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"Standing up for the Rule of Law: Ending Illegal Racial Discrimination and Protecting Men and Women in U.S. Employment Practices"
Hearing Before the Committee on Oversight and Accountability
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Rayburn House Office Building
Room 2154
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Good morning, Chairman Comer, Ranking Member Raskin, and members of the committee. My name is Jonathan Berry, and I am the managing partner of the law and public policy strategy firm Boyden Gray PLLC, where I provide strategic counsel and litigate on issues involving the overlapping bureaucracies of the administrative state and corporate America, including matters relating to Diversity, Equity and Inclusion (DEI) programs in the workplace. I was previously the Acting Assistant Secretary for Policy at the U.S. Department of Labor during the Trump Administration, and served as lead author for the latest edition of Heritage Foundation's *Mandate for Leadership* chapter on reform at the labor agencies, including EEOC and DOL. Thank you for inviting me to testify today on the important subject of the recent overreach of the U.S. Equal Employment Opportunity Commission.

I currently represent the United States Conference of Catholic Bishops and other plaintiffs in litigation against the EEOC regarding one of its recent rulemakings.[1] While my views on the subject of today's hearing are informed by my representation of clients in this and other matters, I do not appear here today on behalf of any client, and the views I present are my own.

I. Executive Summary

The EEOC has a crucial role to play in protecting American workers from discrimination, advancing equal opportunity for all, and ensuring adherence to the law. Unfortunately, in several respects, the EEOC is currently working *against* those objectives, creating the need for congressional oversight to return the EEOC to its proper function.

Three problems stand out when it comes to the EEOC's treatment of race. First, the EEOC has defended DEI initiatives in the workplace, even when those initiatives create the very Title VII violations that the EEOC is entrusted to stamp out. Second, the EEOC has brought enforcement actions against companies for merely performing criminal background checks under a Title VII disparate-impact theory, despite the constitutional problems with disparate-impact liability in the first place. Moreover, the EEOC invokes the powerful weapon of disparate-impact liability inconsistently. Third, the EEOC has continued to require that all employers submit workforce demographic data, breaking their employees down by race. This broad mandate applies to all employers of a certain size, even without any suspicion that an employer is discriminating on the

[1] *See U.S. Conf. of Catholic Bishops v. EEOC*, No. 2:24-cv-00691, 2024 WL 3034006 (W.D. La. June 17, 2024) (challenge to regulation interpreting the Pregnant Workers Fairness Act). The lead counsel for plaintiffs is the Becket Fund for Religious Liberty.

basis of race. This practice, however, contributes to racial balkanization by unnecessarily heightening the salience of race in our society.

Fortunately, despite EEOC's failures, private litigants have stepped into the breach. Recent years have seen private litigants take up the agency's responsibilities and hold companies accountable for embracing racially discriminatory DEI policies.

Congressional oversight can also help EEOC return to meeting its responsibilities. Congress should (1) hold EEOC accountable for letting corporate DEI slide; (2) monitor the priorities that the EEOC has laid out for utilizing the powerful tool of disparate-impact liability; and (3) end the EEO-1 data collection.

II. Background

Congress has empowered the EEOC to enforce Title VII of the Civil Rights Act, along with other anti-discrimination statutes.[2] Title VII prohibits discrimination "with respect to [an employee's] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, . . . or national origin."[3] Title VII purports to outlaw both disparate treatment, which involves intentional discrimination on the basis of a protected characteristic, and disparate impact, which involves facially neutral policies that have the effect of disproportionately harming a protected group.[4]

The EEOC enforces Title VII through several mechanisms. First, the EEOC can investigate and sue employers to obtain relief for victims of employment discrimination.[5] These suits can originate either from a charge filed by an aggrieved party or by a member of the Commission.[6] Second, the EEOC can promulgate regulations and issue guidance interpreting the law. Notably, when it comes to Title VII, EEOC has only been empowered to issue legislative rules about procedural and record-keeping matters, and any guidance it offers on the substance of Title VII are only followed by courts to the extent that EEOC's interpretation is persuasive.[7] Third, Title VII authorizes the EEOC, under rules it has issued, to carry out the EEO-1 data collection, which requires private sector employers with more than 100 employees and federal contractors with 50 or more employees to submit workforce demographic data, including data by job category and sex and race or ethnicity, to the EEOC.[8]

The EEOC has largely declined to fight race-conscious DEI programs operated by employers. After the *Students for Fair Admissions v. President & Fellows of Harvard College*

[2] EEOC, *Laws Enforced by EEOC*, https://www.eeoc.gov/statutes/laws-enforced-eeoc (last visited Jun. 24, 2024).
[3] 42 U.S.C. § 2000e-2(a)(1).
[4] *Id.* §§ 2000e-2(a)(1), (k).
[5] *Id.* § 2000e-5(f).
[6] *Id.* § 2000e-5(b).
[7] *Id.* § 2000e-12.
[8] *Id.* § 2000e-8(c); 29 C.F.R. §§ 1602.7-1602.14; https://www.eeoc.gov/data/eeo-data-collections.

(*"SFFA"*)[9] decision, EEOC Chair Charlotte Burrows announced that, in her view, it "remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."[10] And if actions speak louder than words, inaction speaks the loudest in this case. America First Legal has filed over 30 complaints with the EEOC, identifying corporate DEI programs that treat employees differently on the basis of a protected characteristic, yet the EEOC does not appear to have filed suit on any of them.[11] On a similar note, the number of charges filed by commissioners has skyrocketed in recent years, with Commissioner Andrea Lucas leading the way.[12] While a signed charge is only the start of the investigation process, it is nevertheless concerning that this significant increase in commissioner's charges does not appear to have resulted in a corresponding increase in lawsuits filed by the EEOC.[13]

Meanwhile, the EEOC *has* brought suit against employers' facially neutral policies that allegedly impose a disparate impact on minority groups. Most prominently, the EEOC has alleged that Sheetz, the convenience store company, has violated Title VII with its longstanding practice of conducting criminal background checks of potential employees.[14] The EEOC has not alleged that Sheetz has intentionally treated people of one race differently than people of another. Instead, the suit argues the background check policy is unlawful because it has a disparate impact on racial minorities. Notably, the EEOC has not, to my knowledge, sued any employer for imposing college-degree requirements, which create a similar disparate impact on minorities.[15]

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[9] 143 S. Ct. 2141 (2023).

[10] Press Release, EEOC, Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs (June 29, 2023), https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.

[11] America First Legal, *Woke Corporations*, https://aflegal.org/woke-corporations/ (last visited Jun. 24, 2024).

[12] EEOC, *Commissioner Charges and Directed Investigations*, https://www.eeoc.gov/commissioner-charges-and-directed-investigations (last visited Jun. 24, 2024) (noting that the number of commissioner charges signed rose from 3 to 35 per year from 2021 to 2023).

[13] *Cf.* EEOC, *Enforcement and Litigation Statistics* (last visited Jun. 24, 2024), https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (access "Litigation Statistics" tab and select type "Merits Lawsuits") (last visited Jun. 24, 2024) (showing an increase in merits lawsuits filed, but an increase that does not match the surge in Commissioner charges signed).

[14] Press Release, EEOC, EEOC Sues Sheetz, Inc. For Racially Discriminatory Hiring Practice (April 18, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-sheetz-inc-racially-discriminatory-hiring-practice

[15] *See* Jonathan Berry & G. Roger King, *Re: Request for Interpretive Rulemaking/Guidance on Employment Tests as a Substitute for College-Degree Requirements*, Boyden Gray P.L.L.C. (2024), https://boydengray.com/wp-content/uploads/2024/04/Berry-and-King-EEOC-Petition-for-Filing.pdf.

III. The Problems with EEOC's Current Approach

A. Many "DEI Programs" are Illegal Under Title VII.

EEOC's failure to sue companies with DEI programs that require treating employees or applicants differently based on their race is out of step with the current state of the law.[16] Title VII prohibits discrimination on the basis of race, and many DEI programs are unlawful. Three propositions of law illustrate this.

First, Title VII prohibits so-called "reverse discrimination" or discrimination against majority groups, just as it prohibits discrimination against minorities. This is not a new legal development.[17] But *SFFA* drove the point home. While *SFFA* interpreted the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act (not Title VII), it will likely be persuasive in future cases interpreting Title VII as well. Indeed, Justice Gorsuch suggested as much in his concurrence.[18]

Second, Title VII outlaws all kinds of discrimination that occur at the workplace, not just hiring and firing decisions. Therefore, it reaches lots of corporate DEI programs. Recall Title VII's text, which prohibits discrimination in hiring and firing decisions, as well as "compensation, terms, conditions, or privileges of employment."[19]

The Supreme Court's recent decision in *Muldrow v. City of St. Louis* shows how far this language now reaches.[20] That case asked whether a transfer decision that does not cause a significant disadvantage to the employee (because she kept the same title and pay) is actionable under Title VII.[21] *Muldrow* held that an employee does *not* need to show that an employer's discriminatory action caused significant harm to the employee before Title VII liability. Now all

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[16] *See generally* Eric S. Drieband & Benjamin P. Constine, *Title VII of the Civil Rights Act of 1964 and Affirmative Action*, Nat'l Conf. on Equal Opportunity Law (Mar. 16, 2023), https://www.jonesday.com/en/insights/2023/04/title-vii-of-the-civil-rights-act-of-1964-and-affirmative-action

[17] *See McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273, 281 n.8 (1976) (holding that Title VII protects whites as well as blacks from racial discrimination). There is an open question whether courts must find that "background circumstances support the suspicion that the defendant is the unusual employer that discriminates against the majority" to establish prima facie case of discrimination. *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 68 (6th Cir. 1985). Some circuits have held that such a finding is required. *Id.; Mills v. Health Care Serv. Corp*., 171 F.3d 450, 457 (7th Cir. 1999); *Hague v. Thompson Distribution Co*., 436 F.3d 816, 820 (7th Cir. 2006) (sec. 1981 claim); *Parker v. Baltimore & Ohio R.R. Co.,* 652 F.2d 1012, 1017-18 (D.C. Cir. 1981); *Schaffhauser v. UPS, Inc*., 794 F.3d 899, 903 (8th Cir. 2015); *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992). Other circuits have reached the opposite conclusion. *See Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir. 1999); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011). The Supreme Court will need to resolve this split eventually. *See Ames v. Ohio Dep't of Youth Serv.*, 87 F.4th 822, 827-28 (6th Cir. 2023) (Kethledge, J., concurring) (calling for Supreme Court review).

[18] *SFFA*, 143 S. Ct. at 2216 (Gorsuch J., concurring) ("everything said here about the meaning of Title VI tracks this Court's precedent in *Bostock* interpreting materially identical language in Title VII.")

[19] 42 U.S.C. § 2000e-2(a)(1).

[20] 144 S. Ct. 967 (2024).

[21] *Id*. at 972.

an employee needs to show is that a discriminatory action caused her some kind of "consequence[]"[22]—this "lowers the bar" for bringing a Title VII claim.[23]

Many corporate DEI programs are unlawful under this standard. As EEOC Commissioner Andrea Lucas has pointed out, a DEI program that restricts access to "mentoring, sponsorship, or training programs" to only minority employees is an employment action that discriminates on the basis of race and clearly has some "consequence" for those left out.[24] And if employers discriminate in recruiting, say by mandating a certain number of minorities be interviewed,[25] or targeting recruiting at minority-affinity groups,[26] those policies likely cause "consequences" as well.

Third, the exception to these principles for affirmative action programs under Title VII is so narrow that it likely excludes many existing DEI initiatives, and the exception itself may not exist for long. Title VII does not permit employers to engage in racial discrimination to pursue "diversity."[27] Indeed, Title VII's text expressly prohibits employers from considering race even if it is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[28]

The Supreme Court, however, developed a "remedial" exception to the prohibition on race discrimination for bona fide affirmative action plans in the 1970s.[29] To pass muster under the remedial exception, an affirmative action plan must (1) be "designed to break down old patterns of racial segregation and hierarchy"; (2) not "require the discharge of white workers and their replacement with new black hires"; (3) be "temporary"; and (4) "not [be] intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."[30] This is a high bar. For instance, few corporate DEI programs are designed to be temporary.[31] And to show a "manifest imbalance," an employer must compare the share of minorities currently employed in a job to the

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[22] *Id*. at 977.
[23] *Id.* at 975 n.2.
[24] Andrea R. Lucas, *With Supreme Court Affirmative Action Ruling, It's Time for Companies to Take a Hard Look at Their Corporate Diversity Programs*, REUTERS, June 29, 2023, https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.
[25] *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 721–22 (7th Cir. 2005) (noting that mandating that a racial minority be included in a candidate pool for interview, "when considered with other factors in a case, can constitute circumstantial evidence of race discrimination") (emphasis omitted).
[26] *Cf. United States v. Georgia Power Co.*, 474 F.2d 906, 925–26 (5th Cir. 1973) (violates Title VII to recruit at all white colleges); *United States v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998) (violates Title VII to advertise position exclusively in predominantly white area).
[27] *See Taxman v. Bd. of Educ. of Tp. of Piscataway*, 91 F.3d 1547, 1558–63 (3d Cir. 1996) ("[T]here is no congressional recognition of diversity as a Title VII objective requiring accommodation."); *Frank v. Xerox Corp.*, 347 F.3d 130, 133 (5th Cir. 2003) (finding that affirmative action plan designed to create a "[b]alanced [w]orkforce" violated Title VII when used as basis for termination).
[28] 42 U.S.C. § 2000e-2(e)(1).
[29] *See generally United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).
[30] *Id.* at 208; *see also Johnson v. Transportation Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 628-30 (1987).
[31] *See, e.g., Taxman*, 91 F.3d at 1564 (finding an affirmative action plan invalid because it was not temporary).

share of the population with the requisite training for that specific job.[32] One doubts that much of DEI as currently practiced could satisfy these strictures. Modern caselaw confirms that courts apply these requirements strictly, demanding that an employer show that an affirmative action plan is truly responding temporarily to a manifest racial imbalance and is not simply about maintaining diversity.[33]

Moreover, no one should assume that the "remedial" exception will remain in place for long. For one thing, it strains Title VII's text to permit affirmative action plans, when Title VII so severely limits consideration of race that it does not even allow race to be a bona fide occupational qualification. Justices Gorsuch and Thomas have already suggested that the remedial exception is not consistent with the text of Title VII.[34] And multiple Justices have expressed skepticism of the idea that private employers should have more leeway to engage in affirmative action under Title VII than the government has under the Equal Protection Clause, making the issue prime for reconsideration with the current Supreme Court.[35]

In sum, "reverse discrimination" is unlawful discrimination under Title VII. That means that employers cannot take actions with "consequences" for employees based on their race, even if minorities benefit. To the extent corporate DEI involves employers engaging in recruiting, training, management, and hiring decisions that treat minority employees preferentially on the basis of race, those initiatives are unlawful. And the exception for bona fide affirmative action plans is narrow and closing, offering little protection for the run-of-the-mill DEI program. Nevertheless, the EEOC has not undertaken efforts to stop such efforts.

B. The EEOC Uses Disparate-Impact Liability Unconstitutionally and Inconsistently.

The EEOC has made aggressive use of disparate-impact liability, most prominently in its lawsuit against Sheetz. This is troubling for two reasons. First, disparate-impact liability itself is hard to square with the Constitution. Second, the EEOC has not used the tool consistently.

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[32] *Johnson*, 480 U.S. at 632.

[33] *See, e.g.*, *Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 696-97 (8th Cir. 2009) (refusing to say that an affirmative action was valid as a matter of law because it was not clear that it was truly remedial, as opposed to attempting to maintain racial balance).

[34] *See SFFA*, 143 S. Ct. at 2209–21 (Gorsuch, J., concurring).

[35] *See Johnson*, 480 U.S. at 649 (O'Connor, J., concurring in the judgment) ("In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause."); *id.* at 664-65 (Scalia, J., dissenting) ("While Mr. Johnson does not advance a constitutional claim here, it is most unlikely that Title VII was intended to place a lesser restraint on discrimination by public actors than is established by the Constitution. The Court has already held that the prohibitions on discrimination in Title VI, 42 U.S.C. § 2000d, are at least as stringent as those in the Constitution. There is no good reason to think that Title VII, in this regard, is any different from Title VI.").

1. Disparate-impact liability is likely unconstitutional.

The original text of Title VII did not include a disparate impact provision. Nevertheless, the Supreme Court in *Griggs v. Duke Power Co.* expanded Title VII beyond its original scope to include so-called "disparate impact" liability.[36] The Court construed the statute to prohibit "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[37] *Griggs* continued that employment practices with a disparate impact are permissible only when justified by "business necessity," meaning they are "related to job performance."[38]

Twenty years after *Griggs*, Congress amended Title VII in the Civil Rights Act of 1991 to codify disparate impact liability.[39] Under that provision, plaintiffs can establish liability by showing the relevant employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin" and "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[40] Plaintiffs can also identify "an alternative employment practice" that would not cause a disparate impact, which the employer "refuses to adopt."[41]

Most disparate-impact claims follow a similar pattern. Plaintiffs must challenge "a specific employment practice."[42] Employers typically try to rebut those claims by "undermin[ing] the plaintiff's disparate impact or causal analysis," then defending the challenged employment practice as job-related and consistent with business necessity.[43] Plaintiffs then have the opportunity to "show that other methods exist to further the defendant's legitimate business interest" without a disparate impact.[44]

Title VII's disparate-impact provision likely violates the Constitution, at least to the extent it applies to disparate impacts affecting racial groups. The Fifth Amendment, the Supreme Court has held, prohibits the federal government from discriminating based on race.[45] There are no "benign"[46] racial classifications, because such distinctions "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[47] Any governmental classification that requires or even encourages disparate treatment on the basis of race can only

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[36] *See* 401 U.S. 424, 430–32 (1971).
[37] *Id*. at 431.
[38] *Id*.
[39] 42 U.S.C. § 2000e-2(k); *See* Civil Rights Act of 1991, Pub. L. No. 105, § 105(a), 105 Stat. 1074–75.
[40] *Id*. § 2000e-2(k)(1)(A)(i).
[41] *Id*. § 2000e-2(k)(1)(A)(ii).
[42] *See, e.g., Freyd v. Univ. of Or*., 990 F.3d 1211, 1224 (9th Cir. 2021).
[43] *Mandala v. NTT Data, Inc.,* 975 F.3d 202, 208 (2d Cir. 2020).
[44] *Id*.
[45] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215–18 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).
[46] *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).
[47] *Shaw*, 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

survive if it satisfies strict scrutiny, which requires a compelling governmental interest and narrow tailoring to that end.[48]

Title VII's disparate-impact liability provision *does* require or encourage disparate treatment on the basis of race. As Justice Scalia explained in a concurrence in *Ricci v. DeStefano*, disparate-impact liability under Title VII "affirmatively requires [race-based] actions when a disparate-impact violation would otherwise result."[49] He further observed that disparate impact liability "requires consideration of race on a wholesale, rather than retail, level," which violates the Court's equal protection precedent requiring the government to "treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[50]

And Title VII's disparate-impact liability provisions likely *cannot* satisfy strict scrutiny because it lacks a compelling governmental interest. The two most logical justifications—diversity and remedying past societal discrimination—have already been rejected by the Supreme Court as not compelling. In *SFFA*, the Court made clear that diversity for its own sake is insufficient.[51] The Court likewise reaffirmed that "[a]n effort to alleviate the effects of societal discrimination is not a compelling interest."[52] Accordingly, just as general "racial imbalance . . . without more" does not justify race-based action in schools,[53] racial imbalance in employment, without more, likely cannot justify race-based action in employment.

2. <u>The EEOC invokes disparate-impact liability arbitrarily.</u>

Even accepting Title VII's disparate-impact provision as valid, the EEOC's use of this powerful tool is arbitrary and deserving of careful oversight. A case study of this inconsistency is telling. While the EEOC has brought suit against Sheetz on a disparate-impact theory for merely conducting criminal background checks, it has let other employers slide for requiring college degrees, even though those requirements create similar disparate impacts.

Indeed, nationwide statistics make clear that college-degree requirements do have a disparate impact. For middle-skill jobs that do not require extensive, specialized skill sets,

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[48] *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 710-12 (9th Cir. 1997); *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 215 (5th Cir. 1999).
[49] 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (emphasis omitted).
[50] *Ricci*, 557 U.S. at 595. Justice Scalia did note that disparate impact liability may occasionally be used to "smoke out" intentional discrimination. *Id.* But he explained that the 1991 Amendments to Title VII "sweep too broadly to be fairly characterized" as limited to that context because "they fail to provide an affirmative defense for good-faith (i.e., nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable." *Id*.
[51] 600 U.S. at 219-20.
[52] *Id.* at 226 (quoting *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996)); *see also Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 731 (2007); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (plurality opinion).
[53] *Parents Involved*, 551 U.S. at 721 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

population-level analyses can provide a reasonable proxy applicant pool.[54] And a selection procedure that screens out those without a college degree would result in Black and Hispanic candidates being selected at significantly lower rates for jobs than Whites and Asians.[55]

Moreover, college-degree requirements are harmful to society. They cause significant damage to the economy, especially in a time of labor shortage. They impose burdens on young people, driving them into higher-education and student debt just to be able to pursue employment opportunities. And they harm adults without a college degree who could do a job but are screened out before they even get individualized consideration. For these reasons, Roger King and I have written to the EEOC proposing that companies should be able to replace college-degree requirements more easily with employment tests.[56]

Yet, despite this clear disparate impact and the social and economic problems that they cause, the EEOC has *not* sued companies with college-degree requirements. Instead, they sued Sheetz for having a criminal background check.

But this inconsistency just illustrates the larger problem: The EEOC has a wide berth to bring disparate-impact suits against almost any employer for almost any screening policy. Illustrating the point, Professor Gail Heriot "has offered a check for $10,000 to anyone who can name a job qualification without a disparate impact on some group covered by Title VII."[57] Thus, careful oversight is essential: Why was the hammer brought down on Sheetz as opposed to some other company? Why criminal background checks and not any other screening device relied on by employers? This committee should ensure that EEOC's enforcement priorities effectively reflect who is truly a bad actor and target harmful employment policies, not helpful ones.

C. The EEO-1 Data Collection Increases Race Consciousness Across Society.

The EEOC inflicts further harm through the EEO-1 data collection, asking many American employers to report the demographic data of their workforces. Title VII requires employer recordkeeping, and authorizes the EEOC to then require certain reports.[58] Today the EEO-1 mandate inappropriately heightens the salience of race.

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[54] *Hazelwood Sch. Dist. v. United States*., 433 U.S. 299, 308 n.13 (1977) (observing that "general areawide population" statistics can be "highly probative" where the required job skill "is one that many persons possess or can fairly readily acquire" or where the "comparative statistics . . . [are] properly limited" to those individuals who possess the required skills).

[55] *See* Berry & King, *supra* note 15, at 6–14 (analyzing the data).

[56] Berry & King, *supra* note 15.

[57] Alison Somin, *Disparate Impact as a Non-Delegation Violation and Major Question*, 2024 HARV. J. OF L. & PUB. POL'Y PER CURIAM 1 (2024), https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2024/06/Somin-Disparate-Impact-vf.pdf.

[58] 42 U.S.C. § 2000e-8(c) ("Every employer … shall make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed … and make such reports therefrom as the Commission shall prescribe by regulation or order.").

It is wrong to require employers to classify their employees into racial categories and report the results, absent particularized suspicion of discrimination. It encourages everyone involved—the government, the employer, and the employee—to evaluate the merits of a potential employee on racial terms. Race is an objectively minor attribute of the human person, and foregrounding it diminishes the inherent and equal dignity of every human being[59] and leaves our society degraded in the process.

The EEO-1 form, thankfully, is kept confidential. It is even a crime if an EEOC employee discloses employer-specific information.[60] This distinguishes it from other pro-affirmative action, "name and shame" schemes that try to force private entities to engage in racial discrimination through public pressure. Given their encouragement of race discrimination, those "name and shame" schemes violate the Constitution.[61] My firm, Boyden Gray PLLC, has been pleased to challenge and comment on disclosure requirements like these across the federal and state governments.[62]

But even kept confidential, the harms to our society from forcing employers to view human beings through a racial lens outweigh any potential benefits from the EEO-1 data collection. Indeed, Justice Harlan's famous dissent in *Plessy v. Ferguson* had it right when he said that we should not "permit any public authority to *know* the race of"[63] American citizens under its protection, as we should "obliterate[] the race line from our systems of governments, national and state," so that we can "place[] our free institutions upon the broad and sure foundation of the equality of all men before the law."[64]

IV. Private Litigants Take Up EEOC's Responsibilities

Fortunately, in place of the EEOC enforcing the law, some private litigants have taken up the mantle. America First Legal (AFL) deserves special recognition on this front. AFL has relentlessly pursued unlawful corporate DEI programs, filing dozens of complaints with the EEOC,[65] and filing suit in court against other companies for racial discrimination done in the name

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[59] *See Galatians* 3:28.
[60] 42 U.S.C. § 2000e-8(e).
[61] *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 710–12 (9th Cir. 1997); *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 215 (5th Cir. 1999).
[62] *See, e.g.,* Jonathan Berry, Comment Letter on National Apprenticeship System Enhancements Proposed Rule, ETA-2023-0004-2110 (March 18, 2024), https://www.regulations.gov/comment/ETA-2023-0004-2110 (comment on DOL apprenticeship rule); *National Religious Broadcasters v. FCC*, No. 24-60219 (5th Cir. May 8, 2024) (challenge to FCC diversity scorecard rule); *Alliance for Fair Board Recruitment v. Weber*, Nos. 23-15900, 21-15901 (9th Cir. Jun. 16, 2023) (challenge to California corporate board diversity quota/disclosure rule); *Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir. Oct. 18, 2023) (en banc) (challenge to NASDAQ board diversity quota/disclosure rule).
[63] 163 U.S. 537, 554 (1896) (Harlan, J., dissenting).
[64] *Id.* at 563.
[65] America First Legal, *Woke Corporations*, https://aflegal.org/woke-corporations/ (last visited Jun. 24, 2024).

of DEI.[66] But even beyond AFL, there is no denying the flood of litigation challenging long-accepted affirmative action and DEI practices under the Civil Rights Act.

Indeed, corporations should be on notice: DEI and affirmative action programs that are politically correct and favored in some quarters are no longer protected by (artificial) social norms that formerly made victims of discrimination afraid to sue.

Consider three suits that show the vulnerability of DEI practices in corporate America. In the first, three large law firms—Perkins Coie, Morrison Foerster, and Winston & Strawn—had fellowships only open to students of color. But after private lawsuits, all three opened the fellowships up to students of all races, rather than face judicial rebuke.[67] In the second, a former Penn State University Professor brought suit under Title VI, VII, and Section 1981, claiming a hostile workplace and interference with his right to contract after Penn State conducted trainings that, among other things, called on white people to "feel terrible" about their "own internalized white supremacy." The motion to dismiss was denied in part.[68] In the third, a private venture capital firm announced a policy that it would invest exclusively in companies owned by non-white women. The American Alliance for Equal Rights sued, and the Eleventh Circuit Court of Appeals agreed that this policy violates 42 U.S.C. § 1981, which prohibits discrimination in private contracting.[69]

The flurry of successful private suits against corporate DEI teaches two lessons: (1) companies can no longer defer to their HR departments to create racially discriminatory programs and escape liability; (2) so much brazen racial discrimination is going unpoliced by the EEOC that private firms have had to pick up the slack.

V. Recommendations for Congressional Oversight to Fix the EEOC

With all that said, several priorities for congressional oversight of the EEOC stand out.

First, the EEOC must be held to account for declining to stamp out racially discriminatory DEI programs and leaving much of the work to private law firms, like AFL, Boyden Gray PLLC, and Consovoy McCarthy. These DEI programs regularly violate Title VII, as established above. Yet, while AFL submits complaint after complaint, and Commissioner Lucas signs charge after charge, the EEOC does not seem interested in turning that effort into a lawsuit. In fact, Chair Burrows has already signaled her view that the doctrinal shifts in this area do not require employers to alter their DEI practices.

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[66] *See, e.g,, Wood v. Red Hat, Inc.*, No. 2:24-CV-00237-REP (D. Idaho May 8, 2024)*; Beneker v. CBS Studios, Inc., et al.* No. 24-cv-01659 (C.D. Cal. Feb. 29, 2024)*; Smith v. Ally Financial*, No. 3:24-CV-00529 (W.D.N.C. Jun. 4, 2024).
[67] Julian Mark & Taylor Telford, *Conservatives Are Suing Law Firms Over Diversity Efforts. It's Working.,* WASH. POST. (Dec. 9, 2023), https://www.washingtonpost.com/business/2023/12/09/conservatives-sue-law-firms-dei/.
[68] *De Piero v. Pennsylvania State University*, No. CV 23-2281, 2024 WL 128209 (E.D. Pa. Jan. 11, 2024).
[69] *Am. All. For Equal Rights v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024).

This Committee should ask them why. When AFL submits a new complaint documenting an illegal DEI program, this Committee could follow up with the EEOC in writing to ask about the progress of the investigation and demand explanations when the EEOC fails to take prompt action.

Second, this Committee should monitor how the EEOC is using the tool of disparate-impact liability.[70] The EEOC has released a new Strategic Enforcement Plan, which announces enforcement priorities of discriminatory "screening tools or requirements that disproportionately impact workers on a protected basis, including those facilitated by artificial intelligence or other automated systems, pre-employment tests, and background checks."[71] And the Sheetz lawsuit shows they mean business.

But why are policies like those more appropriate priorities for enforcement, than, say, college-degree requirements? An employer should of course want to know whether his employees pose threats to his fellow employees or customers. And if an employer can identify talented people who lack college degrees through pre-employment tests, that would be more efficient for both the employee and the economy than forcing everyone into four-year colleges.[72] And more generally, this Committee should ensure that the EEOC is not using disparate-impact liability to pursue unwise social policies (like banning criminal background checks) under the guise of neutrally enforcing Title VII.

Third, Congress should end the EEO-1 data collection, or at least limit its imposition to cases where the EEOC has particularized suspicion. Without it, the EEOC can still investigate discrimination cases and rely on complaints filed by the public or other investigative techniques to do so. There is no need to continue this nearly universal data collection, when its racial classification mandate causes the collateral damage of forcing American employers to look at their employees as members of racial categories and not simply as individual human persons possessing God-given dignity.

I thank the Committee again for the invitation to testify today on this important subject, and I look forward to discussing it further with the Committee's members.

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[70] Though perhaps beyond the scope of today's hearing, Congress should also simply eliminate disparate-impact liability from Title VII for many of the reasons discussed above.

[71] EEOC, *Strategic Enforcement Plan Fiscal Years 2024–2028*, https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028

[72] *See* Berry & King, *supra* note 15.