I. Introduction

PEN America stands at the intersection of literature and human rights to protect free expression in the United States of America (US) and worldwide. We champion the freedom to write, recognizing the power of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the human rights that make it possible. As an organization dedicated to defending free expression in the US and globally, and specifically the rights of writers, journalists and artists, we closely observe and monitor developments within the US' landscape of freedom of expression.

This submission addresses the right to non-discrimination and equal rights of men and women (arts. 2, 3 and 26) and the right to privacy (art. 17), and also seeks to provide specific information relevant to paragraph 8 and 22 of the "List of issues prior to submission of the 5th periodic report of the United States of America."[1] PEN America would particularly like to bring the Committee on Civil and Political Rights' attention to the following issues:

- Educational gag orders;
- School book bans;
- LGBTQ+ Speech Suppression & Anti-Drag Legislation;
- Surveillance due to Section 702 of FISA;
- Children online safety bills; and
- Potential TikTok ban.

Our analysis encompasses legal frameworks; recent legal cases; challenges faced by writers, journalists, and readers; and the broader impact on marginalized communities.

II. Non-discrimination and equal rights (arts. 2, 3 and 26)

The right to non-discrimination and equal rights is a fundamental principle upheld by the US Constitution in the Fourteenth Amendment and various international human rights instruments.[2]

PEN America acknowledges that the US has made progress in providing human rights protections to LGBTQ+ individuals, including Title IX of the Education Amendments of 1972 which in law protects all students, including LGBTQ+ students, from sex discrimination, and

[1] "List of issues prior to submission of the 5th periodic report of the United States of America," United Nations Human Rights Committee, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsijKy20sgGcLSyqccX0g1nlYhE7dxYvkfnqbOgGjt0WN%2BV80Vhr%2FCeDA%2FmavqFwov8pSVO80BC2Blh%2F7I%2BUBsm%2F7%2BuQp4Oidt1KdSgRNH5%2F4

[2] The right to non-discrimination and equal rights is listed in the following international treaties: the Universal Declaration of Human Rights (UDHR) Article 2;
The International Covenant on Civil and Political Rights (ICCPR) Article 2, 3, and 26; The Convention on the Elimination of All Forms of Racial Discrimination (CERD) Article 2 and 5; and The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Article 1,2, and 3.

encompasses discrimination based on students' non-conformity with sex-based stereotypes.[3] However, despite this federal legislation, various states have sought to enact legislation and policies that ban books, restrict teaching of certain subjects and prohibit gender non conforming performances. These measures, on their own and cumulatively, discriminate against LGBTQ+ communities and communities of color, with a disproportionate impact on BIPOC LGBTQ+ individuals and communities.

A. Educational Gag Orders

Over the past three years, a political movement to exert ideological control over public education and suppress freedom of expression, including the freedom to read, learn, and think has been gaining steam across the US, targeting both K-12 schools and higher education institutions.[4] This movement has taken various forms, including state legislative proposals that directly or indirectly contribute to a chilled climate for expression in educational institutions, as well as efforts by local and national advocacy groups to pressure school districts, teachers, and librarians to engage in censorship which directly impacts marginalized communities.

At the heart of this wide-ranging movement has been an effort to stifle free expression, including academic autonomy[5], and assert inappropriate state control over educational institutions via the passage of new state laws that PEN America has dubbed 'educational gag orders.'[6] PEN America has documented the use and spread of these gag orders in its 2021 report, "Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach", and 2022 report, "America's Censored Classrooms."[7]

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[3] Fifth periodic report submitted by the United States of America under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020 : International Covenant on Civil and Political Rights.

[4] K-12 refers to the educational levels from kindergarten through grade 12 in the United States, typically ages 5-18. Higher education constitutes any post-secondary education, including non-degree programs that lead to certificates and associate, bachelor, first professional, master, advanced intermediate, and research doctorate diplomas.
"Kindergarten to Grade 12 Students,"
https://studyinthestates.dhs.gov/students/get-started/kindergarten-to-grade-12-students.;
"Structure of US Education,"
https://www2.ed.gov/about/offices/list/ous/international/usnei/us/edlite-structure-us.html.

[5] Academic autonomy refers to the principle that educational institutions, particularly universities and colleges, have the independence and freedom to make decisions related to their academic and administrative affairs without external interference. This autonomy encompasses the ability to determine curricula, research priorities, faculty appointments, student admissions, and institutional policies, among other aspects. It is essential for fostering intellectual freedom, promoting critical inquiry, and maintaining the integrity and quality of academic pursuits. Academic autonomy allows institutions to operate based on their own values and expertise, safeguarding their ability to contribute to the advancement of knowledge and society.

[6] PEN America defines educational gag orders as state legislative efforts to restrict teaching about topics such as race, gender, American history, and LGBTQ+ identities in K–12 and higher education.

[7] "Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach," PEN America, 25 February 2022, https://pen.org/report/educational-gag-orders/;
"America's Censored Classrooms," PEN America, August 2022,
https://pen.org/report/americas-censored-classrooms/.

Since January 2021, 45 US state legislatures have introduced 309 educational gag order bills which aim to limit teaching on race, gender, and US history in various educational settings. Twenty-nine of these bills have become law in seventeen states, and an additional three states have enacted similar restrictions via policy or executive order; in total, 135 million Americans live in a state where at least one educational gag order is in force.[8] These laws are inspired by Executive Order 13950 (signed in 2020) that prohibited this teaching in federal workplaces.[9] Executive Order 13950 has since been repealed but continues to serve as a template for states to pass their own educational gag orders."[10] Measures that targeted teaching around race, including critical race theory, emerged in response to George Floyd's murder in 2020 and were also influenced by the New York Times' 1619 Project.[11] Over three years, a range of legislative proposals have been copied across state lines, including restrictions on discussing gender, sexuality or LGBTQ+ identities; this proposal first appeared in a Florida law, but has since been copied to numerous other states, and has become law in several of them.[12]

While the majority of these state legislative efforts have targeted K-12 schools, a distinct but impactful subset have also targeted higher education, including laws passed in nine US states affecting a total population of 43 million people. In 2023, this focus on legislating college- and university-level teaching expanded, with new proposals to ban gender studies, diversity, equity and inclusion (DEI) offices and initiatives, and restrict general education curricula, university accreditation, and university mission statements to remove references to DEI. This subset of laws can be understood as an effort to impinge upon the traditional autonomy of higher education institutions, undermining academic autonomy. Twenty-two such bills have been introduced, and three have become law.[13]

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[8] PEN America Index of Educational Gag Orders, https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit?usp=sharing.

[9] Office of the Federal Register, National Archives and Records Administration. "DCPD-202000715 - Executive Order 13950-Combating Race and Sex Stereotyping". Government. Office of the Federal Register, National Archives and Records Administration, 21 September 2020. https://www.govinfo.gov/app/details/DCPD-202000715.

[10] Ken Paulson, "Divisive Concepts," First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/2178/divisive-concepts.

[11] The 1619 Project is a multimedia initiative by The New York Times Magazine that seeks to reexamine and broaden the historical narrative of the United States by highlighting the profound impact of slavery and the contributions of Black Americans throughout American history, with a focus on the year 1619 when the first enslaved Africans arrived in the English colonies. It includes essays, interactive elements, and educational resources to promote a deeper understanding of how slavery has shaped the nation's past and present.
"The 1619 Project," The New York Times, 14 August 2019, https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html.

[12] Eesha Pendharkar, "Which States Are Considering 'Don't Say Gay' Bills and Where They Stand," Education Week, February 28, 2023, https://www.edweek.org/policy-politics/which-states-are-considering-dont-say-gay-bills-and-where-they-stand/2023/02.

[13] PEN America Index of Educational Gag Orders, https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit?usp=sharing;

These educational gag orders infringe upon the principles of non-discrimination and freedom of expression, including academic autonomy.[14] As outlined in article 26, non-discrimination prohibits any distinction, exclusion, restriction, or preference that is based on various grounds, including race, gender, and other protected characteristics.[15] Educational gag orders disproportionately target and affect students, educators, and trainers who are women, people of color, and LGBTQ+ individuals and therefore constitute a form of discrimination.[16] The principle of non-discrimination requires governments not only to ensure the absence of direct discrimination, but they are also obliged to prevent and address any discriminatory effects of seemingly neutral policies. By singling out content related to certain racial, ethnic, or gender identity groups for restriction, and by selectively forbidding autonomous decision-making at educational institutions when those decisions affect those specific groups, the bills seek to perpetuate and reinforce existing patterns of discrimination and marginalization.

Additionally, educational gag orders violate article 19 by limiting educators' freedom of expression and students' rights to access information. Students have the right to access a broad range of information and ideas as part of their right to access and receive information. Educational gag orders restrict students' exposure to different viewpoints, and can be used to enforce a specific ideological or political viewpoint within educational settings. This can lead to censorship where only one perspective is allowed while others are suppressed.

B. School Book Banning

Alongside educational gag orders, there has also been a rise of legislation, policy, and local efforts to ban books[17] in schools in several states in the US since 2021.[18]

"From Classroom Censorship to Curricular Control," 1 May 2023, https://pen.org/from-classroom-censorship-to-curricular-control/;
"More Than Meets the DEI," PEN America, 25 May 2023, https://pen.org/more-than-meets-the-dei/;
"The Culture Wars are Coming for College Accreditation," PEN America, 13 July 2023, https://pen.org/the-culture-wars-are-coming-for-college-accreditation/.

[14] "Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach," PEN America, 25 February 2022, https://pen.org/report/educational-gag-orders/.

[15] Kate Ruane, "Girls Gays Theys' Shirts aren't Obscene," 21 July 2023, https://thehill.com/opinion/civil-rights/4107682-girls-gays-theys-shirts-arent-obscene-dont-let-conservatives-rewrite-history/.

[16] "Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach," PEN America, 25 February 2022, https://pen.org/report/educational-gag-orders/.

[17] PEN America defines a school book ban as any action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to direct or threatened action by lawmakers or other governmental officials, that leads to a previously accessible book being either completely removed from availability to students, or where access to a book is restricted or diminished

[18] Kasey Meehan and Jonathan Friedman, "Banned in the USA: State Laws Supercharge Book Suppression in Schools," PEN America, 20 April 2023, https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/.

PEN America started tracking school book bans in July 2021 and recorded more than 4,000 instances of book banning through December 2022, affecting 2,253 unique titles.[19] In that time, groups and individuals pushing to remove books from schools have overwhelmingly targeted books with stories by and about people of color and LGBTQ+ individuals.[20] There has also been a concerted effort to suppress content related to sex and sexuality, including a range of fiction and non-fiction books that touch on puberty, dating, sexual consent, teen pregnancy, and abuse. Efforts to suppress this content risks depriving students of vital information about their bodies and relationships that can help them grow into healthy adults.

Book bans have an especially pernicious impact on individuals from historically marginalized communities and identities and the rhetoric being marshaled to justify banning books containing LGBTQ+ characters or themes in particular regularly evokes long-standing, denigrating stereotypes that stigmatize LGBTQ+ people as inherently sexual or pornographic.

State laws are playing an increasingly significant role in these trends. Nearly a third of the book bans in the first half of the 2022-2023 school year (July-December 2022) were the direct result of newly-enacted laws in just three states: Florida, Utah, and Missouri. These states have imposed stringent requirements that schools must abide by when reviewing existing library collections.[21]

In Florida, a state mandate prohibits the use of instructional materials involving critical race theory, culturally responsive teaching, social-emotional learning, social justice, and "any other unapproved theories that may potentially lead to student indoctrination" and school librarians are now required to undergo training in book selection, removal, and curation.[22] Education experts and librarians have expressed concerns that these practices will lead to self-censorship among librarians, potentially limiting students' access to diverse perspectives, particularly affecting historically marginalized students represented in many of the prohibited materials.[23]

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[19] Kasey Meehan and Jonathan Friedman, "Banned in the USA: State Laws Supercharge Book Suppression in Schools," PEN America, 20 April 2023, https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/.

[20] Kasey Meehan and Jonathan Friedman, "Banned in the USA: State Laws Supercharge Book Suppression in Schools," PEN America, 20 April 2023, https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/.; Jonathan Friedman, "Banned in the USA: The Growing Movement to Ban Books," PEN America, September 2022, https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/.

[21] Kasey Meehan and Jonathan Friedman, "Banned in the USA: State Laws Supercharge Book Suppression in Schools," PEN America, 20 April 2023, https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/.

[22] Eesha Pendharkar, "New Training Tells Florida School Librarians Which Books Are Off-Limits," Education Week, 19 January 2023, https://www.edweek.org/leadership/new-training-tells-florida-school-librarians-which-books-are-off-limits/2023/01.

[23] Eesha Pendharkar, "New Training Tells Florida School Librarians Which Books Are Off-Limits," Education Week, 19 January 2023, https://www.edweek.org/leadership/new-training-tells-florida-school-librarians-which-books-are-off-limits/2023/01.

These book bans violate the right to freedom of expression, including the right to access information. Article 19 states that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[24] General comment No. 34 identifies that “means of expression include books…”[25] Banning books curtails individuals' ability to seek, receive, and impart information. This prohibition restricts the free flow of diverse viewpoints, stifles critical thinking, and limits the public's access to information that might challenge prevailing norms or ideologies.

While article 19 permits limitations to the right to freedom of expression, it does not appear that the removal of books from public school libraries and classrooms serve any legitimate aim as envisaged in article 19(3).[26] Rather they are being wielded to reinforce discrimination against LGBTQ+ communities and communities of color. A democratic society based on human rights thrives on a diversity of opinions, ideas, and cultural expressions and book bans restrict access to various perspectives and insights. Additionally, books often serve as important educational resources and contribute to the advancement of knowledge. Banning books limits academic autonomy by obstructing research, reading, and critical analysis.[27]

The US federal government has taken initial steps to address the surge of book bans. The US Department of Education's Office for Civil Rights (OCR) has the authority to investigate complaints of discrimination based on race, color, national origin, ethnicity, ancestry, sex, gender and disability at any public or private program that receives federal funding from the US Department of Educations.[28] This authority can be used to investigate prohibitions on books and other content based on ideological preferences, particularly cases that result in the removal of materials that specifically target LGBTQ+ and communities of color. In May 2023, the OCR concluded its investigation in response to concerns about the removal of books from Forsyth

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[24] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[25] United Nations (Committee on Civil and Political Rights). 2011. *General Comment No. 34, Article 19: Freedoms of Opinion and Expression.*

[26] Restrictions to the freedom of expression may be for respecting the rights or reputations of others, protection of national security or of public order (ordre public), or of public health or morals. These school book ban legislation goes far beyond the legitimate aims, including the protection of public health or morals, and allows for arbitrary use. Furthermore, book ban legislation is neither necessary nor proportionate to the end purpose of protecting public health or morals.
UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[27] “Banned in the USA: Rising School Book Bans Threaten Free Expression and Students’ First Amendment Rights (April 2022).” PEN America, April 2022. https://pen.org/banned-in-the-usa/.

[28] “US Department of Education’s Office for Civil Rights Resolves Investigation of the Removal of Library Books in Forsyth County Schools in Georgia,” US Department of Education’s Office for Civil Rights Resolves Investigation of the Removal of Library Books in Forsyth County Schools in Georgia | US Department of Education, 19 May 2023,
https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-resolves-investigation-removal-library-books-forsyth-county-schools-georgia.

County Schools' libraries in Georgia.[29] These concerns centered on whether the removal of certain books created a hostile environment for students based on sex, race, color, or national origin, which could violate Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964. Following the investigation, the Forsyth County School District agreed to ensure compliance with Title IX, prohibiting sex-based discrimination, and Title VI, prohibiting race, color, or national origin-based discrimination, as outlined in the Education Amendments of 1972 and the Civil Rights Act of 1964.[30] Currently, the OCR is also investigating a similar complaint in Texas, spearheaded by the American Civil Liberties Union of Texas in July 2022, alleging that Granbury Independent School District officials told librarians to remove books that included the LGBTQ+ community and people who are transgender.[31]

In June 2023, the OCR announced that it will appoint a coordinator to address the growing threat that book bans pose to the civil rights of students.[32] The yet-to-be-named coordinator will work to provide new training for schools nationwide on how book bans that target specific communities and create a hostile school environment may violate federal civil rights laws. Additionally, the US Secretary of Education has used his platform to elevate and oppose efforts to suppress reading and learning in schools.[33] While these actions are important, the US government should take further action to ensure that the rights to non discrimination and freedom of expression are protected in US educational institutions.

C. LGBTQ+ Speech Suppression & Anti-Drag Legislation

There has been an increased effort to exclude LGBTQ+ speech from constitutional protection and a wave of legislation targeting gender nonconforming performances, or drag performances,

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[29] "US Department of Education's Office for Civil Rights Resolves Investigation of the Removal of Library Books in Forsyth County Schools in Georgia," US Department of Education's Office for Civil Rights Resolves Investigation of the Removal of Library Books in Forsyth County Schools in Georgia | US Department of Education,19 May 2023, https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-resolves-investigation-removal-library-books-forsyth-county-schools-georgia.

[30] Forsyth County Schools Resolution Agreement - US Department of Education, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-b.pdf.

[31] "Doe Delivers Potentially Crucial Finding in Fight against Book Bans," PublishersWeekly.com, 23 May 2023, https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/92379-doe-delivers-potentially-crucial-decision-in-fight-against-book-bans.html.

[32] "Biden-Harris Administration Announces New Actions to Protect LGBTQI+ Communities," The White House, 8 June 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/08/fact-sheetbiden-harris-administration-announces-new-actions-to-protect-lgbtqi-communities/.

[33] Miguel Cardona, "As US Education Secretary, I Want Us to Enrich Public Schools, Not Ban Books and Topics: Column," Tampa Bay Times, 16 March 2023, https://www.tampabay.com/opinion/2023/03/16/us-education-secretary-i-want-us-enrich-public-schools-not-ban-books-topics-column/.;
Secretary Miguel Cardona, "Banning Books and Censoring Our Teachers Are Direct Attacks on Our Public School System.," Twitter, 19 May 2023, https://twitter.com/SecCardona/status/1659574859788058628?s=20.

in 2022 and 2023.[34] As of March 2023, at least 32 bills have been introduced specifically targeting drag performances in Arizona, Arkansas, Iowa, Idaho, Kansas, Kentucky, Minnesota, Missouri, Montana, North Dakota, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas and West Virginia.[35] This effort is explicitly aimed at categorizing gender non-conforming expression, like drag shows, but also, in many cases, simply dressing in a manner that does not conform to gender norms, as harmful to children and therefore able to be constitutionally restricted. The attempt to ban or restrict gender nonconforming performances under the guise of protecting children raises significant concerns about discrimination, freedom of expression, and the well-being of LGBTQ+ individuals and communities, including LGBTQ+ youth and children.

By specifically targeting gender nonconforming performances and attempting to categorize LGBTQ+ speech as harmful to children, these laws effectively discriminate against individuals based on their sexual orientation and gender identity. These bills, if enacted, would violate both the US Constitution and international human rights law. In three states where these policies have been adopted, US federal courts have declared them to be likely unconstitutional.[36] The anti-drag legislation and LGBTQ+ speech suppression contradicts the principle of non-discrimination, as outlined in article 2 which provides for equal treatment and protection of all individuals regardless of their characteristics. This legislation, in addition to discriminating against specific groups, also has a stigmatizing effect on LGBTQ+ youth by sending the message that their identities and expressions are inherently problematic or harmful and amy contribute to feelings of isolation, shame, and lack of acceptance, which can have long-lasting psychological and emotional effects.

These bills have a chilling effect on free expression and artistic creativity. Drag shows and other gender nonconforming performances are forms of artistic expression and cultural representation for the LGBTQ+ community. Efforts to restrict or criminalize this expression deters participation in it even in places where the legislation does not become law. Attempts to ban or restrict gender nonconforming performances under the guise of protecting children directly violates article 19 which protects the right to freedom of expression. Restricting, or attempting to restrict, such

[34] Kate Ruane et al., "Laws Restricting Drag Shows and Drag Queen Story Hours Should Scare US," PEN America, 5 March 2023, https://pen.org/drag-show-laws/.

[35] Suzanne Nossel, "The Drag Show Bans Sweeping the US Are a Chilling Attack on Free Speech," The Guardian, 10 March 2023, https://www.theguardian.com/culture/commentisfree/2023/mar/10/drag-show-bans-tennessee-lgbtq-rights.

[36] These cases may be subject to appeal.
HM Florida-ORL, LLC v. DeSantis, 6:23-cv-00950, (M.D. Fla.), https://storage.courtlistener.com/recap/gov.uscourts.flmd.414413/gov.uscourts.flmd.414413.29.0.pdf; *Friends of Georges, Inc. v. Mulroy*, 2:23-cv-02163-TLP-tmp (W.D. Tenn. 2 June 2023), https://drive.google.com/file/d/19ocijP9lNXnQFDJKup0Jxmq-3nI09yor/view?pli=1;
Holly Michels, "Federal Judge Blocks Montana Drag Ban Law for Now," Bozeman Daily Chronicle, 28 July 2023, https://www.bozemandailychronicle.com/news/politics/drag-shows-drag-story-hours-montana-ban-blocked/article_4dae42fe-6c5f-5f27-82a1-d2b3572ea6af.html.

performances based on a perception of harm to children is an unjustifiable limitation on this right.

Moreover, this systematic effort to suppress LGBTQ+ expression does not occur in a vacuum within the US. This year, the Supreme Court's decision *303 Creative v. Eleni*[37] held that business owners may discriminate against LGBTQ+ people in the provision of certain expressive services, like the production of wedding websites. The decision was the culmination of a long campaign by religious conservatives to gain the legal right to discriminate against LGBTQ+ people in offering certain services to the public.[38] This decision infringes upon articles 2 and 26 as it permits differential treatment based on sexual orientation. Discrimination against LGBTQ+ individuals by businesses who refuse services solely due to their sexual orientation also contradicts the principle of equal protection under the law.

III. Right to privacy (art. 17)

Although state governments have taken some steps to address the right to privacy, in reference to paragraph 22 of the "List of issues prior to submission of the fifth periodic report of the United States of America" PEN America would like to highlight the pressing privacy concerns raised by Section 702 of the Foreign Intelligence Surveillance Act (FISA) and proposed legislations such as the children's online safety bills and TikTok ban.[39]

A. Section 702 of FISA

Section 702 of FISA permits the US government to target electronic communications of non-US persons reasonably believed to be located outside the US for collection if the government believes they possess foreign intelligence information.[40] The US government claims that meaningful limitations have been placed upon this broad authority by recent amendments to Section 702; however, evidence suggests these amendments have been ineffectual. For example, the US government indicates that, in non-national security criminal investigations, in order to protect privacy, the FBI must obtain a court order to access information collected pursuant to Section 702.[41] However, as the Foreign Intelligence Surveillance Court has disclosed, as of April

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[37] *303 Creative LLC v. Elenis*, 600 US ___ (2023), https://www.supremecourt.gov/opinions/22pdf/21-476_c185.pdf.

[38] Dana Liebelson, "Inside the Conservative Campaign to Launch 'Jim Crow-Style' Bills against Gay Americans," Mother Jones, 20 February 2014, https://www.motherjones.com/politics/2014/02/gay-discrimination-bills-religious-freedom-jim-crow/.

[39] "List of issues prior to submission of the 5th periodic report of the United States of America," United Nations Human Rights Committee, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsijKy20sgGcLSyqccX0g1nlYhE7dxYvkfnqbOgGjt0WN%2BV80Vhr%2FCeDA%2FmavqFwov8pSVO80BC2Blh%2F7I%2BUBsm%2F7%2BuQp4Oidt1KdSgRNH5%2F4.

[40] "FISA Section 702," INTEL, https://www.intel.gov/foreign-intelligence-surveillance-act/1237-fisa-section-702.

[41] Sarah Taitz Patrick C. Toomey, "The Government's Section 702 Playbook Doesn't Work Anymore," Just Security, 30 August 2023, https://www.justsecurity.org/87893/the-governments-section-702-playbook-doesnt-work-anymore/.

2023, the FBI has never once complied with this requirement.[42] And so, to the extent reforms have been made, they have been poorly enforced at best and ineffectual at worst. It is clear that, to truly protect privacy, more changes are necessary.

The broadly defined scope of "foreign intelligence information" under Section 702 potentially allows for the suspicionless collection of a wide range of communications. This law raises concerns about potential infringements on the right to privacy as outlined in article 17 which stipulates that no one shall be subjected to arbitrary or unlawful interference with their privacy. The surveillance permitted under Section 702 of FISA allows the collection of electronic communications of any foreign person without necessarily distinguishing between individuals who may or may not have connections to criminal or security-related activities. This lack of differentiation could be considered arbitrary interference with privacy.

The broadly defined criteria for collecting communications of any non-US person located outside the United States based on the potential possession of "foreign intelligence information" allows for a wide net to be cast, potentially encompassing everyday personal communications that have no connection to national security threats. This overbroad scope might lead to the collection of private and innocuous conversations, infringing on the expectation of privacy that individuals have in their communications.

The potential for government surveillance without clear and transparent oversight mechanisms raises concerns about accountability. ICCPR article 17 emphasizes the importance of protecting privacy through effective legal safeguards. Without adequate oversight and accountability measures, the surveillance authorized by Section 702 may lack the necessary safeguards to prevent abuses and protect individuals' privacy.

The surveillance enabled by Section 702 of FISA has the potential to infringe upon the right to privacy outlined in article 17 due to its overbroad scope and apparent lack of transparency and accountability. These concerns highlight the need to balance legitimate security interests with the preservation of fundamental human rights, particularly the right to privacy.

B. Children's Online Safety Bills (KOSA, age-appropriate design)

The raft of children's online safety bills, including the federal Kids Online Safety Act, EARN IT Act, and Stop CSAM Act, and similar state bills, infringe on the rights to privacy and freedom of expression.[43] These bills claim to protect children and children's privacy but in fact endanger the

[42] FISA Section 702 Memorandum Opinion and Order, https://www.intel.gov/assets/documents/702%20Documents/declassified/2023/FISC_2023_FISA_702_Certifications_Opinion_April11_2023.pdf, 91.

[43] "Bill Intended to Protect Children Online Would Likely Block Them from Information They Need, Especially on Health and Wellness Concerns," PEN America, 28 July 2023, https://pen.org/press-release/pen-america-bill-intended-to-protect-children-online-would-likely-block-them-from-information-they-need-especially-on-health-and-wellness-concerns/.

human rights of both children and adults. The bills generally require online platforms to prevent children using their services from seeing harmful content, the specifics of which are often vague and overbroad and in turn, threaten user privacy and free expression online. For example, The Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2023 (EARN IT, S.1207) has the stated aim of curbing the scourge of child exploitation online. Although PEN America supports the overarching objective of protecting children from online exploitation, the implementation of EARN IT stands to complicate law enforcement's efforts to safeguard children. Moreover, as platforms try to comply with the bill's provisions, they will almost certainly err on the side of removing *more* content than less, and in doing so, they will inevitably censor users, with a disproportionate effect on marginalized communities.[44] Additionally, EARN IT jeopardizes the accessibility of encrypted services, thereby eroding a fundamental cornerstone of digital security, confidentiality, and overall safety.

Bills like the Kids Online Safety ACT (KOSA, S.1409), which require companies to safeguard minors from encountering harmful content on their services, also potentially infringe on the right to privacy. In order to prevent children from seeing harmful content (the scope of which tends to be poorly defined), platforms could decide that they need to know which of their users are "children."[45] That could lead to identity verification, additional data collection, and surveillance, all of which would impact–if not infringe–on user privacy, protected under article 17. Comparable laws have been enacted at the state level, such as Texas H.B. 1181, which restricts access to adult content websites through the enforcement of digital age verification measures and alerts regarding potential harms.[46] When this law was challenged in court, the US District Court determined that the state's intention to shield children from explicit online material is valid. Nonetheless, the court also ruled that the legislation infringes upon First Amendment free speech rights and is overly ambiguous.[47]

Joint letter in Opposition to the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2023, Center for Democracy & Technology, et al., 2 May 2023, https://cdt.org/wp-content/uploads/2023/05/May-2023-EARN-IT-Act-opposition-letter-FINAL.pdf.

[44] Joint letter in Opposition to the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2023, Center for Democracy & Technology, et al., 2 May 2023, https://cdt.org/wp-content/uploads/2023/05/May-2023-EARN-IT-Act-opposition-letter-FINAL.pdf.

[45] "Senate Commerce Should Reject Bills Jeopardizing Online Safety for Kids and Adults," Center for Democracy and Technology, 31 July 2023, https://cdt.org/insights/senate-commerce-should-reject-bills-jeopardizing-online-safety-for-kids-and-adults/.

[46] Emma Bowman, "A Texas Law Requiring Age Verification on Porn Sites Is Unconstitutional, Judge Rules," NPR, 2 September 2023, https://www.npr.org/2023/09/01/1197380455/a-texas-law-requiring-age-verification-on-porn-sites-is-unconstitutional-judge-r.

[47] Please note that this case has been ruled on at the federal district court level, and there remains an opportunity for a potential appeal in this case.
Free Speech Coalition, Inc. v. Colmenero, 1:23-cv-00917, (W.D. Tex.), https://storage.courtlistener.com/recap/gov.uscourts.txwd.1172751222/gov.uscourts.txwd.1172751222.36.0.pdf.

Furthermore, there are significant risks to both children's and adults' rights to free expression, which are guaranteed under both the US Constitution's First Amendment and ICCPR article 19. These bills, if enacted, could incentivize platforms to host only content suitable for children, significantly deteriorating discourse and reducing the number of forums online for all. Additionally, "harmful content" is, in many ways, in the eye of the beholder. If some government officials view LGBTQ+ content or anti-racist content or sexual education content as "harmful to children," they could use their powers under these laws to suppress the ability of minors to access that content.[48]

C. TikTok Bans

A wholesale ban on TikTok, as proposed at both the federal and state level in the US, would violate articles 17 and 19. In March 2023, PEN America, along with a coalition of civil liberties, digital rights, and anti-censorship organizations, raised this concern in a joint letter to the US Congress.[49]

Article 17 guarantees the right to privacy, including protection against "arbitrary or unlawful interference" into one's "privacy, family, home or correspondence." A nationwide ban on TikTok, such as that proposed by US lawmakers, would render the platform inaccessible to millions of users, an extreme measure and one that would significantly interfere with individuals' ability to communicate, access information, and engage in online activities while also incentivizing the surveillance of anyone who may try to access the service. Such interference with digital interactions and personal communications is an infringement on the rights to privacy and freedom of expression. A wholesale ban on an online platform that enables expression and exchange would amount to an arbitrary restriction on individuals' ability to communicate and receive information. Further, such a ban in the US would risk setting a precedent, lowering the bar for governments seeking new ways to justify restrictions on the right to freedom of expression, including how individuals communicate and access information.

While acknowledging the national security and privacy concerns surrounding TikTok, PEN America and its partners highlighted the alternative approaches, short of a full-scale ban, that are available.[50] Articles 17 and 19 necessitate that any restrictions on privacy and expression be

[48] "Senator Appeared to Suggest Bipartisan Bill Would Censor Transgender Content Online," NBCNews.com, 6 September 2023, https://www.nbcnews.com/nbc-out/out-politics-and-policy/senator-appears-suggest-bipartisan-bill-will-censor-transgender-conten-rcna103479.

[49] "PEN America, with Other Free Speech Organizations, Sends Letter to Congress Opposing Proposed National Tiktok Ban," PEN America, 23 March 2023, https://pen.org/press-release/pen-america-with-other-free-speech-organizations-sends-letter-to-congress-opposing-proposed-national-tiktok-ban/.

[50] "PEN America, with Other Free Speech Organizations, Sends Letter to Congress Opposing Proposed National Tiktok Ban," PEN America, 23 March 2023, https://pen.org/press-release/pen-america-with-other-free-speech-organizations-sends-letter-to-congress-opposing-proposed-national-tiktok-ban/.

proportionate, necessary, and in line with lawful procedures. A nationwide ban on TikTok is disproportionate, particularly since there are alternative measures that can address the security concerns without impinging on individuals' rights to privacy and freedom of expression. Further, as PEN America has advocated, more robust protection for online privacy should come in the form of comprehensive privacy legislation rather than a wholesale ban on one specific app.

IV. Recommendations

In light of the facts highlighted above, the Human Rights Committee may consider making the following recommendations to the Government of the United States:

- Prioritize the principle of non-discrimination (ICCPR art. 2,3,26) and the protection of freedom of expression (ICCPR art. 19) and safeguarding the right of individuals and communities, including LGBTQ+ individuals, to express themselves through artistic and cultural means without undue restrictions.
- Request that the US Department of Education, particularly the appointed book ban coordinator, take all appropriate measures to ensure that school districts and their policies abide by the principle of equality and non-discrimination with particular attention towards LGBTQ+ communities and other marginalized communities. Consider implementing data collection and surveys of teachers and librarians on efforts to suppress free expression using the discontinued Library Statistics Program as a reference.[51]
- Continue the OCR's work in monitoring and ensuring compliance with Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964 in school districts like Forsyth County Schools. This would include the OCR continuing to monitor school districts' compliance with federal laws related to discrimination, harassment, and the creation of hostile environments. Encourage the OCR to conduct regular assessments of districts' policies and practices to ensure that they align with Title IX and Title VI.
- Amend Section 702 of FISA to be in line with ICCPR article 17 the right to privacy. Strengthen the oversight and accountability mechanisms for surveillance activities conducted under Section 702. This could include narrowing the permissible pool of foreign targets, requiring the FBI to obtain a warrant any time that it wishes to access data collected about US persons pursuant to Section 702, and ensuring judicial review is available and effective.
- Find a balanced approach that safeguards children while also upholding the right to privacy and freedom of expression for all individuals. Consider enacting privacy protections that benefit everyone and working with stakeholders to identify other tools and mechanisms that will protect children's rights to privacy and free expression as well. Consider those who would suffer the most without end-to-end encryption, including refugees, whistleblowers, asylum seekers, and domestic violence survivors.

[51] "Library Statistics Program," National Center for Education Statistics (NCES) Home Page, a part of the US Department of Education, https://nces.ed.gov/surveys/libraries/.

- Prioritize passing comprehensive data privacy legislation that protects users while respecting free expression rights. Implement rigorous mitigation measures that enhance data security, safeguard user privacy, and prevent any potential misuse of user data. Such provisions could include enhancing user education regarding privacy settings, data usage, and digital literacy. Empower users to make informed choices about their online interactions and data sharing.