

Trump's War on Diversity, Equity, and Inclusion: Unconstitutional Usurpation Through Obfuscation

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Among the many head-spinning developments that have occurred from the first days of President Trump's second presidency are his attacks on DEI (diversity, equity, and inclusion), including anti-DEI edicts targeting educational institutions. This Article provides a chronology and analysis of the early 2025 Trump Administration's attacks on DEI targeting schools nationwide, the resulting harms, and responses thereto, including litigation. A discernible refrain in the early litigation challenging President Trump's anti-DEI attacks targeting educational institutions across the country has been how those attacks cross a clear constitutional line: the prohibition of unconstitutionally obscure governmental mandates. At its core, the void-for-vagueness doctrine protects against three dangers corresponding with three key constitutional values central to the doctrine: the dangers of (1) denying fair notice and warning to those subject to laws (implicating core due process values); (2) arbitrary or discriminatory enforcement of laws (implicating equal justice principles); and (3) chilled speech (implicating First Amendment freedoms). Trump's sweeping attacks on diversity, equity, and inclusion have resulted in each of these dangers coming to fruition, undermining vital constitutional values in the process. While being unconstitutionally vague, Trump's anti-DEI mandates also implicate interrelated separation of powers concerns, as the Trump Administration increasingly attempts to usurp powers constitutionally allocated to other branches of government. Consequently, Trump's unpresidential and unprecedented issuance of sweeping anti-DEI mandates poses a substantial threat not just to our academic institutions, but also, more broadly, to the well-being of our constitutional democracy, amounting to "usurpation by obfuscation."

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INTRODUCTION

From his first days back in the White House in 2025, the newly re-elected President Trump unleashed a barrage of anti-diversity executive orders the likes of which (to quote one of his favorite phrases)¹ have never

¹ See David A. Graham, *An Article the Likes of Which Nobody Has Ever Seen Before*, ATLANTIC (Sep. 24, 2024), <https://www.theatlantic.com/ideas/archive/2024/09/article-likes-which-nobody-has-ever-seen/679703/> [https://perma.cc/9T49-4W8W].

been seen before.² Along with transgender people³ and immigrants,⁴ to name just a couple of Trump's targets, "DEI" (or diversity, equity, and inclusion) more broadly was a recurring target of the opening executive order attacks that set the tone for Trump's second presidency.⁵ Two of the executive orders issued in Trump's first two days back in office explicitly condemned diversity, equity and inclusion, or "DEI," in higher education: a January 20, 2025, executive order titled *Ending Radical and Wasteful Government DEI Programs and Preferencing*⁶ and an executive order issued the following day titled *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*.⁷ Those executive orders were soon followed by another even more explicitly targeting schools, although more focused on transgender students and DEI as a whole, titled *Ending Radical Indoctrination in K-12 Schooling*.⁸

Those executive orders issued by President Trump immediately upon his return to the White House marked only the opening blows of the Trump Administration⁹ in a broader war against diversity, equity, and

² A complete compilation of executive orders issued by Trump in 2025 is available in the Federal Register. 2025 *Donald J. Trump Executive Orders*, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025> [<https://perma.cc/GF8T-BEKK>].

³ See, e.g., Exec. Order 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025) ("Ending Radical Indoctrination in K-12 Schooling"); Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025) ("Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government").

⁴ See, e.g., Exec. Order No. 14161, 90 Fed. Reg. 8451 (Jan. 20, 2025) ("Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats"); Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025) ("Protecting the American People Against Invasion").

⁵ See *County of Santa Clara v. Noem*, No. 25-cv-08330-WHO, 2025 WL 3251660, at *1 (N.D. Cal. Nov. 21, 2025) ("Shortly after taking office in January, President Trump began to issue a slew of Executive Orders ('EOs') targeting diversity, equity, and inclusion ('DEI') initiatives, directing federal agencies to follow suit."). Although, as discussed throughout this Article, the Trump Administration has never clearly defined the type of DEI that it condemns as illegal, as opposed to diversity, equity, or inclusion-related efforts that are lawful or even required by law, "DEI" is generally known to stand for "diversity, equity, and inclusion." Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 258 (D. Md. 2025). For a comprehensive discussion of the evolving history of affirmative action, culminating in recent movements toward increased DEI programming to counter discrimination and anti-DEI reactions thereto, see generally Shelby A.D. Moore, *Moving Forward While Reaching Back: How Private Law Schools Can Help Public Law Schools Navigate Diversity, Equity, Inclusion and Access in Challenging Times*, 55 U. TOL. L. REV. 241, 247–66 (2024).

⁶ Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025).

⁷ Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

⁸ Exec. Order No. 14190, 90 Fed. Reg. 8853.

⁹ Notably, some states as well have engaged in attacks on DEI, and while those state attacks are not separately listed and analyzed herein, it is worth contemplating the encouragement the Trump Administration has provided to states focused on dismantling diversity, equity, and inclusion programming at educational institutions. See, e.g., OHIO REV. CODE ANN.

inclusion, soon followed by additional anti-DEI attacks, including those targeting educational institutions and communities. The damaging repercussions of the Trump Administration's heavy-handed attacks on DEI are manifold, including at the constitutional level, with the Administration's anti-DEI attacks implicating interrelated unconstitutional vagueness and separation-of-powers issues that, viewed together, amount to what this Article dubs "usurpation through obfuscation."

Part I of this Article documents the Trump Administration's early 2025 attacks on DEI targeting educational institutions across the country. Part I additionally describes harms to academic communities resulting from and early resistance to those attacks, from organizational statements to litigation, with a focus on constitutional challenges to the anti-DEI mandates as crossing a clear line: the prohibition of unconstitutionally vague government regulations.

Part II explains how the void-for-vagueness doctrine applies to the Trump Administration's sweeping anti-DEI attacks, through comparisons with past government mandates ruled unconstitutionally vague by the Supreme Court, and through an examination of how due process, free speech, and equal justice principles—i.e., three core constitutional values central to the void-for-vagueness doctrine—are threatened by the anti-DEI attacks. Part II further details how the anti-DEI attacks simultaneously implicate various separation-of-powers principles, which are intertwined with the void-for-vagueness doctrine as well. With those constitutional issues viewed in conjunction, this Article posits that the disregard of constitutional separations of powers through the issuance of sweeping and vague anti-DEI mandates by a presidential administration dead-set on dismantling diversity, equity, and inclusion efforts throughout the academic world amounts to unconstitutional "usurpation through obfuscation."

This Article concludes with an imploration at this critical juncture in history for all branches of government to rise against attempted usurpations of their respective constitutionally delegated powers. It is equally imperative that organizational, institutional, and individual community members exercise their power as a democratic polity to resist the Trump Administration's attacks on diversity-embracing, equitable, and inclusive schools. This is no time for neutrality. Rather, it is a time for this country's courts, legislative bodies, and community members alike to resist President Trump's usurpation through obfuscation, and to stand up

§ 3345.0217(B)(1)(a) (2025) (banning DEI in Ohio's public universities and colleges in a number of contexts, including trainings, scholarships, admissions, hiring, and other contexts); see also *infra* note 81 (describing state legislation targeting DEI prior to 2025).

against his shameful attacks on our nation's diverse, equitable, and inclusive academic institutions.

I. THE TRUMP ADMINISTRATION'S EARLY 2025 ATTACKS ON DIVERSITY, EQUITY, AND INCLUSION IN AMERICAN EDUCATION

Being a legal scholar attempting to find an appropriate beginning and ending point for the examination of the ever-increasing attacks by the Trump Administration on communities across the country is like attempting to play a game of whack-a-mole with a mallet made of Jell-O chasing after rapidly reproducing moles who exponentially multiply by the minute. Any analysis written one day will inevitably be viewed in the mirror of hindsight in subsequent days, as there is a never-ending onslaught of both constitutionally questionable executive actions and legal challenges thereto.

Rather than being paralyzed by the impossibility of finding the perfect moment to step back and analyze an unfolding series of events with no end in sight, it is important to at least pause to review a limited series of events that have occurred to date, with the understanding that there will be much more to come. The foregoing analysis, therefore, is but a single snapshot in time, focused on the Trump Administration's attacks on DEI that have targeted educational institutions nationwide in just the first few months of his return to the White House in 2025.

A. The Scope of Trump's Early 2025 Anti-DEI Attacks Targeting Schools

From the very first day of his return to the White House in 2025, President Trump wasted no time in attacking diversity, equity, and inclusion, making it clear that his abhorrence for DEI was of highest priority. His January 20, 2025, *Ending Radical and Wasteful Government DEI Programs and Preferencing* executive order, soon followed by his January 21, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, and January 29, *Ending Radical Indoctrination in K-12 Schooling* executive orders,¹⁰ marked the beginning of a new Trump presidency that prioritized dismantling DEI in educational settings and beyond.

The January 20, 2025, executive order opens with a scathing condemnation of the prior President Biden's Administration for "forc[ing] illegal and immoral discrimination programs, going by the name 'diversity, equity, and inclusion' (DEI), into virtually all aspects of the

¹⁰ Exec. Order No. 14151, 90 Fed. Reg. 8339; Exec. Order No. 14173, 90 Fed. Reg. 8633; Exec. Order No. 14190, 90 Fed. Reg. 8853.

Federal Government.”¹¹ The executive order then proceeds to direct all “illegal” federal DEI programs to be shuttered and to require executive agencies (including the Department of Education) to terminate all previously issued “equity-related” grants and contracts.¹²

The January 21, 2025, executive order similarly decries what President Trump describes as “dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called ‘diversity, equity, and inclusion’ (DEI) or ‘diversity, equity, inclusion, and accessibility’ (DEIA) that can violate the civil-rights laws of this Nation.”¹³ Among other mandates related to the revocation of existing DEI protections, the executive order instructs the United States Attorney General to “deter DEI programs or principles,”¹⁴ while requiring the heads of federal agencies (which include the Department of Education) to ensure that every contract or grant award moving forward contains “[a] term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”¹⁵ The executive order further requires the Director of the Office of Management and Budget (OMB) to “[e]xcise references to DEI and DEIA principles, *under whatever name they may appear*, from Federal acquisition, contracting, grants, and financial assistance procedures” and also to “[t]erminate all ‘diversity,’ ‘equity,’ ‘equitable decision-making,’ ‘equitable deployment of financial and technical assistance,’ ‘advancing equity,’ and like mandates, requirements, programs, or activities, as appropriate.”¹⁶ Section 5 of the January 21, 2025, executive order further directs the Attorney General and Secretary of Education to jointly issue guidance to schools and educational agencies regarding the Trump Administration’s interpretation of the Supreme Court’s *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*¹⁷ decision.¹⁸

The January 29, 2025, executive order announces as its purpose the need to reinstall patriotism in schools by protecting “innocent children” from the purported dangers of “radical, anti-American ideologies” that it claims are forced on schoolchildren, forcing them “to adopt identities as either victims or oppressors solely based on their skin color and other immutable characteristics” or “to question whether they were born in the

¹¹ Exec. Order No. 14151, 90 Fed. Reg. at 8339.

¹² *Id.*

¹³ Exec. Order No. 14173, 90 Fed. Reg. at 8633.

¹⁴ *Id.* at 8635.

¹⁵ *Id.* at 8634.

¹⁶ *Id.* (emphasis added).

¹⁷ 143 S. Ct. 2141 (2023).

¹⁸ *Id.*

wrong body and whether to view their parents and their reality as enemies to be blamed.”¹⁹ The executive order’s purpose and policy section further claims that such purported dangers “erode critical thinking,” “undermine the . . . foundations of personal identity and family unity,” and imprint “anti-American, subversive, harmful, and false ideologies on our Nation’s children” in violation of “longstanding anti-discrimination civil rights law.”²⁰ The order equates teaching about “White Privilege” or “unconscious bias” to “promot[ing] racial discrimination and undermin[ing] national unity.”²¹ The executive order then compels various federal agencies, including the Department of Education, to create an “Ending Indoctrination Strategy” that eliminates federal funding “for illegal and discriminatory treatment and indoctrination in K-12 schools, including based on gender ideology and discriminatory equity ideology.”²² It also requires an extensive audit of K-12 schools’ curriculum, instruction, programs, activities, teacher education, certification, licensing, employment, and training for purposes of preventing and rescinding federal funding of such programs that reflect what the Administration views as “radical,” “anti-American, subversive, harmful, and false ideologies,” while allocating resources toward creating programs emphasizing patriotism.²³ Much of the language in the executive order is focused on targeting transgender students and penalizing schools that support them.²⁴

The Trump Administration’s subsequent enforcement actions even more specifically targeted educational institutions with diversity-supportive programming across the country, with many actions targeting higher education more narrowly focused on race-related DEI efforts specifically. Among those enforcement actions, for example, was a Valentine’s Day “Dear Colleague” letter sent by the U.S. Department of Education’s Office for Civil Rights to institutions of higher education across the country, threatening schools that affirmatively promote and protect racial diversity.²⁵ Far from a Valentine’s Day love note, the February 14, 2025, letter warns that federal funds will be withheld from

¹⁹ Exec. Order No. 14190, 90 Fed. Reg. at 8853.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 8854.

²³ *Id.* at 8853, 8855.

²⁴ *See id.* at 8854–55.

²⁵ Letter from Craig Trainor, Acting Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., to “Colleague” (Feb. 14, 2025) [hereinafter Dear Colleague Letter], <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf> [<https://perma.cc/38XW-76EE>]. In contrast with the January 2025 executive orders that condemned diversity, equity, and inclusion more broadly, the Dear Colleague letter only specifically addressed and condemned DEI efforts in the context of racial diversity. *See id.*

any school that considers race as “a factor in admissions, financial aid, hiring, training, and other institutional programming.”²⁶

Purporting to “explain[] and reiterate[] existing legal requirements under Title VI of the Civil Rights Act of 1964,²⁷ the Equal Protection Clause of the United States Constitution,²⁸ and other relevant authorities,”²⁹ the letter instead creates tension with existing legal authorities and precedent. For example, in addressing the Supreme Court’s *Students for Fair Admissions v. Harvard* decision, the letter concedes that the new administration’s interpretation of that opinion goes beyond the opinion’s text prohibiting racial favoritism in the admissions process, with the Trump Administration instead much more broadly prohibiting a wide array of “explicit race-consciousness into everyday training, programming, and discipline.”³⁰ While conceding that the Supreme Court’s *Students for Fair Admissions* holding on its face only prohibits racial preferences in an admissions context, the Dear Colleague letter asserts, without citation in support, that the holding must nonetheless be interpreted more broadly as also prohibiting racial considerations in “hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life” as well.³¹ In those and all other contexts, the letter admonishes, “If an educational institution treats a person of one race differently than it treats another person because of that person’s race, the educational institution violates the law.”³² Decrying racial considerations across the board, which the letter deems “impermissible,” the letter warns:

The Department will no longer tolerate the overt and covert racial discrimination that has become widespread in

²⁶ *Id.* at 1. Although a footnote in the letter contains the disclaimer that “[t]his guidance does not have the force and effect of law and does not bind the public or create new legal standards,” the letter proceeds to warn that the “Department will vigorously enforce the law on equal terms as to all preschool, elementary, secondary, and postsecondary educational institutions, as well as state educational agencies, that receive financial assistance.” *Id.* at 1 n.3, 3. It also warns that “[t]he Department intends to take appropriate measures to assess compliance” and that “[i]nstitutions that fail to comply with federal civil rights law may, consistent with applicable law, face potential loss of federal funding.” *Id.* at 3–4.

²⁷ Title VI provides, in pertinent part, “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.” 42 U.S.C. § 2000d; *see also* 34 C.F.R. §§ 100.1–100.13 (enforcing Title VI regulations).

²⁸ U.S. CONST. amend. XIV, § 1.

²⁹ Dear Colleague Letter, *supra* note 25, at 1.

³⁰ *Id.* at 2.

³¹ *Id.*

³² *Id.*

this Nation's educational institutions. The law is clear: treating students differently on the basis of race *to achieve nebulous goals such as diversity, racial balancing, social justice, or equity* is illegal under controlling Supreme Court precedent.³³

Remarkably, the letter proceeds to decry as “toxic[] indoctrinat[ion]” built upon a “false premise” the concept, and presumptively any related teaching, “that the United States is built upon ‘systemic and structural racism.’”³⁴ Such toxic indoctrination, the letter continues, often takes the form of what it describes as illegal discrimination justified “under the banner of ‘diversity, equity, and inclusion’ (‘DEI’),” which the letter describes as a nefarious means of “smuggling racial stereotypes and explicit race-consciousness into everyday training, programming, and discipline.”³⁵ The letter also prohibits race-neutral policies that might potentially serve as a proxy for racial considerations, such as the elimination of standardized test score requirements.³⁶

Shortly after sending the Valentine's Day Dear Colleague letter to schools across the country, the Trump Administration followed up with various additional, ominous steps to enforce the terms of the letter. On February 27, 2025, for instance, a press release by the Department of Education announced the launch of an “End DEI” online portal to encourage and facilitate the filing of reports by parents, students, teachers, and members of the broader community reporting purported discrimination in the form of “critical theory, rogue sex education and divisive ideologies.”³⁷ On March 1, 2025, the Department released an FAQ document that warned schools to cease operating programs and policies, whether called “DEI” initiatives or not, that treat students differently because of race, or that those of any race (e.g., white students) might experience as creating a hostile environment or as racial stereotyping.³⁸ While indicating that some educational, cultural, or

³³ *Id.* at 2–3 (emphasis added).

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *Id.* at 3.

³⁷ See Press Release, U.S. Dep't of Educ., U.S. Department of Education Launches “End DEI” Portal (Feb. 27, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-launches-end-dei-portal> [<https://perma.cc/8BZ5-RY8V>].

³⁸ *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act*, U.S. DEP'T OF EDUC. OFF. OF C.R., at 6 [hereinafter FAQs], <https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf> [<https://perma.cc/9SPU-DCL2>]; see also Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases Frequently Asked Questions on Dear Colleague Letter About Racial Preferencing (Mar. 1, 2025),

historical observances might be acceptable, the FAQs warn that “DEI” programming is suspect, along with other programs that “veil racial discriminatory policies with terms like ‘social-emotional learning’ or ‘culturally responsive teaching.’”³⁹ The FAQs do not proceed to define either those phrases or DEI. However, the FAQs do warn that a school’s history of “further[ing] DEI objectives, ‘equity,’ a racially-oriented vision of social justice, or similar goals” could be evidence of unlawful covert discrimination.⁴⁰

After releasing the FAQ document, the Department of Education announced in a March 14, 2025, press release that it was opening Title VI investigations into “illegal discrimination” at dozens of universities.⁴¹ The investigations targeted schools that provide doctoral and scholarship opportunities to students of color, which the Department deemed to be impermissible “race-exclusionary practices” and “race-based” scholarships and segregation.⁴²

Lacking any caveat to the contrary, the anti-DEI edicts from the Trump Administration could be viewed as capturing in their sweep any number of diversity-celebrating efforts in an educational context, from affinity group student organizations to cultural programming to remedial measures intended to provide equal opportunity to descendants of slavery- and segregation-era oppression and others who have inherited disadvantages due to historic systemic discrimination. At the very least, the parameters of the anti-DEI edicts, as discussed below, are unclear enough to have elicited a range of responses from their targets.

B. The Early Fall-Out: Initial Harms and First Responders

In the early months of Trump’s second presidency, the impact of the Trump Administration’s attacks on DEI—both broadly through the January 2025 executive orders and more specifically through the targeting of race in the subsequent Dear Colleague letter and March 1, 2025, FAQs—had already begun to rapidly re-shape academia into a world too often governed by threats toward and fear by those who previously proudly promoted principles and protections of diversity, equity, and inclusion.

<https://www.ed.gov/about/news/press-release/us-department-of-education-releases-frequently-asked-questions-dear-colleague-letter-about-racial-preferencing> [<https://perma.cc/93JL-Z428>] (announcing the March 1, 2025, release of the FAQs).

³⁹ FAQs, *supra* note 38, at 6.

⁴⁰ *Id.* at 9.

⁴¹ See Press Release, U.S. Dep’t of Educ., Office for Civil Rights Initiates Title VI Investigations into Institutions of Higher Education (Mar. 14, 2025), <https://www.ed.gov/about/news/press-release/office-civil-rights-initiates-title-vi-investigations-institutions-of-higher-education-0> [<https://perma.cc/Z6JV-XMBU>].

⁴² *Id.*

The extent of harm caused by and the resulting whirlwind of litigation emanating from the morass of legally questionable anti-DEI actions by the Trump Administration cannot be completely captured in a single law review article, considering how rapidly that landscape is evolving. After just a few months into Trump's second term, however, enough of a pattern has emerged, both of Trump's anti-DEI attacks on schools and of resulting harms and litigation responses thereto, to analyze those initial developments and what they may bode for the future of diversity, education and inclusion on campuses across the country.

1. Initial Harms of Trump's Anti-DEI Attacks

The ripple effects of President Trump's crusade against diversity, equity, and inclusion in American educational institutions quickly evolved into an avalanche of harms flowing from the Trump Administration's anti-DEI edicts. For example, the National Association of Diversity Officers in Higher Education (NADOHE) has attested that the anti-DEI January 20 and 21, 2025, executive orders "will lead to the eradication of critical support for students, staff, and faculty on campuses of higher education; the elimination of many of [their] members' jobs; and will ultimately threaten NADOHE's existence."⁴³ Others have explained that if the Trump Administration's anti-DEI attacks are upheld in court, "higher ed institutions could lose out on billions in funding for research grants, student financial aid and institutional support, undermining decades of work to improve success and access for marginalized students."⁴⁴ In the first few months of President Trump's second term, many such harms have been documented at educational institutions across the country, ranging from billions of dollars of revoked grants and lost vital research⁴⁵ to numerous other losses and injuries suffered by educators, students, and other members of academic communities.⁴⁶

Revoked Federal Funding for Educational Institutions and Research

The Trump Administration did not waste much time following up on the Department of Education's Dear Colleague letter, commencing investigations of numerous schools across the country for alleged

⁴³ Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 288 (D. Md. 2025).

⁴⁴ Liam Knox, *After Sweeping Anti-DEI Guidance, What Should Colleges Do?*, INSIDE HIGHER ED (Feb. 18, 2025), <https://www.insidehighered.com/news/diversity/race-ethnicity/2025/02/18/after-trumps-diversity-threats-what-should-colleges-do> [<https://perma.cc/S82543TN>].

⁴⁵ See *infra* subsection I(B)(1)(a).

⁴⁶ See *infra* subsection I(B)(1)(b).

violations of Title VI and threatening severe penalties for noncompliance while also initiating enforcement actions demanding civil penalties and treble damages.⁴⁷ Soon thereafter, in the first few months of the second Trump Administration, schools across the country lost billions of dollars of federal funding, including through the Department of Education's termination of twenty-nine DEI-related grants totaling over a hundred million dollars.⁴⁸

Among those grant cancellations was the termination of funding used "to train teachers to 'help students understand/interrogate the complex histories involved in oppression, and help students recognize areas of privilege and power on an individual and collective basis.'"⁴⁹ Another grant revocation resulted in the cancellation of a conference on alternative models of education at Historically Black Colleges and Universities (HBCUs).⁵⁰ Other documented losses resulting from the federal government's grant cancellations for DEI programming included termination of funding for a California State University program that trained teachers at high-need and high-poverty schools, including for special education; the documented loss of support, mentoring, training, and financial stipends for California students, including those participating in classroom teaching; the forced cancellation of an urban teacher residency program in New Jersey; and the firing of a Boston teacher pipeline program that remedied a shortage of multilingual educators.⁵¹

At the higher education level, individual research projects by academics nationwide have suffered funding cuts as well. Among those whose research has been interrupted or ended as a result of the grant cancellations are a Virginia professor who lost a "Gender Equity in STEM [Science, Technology, Engineering and Mathematics] Academic Professions" grant from the National Science Foundation to study disparities that affect women in science; a Connecticut professor researching diversity in the STEM workforce; and a Texas professor who had been researching equity in access to critical goods and services.⁵² The Trump Administration has been particularly heavy-handed in singling out

⁴⁷ Nat'l Educ. Ass'n v. U.S. Dep't of Educ., 779 F. Supp. 3d 149, 169 (D.N.H. 2025).

⁴⁸ Nat'l Ass'n of Diversity Officers in Higher Educ., 767 F. Supp. 3d at 263.

⁴⁹ *Id.* (quoting the Department of Government Efficiency Letter included in the record in that case).

⁵⁰ *Id.* at 268.

⁵¹ California v. U.S. Dep't of Educ., 769 F. Supp. 3d 72, 78–79 (D. Mass. 2025). In an appeal of an injunction initially ordered against the grant denial, the Supreme Court struck down the order, allowing the Trump Administration to withhold the grants pending resolution of an Administrative Procedure Act challenge to the grant revocations. *See* Dep't of Educ. v. California, 145 S. Ct. 966, 969 (2025).

⁵² Nat'l Ass'n of Diversity Officers in Higher Educ., 767 F. Supp. 3d at 268.

a number of reputable schools for exceptionally harsh punitive measures tied to their DEI programming or DEI-supportive research, including Harvard University, Columbia University, UCLA, and the University of Virginia.

The University of Virginia was the recipient of seven threatening letters sent by the Trump Administration over the course of two months alleging race discrimination by the school and demanding an end to the school's DEI initiatives along with the resignation of University of Virginia President James Ryan, about whom Justice Department Assistant Attorney General for Civil Rights Harmeet Dhillon charged, "I don't have any confidence that he was going to be willing and able to preside over the dismantling of DEI."⁵³ The pressure from Trump Administration members had continued even after the school closed its DEI office and ended its diversity policies in financial aid, hiring, and admissions.⁵⁴ In June of 2025, President Ryan resigned.⁵⁵ Reactions ranged from Virginia's Republican Governor Glenn Youngkin proclaiming that "DEI is done at the University of Virginia"⁵⁶ to the University of Virginia faculty senate passing a vote of no confidence against the Board of Visitors, condemning the board for not protecting the school against "'outside interference' by the Trump administration," culminating in President Ryan's resignation.⁵⁷

During the same period, UCLA researchers were stripped of hundreds of millions of dollars of grants for research pertaining to diversity, equity, and inclusion and related topics blacklisted as a result of President Trump's January 2025, executive orders; litigation was subsequently brought by six affected UCLA researchers, resulting in a partial restoration of funding after a successful lower court challenge.⁵⁸

⁵³ Erin Tucker & Collin Binkley, *University of Virginia President, Pressured Over DEI, Resigns Rather than 'Fight Federal Government'*, ASSOCIATED PRESS (June 27, 2025), <https://apnews.com/article/university-of-virginia-dei-james-ryan-6f8cfc43738944ca8164ab20814c5695> [<https://perma.cc/2BGJ-P8VB>]; see also Kate Hidalgo Bellows & Katherine Mangan, *The U. of Virginia's President Was Targeted Over DEI. Now He's Resigning.*, CHRON. HIGHER EDUC. (June 27, 2025), <https://www.chronicle.com/article/university-of-virginia-president-reportedly-resigns-under-pressure-from-trump-administration> [<https://perma.cc/5WC7-A86M>].

⁵⁴ Tucker & Binkley, *supra* note 53.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Dan Rosenzweig-Ziff, *As U-Va. President Leaves, Faculty Say Board Failed to Protect University*, WASH. POST (July 11, 2025), <https://www.washingtonpost.com/education/2025/07/11/university-of-virginia-faculty-board-no-confidence-ryan/> [<https://perma.cc/GL28-5984>].

⁵⁸ *Thakur v. Trump*, 787 F. Supp. 3d 955, 966–68 (N.D. Cal. 2025); see also Dwight J. Draughon et al., *In Suit Brought by UCLA Faculty, Court Orders Trump Administration to Partially Restore Grant Funding*, STEPTOE (Aug. 28, 2025), <https://www.steptoelaw.com/en/news-publications/in-suit-brought-by-ucla-faculty-court-orders-trump-administration-to-partially-restore-grant-funding.html> [<https://perma.cc/M4TR-LNLC>].

As to Harvard, in April of 2025, officials from the U.S. Department of Education, the Department of Health and Human Services, and the General Services Administration sent a letter to Harvard threatening to eliminate federal funding to the university unless it complied with an extensive list of demands.⁵⁹ Included in the list were demands that Harvard dismantle its programs and cease any consideration of race in hiring or admissions practices, although it was also critiqued for not doing enough to combat anti-Semitism on campus.⁶⁰ Within days of the letter, Harvard had already been stripped of over two billion dollars in federal government funding.⁶¹ The consequences extend beyond Harvard Yard, with billions of dollars of funding cuts also affecting many who rely on Harvard's innovative and critical research, including tens of millions designated for life-saving cancer research.⁶² Until that funding was revoked, Harvard had long been at the forefront of developing cutting-edge treatments and clinical trials for anti-cancer agents.⁶³ Now, vital medical advances that millions worldwide have long relied upon are at risk of elimination, along with other critical research,⁶⁴ threatening the end of an era of life-saving innovations pioneered by Harvard's leading research programs.⁶⁵

Similarly, Columbia University was stripped of hundreds of millions of dollars in research funding by the Trump Administration, and consequently reached a settlement with the Trump Administration.⁶⁶

⁵⁹ Letter from Josh Gruenbaum, Comm'r of the Fed. Acquisition Serv., General Servs. Admin., Sean R. Keveney, Acting General Counsel, U.S. Dep't of Health & Human Svcs., & Thomas E. Wheeler, Acting Counsel, U.S. Dep't of Educ., to Alan M. Garber, President, Harvard Univ., & Penny Pritzker, Lead Member, Harvard Corp. (Apr. 11, 2025), <https://www.harvard.edu/research-funding/wp-content/uploads/sites/16/2025/04/Letter-Sent-to-Harvard-2025-04-11.pdf> [<https://perma.cc/6Q9A-V74S>].

⁶⁰ *Id.*

⁶¹ Steve Inskeep, Obed Manuel & Reena Advani, *As Trump Targets Elite Schools, Harvard's President Says TheyvShould 'Stand Firm'*, NPR (May 28, 2025), <https://www.npr.org/2025/05/27/nx-s1-5409576/trump-harvard-lawsuit-funding-international-students> [<https://perma.cc/N79V-L63B>].

⁶² *Id.*

⁶³ Caroline Perry, *Chemists' Breakthrough in Synthesis Advances a Potent Anti-Cancer Agent*, HARV. GAZETTE (June 17, 2019), <https://news.harvard.edu/gazette/story/2019/06/harvard-chemists-breakthrough-in-synthesis-advances-a-potent-anti-cancer-agent> [<https://perma.cc/GF59-GXCC>].

⁶⁴ *See id.*

⁶⁵ *See* Liz Mineo, *Freezing Funding Halts Medical, Engineering, and Scientific Research*, HARV. GAZETTE (Apr. 21, 2025), <https://news.harvard.edu/gazette/story/2025/04/freezing-funding-halts-medical-engineering-and-scientific-research/> [<https://perma.cc/EPY5-B5PV>].

⁶⁶ Collin Binkley, *Trump's Settlement with Columbia Could Become a Model for His Campaign to Reshape Higher Education*, ASSOCIATED PRESS (July 24, 2025), <https://apnews.com/article/columbia-university-settlement-trump-harvard-526cefc6623d3572605d3e792ac19682> [<https://perma.cc/3M7U-3ATP>]. Notably, soon after the Columbia settlement, Brown University reached a similar settlement with the federal government. *See Fact Sheet: President Donald J. Trump Secures Major Settlement with Brown University*, THE WHITE HOUSE (July

Among the terms of the Columbia settlement were many that will severely curtail the school's DEI efforts, with the school agreeing to fully comply with the Trump Administration's interpretation of Title IX as requiring the removal of transgender players from women's sports teams, agreeing to refrain from any consideration of race in admissions decisions even beyond the prohibitions set forth in *Students for Fair Admissions*, and agreeing to provide regular reports to the Administration to demonstrate that the school does not "promote unlawful DEI goals."⁶⁷

A primary justification articulated in the Dear Colleague letter for revoking grants to educational institutions was the statement that programs funded by the grants "promote or take part in DEI initiatives" or "otherwise fail to serve the best interests of the United States."⁶⁸ That telling statement sends the unequivocal message that, in the view of the Trump Administration, the protection of diversity, equity, and inclusion is not in the best interest of the United States.

Other higher education institutions have similarly suffered funding cuts to their research as casualties of Trump's war on DEI, resulting in a notable "brain drain" at colleges and universities across the United States, while researchers seek safe haven at research institutions elsewhere in the world.⁶⁹ Reflecting that unfortunate trend, the financial ratings agency Moody's has downgraded its outlook for colleges and universities in the United States.⁷⁰

Harms to Individual Teachers and Students in the Classroom and Beyond

In addition to the widespread financial damage to educational institutions and their research programs resulting from the Trump Administration's anti-DEI attacks, individual educators and students have been harmed in numerous additional ways.

30, 2025), <https://www.whitehouse.gov/fact-sheets/2025/07/fact-sheet-president-donald-j-trump-secures-major-settlement-with-brown-university/> [<https://perma.cc/2L2W-LN85>].

⁶⁷ Binkley, *supra* note 66.

⁶⁸ See *California v. U.S. Dep't of Educ.*, 769 F. Supp. 3d 72, 77 (D. Mass. 2025) (citations omitted).

⁶⁹ See Josh Moody, *Moody's Downgrades Sector Outlook to Negative*, INSIDE HIGHER ED (Mar. 19, 2025), <https://www.insidehighered.com/news/business/financial-health/2025/03/19/moodys-downgrades-sector-outlook-negative> [<https://perma.cc/2V9J-UKTJ>]; Catherine Offord, *Overseas Universities See Opportunity in U.S. 'Brain Drain'*, SCIENCE (Mar. 17, 2025), <https://www.science.org/content/article/overseas-universities-see-opportunity-u-s-brain-drain> [<https://perma.cc/L9R9-BTL4>].

⁷⁰ Moody, *supra* note 69.

As to the impact on individual educators, some teachers have described pressure to self-censor lectures and courses.⁷¹ Other teachers have similarly faced censorship pressures. Following the Dear Colleague letter, for example, a history teacher was prevented from teaching historical facts about the Civil War and Reconstruction Era and other events “including the enactment of the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments, the Jim Crow south, the founding of the KKK, and the Tulsa Race Massacre,” all of which “necessarily entail[] discussions of race and how race and perceptions toward different racial groups has shaped American history.”⁷² Teachers have also been censored and censured for merely welcoming all students to class; in Idaho, as a result of the Trump Administration’s threat to strip funding from schools with DEI programming, one middle school teacher was ordered by her school district to take down a poster she had hung in her classroom to welcome students that simply read, “Everyone is Welcome Here.”⁷³

Many teachers have also been forced to leave their jobs entirely. The National Education Association has documented a mass exodus of other educators across the country, following the elimination of teaching positions that involve race-related subjects, the censoring of lesson plans addressing race or inclusivity in the classroom, and the chilling of what was once a robust offering of multicultural programming.⁷⁴

The classroom experience has been detrimentally impacted in other ways as well, with students, of course, among the most egregiously harmed victims of anti-DEI efforts to whitewash history and erase diversity, equity, and inclusion. As Professor Moore has explained, “[t]he adoption of DEI and affirmative action policies did not arise in a vacuum. Instead, they occurred out of necessity. These policies have deep roots in American history, particularly for African Americans who endured the persistent belief that they were racially inferior.”⁷⁵ To strip education of these critical lessons in American history—including chapters on colonization of indigenous lands, slavery, segregation, redlining and racial displacement, and other forms of discriminatory subjugation within the United States—is to risk perpetuating and repeating some of the most horrific mistakes of our past. As the federal court explained in *NAACP v.*

⁷¹ See *infra*, subsection II(A)(2)(b) (addressing the chilling effect of the anti-DEI mandates as a due process and First Amendment issue)

⁷² Nat’l Educ. Ass’n v. U.S. Dep’t of Educ., 779 F. Supp. 3d 149, 189 (D.N.H. 2025).

⁷³ Sophie Clark, *School Removes ‘Everyone Is Welcome’ Poster: What We Know*, NEWSWEEK (Mar. 20, 2025), <https://www.newsweek.com/school-removes-everyone-welcome-poster-what-we-know-2047992> [<https://perma.cc/C5CN-NR4P>].

⁷⁴ Nat’l Educ. Ass’n, 779 F. Supp. 3d at 180–81.

⁷⁵ Moore, *supra* note 5, at 247.

U.S. Department of Education,⁷⁶ the Dear Colleague letter and ensuing certification requirements upon schools to disavow DEI “will force ‘schools and teachers . . . to steer clear of offering courses and teaching topics that touch on undefined concepts such as “diversity, equity, and inclusion” to comply’ with the challenged documents.”⁷⁷

But diversity, equity, and inclusion are not just subjects for history lessons; they are also integral aspects of the broader academic experience. For example, disparities within higher education have been shown to affect the experiences of underrepresented groups, as students from diverse backgrounds struggle with hurdles in accessing opportunity and feeling a sense of belonging, which in turn can detrimentally affect their academic success.⁷⁸ Consequently, the preservation of diversity, equity, and inclusion efforts is important both to rectify imbalances and to provide meaningfully equitable and inclusive educational opportunities to all students. Conversely, anti-DEI initiatives threaten the existence of equitable and inclusive classrooms, while also depriving students of other diversity-friendly experiences and opportunities. For example, the Department of Education has dissolved its own Diversity and Inclusion Council and its Equity Action Plan, an initiative intended to improve the ability of underserved students to afford, attend, and complete college.⁷⁹

Students have also been harmed by the responses of schools that have succumbed to various degrees to the anti-DEI edicts from the Trump Administration. While many schools have announced scrubbing websites and other communications and materials of references to DEI in response to heavy pressure from the federal government,⁸⁰ others have acquiesced to the point of eliminating DEI programming, offices, and curricula, which has been described as an “over-correction.”⁸¹ Schools have described

⁷⁶ 779 F. Supp. 3d 59 (D.D.C. 2025).

⁷⁷ *Id.* at 65 (alteration in original).

⁷⁸ LeAnne Salazar Montoya, *Equity, Diversity, and Inclusion: What Is in a Name?*, 22 SEATTLE J. SOC. JUST. 621, 641 (2024) (citing SUSAN GROUNDWATER ET AL., 2023 STATE OF DIVERSITY, EQUITY, INCLUSION, & BELONGING (2023); Mega Wanti, Renate Wesselink, Harm Biemans & Perry den Brok, *Determining Factors of Access and Equity in Higher Education: A Systematic Review*, 1 EQUITY EDUC. & SOC’Y 279 (2022)).

⁷⁹ Alia Wong & Annie Ma, *Federal Agencies Begin Removing DEI Guidance from Websites in Trump Crackdown*, ASSOCIATED PRESS (Jan. 24, 2025), <https://apnews.com/article/trump-dei-education-diversity-equity-inclusion-20cf8a2941f4f35e0b5b0e07c6347ebb> [<https://perma.cc/92EE-44DC>].

⁸⁰ See Laura Spitalniak, *A Surge of DEI Cuts Hits Colleges Across the US*, HIGHER ED DIVE (Feb. 27, 2025), <https://www.highereddive.com/news/surge-dei-cuts-wave-colleges-ohio-state-upenn-iowa/741191/> [<https://perma.cc/C6AH-95KD>].

⁸¹ See, e.g., Vin Gurrieri, *Trump’s Anti-DEI Push Calls for Change, Not ‘Overcorrection’*, LAW360 (Feb. 7, 2025), <https://www.law360.com/employment-authority/articles/2293395> [<https://perma.cc/VT34-H4WX>]; see also Collin Binkley, *DEI Rollbacks Hit Campus Support Systems for Students of Color*, ASSOCIATED PRESS (Apr. 22, 2025), <https://apnews.com/article>

exorbitant pressure that compelled them to take such steps, as reflected, for example, in one university president's statement that "[i]t is clear we must be in compliance with them to receive the federal funding that is critical to our present and future."⁸²

As a result, students across the country have reported losing valuable resources, from scholarships to campus mentors to diversity centers that provide a sense of belonging to students who belong to underrepresented communities.⁸³

Finally, and ironically, some of the students who might be particularly harmed by prohibiting consideration of factors including gender in admissions will be men. In recent years, female applicants have typically outnumbered male applicants to colleges and universities by nearly a million a year, and with boys scoring lower in the LSAT and ACT and having lower high school grade point averages than girls, many schools have intentionally admitted boys at a higher rate than girls, despite their lower scores, to try to maintain a gender balance.⁸⁴ "If we were going to eliminate preferences for men, the undergraduate population would skew to 65 percent female overnight," one school administrator has explained.⁸⁵ Thus, even white men will be likely harmed by the anti-DEI mandates of the Trump Administration.⁸⁶

/dei-diversity-equity-inclusion-college-bbe09c081d8a47fcb5616c8fa3b23cee [https://perma.cc/W7S2-CP5X] (describing schools closing DEI offices and eliminating other DEI programming soon after the January 20 and 21 executive orders and Dear Colleague letter); Spitalniak, *supra* note 80 (describing schools closing DEI programming and offices; discontinuing a Center for Belonging and Social Change; removing DEI references from websites, communications, offices, and policies; and/or deleting equal opportunity statements).

Notably, even prior to President Trump re-taking the White House in 2025, there had already been a trend, particularly in Southern states, of passing state legislation to stifle DEI programming at colleges and universities, efforts that were then buffered by the Trump Administration embracing those efforts as a matter of federal policy. See Cecil Robinson, *The Rise of Anti-Diversity, Equity & Inclusion Bills in the South*, CAMPAIGN FOR S. EQUAL. (Apr. 26, 2024), <https://southernequality.org/title-the-rise-of-anti-dei-bills-in-the-south/> [https://perma.cc/KP6K-YDFZ]. As the court in *National Education Ass'n v. U.S. Department of Education* observed, however, even prior to Trump's 2025 attacks on such educational content addressing systemic and structural racism, similar prohibitions at the state level had been ruled both unconstitutionally vague and overbroad. *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 149, 189 (D.N.H. 2025) (citing *Black Emergency Response Team v. Drummond*, 737 F. Supp. 3d 1136, 1148–49 (W.D. Okla. 2024)).

⁸² Binkley, *supra* note 81.

⁸³ See, e.g., *id.*

⁸⁴ See Jon Marcus, *Trump's Attack on DEI May Hurt College Men, Particularly White Men*, WASH. POST (Dec. 4, 2025), <https://www.washingtonpost.com/education/2025/12/04/trump-dei-ban-college-men/> [https://perma.cc/6PNK-DD6U].

⁸⁵ *Id.*

⁸⁶ *Id.*

In addition to tangible repercussions for students, as a matter of human decency and compassion, one must also consider the psychic and emotional damage resulting from the federal government's DEI attacks. Students have expressed dismay from witnessing their schools abandon commitments to diversity, equity, and inclusion.⁸⁷ Some have described feeling like they have lost their voices, with a University of Michigan student, for example, responding to the elimination of her school's DEI office and programming with the pained reflection, "It feels like we're going back. I don't know how else to describe it . . . It's like our voices aren't being heard."⁸⁸ For the Trump Administration to condemn diversity, equity, and inclusion in education, even prohibiting the acknowledgement of systemic injustices that shape the ancestral and personal backgrounds of diverse students, is to shamefully and callously erase the cultural identities of diverse groups of student bodies, while whitewashing history in the process.

Urging schools to stand strong against pressure to dismantle DEI programming, U.C. Davis School of Law Dean Kevin Johnson has explained that DEI programming provides critically important services to members of marginalized communities, fostering a sense of belonging among them while also preserving important diversity, equity, and inclusion principles, and facilitating communication about DEI issues.⁸⁹ Johnson explains that "[t]he overall value of the modern DEI function should not be underestimated" and urges that "principles of diversity, equity, and inclusion should be fully integrated into the fabric of each and every leader and office at the law school."⁹⁰ Rather than honoring those principles, however, the 2025 Trump Administration appears doggedly committed to unraveling and destroying the unique threads of the richly diverse—and, yes, colorful—tapestry of our academic communities.

Another endangered benefit of DEI-inclusive education is that DEI programming can help fulfill critically important requirements of training culturally competent professionals, ensuring competitiveness in a diverse world.⁹¹ For example, in the law school context, equipping future attorneys

⁸⁷ Binkley, *supra* note 81.

⁸⁸ *Id.*

⁸⁹ Kevin R. Johnson, *Diversity, Equity, and Inclusion as an Institutional Imperative*, 55 U. TOL. L. REV. 207, 210 (2024).

⁹⁰ *Id.* at 210, 212.

⁹¹ See David J. Hanson, *Diversity and Representation in Higher Education*, HIGHER ED JOBS (Nov. 4, 2022), <https://www.higheredjobs.com/Articles/articleDisplay.cfm?ID=3243&Title=DiversityandRepresentationinHigherEducation> [<https://perma.cc/E4XH-X9TD>]. Notably, while DEI programming may fall short at times, Dean Johnson also observes, it does so when it functions in a performative manner, as window-dressing, rather than engage at a deeper level in addressing issues of racial inequity, demonstrating a true, principled, and fully funded commitment to diversity, equity, and inclusion. *Id.*

to effectively serve clients of diverse backgrounds, “whether different due to race, ethnicity, religion, economic status, gender, gender identity, military status, sexual orientation, disability, or any other status,” is essential, Professor Shelby A.D. Moore has explained: “As private institutions move forward, carrying this message, both by teaching and leading, we must open our doors to all who are willing to enter and learn.”⁹² Addressing the benefits of diversity in the classroom, the Supreme Court itself has recognized that “the classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”⁹³

Finally, as previously described, Harvard has been a target of the Trump Administration, but that includes more than just billions of dollars in lost funding; the Trump Administration has also targeted foreign students at Harvard. In May of 2025, a letter from the Office of Homeland Security demanded extensive records from Harvard regarding its foreign “nonimmigrant” student population, who constitute a quarter of Harvard’s overall student population.⁹⁴ The letter announced the revocation of Student and Exchange Visitor Program Certification, which enables foreign students to attend Harvard.⁹⁵ The letter’s articulated reasons for the revocation included, among other things, Harvard’s “employ[ing] racist ‘diversity, equity, and inclusion’ policies.”⁹⁶ That revocation, at least, was enjoined the next day by a federal court.⁹⁷

Such losses are just the tip of the iceberg. Among other injuries suffered from Trump’s war on DEI are harms with serious constitutional implications in the form of chilled speech, discriminatory or arbitrary enforcement, and educational institutions caught off guard from lack of fair notice.⁹⁸ Furthermore, with each day the federal government’s anti-DEI threats and mandates continue to loom over the academia, there is an

⁹² Moore, *supra* note 5, at 245.

⁹³ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

⁹⁴ See Letter from Kristi Noem, U.S. Secretary of Homeland Sec., to [redacted], Harvard Univ., at 2 (May 22, 2025), https://www.harvard.edu/federal-lawsuits/wp-content/uploads/sites/17/2025/05/S1-Ltr-to-Harvard-05222025_Redacted.pdf [<https://perma.cc/E4A3-DPX7>]; see also Inskeep et al., *supra* note 61 (noting that foreign students constitute a quarter of the Harvard student population).

⁹⁵ Letter from Kristi Noem, *supra* note 94, at 1.

⁹⁶ *Id.*

⁹⁷ *President & Fellows of Harvard Coll. v. Dep’t of Homeland Sec.*, No. 1:25-cv-11472, 2025 WL 1479077, at *1 (D. Mass. May 23, 2025).

⁹⁸ See *infra* section II(A)(2).

ever-increasing number of individuals and institutions harmed by those initiatives, with incalculable future damage to come.

2. Initial Resistance, from Organizational Statements to Court Challenges

Organizational and institutional responses to Trump's anti-DEI attacks targeting schools have reflected a mixture of fight and flight responses. As described in the previous section, many schools have reluctantly acquiesced by scrubbing websites of references to diversity, equity, and inclusion, with some capitulating to the point of abandoning DEI programming and curriculum, and shuttering DEI offices.

However, some schools have engaged in resistance. For example, Georgetown University Law Center has forcibly pushed back against the Administration's attacks. In a March 6, 2025, letter response to a Department of Justice's letter questioning "whether diversity, equity, and inclusion is part of the curriculum," and warning that the Department of Justice would not hire schools with curriculum deemed "unacceptable," Georgetown University Law Center's Dean and Executive Vice President William M. Treanor responded on behalf of the law school:

The First Amendment . . . guarantees that the government cannot direct what Georgetown and its faculty teach and how to teach it. The Supreme Court has continually affirmed that among the freedoms central to a university's First Amendment rights are its abilities to determine, on academic grounds, who may teach, what to teach, and how to teach it.

This is a bedrock principle of constitutional law—recognized not only by the courts, but by the administration in which you serve. The Department of Education confirmed last week that it cannot restrict First Amendment rights and that it is statutorily prohibited from "exercising control over the content of school curricula."

Your letter informs me that your office will deny our students and graduates government employment opportunities until you, as Interim United States Attorney for the District of Columbia, approve of our curriculum. Given the First Amendment's protection of a university's freedom to determine its own curriculum and how to deliver it, the constitutional violation behind this threat is clear, as is the attack on the University's mission as a Jesuit and Catholic institution.

Georgetown Law has one of the preeminent faculties in the country, fostering groundbreaking scholarship, educating students in a wide variety of perspectives, and thriving on the robust exchange of ideas. . . . We look forward to your confirming that any Georgetown-affiliated candidates for employment with your office will receive full and fair consideration.⁹⁹

Seven months later, a group of six different universities—MIT, Brown University, the University of Pennsylvania, the University of Southern California, Dartmouth University, the University of Arizona, and the University of Virginia—stood firm against pressure by the Trump Administration in refusing to enter into a compact to agree to a number of conditions for preferential funding treatment, including promising to forsake consideration of sex, ethnicity, race, nationality, political views, sexual orientation, gender identity, and religious associations in admissions, hiring, and other contexts.¹⁰⁰ Condemned by UC Berkely Dean Erwin Chemerinsky as “extortion, plain and simple,”¹⁰¹ the proposed compact was also forcefully decried in a statement co-signed by thirty-seven different higher education associations.¹⁰²

While other schools may not have felt empowered to join the front lines of resistance against attacks on diversity, equity, and inclusion, organizations across the country have stepped in to fight for them, including in and beyond the abovementioned statement. Among organizational statements issued in earlier 2025 that offered solidarity with schools facing threats from the federal government was a joint public statement issued by the American Association of Colleges and Universities and the American Academy of Arts & Sciences.¹⁰³ The

⁹⁹ Letter from William M. Treanor, Dean & Executive Vice President, Georgetown Univ., to Edward R. Martin, Jr., Interim U.S. Att’y, at 1-2 (Mar. 26, 2025), <https://georgetown.app.box.com/s/hr3dgynlcuacm23qqm1zv12s2jf00gt0> [<https://perma.cc/UCY2-ASAC>].

¹⁰⁰ Coral Murphy Marcos, *University of Arizona Becomes Seventh US College to Reject Trump’s ‘Compact’*, GUARDIAN (Oct. 20, 2025), <https://www.theguardian.com/us-news/2025/oct/20/university-of-arizona-rejects-trump-compact> [<https://perma.cc/A7E2-S4NL>]; *Compact for Academic Excellence in Higher Education*, https://www.insidehighered.com/sites/default/files/2025-10/Compact%20for%20Academic%20Excellence%20in%20Higher%20Education%2010.1%5B97%5D%5B39%5D_0.pdf [<https://perma.cc/PD6Q-FEUE>].

¹⁰¹ Erwin Chemerinsky, Opinion, *Trump’s ‘Compact’ with Universities Is Just Extortion*, N.Y. TIMES (Oct. 2, 2025), <https://www.nytimes.com/2025/10/02/opinion/trump-compact-universities-constitution.html> [<https://perma.cc/E6MZ-LKKM>].

¹⁰² *Statement by Higher Education Associations in Opposition to Trump Administration Compact*, AM. COUNCIL ON EDUC. (Oct. 17, 2025), <https://www.acenet.edu/News-Room/Pages/Statement-Trump-Administration-Compact.aspx> [<https://perma.cc/Y3G5-AKRW>].

¹⁰³ Andrés Acebo et al., *Public Statement: A Call for Constructive Engagement*, AM. ASS’N OF COLLS. & UNIVS. (Apr. 22, 2025), <https://www.aacu.org/newsroom/a-call-for-constructive-engagement> [<https://perma.cc/XN5X-2AFE>].

statement offered forceful commitments to resist “unprecedented government overreach and political interference now endangering American higher education”; to “oppose undue government intrusion in the lives of those who learn, live, and work on our campuses”; and to “reject the coercive use of public research funding.”¹⁰⁴

In the legal academy, the leaders of the American Association of Law Schools (AALS) issued a statement in the form of a March 25, 2025, letter with the heading, *Standing Together in Support of Higher Education and the Legal Profession*.¹⁰⁵ The letter decries the Trump Administration’s attacks on higher education as “striking at the core of ordered liberty and threaten[ing] our freedoms of speech and association, the independence and impartiality of our courts, the right to counsel, due process, and the rule of law itself.”¹⁰⁶ Referencing a previous bi-partisan statement by more than a thousand law professors warning that “we are in a constitutional crisis,”¹⁰⁷ and quoting another commentator who wrote that “[t]he result, if all goes through, will be nothing less than the permanent diminishment of research universities and an upheaval of the free speech principles at the core of the country,”¹⁰⁸ the AALS letter calls upon members of the legal profession to be united “in insisting that the attacks on our courts, on the legal profession, on lawyers, and on our universities are wrong and must cease.”¹⁰⁹ In that call to unified resistance, the AALS joined the company of, among others, the American Bar Association, which, the AALS letter describes, has “call[ed] upon the entire profession, including lawyers who serve in elected positions, to speak out against intimidation.”¹¹⁰

Explaining that “[a]ctions that weaken law schools and universities, the legal profession, and the judiciary, hurt all Americans,” the AALS letter offers support to educational organizations, schools, and leaders

¹⁰⁴ *Id.*

¹⁰⁵ Letter from Austen Parrish et al., Ass’n of Am. L. Schs., to “Friends” (Mar. 25, 2025), <https://www.aals.org/app/uploads/2025/03/AALS-Letter-on-Threats-to-Law-and-Legal-Education-.pdf> [<https://perma.cc/8VCE-9KDP>].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting Kent Greenfield et al., “*We Are in a Constitutional Crisis*”: Statement of Law Professors and Law Teachers, AM. CONST. SOC’Y (Feb. 26, 2025), <https://www.acslaw.org/inbrief/we-believe-we-are-in-a-constitutional-crisis-law-professors-and-law-teachers-stand-against-administrations-illegal-and-unconstitutional-actions/> [<https://perma.cc/4U8H-G58R>]).

¹⁰⁸ *Id.* (quoting Meghan O’Rourke, Opinion, *The End of the University as We Know It*, N.Y. TIMES (Mar. 16, 2025), <https://www.nytimes.com/2025/03/16/opinion/university-defunding-trump-rufo.html> [<https://perma.cc/N2HN-YEJ4>]).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (alteration in original) (quoting *The ABA Rejects Efforts to Undermine the Courts and the Legal Profession*, ABA (Mar. 3, 2025), <https://www.americanbar.org/news/abanews/aba-news-archives/2025/03/aba-rejects-efforts-to-undermine-courts-and-legal-profession/> [<https://perma.cc/U98Y-VDV7>]).

across the country, concluding that while “[t]he volume and unprecedented nature of these actions have understandably left many of us feeling overwhelmed,” those feelings cannot translate to complacency.¹¹¹ Instead, the AALS “urge[s] our law schools to stand together behind core values that support the rule of law and our constitutional order.”¹¹²

Those strong statements of unity and resistance from organizations representing academic institutions across the country join many other similar statements. At the end of its *Standing Together in Support of Higher Education and the Legal Profession* letter, the AALS compiled other statements and critiques of the Administration’s harmful attacks against law and higher education, including, for example:

Statement of Law Professors and Law Teachers, *We Are in a Constitutional Crisis*, February 2025 (statement signed by more than 1,000 law professors).

. . . .

The American Bar Association, *The ABA Rejects Efforts to Undermine the Courts and the Legal Profession*, March 3, 2025.

. . . .

Knight Institute, *Knight Institute Condemns Trump Administration’s Effort to “Subjugate Universities to Official Power,”* March 14, 2025.

. . . .

Kate Andrias *et al.*, *A Title VI Demand Letter That Itself Violates Title VI (and the Constitution)*, Balkanization, March 15, 2025 (scholars of constitutional law, administrative law, and antidiscrimination law explaining how the demands of Columbia University are unlawful).

Meghan O’Rourke, *The End of the University as We Know It*, New York Times, March 16, 2025.

. . . .

American Association of University Professors, *Political Attacks on Higher Education* (resources and list of events).¹¹³

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (linking directly to each source).

As one would expect when the legal profession itself is under attack, such powerful statements have been accompanied by challenges in court, with a number of lawsuits filed in the immediate aftermath of the early 2025 DEI attacks. The remainder of this section provides a snapshot of where such litigation stands as of the drafting of this Article in the sixth month of President Trump's second term, with (1) a particular focus on void-for-vagueness challenges to the anti-DEI mandates,¹¹⁴ and (2) the disclaimer that the litigation landscape is a perpetually evolving one that will be difficult to fully capture until the dust from this stormy chapter of history has settled years or decades from now.

Challenging the Trump Administration's sweeping anti-DEI mandates as unconstitutionally vague was a common successful litigation approach in the immediate aftermath of the January 2025 executive orders and the Valentine's Day Dear Colleague letter. For instance, in three separate federal cases across the country, three different district courts recognized the viability of void-for-vagueness challenges to the mandates: *National Ass'n of Diversity Officers in Higher Education v. Trump*¹¹⁵ in

¹¹⁴ Other early court challenges to the Trump Administration's anti-DEI mandates included, for example, those brought primarily under the Administrative Procedure Act (APA), with mixed results. In *Department of Education v. California*, for example, a case brought by seven other states in addition to California, the Supreme Court reversed the lower courts' injunctions against grant denials to schools. 145 S. Ct. 966, 969 (2025). In contrast, another early APA federal case resulted in an injunction against the enforcement of the Dear Colleague letter's anti-DEI mandates. *Am. Fed'n of Teachers v. Dep't of Educ.*, 779 F. Supp. 3d 584, 598 (D. Md. 2025); see also *Amer. Fed'n of Teachers v. Dep't of Educ.*, 796 F. Supp. 3d 66, 92–97 (D. Md. 2025) (re-emphasizing, in subsequent ruling in the case, facts previously described).

¹¹⁵ 767 F. Supp. 3d 243 (D. Md. 2025), *vacated*, 167 F.4th 86 (4th Cir. 2026). The 2026 Fourth Circuit opinion, while vacating and remanding the 2025 federal court opinion granting a preliminary injunction, did so on two grounds: (1) that the plaintiffs lacked standing to challenge the January 21, 2025, executive order because it was intra-governmental—it required agencies and the Attorney General to issue reports identifying proposed measures to deter those DEI programs that amount to illegal discrimination or preferences—and it created threats to plaintiffs too attenuated to give them standing; and (2) that the challenge to the January 22, 2025, executive order, although potentially viable if brought as an as-applied challenge, was less likely to succeed on its merits under the high burden imposed by facial challenges, which require proof of unconstitutionality of a provision in all of its applications. *Nat'l Ass'n of Diversity Officers in Higher Educ.*, 167 F.4th at 97, 101–02. The Fourth Circuit noted that rather than regulating private conduct, the wording of the January 20, 2026, order was “nothing more than ‘an outward-facing’ policy directive from the President to his agents” that “instructs the President’s subordinates to act, and then only ‘to the maximum extent allowed by law.’” *Id.* at 101.

Notably, in an unusual concurrence by Chief Judge Diaz, who also authored the majority opinion, Diaz emphasized that the plaintiffs had raised valid claims of sinister developments regarding “important programs terminated by keyword; valuable grants gutted in the dark; [and] worthy efforts to uplift and empower denigrated in social media posts,” but nonetheless, their framing of their challenge as a facial challenge rather than a challenge focused on the executive orders’ effects on a particular DEI program—i.e., how the claim was framed rather than its overall evidentiary and legal merits as to any specific plaintiff’s injuries—was what made “all the difference.” *Id.* at 104 (Diaz, C.J., concurring). Judge Diaz explained, “Cognizant of my

the U.S. District Court for the District of Maryland; *National Education Ass’n [NEA] v. U.S. Department of Education*¹¹⁶ in the District of New Hampshire; and *NAACP v. U.S. Department of Education*, in the District of Columbia.¹¹⁷ The federal district courts in all three opinions concluded that the plaintiffs in those cases were likely to succeed in their void-for-vagueness claims against President Trump’s DEI attacks.¹¹⁸ Notably, two of the three federal court judges who authored the opinions were Trump appointees: U.S. District Judge Stephanie A. Gallagher of Maryland and U.S. District Judge Dabney L. Friedrich of Washington, D.C.¹¹⁹

In *National Ass’n of Diversity Officers in Higher Education v. Trump*, the National Association of Diversity Officers in Higher Education and the American Association of University Professors brought constitutional challenges to President Trump’s January 20 and 21, 2025, executive orders.¹²⁰ In that case, the U.S. District Court for the District of Maryland concluded that the plaintiffs had sufficiently established their constitutional claims for purposes of initial injunctive relief, including the claim that the executive orders were unconstitutionally vague.¹²¹

Soon thereafter, the New Hampshire federal district court issued a similar ruling in *NEA v. U.S. Department of Education*, a case challenging the February 14, 2025, Dear Colleague letter on void-for-vagueness grounds, among others.¹²² In that case, the court granted the plaintiffs’ request for injunctive relief, ruling that the plaintiffs were likely to succeed in their void-for-vagueness claim because, while the Dear Colleague letter may express the Department of Education’s “intent to ‘vigorously enforce’ its understanding” that DEI programs may be unlawful, the letter “does not make clear, however, what the Department believes constitutes a DEI program, or the circumstances in which the Department believes DEI

oath, I’ve framed the limited question before us and answered it. And I’ve (reluctantly) left others for tomorrow,” and poignantly added in conclusion, “For those disappointed by the outcome, I say this: Follow the law. Continue your critical work. Keep the faith. And depend on the Constitution, which remains a beacon amid the tumult.” *Id.* at 105. As of the publication of this Article, the case is still ongoing, with the described opinions not deciding the final merits of the constitutional claims but rather only issuing rulings as to the issuance of preliminary injunctive relief.

¹¹⁶ 779 F. Supp. 3d 149 (D.N.H. 2025).

¹¹⁷ 779 F. Supp. 3d 53 (D.D.C. 2025).

¹¹⁸ *Nat’l Ass’n of Diversity Officers in Higher Educ.*, 767 F. Supp. 3d at 291; *Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 203; *NAACP*, 779 F. Supp. 3d at 67.

¹¹⁹ See *Stephanie A. Gallagher, District Judge*, U.S. DIST. CT. D. MD., <https://www.mdd.uscourts.gov/stephanie-gallagher-district-judge> [https://perma.cc/43R7-B445]; *District Judge Dabney L. Friedrich*, U.S. DIST. CT. D.D.C., <https://www.dcd.uscourts.gov/content/district-judge-dabney-l-friedrich> [https://perma.cc/6UD2-MLAQ].

¹²⁰ *Nat’l Ass’n of Diversity Officers in Higher Educ.*, 767 F. Supp. 3d at 259.

¹²¹ *Id.* at 258–59.

¹²² *Nat’l Educ. Ass’n v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d at 171–72.

programs run afoul of Title VI. The Letter does not even define what a 'DEI program' is."¹²³

That same day, back in D.C., yet another federal court opinion was released condemning Trump's DEI attacks as unconstitutional.¹²⁴ In *NAACP v. U.S. Department of Education*, the U.S. District Court for the District of Columbia concluded, among other things, that the plaintiffs had sufficiently demonstrated for injunctive relief purposes a likelihood of success on their void-for-vagueness claims against the Dear Colleague letter and ensuing anti-DEI certification requirements.¹²⁵ Pertinently, the court concluded that the letter and certification requirements were unconstitutionally vague because "[a]lthough the challenged documents place a particular emphasis on 'certain DEI practices,' they fail to provide an actionable definition of what constitutes 'DEI' or a 'DEI' practice."¹²⁶

While such litigation continues to rise through the courts challenging the sweeping anti-DEI edicts, educational institutions across the country remain in peril as long as the Trump Administration continues to attack diversity, equity, and inclusion in schools through heavy-handed, sweeping, and—as described more in the next Part—constitutionally questionable, vague mandates that amount to usurpation through obfuscation.

II. USURPATION THROUGH OBFUSCATION: THE UNCONSTITUTIONALITY OF TRUMP'S ATTACKS ON DIVERSITY, EQUITY, AND INCLUSION

As academic communities that once openly embraced equity, inclusion, and diversity as important values find themselves under siege by an administration hostile to those values, they are not without meaningful shields in the fight for those values, as well as for their funding, research, curricula, and community members. To the contrary, those pushing back against the Trump Administration's anti-DEI attacks can still avail themselves of potent protections under the U.S. Constitution, including through the void-for-vagueness doctrine and interrelated constitutional safeguards.

¹²³ *Id.* at 187.

¹²⁴ *NAACP v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 53, 59, 65 (D.D.C. 2025).

¹²⁵ *Id.*

¹²⁶ *Id.* at 66.

A. Application of the Void-for-Vagueness Doctrine to Trump's Unclear Anti-DEI Mandates and Attacks

It is a longstanding constitutional principle that due process is violated by a government enactment “if its prohibitions are not clearly defined,”¹²⁷ and if it is “so vague that it fails to give ordinary people fair notice” of which conduct it prohibits, including when a lack of clear standards invites discriminatory or arbitrary enforcement.¹²⁸ The void-for-vagueness doctrine, which the Supreme Court has described as an outgrowth of the Fifth Amendment’s Due Process Clause, is grounded in the recognition by courts that “clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment,”¹²⁹ consistent with “ordinary notions of fair play and the settled rules of law.”¹³⁰ This is the case because, as a matter of basic fairness, a person cannot be said to have been granted due process when subjected to mandates that are ambiguous as to their prohibitions or how one is supposed to attain compliance.¹³¹

While the void-for-vagueness doctrine has evolved over time,¹³² most recently, the Supreme Court has described the doctrine in terms of two main prongs: that it “guarantees that ordinary people have ‘fair notice’ of the conduct a statute proscribes”¹³³ and that it “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.”¹³⁴ In *Sessions v. Dimaya*,¹³⁵ the Court ruled that a federal statute governing the deportation of felons was unconstitutionally vague to the extent it required courts “to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction

¹²⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹²⁸ *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)); *see also* *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¹²⁹ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

¹³⁰ *Johnson*, 576 U.S. at 595 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

¹³¹ *See Fox Television Stations*, 567 U.S. at 253.

¹³² *See, e.g.*, Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284–86, 285 n.45 (2003) (identifying past cases incorporating separation-of-powers considerations into required test for vagueness claims).

¹³³ *Sessions v. Dimaya*, 584 U.S. 148, 155–56 (2018) (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)).

¹³⁴ *Id.* at 156 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983)).

¹³⁵ 584 U.S. 148 (2018).

presents' some not-well-specified-yet-sufficiently-large degree of risk."¹³⁶ Although the statute at issue in *Dimaya* was not a criminal statute, the Court emphasized that the void-for-vagueness doctrine is not limited to criminal contexts.¹³⁷

In cases involving chilled speech, the Supreme Court has recognized the importance of preserving First Amendment rights as a third core constitutional value implicated by statutes that are vague about which speech is prohibited.¹³⁸ In those cases, the Court has described the void-for-vagueness doctrine as providing safeguards against the dangers of (1) denying fair notice and warning to those subject to laws [threatening core due process values]; (2) arbitrary or discriminatory enforcement of laws [offending equal justice¹³⁹ principles]; and (3) chilled speech [implicating First Amendment freedoms].¹⁴⁰ Each of the three corresponding constitutional values—fair notice, free speech, and equal justice in the enforcement of laws—is at risk when a government mandate is too vague to ensure the protection of those principles.¹⁴¹

Consistent with those three core values protected under the void-for-vagueness doctrine, the Supreme Court in *Grayned v. City of Rockford*,¹⁴² while not ruling the noise ordinance in that case unconstitutionally vague, set forth the following correlating factors to be evaluated in a void-for-vagueness claim implicating First Amendment rights:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly

¹³⁶ *Id.* at 153–54, 161–62 (quoting *Johnson*, 576 U.S. at 596) (involving substantially similar statute).

¹³⁷ *Id.* at 156–57.

¹³⁸ *See, e.g.,* *Smith v. Goguen*, 415 U.S. 566, 572–73 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

¹³⁹ Although equality principles are also at the heart of equal protection claims brought under the Fourteenth Amendment, the equal justice component of the void-for-vagueness doctrine is distinct from equal protection. As is the case with the vagueness challenges to the Trump anti-DEI mandates discussed in this Article, void-for-vagueness claims that implicate arbitrary or discriminatory enforcement are often brought separate from and without corresponding equal protection claims. One reason for that is likely that, while the “arbitrary and discriminatory enforcement” danger of vague laws pertains to the disparate impact some vague laws may have, the Supreme Court has explicitly rejected disparate impact claims under an equal protection theory absent evidence of discriminatory governmental discriminatory intent. *Goguen*, 415 U.S. at 573; *Washington v. Davis*, 426 U.S. 229, 239 (1976).

¹⁴⁰ *See* *Goguen*, 415 U.S. at 572–73 (describing similarly the void-for-vagueness doctrines as “requir[ing] legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent ‘arbitrary and discriminatory enforcement’” and further explaining that “[w]here a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts”).

¹⁴¹ *See id.*

¹⁴² 408 U.S. 104 (1972).

defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abut[s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.”¹⁴³

Thus, while the void-for-vagueness doctrine is an outgrowth of the Due Process Clause, its hybrid nature also reflects constitutional values of equality and free speech as well. Although each of those three core principles mirrors interrelated constitutional issues that may give rise to separate and additional claims—for example, standalone due process or First Amendment claims—the void-for-vagueness claim is its own distinct constitutional claim, as seen in cases discussed herein in which plaintiffs raised additional First Amendment and lack of fair notice claims separate from and in addition to their void-for-vagueness claims.¹⁴⁴

The following sections address first, why the Trump Administration’s anti-DEI mandates and attacks are unclear enough to initially give rise to a void-for-vagueness challenge, and then, how each of the three core values of the void-for-vagueness doctrine is threatened in the process.

1. General Applicability of the Doctrine: The Vagueness of Trump’s Anti-DEI Mandates on Their Face

¹⁴³ *Id.* at 108–09 (footnotes omitted).

¹⁴⁴ *See, e.g.,* Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 264 (D. Md. 2025) (addressing various claims brought, including First Amendment claims separate and distinct from void-for vagueness claims); Nat’l Educ. Ass’n v. U.S. Dep’t of Educ., 779 F. Supp. 3d 49, 172 (D.N.H. 2025) (same, and also including Administrative Procedure Act claims incorporating constitutional violations and lack of notice allegations, among other things).

For over a century, the Supreme Court has affirmed due process protections against vague laws, dating back to the 1914 case *International Harvester Co. of America v. Kentucky*.¹⁴⁵ Since then, the Court has consistently found statutes void for vagueness when, because of lack of clarity, the resulting enforcement of their prohibitions would be based on “wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”¹⁴⁶ As such, the Court has time and again struck down statutes that penalize conduct while, on the face of the statutes, failing to adequately define the conduct being regulated.

In the Supreme Court *Dombrowski v. Pfister*¹⁴⁷ and *Baggett v. Bullitt*¹⁴⁸ cases, for example, McCarthy-era statutes that criminally penalized membership in a “subversive organization,” even while failing to define that term, were ruled unconstitutionally vague.¹⁴⁹ In *Baggett*, the rationale of which was followed in *Dombrowski*, the Court explained that although the statute did provide a definition of “subversive organization” “as one which engages in or assists activities intended to alter or overthrow the Government by force or violence or which has as a purpose the commission of such acts,” that definition itself was so vague as to beg more questions than it answered.¹⁵⁰ The definition left unclear, for instance, whether it would apply to attorneys who represent members of the Communist Party, to journalists, or to others who engage in an “undefined variety of ‘guiltless knowing behavior.’”¹⁵¹

Other void-for-vagueness cases have arisen in other contexts, with the Supreme Court consistently affirming the need for clear statutes as a matter of constitutional law. In *Smith v. Goguen*,¹⁵² for example, the Supreme Court deemed unconstitutionally vague a statute that criminalized treating the American flag “contemptuously,” while failing to provide a clear definition of “contemptuous.”¹⁵³ In *Kolender v. Lawson*,¹⁵⁴ the law found unconstitutionally vague was an anti-loitering statute that required individuals caught wandering on the streets to produce

¹⁴⁵ See *Johnson v. United States*, 576 U.S. 591, 618 (2015) (Thomas, J., concurring) (recognizing the first such case in which the Supreme Court “nullified a law on vagueness grounds under the Due Process Clause”); *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 221 (1914) (ruling unconstitutional state antitrust laws that fixed prices that conflicted with the “real value” of an article, which the Court found lacking a discernable standard).

¹⁴⁶ *United States v. Williams*, 553 U.S. 285, 306 (2008).

¹⁴⁷ 380 U.S. 479 (1965).

¹⁴⁸ 377 U.S. 360 (1964).

¹⁴⁹ *Dombrowski*, 380 U.S. at 492–94; *Baggett*, 377 U.S. at 362, 366–68.

¹⁵⁰ *Baggett*, 377 U.S. at 367–68; accord *Dombrowski*, 380 U.S. at 494.

¹⁵¹ *Baggett*, 377 U.S. at 368.

¹⁵² 415 U.S. 566 (1974).

¹⁵³ *Id.* at 567–69, 573–76, 581–82.

¹⁵⁴ 461 U.S. 352 (1983).

“credible and reliable” identification.¹⁵⁵ The Court explained that the meaning of “credible and reliable” was too vague to provide sufficient minimal guidelines such that it “vest[ed] virtually complete discretion in the hands of the police to determine” who might be subject to the law’s criminal penalties.¹⁵⁶ Applying the same principles in *City of Chicago v. Morales*,¹⁵⁷ the Supreme Court struck down as unconstitutionally vague another loitering statute with unclear language that prohibited remaining in “any one place with no apparent purpose.”¹⁵⁸ As the Court explained, the meaning of “no apparent purpose” itself was far from apparent, lacking the clarity that due process demands.¹⁵⁹ In *Coates v. Cincinnati*,¹⁶⁰ the Court held that a law prohibiting people on sidewalks from conducting themselves “in a manner annoying to persons passing by” was unconstitutionally vague, explaining that “[c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.”¹⁶¹

These cases mirror the issues raised by the Trump Administration’s nebulous anti-DEI mandates. The simultaneous prohibition of and failure to define unlawful DEI parallels the government actions struck down as unconstitutionally vague in the above cases, being of the same nature as the prohibition of ill-defined vaguely “subversive organizations” in *Baggett and Dombroski*¹⁶² (with notably identical language in the January 29, 2025, executive order’s prohibition of diversity-friendly school policies that President Trump describes as “anti-American, *subversive*, harmful, and false ideologies”);¹⁶³ as the ban on “contemptuous” treatment of flags in *Goguen*,¹⁶⁴ as the requirement to produce “credible and reliable” identification in *Kolender*,¹⁶⁵ and as the *Morales* loitering statute prohibiting remaining “in any one place with no apparent purpose.”¹⁶⁶

Furthermore, the Dear Colleague letter’s elaboration of which DEI-related conduct is unlawful in terms of whether a lesson plan, for example,

¹⁵⁵ *Id.* at 353–54.

¹⁵⁶ *Id.* at 358.

¹⁵⁷ 527 U.S. 41 (1999).

¹⁵⁸ *Id.* at 51, 56–57.

¹⁵⁹ *Id.* at 56–60.

¹⁶⁰ 402 U.S. 611 (1971).

¹⁶¹ *Id.* at 611–14.

¹⁶² *Dombrowski*, 380 U.S. at 492–94; *Baggett*, 377 U.S. at 362, 366–68.

¹⁶³ See Exec. Order 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025) (emphasis added).

¹⁶⁴ *Smith v. Goguen*, 415 U.S. 566 567–69, 573–76, 581–82 (1974).

¹⁶⁵ *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983).

¹⁶⁶ *City of Chicago v. Morales*, 527 U.S. 41 at 51, 56–60 (1999).

may result in feelings of “shame” in some students¹⁶⁷ is reminiscent of the law prohibiting “annoying” conduct that was deemed unconstitutionally vague in *Coates v. Cincinnati*, where the Supreme Court explained that conduct that annoys some people may not be annoying to everyone; subjective feelings are not a “comprehensible normative standard” for purposes of due process.¹⁶⁸

Indeed, in the early months of 2025, federal courts were quick to recognize the merits of void-for-vagueness challenges to the Trump Administration’s anti-DEI mandates. In *NEA v. U.S. Department of Education*, for example, the plaintiffs alleged that “although the [Dear Colleague] Letter asserts that ‘DEI programs’ unlawfully ‘discriminate,’ it fails to define what constitutes a ‘DEI program,’ explain how such programs ‘preference’ certain racial groups, or provide criteria for determining the circumstances under which educational programs that in any way address race might violate federal antidiscrimination law.”¹⁶⁹ Tracking the main components of a void-for-vagueness claim, the complaint further alleged that “the [Dear Colleague] letter fails to provide adequate notice about what speech and programming regarding race, diversity, equity, or inclusion is prohibited under federal law” and that “[t]he ambiguity permeating the Letter’s discussion of DEI programs also invites arbitrary and selective enforcement against educational programs that advocate views on race inconsistent with those espoused by [the U.S. Department of Education].”¹⁷⁰ The district court in *NEA v. U.S. Department of Education* agreed, explaining in its ruling that both the 2025 Dear Colleague Letter and the subsequent Department of Education press release demanding certification of compliance from school districts, even while prohibiting DEI, failed to actually define “diversity, equity, and inclusion” or “DEI.”¹⁷¹

Similarly, in response to void-for-vagueness claims against Trump’s January 20 and 21, 2025, executive orders, the U.S. District Court for the District of Maryland in *National Ass’n of Diversity Officers in Higher Education v. Trump* described the executive orders in terms of their confounding vagueness, observing “the administration has declared ‘DEI’ to be henceforth ‘illegal,’ has announced it will be terminating all “equity-related” grants or contracts”—whatever the administration might decide that means—and has made ‘practitioners’ of what the government

¹⁶⁷ FAQs, *supra* note 38, at 6–7.

¹⁶⁸ See *Coates v. Cincinnati*, 402 U.S. 611, 611–14 (1971).

¹⁶⁹ Complaint for Declaratory and Injunctive Relief ¶ 122, Nat’l Educ. Ass’n v. U.S. Dep’t of Educ., 779 F. Supp. 3d 149 (D.N.H. 2025).

¹⁷⁰ *Id.*

¹⁷¹ Nat’l Educ. Ass’n v. U.S. Dep’t of Educ., 779 F. Supp. 3d 149, 203 (D.N.H. 2025).

considers ‘DEI’ the targets of a ‘strategic enforcement plan.’”¹⁷² The crux of the vagueness problem, the court explained, is that “the Challenged Orders do not define any of the operative terms, such as ‘DEI,’ ‘equity-related,’ ‘promoting DEI,’ ‘illegal DEI,’ ‘illegal DEI and DEIA policies,’ or ‘illegal discrimination or preferences,’—let alone identify the types of programs or policies the administration considers ‘illegal.’”¹⁷³

Meanwhile, in an order issuing injunctive relief against the enforcement of the Dear Colleague letter and its certification requirements in *NAACP v. Department of Education*, the U.S. District Court for the District of Columbia identified a number of conundrums resulting from the vagueness of the anti-DEI mandates:

For example, is the decision to host events featuring black scholars (open to all students) an impermissible advantaging of black students over students of other races? Would courses taught by professors who promote the view that systemic racism exists, and that race can be central to one’s experiences and identity, be unlawful? Does a school’s Black Pre-law Student Union, open to all students, nonetheless treat black students differently on the basis of race? The challenged documents provide no answers to those questions and no clear “boundaries of the forbidden areas” to guide schools’ compliance with the certification or to limit the Department’s enforcement actions.¹⁷⁴

The vagueness of the anti-DEI mandates is further illustrated by language in the January 21, 2025, executive order requiring deletion of references “to DEI and DEIA principles, *under whatever name they may appear*,” and to “[t]erminate all ‘diversity,’ ‘equity,’ ‘equitable decision-making,’ ‘equitable deployment of financial and technical assistance,’ ‘advancing equity,’ and like mandates, requirements, programs, or activities, *as appropriate*.”¹⁷⁵

Rather than clarifying the morass of obfuscation created by the unclear wording in the executive orders and Dear Colleague letter, the subsequent March 1, 2025, FAQ document only served to further confuse the issue. For example, one nominal clarification in the FAQs regarding the scope of prohibited conduct is FAQ 8’s explanation that “DEI” does not literally mean “DEI.” To wit, in response to Question 8, *Are Diversity*,

¹⁷² Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 258 (D. Md. 2025).

¹⁷³ *Id.* (footnote omitted) (citation omitted).

¹⁷⁴ *NACCP v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d 53, (2025) (citation omitted).

¹⁷⁵ Exec. Order 14173, 90 Fed. Reg. 8633, 8634 (Jan. 21, 2025) (emphasis added).

Equity, and Inclusion (DEI) programs unlawful under SFFA?, the FAQ elaborates that DEI prohibitions can apply to programs or educational activity “under any name,” not just those that explicitly reference “DEI,” because, the FAQs state, “[m]any schools have advanced racially discriminatory policies and practices under the banner of ‘DEI’ initiatives” and “[o]ther schools have sought to veil racially discriminatory policies with terms like ‘social-emotional learning’ or ‘culturally responsive’ teaching.”¹⁷⁶ Consequently, the FAQ concludes, “whether an initiative constitutes unlawful discrimination does not turn solely on whether it is labeled ‘DEI’ or uses terminology such as ‘diversity,’ ‘equity,’ or ‘inclusion.’ [The U.S. Department of Education Office for Civil Rights’s] assessment of school policies and programs depends on the facts and circumstances of each case.”¹⁷⁷

Thus, FAQ 8 leaves unclear precisely which types of policies and programs are unlawful, instead only obscurely demanding, “Schools may not operate policies or programs *under any name* that intentionally treat students *differently* based on race, engage in racial stereotyping, or create hostile environments for students of particular races.”¹⁷⁸ Without further elaboration as to the meaning of unlawful “different” treatment, the FAQ provides no clarity as to which types of “different” treatments of non-white students are unlawful. Nor does the FAQ explain whether anti-DEI prohibitions include all pipeline projects, affinity groups, or other support for racial minorities; or whether the Trump Administration’s prohibitions of DEI programming at educational institutions are limited to race-related DEI efforts, or if they extend as well to the many other forms of diversity, equity, and inclusion that have been celebrated and protected by schools across the countries in contexts beyond race.

FAQ 9, in turn, purports to clarify the meaning of “hostile environment,” but its explanation raises even more troubling questions. FAQ 9 provides that educational programming may constitute an unlawful hostile environment if it “acts to shame students of a particular race or ethnicity, accuse them of being oppressors in a racial hierarchy, ascribe to them less value as contributors to class discussions because of their race, or deliberately assign them intrinsic guilt based on the actions of their presumed ancestors.”¹⁷⁹ With the items in that list being joined by the “or” connector, under a plain reading of that language, a student’s subjective feelings could trigger punitive measures taken against a teacher for diversity-positive classroom content. The FAQs leave unresolved whether

¹⁷⁶ FAQs, *supra* note 31, at 6.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (emphases added).

¹⁷⁹ *Id.* at 6–7.

educators may lawfully continue to teach students about slavery and its vestiges if doing so might cause white students to feel shame, or merely and appropriately (recognizing that shame and compassion are two sides of the same coin) awaken in them a morally responsible sense of social justice, compelling empathy for diverse communities moving forward.

As the Supreme Court recognized in *Coates v. Cincinnati*, such a prohibition of conduct based on others' subjective feelings is a prohibition lacking in a "comprehensible normative standard" for purposes of satisfying due process requirements.¹⁸⁰ Whether the prohibition is on "annoying" conduct, as in *Coates*, or shame-inducing conduct, as prohibited by the Trump Administration, the same principle applies.

FAQ 9's attempted clarification that DEI-related lessons create an impermissible hostile environment if they cause feelings of "shame"¹⁸¹ further begs the question: Causes shame *in whom*? If the implication is that it should be (or is) illegal to cause white students to feel shame by teaching them about the discriminatory actions of their ancestors, why should that white fragility be coddled to the point of censoring history when the deep emotional wounds felt by people of color—who are even more egregiously harmed by witnessing the history of their people dismissed and erased from the annals of history—are not similarly respected? The elevation of shame-fearing fragility does not appear to recognize that, to a student of color who has grown up affirmatively celebrating their diverse cultural roots, the erasure of racial diversity and of diverse students' backgrounds and histories may itself feel like being forced into a hostile environment.¹⁸² What legal precedent or principles can possibly justify elevating the fragile feelings of those white people who are loathe to be confronted with the actions of their ancestors over the feelings of people of color whose own ancestors were subjugated through slavery and segregation? In what world does it make sense to redefine discrimination as the verbal acknowledgement of shameful and indisputably racist chapters of this nation's history that might cause emotional discomfort to those of a historically more privileged race who find it offensive to acknowledge that past?

And since when is the absence of shame itself something to strive for? Perhaps, when confronted with instances of blatant systemic

¹⁸⁰ See *Coates v. Cincinnati*, 402 U.S. 611, 611–14 (1971).

¹⁸¹ FAQs, *supra* note 38, at 6–7.

¹⁸² See generally *How 'Diversity' Has Evolved—and Why We Need to Celebrate Diversity Now More than Ever*, NW. UNIV. (Apr. 28, 2022), <https://news.weinberg.northwestern.edu/2022/04/28/how-diversity-has-evolved-and-why-we-need-to-celebrate-diversity-now-more-than-ever/> [<https://perma.cc/5UZV-C4CA>] (discussing the importance of celebrating diversity, including diversity, in contexts including and beyond educational curricula, research and programming).

discrimination, one judge has recently implored, a bit *more* shame might be in order. During a hearing in a case challenging the Trump Administration's cuts to hundreds of National Institutes of Health (NIH) research grants that mentioned gender identity or diversity, equity, and inclusion, U.S. District Court Judge William Young concluded that it was "palpably clear" that underlying the government's actions was "racial discrimination and discrimination against America's LGBTQ community," exclaiming that in forty years on the bench, "I've never seen government racial discrimination like this *Have we no shame.*"¹⁸³

Not that history lessons in fact assign guilt to white people as a whole. Adding even more obscurity to the Trump Administration's apparent equating of diversity-embracing educational efforts with guilt-bullying, the FAQs fail to provide a specific example of an educational program that describes systemic racism as the students' own fault. That said, to prohibit discourse about systemic racism in the United States if doing so might make white students feel shame is, in effect, to (shamefully) deny the importance of teaching new generations the true and terrible role that the vestiges of slavery—including segregation, Jim Crow laws, redlining, and other systemic discrimination, both against African Americans and other historically oppressed populations—have played in perpetuating generational disparities and inequities in this country.¹⁸⁴

Additionally, FAQ 13, which elaborates that unlawful discrimination can be established by evidence of a school "further[ing] DEI objectives, 'equity,' a racially-oriented vision of social justice, or similar goals"¹⁸⁵ further compounds the vagueness problem, leaving one to puzzle over the perplexing question of how "equity" (i.e., treating people fairly)¹⁸⁶ can logically be equated with discrimination, and what the

¹⁸³ Luran Neergaard, *Judge Rules Some NIH Grant Cuts Illegal, Saying He's Never Seen Such Discrimination in 40 years*, ASSOCIATED PRESS (June 16, 2025), <https://apnews.com/article/nih-research-trump-cuts-dei-rfk-4fec9f308f3ff427185a12e88f260c81> [https://perma.cc/6VYR-ZSVF]. As Harvard President Alan Garber has explained, those NIH grant revocations, as with the previously described grant revocations, hamper the ability for research universities like Harvard to continue their research: "The kinds of changes that the administration has begun and is contemplating, which include deep cuts to the National Institutes of Health and to the National Science Foundation, will affect all research universities and will have a real impact on the ability of the United States to remain at the forefront of science and technology." Inskeep et al., *supra* note 61.

¹⁸⁴ See Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 311–13 (2003) (countering, from a historical perspective, arguments against accountability for past racial injustices flowing from the vestiges of slavery).

¹⁸⁵ FAQs, *supra* note 38, at 9.

¹⁸⁶ See *Equity*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining equity as "[f]airness; impartiality; evenhanded dealing").

“similar goals” to equity are that might establish illegal discrimination. How, one might ask, is “discriminatory equity” not a complete oxymoron?

Likewise, the Administration’s announcement of a portal for concerned citizens to report the presence of “divisive ideologies” in schools absolutely begs definition and clarity.¹⁸⁷ Certainly the teaching of world history by necessity addresses divisive ideologies, as world history courses include the study of wars fought over religious principles and other ideologies that have divided warring sides of conflicts, for example.

Such unclear descriptions in the Administration’s statements issued in the aftermath of the Dear Colleague letter and anti-DEI executive orders only serve to add more layers of obscurity to the anti-DEI mandates. The above illustrations exemplify ways in which Trump’s prohibition on any number of educational efforts that affirmatively acknowledge diversity, equity, or inclusion, whether called “DEI” or not, is nebulous in numerous ways. As with other government mandates that have been rendered unconstitutional, Trump’s DEI attacks are precisely the type of vague government mandates that the void-for-vagueness doctrine exists to prevent.

2. Resulting Threats to Three Core Values of the Void-for-Vagueness Doctrine

Not only does Trump’s war on “DEI” employ the type of sweeping prohibition of undefined conduct that has been recognized as unconstitutionally vague by the Supreme Court, but the anti-DEI attacks further threaten each of the three fundamental values explicitly protected by the void-for-vagueness doctrine: (1) the need to provide fair warning and notice of laws to those bound by them (reflecting basic due process principles); (2) the need to prevent arbitrary and discriminatory enforcement (ensuring equal justice under law); and (3) in cases involving chilled speech, the need to protect free expression from chilling threats to First Amendment rights.¹⁸⁸ The Trump’s Administration’s anti-DEI attacks threats to each of these values is examined in turn below.

Due Process Implications of New Anti-Diversity Mandates Without Fair Notice, and the Problem of Nefarious Neutrality

Due process requires that those subject to government mandates “know what is required of them so they may act accordingly.”¹⁸⁹ “Perhaps the most basic of due process’s customary protections is the demand of

¹⁸⁷ See Press Release, U.S. Dep’t of Educ., *supra* note 37.

¹⁸⁸ See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

¹⁸⁹ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

fair notice,” Justice Gorsuch has explained, while quoting the Federalist Papers’ warning that “[w]ithout an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a ‘parchment barrie[r]’ against arbitrary power.”¹⁹⁰

Accordingly, vague laws that “trap the innocent by not providing fair warning” violate fundamental due process principles.¹⁹¹ Fair notice and warning cannot (fairly) be said to exist when federal mandates amount to an abrupt reverse course from existing law and policy, contradicting longstanding government support and legal protections for diversity, equity, and inclusion.¹⁹² But that is what Trump’s war on DEI does.

The February 14, 2025, Dear Colleague letter epitomizes a whiplash-inducing about-face in its language condemning the teaching of historic instances of systemic racism as “toxic[] indoctrinat[ion],” and equating diversity, equity, and inclusion with “smuggling racial stereotypes and explicit race-consciousness into everyday training, programming, and discipline.”¹⁹³ The letter announces a new standard identifying unlawful race-consciousness: “At its core, the test is simple: If an educational institution treats a person of one race differently than it treats another person because of that person’s race, the educational institution violates the law.”¹⁹⁴ The letter further proclaims that federal law “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.”¹⁹⁵ Consequently, the Trump Administration’s new race-blindness mandate threatens to prohibit nearly anything race-conscious in an educational context, even if benign, remedial, equitable, or inclusive in nature.

This new “simple” anti-diversity test mandating complete race-blind neutrality is in tension with the Supreme Court’s past recognition that there is “a compelling interest in a diverse student body.”¹⁹⁶ The letter’s prohibition of race-conscious diversity, equity, and inclusion efforts is a

¹⁹⁰ *Sessions v. Dimaya*, 584 U.S. 148, 177, 181 (2018) (Gorsuch, J., concurring) (second alteration in original) (quoting THE FEDERALIST NO. 48, (James Madison)).

¹⁹¹ *Grayned*, 408 U.S. at 108.

¹⁹² *See Torres v. Immigr. & Naturalization Serv.*, 144 F.3d 472, 474 (7th Cir. 1998) (explaining that due process generally requires fair notice of changes in the law).

¹⁹³ Dear Colleague Letter, *supra* note 25, at 2.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). *But c.f.* *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2207 (2023) (Thomas, J., concurring) (“The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”).

dramatic departure from the Department of Education’s own recent interpretations of Supreme Court affirmative action precedent, conflicting, as one district court observed, with the Department’s interpretation of the Court’s *Students for Fair Admissions (SFFA)* affirmative action decision:

A prior guidance—that has now been removed from the DOE website—interpreting *SFFA* provided that “nothing in the *SFFA* decision prohibits institutions from continuing to seek the admissions and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions.” The prior guidance also advised schools that race-neutral efforts to promote diversity and increase opportunity for all students were lawful. The Letter, by contrast, says that even race-neutral policies, such as eliminating standardized testing, would be “unlawful” if “motivated by racial considerations” or a desire to “increase racial diversity.” The change in position is not explained.¹⁹⁷

The district court in *NEA v. U.S. Department of Education* similarly noted the Department’s about-face, pointing out that prior to the 2025 Dear Colleague letter, the Department of Education had not taken the position that programs promoting diversity, equity, or inclusion amounted to unlawful discrimination.¹⁹⁸ To the contrary, in 2023, following the Supreme Court’s *SFFA* decision, the Department of Education had issued a document explicitly assuring schools that they “could ‘continue to articulate missions and goals tied to student body diversity and may use all legally permissible methods to achieve that diversity.’”¹⁹⁹ The Department’s 2023 guidance further identified a number of lawful means to affirmatively promote racial diversity, including the outreach to and recruitment from school districts and individual schools serving predominantly students of color, in which contexts race could be affirmatively taken into account.²⁰⁰

The court in *NEA v. U.S. Department of Education* explained that the Department of Education’s historic encouragement of such race-conscious efforts is in conflict with the 2025 Dear Colleague letter, which “does not acknowledge the scores of lawful methods the Department had

¹⁹⁷ *Am. Fed’n of Tchrs. v. Dep’t of Educ.*, 779 F. Supp. 3d 584, 617 (D. Md. 2025) (citations omitted).

¹⁹⁸ *Nat’l Educ. Ass’n v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d 149, 166 (D.N.H. 2025).

¹⁹⁹ *Id.* at 167.

²⁰⁰ *See id.*

previously informed schools they could use to promote racial diversity following *Students for Fair Admissions*.²⁰¹ The court further pointed out another example of the Department's sudden about-face on diversity:

Similarly, in a report issued in September of 2023, the Department explained various “legally permissible ways to advance the critical mission of socioeconomic and racial diversity in American colleges and universities” following the *Students for Fair Admissions* decision. The 2023 Report states that, in order to attract and retain students from diverse racial backgrounds, schools could “invest in programming and activities to support students’ sense of belonging, including campus cultural centers, affinity groups, DEI offices, clubs, and other programming that addresses issues relevant to student identity groups.” The 2023 Report is explicit: “Activities intended to further objectives such as diversity, equity, accessibility, and inclusion are not generally prohibited under federal civil rights laws.” To the contrary, “these activities and spaces may demonstrate to current and prospective students that the campus has a supportive, welcoming environment.” Again, the 2025 Letter does not acknowledge the Department’s change in position from believing that DEI initiatives lawfully foster a “supportive, welcoming environment,” to believing that DEI programs illegally “deny students the ability to participate fully in the life of a school” by “stigmatiz[ing] students . . . based on crude racial stereotypes.”²⁰²

That reversal in position by the Trump Administration’s new Department of Education is also startling for the vehemence with which it decries diversity in the Dear Colleague letter, condemning as illegal “treating students differently on the basis of race to achieve *nebulous goals such as diversity*, racial balancing, social justice, or equity.”²⁰³ What *are* truly nebulous, one might counter, are not goals like diversity and equity, but are, rather, demands to forsake those important principles in favor of blind neutrality.

Beyond the Supreme Court’s affirmative action precedent, Trump’s insistence on “neutrality” as a governing principle in his anti-DEI attacks is inconsistent with other civil rights law precedent and laws affirming that neutrality is the wrong framework to impose across the board in anti-

²⁰¹ *Id.*

²⁰² *Id.* at 167–68 (alterations in original) (citations omitted).

²⁰³ Dear Colleague Letter, *supra* note 25, at 2 (emphasis added).

discrimination cases. In Americans with Disabilities Act accommodations cases, for example, the Supreme Court has explicitly affirmed that accommodations required to enable equal opportunity for those with disabilities by their nature need not, and in many cases cannot be, “neutral.”²⁰⁴

This principle is not confined to disability cases. Similarly, the district court in *NEA v. U.S. Department of Education* described the problem with the “neutrality” framing of the February 14, 2025, Dear Colleague letter: “[T]he 2025 Letter fails to give reasonable notice of the Department’s understanding of *how* DEI programs unlawfully discriminate and the ways in which such programs could be operated to avoid running afoul of Title VI. How is it that DEI programs ‘smuggl[e] . . . explicit race-consciousness into everyday training, programming, and discipline?’”²⁰⁵ Even more problematic and unclear, the court added, “is it even possible to operate a DEI program—whatever such a program even is—without ‘race-consciousness?’ Again, the 2025 Letter does not define this term, but on its face it concerns a consciousness or awareness of one’s race or others’ races.”²⁰⁶

That said, as a matter of constitutional doctrine, the Dear Colleague letter’s emphasis of neutrality as a governing principle is reminiscent of past language from some Supreme Court justices advocating judicial neutrality and deference to state legislatures in matters of controversial policy, from birth control access to same-sex marriage and beyond.²⁰⁷ While echoing those themes of neutrality, however, the “Dear Colleague”

²⁰⁴ See, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391, 398–99 (2002).

²⁰⁵ *Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 190 (alterations in original).

²⁰⁶ *Id.* (citation omitted)

²⁰⁷ See, for example, Justice Scalia’s scathing dissent in *Lawrence v. Texas*, in which he decried the majority opinion as “the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct,” with Scalia concluding, “It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, *as neutral observer*, that the democratic rules of engagement are observed.” *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (emphasis added); see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2259 (2022) (“Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.”); *Obergefell v. Hodges*, 576 U.S. 644, 686, (2015) (Roberts, C.J., dissenting) (“But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.”); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (“My Brother Stewart, while characterizing the Connecticut birth control law as ‘an uncommonly silly law,’ would nevertheless let it stand on the ground that it is not for the courts to ‘substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.’” (citation omitted)).

letter actually reverses past federalist stances that advocate neutrality at the federal level, while allowing state and localities to establish policy positions free from federal interference.²⁰⁸ In contrast, the “Dear Colleague” letter invokes the forceful hammer of federal mandates to strip state and local schools of their autonomy in establishing DEI policy, programming, and related curricula (even as the Trump Administration simultaneously decries the existence of the Department of Education itself as violating state and local autonomy).²⁰⁹

A lack of fair notice to educators is further evident when considering that, at the time of Trump’s new anti-diversity mandates, educators were still required to follow existing federal, state, and local civil rights mandates *requiring* diversity protections.²¹⁰ As the district court in *National Ass’n of Diversity Officers* recognized, Trump’s anti-DEI mandates fly in the face of a longstanding body of civil rights laws, because “ensuring equity, diversity, and inclusion has long been a goal, and at least in some contexts arguably a requirement, of federal anti-discrimination law.”²¹¹ Emphasizing that “[t]here have been 60 years of statutes, regulations, and case law developed since the Civil Rights Act of 1964,” the court expressed concern that “[t]he Challenged Provisions strip away much of the prior executive branch guidance, and then threaten the loss or condition the receipt of federal funds, and also threaten civil enforcement actions—some backed by the possibility of treble damages—for violations.”²¹² Rather than recognize the sixty years of laws protecting race-conscious efforts to protect diversity, equity, and inclusion, the Valentine’s Day Dear Colleague letter scoffs at such principles, declaring “race-based decision-making, no matter the form,” unlawful.²¹³

Fair notice problems also arise regarding the Administration’s new anti-diversity mandates to the extent that when those new rules were abruptly announced through the Dear Colleague letter, schools were still reliant upon and governed by diversity-affirming educational standards and requirements. At the federal level, regulations provide that educational institutions “*may* properly give special consideration to race, color, or

²⁰⁸ See Dear Colleague Letter, *supra* note 25.

²⁰⁹ See Exec. Order No. 14242, 90 Fed. Reg. 13679 (Mar. 20, 2025) (“Improving Education Outcomes by Empowering Parents, States, and Communities”).

²¹⁰ At the federal level, for example, see, Title VI, 42 U.S.C. §§ 2000d–2000d-7, Title VII, 42 U.S.C. §§ 2000e–2000e-17, and Title IX of the Civil Rights Act, 42 U.S.C. §§ 1681–1688; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213; and the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1400–1482.

²¹¹ *Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243, 258 (D. Md. 2025).

²¹² *Id.* at 287.

²¹³ Dear Colleague Letter, *supra* note 25, at 2.

national origin to make the benefits of its program more widely available to such groups, not then being adequately served.”²¹⁴ Consistent with those regulations are, for example, the law school accreditation requirements set by the American Bar Association’s Standards and Rules of Procedure for Approval of Law Schools, that at the time of the Trump Administration’s 2025 anti-DEI edicts still included the Standard 206 requirement for law schools to demonstrate “a commitment to diversity and inclusion,” specifically requiring law schools to demonstrate this commitment through concrete steps reflecting the provision of full and equal opportunities for students in unrepresented groups, “particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity,” and to “demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.”²¹⁵ In addition, Standard 303(c) had required every ABA-approved American law school to “provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation.”²¹⁶ However, after Trump’s 2025 anti-DEI mandate, the ABA announced it was suspending both Standard 206²¹⁷ and Standard 303(c).²¹⁸

State-established licensure standards for teaching certification similarly include diversity-conscious requirements. For example, as the court pointed out in *NEA v. U.S. Department of Education*, English teachers in New Hampshire are required to “[g]uide students to read, discuss, and write about literature through various critical lenses such as but not limited to gender, religion, ethnicity, or socio-economic conditions as appropriate”; to “[e]xplain how bias, propaganda, persuasion, and point

²¹⁴34 C.F.R. § 100.5(i) (2026) (emphasis added).

²¹⁵ ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023–2024, at 15 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/23-24-revised-standards-and-rules-since-aug-2023.pdf [<https://perma.cc/7GZT-D38Y>].

²¹⁶ *Id.* at 20.

²¹⁷ See *ABA Council Reiterates Access to Legal Education Standard Is Suspended*, ABA (Mar. 11, 2025), <https://www.americanbar.org/news/abanews/aba-news-archives/2025/03/aba-council-reiterates-legal-ed-standard-suspended/> [<https://perma.cc/24CW-DSHT>]; Am. Bar Ass’n, *Council of the ABA Section of Legal Education Extends Standard 206 Suspension to 2026* (May 9, 2025), <https://www.americanbar.org/news/abanews/aba-news-archives/2025/05/aba-council-extends-206-suspension/> [<https://perma.cc/ZJ5L-VLWF>].

²¹⁸ See Laura Spitalniak, *ABA Faces DOJ Wrath Over Law School Diversity Requirements*, HIGHER ED DIVE (Mar. 10, 2025), <https://www.highereddive.com/news/aba-faces-doj-wrath-over-law-school-diversity-requirements/742091/> [<https://perma.cc/CU3P-EBUU>]; see also Josh Moody, *ABA Suspends DEI Standards for Accreditation*, INSIDE HIGHER ED (Feb. 22, 2025), <https://www.insidehighered.com/news/quick-takes/2025/02/22/aba-suspends-dei-standards-accreditation> [<https://perma.cc/NAG6-ZUPF>].

of view are expressed”; and to “[h]elp students . . . recognize bias, propaganda, persuasion, [and] point of view.”²¹⁹ Similarly, history teachers are required to “[p]rovide exposure to and opportunities to express multiple interpretations of issues.”²²⁰

In light of such pre-existing diversity-embracing educational standards and mandates, the Dear Letter mandates leave educators impossibly positioned between a rock and a hard place—or, as the court in *NEA v. U.S. Department of Education* described it, faced with a Hobson’s choice, threatened with severe penalties if they continue following mandated diversity-conscious standards and protocols, but risking being in violation of those standards and protocols if they don’t.²²¹ As the court aptly described the difficult position teachers have been put in, “even if they endeavor to abide by the 2025 Letter’s requirements, they risk failing to comply with certification requirements necessary for retention of their professional credentials. All while not being afforded a reasonable opportunity to know what the 2025 Letter even requires of them. The Constitution requires more.”²²² The sudden onslaught of anti-DEI mandates issued by President Trump in the early days of his new second presidency without meaningful prior notice consequently creates practical compliance conundrums along with constitutional concerns.²²³

Prohibitions on race-conscious efforts to protect diversity, equity and inclusion are certainly in tension with other laws and policies as well. Compiling a comprehensive list of all laws and policies that honor principles of diversity, equity, and inclusion is a practically impossible endeavor, as each of those principles predominate throughout the law—our republic being founded on the promise of equal justice under law, as carved above the entrance to the highest court of our land.²²⁴

²¹⁹ See Nat’l Educ. Ass’n v. U.S. Dept. of Educ., 779 F. Supp. 3d 149, 192 (D.N.H. 2025) (quoting N.H. CODE ADMIN. R. ANN. ED 507.24 (2025)).

²²⁰ *Id.* (quoting N.H. CODE ADMIN. R. ANN. ED 507.28 (2025)).

²²¹ *Id.* at 193.

²²² *Id.*

²²³ Notably, the lack of prior notice is also pertinent to the Administrative Procedure Act claims challenging the Department of Education’s new mandates, which were not preceded by statutorily required notice and comment. See, e.g., *id.* at 172 (describing complaint allegation that the 2025 letter violates the APA because it was issued “without observance of procedure required by law insofar as it constitutes a legislative rule that was issued without notice and comment” (citation omitted)); *NAACP v. U.S. Dep’t of Educ.*, 779 F. Supp. 53, 62 (D.D.C. 2025) (addressing, but rejecting, the claim that the Department unlawfully issued the documents without notice and comment in violation of the APA).

²²⁴ We may as well drape a banner of Trump’s face over the “Equal Justice Under Law” proclamation of equity framing the Supreme Court entrance, in the name of following Trump’s condemnation of equity. See Oliver O’Connell, ‘Deeply Creepy’: Enormous Brooding Banner of Trump Now Hangs Next to Lincoln Outside Department of Agriculture, *Independent* (May 15, 2025), <https://www.independent.co.uk/news/world/americas/us-politics/trump-banner-portr>

It is jarring just how quickly such a new anti-DEI world has been imposed on academic communities. The difficulty of complying with the new demands was poignantly captured by the University of Cincinnati president, who, in announcing the pending erasure of his school's DEI programming and content, explained that he was having to "unwind many years of DEI efforts under an extremely compressed timeline."²²⁵ The University of Cincinnati is far from alone, as academic institutions across the country find themselves caught off guard with an overnight script flip that shakes long valued and even legally mandated diversity programming to the core. Schools across the country have been thrown into new and uncharted territory without clear parameters or advance warning.

Thus, educators cannot be said to have been given fair notice by the Department of Education's sudden and stark reversal of policy, as it prohibits DEI efforts as unlawful discrimination, including by requiring (in tension with existing conflicting standards) complete neutrality and color blindness by schools across the country. There is no fair notice of changes of the law and policy when reversals are announced overnight through executive order and a Dear Colleague letter, amounting to a sudden about-face from longstanding equitable frameworks for civil rights that had historically embraced diversity, equity, and inclusion.

Equal Justice: Arbitrary and Discriminatory Enforcement Issues

In the face of the Trump Administration's obscure "neutrality" mandates,²²⁶ the void-for-vagueness doctrine itself can, ironically, provide clarity regarding the appropriate role of neutrality where the Administration's own statements are comparatively lacking in clarity. Specifically, while the void-for-vagueness doctrine does underscore the importance of neutrality, it does so in terms of warning against arbitrary and discriminatory enforcement of laws, not in terms of absolute color blindness or prohibitions on diversity, equity, and inclusion efforts.²²⁷

As the Supreme Court has explained, the void-for-vagueness doctrine is intended in part to guard against situations where the unclear parameters of vague laws result in arbitrary or discriminatory enforcement based on any given enforcing authority's subjective interpretation of the

ait-department-agriculture-b2751192.html [https://perma.cc/FA2N-VZC4] (describing a giant banner of Trump's face unfurled over the entrance of the Department of Agriculture soon into Trump's second term, triggering alarmed responses that such a display "is reminiscent of portraits of leaders hanging from public buildings, often seen in dictatorships, monarchies, and in descriptions in George Orwell's 1984 of 'Big Brother'").

²²⁵ Spitalniak, *supra* note 80.

²²⁶ See *supra* subsection II(A)(2)(a).

²²⁷ See *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983).

law, in contravention of due process and equal justice principles.²²⁸ Thus, in *Kolender v. Lawson*, the Court explained that a law requiring “credible and reliable” identification failed to provide sufficient minimal guidelines such that it “vest[ed] virtually complete discretion in the hands of the police to determine” who might be subject to the law’s criminal penalties, rendering it unconstitutionally vague.²²⁹

That equal justice principle underlying the void-for-vagueness doctrine is threatened by Trump’s unclear anti-DEI mandates, as the district court in *NEA v. U.S. Department of Education* concluded.²³⁰ There, the court explained that the DEI-related conduct prohibited by the Trump Administration is so ill-defined that “one can imagine a wide range of viewpoints on what the values of diversity, equity, and inclusion mean when describing a program or practice.”²³¹

Similarly, the district court in *National Ass’n of Diversity Officers in Higher Education v. Trump* found a “very real possibility of arbitrary and discriminatory enforcement” resulting from the vagueness of the January 20, 2025, executive order, including in its prohibition of “equity-related” contracts and grants.²³² As the court explained, “‘equity’ is a concept that transcends issues of diversity, inclusion, and accessibility. It also extends beyond areas addressed by anti-discrimination efforts and civil rights laws.”²³³ After noting the breadth of equitable priorities in educational contexts, the court asked, “Is ‘equity’ limited to one part of the acronym ‘DEI’ or ‘DEIA’? . . . [Or d]oes the meaning of ‘equity’ extend beyond DEI/DEIA?”²³⁴ The court continued, “The meaning of the word ‘equity’ is unclear to a degree that risks arbitrary and discriminatory enforcement, particularly absent any definitions or other guidance to clarify the meaning of the term.”²³⁵ For those reasons, the court concluded that the plaintiffs in that case “have amply established a likelihood that they will succeed in proving that the Termination Provision [of the executive order] invites arbitrary and discriminatory enforcement over billions of dollars in government funding.”²³⁶

Contrary to President Trump’s purported adherence to principles of neutrality, one might conclude that his own actions have been far from

²²⁸ *Id.*

²²⁹ *Id.* at 358.

²³⁰ *See* Nat’l Educ. Ass’n v. U.S. Dep’t of Educ., 779 F. Supp. 3d 149, 188 (D.N.H. 2025).

²³¹ *Id.*

²³² Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 278 (D. Md. 2025)

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 279.

neutral, as opposed to arbitrary or discriminatory, as illustrated, for example, by his administration's treatment of immigrants. As bemoaned by the dissenting Supreme Court justices in the shadow docket case *Noem v. Vasquez Perdomo*,²³⁷ the practice of racial profiling in immigration raids in the early months of Trump's return to office has resulted in non-white Latinos being singled out for immigration raids "based solely on four factors: apparent race or ethnicity, speaking Spanish or speaking English with an accent, presence in a particular location (e.g., bus stop, car wash, etc.), and the type of work one does."²³⁸ While those of apparent Latino race have been targeted for their race by Trump-Administration-led immigration raids as the Administration has put immigration in its crosshairs, with mass deportations and reduced asylum among its policy priorities,²³⁹ it has at the same time singled out white Afrikaners from South Africa for favorable treatment as refugees on the basis of their paler race.²⁴⁰ To wit, on February 7, 2025, President Trump signed an executive order extending asylum opportunities exclusively to white South Afrikaners, whom the executive order described as racial discrimination victims (despite the country's notorious history of apartheid, perpetuating racial discrimination by, not against, white South Afrikaners).²⁴¹ An asylum seeker from the Congo reacted with dismay about what appeared to be special treatment given to white asylum seekers over people of color under Trump's policies, remarking, "It's not fair . . . There are 120,000 refugees who went through the whole process, the vetting, the security, the medical screenings. We've waited for years, but now these (Afrikaners) are just processed in like three months."²⁴²

Nor can Trump fairly claim to be even-handed or neutral, or race-blind in light of his comments about so-called diversity hiring, suggesting that people of diverse backgrounds are unqualified, such as those he made in the aftermath of a tragic plane crash in Washington, D.C.²⁴³ When

²³⁷ 146 S. Ct. 1 (2025) (mem.).

²³⁸ *Id.* at *8 (Sotomayor, J., dissenting).

²³⁹ See Laurence Benenson & Nicci Matthey, *The First 100 Days of the Second Trump Administration: Key Immigration-Related Actions and Developments*, NAT'L IMMIGR. F. (Apr. 28, 2025), <https://immigrationforum.org/article/the-first-100-days-of-the-second-trump-administration-key-immigration-related-actions-and-developments/> [<https://perma.cc/ZN53-QGKQ>].

²⁴⁰ See Exec. Order No. 14204, 90 Fed. Reg. 9497 (Feb. 7, 2025) ("Addressing Egregious Actions of the Republic of South Africa").

²⁴¹ *Id.*

²⁴² Brandon Drenon, *'It's Not Fair': Other Refugees in Limbo as US Welcomes White South Africans*, BBC (May 24, 2025), <https://www.bbc.com/news/articles/czellw10ejdo> [<https://perma.cc/J7YH-BYXG>].

²⁴³ See GLOBAL NEWS, *DC Plane Crash: Trump Suggests DEI Policies to Blame After Plane, Army Helicopter Collide* (YouTube, Jan. 30, 2025), <https://www.youtube.com/watch?v=ABgkyzrt-k> [<https://perma.cc/89RL-88W5>].

questioned by a journalist as to why he would blame a plane crash on diversity hiring, Trump responded in part that “for an air traffic controller, we want the brightest, the smartest, the sharpest. We want somebody that’s psychologically superior.”²⁴⁴ When questioned further, he doubled down:

QUESTION: . . . I’m trying to figure out how you can come to the conclusion right now that diversity had something to do with this crash.

TRUMP: Because I have common sense, OK? And unfortunately, a lot of people don’t. We want brilliant people doing this. This is a major chess game at the highest level, when you have 60 planes coming in during a short period of time, and they’re all coming in different directions, and you’re dealing with very high-level computer, computer work and very complex computers.²⁴⁵

The implication that a plane crash should be attributed to lack of intelligence and skill caused by diversity hiring is deeply troubling, perpetuating abhorrent stereotypes about diverse employees being inherently unskilled. Such statements are chilling in more ways than one,²⁴⁶ and singling out diverse employees as undesirable or even unlawful hires does not exactly epitomize even-handedness or a lack of discrimination.

In the context of race, other troubling examples of arbitrary (at best) or discriminatory (at worst) effects of the Trump Administration’s anti-DEI mandates that do not exactly exude neutrality have popped up in various contexts. It has been reported that President Trump has disproportionately fired non-white federal employees, including female and African American military officers.²⁴⁷ Furthermore, following one of Trump’s anti-DEI executive orders, there were reports the Air Force responded by removing DEI courses that included videos about the nation’s first all-Black cauldron of fighter pilots (the Tuskegee Airmen)

²⁴⁴ *Id.* at 22:49.

²⁴⁵ *Id.* at 28:19.

²⁴⁶ In addition to the chill down one’s spine caused by such statements by the President of the United States, and in addition to anti-DEI mandates chilling speech (as discussed in the previous section), a statement from the President indicating a presumption that diverse employees lack merit can also chill efforts to hire a diverse workforce.

²⁴⁷ See Curtiss Bunn et al., *Federal Workers Fired in Anti-DEI Purge Say It Was Because They’re Not White Men*, NBC NEWS (Mar. 26, 2025), <https://www.nbcnews.com/news/nbcblk/federal-worker-lawsuit-dei-related-firings-rcna198062> [<https://perma.cc/W65H-5DMH>]; *President Trump Fired African-American and Female Officers from Army, Navy and Air Force*, GLOBAL DEF. CORP (Feb. 24, 2025), <https://www.globaldefensecorp.com/2025/02/24/president-trump-fired-african-american-and-female-officers-from-army-navy-and-air-force/> [<https://perma.cc/NS9H-XUL3>].

and about the Women's Airforce Service Pilots (the WASPs).²⁴⁸ It was further reported that "[i]n later announcing the reversal, Air Force Chief of Staff Gen. David Allvin said in a statement that the initial removal was because the service, like other agencies, had to move swiftly to comply with Trump's executive order with 'no equivocation, no slow-rolling, no foot-dragging.'"²⁴⁹ Such incidents highlight the very real danger that Trump's vague anti-DEI mandates could be interpreted arbitrarily or with the discriminatory effect of erasing historic achievements of people of color, even those of this country's heroes.

Consequently, left without clear parameters to protect against such history-erasing, whitewashing, arbitrary, or even discriminatory repercussions, those struggling to make sense of and enforce Trump's sweeping mandates may feel compelled to prohibit nearly any recognition of the existence of accomplishments by diverse members of society, in contexts ranging from military to educational settings and beyond. Whether intentionally or not, those following Trump's vague and sweeping anti-DEI mandates risks perpetuating the exclusion and inequitable treatment of diverse individuals who have contributed to our nation's well-being and proud accomplishments over the centuries in profoundly important ways. That risk of arbitrary or discriminatory enforcement of the Trump Administration's anti-DEI mandates, in turn, undermines the second core value of the void-for-vagueness doctrine: that all individuals must be accorded equal justice rather than subjected to arbitrary or discriminatory applications of the law.

Interrelated First Amendment Implications

The third key value of the void-for-vagueness doctrine is that of free speech, with heightened protections applying when vague mandates by the government are so sweeping in their breadth as to threaten to chill constitutionally protected expression.²⁵⁰ As the Supreme Court explained in *Smith v. Goguen*, in which it ruled a statute unconstitutional for vaguely prohibiting the "contemptuous" treatment of the American flag, vague statutes that potentially impact expression protected by the First Amendment are subject to particularly strict review.²⁵¹ In other cases as well, the Supreme Court has affirmed that when speech is affected,

²⁴⁸ See Kim Chandler & Gary Fields, *Trump Wants to Undo Diversity Programs. Some Agencies React by Scrubbing US History and Culture*, ASSOCIATED PRESS (Feb. 2, 2025), <https://apnews.com/article/trump-dei-tuskegee-airmen-women-war-history-88a92c8485281d7c088c5eafe5dbf002> [https://perma.cc/K33L-P4D7].

²⁴⁹ *Id.*

²⁵⁰ *Smith v. Goguen*, 415 U.S. 566, 576 (1974).

²⁵¹ *Id.*

“rigorous adherence” to the constitutional requirements of clarity and fair notice “is necessary to ensure that ambiguity does not chill protected speech”²⁵² or “abut[] upon sensitive areas of basic First Amendment freedoms.”²⁵³ In recognition of the danger of unclear mandates chilling constitutionally protected speech, some courts have framed that overlap between due process vagueness and First Amendment overbreadth concerns as a constitutional problem of “[o]verbreadth from indeterminacy.”²⁵⁴

In the context of Trump’s anti-DEI mandates, the resolution of void-for-vagueness challenges to those mandates, even when not involving explicit overbreadth claims separate from the vagueness claims, has nonetheless been described as “turn[ing] in part on the applicability of the First Amendment . . . because the applicable void-for-vagueness standard depends in part on whether ‘a vague statute abuts upon sensitive areas of basic First Amendment Freedoms.’”²⁵⁵ Applying these principles, the district court in *NEA v. U.S. Department of Education* addressed the defendants’ contention that any censorship of teachers was not directly traceable to the Dear Colleague letter by chastising the defendants for disregarding the reality that the censorship “was the result of school districts ‘overcorrecting’ in response to the 2025 Letter,” while explaining that “such overcorrections are themselves caused by the 2025 Letter’s vagueness, the steep penalties the Department has announced for noncompliance with the Letter’s requirements, and the measures that the Department has already taken to implement the Letter,” citing the Supreme Court’s admonitions “that ambiguous meanings cause citizens to ‘steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.’”²⁵⁶

²⁵² *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012).

²⁵³ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

²⁵⁴ *See, e.g., Am. Booksellers v. Webb*, 919 F.2d 1493, 1505 (11th Cir. 1990); *see also id.* at 1505–06 (“The overbreadth and vagueness doctrines are related in that ‘a court should evaluate the ambiguous as well as the unambiguous scope of the enactment . . . [since] ambiguous meanings cause citizens to “steer far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.’” (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.6 (1982))).

²⁵⁵ *Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 243, 274 (D. Md. 2025) (quoting *Grayned*, 408 U.S. at 109) (citing *Holder v. Humanitarian L. Project*, 561 U.S. 1, 19 (2010) (“[W]hen a statute ‘interferes with the right of free speech or of association, a more stringent vagueness test should apply.’”); *Sessions v. Dimaya*, 584 U.S. 148 183 (2018) (Gorsuch, J., concurring) (“[A] ‘stringent vagueness test’ should apply to at least some civil laws—those abridging basic First Amendment freedoms.”)).

²⁵⁶ *Nat’l Educ. Ass’n v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d 149, 181 (D.N.H. 2025) (quoting *Vill. of Hoffman Ests.*, 455 U.S. at 494 n.6).

The *NEA v. U.S. Department of Education* district court opinion illustrates how even a teacher's request of students to sign a "Golden Rule" pledge to treat each other kindly could be swept up under the broad umbrella of unlawful "DEI" activities.²⁵⁷ The court further expressed concern about the Dear Colleague letter's description of unlawful DEI programs as "indoctrinat[ing]" students "that the United States is built upon 'systemic and structural racism.'"²⁵⁸ A prohibition under those parameters, the court warned, could be interpreted as precluding a teacher from talking with students about basic historic facts "about the role that race and attitudes toward race have played in American history and culture," about economic development of the Antebellum South, or about books such as *Heart of Darkness* or *To Kill a Mockingbird*—i.e., classic works of literature than have long been springboards for students to engage in critical examinations of race and justice throughout various eras and historic contexts.²⁵⁹ The court further found that the chilling effects of the DEI prohibitions are particularly severe given the threat to schools' federal funding, along with the creation of a DEI portal that encourages parents to report teachers who they feel are indoctrinating their children with unlawful DEI lessons, thereby "rais[ing] the specter of a public 'witch hunt' that will sow fear and doubt among teachers."²⁶⁰ The court consequently concluded that the Trump Administration's Dear Colleague letter is a threat to "the 'supremely precious' yet 'delicate and vulnerable' nature of the right to free speech in our country,"²⁶¹ and granted injunctive relief against its enforcement.²⁶²

The chilling, speech-stifling effect of the Trump Administration's DEI prohibitions has been demonstrated in other contexts as well. One history teacher who was prevented from teaching civil rights and Reconstruction Era lessons in the aftermath of the Trump Administration's

²⁵⁷ *Id.* at 187.

²⁵⁸ *Id.* at 188.

²⁵⁹ *Id.* at 188–89.

²⁶⁰ *Id.* at 192. One example of such vigilante witch hunts being encouraged and facilitated not just by the creation of the portal, but by the broader context of the Trump Administration's inflammatory attacks on schools that embrace gender and racial diversity, is in the federal case resulting from a parent taking pictures of books and posters from a school's Gay Straight Alliance club, pictures that exposed the teacher advisor's name, and posted them on a "Libs of TikTok" social media account with the caption: "School in Gardner, Kansas (@GEHSBlazers) Strip them of their funding immediately." *Schmidt v. Huff*, No. 25-CV-2081-EFM-GEB, 2025 WL 901335, at *1–2 (D. Kan. Mar. 25, 2025). The parent explicitly attested that she was motivated by her belief that "the school was in violation of the President's Executive Order [14190] by endorsing and otherwise advocating for gender ideology and discriminatory equity ideology." *Id.* at *1.

²⁶¹ *Nat'l Educ. Ass'n*, 779 F. Supp. 3d at 186 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

²⁶² *Id.* at 203.

edicts described in that case feeling “as if [she is] being held hostage to students and parents’ feelings and vague conceptions of discrimination and DEI.”²⁶³ Another teacher has attested that “content in my courses may be directly affected because much of it contextualizes the history of structural racism in our country I fear that the Department may consider this to be ‘toxically indoctrinating’ my students regarding structural and systemic racism.”²⁶⁴ Another expressed fear that a course that “‘focuses on systems of discrimination, the history of oppression, and social and political power dynamics’ will be considered a ‘discriminatory practice[.]’”²⁶⁵ Additionally, incidents of special education teachers censored from speaking of disabilities²⁶⁶ and legal studies professors struggling to ascertain how to teach constitutional history while sidestepping potentially uncomfortable subjects related to systemic racism such as the codification of slaveowners’ rights into the founding documents of the United States²⁶⁷ exemplify other chilling effects within the classroom at all levels of education.

The following passage from *American Federation of Teachers v. Department of Education* describes how one school district has had to wrestle with the vast chilling effects of the anti-DEI mandates:

District 4J alleges that the Letter concretely impacts the content it teaches. For example, District 4J has been actively preparing to implement social studies coursework to “address contributions from persons who are Native Americans, are of diverse racial and ethnic backgrounds, or are immigrants or refugees,” in order to comply with Oregon law. “The ideas and topics that these state curricula and lessons require appear to be in conflict with what the Letter attempts to prohibit, which leaves school districts, like Plaintiff District 4J, . . . unclear as to how to meet their obligations under [state] law while also protecting the federal funding the Letter threatens.” District 4J “selects and implements curricula that include teaching on . . . diversity, structural racism, and similar topics,” and is “reasonably concerned that continuing to implement its adopted curricula in compliance with state law would result in the loss of federal funding.” “Without

²⁶³ *Id.* at 189–90 (alteration in original).

²⁶⁴ *Am. Fed’n of Tchrs. v. Dep’t of Educ.*, 779 F. Supp. 3d 584, 621 (D. Md. 2025).

²⁶⁵ *Id.*

²⁶⁶ *See Nat’l Educ. Ass’n*, 779 F. Supp. 3d at 181.

²⁶⁷ *See* Paul M. Collins, Jr. & Rebeca Hamlin, *Anti-DEI Rules Are Gutting Educators’ Free Speech Rights*, FLAGLERLIVE (Mar. 18, 2025), <https://flaglerlive.com/anti-dei-rules-are-gutting-educators-free-speech-rights/> [<https://perma.cc/GV62-4S7Y>].

clarity [on the meaning of the Letter] . . . District 4J . . . fear[s] they may have to abandon their lawful efforts and speech related to diversity, equity, and inclusion, or else lose federal funds that support their valuable programs.”

Moreover, one of District 4J’s stated goals is to “increase equitable outcomes and achievements” for its students. District 4J is concerned that its “commit[ment] to eliminating gaps in opportunities and barriers to access” for all students could be interpreted as “smuggling racial stereotypes into everyday programming” based on the Letter. Similarly, District 4J fears continuing diversity, equity, and inclusion programming and teaching “could subject them . . . to enforcement actions, even though they believe they are acting in full compliance with state and federal law.”

In sum: District 4J alleges it has been put in an “impossible position, not knowing what conduct, speech, perspectives, lessons, programs, activities, or meetings [DOE] would consider prohibited by the Letter.” They are thus experiencing a “chilling effect of their First Amendment rights” because they “fear that many activities central to their work, their missions, and their employment could jeopardize their federal funding.”²⁶⁸

District 4J is far from alone. Many other educational communities have documented the chilling effect of Trump’s anti-DEI prohibitions in and beyond the classroom, such as educational institutions across the country who felt compelled to scrub their websites of references to diversity after receiving the Valentine’s Day Dear Colleague letter.²⁶⁹ The American Association of University Professors (AAUP) has documented the chilling effect on members who “‘work at institutions of higher education with endowments exceeding 1 billion dollars’ ‘whose teaching or research focuses on topics related to diversity or equity’ and who ‘fear that their work . . . might endanger their own institutions and lead to adverse employment consequences’” after the January 20, 2025, executive order.²⁷⁰ From media content and mission statements to vital research; from diversity committees and affinity groups to pipeline projects and scholarships; from the inclusive embrace of demographic diversity among

²⁶⁸ *Am. Fed’n of Tchrs.*, 779 F. Supp. 3d at 607–08 (alterations in original) (citations omitted).

²⁶⁹ See *infra* section I(B)(2).

²⁷⁰ *Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243, 269–70 (D. Md. 2025).

students and teachers to the preservation of viewpoint diversity and academic freedom; from the fair and equitable treatment of all students to the affirmative confrontation of actual discrimination, a wide range of critical components of the educational experience are stifled, threatened, and unconstitutionally chilled by Trump's anti-DEI mandates.²⁷¹

Consequently, Trump's anti-DEI mandates targeting the academia are subject to legal challenge for being unconstitutionally vague, with severe repercussions for overlapping the First Amendment and due process rights of members of the academic community.

B. Usurpation Through Obfuscation: The Interrelationship Between Void-for-Vagueness and Separation-of-Powers Constitutional Infirmities of Trump's DEI Attacks

An additional constitutional problem intertwined with the void-for-vagueness issue is that of separation of powers, as unclear laws can risk blurring the lines between delineated constitutional roles among the branches of government, threatening constitutional checks and balances. The Supreme Court's 2018 *Sessions v. Dimaya* opinion addressing the void-for-vagueness doctrine expressly affirmed the interrelationship between such separation-of-powers and void-for-vagueness concerns.²⁷² Specifically, it described the void-for-vagueness doctrine as "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."²⁷³ In his concurrence in that case, Justice Gorsuch added that the "void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation-of-powers principles the framers recognized as vital to ordered liberty under our Constitution."²⁷⁴

That was not the Court's first affirmation of the link between the void-for-vagueness doctrine and separation-of-powers concerns. Prior to *Dimaya*, as legal scholars have observed, courts have long affirmed the

²⁷¹ See generally Alexander Volokh, *Expressive Discrimination: Universities' First Amendment Right to Affirmative Action*, 77 FLA. L. REV. 75 (2025) (discussing many of these points in the context of affirmative action and other diversity protections, within the academic setting).

²⁷² *Sessions v. Dimaya*, 584 U.S. 148, 156 (2018).

²⁷³ *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

²⁷⁴ *Id.* at 176 (Gorsuch, J., concurring). Following Justice Gorsuch's description, separation-of-powers principles could alternatively be viewed as a fourth key value of void-for-vagueness cases, along with the three principles highlighted in cases such as *Smith v. Goguen*, 415 U.S. 566, 572–73 (1974), and *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972), but because the majority opinion rather described separation of powers as correlating the other primary components of the doctrine, it is addressed here separately.

symbiotic relationships between vagueness and separation of powers,²⁷⁵ with one scholar noting that for decades, the void-for-vagueness doctrine was incorporated as a formal element of a vagueness claim the requirement “that the separation of powers must be maintained.”²⁷⁶

President Trump’s anti-DEI attacks implicate a number of constitutional separation-of-powers issues which, viewed in conjunction with vagueness issues and Trump’s reputation for obfuscation,²⁷⁷ create what this Article dubs a broader “usurpation through obfuscation” problem.

Vague laws can endanger constitutional separation-of-powers protections in several respects. First, vague laws, in a sense, substitute the judiciary for the legislative branch by requiring courts to take the place of legislatures in creating the law (beyond the permissible role of courts in

²⁷⁵ See, e.g., Miriam H. Baer, *Forecasting the How and Why of Corporate Crime’s Demise*, 47 J. CORP. L. 887, 894–96 (2022) (examining the interplay between vague laws and separation-of-powers concerns in a white collar crime context); Goldsmith, *supra* note 132, at 284–86 (identifying and discussing cases in which both doctrines are implicated); Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1143–45 (2016) (describing cases in which the Court has identified vague laws and raising delegation problems and concluding that “the nondelegation principle underlying the vagueness doctrine is a concern that vague laws allow law enforcement and fact finders to pursue their own policy agenda”); Emily M. Snoddon, *Clarifying Vagueness: Rethinking the Supreme Court’s Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2328–34 (2019) (analyzing the interrelationship between due process and separation of powers under the void-for-vagueness doctrine).

²⁷⁶ Goldsmith, *supra* note 132, 284–86, 285 n.45 (citing *United States v. Ragen*, 314 U.S. 513, 523–24 (1942); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 457 (1927); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92 (1921)).

²⁷⁷ See, e.g., Ashley Parker, *Trump and Allies Ratchet Up Disinformation Efforts in Late Stage of Campaign*, WASH. POST (Sep. 6, 2020), https://www.washingtonpost.com/politics/trump-disinformation-campaign/2020/09/06/f34f080a-ecca-11ea-a21a-0fbbe90cfd8c_story.html [<https://perma.cc/Q6VC-UDYZ>] (“[T]he Trump campaign . . . [is] disseminating falsehoods and trafficking in obfuscation at a rapid clip, through the use of selectively edited videos, deceptive retweets and false statements.”); Mark Fenster, *Populism and Transparency: The Political Core of an Administrative Norm*, 89 U. CIN. L. REV. 286, 343 n.199 (2021) (describing Trump’s lack of transparency about his finances (citing DAVID CAY JOHNSON, *THE MAKING OF DONALD TRUMP* 77–83, 147–53 (2016) (describing Trump’s longstanding effort to obfuscate and keep secrets about his net worth and his public image))); Trevor George Gardner, *Law and Order as the Foundational Paradox of the Trump Presidency*, 73 STAN. L. REV. ONLINE 141, 141 (2021) (“[U]nder the Trump regime, law-and-order politics exhibited an additional benefit to its purveyors: obfuscation of the threat to the criminal-legal order posed by the very purveyors of these politics.”); Jonathan Turley, *Rage Rhetoric and the Revival of American Sedition*, 65 WM. & MARY L. REV. 1409, 1491 (2024) (documenting trial courts’ reliance on testimony of expert witness and Chapman University Professor Peter Simi, a sociologist with expertise in political extremism, who testified “that ‘violent far-right extremists understood that [President] Trump’s calls to ‘fight,’ which . . . were, when spoken by [President] Trump, literal calls to violence by these groups, while [President] Trump’s statements negating that sentiment were insincere and existed to obfuscate and create plausible deniability” (first, third, and fourth alterations in original)).

creating common law), rather than leaving it to legislatures to enact clear laws in the first place.²⁷⁸ As the Court explained in *Kolender v. Lawson*, as quoted years later in *Dimaya*, “if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department.”²⁷⁹ Today, those who are potentially subject to the Trump Administration’s anti-DEI edicts find themselves in that uncertain position of grappling with unclear mandates that might (or might not) target them as possible offenders, while waiting for courts to establish what the law actually is, as warned about in *Kolender v. Lawson*.

Vague laws also threaten to substitute the executive for the legislative branch in violation of separation-of-powers principles, raising delegation problem concerns. In *Grayned*, for example, in warning of the danger of arbitrary and discriminatory enforcement of laws, the Supreme Court explained that “[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.”²⁸⁰ In the 1921 case *United States v. L. Cohen Grocery Co.*,²⁸¹ the Court had similarly warned that statutes lacking clear standards “delegate legislative power.”²⁸² As Justice Gorsuch has more recently cautioned, laws that are vague “threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute’s contours through their enforcement decisions.”²⁸³

As to the chief executive himself, the Supreme Court has long recognized that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”²⁸⁴ In *Youngstown Sheet & Tube Co. v. Sawyer*,²⁸⁵ the Court explained that presidential orders “must stem either from an act of Congress or from the Constitution itself.”²⁸⁶ Famously, the concurring opinion of Justice Jackson describes a three-tiered level of scrutiny applicable to cases involving tensions between presidential and congressional authority, with the president having the highest level of authority when acting with the express or

²⁷⁸ See *Medellín v. Texas*, 552 U.S. 491, 526–27 (2008).

²⁷⁹ *Dimaya*, 584 U.S. at 156 (alteration in original) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983)).

²⁸⁰ *Grayned v. City of Rockford*, 408 U.S. 108–09 (1972).

²⁸¹ 255 U.S. 81 (1921).

²⁸² *Id.* at 92.

²⁸³ *Dimaya*, 584 U.S. at 182 (Gorsuch, J., concurring) (citing *Grayned*, 408 U.S. at 108–09).

²⁸⁴ *Medellín v. Texas*, 552 U.S. 491, 526–27 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

²⁸⁵ 343 U.S. 579 (1952).

²⁸⁶ *Id.* at 585.

implied consent of Congress and the lowest level of authority when acting against it.²⁸⁷ Under that tiered review of presidential actions, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”²⁸⁸ In *Youngstown*, the Supreme Court consequently held that President Truman had exceeded his constitutional powers when he issued an executive order to seize and control production at steel mills to prevent work stoppages, absent authorization by Congress or the Constitution.²⁸⁹

Today, President Trump’s Department of Education has similarly been found to have exceeded its constitutionally delegated statutory authority set by Congress under the Department of Education Organization Act (DEOA), which prohibits the Department of Education from exercising control over school curricula, instructional programming, administration, or personnel.²⁹⁰ The Trump Administration, through the Department of Education’s Dear Colleague letter and otherwise, has consequently been found to have violated that limitation on federal executive power: “[B]y declaring broad categories of classroom speech discriminatory . . . DOE is exercising ‘direction, supervision, or control’ over ‘the curriculum, program of instruction, administration, or personnel of [schools],’” which it cannot lawfully do.²⁹¹ Similarly, noting that the “strident” tone of the Dear Colleague letter left little room for nuance, the court in *American Federation of Teachers v. Department of Education* concluded that “there is no basis in Title VI or SFFA for concluding that discussion of race . . . is ever, or especially always, discrimination. The government cannot proclaim entire categories of classroom content discriminatory to side-step the bounds of its statutory authority.”²⁹²

A related separation-of-powers issue pertaining to the blurring of lines between the executive and legislative branches has been raised in

²⁸⁷ *Id.* at 635–38 (Jackson, J., concurring).

²⁸⁸ *Id.* at 637.

²⁸⁹ *Id.* at 583–89 (majority opinion).

²⁹⁰ *Am. Fed’n of Tchrs. v. Dep’t of Educ.*, 779 F. Supp. 3d 584, 615.

²⁹¹ *Id.* (alteration in original) (quoting 20 U.S.C. § 3403(b)).

²⁹² *Id.* (citation omitted). Relatedly, in addition to threatening horizontal checks and balances and separation of powers, the anti-DEI attacks also pose a threat to federalism by usurping state and local roles in defining the educational process. Even while the Trump Administration has on the one hand issued a statement purporting to reserve and even “return” power over education to state and local communities, the DEI mandates upon schools across the country do quite the opposite. See Press Release, U.S. Dep’t of Educ., Statement on President Trump’s Executive Order to Return Power Over Education to States and Local Communities (Mar. 20, 2025), <https://www.ed.gov/about/news/press-release/statement-president-trumps-executive-order-return-power-over-education-states-and-local-communities> [<https://perma.cc/7EVF-246G>].

claims in court (yet to be resolved on their merits) that, by ordering the seizure of millions of dollars from schools due to their DEI policies, the Trump Administration has usurped Congress's constitutionally delegated authority over the nation's purse strings under the Spending Clause of Article I of the U.S. Constitution.²⁹³ The constitutional basis for such claims is that Article I of the Constitution vests spending powers in the legislative, not executive branch, with those powers allocated exclusively to Congress.²⁹⁴ Consequently, in matters including the provision of grants expressly approved by Congress, the President bears a heavy burden to justify withholding those funds, since the revocation can be viewed as being in direct contravention with the will of Congress, thus falling within the lowest level of presidential authority under Justice Jackson's *Youngstown Sheet & Tube Co.* framework.²⁹⁵

In addition to potentially usurping congressional authority by overstepping statutorily authorized power, the Trump Administration has also in essence usurped the role of the federal judiciary by claiming authority to interpret constitutional standards beyond the interpretations set forth by the Supreme Court, including in the context of *Students for Fair Admissions*.²⁹⁶ As famously set forth in *Marbury v. Madison*,²⁹⁷ in which the Supreme Court, rising to the protection of essential constitutional checks and balances, declared: "It is emphatically the province and duty of the judicial department to say what the law is."²⁹⁸ In disregard of that longstanding fundamental principle, however, the Trump Administration has decried judicial attempts to reign in its abuses of executive power—including when the Trump Administration has bordered on openly thwarting the law and court orders—as "judicial coup,"²⁹⁹ the longstanding precedent of *Marbury v. Madison*'s affirmation of judicial review powers notwithstanding.

²⁹³ See Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 259–60 (D. Md. 2025).

²⁹⁴ U.S. CONST. art. I, § 1, 8; see also Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (noting that, under the major questions doctrine, the executive branch cannot seize the power of the legislature and deeming unconstitutional the attempted forgiveness of student loan debt by the executive branch during the COVID-19 pandemic).

²⁹⁵ See *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 583–89 (1952).

²⁹⁶ See *supra* subpart I(A) (addressing the Administration's problematic new interpretation of *Students for Fair Admissions*); subsection II(A)(2)(b) (same).

²⁹⁷ 5 U.S. 137 (1803).

²⁹⁸ *Id.* at 177.

²⁹⁹ See Luke Broadwater, *Trump Officials Intensify Attacks on Judges as Court Losses Mount*, N.Y. TIMES (May 29, 2025), <https://www.nytimes.com/2025/05/29/us/politics/trump-judges-attacks-tariffs.html> [<https://perma.cc/8K4Q-HABR>].

Thus, even independent of the co-existing void-for-vagueness issue, each of these problems with President Trump's sweeping war on DEI implicates constitutional separation-of-powers concerns.

The combined maelstrom from the interrelated resulting constitutional threats to both separation-of-powers and constitutional protections against vague governmental mandates compounds the coerced confusion resulting from Trump's unprecedented attack on diversity, equity, and inclusion in the academia. Through unconstitutionally vague anti-DEI edicts, Trump has managed to simultaneously blur both the parameters of the law and the respective lines of authority among the judiciary, the legislature, and the executive branch, undermining state and local authority over education in the process. Such executive overreach through heavy-handed mandates that simultaneously violate both void-for-vagueness and separation-of-powers principles ultimately amounts to unconstitutional usurpation through obfuscation.

CONCLUSION: A CALL FOR RESISTANCE TO TRUMP'S UNCONSTITUTIONAL ANTI-DEI COERCION

The Supreme Court has long recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."³⁰⁰ The importance of protecting educational communities against unconstitutional attacks by the federal government is more critical today than ever. President Trump's anti-DEI war that he initiated on his very first day back in the White House in 2025 has transformed academic communities across the country into an "upside down" parallel dimension of reality³⁰¹ in which basic principles of fairness, such as diversity, inclusion, and equity, are demonized rather than celebrated.

President Trump's usurpation through obfuscation—i.e., his sweeping and unprecedented disregard of constitutional checks and

³⁰⁰ *Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

³⁰¹ See *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1168 (N.D. Fla. 2022) (deeming unconstitutional a Florida statute known informally as the "Don't Say Gay" law that restricted diversity-related speech in Florida schools), *aff'd sub nom.*, *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272 (11th Cir. 2024); see, also Catherine Jean Archibald, *Still Problematic, Even Post-Settlement: Florida's "Don't Say Gay" Law and the Federal Constitution*, 28 CHAP. L. REV. 1, 2 (2024). The court observed in *Honeyfund*:

In the popular television series *Stranger Things*, the "upside down" describes a parallel dimension containing a distorted version of our world. Recently, Florida has seemed like a First Amendment upside down. Normally, the First Amendment bars the state from burdening speech, while private actors may burden speech freely. But in Florida, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely.

Id. (citation omitted).

balances to impose vague anti-DEI mandates upon academic communities across the country—not only endangers the constitutional rights of those directly impacted but also poses broader threats to the rule of law and our constitutional democracy itself. For an administration that purports to revere history, albeit a bizarre white-washed form of history,³⁰² it would do well to heed the message of the Magna Carta—that even kings are not above the law.³⁰³ President Trump's constitutionally questionable attacks upon diversity, equity, and inclusion protections at campuses across the country are anathema to our nation's imperfect but important history of ever striving toward greater—not lesser—protections for equality and inclusion among all those in our diverse melting pot of a nation.

In the 2025 *Trump v. CASA, Inc.*³⁰⁴ birthright citizenship Supreme Court case in which the Court limited the use of national injunctions to block unconstitutional executive actions, Justice Sotomayor implored in her dissent: “The rule of law is not a given in this Nation, nor any other. It is a precept of our democracy that will endure only if those brave enough in every branch fight for its survival.”³⁰⁵ While the majority of Supreme Court did not heed Justice Sotomayor's pleas in that case, the litigation surrounding President Trump's attempted power grabs in his war against DEI on campuses across the country provide ample opportunity for courts to exercise their constitutional authority to check the executive's usurpation of power in that context. The judiciary must exercise its rightful role in checking and balancing the executive branch through judicial review (despite Trump defenders' attacks on judicial review itself).³⁰⁶ Even if it must occur one case at a time through a series of separate court decisions (following *Trump v. Casa*'s limitation on nationwide

³⁰² See Exec. Order 14253, 90 Fed. Reg. 14563 (Mar. 27, 2025) (“Restoring Truth and Sanity to American History”).

³⁰³ One ironic twist in the story of Trump's attack on higher institutions such as Harvard is that shortly after the second Trump Administration's 100-day mark, and in the midst of the Administration's attacks on Harvard, an astounding discovery was made: Harvard's Magna Carta is an original, not—as thought for nearly eight decades—a copy, despite Harvard having purchased it in 1946 for \$27.50. See Jo Black, *Cut-Price Magna Carta 'Copy' Now Believed Genuine*, BBC (May 14, 2025), <https://www.bbc.com/news/articles/cm23zjknre7o> [<https://perma.cc/LJ36-CCSS>].

³⁰⁴ No. 24A884, 145 S. Ct. 2540 (2025).

³⁰⁵ *Id.* at 2573, 2596 (Sotomayor, J., dissenting) (addressing President Trump's rejection of birthright citizenship despite the Constitution's clear text and unanimous court rulings across the country affirming the citizenship rights of those born in this country). Justice Sotomayor then concluded, “Today, the Court abdicates its vital role in that effort. With the stroke of a pen, the President has made a ‘solemn mockery’ of our Constitution. Rather than stand firm, the Court gives way. Because such complicity should know no place in our system of law, I dissent.” *Id.* (citation omitted).

³⁰⁶ See *supra* note 299 and accompanying text (describing the Trump Administration's accusations that court rulings against it amount to a “judicial coup”).

injunctions), with litigants also mindful of jurisdictional limitations where grant revocations are at issue,³⁰⁷ courts must continue to exercise their constitutional judicial review powers to strike down executive actions that infringe upon longstanding constitutional and civil rights of educational community members across the country. Those challenging Trump's unconstitutional attacks on DEI can certainly find hope not just in the federal district court victories described in this Article, but in more recent developments as well. As this Article was in the midst of the editing process, for example, in one of the cases described herein, *American Federation of Teachers v. Department of Education*,³⁰⁸ the Trump Administration has now dropped its appeal of the district court ruling declaring the February 14, 2025 Dear Colleague letter unconstitutionally vague.³⁰⁹ While it remains to be seen what this development means for the Trump Administration's continued attacks on diversity, education, and inclusion programming in schools, and if the Dear Colleague letter's threats are truly extinguished moving forward, this striking development is a significant one that should offer hope to those seeking to preserve and protect DEI efforts on campuses across the country.

³⁰⁷ In particular, litigants should be mindful of recent court rulings, such as that of the Fourth Circuit in *National Ass'n of Diversity Officers in Higher Education v. Trump*, concluding that vagueness challenges to decisions regarding grants or contracts are accorded a different type of scrutiny than other void-for-vagueness challenges, quoting a district court judge's statement that "[a]ny concerns of vagueness regarding exactly what authority an agency may have to terminate a grant are internal considerations for the agency itself." *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 167 F.4th 86, 101 (2026) (quoting *Chi. Women in Trades v. Trump*, 778 F. Supp. 3d 959, 989 (N.D. Ill. 2025)). Another example is the Supreme Court's *National Endowment for the Arts v. Finley* precedent rejecting a facial vagueness challenge to National Foundation on the Arts and Humanities Act standards governing grant applications, where the Court ruled that in such contexts, "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe," because government funding determinations are often permissibly based on subjective criteria. *Nat'l Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998). Litigants should also note the Supreme Court's recent ruling that challenges to terminations of grants based on contractual agreements may need to be presented as separate claims through the U.S. Court of Federal Claims. *See Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2660 (2025) (Barrett, J., concurring) (explaining in cursory shadow docket order that, in APA suit brought to recover NIH funding denied due to DEI, the Court of Federal Claims, not a different federal court, had jurisdiction to adjudicate claims and issue orders related to the termination of research-related grants, and the payment thereof); *see also Bd. of Educ. for Silver Consol. Schs. v. McMahon*, 791 F. Supp. 3d 1272, (D.N.M. 2025) (denying injunction in challenge to Dear Colleague letter primarily because the sought relief, for the United States to pay a contract, belonged in the Court of Federal Claims).

³⁰⁸ *See supra* note 114.

³⁰⁹ *See* Jaweed Kaleem, "The Damage Is Done": Why Trump's DEI Retreat in Court May Be Too Late for Many Colleges, L.A. TIMES (Jan. 21, 2026), <https://www.latimes.com/world-nation/story/2026-01-21/trump-administration-drops-legal-appeal-over-anti-dei-funding-threat-to-schools-colleges> [<https://perma.cc/F3BC-DAD3>].

Ultimately the responsibility to stand firm against unconstitutional usurpations of power that threaten core values of our constitutional democracy lies not with the judiciary alone. Congress, too, must defend against the usurpation of its own spending and legislative powers. Ultimately, it is incumbent upon all branches of the government, and upon individuals across the country both within and beyond academic communities, to fight with courage and tenacity against cruel and unconstitutional attacks on our country's diverse, inclusive, and equality-embracing educational institutions, and on our schools' teachers, students, and research programs. As the Trump Administration continues to issue oppressive mandates requiring the abandonment of principles long valued in our constitutional democracy, each day presents new opportunities for resistance.

Within academic communities specifically, it is essential to follow the lead of the growing number of universities and educational organizations who have stood firm against pressure from the Trump Administration to abandon their diversity, equity, and inclusion-affirming programming and principles.³¹⁰ Rather than abandoning commitments to diversity, equity, and inclusion, either nominally or programmatically, schools and their leaders across the country should issue strong statements of solidarity with their diverse student bodies and commitment to continued protections for diversity, equity, and inclusiveness. There is strength in numbers, and with the increased number of successful challenges in court to anti-DEI attacks, those courageously fighting a federal government hellbent on reshaping the culture of academia into one that cowers to even mention diversity, equity, and inclusion beyond shrouded whispers should feel increasingly empowered in standing up for essential policies and principles of social and educational justice, and the students they protect. As much as constitutional checks and balances have been tested in recent days, the Constitution still stands strong, a bulwark against sweeping power grabs and authoritarian, undemocratic attacks on equity, inclusion, and diversity.

From protests to court orders to legislative action, there are a myriad of ways to resist executive attempts to wield unconstitutionally usurped power as a weapon against diversity, equity, and inclusion on campuses across the United States. It would take much more than a single law review article to meaningfully detail with specificity all the possible means of reclaiming the rule of law and restoring constitutional rights that have been diminished or even lost under an administration that continues to threaten more individual rights each day. At the very least, however, resistance can

³¹⁰ See *supra* sections I(B.)(1)–(2).

be fueled by confidence that the Constitution continues to stand strong as a potent shield against attempts to undermine the equitable and inclusive individual rights protections at the core of a healthy constitutional democracy in a diverse nation, in our academic communities, and beyond.

From campuses to broader communities across the country, we must all stand committed to an evolution forward, not backward regression. We cannot give up on principles of diversity, equity, and inclusion as essential values that make us a better and more just nation than the oppressive slavery- and segregation-embracing country of our past. In the words of Thomas Jefferson himself, words forever engraved on the walls of the Jefferson Memorial: “We might as well require a man to wear still the coat which fitted him when a boy as a civilized society to remain ever under the regimen of their barbarous ancestors.”³¹¹

³¹¹ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), <https://www.nps.gov/thje/learn/photosmultimedia/quotations.htm> [<https://perma.cc/9HF6-5YP5>].