Memorandum

To: Colleagues, University Offices of General Counsel, and University Leaders

From: [To promote readability, signatories are listed in Appendix A].

Date: February 20, 2025

Re: **DEI Programs Are Lawful Under Federal Civil Rights Laws and Supreme Court Precedent**

We are law professors who study and teach antidiscrimination law, education law, employment law, constitutional law, and civil rights. "DEI" is common shorthand for a varied set of initiatives broadly designed to counter pervasive biases and stereotypes, and to cultivate more diverse, equitable, and inclusive institutions. We are concerned that federally funded institutions will eliminate, or already have eliminated, important DEI initiatives that remain legally defensible and often further institutions' legal obligations under those very laws. **This memo explains why common DEI initiatives remain legally defensible** notwithstanding President Trump's January 21, 2025 Executive Order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (the "J21 EO") and related agency communications like the Department of Education's February 14 Dear Colleague Letter (the "DCL").

The J21 EO demeans "diversity, equity, and inclusion" initiatives and tracks the Trump administration's broader desire to eliminate public and private efforts to counter various forms of exclusion, bias and bigotry that permeate American society. Federally funded institutions should not, however, interpret the J21 EO and related communications as requiring the elimination or curtailment of existing DEI initiatives.[1]

> ***First***, the J21 EO expressly (a) recognizes the right of federally funded institutions to engage in their own First Amendment protected speech and (b) does not apply to academic programs or classroom teaching.
>
> ***Second,*** common DEI initiatives are lawful under prevailing federal civil rights laws and Supreme Court precedent.
>
> ***Third***, neither the J21 EO nor related communications change existing federal law. In fact, the J21 EO and DCL concede that DEI initiatives are not inherently unlawful.
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> ***Fourth***, the constitutionality of the J21 EO is currently being litigated. Among other arguments before the court, evidence suggests that the J21 EO rests on, and furthers, pernicious stereotypes about women and Black people.

[1] For an inexhaustive set of legal scholarship that thickens the analysis in this memo, see Russell K. Robinson, *The Incoherence of the "Colorblind Constitution,"* 113 CALIF. L. REV. __ (forthcoming 2025); Deborah Hellman, *Diversity by Facially Neutral Means*, 110 VA. L. REV. 1091 (2024); Jonathan Feingold, *Affirmative Action After* SFFA, 48 J. COLL. U. L. 239 (2023); Jonathan Feingold, *The Right to Inequality: Conservative Politics and Precedent Collide*, 57 CONN. L. REV. 1 (2024); Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161 (2024); Kimberly West-Faulcon, *Affirmative Action After* SFFA: *The Other Defenses*, 74 SYRACUSE L. REV. 110 (2024); Kim Forde-Mazrui, *Alternative Action After* SFFA, 76 STAN. L. REV. ONLINE 149, 159 (2024); Jonathan D. Glater, *Reflections on Selectivity*, 49 FORDHAM URB. L.J. 1121 (2022); Vinay Harpalani, *"Safe Spaces" and the Educational Benefits of Diversity*, 13 DUKE L. CONST. L. & PUB. POL'Y 117 (2017).

I. The J21 EO recognizes the right of institutions to engage in their own First Amendment protected speech and does not apply to academic programs or classroom teaching.

The J21 EO expressly limits its own scope in two critical respects. The DCL more broadly disclaims that it "does not have the force and effect of law and does not bind the public or create new legal standards."

A. The J21 EO "does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech." Among other consequences, this means that **the J21 EO does not prohibit universities from using their own voice to proudly proclaim their commitment to egalitarian values like diversity, equity, and inclusion.** This should reassure universities that they may continue to employ terms like "diversity," "equity," and "inclusion" on university websites and publications. Universities may also communicate their egalitarian-oriented values by, for example, posting #BLM banners on campus, hanging Pride Flags in the student center, or simply reiterating such messages as "Black Lives Matter," "Trans Lives Matter," "Palestinian Lives Matter," "Antisemitism is Unwelcome Here," "Against Asian Hate," or any other slogan that cultivates an academic environment in which all students belong.

B. The J21 EO "does not prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order." In plain language, the J21 EO does not require universities, departments, or individual academics to alter the courses they offer and teach, or censor classroom discussion about racism, gender identity, or other topics disfavored by the Trump administration—even if those courses or topics happen to articulate positions inconsistent with those expounded in the J21 EO.

In short, nothing about African American Studies, Gender Studies, Jewish Studies, Chicana/o Studies, Asian American Studies, Indigenous Studies, Russian Studies, or any other field, program or academic department focused on a particular group runs afoul of the J21 EO.

II. Common DEI Initiatives are Lawful under Federal Civil Rights Laws and Supreme Court Precedent.[2]

As noted, "DEI" is common shorthand for a varied set of initiatives broadly designed to counter pervasive biases and stereotypes, and to cultivate more diverse, equitable, and inclusive institutions. These goals are consistent with the values that animate federal civil rights laws. In fact, common DEI initiatives—because they combat biases and cultivate inclusion—better position universities to fulfill their Title VI obligations to, *inter alia*, (a) avoid unlawful disparate treatment; (b) affirmatively remedy racially hostile environments; and (c) avoid unjustifiable disparate outcomes.[3]

A. Contrary to the Trump administration's suggestion, *Students for Fair Admissions v. Harvard* (*SFFA*) does not render DEI initiatives legally suspect. In *SFFA*, the Supreme Court struck down one component of Harvard University's and the University of North Carolina's admissions policies: their practice of using an applicant's racial identity as a formal criterion during the admissions process. The

[2] This memo refers specifically to the Equal Protection Clause in the United States Constitution and Title VI of the Civil Rights Act of 1964. Most of the analysis also applies to Title VII (barring race- and gender-based discrimination in employment) and Title IX (barring sex-based discrimination).

[3] The DOJ has explained that Title VI's disparate impact regulation furthers one of Title VI's core objectives "to ensure that programs accepting federal money are not administered in a way that perpetuates the repercussions of past discrimination." Title VI Legal Manual, Civil Rights Division, U.S. Department of Justice, https://www.justice.gov/crt/media/1384931/dl?inline.

decision was limited to the admissions context. It is less than clear whether *SFFA* applies beyond admissions. Even if it does, the decision is limited to policies that employ "racial classifications"—a term the Supreme Court has historically applied to policies that classify and treat individuals differently based on their racial identities. This would include, for example: (a) employment "set asides" that are only available to members of certain racial groups; and (b) selection processes, like Harvard's, that use race as a formal criterion when selecting between applicants.

Critically, the *SFFA* majority and concurrences (all authored by conservative Justices) distinguished between the legally suspect racial *means* Harvard and UNC employed (i.e., the racial classification) and the legally permissible—if not compelling—racial *ends* the defendants pursued (i.e., racial diversity). Writing for the majority, Chief Justice Roberts characterized the defendants' diversity-related interests as "worthy" and "commendable."[4] Justice Kavanaugh reinforced this distinction. Citing opinions from Justices Scalia and O'Connor, Kavanaugh noted that "governments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that *do not involve classification by race*.'" (emphasis added).[5]

In relevant respects, Justice Kavanaugh (and Justices Scalia and O'Connor before him) is characterizing common DEI initiatives that aim to "undo the effects of past discrimination"—e.g., by combating biases, eliminating unjustifiable barriers, and cultivating inclusion—but do not "involve classification by race."[6] This would include, for example:[7]

(i) positively crediting, in admissions or hiring, an individual's personal experiences with or demonstrated ability to remedy anti-Black racism, anti-LGBTQ bigotry, anti-Asian racism, antisemitism, or any other forms of systemic discrimination, bias, or bigotry[8];

(ii) university programming or events that focus on a particular group—including based on race, ethnicity, gender, or sexual orientation—or particular forms of societal bias or discrimination;

(iii) affinity groups or themed residence halls that are open to all students but foreground a particular group or identity;

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[4] *SFFA v. Harvard*, 600 U.S. 181, 214 (2023) ("Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny); *id.* at 215 ("The interests that respondents seek, though plainly worthy, are inescapably imponderable."). This distinction between suspect racial means and permissible racial motives tracks Justice Roberts's opinion in *Parents Involved*, where he invalidated two districts' use of race as a formal criterion in their school assignment process but approved of the districts' underlying racial motives. *See* Parents Involved in Cmty. Schools v. Seattle Sch. Dist., 551 U.S. 701, 743 (2007) ("Simply because the school districts may seek a *worthy* goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.") (emphasis added).

[5] *SFFA*, 600 U.S. at 317. *See also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 539-40 (2003) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–38 (1995)) ("*Adarand* repeated this idea that 'race-neutral means to increase minority business participation' can be a constitutionally appropriate substitute when race-specific affirmative action programs would violate equal protection." (footnote omitted)).

[6] Although this memo focuses on the legality of facially neutral—or "colorblind"—DEI initiatives, we note that certain racial classifications remain legally defensible. *See* Feingold, Affirmative *Action After* SFFA (citing examples).

[7] For a more detailed overview of DEI initiatives that comply with, and further, federal civil rights laws and Supreme Court precedent, see Jonathan Feingold & Julie Park, *How Universities Can Build and Sustain Welcoming and Equitable Campus Environments* (2024).

[8] By only identifying some groups and forms of systemic discrimination, bias, or bigotry, we in no way mean to obscure or minimize other groups that face forms of systemic discrimination, bias, or bigotry in American society.

(iv) anti-harassment trainings that equip campus stakeholders to interrogate and counter the implicit biases and pervasive race- and gender-based presumptions that permeate United States society and infiltrate American institutions;

(v) tracking applicants' racial and gender identity and assessing the aggregate impact of hiring or admissions processes along racial or gender lines;

(vi) taking affirmative steps to mitigate unjustifiable disparities that arise in hiring or admissions contexts;

(vii) adopting admissions or hiring criteria designed to racially integrate historically white universities (e.g., by eliminating legacy preferences or application fees, ensuring more equitable representation from feeder schools or geographic regions, or reducing reliance on criteria—like standardized tests—that systematically reward inherited advantage over individual talent or potential);

(viii) investing in professional and impartial internal investigation and compliance units able to timely track, investigate, and respond to complaints of bias, harassment, or discrimination;

(ix) proudly proclaiming their commitment to cultivate a campus environment where all students, regardless of their identity, feel valued and can enjoy the full benefits of university membership free from harassment, bias or group-based stigma;

(x) investing in academic departments and curricula (e.g., Ethnic Studies, Gender Studies, Asian American studies, Jewish studies, African American Studies) that directly foreground the experience of a particular racial or ethnic group, or other distinct community;

(xi) adopting policies that promote full inclusion and accessibility for all community members regardless of their ability status;

(xii) the use of "all gender" restrooms that are available to all members of the campus community regardless of a person's gender identity;

(xiii) recruitment and retention programs or policies that focus on the experience and barriers most often faced by students from specific groups but are available to all.

The foregoing DEI initiatives promote the egalitarian ideals that animate federal civil rights laws. **By helping institutions cultivate academic environments free from bias, stigma, or harassment, DEI initiatives also better position universities to fulfill their basic mission "[t]o pursue truth and knowledge for the common good, which requires the free exchange and critical evaluation of competing ideas."** Most relevant for present purposes, none of the foregoing DEI initiatives "involve classification by race." For that reason, these DEI initiatives are not legally suspect.

B. Last year, the Supreme Court tacitly reinforced the legality of colorblind DEI initiatives when it denied certiorari in *Coalition for TJ. v. Fairfax*.[9] In that lawsuit, the conservative Pacific Legal Foundation argued that changes to a public high school's admissions policy—which included eliminating a $100 application fee and affording greater representation to feeder middle schools—was unlawful because the policy was designed to increase student body diversity. The Fourth Circuit appropriately rejected the claim. The cert denial, from which Justices Alito and Thomas dissented, suggests that the Supreme Court is not ready to entertain the Trump administration's theory that any policy adopted with a racial motive—including equality-oriented goals like racial diversity or racial inclusion—is inherently suspect.

[9] *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 218 L. Ed. 2d 71 (U.S. 2024) (No. 23-170). The Supreme Court subsequently denied certiorari in a similar case Pacific Legal filed against three of Boston's most competitive public schools. Justices Alito and Thomas dissented from the cert denial; Justice Gorsuch filed a "Statement."

To suggest—as the DCL expressly does[10]—that all racially motivated conduct is unlawful proves too much. Civil rights laws like Title VI are themselves racially motivated: to promote racial equality and inclusion. The J21 EO and DCL are also racially motivated: to target and eliminate programs and policies that attend to race.

In its briefing before the Supreme Court, Pacific Legal appeared to concede this point. The organization noted that the "mere intent to increase Black and Hispanic enrollment" does not violate the Equal Protection Clause unless "the *means* chosen [to realize that goal] are designed to treat applicants differently based on race."[11] (emphasis added). Pacific Legal continued: "For example, the Board removed the $100 application fee for TJ. Even if it did so to increase black and Hispanic enrollment, it is implausible that having all applicants pay $0 discriminates against anyone." The same reasoning would apply to a university's decision to, for example, eliminate legacy preferences for the children of alumni, reduce reliance on standardized tests, positively credit students whose ancestors were prohibited from attending the university, or automatically admit a specific percentage of students from each public high school in the state. In each instance, the policy furthers a permissible racial goal, and no student is treated "differently based on race."

Thus, so long as covered institutions do not limit opportunities to students from a particular racial group or apply different standards to individual students or applicants, there is no legal concern—even *if* the policy is designed to promote overtly racial goals like diversity, equity, or inclusion.

III. The J21 EO concedes that DEI initiatives are not inherently unlawful.

The J21 EO proclaims that many of the most powerful institutions and industries in the country have "adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusions' (DEI) or "diversity, equity, inclusion, and accessibility' (DEIA) that *can* violate the civil-rights laws of this Nation." (emphasis added). The "can" reflects the Trump administration's recognition that DEI initiatives do not inherently violate federal civil rights laws.[12]

As a theoretical matter, any policy—whether DEI or not—could violate federal civil rights laws. To answer that question, one would have to determine whether a particular policy: (a) employs suspect *means* (e.g., "Does the policy treat individual students differently because of their racial identity?"); (b) traces to an impermissible *motive* (e.g., "Is the policy motivated by racial animus, negative stereotypes, or a desire to harm an identifiable racial group?") and, potentially, (c) does the policy produce a negative *disparate impact* (e.g., "Does the policy negatively impact Asian American students or Jewish students relative to students from other racial or ethnic groups?"). Even were one to answer one of these questions in the affirmative, that answer is not itself dispositive concerning the policy's ultimate legality.[13]

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[10] *See* DCL, https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf ("It would, for instance, be unlawful for an educational institution to eliminate standardized testing to achieve a desired racial balance or to increase racial diversity . . . And race-based decision-making, no matter the form, remains impermissible.").

[11] Reply in Support of Petition for Writ of Certiorari at 12, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023) (No. 23-170).

[12] The DCL contains a similar tell. *See id.* ("DEI programs, for example, *frequently* preference certain racial groups and teach students that certain racial groups bear unique moral burdens that others do not."). We are unpersuaded by the empirical claim that DEI programs *frequently* do what the DCL claims they do. We nonetheless flag the sentence because it concedes that DEI programs are not inherently unlawful.

[13] An affirmative finding often shifts the burden to the defendant to justify the challenged policy. *See* Feingold, *Right to Inequality* (discussing burden shifting frameworks).

Even cursory analysis reveals that common DEI initiatives do not run afoul of these concerns, but instead equip federally funded institutions to prevent and remedy the identity-based harms Title VI and other civil rights laws are designed to prevent.

IV. The J21 EO is constitutionally suspect because it appears to rest on pernicious stereotypes that presume the intellectual inferiority of women and Black people.

As we write, plaintiffs are challenging the legality of the J21 EO.[14] The plaintiffs argue that the J21 EO violates Separation of Powers and is unconstitutional under the First and Fifth Amendment.[15] We anticipate that advocates will raise additional arguments as the case proceeds. One of those arguments will likely be that the J21 EO unlawfully rests on, and furthers, pernicious stereotypes that presume the intellectual inferiority of women and Black people.[16]

This argument will likely point to Section II of the J21 EO, which blames "illegal DEI and DEIA policies" for "case after tragic case" of unspecified catastrophe leading to "disastrous consequences." This language invokes the talking point that DEI is responsible for essentially every human-made disaster and relies on the empirically fraught claim that DEI policies, because they attend to identity and promote inclusion, compromise "merit" by placing women and Black people into positions for which they are "unqualified."[17] This theory, in turn, rests on the stereotype that women and Black people are presumptively incompetent and intellectually inferior to white men.

We are not claiming that opposition to DEI inherently traces to pernicious stereotypes or animus. Our claim is specific to President Trump and his administration, whose hostility to DEI appears specifically motivated by presumptions of female and Black incompetence and negative attitudes toward those groups.[18]

Beyond the J21 EO itself, advocates will likely highlight the Trump administration's use of the pejorative term "DEI hire," which is often employed to question the qualifications and competence of women and Black people in positions of power—regardless of the person's individual record, accomplishments or accolades.[19] On this point, the Foundation Against Intolerance and Racism recently cautioned that the Trump administration's directive to purge "DEI hires" reinforces and invites race- and gender-based presumptions of incompetence.[20] Elon Musk, one of the most influential people driving President Trump's

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[14] National Association of Diversity Officers in Higher Education v. Trump (1:25-cv-00333), https://www.courtlistener.com/docket/69607847/national-association-of-diversity-officers-in-higher-education-v-trump/.

[15] See Complaint, National Association of Diversity Officers in Higher Education et al. v. Donald J. Trump et al., https://storage.courtlistener.com/recap/gov.uscourts.mdd.575287/gov.uscourts.mdd.575287.1.0.pdf.

[16] SFFA v. Harvard, 600 U.S. 181, 220-21 (2023); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 2666 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

[17] *See generally* Devon Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174 (2016).

[18] *See* David Sanger, *Trump Blames D.E.I. and Biden for Crash Under His Watch*, The New York Times (Feb. 1, 2025), https://www.nytimes.com/2025/01/30/us/politics/trump-plane-crash-dei-faa-diversity.html.

[19] *See* Melanie Mason, *Republicans blame DEI for the LA fires. This fire captain disagrees*, Politico (Jan. 15, 2025), https://www.politico.com/news/2025/01/15/republicans-dei-la-fires-00198551; Julie Ingram & Alexander Hunter, *Some Republicans attack Kamala Harris as "DEI Hire." Here's what that means*, CBS News (July 26, 2024), https://www.cbsnews.com/news/republicans-attack-kamala-harris-dei-hire/ ("GOP Rep. Tim Burchett of Tennessee called Harris a 'DEI vice president,' a reference to diversity, equity and inclusion efforts. Rep. Harriet Hageman of Wyoming called Harris a 'DEI hire' and referred to her as 'intellectually, just really kind of the bottom of the barrel.'").

[20] *See* FAIR, *Restoring Biological Truth and Meritocracy in Government* (Jan. 22, 2025), https://news.fairforall.org/p/restoring-biological-truth-and-meritocracy ("We urge caution in using this term ["DEI

agenda, has repeatedly traded on these stereotypes to denigrate DEI.[21] Following the fatal January 2025 plane crash, Musk endorsed a now-deleted post that expressly questioned the IQ of pilots from Historically Black Colleges and Universities (HBCUs), which were described as indicating "borderline intellectual impairment."

We flag these final points, in part, to alert universities about arguments likely to be marshalled against the J21 EO as litigation proceeds. **Given evidence that the J21 EO rests on, and furthers, race- and gender-based notions of intellectual inferiority, it is possible that a court enjoins the J21 EO on this basis.**

Conclusion

To close, we reiterate our overarching observation: **under prevailing federal civil rights laws and Supreme Court precedent, DEI initiatives that do not employ racial classifications or otherwise limit opportunity to individuals from certain racial groups remain legally secure.** It is increasingly clear that the Trump administration intends to dismantle our civil rights infrastructures and erode the autonomy and independence of institutions of higher education. **We urge university leaders to respond confidently, with both law and moral principle on your side,[22] and not to sacrifice essential and legally defensible DEI initiatives that help universities fulfill their most basic mission to pursue truth and knowledge for the common good.**

hires"] as it may invite speculation, without a firm basis or evidence, regarding an employee's skills, abilities, or merit and instead make assumptions based on their perceived identity.").

[21] *See* Connor Murray, *Elon Musk and More Right-Wing Critics Blame Diversity, Equity and Inclusion for LA Wildfires-With Little Evidence*, Forbes (Jan. 9, 2025), https://www.forbes.com/sites/conormurray/2025/01/09/elon-musk-and-more-right-wing-critics-blame-diversity-equity-and-inclusion-for-la-wildfires-with-little-evidence/.

[22] Note: A portion of this sentence was revised on Feb. 20, 2025 to avoid potential ambiguity.

Appendix A: Memo Signatories[23]

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