WRITTEN STATEMENT FOR THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION & WORKFORCE,
SUBCOMMITTEE ON HIGHER EDUCATION & WORKFORCE DEVELOPMENT

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"RESTORING EXCELLENCE: THE CASE AGAINST DEI"

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I appreciate the Committee allowing me to contribute to its consideration of the status of so-called "DEI" in higher education.[1] Below I briefly summarize existing law, its incompatibility with certain institutional norms across higher education, and steps the current Administration is taking to address those inconsistencies, before turning to the need for Congress to act to codify those steps and to ensure federal law never again promotes the very discriminatory practices it prohibits.

I. THE LINCOLNIAN CONSTITUTION

The Founding Fathers gave us the great American Experiment, but the refounders of the post-Civil War period crafted the legal architecture of modern America. Their work (writing and ratifying the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as passing the Civil Rights Act of 1866 and more) redefined the relationship between the states and the federal government. More, it formally committed our nation at both the state *and* federal levels to a shared national citizenship and the equal protection of the law.

For the better part of a century, after Reconstruction's brief explosion of

[1] I do not use this terminology elsewhere in this testimony. Those who initially labeled the "DEI" movement chose the terms "diversity," "equity," and "inclusion" precisely because they sounded vaguely positive without communicating any specific content. Years of exposure to the excesses of "DEI" have convinced much the public that the phrase is vaguely negative, without adding clarity to the content of the categorization. I am interested in only the material subset of "DEI" programs that involve illegal discrimination. That label—illegal discrimination—most precisely denotes my topic, so that's the terminology I employ throughout.

equality, our institutions often ignored these promises. Nonetheless, the mid-century triumphs of the Civil Rights Movement (including Jackie Robinson's integration of Major League Baseball in 1947, Truman's integration of the U.S. Military in 1948, the Supreme Court's simultaneous issuance of *Brown v. Board of Education* and *Bolling v. Sharpe* in 1954, and Congress's passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965) restored the centrality of these promises.

Let me highlight three of those successes more specifically.

1. *Brown* established that the Fourteenth Amendment's Equal Protection Clause forbid states from discriminating based on race in the provision of public education, including higher education.

2. *Bolling v. Sharpe*, a sister case addressing the federal public schools of Washington, D.C., recognized that the Constitution imposes the same constraint on federal power that the Fourteenth Amendment's Equal Protection Clause imposes on the states. Congress could no more differentiate its educational programming based on the race of students than could the states.

3. The Civil Rights Act of 1964 largely excised discrimination from public life, very much including in education. This remained necessary, as Justice Marshall famously quipped, because the states had understood *Brown II*'s instruction to integrate with "all deliberate speed" to mean that they could do so "slow[ly.]"[2]

That's why it mattered when Congress imposed on federal funding recipients, through Title VI, a broad sweeping prohibition: "No 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."[3] That included almost all colleges and universities. The Courts have long interpreted this language to prohibit intentional discrimination against anyone because of race, color, or national origin.[4]

Congress imposing, through Title VII's prohibitory provisions, a bar on

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2 Cass R. Sunstein, *Did Brown Matter*, The New Yorker (Apr. 25, 2004), https://www.newyorker.com/magazine/2004/05/03/did-brown-matter.

3 42 U.S.C. § 2000d.

4 *See, e.g.*, *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181, 198 n.2 (reiterating, because "no party asks us to reconsider it," the longstanding proposition that all and only "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment [when pursued by a state actor] also constitutes a violation of Title VI."); *Id.* at 288 (Gorsuch, J., Concurring) (restating that "Title VI…'prohibits only intentional discrimination.' From this, we can safely say that Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color or national origin.") (citing *Alexander v. Sandoval*, 532 U.S. 275, 280 (2011) (cleaned up)).

almost all employers (including colleges and universities), among others, discriminating in employment actions against "any individual" "because of" "race, color, religion, sex, or national origin"[5] mattered at least as much.

These enactments (and others like them[6]) express and embody our broad, long-standing national consensus in favor of nondiscrimination. They jointly compel equal treatment of individuals, regardless of their race, color, national origin, or sex.

II. THE EXCEPTION THAT THREATENED THE RULE

For two generations, the Supreme Court carved what it intended to be a narrow exception to these enactments' requirements of nondiscrimination for the admissions decisions of higher education. For two generations, people who should have known better took that exception as a broadly applicable trump card, overruling the Lincolnian Constitution.[7]

In 1978, while acknowledging that racial discrimination must satisfy strict

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5 *Compare* 42 U.S.C. §§ 2000e-2(a) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color religion, sex, or national origin."); 2000e-2(b) ("It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."); 2000e-2(c) ("It shall be an unlawful employment practice for a labor organization—(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."); and 2000e-2(d) ("It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.").

6 The most notable such parallel enactments would be 42 U.S.C. § 1981 (which started life as Section 1 of the Civil Rights Act of 1866 and has long been held to bar *all* contracting decisions based on race) and Title IX of the Education Amendments of 1972 (based tightly on Title VI, Title IX bars discrimination on the basis of sex by federal funding recipients engaged in educational programming, outside of specific, legislated exceptions). 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance….").

7 This section draws heavily on the Brief of Hamilton Lincoln Law Institute and Ilya Shapiro as *Amici Curiae* in Support of Petitioner, filed in the consolidated cases of *Students for Fair Admissions,*

scrutiny to comply with the Equal Protection Clause, a single Justice wrote in *Regents of the University of California v. Bakke* that "the interest of diversity is compelling in the context of a university's admissions program."[8] Justice Powell agreed with four of his colleagues that the discriminatory admissions program at issue nonetheless violated Equal Protection, because it was insufficiently narrowly tailored.[9]

A generation later, in 2003 in *Grutter v. Bollinger*, a Supreme Court majority followed, but narrowed, this lead. Out of respect for "a university's academic decisions" (specifically—and only—the school's "educational judgment" that producing "such diversity" as could only be achieved through race-conscious interventions "is essential to its educational mission") that majority deferred to a defendant on the "compellingness" of this interest.[10] *Grutter* recognized as compelling the school's interest in obtaining for students the alleged educational benefits of a racially diverse student body, while rejecting as insufficient any broader interest in racial balancing for its own sake.[11] Unlike in *Bakke*, after so finding, the *Grutter* Court approved of the tailoring of Michigan's law school's racial discrimination.

Grutter's exception to our nondiscrimination law remained extraordinarily narrow. It applied *only* to higher education.[12] In higher education, it addressed nothing but admissions decisions.

Despite the narrowness of *Grutter*, the years that followed saw institution after institution misread it to more generally bless illegal "diversity"-seeking discrimination. Universities relied on *Grutter* to justify race-based hiring decisions.[13] Public school systems relied on *Grutter* to justify how they assigned students to K-12 public schools.[14] Private companies relied on *Grutter* in announcing that they would refuse to contract with parties unless they discriminated based on race in their hiring, firing, promotional and assignment decisions.[15] Governmental employers relied on *Grutter* to justify

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Inc. v. President and Fellows of Harvard College, Case No. 20-1199, and *Students for Fair Admissions, Inc. v. University of North Carolina*, Case No. 21-707. https://hlli.org/wp-content/uploads/2022/05/SFFA-v-Harvard-HLLI-Shapiro-amicus.pdf.

8 438 U.S. 265, 314 (1978).

9 *Id.* at 320 (holding state failed to meet its burden of demonstrating that "the challenged classification is necessary to promote" the state's interest in obtaining a diverse student body).

10 539 U.S. 306, 328 (2003).

11 *Id.* at 328; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729 (2007).

12 *Id.*

13 John Hollis, *President Washington Announces Membership to the Anti-Racism and Inclusive Excellence Task Force*, George Mason University (Sep. 3, 2020), https://www2.gmu.edu/news/2020-inclusive-excellence-task.

14 *See, e.g.*, *Christa McAuliffe Intermediate Sch. PTO, Inc. v. DeBlasio*, 364 F.3d 253, 282-83 (2d Cir. 2019).

15 *See, e.g.*, Sam Skolnik, *Novartis Demands Outside Counsel Make Tough Diversity Guarantees*, BLOOMBERG LAW (Feb. 12, 2020), https://news.bloomberglaw.com/us-law-week/novartis-demands-out-side-counsel-make-tough-diversity-guarantees.

"racial mirroring" promotional decisions.[16] Even *courts* relied on *Grutter* as a basis to discriminate in their selection of class counsel for representative plaintiffs in class-action litigation.[17]

III. THE *SFFA* COURSE CORRECTION

All of that *should* have come to an end with the Supreme Court's reversal of course in *Harvard*.

The Supreme Court ended *Grutter*'s exception to American nondiscrimination law for university admissions decisions.[18] It specified that this was about more than labels: "'The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'leveled at the thing, not the name.'"[19]

If *Grutter* no longer even allowed discrimination in higher education's admissions decisions, it *could not* continue to authorize *any other* illegal discrimination.

IV. CONTINUING PREVALENCE OF DISCRIMINATORY HIGHER EDUCATIONAL NORMS

And yet, evidence continues to suggest that actors have not gotten the memo (or have, and have chosen to disregard its clear meaning). Despite the *Harvard* decision, actors across the nation appear to continue to pursue discrimination in ways that obviously violate the Lincolnian Constitution.

In higher education, reported statistics for the first matriculating classes admitted post-*Harvard* suggest widespread continued discriminatory decision-making. Universities seemingly continue to systematically make discriminatory hiring, promotional, and training decisions, without regard for the limitations imposed by Title VII. Discriminatory scholarships continue to abound, often under the thinnest veneer of lip-service to the requirements of Equal Protection and Title VI. Even the federal government continues to both: (a) maintain and fund expressly discriminatory programs; and (b) provide structural incentives (directly and indirectly) rewarding the same discrimination Congress has banned.

A. ONGOING ADMISSIONS DISCRIMINATION

Throughout the *Harvard* litigation, Harvard maintained that its racial

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16 *See, e.g.*, *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003); *Bresden v. Tenn. Judicial Selection Comm'n*, 214 S.W.3d 419 (Tenn. 2007); *see generally* Darwinder S. Sidhu, *Racial Mirroring*, 17 U. PA. J. CONST. L. 1335, 1342-1347 (2025).

17 *See, e.g.*, *City of Providence v. AbbVie Inc.*, 2020 U.S. Dist. LEXIS 189472, at *26, 2020 WL 6049139 (S.D.N.Y. Oct. 13, 2020).

18 *Harvard*, 600 U.S. at 230.

19 *Id.*

preferences were required to obtain the purported benefits of the racially balanced student body it annually engineered. Specifically, Harvard maintained that race neutrality "would prompt a 33-percent drop in [B]lack and Hispanic students."[20] At the Supreme Court, Yale, Princeton, Duke, and Penn joined 11 other selective colleges in jointly filing an amicus brief, expressly arguing that "using exclusively race-neutral approaches to admissions decisions would undercut [their] efforts to attain 'the benefits of diversity' they seek"—because "no race-neutral alternative presently can fully replace race-conscious [admissions processes] to obtain the diverse student body [they] have found essential to fulfilling their missions."[21]

Given these longstanding, insistent positions, many of these schools' post-*Harvard* releases of demographic data on their later-admitted classes tell on them. Despite Harvard's litigated representations, the percentage of its Class of 2028 comprised of Black and Hispanic students dropped only 4 percent.[22] Meanwhile, Yale saw *no* change in the percentage of its matriculating class that was Black and an *increase* in its Hispanic percentage.[23] Duke matched Yale's performance to a tee.[24] Princeton saw a 0.1% decrease in its Black figure and a 1% drop in its Hispanic one.[25] Penn saw its disclosed percentage of Black and Hispanic students (jointly reported as an undifferentiated mass) drop two percentage points.[26]

These reported demographics cannot be reconciled with the positions the schools took before the Supreme Court. Either what these schools told the Court was factually wrong, then, or they are not engaging in race-neutral admissions now. The hard data does not afford a third possibility.

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20 Lexi Boccuzzi, *At Some Elite Universities, Affirmative Action Ruling Leaves Little Impact on Racial Makeup, Prompting Scrutiny: 'It Looks to Me Like Yale is Deliberately Sending a Message that it Doesn't Intend to Comply with the Law,' Expert Tells Free Beacon*, WASHINGTON FREE BEACON (Sep. 11, 2024), https://freebeacon.com/campus/at-some-elite-universities-affirmative-action-ruling-leaves-little-impact-on-racial-makeup-prompting-scrutiny/.

21 Brief of *Amici Curiae* Brown University, California Institute of Technology, Carnegie Mellon University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, Johns Hopkins University, Princeton University, University of Chicago, University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Case No. 20-1199, and *Students for Fair Admissions, Inc. v. University of North Carolina*, Case No. 21-707. https://www.supremecourt.gov/DocketPDF/20/20-1199/232422/20220801150520881_20-1199%20%2021-707%20bsac%20Universities.pdf.

22 Boccuzzi, *supra* n.20. The four percent drop took the relevant share of Harvard's freshman class from a consistent 18% to 14%. To be fair, that four percent decline in class share works out to a 22.2% reduction in the subgroups' representation.

23 Yale's Class of 2027 percentages were 14% and 18% (respectively); those for its Class of 2028 were 14% and 19%.

24 Duke's Class of 2027 percentages were 13% and 13% (respectively); those for its Class of 2028 were 13% and 14%.

25 Princeton's Class of 2027 percentages were 9% and 10% (respectively); those for its Class of 2028 were 8.9% and 9%.

26 Penn's Class of 2027 was 25% Black-and-Hispanic; its Class of 2028 was 23%.

B. APPARENTLY RETAINED DISCRIMINATORY HIRING AND PROMOTIONAL PRACTICES

As previously discussed, *Grutter* offered no specific authorization to universities to disregard Title VII and discriminate in their hiring, promotional, and training programs for employees. *Harvard* removed whatever fig-leaf of rhetorical cover they may have perceived for such illegal discrimination. Nonetheless, a steady drumbeat of disclosures has uncovered ongoing employment discrimination by major universities in the years since the Supreme Court decided *Harvard*.

I won't belabor the point. John Sailer (now at the Manhattan Institute) has done yeoman's work uncovering the methods through which major universities have skirted the law over these years. Related private lawsuits were filed against at least UCLA,[27] Northwestern University,[28] and Texas A&M.[29]

C. APPARENTLY RETAINED DISCRIMINATORY SCHOLARSHIPS

Grutter's narrow exception governed *only admissions decisions* for institutions of higher learning. Long before it was decided, the Court of Appeals for the Fourth Circuit had held that the Equal Protection Clause (and therefore, presumptively, Title VI) barred public colleges or universities from discriminating in their provision of financial aid.[30] That precedent was never overturned or limited. As far as I've determined, no sister circuit ever created a circuit split.

Nonetheless, colleges and universities across the nation continued throughout the *Grutter*-era and have continued after its passing to administer and fund scholarships discriminating based on race, national origin, and sex. Since 2023, the Equal Protection Project alone has filed challenges to illegally discriminatory scholarship programs (some discriminating because of race, others because of national origin or sex) at 100 schools.[31]

Above and beyond this clearly established, widespread practice of colleges and universities openly flouting Title VI, Title IX, and the Equal Protection

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27 *Do No Harm v. David Geffen School of Medicine at UCLA*, C.D. Cal. Case No. 2:25-cv-4131.

28 *Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. Northwestern University*, N.D. Ill. Case No. 1:24-cv-05558. The plaintiff voluntarily dismissed this suit on January 31, 2025.

29 *Lowery v. Texas A&M University Sys.*, S.D. Tex. Case No. 4:22-cv-03091. The court denied the plaintiff had standing to pursue his claims. As the Court of Appeals for the Fifth Circuit noted, Texas subsequently altered its law to prohibit the practices at issue. On both scores, the merits of the plaintiff's allegations were not reached.

30 *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

31 William A. Jacobson, *Equal Protection Project Challenges 100th School—DACA-Only Scholarship at U. Nebraska Omaha*, Legal Insurrection (May 15, 2025), https://legalinsurrection.com/2025/05/equal-protection-project-challenges-100th-school-daca-only-scholarship-at-u-nebraska-omaha/.

Clause, it appears a growing set of schools have chosen to retain discriminatory scholarships post-*Harvard* by outsourcing administration of those scholarships to corporate alter egos. Such schools have variously assigned the offending scholarships to alumni associations or captive supporting foundations, under the apparent theory that these affiliates (as spun-off 501(c)(3)s that do not receive federal funding) are subject to neither the Fourteenth Amendment nor Title VI.[32]

D. CONTINUED DIRECT AND INDIRECT FEDERAL DISCRIMINATION IN HIGHER EDUCATION

We must also acknowledge that until January 2025 (and, as described below, sometimes beyond), *the federal government itself* discriminated—directly and indirectly—in its funding and operation of higher education.

1) Federal Funding of Higher Education's Illegal Discrimination

In ways large and small, federal agencies directly funded illegal discrimination by federal funding recipients in higher education. The National Institutes of Health's Faculty Institutional Recruitment for Sustainable Transformation (FIRST) program is a typical example. Through this grant program, NIH expressly funded "round[s] of awards to enhance [a demographically measured] diversity and inclusion among biomedical faculty."[33] Expressly, FIRST "awards provide[d] funds to recruit [demographically measured] diverse cohorts of early-stage research faculty and establish inclusive environments to help those faculty succeed." This made FIRST funds seemingly contingent on participating recipients intentionally making race-and-sex based recruiting and hiring decisions expressly banned by Title VII, without anything like the kind of strong basis in evidence our case law requires for such an employer to even arguably have the right to make them.[34]

2) Federal Incentivization of Discrimination (Indirect)

Above and beyond such direct funding of illegal discrimination, the federal government indirectly incentivizes illegal discrimination by federal funding recipients through the structure of the Higher Education Act.

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[32] We have recently documented a pair of such examples (at Wright State and Youngstown State). *ACR Project Alerts Ohio AG Yost that State Schools Continue to Operate Illegal, Race-Based Scholarships* (Feb. 3, 2025), https://www.americancivilrightsproject.org/blog/acr-project-alerts-ohio-ag-yost-that-state-schools-continue-to-operate-illegal-race-based-scholarships/.

[33] The FIRST program (including its website) "is no longer an active Common Fund program," but "the program website is being maintained as a[no-longer publicly accessible] archive…" Faculty Institutional Recruitment for Sustainable Transformation (FIRST): Program Snapshot, National Institutes of Health, https://commonfund.nih.gov/FIRST (last visited, May 17, 2025).

[34] *See, e.g.*, *Ricci v. Stefano*, 557 U.S. 557 (2009).

The Higher Education Act authorizes and requires the U.S. Department of Education ("ED") to license accreditors to serve as a "reliable authority as to the quality of education" provided by higher educational institutions.[35] While some level of competition between undergraduate accreditors is possible, a number of fields' professional degrees may only be issued by schools accredited by a single licensed accrediting agency.[36]

The "quality determination" such licensed accreditors reach then determines schools' eligibility for federal funding, including through the federal student loan program.[37] The Higher Education Act specifies a series of "standards for accreditation" that such accreditors *must* assess.[38] The Higher Education Act then specifies both that:

(i) "Nothing in subsection (a)(5) shall be construed to restrict the ability of – (1) an accrediting agency or association to set, with the involvement of its members, and to apply, [additional] accreditation standards[;]"[39] and

(ii) "the Secretary [of Education] shall not promulgate any regulation with respect to the standards of an accreditation agency or association described in subsection (a)(5)."[40]

This structure empowers accreditors (definitionally private actors) to set any standards they choose to impose on their participants and to condition on schools' compliance with those standards the access of such schools to federal funding programs of general applicability.

As of January 2025, numerous accreditors used this delegation to impose race-and-sex-balancing goals and standards onto federal funding recipient schools. For example, the ABA imposed a standard requiring demonstrated commitment both "to having a student body that is diverse with respect to gender, race, and ethnicity" and "to having a faulty and staff that are diverse with respect to gender, race, and ethnicity." The Commission on Accrediting of the Association of Theological Schools imposed a standard requiring "[t]he composition of the faculty [to be] sufficient in number and diversity—demographically and educationally[.]" The various kinds of medical and public health accreditors proved particularly zealous in imposing standards dictating the demography of their schools' enrollments

35 20 U.S.C. § 1009b(a).

36 E.g., the sole accreditor for American law schools is the American Bar Association's Council of the Section of Legal Education and Admissions to the Bar. See also, (i) the American Dental Association's Commission on Dental Accreditation; (ii) the American Veterinary Medical Association's Council on Education; (iii) the Accreditation Council for Pharmacy Education, and the (iv) Accreditation Commission for Midwifery Education; among others.

37 20 U.S.C. § 1099b(j).

38 20 U.S.C. § 1099b(a)(5).

39 20 USC 1099b(p).

40 20 USC 1099b(o).

and faculties.

And accreditors regularly cited these standards and any perceived noncompliance to pressure universities—by hook or by crook and regardless of laws to the contrary—to produce what they deemed sufficiently racially balanced student bodies and faculties.[41] As a result, because of these standards (and the Higher Education Act's insulation of them from administrative scrutiny), federal dollars have been (and continue to be) used to coerce higher educational institutions to discriminate in their programming and in their employment decisions by race, national origin, and sex in violation of Title VI, Title VII, and Title IX (as well as in violation of Section 1981 and, in the case of public schools, of the Fourteenth Amendment's Equal Protection Clause).

3) Federal Incentivization of Discrimination (Direct)

Similarly, Congress has crafted and continues to fund at least nine (9) "Minority Serving Institution" programs, which expressly condition schools' eligibility for federal money on the racial balances they engineer for their student populations.[42]

Congress created the first of these programs to support "institutions of higher education, which have a student body that has traditionally had a significant portion of [the relevant population of] students[,]"[43] but never incorporated any requirement of any such history into the statute; instead—from the jump—Congress made MSI funding availability contingent on *current* enrollment percentages. By so defining the MSI Programs, Congress denies all other schools an equal opportunity to access federal funding because too few of their students classify in specified racial groups, while too many

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41 Peter Kirsanow and Gail Heriot (of ACR Project Board) Submit Legislative Proposal on Accreditation to Congress, ACR Project (Feb. 26, 2025), https://www.americancivilrightsproject.org/blog/peter-kirsanow-and-gail-heriot-of-acr-project-board-submit-legislative-proposal-on-accreditation-to-congress/.

42 Among those programs are: (i) the Developing Hispanic Serving Institutions Program (the "DHSI Program"); (ii) the Hispanic-Serving Institutions—Science, Technology, Engineering, or Mathematics and Articulation Program (the "HSI-STEM Program"); (iii) the Promoting Postbaccalaureate Opportunities for Hispanic Americans Program (the "HSI Postbac Program" and, with the DHSI Program and the HSI-STEM Program, the "HSI Programs"); (iv) the Alaska Native-Serving Institutions Program (the "ANSI Program"); (v) the Native Hawaiian-Serving Institutions Program (the "NHSI Program"); (vi) the Asian American or Native American Pacific Islander-Serving Institutions Program (the "AANAPISI Program"); (vii) the Native American-Serving Nontribal Institutions Program (the "NASN Program"); (viii) the Predominantly Black Institutions Program (the "PBI Program"); and (ix) the Master's Degree Programs at Predominantly Black Institutions Program (the "MPBI Program" and, with the HSI Programs, the ANSI Program, the NHSI Program, the AANAPISI Program, the NASN Program, and the PBI Program, the "Minority Serving Institutions Programs" or the "MSI Programs," with each an "MSI Program").

43 Alexander M. Heideman, *Hispanic-Serving Institutions and Emerging Constitutional Issues*, 24 Federalist Soc'y Rev. 147, 152 (2023) (citing the Hispanic Serving Institutions of Higher Education Act of 1989, H.R. 1561, 101st Cong. (1989)).

identify with others.

These programs primarily flow through ED, which designates the qualifying institutions and awards dedicated grants solely to the schools so designated. Then a host of other federal agencies participate in the same programs by piggybacking on ED's designations of institutions having achieved its to-order racial results and awarding grants solely to those schools. These agencies, like ED, so limit access to federal funding streams to the schools ED favors because of the racial balances of their students.

Through the MSI Programs, the federal government discriminates against students because of their races. Through the MSI Programs, the federal government discriminates against schools because of the races of their students. Those are *Bolling v. Sharpe* constitutional problems, not *Harvard* ones. Through the MSI Programs, the federal government incentivizes schools (including state public schools) to violate the Civil Rights Act of 1964 (and public schools to violate the Fourteenth Amendment).

Let me emphasize that these unlawful programs differ profoundly from other programs which I am *not* discussing here. As far as I am aware, federal support for both Historically Black Colleges and Universities ("HBCUs") and Tribal Colleges and Universities ("TCUs") *do not* suffer from *any* of the MSI Programs' constitutional infirmities.

HBCUs' federal support *is not* conditioned (as the MSI Programs are) on their current demography. Instead, HBCU status (and HBCU funding eligibility) is determined by the "H"—if an institution existed as a school for Black Americans and received federal funding before the passage of the Civil Rights Act of 1964, it retains that funding today, whatever its current student makeup. Congress's continued funding of HBCUs so stands on a different and much stronger constitutional footing.

TCUs' funding likewise lacks the MSI Programs' shared conditioning of federal money on current racial balances. TCUs receive support from the federal government because (regardless of current student body demographics), they are institutions of higher learning maintained by America's *sovereign tribes*. The Tribes maintain TCUs as sovereign political entities, not as racial or ethnic groups. Those political units can and do institute rules for such institutions to assure that they serve the tribes' constituencies in exactly the same way that Georgia charges Georgia residents less for tuition at the University of Georgia than it charges Americans from elsewhere—because tribes are political institutions, this is a political distinction, not a racial or ethnic one, with the treatment turning on constituency-status, not on demography. Again, this leaves Congress's funding of TCUs on a different and much stronger constitutional footing.

Cumulatively, the MSI programs hand out approximately $1 billion per year

in such grants.

4) Federal Discrimination at the Service Academies

Post-*Harvard*, the federally administered service academies also continued to discriminate in their admissions and to vigorously defend that discrimination in court. Students for Fair Admissions documented the ways in which the service academies did so in suits filed against both the United States Naval Academy and the United States Military Academy at West Point.[44]

V. TRUMP ADMINISTRATION ACTIONS TO RESTORE EQUALITY

Since his re-inauguration on January 20, 2025, President Trump and his Administration have taken a series of actions that appear geared toward resolving several of these problems.

A. ENDING DIRECT FEDERAL FUNDING OF DISCRIMINATION

Perhaps pursuant to President Trump's January 20, 2025 Executive Order 14151, various agencies have moved to curtail federal funding of explicitly discriminatory employment programs. For example, as mentioned above, NIH has terminated the FIRST program.

While I have not specifically tracked all of the challenges to all of the actions taken by various agencies to curtail federal funding of illegality since January, given the high number of such challenges filed, it is probable that at least some of these cases seek to restore such funding by judicial fiat.

At least to some degree, they have not yet succeeded—again, pointing to the emblematic example of the FIRST program, as of this writing, that program remains dead.

B. ENDING ADMISSIONS DISCRIMINATION

The Administration has also begun to act against continuing admissions discrimination. On January 21, 2025, President Trump issued Executive Order 14173, which ordered the Attorney General and the Secretary of Education, jointly, to issue within 120-days guidance "regarding the measures and practices required to comply with" *Harvard*. On February 14, 2025, the Department of Education's Office of Civil Rights issued related

[44] These cases were filed as *Students for Fair Admissions v. The United States Naval Academy*, D.Md. Case No. RDB-23-2699 and *Students for Fair Admissions v. The United States Military Academy at West Point*, S.D.N.Y. Case No. 23-cv-08262.

guidance.[45]

A district court in New Hampshire has enjoined enforcement of that guidance document.[46] There is always a question of what an injunction against *guidance*, rather than against any pursuit of the legal theories embedded *in* such guidance, means. Regardless, the injunction currently stands.

C. Ending Employment Discrimination in Higher Education

The same Executive Order 14173 included numerous provisions combating ongoing faddish employment discrimination, including within higher education.

One such provision instructed all federal "agencies, with the assistance of the Attorney General" to "take all appropriate action … to advance in the private sector the policy of individual initiative, excellence and hard work" and to "enforce longstanding civil-rights laws … to combat illegal private-sector … preferences, mandates, policies, programs, and activities." The order instructed all agencies to identify targets for "up to nine potential civil compliance investigations" in specified priority areas, explicitly including "institutions of higher education with endowments over 1 billion dollars[.]"

It is presumably no accident that Acting Chairman of the Equal Employment Opportunity Commission Andrea Lucas filed a commissioners charge against Harvard University relating to its apparent "pattern or practice of disparate treatment against white, Asian, male, or straight employees, applicants, and training program participants in hiring, promotion (including but not limited to tenure decisions), compensation, and separation decisions; internship programs; and mentoring, leadership development, and other career development programs."[47]

Perhaps relatedly, the same order also flat-out revoked Lyndon Johnson's Executive Order 11246, under which the Department of Labor had issued regulations governing all federal contracting for generations.[48] There have

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45 U.S. Dep't of Educ., Office of Civil Rights, Dear Colleague Letter: Title VI of the Civil Rights Act in Light of *Students for Fair Admissions v. Harvard* (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf.

46 *See Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, No. 25-CV-091-LM (D.N.H. Apr. 24, 2025).

47 U.S. Equal Employment Opportunity Commission, Commissioner's Charge (Apr. 25, 2025), https://freebeacon.com/wp-content/uploads/2025/05/2025.04.25-Commissioner-Charge-Against-Harvard-University.pdf.

48 In 1964, Congress placed enforcement authority for Title VII in the U.S. Department of Justice. Later, Congress split that authority between the Justice Department and the EEOC. Congress has *never* placed enforcement authority for Title VII in the U.S. Department of Labor. Nor did Congress empower either the Justice Department or the EEOC (much less the Labor Department) to draft *substantive* regulations related to Title VII. Definitionally, DOL's regulations enforcing E.O. 11246 *could not* have altered the meaning of Title VII (to the degree that *any* regulation could

been longstanding questions concerning the compatibility of E.O. 11246 and the regulations the Labor Department issued to effectuate it with Title VII.[49] Those unresolved issues have presumably, at least pro-actively, been mooted by President Trump's revocation of the entire prior regime.

D. CONFRONTING ACCREDITORS' ABUSE OF THEIR DELEGATED POWER OVER CONGRESS'S PURSE

On April 23, 2025, President Trump issued Executive Order 14279, seeking to confront accreditors' misuse of their delegated power over Congress's purse.

The order instructed the Secretary of Education "as appropriate and consistent with applicable law" to:

> hold accountable, including through denial, monitoring, suspension, or termination of accreditation recognition, accreditors who fail to meet the applicable recognition criteria or otherwise violate Federal law, including by requiring institutions seeking accreditation to engage in unlawful discrimination … under the guise of 'diversity, equity, and inclusion' initiatives.

It specifically called for the Secretary of Education, the Secretary of Health & Human Services, and the Attorney General to "assess whether to suspend or terminate" the "status as an accrediting agency" of particular accreditors alleged to have clearly and aggressively used their standard-setting power to press for violations of Title VI and Title VII.

The long-term efficacy of these steps is unclear, but the specifically identified accreditors have since announced their "suspension" (though not their revocation) of the specified standards.[50]

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ever alter the meaning of a statute). Nonetheless—in the interest of intra-executive comity—the EEOC's longstanding practice on receiving a Title VII charge against a federal contractor was to defer to DOL's assessment of compliance with E.O. 11246, rather than to risk parallel investigations assessing the same behaviors and reaching divergent conclusions on their legality.

[49] As one example, Title VII expressly prohibits "classify[ing] employees or applicants for employment in any way which would … tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2). DOL, however, long *required* federal contractors to classify all employees and applicants by race and sex in order to track compliance with E.O. 11246.

[50] Breccan F. Thies, *Medical School Accreditor Suspends "Diversity" Requirements After Trump Executive Order*, THE FEDERALIST (May 13, 2025), https://thefederalist.com/2025/05/13/medical-school-accreditor-suspends-diversity-requirements-after-trump-executive-order/. Neetu Arnold, *Woke School Accreditors Must be Stopped*, City Journal (Mar. 6, 2025), https://www.city-journal.org/article/american-bar-association-dei-school-accreditors.

E. ENDING DISCRIMINATION AT THE ACADEMIES

On January 27, 2025, President Trump signed Executive Order 14185, which ordered U.S. Departments of Defense and Homeland Security to end all preferences "on the basis of sex, race, ethnicity, color, or creed[.]" The order specifically ordered the Secretaries of Defense and Homeland Security to align the service academies. By all appearances, the academies have complied and are not—for the duration of President Trump's term at least—currently discriminating in their admissions decisions.

F. STEPS NOT YET TAKEN: DISCRIMINATORY SCHOLARSHIPS AND MSIS

In addition to its guidance concerning admissions policies, OCR's February 14, 2025 guidance package also addressed, in passing, the legality of university-administered discriminatory scholarships.[51] Relevant to the illegality of relabeling a university's discriminatory scholarships those of its affiliates, OCR's related FAQ document recognized that:

> Title VI applies to "any program or activity receiving Federal financial assistance from the Department of Education," and a school's responsibility not to discriminate against students applies to the conduct of everyone over whom the school exercises some control, whether through a contract or other arrangement. A school may not engage in racial preferences by laundering those preferences through third parties.[52]

While this correctly states the law, the same district court that enjoined OCR's guidance letter simultaneously enjoined enforcement of the FAQ.

While parties have since filed administrative complaints against discriminatory scholarships administered by universities,[53] I am unaware of any other steps the administration has taken to confront these practices.

Similarly, I am unaware of *any* action the Administration has yet taken to admit or confront the unconstitutionality of the MSI Programs.

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51 Office of Civil Rights, Dear Colleague Letter ("Federal law thus prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, *financial aid*, *scholarships*, *prizes*, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life.") (emphasis added).

52 Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act (first issued on Feb. 28, 2025), https://www.ednc.org/wp-content/uploads/2025/03/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf (internal citations omitted).

53 *See, e.g.*, Equal Protection Project, *Equal Protection Project v. Univ. of Ala.*, https://equalprotect.org/case/equal-protection-project-v-university-of-alabama/ (last visited May 17, 2025).

VI. NEED FOR CONGRESSIONAL ACTION

As the prior section hopefully leaves obvious, there is only so much that any Administration, even one as creative and aggressive as the Trump Administration, can do to permanently answer these questions. What can be done by one President through the exercise of his discretion can almost always be reversed by a successor through the same. While related regulations could be written in the years to come (and are likely in the works), those, too, can be reversed by a successor willing to put in the work to satisfy the Administrative Procedure Act's requirements.

Simply, there are *necessary* steps that no Administration can take without the participation and active involvement of Congress, because they require legislation.

To assure that all federal programs explicitly funding legal violations by third parties (like the FIRST program) stay dead, Congress must both defund and de-authorize them.

While the law is remarkably clear already, there may be small clarifications to Title VI, Title VII, or Title IX that Congress could pass to disable the arguments in favor of ongoing admissions, employment, and scholarship discrimination by institutions of higher learning.

There are definitely changes Congress can and should make to stop directly and indirectly incentivizing illegal and unconstitutional action by colleges and universities.

At the top of that list must fall amending the Higher Education Act to push accreditors out of dictating *anything* about the demography of schools. In their capacities as U.S. Civil Rights Commissioners, Professor Gail Heriot and Mr. Peter Kirsanow (who are also Directors of the ACR Project) wrote to this Committee in February to explain how this could best be done.[54] The recommended change would be small, but meaningful. It would also serve to re-establish academic freedom, by restoring to individual institutions the setting of any lawful policy on these divisive issues, without duress from non-governmental actors. And, because of the existing language of the Higher Education Act, it is quite likely that *only* such Congressional action *can* prevent accreditors from snapping right back to compelling illegal behavior if and when a future President should prove less equality-friendly than President Trump.

The committee should also consider potential alterations to the MSI

[54] Peter Kirsanow and Gail Heriot (of ACR Project Board) Submit Legislative Proposal on Accreditation to Congress, ACR Project (Feb. 26, 2025), https://www.americancivilrightsproject.org/blog/peter-kirsanow-and-gail-heriot-of-acr-project-board-submit-legislative-proposal-on-accreditation-to-congress/.

Programs. As Professor Heriot, Mr. Kirsanow, and I wrote this Committee in March,[55] Congress can and should address the MSI Program's structural problems. I have drafted model legislation exploring some available options,[56] and I encourage the Committee to consider such improvements.

To make the President's reforms at the service academy permanent (and to disable the "national security demands discrimination" defenses they deployed in litigation during the Biden Administration), Congress must act—pursuant to its Article I, Section 8 power "To make rules for the government and regulation of the land and naval forces"—to bar a future Administration from unwinding them.

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55 *ACR Project Alerts Congress to Unconstitutional MSI Programs*, ACR Project (Mar. 10, 2025), https://www.americancivilrightsproject.org/blog/acr-project-alerts-congress-to-unconstitutional-msi-programs/.

56 *New Model Legislation: Enforcing the Law on Colorblind Admissions—Congress Can Stop Unconstitutional Discrimination and Fund Better Alternatives*, ACR Project (Feb. 2024), https://www.americancivilrightsproject.org/blog/new-model-legislation-enforcing-the-law-on-colorblind-admissions-congress-can-stop-unconstitutional-discrimination-and-fund-better-alternatives/.