only attended school until eighth grade or less."[4] And school integration remains an unfulfilled promise, as "more than 1 million black and Hispanic students study in Texas classrooms that include few to no white students."[5]

These entrenched racial inequalities experienced by people of color persist, despite federal, state, and local laws that prohibit race discrimination. Within that context, concepts like CRT and antiracism were born. For example, although CRT is comprised of a wide variety of scholarship, its approach is "unified by two common interests": (1) the pursuit of understanding how racial subordination originated and has been maintained in the United States, especially in relation to the legal system; and (2) a desire to change the legal system so that it no longer supports racial subordination.[6] And "being antiracist" is "fighting against racism" through a "conscious decision to make frequent, consistent, equitable choices daily" that "require ongoing self-awareness and self-reflection as we move through life."[7] Contrary to the mischaracterizations proliferating in media and political discourse, both CRT and antiracism are credible and laudable efforts to advance critical thinking on the continuing legacy of racism in our country.[8] Indeed, far from being extreme, racist, or divisive, legal CRT scholars have been cited with authority by federal and state courts of law over the course of decades,[9] and antiracism has been embraced by entities like the Smithsonian Institution, the "world's largest museum, education, and research complex."[10]

To be clear, the attacks on CRT or antiracism are a thinly-veiled attack on the broader principles of truth, equity and inclusion in public school education. Representative White himself distinguishes CRT and antiracism from "productive messages of unity we should be instilling in our society." Consequently, Representative White targets educational programs that "[t]ake into account systemic marginalization, biases, inequities, and discriminatory policy and practice in American history" and "[e]ncourage students to critically analyze the diverse perspectives of historical and contemporary media and its impact" as reflecting the "integration of 'anti-racist'

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[3] Kihana Ross et al., Univ. of Tex. at Austin Inst. for Urb. Pol'y Rsch. & Analysis, The State of Black Lives in Texas: Education Report 1 (2018), https://utexas.app.box.com/v/2018-black-lives-tx-education.
[4] Sonya M. Alemán et al., *Remapping the Latina/o and Chicana/o Pipeline: A Critical Race Analysis of Educational Inequity in Texas*, J. of Hisp. Higher Educ., Dec. 2019, at 1, 2, 9.
[5] *Dis-Integration*, The Tex. Trib. (Nov. 2018 – Nov. 2019), https://rb.gy/wqjmnr.
[6] Critical Race Theory: The Key Writings That Formed the Movement viii (Kimberlé Crenshaw et al. eds., The New Press, ed. 1995); *see also* Gary Peller, *I've Been a Critical Race Theorist for 30 Years. Our Opponents Are Just Proving Our Point for Us*, Politico (June 30, 2021), https://rb.gy/3jrogx.
[7] *Being Antiracist*, Nat'l Museum of Afr. Am. Hist. & Culture, https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist (last visited Aug. 29, 2021).
[8] *See*, *e.g.*, Janel George, *A Lesson on Critical Race Theory*, Am. Bar Ass'n Human Rights Magazine, Jan. 2021.
[9] *See, e.g.*, *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F. 4th 330, 347 (4th Cir. 2021); *B.K.B. v. Maui Police Dep't,* 276 F.3d 1091, 1101 (9th Cir. 2002), *as amended* (Feb. 20, 2002); *In re Emp. Discrimination Litig. v. Alabama*, 198 F.3d 1305, 1321 (11th Cir. 1999); *Thomas v. Eastman Kodak Co*., 183 F.3d 38, 61 (1st Cir. 1999); *State v. Martinez*, 476 P.3d 189, 191 (Wash. 2020); *Commonwealth v. Buckley*, 90 N.E.3d 767, 782 (Mass. 2018); *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 963 (Alaska 2005).
[10] *Welcome,* Smithsonian Inst., https://www.si.edu/ (last visited Aug. 29, 2021).

teachings and CRT into classrooms." Banning CRT and antiracism, therefore, is presumably meant to ban critiques of American history that are centered on the perspectives and experiences of marginalized people, whose history may not promote the preferred narrative of national "unity," but instead an ongoing struggle to secure the full rights of citizenship.

At stake is the accurate teaching of American history, especially the history of slavery and the racial subordination of Black people and other marginalized communities, and the critical efforts to address the growing educational gap that deprives many children of color of the educational opportunities that will place them on equal footing for a successful life. In fact, when banning *de jure* segregation from public schools, the U.S. Supreme Court emphasized the "importance of education to our democratic society" as "[i]t is the very foundation of good citizenship" by being the "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."[11]

In addition to addressing the past exclusion of people of color—and their perspectives and experiences—from educational curricula, a robust and thoughtful engagement of topics pertaining to racial inequalities in America and a conscious effort to promote and embrace racial inclusivity in the classroom ultimately benefit all students. Research has shown that student body diversity—and the resultant diversity in views and perspectives—leads to "significant positive educational outcomes" for all students, such as improved critical thinking and problem solving, higher graduation rates, improved knowledge, higher career earnings, and better health outcomes.[12] Thus, contrary to alarmists who oppose any discussions about race in the classroom, a more racially inclusive—and consequently more accurate—teaching about the history of American racism and its relevance to today's society will benefit not only the students of color, whose families' histories and experiences finally would be acknowledged and embraced, but also will ensure all students learn to become more open-minded critical thinkers as they are exposed to—and learn from—diverse viewpoints and experiences.

II. Prohibiting the Critical Learning of Our History of Racism and Its Ongoing Legacy Contradicts the Purpose and the Spirit of the Fourteenth Amendment.

As an initial matter, Representative White's characterizations of how CRT and antiracist approaches are used in educational settings do not implicate the Fourteenth Amendment whatsoever. Robust classroom instruction, including teaching and discussions, about racism in the United States as part of a school's ongoing efforts to foster an inclusive and equitable educational environment for all children does not constitute a racial classification that would trigger strict scrutiny.[13] Nor are such efforts to provide truth, historical accuracy, and an

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[11] *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954); *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (nothing that "public schools as a most vital civic institution for the preservation of a democratic system of government, . . . and as the primary vehicle for transmitting 'the values on which our society rests." (Brennan, J. concurring) (quotations and internal citations omitted)).

[12] U.S. Comm'n on C.R., Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation 5 (2018), https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf; Amy Stuart Wells et al., Am. Educ. Rsch. Ass'n, Research Fact Sheet: The Educational Benefits of Diverse Schools and Classrooms for All Students 2 (2016), https://rb.gy/an2i1g.

[13] *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

equitable and inclusive learning environment motivated by a discriminatory purpose.[14] In fact, a contrary belief only underscores the urgency to accurately teach American history—including the history of the Fourteenth Amendment, which was enacted with the primary purpose of ending racial subjugation—and implies an unlawful motive to intentionally erase the lived history and experiences of a protected class of people.

Following the end of the Civil War, the 39th Congress created the Joint Committee on Reconstruction to examine the condition of the former Confederacy and recommend legislation for reintegrating it into the country.[15] From the outset, the Committee considered proposals to enfranchise Black men in the South and a constitutional amendment to "secure" the rights of Black Americans across the country.[16] The latter proposal became the Fourteenth Amendment.[17] Representative John Bingham, one of the architects of the Fourteenth Amendment, put it plainly: a new constitutional guarantee was needed simply because "slaves were not protected by the Constitution."[18] Representative Thaddeus Stevens similarly argued that the Fourteenth Amendment was necessary to promote "the amelioration of the condition of the freedmen."[19] In fact, in the years immediately preceding the ratification of the Fourteenth Amendment, Congress proposed and enacted a series of social welfare laws for Black Americans, including the 1864 Freedmen's Bureau Bill, the 1865 Freedmen's Bureau Act, and the 1866 Freedmen's Bureau Act.[20] These bills were designed to benefit "persons of African descent;" "such persons as have once been slaves" and "colored women and children;" among other race-specific designations.[21]

Lawmakers in the 1860s sharply rejected arguments that the Freedmen's bills and Fourteenth Amendment constituted "discrimination" against white Americans, as well as attempts to limit the reach of this legislation to those freed during the Civil War.[22] On both fronts, the bills' proponents held firm in their belief that these laws were necessary to address the ongoing legacy of enslavement.[23] As Senator Charles Sumner declared: "We need a freedmen's bureau, not because these people are negroes, but because they are men who have been for generations despoiled of their rights."[24] The Congress who authored the Fourteenth Amendment affirmed their commitment to advancing racial equality by frequently referencing the reality of

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[14] *See*, *e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).
[15] Earl M. Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 Hastings Const. L.Q. 287, 291 (2015); *Adamson v. California*, 332 U.S. 46, 92 (1947), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964) (Black, J., dissenting).
[16] *Adamson v. People of State of California*, 332 U.S. at 92-93.
[17] *See id.* 93-95.
[18] Cong. Globe, 39th Cong., 1st Sess. 1089-91 (1866) (statement of Rep. Bingham).
[19] Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 785 (1985). Shortly after its enactment, the Supreme Court found "the one pervading purpose" of the Fourteenth Amendment to be "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *The Slaughter-House Cases*, 83 U.S. 36, 71 (1873).
[20] Schnapper, *supra* note 19, at 755-75.
[21] *Id.* at 755-56.
[22] *See* Schnapper, *supra* note 19, at 756-58.
[23] *Id*. at 758.
[24] *See* i*d.;* Cong. Globe, 38th Cong., 1st Sess. app. at 54 (1864) (statement of Sen. Sumner).

life for Black Americans who faced Black Codes,[25] lynch mobs,[26] and near-total exclusion from housing, employment, the judicial process and virtually every other facet of public life.[27]

Efforts to disconnect the Equal Protection Clause from the primary goal of ending racial subjugation are as old as the Fourteenth Amendment itself. In 1883, a mere two decades after Emancipation, the U.S. Supreme Court ruled in *The Civil Rights Cases* that the Fourteenth Amendment did not authorize Congress to prohibit racial discrimination by private individuals, thus paving the way for Jim Crow laws throughout the Deep South.[28] The Court reasoned that newly-freed Black individuals had already "shaken off" the harms of slavery "by the aid of beneficient legislation" and that "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ."[29] Additionally, in the 1896 *Plessy v. Ferguson* decision, the Court upheld the "separate but equal" justification for state-sanctioned racial segregation, noting that any "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority" is "solely because the colored race chooses to put that construction upon it."[30] In both cases, the Supreme Court ignored America's history of racism and trivialized the lasting and enduring harms to Black people from that racism. It was not until nearly sixty years later in *Brown v. Board of Education*, that the U.S. Supreme Court finally struck down *de jure* segregation in public education.[31]

Thus, it is especially spurious to suggest that the Equal Protection Clause—which the Court held to ban *de jure* educational segregation based, in part, on the harm of racial exclusion on Black children—would likewise ban important efforts by educators to prevent similar types of harm to children of color when they are taught an American history that excludes, erases, or denigrates them and their ancestors. Efforts by educators in Texas to teach culturally responsive lessons and to lessen racial bias and prejudice in schools should thus be encouraged, not banned. For example, teachers in San Antonio are incorporating anti-racist teaching efforts that endeavor to "affirm[] and empower[] all students, in light of their race, class and all aspects of identity, to be critical thinkers and agents of their own learning . . . ."[32] Contrary to specious accusations by critics, including those stated in the Request, facilitating such critical thinking is the "opposite of indoctrination," as students learn to weigh and assess multiple perspectives, many of which historically have been denied or ignored.[33]

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[25] *Slaughter-House Cases*, 83 U.S. at 70 (1872); Cong. Globe, 39th Cong., 1st Sess. 39 (1865).
[26] Mary Frances Berry, Black Resistance/White Law 72-79, 81 (Penguin Books 2d ed. 1995).
[27] *See Slaughter-House Cases*, 83 U.S. at 70.
[28] *The Civil Rights Cases*, 109 U.S. 3 (1883).
[29] *Id.* at 25.
[30] *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).
[31] *Brown v. Bd. of Educ. of Topeka*, 347 U.S. at 494 (1954).
[32] Isabella Zou, *"I Wanted to Teach Differently Than I Had Been Taught": How Some Texas Educators Practice Anti-Racist Teaching*, The Tex. Trib. (Aug. 24, 2021), https://rb.gy/hsj2wh.
[33] *Id.*

III. Title VI of the Civil Rights Act of 1964 Does Not Prohibit CRT and Antiracism Approaches and Efforts to Ensure a Racially Inclusive and Racially Equitable Education.

Nothing in Title VI of the Civil Rights Act of 1964 prohibits discussions or trainings informed by CRT and antiracism efforts. Indeed, if anything, CRT- and antiracism-influenced efforts help address both past and present discrimination affecting students of color in Texas.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Congress enacted Title VI ten years after *Brown v. Board of Education* failed to halt Jim Crow laws and segregation. It was crafted to address such practices, particularly where both public and "private programs . . . use[d] race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 328 (1978) (Brennan, J., concurring in part). For the 88th Congress, Title VI "primarily connoted an end to segregation" and "end[ing] a century of mistreatment of black Americans."[34] Title VI was intended to be used as a tool to "deal effectively with the problem of school segregation in areas where state and local government had been uncooperative and the courts ineffective."[35]

This was the case in Texas too: racial segregation in schools continued for decades after the U.S. Supreme Court struck down *de jure* segregation and well into the 21st century. *See, e.g., United States v. CRUCIAL*, 722 F.2d 1182, 1191 (5th Cir. 1983) (finding a "particularly egregious pattern of intentional segregation by Ector County [Independent School District] extending into the 1981-82 school year"); Yue Qiu and Nikole Hannah-Jones, *A National Survey of Desegregation Orders,* ProPublica (Dec. 23, 2014) https://rb.gy/qbnn5j (noting 29 Texas school districts under desegregation orders in 2014).

To enforce the spirit of *Brown*, Title VI prohibits entities who receive federal funding from engaging in discrimination based on race, color and national origin.[36] Pursuant to the law, both the Department of Justice and the Department of Education promulgated rules governing the applicability of Title VI to the American education system. 28 C.F.R. 42.101 *et seq.* (Department of Justice): 34 C.F.R. 100.1 *et seq.* (Department of Education). Among other things, these regulations recognize that Title VI prohibits not only intentional discrimination but also disparate impact actions that "have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 28 C.F.R 42.104(b)(vii)(2); 34 C.F.R. 100.3(b)(vii)(2); *see also Alexander v. Choate*, 469 U.S. 287, 292–94 (1985).

Nothing in CRT or antiracism education indicates any intent to classify or treat any persons differently based on race nor does it have the type of actionable effect on any race. *See Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 265-67

[34] Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining 'Discrimination'*, 70 Geo. L. J. 1, 9 (1981) (quoting *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. On the Judiciary*, 88th Cong., 1st Sess. 1103 (1963)).
[35] Kenneth Wing, *Title VI and Health Facilities: Forms Without Substance*, 30 Hastings L.J. 137, 152 (1978).
[36] *See* Civil Rights Division, *Title VI Legal Manual*, The United States Department of Justice (2021), https://www.justice.gov/crt/fcs/t6manual.

(1977); *see* 34 C.F.R. §l00.3(b)(2) (disparate impact regulations). As noted above, CRT is *an approach* to understanding the full, truthful history of racism in the U.S. and its relationship to today's systemic inequalities; it does not dictate specific outcomes or actions. Similarly, antiracism education is associated with efforts to more consciously address the role of racism. Both CRT- and antiracism-inspired education can be applied in several different contexts, in several different ways[37] and are not premised on discrimination on the basis of race nor do they have the effect of discriminating on the basis of race. Accordingly, neither pedagogical approach triggers any application of Title VI. And radicalized attempts to ascribe these approaches to one set of policies and practices *cannot and should not* be used to silence critical approaches to education and learning through an attorney general's opinion. These are nothing more than bald attempts to censor important discussions in schools, universities, and agencies. Such extreme positions not only show how inappropriate the questions the Request put before the AG are, but also how this dangerous, slippery slope likely runs afoul of bedrock First Amendment principles protecting the academic freedom of professors and teachers and the right of students to receive information and ideas free of racial animus and politically-charged ideology. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); *Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. v. Pico,* 457 U.S. 853, 866-67 (1982) (recognizing "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom").

If anything, CRT and antiracist approaches to unearthing the true history of racism and its continuing presence and effects on people of color are wholly consistent with Title VI's purpose of ensuring that recipients of federal funds do not discriminate on the basis of race, color and national origin. Texas's curriculum has long excluded the perspectives and experiences of people of color.[38] As recently as 2015, Houston public schools used geography textbooks misrepresenting slaves as "workers."[39] In 2018, a San Antonio school assigned homework asking students to list "positive and negative aspects of slavery."[40] That assignment was drawn from a textbook that Texas schools had used for over a decade; the textbook asserted that "there were kind and generous [slave]owners" and that "[m]any [slaves] may not have even been terribly unhappy."[41] Until 2019, Texas's "social studies standards for fifth and seventh grades . . .

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[37] *See, e.g.,* Jamilah Pitts, *What Anti-racism Really Means for Educators*, Learning for Justice Sep. 11, 2020, https://rb.gy/qjlc69 (describing anti-racist education as "the exercise of hope, the practice of undoing and dismantling systems of oppression, the practice of freedom and of truth-telling. Anti-racist work is the practice of healing and of restoring; it is a practice of love.").

[38] *See, e.g.*, Gail Collins, *How Texas Inflicts Bad Textbooks on Us*, N.Y. Rev. Books June 21, 2012, at 18; Jonna Perrillo, *Once again, Texas's board of education exposed how poorly we teach history*, The Washington Post Sept. 21, 2018, https://rb.gy/e7pu9o.

[39] Perrillo, *supra* note 38.

[40] Cynthia Greenlee, *How history textbooks reflect America's refusal to reckon with slavery*, Vox (Aug. 26, 2019), https://rb.gy/qfqzon (last visted Aug. 30, 2021).

[41] Annabelle Timsit & Annalisa Merelli, *For 10 years, students in Texas have used a history textbook that says not all slaves were unhappy*, Quartz (May 11, 2018), https://rb.gy/tos8hj (last visited Aug. 30, 2021).

downplayed slavery as the main reason Texas joined the Confederacy."[42] Only a few weeks ago, the Texas State Senate passed a bill removing a requirement that schools teach that the Ku Klux Klan was "morally wrong."[43]

In light of this long history of racism in Texas curriculum, materials, and textbooks and its effects on students of color and the environment they learn in, it is understandable if not incumbent upon schools and other recipients of federal funds to confront racism through the use of antiracist approaches that include fuller, more truthful and racially inclusive practices.

Guidance from federal agencies further substantiates the need to examine and actively counter systemic racism and discrimination against people of color. The Department of Education's Office for Civil Rights ("OCR") has repeatedly issued guidance to school districts affirming Title VI's mandate of ensuring equal educational opportunities in education for students of color, in particular, and opposing systemic racism, including guidance on racist bullying, racial harassment, and resource equity distribution, among others.[44] OCR's inclusion of training on implicit and explicit racial bias, stereotypes, and other related threats to students of color in resolution agreements involving racial discrimination and harassment further evidence the lawfulness of such antiracist practices. *See, e.g.,* Office for Civil Rights, U.S. Dep't of Educ., *Resolution Agreement, Loleta Union Elementary School* District, OCR Case No. 09-14-1111 at 6, 10 (Nov. 20, 2017), https://rb.gy/hl0ltc (requiring school district to "assess[ ] implicit bias and cultural sensitivity and their possible role in disparities in school discipline and racial harassment" and to provide staff training on "how to administer discipline fairly and equitably, including ensuring nondiscrimination in discipline by eliminating any bias or implicit bias in discipline decision-making").[45] Although such training should not be assumed to be CRT- and antiracism-influenced, the broad mischaracterization of CRT and antiracism described in Representative White's letter would undoubtedly sweep in these critical tools used by the federal government to address violations of Title VI.

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[42] Silas Allen, *Texas Students Will Learn That the Civil War Was About Slavery. Sort of.*, Dallas Observer Aug. 13, 2019, https://rb.gy/xkjavb.

[43] Minyvonne Burke, *Texas Senate passes bill that removes requirement to teach Ku Klux Klan as 'morally wrong'*, NBC News (July 21, 2021), https://rb.gy/uvqtgj (last visited Aug. 30, 2021).

[44] *See, e,g.,* Norma V. Cantu, *Racial Incidents and Harassment Against Students at Educational Institutions* (1994), https://rb.gy/sq2tdx (last visited Aug 29, 2021); Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: *Guidance on Schools' Obligations to Protect Students from Student-on-Student Harassment on the Basis of Sex; Race, Color and National Origin; and Disability* (Oct. 26, 2010), https://rb.gy/dds4el (last visited Aug 29, 2021).

[45] *See also* Office for Civil Rights, U.S. Dep't of Educ., *Resolution Agreement, Cherry Creek School District*, OCR Case No. 08-17-1245 at 5 (Feb. 19, 2018), https://rb.gy/cstgfg (requiring school staff training in "[c]ultural competency and implicit bias"); Office for Civil Rights, U.S. Dep't of Educ., *Resolution Agreement, Durham Public Schools*, OCR Case No. 11-13-1175 at 5 (Feb. 1, 2018) https://rb.gy/7jhed0 (requiring school staff training in "the concept of implicit bias and corresponding techniques to ameliorate implicit bias"); Office for Civil Rights, U.S. Dep't of Educ., *Resolution Agreement, Cleveland Heights-University Heights City School District*, OCR Case No. 15-14-5001 at 6 (Dec. 8, 2017), https://rb.gy/3s2zx4 (requiring school staff training on "restorative justice" and "the concept of implicit bias and corresponding techniques to ameliorate implicit bias"); Civil Rights Division, U.S. Dep't of Justice, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present* at 27 (Jan. 2017), https://rb.gy/jnmqle ("Training on implicit bias has been a core feature of the [Civil Rights Division of the Department of Justice]'s [police] reform agreements since 2012.").

IV. The Texas Constitution Embraces Educational Practices that Seek to Acknowledge and Address Racial Inequalities.

Much like the Equal Protection Clause and Title VI, the equal rights guarantee of the Texas Constitution allows for instruction informed by critical race theory and antiracism instruction and, in fact, such education should be encouraged. Ratified in 1876, the Texas Constitution provides an affirmative grant of equal rights in Section 3 of its Bill of Rights. Tex. Const. § 3. This section establishes that no Texan may be denied equal rights based on race, sex, and other immutable characteristics of their personhood. Significantly, this state constitutional provision guarantees the equal treatment of all Texans in toto, unlike the Equal Protection Clause of the Fourteenth Amendment, which has been interpreted by federal courts to apply only to actions by state actors and not private individuals.[46] Stated plainly, the Texas Constitution provides even stronger protections than the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.

The Texas Bill of Rights was enacted at a time of unparalleled political participation by Black people in the federal government, state legislatures, and local elected offices.[47] Towns and communities were built by formerly enslaved people that created avenues for economic power for Black Southerners. Texas was certainly no outlier during this era. As documented by Dr. Andrea Roberts of Texas A&M University through The Texas Freedom Colonies Project Atlas and Study, one million freed people established freedom colonies throughout Texas during Reconstruction, even under the constant threat of white domestic terrorism during this epoch.[48]

The constitution of 1876, and that of 1869, reflected the progressive ideals of Texas legislators at that time, who were intent on enshrining racial equality by law. Indeed, the 1869 constitution went even further than the federal constitution by providing for a uniform system of public education that was accessible to all children in the state, regardless of sex or race.[49] This more egalitarian document, as compared to its predecessors, owed its progressivism to the ten Black men who served as delegates to the Texas State Constitutional Convention of 1868-69.

The gains of Black Texans during the Reconstruction era were swiftly met with backlash from the white establishment. As described above, beginning in the 1870s, Black Texans saw a widespread curtailment of their civil and political rights. The Compromise of 1877, which led to the election of Rutherford B. Hayes, eviscerated federal support of desegregation efforts and plunged Black Southerners right into the merciless and incessant threat of white domestic terrorism for generations. In the final decades of the nineteenth century, the insidious nature of Jim Crow laws in Texas steadily eroded the progress that was made during this era; by 1891, only a handful of Black members served in the Texas Legislature, and the 22nd Legislature passed an infamous Jim Crow law that mandated separate railroad coaches for Black Texans.[50]

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[46] James C. Harrington, *The Texas Bill of Rights and Civil Liberties*, 17 Texas Tech Law Review 1487 (1986)
[47] *See generally The Reconstruction Generation, 1870-1887*, History, Art & Archives: United States House of Representatives, https://rb.gy/rcnaur.
[48] *The Texas Freedom Colonies Project Atlas and Study*, https://rb.gy/f00ux9.
[49] S.S. McKay, revised by Carl H. Moneyhon, *Constitution of 1869*, Texas State Historical Association: Handbook of Texas, https://rb.gy/6xhmfw.
[50] *The 1890s: Jim Crow Laws*, Texas State Library and Archives Commission, https://rb.gy/qqel1i

As expressed previously, this brutal regime governed Texas affairs for generations, and its effects are still acutely felt by the descendants of enslaved Texans.

Nearly 150 years after this pivotal occurrence, people of all races in Texas and across the nation rose up together to confront the unfulfilled promise of eradicating racial discrimination, following the death of native Texan: George Perry Floyd. Mr. Floyd's far-too-short 46-year life shows how every facet of American life fails Black people in the twenty-first century, including opportunities in education.[51] Efforts to overcome the persistent nature of these systemic barriers through CRT and antiracism in order to access opportunities in education cannot possibly run afoul of the Texas Equal Rights Amendment, which is intended to guarantee equal protection of the law for all Texans. Like the federal equal protection clause, the Texas Equal Rights Amendment prevents intentional discrimination and neither CRT nor antiracism approaches intentionally discriminate against any class or persons. *See e.g., Wolber v. Round Rock Indep. Sch. Dist.,* No. 1:19-CV-602-AWA, 2020 WL 1536384, at *5 (W.D. Tex. Mar. 31, 2020); *see also Richards v. League of United Latin Am. Citizens (LULAC),* 868 S.W.2d 306, 312–13 (Tex. 1993).

Presently, millions of people of color in Texas face the unaddressed legacy of slavery and Jim Crow segregation in their daily lives, including gross inequalities in the public education system. These inequities have only been exacerbated by the unprecedented coronavirus pandemic; the disparate infection rate in Black communities and other communities of color, and the challenges that Black students face in securing an equitable remote education. These realities are missing in the current statewide debate about what has been labeled as CRT or antiracism, and their omission signifies a notable lack of will to address the many challenges faced by Texan families today. Instead, families must now face a public education that fails to accurately recount the history of racism in the United States and Texas and ignores the experiences and perspectives of people of color—not to mention the calls of unending special sessions in 2021, which are focused on restricting bail, excluding trans children from extracurricular activities at school, and broadly limiting access to the ballot box.[52]

Rarely has such an opportune moment arisen for the state government of Texas to meaningfully address systemic inequalities in education. Moreover, the three branches of the Texas state government could work to develop retroactive and prophylactic measures that acknowledge the pernicious impact of racism in every facet of modern society, including in the classroom. The presently considered request for an opinion from the Attorney General's Office runs counter to the spirit of the Reconstruction-era Texas Constitution, and it brings forth a particular cruelty that prioritizes academic censorship over the adoption of policies that could actually help Texans during these particularly devastating times.

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[51] *See, e.g.,* The Washington Post Staff, *George Floyd's America*, The Washington Post (Oct. 26, 2020), https://rb.gy/5jfndu.

[52] Press Release, Office of the Governor of Texas, Governor Abbott Announces Second Special Session Date & Agenda (Aug. 5, 2021) (on file with author).

IV. Conclusion

It cannot possibly be the case that efforts to teach this state's and nation's full, shared history of racism and its ongoing impact on present-day inequalities, or efforts to ensure that all children—especially who have been historically marginalized—feel included and acknowledged in the classroom, violate the Equal Protection Clause, Title VI, or the Texas Constitution. Nor is it proper to mischaracterize CRT or antiracism as harming or denigrating others when, in actuality, they are approaches to learning and training that aim to educate people on this nation's shameful history of race and racism and, ultimately, to eradicate racism, which benefits everyone regardless of their race. An Attorney General opinion that broadly bans these types of practices would turn antidiscrimination laws and constitutional provisions on their head, contravene foundational constitutional principles and the purposes underlying these laws, and lead to gross inconsistencies in application given the widespread use of curricula that ignore the experiences and perspectives of people of color. Moreover, because CRT and antiracism are synonymous with mere *approaches* to learning, and cannot be pigeon-holed into any specific practice or policy, rendering a decision on their legality or constitutionality would require the Attorney General to wildly speculate (as the letter requesting the opinion does) on how CRT and antiracism operate in a given context and, thus, are inappropriate for an attorney general's opinion.[53]

Communities of color face the exclusion of their lived experiences in curricula with white-dominated narratives; deficit-oriented views of their capabilities, communities, and educability; discriminatory school discipline policies that criminalize them for benign behavior; funding inequities that disproportionately impact their communities; and racially segregated school districts.[54] As these vast racial inequities persist in society, teachers need an array of curricula and pedagogical tools to carry out the spirit of diversity, inclusion and racial justice in the classroom and the broader society. CRT and antiracism are among the approaches that provide some of the tools that educators can use to facilitate discussions about current-day inequities and uncover the role and present-day effects of slavery and Jim Crow segregation. As such, these efforts should be encouraged, supported and implemented as they are fully compliant with federal and state civil rights protections.

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[53] *See, e.g.,* Tex. Att'y Gen. KP-0331 (2016) at 4 (declining to issue opinion on whether a particular vehicle qualifies as a motorcycle for registration and titling depends on particular facts which cannot be resolved by the opinion process).

[54] Janel George, *A Lesson on Critical Race Theory*, American Bar Association (Jan. 11, 2021), https://rb.gy/4yuexm; The Education Trust, *Publications*, The Education Trust (2021), https://edtrust.org/our-resources/publications/ (last visited Aug 28, 2021).

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