

TRUMP ON DEI AND ANTI-DISCRIMINATION LAW

Rolling Back the Clock on Racial Justice

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When Donald Trump's administration left office in 2020, two-thirds of surveyed Americans agreed that Trump had increased racial tensions in the United States.¹ The backdrop for that widespread sentiment was the Trump administration's sustained assault on political, civic, and legal efforts to promote racial justice; Trump's consistent use of inflammatory racist rhetoric; and his transparent pursuit of a white supremacist agenda rooted in racial grievance.

Fulfilling promises made during the 2016 presidential campaign, the Trump administration engaged in a wholesale attempt to roll back the clock on racial justice by dismantling efforts to address systemic racism and promote a more equitable and just society. Trump's legacy on these issues is encapsulated by the "1776 Report," published by the White House in the administration's waning days. The report advanced a dystopian vision that demonized attempts at achieving racial equality. Designed to "restore patriotic education in schools," the "1776 Report" compared progressivism to fascism, claimed that the civil rights movement embraced

ideas similar to those held by defenders of slavery, and sought to downplay the legacy of racism in U.S. history.² Historians uniformly condemned the report, pointing out that it was littered with factual inaccuracies and partisanship, and lacking serious scholarship.³

But the "1776 Report" was not simply a far-right musing; it captured the political and legal agenda the Trump administration pursued for four years. In that time, the administration ordered federal agencies to cease all trainings on systemic racism and unconscious racial bias⁴ and, by executive order, banned the U.S. Armed Forces, federal agencies, federal contractors, and recipients of federal grants from providing employees with trainings related to race and gender discrimination.⁵ As described in further detail below, the administration also abandoned enforcement of civil rights laws on behalf of historically marginalized groups, and marshaled federal power to ramp up right-wing attacks on equal opportunity initiatives led by both local and state governments as well as the private sector.

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- 1 Domenico Montanaro, *Americans Say President Trump Has Worsened Race Relations Since George Floyd's Death*, NPR, (June 5, 2020), <https://www.npr.org/2020/06/05/871083543/americans-say-president-trump-has-worsened-race-relations-since-george-floyds-de>.
 - 2 The President's Advisory 1776 Commission, *The 1776 Report*, 14-15, (2021)
 - 3 Michael Crowley & Jennifer Schussler, *Trump's 1776 Commission Critiques Liberalism in Report Derided by Historians*, N.Y. Times, (Jan. 18, 2021), <https://www.nytimes.com/2021/01/18/us/politics/trump-1776-commission-report.html>; Gillian Brockell, 'A hack job', 'outright lies': Trump commission's '1776 Report' outrageous historians, Wash. Post, (Jan. 20, 2021), <https://www.washingtonpost.com/history/2021/01/19/1776-report-historians-trump/>.
 - 4 Memorandum from the Executive Office of the President to the Heads of Executive Departments and Agencies, M-20-34, (Sept. 4, 2020).
 - 5 Exec. Order No. 13950, 85 FR 6063 (Sept. 22, 2020); Sarah Hinger & Brian Hauss, *The Trump Administration is Banning Talk about Race and Gender*, ACLU (Oct. 9, 2020), <https://www.aclu.org/news/civil-liberties/the-trump-administration-is-banning-talk-about-race-and-gender>.

Meanwhile, the administration alternated between openly vilifying and woefully neglecting communities of color. Trump used racialized, xenophobic dog whistles to attack Black, Middle Eastern, South Asian, Latine, and other immigrants of color, and to justify his exclusionary immigration policy.⁶ Trump studiously referred to COVID-19 as “the Chinese virus,” just as bias-motivated attacks against Asian Americans were spiking.⁷ He ignored public health experts’ urgent advice to make COVID-19 testing widely available, especially in Black, Latine, and Indigenous communities, despite the dramatic disparities in mortality rates experienced in those communities.⁸ He also refused to unambiguously condemn white supremacist groups, telling the Proud Boys to “stand back and stand by” at a televised election debate.⁹

The 2024 Trump campaign has doubled down on this commitment to racial grievance. The campaign has promised, for example, to eradicate both public and private diversity, equity, and inclusion (DEI) policies. This attack on DEI is part of a larger backlash against racial justice efforts ignited by the 2020 killings of George Floyd, Ahmaud Arbery, and Breonna Taylor, and the nationwide protests — unprecedented in size and diversity — that followed. In the wake of those protests, workplaces, schools, and other institutions announced plans to expand DEI efforts and to incorporate anti-racism principles in their communities.¹⁰ The opposition to these efforts from far-right actors has been dramatic,

with anti-DEI activists and political operatives framing their attacks as a strike against “identity politics” and weaponizing the term “DEI” to mean any ideas and policies they disagree with — especially those that address systemic racism and sexism.¹¹ More broadly, however, the anti-DEI backlash is part of a larger effort by right-wing foundations, think tanks, and political operatives to dismantle civil rights gains made in recent decades.¹²

Even though most of the country supports efforts to address racial inequality,¹³ Trump promises to eradicate many of those efforts and thereby worsen racial disparities. To understand the threat posed by a second Trump administration — and plan our response — we examined three strategies Trump will continue to deploy as president to upend and reverse course on racial equality. We also outlined strategies and tactics to fight against such policies and mitigate their harm.

1. Censoring Academic Discussions of Race and Sex-Based Discrimination

A second Trump administration would supercharge efforts to censor discussion of any concepts deemed “divisive” from the nation’s classrooms, by which it means classroom discussions about race, gender, and systemic oppression with which it disagrees. Trump has promised to cut federal funding for schools with curricula that touch on these “disfavored” subjects,¹⁴ eliminate school

6 Kasie Hunt, et al., *Trump Referred to Haiti and African Nations as ‘shithole’ Countries*, NBC, (Jan. 12, 2018), <https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946>; ACLU, *Trump on Immigration: Tearing Apart Immigrant Families, Communities, and the Fabric of our Nation* (June 6, 2024).

7 Cecillia Wang, *Let’s Stop the Scapegoating During a Global Pandemic*, ACLU (Apr. 14, 2020), <https://www.aclu.org/news/racial-justice/lets-stop-the-scapegoating-during-a-global-pandemic>.

8 ReNika Moore, *If COVID-19 Doesn’t Discriminate, Then Why Are Black People Dying at Higher Rates*, ACLU (Apr. 8, 2020), <https://www.aclu.org/news/racial-justice/if-covid-19-doesnt-discriminate-then-why-are-black-people-dying-at-higher-rates>; Denys T. Lau & Paulina Sosa, *Disparate Impact of the COVID-19 Pandemic and Health Equity Data Gaps*, *American Journal of Public Health* 112, 1404_1406, (Sep. 14, 2022), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2022.307052>.

9 Sarah McCammon, *From Debate Stage, Trump Declines To Denounce White Supremacy*, NPR (Sept. 30, 2020), <https://www.npr.org/2020/09/30/918483794/from-debate-stage-trump-declines-to-denounce-white-supremacy>.

10 Leah Watson, *Anti-DEI Efforts Are the Latest Attack on Racial Equity and Free Speech*, ACLU (Feb. 14, 2024), <https://www.aclu.org/news/free-speech/anti-dei-efforts-are-the-latest-attack-on-racial-equity-and-free-speech>.

11 Watson, *supra* no. 10.

12 Nicholas Confessore, *‘America is Under Attack’: Inside the Anti-D.E.I. Crusade*, N.Y. Times (Jan. 20, 2024), <https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html>; Julian Mark, *Affirmative Action is under attack. How did we get here?*, Wash. Post (Mar. 9, 2024), <https://www.washingtonpost.com/technology/interactive/2024/dei-history-affirmative-action-timeline/>.

13 Emmanuel Felton, et al., *Most Americans approve of DEI, according to Post-Ipsos poll*, Wash. Post (June 18, 2024), <https://www.washingtonpost.com/nation/2024/06/18/affirmative-action-dei-attitudes-poll/>.

14 Piper Hudspeth Blackburn, Abby Turner, Will Mullery and Kenneth Uzquiano, *Promises Donald Trump has made so far in his campaign for a second term*, CNN (Apr. 20, 2024), <https://www.cnn.com/interactive/2024/04/politics/trump-campaign-promises-dg/>.

administrator positions that oversee DEI initiatives,¹⁵ and resuscitate the discredited 1776 Commission.¹⁶

These policies would, of course, trample on students' and educators' constitutional rights. They would also cause palpable harm to educational outcomes and the basic civil liberties of both students and teachers. Research has shown that an inclusive K-12 and college curriculum and environment is a significant contributor to the retention and academic success of not just students of color, but *all* students.¹⁷ Policies eradicating DEI programming and curricula are not only unlawful; they also actively undermine students' ability to thrive.

2. Abandoning Civil Rights Enforcement on Behalf of Historically Marginalized Groups

The Trump administration consistently subverted traditional legal tools and principles designed to combat unlawful discrimination. It ceased to pursue — and attempted to dismantle — disparate impact liability,¹⁸ a bedrock tool for effective civil rights enforcement.¹⁹ The administration also revoked federal guidance designed to address race- and disability-based discrimination in student discipline policies and practices;²⁰ imposed a sweeping ban on trainings on race and gender discrimination by federal agencies, contractors, and grant recipients;²¹ and weakened protections against unlawful discrimination through regulatory action.

A second Trump administration threatens to altogether stop enforcement of civil rights on behalf of individuals from historically marginalized groups. In the regulatory context, the administration would weaken protections in the areas of housing, education, healthcare, and other essential resources by narrowing the availability of disparate impact liability; adding new legal hurdles to challenging policies and practices that disproportionately harm people of color and other protected groups under major civil rights laws, such as the Fair Housing Act (FHA); and gutting federal rules designed to increase access to housing and other community assets for people of color and other vulnerable and marginalized groups.

3. Marshalling Federal Power to Ramp up Right-Wing Attacks on Equal Opportunity Initiatives

From 2017-2021, the Trump administration utilized federal legal and policy authority to bolster far-right attacks on educational and economic opportunity initiatives, including efforts led by local and state governments and the private sector. For example, the administration weaponized its investigative and legal authority to target efforts by the private sector and institutions of higher education — including, for example, Microsoft²² and Yale University²³ — to address inequality, which had a predictably chilling effect across sectors, including government, academia, and corporate America.²⁴

A second Trump administration would intensify these attacks by abandoning any efforts to advance and

15 Blackburn, *supra* no. 14.

16 Blackburn, *supra* no. 14.

17 *Infra*, p. 12 – 14.

18 Laura Meckler & Devlin Barrett, *Trump admin sought to eliminate disparate impact under Title VI of the 1964 Civil Rights Act*, Wash. Post (Jan. 5, 2021), https://www.washingtonpost.com/education/civil-rights-act-disparate-impact-discrimination/2021/01/05/4f57001a-4fc1-11eb-bda4-615aaefd0555_story.html; Linda Morris & Alejandro Agustin Ortiz, *Trump Administration's New Rule Will Slam Door to Fair Housing*, ACLU (Oct. 16, 2019), <https://www.aclu.org/news/racial-justice/trump-administrations-new-rule-will-slam-door-to-fair-housing>.

19 Sarah Hinger, *Why Trump's Effort to Eliminate Disparate Impact Rules Is a Terrible Idea*, ACLU (Jan. 9, 2019), <https://www.aclu.org/news/racial-justice/why-trumps-effort-eliminate-disparate-impact-rules>.

20 Collin Binkley, *Trump officials cancel Obama-era policy on school discipline*, AP News (Dec. 21, 2018), <https://apnews.com/article/07c8e7c5a69942699f7640890677c2d2>.

21 Exec. Order 13950, 85 FR 6063 (Sept. 22, 2020); Sarah Hinger & Brian Hauss, *The Trump Administration is Banning Talk about Race and Gender*, ACLU (Oct. 9, 2020), <https://www.aclu.org/news/civil-liberties/the-trump-administration-is-banning-talk-about-race-and-gender>.

22 Dev Stahlkopf, *Responding to the OFCCP on our June diversity commitments*, Microsoft (Oct. 6, 2020), <https://blogs.microsoft.com/on-the-issues/2020/10/06/ofccp-diversity-employment-laws/>.

23 Anemona Hartocollis, *Justice Dept Sues Yale Citing Illegal Race Discrimination*, N.Y. Times (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/yale-discrimination.html>.

24 Hailey Fuchs, *Trump Attack on Diversity Training Has a Quick and Chilling Effect*, N.Y. Times (Oct. 14, 2020), <https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html>.

legally defend affirmative action policies at military academies, federal minority contracting programs, and other federal programs proven to open opportunities unfairly denied to people of color. The Trump campaign has also promised to charge the Department of Justice (DOJ) and Department of Education (DOE) with investigating “anti-white” civil rights violations in schools while removing so-called “Marxists” from the DOE;²⁵ direct the DOJ’s civil rights division to investigate private sector programs designed to “boost the number of people of color in the workplace” (a dramatic departure from its traditional role of protecting marginalized groups);²⁶ and order the Equal Employment Opportunity Commission (EEOC) to use Title VII of the Civil Rights Act to attack DEI programs and trainings.²⁷

These attacks would not be restricted to federal government agencies. A second Trump administration would also target local and state government, as well as private sector efforts, to remedy historical discrimination and ongoing inequality. It would also scale up “reverse discrimination” cases to further chill public and private institutions’ efforts to expand access to Black, Latine, Indigenous, and other people of color. Such efforts would build on current attacks from the private bar, including challenging school desegregation efforts and grant, scholarship, and fellowship programs²⁸ intended to open access to career fields.²⁹

Since 2023, emboldened by the Supreme Court’s blow to affirmative action, state lawmakers have introduced over 80 anti-DEI bills seeking to dismantle minority- and women-owned business diversity programs; prohibit certain discrimination and anti-bias training for employees, school staff, and students; prohibit

programs to attract a diverse pool of employees, faculty, and students; preclude student scholarships, grants, or financial aid based upon sex, race, and national origin; and/or eliminate DEI programs on college campuses that aim to create inclusive and supportive environments for all students.³⁰ If Trump is reelected, his administration would intensify this landscape by trying to force diversity programs within local school districts, post-secondary institutions, places of public and private employment, and public contracting to end by using not just DOJ investigations and lawsuits, but also threatening to revoke federal funding. Campaign advisors have promised that a second Trump administration would withhold federal money from any schools, companies, or charities that use DEI principles in their curricula or hiring practices.³¹

The administration’s ultimate goal would be the eradication of all programs designed to address profound and persistent inequalities in American life — with the effect of further entrenching, and indeed worsening, systemic inequalities in access to education, health care, and economic opportunity. And, perversely, a Trump DOJ would employ the 14th Amendment’s Equal Protection Clause, along with landmark civil rights statutes such as the Civil Rights Act of 1964 — including Title VI, which prohibits recipients of federal funds from discriminating based on race, color, or national origin, and Title VII, which prohibits employment discrimination based on race, color, religion, sex and national origin — in its efforts.

At this critical juncture in our country’s commitment to equality and equitable access to vital resources, the ACLU stands ready to act.

25 Gram Slattery, Nathan Layne, *Trump Vows to Fight ‘anti-white feeling’ in the United States*, Reuters (May 4, 2024), <https://www.reuters.com/world/us/trump-vows-fight-anti-white-feeling-us-his-allies-have-plan-2024-05-04/>; Olympia Sonnier, Ben Kamisar, *Trump Calls for Certifying ‘patriotic’ teachers, Cutting funds to Schools Teaching CRT*, NBC News (Jan. 27, 2023), <https://www.nbcnews.com/meet-the-press/meetthepressblog/trump-calls-certifying-patriotic-teachers-cutting-funds-schools-teachi-rcna67836>.

26 Gram Slattery, Nathan Layne, *Trump Vows to Fight ‘anti-white feeling’ in the United States*, Reuters (May 4, 2024), <https://www.reuters.com/world/us/trump-vows-fight-anti-white-feeling-us-his-allies-have-plan-2024-05-04/>.

27 Jonathan Berry, *Mandate for Leadership 2025: The Conservative Promise*, The Heritage Foundation, 582–83, (Paul Dans & Steven Groves eds., 9th ed. 2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf

28 *E.g.*, *American Alliance for Equal Rights v. Fearless Fund Management, et al.*, 23-13138 (11th Cir.); *Roberts, et al. v. Progressive Preferred Insurance Co., et al.*, 23-cv-01597 (N.D. Ohio); *Nistler v. Walz et al*, 24-cv-186 (D. Minn.); *Dalton v. Hao and MA Growth Capital Corp*, 23-cv-11216 (D. Mass).

29 *E.g.*, *Do No Harm v. Pfizer*, 23-0015 (2d Cir.), 1:22-cv-07908 (S.D.N.Y); *American Alliance for Equal Rights v. Morrison & Foerster*, 23-cv-23189 (S.D. Fla.).

30 See Char Adams, Nigel Chiwaya, *Map: See which states have introduced or passed anti-DEI bills*, NBC News (Mar. 2, 2024), <https://www.nbcnews.com/data-graphics/anti-dei-bills-states-republican-lawmakers-map-rcna140756>; Jessica Bryant, Chloe Appleby, *These States ‘Anti- DEI Legislation May Impact Higher Education*, Best Colleges (May 22, 2024), <https://www.bestcolleges.com/news/anti-dei-legislation-tracker/>

31 Gram Slattery, Nathan Layne, *Trump Vows to Fight ‘anti-white feeling’ in the United States*, Reuters (May 4, 2024), <https://www.reuters.com/world/us/trump-vows-fight-anti-white-feeling-us-his-allies-have-plan-2024-05-04/>.

THE ACLU'S OVERALL RESPONSE

The ACLU will resist a second Trump administration's retreat from civil rights enforcement and attacks on efforts to promote racial justice with litigation and legislative and policy advocacy in progressive states and localities.

Courts

A second Trump administration would undoubtedly pose sobering and multifaceted legal threats to efforts to promote racial equality. However, many components of Trump's radical "anti-DEI" agenda, rooted in racial grievance rather than fact, cannot be achieved without violating the Constitution and federal laws. As was the case in the prior Trump administration, litigation and regulatory advocacy will be indispensable for both stymying these threats and advancing an affirmative vision of racial justice.

The Trump years underlined the practical importance of legal action and engagement. Lawsuits stopped many illegal Trump administration policies designed to undermine anti-discrimination efforts and laws, such as Trump's unconstitutional ban on federal trainings on systemic racism and sexism,³² and his administration's efforts to undermine the FHA.³³ Furthermore, since Trump was voted out of office in 2020, federal courts have already enjoined or struck down the kinds of classroom censorship and anti-DEI policies that he promises to pursue more broadly,³⁴ and upheld efforts to promote access to educational opportunity that have been challenged by far-right advocates.³⁵ These court victories will be crucial building blocks to our legal strategy under a second Trump administration.

Even though Trump has made a significant mark on the judiciary, and it is not difficult to find recent examples where the courts have failed to protect efforts to build a more racially inclusive society,³⁶ there are still lawful avenues to promote equal educational opportunities and advance racial justice. We must both defend and build upon this precedent.³⁷ Below, we outline ways in which we will engage in litigation and legal advocacy to oppose unlawful attacks on educational access, classroom censorship, rollbacks of critical federal anti-discrimination protections, and assaults on state and local DEI policy interventions.

Congress

The Trump administration would push Congress to pass anti-DEI bills restricting access to education, employment, and public contracting opportunities. Members of Congress who support racial justice must consistently vote against anti-DEI bills and efforts to strip federal funding from such programs. Committees and caucuses should also utilize subpoenas and hearings to strengthen the factual record and ascertain the status of DEI programs in the public and private sectors, as well as the harmful impacts of current anti-DEI legislation. This information can be used to build the necessary factual predicate for legislation advancing DEI goals, and to educate Congress members about the benefits of lawful DEI practices.

Congress members should also counter the anti-DEI movement by publicly and vigorously pushing back against propaganda that DEI is inherently "racist" and stifles freedom of speech. They must refocus the

32 *Supra* no. 5.

33 *See Mass. Fair Hous. Ctr. v. HUD*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020) (holding that the 2020 Rule's "new and undefined terminology, altered burden-shifting framework, and perplexing defenses accomplish the opposite of clarity").

34 *Pernell v. Florida Board of Governors et al.*, 641 F. Supp. 3d 1218 (N.D. Fl. 2022).

35 *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 874–75 (4th Cir. 2023), cert. denied, 218 L. Ed. 2d 71 (Feb. 20, 2024); *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 53 (1st Cir. 2023).

36 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

37 ACLU, *Affirmative Action in Higher Education Report* (Oct. 2, 2022), <https://www.aclu.org/documents/affirmative-action-in-higher-education-report>.

conversation on the origin of DEI programs and amplify, through hearings and public statements, how such critical programs work.³⁸ DEI programs became prevalent in public and private sectors following the civil rights movement as a way to combat racism and sexism³⁹ — two pervasive problems that persist today. A key political aim of the extreme right in their anti-DEI efforts is to divide voter coalitions and advance a partisan agenda. The anti-DEI movement labels DEI programs as discriminatory publicly, but it is the extreme right's proposed anti-DEI policies and legislation that will make workplaces, schools, and public contracting more discriminatory and less inclusive and welcoming for persons based upon their race, gender, sexual orientation, socioeconomic status, and religious identity.

While arguing that DEI programs inhibit free speech, the anti-DEI movement itself stifles speech and whitewashes discussions concerning the inconvenient truths of systemic discrimination in U.S. history and society by banning books, censoring classroom discussions, and erasing facts from curricula. Congress members should coordinate to build a vigorous offensive strategy to reveal the false attacks made against DEI programs.

State & Municipalities

Particularly in the wake of a federal government turning hostile to civil rights, state and local governments must step in to limit discrimination and defend and promote DEI programs and inclusive curricula at the K-12 level. Public and private sector entities created DEI programs in direct response to the Civil Rights Act of 1964 to combat racism and sexism, and to remedy resulting harms by building workplaces, educational environments, and public contracting programs that reflect and benefit the demographics of this country.⁴⁰ As DEI programs have evolved, public and private sector entities have sought to create inclusive and welcoming environments where people of all races, genders, sexual orientations, socioeconomic statuses, and religious identities can thrive.

Now, far-right actors seek to roll back gains achieved during the civil rights movement and deprive a large population of Americans of equal access to education, employment, and economic opportunities under the law. Ultimately, these attacks strike at a core principle of democracy: equality under the law.

State and local officials can mobilize to protect democracy and continue civil rights gains in the face of a hostile Trump administration. Indeed, since July 2023 state attorneys general have issued two opinions as a coalition to “condemn attempts to correlate diversity measures with racial discrimination, and to remind companies of their obligations to ensure equitable and inclusive environments for their employees and clients.”⁴¹ Governors and mayors can also continue the advancement of civil rights protections in the public sector by issuing executive orders to create and expand state- and locally-funded DEI programs. Finally, state legislators and city council members should thwart attacks on DEI by voting against proposals to restrict funding for DEI programs, holding hearings concerning public and private sector DEI programs and the negative impacts of dismantling them, and proposing bills that advance DEI goals.

38 See, e.g., Ming-Qi Chu, *DEI critics were hoping that the Supreme Court's Muldrow decision would undermine corporate diversity programs. It does no such thing*, *Fortune* (Apr. 18, 2024), <https://fortune.com/2024/04/18/dei-critics-supreme-courts-muldrow-decision-corporate-diversity-programs-politics/>.

39 Office of Labor, *History of DE&I*, (Dec. 13, 2023), <https://www.dol.gov/agencies/olms/deia/history>.

40 *Supra* no. 39.

41 Letter from Kwame Raoul, Att'y Gen. of Illinois, to the American Bar Association, Fortune 100 CEOs, and Other Organizations, (June 20, 2024), <https://ilag-dev.dotcms.cloud/dA/94031f5c-1c55-4aca-a4c1-5900457f736a/fileAsset/June%2020%202024%20AG%20Letter%20to%20ABA%20and%20Fortune%20100%20Companies.pdf>.

SPECIFIC RESPONSES

The ACLU will continue to challenge unconstitutional classroom censorship and Trump administration executive actions targeting “divisive concepts.”

Using Trump’s Executive Order 13950, which unconstitutionally banned federal trainings on systemic racism and sexism,⁴² as their template, far-right legislators around the country have introduced scores of bills to ban the teaching of so-called “divisive concepts” in K-12 public schools and in public colleges and universities.⁴³ While these laws vary in their details, they typically censor classroom instruction on race and gender. The Trump campaign has promised to intensify these efforts by cutting federal funding for schools whose curricula touch on these “disfavored” subjects.⁴⁴

Legal Analysis/Litigation Response

These assaults on academic freedom violate the First and 14th Amendments, which prohibit suppression of specific viewpoints and vague legal restrictions.

Indeed, in every case where the ACLU has challenged classroom censorship and the teaching of “divisive concepts,” we have prevailed. In November 2022, a federal court granted our request for a preliminary injunction blocking Florida from enforcing HB 7/SB 148, the so-called “Stop W.O.K.E. Act.”⁴⁵ The Act is a classroom

copyright law championed by Governor Ron DeSantis⁴⁶ that severely restricts Florida educators and students from learning and talking about issues related to race and gender in higher education classrooms.⁴⁷ Similarly, in May 2024, a federal court agreed that New Hampshire’s classroom censorship law, the “Banned Concepts Act,”⁴⁸ is unconstitutional.⁴⁹ The law actively discouraged public school teachers from teaching and talking about race, gender, sexual orientation, disability, and gender identity inside and outside the classroom.⁵⁰ And, in June 2024, a federal court granted a partial preliminary injunction that prevents Oklahoma’s classroom censorship law, HB 1775, from going into effect in university classrooms.⁵¹ The law sought to severely restrict teachers and students in K-12 public schools and public universities from learning and talking about race and gender.⁵²

Should a second Trump administration increase its attacks in this area, we will commensurately increase our litigation challenging such efforts, building on the successful blueprint we have already created. These classroom bans do not simply violate students’ and educators’ constitutional rights: they undermine student safety, academic achievement, and student retention. Researchers and educators have recognized that a school-wide approach involving education and training is, for example, necessary to combat harassment and bullying on the basis of race and gender.⁵³ Laws banning

42 *Supra* no. 5.

43 Watson, *supra* no. 10; The Chronicle of Higher Education, *DEI Legislation Tracker*, <https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts>.

44 Blackburn, *supra* no. 14.

45 ACLU, *Pernell v. Lamb*, (Jul. 7, 2023), <https://www.aclu.org/cases/pernell-v-lamb>.

46 PBS NewsHour, *Florida moves to restrict what school can teach about systemic racism*, (Jul. 8, 2022), <https://www.pbs.org/newshour/show/florida-moves-to-restrict-what-schools-can-teach-about-systemic-racism>.

47 *Supra* no. 34.

48 ACLU, *Largest Teachers’ Union NEA-NH, Leading Disability And LGBTQ+ Advocacy Groups, File Federal Lawsuit Challenging New Hampshire Classroom Censorship Law* (Dec. 20, 2021), <https://www.aclu.org/press-releases/aclu-largest-teachers-union-nea-nh-leading-disability-and-lgbtq-advocacy-groups-file>; Ari Mischik et al., *Victory: Court Declares NH Classroom Censorship Law Unconstitutional*, CLU (May. 28, 2024), <https://www.aclu-nh.org/en/press-releases/victory-court-declares-nh-classroom-censorship-law-unconstitutional>.

49 Gilles Bissonnette & Emerson Sykes, *Victory: Court Declares NH Classroom Censorship Law Unconstitutional*, ACLU (May 28, 2024), <https://www.aclu.org/press-releases/victory-court-declares-nh-classroom-censorship-law-unconstitutional>.

50 *Mejia et al. v. Edelblut et al.* 1:21 U.S. 01077.

51 ACLU, *Bert v. Connor*, (Oct. 29, 2021), <https://www.aclu.org/cases/bert-v-oconnor>.

52 Press Release, ACLU, *Federal Court Partially Halts Oklahoma’s Classroom Censorship Law* (June 17, 2024), <https://www.aclu.org/press-releases/federal-court-partially-halts-oklahomas-classroom-censorship-law>.

53 American Psychological Association, *Students Experiencing Bullying* (Oct. 2021), <https://www.apa.org/ed/schools/primer/bullying>.

conversations about race jeopardize this important work and create educational environments that are unwelcoming to students of color and other marginalized students.

Additionally, for students of color, the ability to learn about the experiences and viewpoints of people of color and America's legacy of racism is critical to feeling connected and equally valued. Further, research shows that an inclusive K-12 and college curriculum and environment is a significant contributor to the retention and academic success of not just students of color, but *all* students. Studies have found that learning about racism and its implications has a positive impact on the development of critical thinking skills and critical consciousness, and contributes to a more complex issue analysis. For example, both white college students and students of color in a racial justice course demonstrated growth in their problem-solving and analytical skills.⁵⁴ Other researchers have noted an increase in math standardized test scores of middle school students following implementation of anti-bias education programs.⁵⁵ The inclusion of an ethnic studies course for ninth-graders in California was also found to significantly increase student attendance and GPA by 1.4 points.⁵⁶ These educational efforts, in other words, can have marked positive effects on educational outcomes, which are critical given persistent retention and achievement gaps between students.

Considering these important goals and constitutional principles, the ACLU will neutralize threats to diverse, inclusive campuses dedicated to creating vibrant educational experiences that are foundational to our multiracial democracy. We will build on our successful legal challenges⁵⁷ to unconstitutional state laws in Florida,⁵⁸

Oklahoma,⁵⁹ and New Hampshire⁶⁰ — and to similar unconstitutional crackdowns on academic freedom — we will continue to establish strong precedent, applicable across jurisdictions, that we will use to strike down Trump's efforts to stifle speech and DEI activities around issues of race and gender in U.S. schools and college campuses.

Advocacy Response

Education is primarily a state and local responsibility, and each state constitution mandates the creation of a free K-12 public education system with distinct requirements concerning the quality of education. As a result, states and communities, as well as public and private organizations operating on behalf of those entities, develop curricula concerning what students should learn by each grade level.⁶¹ Because state and local education agencies play a lead role in K-12 education policy and best understand the needs of and climate within their own schools, they are uniquely positioned to effectively mobilize against any efforts by a Trump administration to mischaracterize inclusive education and its value to schools and students. Consequently, the ACLU will lobby state assembly members to enact laws mandating inclusive curricula, and prohibiting the banning, removal, or restriction of books at the K-12 level. In addition, in states where there are constitutional mandates for a minimum quality of education, the ACLU will request opinions from state attorneys general concerning state constitutional mandates for inclusive curricula and/or curricula that accurately reflect historical events and government policies in K-12 schools. On the federal level, the ACLU will work with coalition members to lobby against bills that seek to prohibit inclusive curricula in post-secondary institutions and professional schools.

54 Joe Bandy, Brielle M. Harbin, & Amie Thurber, *Teaching Race and Racial Justice: Developing Students' Cognitive and Affective Understanding*. *Teaching and Learning Inquiry* 9, no. 1 (2021): 130-37.

55 Philene Harte-Weiner, *Improving Student Academic Performance through Anti-Bias Education*. ProQuest LLC (2013), <https://www.proquest.com/openview/be182f909a6df7da51f8fc56d25af92b/%201.pdf?pq-origsite=gscholar&cbl=18750>.

56 Thomas S. Dee & Emily K. Penner, *The Causal Effects of Cultural Relevance: Evidence From an Ethnic Studies Curriculum*, *American Educational Research Journal* 54, no. 1 (2017): 12, <https://files.eric.ed.gov/fulltext/EJ1132535.pdf>.

57 *Supra* no. 34; *Supra* no. 52; Thomas Dewitt, *NH federal court strikes down 'banned concepts' teaching law*, *New Hampshire Bulletin* (May 28, 2024), <https://newhampshirebulletin.com/2024/05/28/nh-federal-court-strikes-down-banned-concepts-teaching-law/>.

58 *Supra* no. 45.

59 *Supra* no. 51.

60 ACLU, *supra* no. 48; Mischik, *supra* no. 48.

61 U.S. Department of Education, *The Federal Role in Education*, <https://www2.ed.gov/about/overview/fed/role.html>.

The ACLU will intensify its role defending access to educational opportunities for students of color, mitigating the impact of a Trump DOJ's retreat from that role.

Educational access continues to be a key driver of socio-economic success and stability, and yet educational opportunity in the U.S. too often depends on race and ethnicity, wealth, and geography. Even as our student population across the nation is more diverse than ever, *all* students — irrespective of race⁶² — are more likely to attend racially segregated schools, with Black and Latine students more likely to attend schools that are highly racially segregated and economically under-resourced.⁶³ In fact, both Black and Latine students are *increasingly* educated in intensely segregated schools.⁶⁴ The confluence of housing segregation and growing income inequality means that, in addition to attending racially segregated schools, Black and Latine students are significantly more likely to attend high-poverty schools.⁶⁵ This double segregation occurs because Black and Latine families are disproportionately concentrated, at all income levels, in segregated neighborhoods with fewer resources than predominantly white communities with similar income demographics.⁶⁶ Thus, public schools with higher densities of Black and Latine students receive fewer resources on average, despite higher needs.⁶⁷ Double segregation of this kind disadvantages students academically, creating performance gaps that have long-lasting effects on Black and Latine students' future career prospects.⁶⁸

These facts illustrate the critical importance of proactively and aggressively desegregating schools around the country. In the K-12 setting, school districts are pursuing constitutionally sound, race-neutral efforts to make access to education more equitable. And, even after the U.S. Supreme Court's curtailment of affirmative action programs in 2023, institutions of higher education *can* still lawfully strive to pursue a diverse student body, as the ACLU and our partners have made clear in the wake of that decision.⁶⁹

Nevertheless, the conservative legal movement has targeted even these efforts, and Trump promises to steer the DOJ away from its historical role of defending such policies and programs. This threatens to exacerbate educational disparities across the country and deepen economic and professional inequality.

Legal Analysis/Litigation Response

We will continue to provide critical guidance and support for efforts by institutions and school districts around the country to combat these forms of segregation that are still constitutionally sound, despite aggressive messaging to the contrary. In June 2023, in two cases brought by Students for Fair Admissions (SFFA), the Supreme Court struck down longstanding affirmative action admissions policies at both Harvard University and the University of North Carolina.⁷⁰ Nonetheless, the court left open a number of pathways to increase access to educational opportunity. We will continue to build on our inclusive education assistance for educational institutions, highlighting the tools that still remain available.⁷¹ We will

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- 62 It is important to recognize that data collection grouping together all Asian Americans overlooks the immense diversity and needs within the growing population of AAPI public school students, suggesting the need for more, not less, attention to multifaceted diversity in education. See, e.g., Amicus Br. of ACLU et al. in *Coal. for TJ v. Fairfax Cnty. Sch. Bd.* (4th Cir. Cert denied), at 12-16. Additionally, the data used to assess these nationwide trends did not enable an analysis of Native American and Indigenous students.
- 63 Sequoia Carrillo & Pooja Salhotra, *The U.S. student population is more diverse, but schools are still highly segregated*, NPR (July 14, 2022), <https://www.npr.org/2022/07/14/1111060299/school-segregation-report>.
- 64 Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, Univ. Cal. L.A. Civil Rights Project, 11-12 (2014), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.
- 65 Orfield, *supra* no. 64 at 15, 38-39.
- 66 Will McGrew, *U.S. School Segregation in the 21st Century*, Wash. Ctr. for Equitable Growth, 11 (2019), <https://equitablegrowth.org/wp-content/uploads/2019/10/101519-school-seg.pdf>.
- 67 Genevieve Siegel-Hawley et al., *Double Segregation by Race and Poverty in Virginia Schools*, Penn State Ctr. for Educ. & Civil Rights, 1 (2021), [https://cecr.ed.psu.edu/sites/default/files/Double Segregation by Race and Poverty Virginia Schools 2021.pdf](https://cecr.ed.psu.edu/sites/default/files/Double_Segregation_by_Race_and_Poverty_Virginia_Schools_2021.pdf).
- 68 See, e.g., Emma García, *Schools are still segregated, and black children are paying a price*, Econ. Pol'y Inst. (2020), <https://files.eric.ed.gov/fulltext/ED603475.pdf>, at 4.
- 69 *Supra* no. 37.
- 70 *Students for Fair Admissions, Inc. v. University of North Carolina and Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).
- 71 *Supra* no. 37.

defend the ability of local and state actors to ensure that educational opportunities are open to all, and that addressing societal discrimination remains a legitimate objective under the governing law. At the K-12 level, for example, the ACLU will defend local efforts to address segregation and exclusion based on past and present discriminatory practices — including redlining, predatory lending, and steering — by both state and private actors.

Two illustrative examples are worth unpacking. School districts in both Virginia and Massachusetts have adopted race-neutral efforts to promote equitable access to competitive high schools, and courts have thus far upheld their efforts, consistent with the *SFFA* decision.⁷² For instance, in 2020, in an effort to expand access to the highly competitive Thomas Jefferson High School for Science and Technology (TJ), a prestigious public magnet school that serves part of Northern Virginia, the Fairfax County School Board revised the admissions process. They eliminated the need for a standardized test, removed a \$100 application fee, and allocated a small number of seats in the incoming class of 2025 to each public middle school in the region, while evaluating students on their grades, essays, and experience factors, including students who are economically disadvantaged, English language learners, special education students, or students who are currently attending underrepresented middle schools.⁷³ These efforts eliminated barriers to admission for many students across Fairfax County schools.⁷⁴

Despite the fact that the admissions policy was racially neutral, a right-wing group challenged the policy as a form of racial discrimination under the 14th Amendment’s equal protection clause. The challengers contended that “the [School] Board adopted it with a racially discriminatory purpose” — that is, “to racially balance TJ.”⁷⁵ With our partners, the ACLU weighed in on the case before the

Fourth Circuit, laying out how and why school communities can and should be able to lawfully consider the impacts of admissions policies on diversity and access as schools across the country are increasingly racially segregated and unequal.⁷⁶

Following hotly contested litigation, the Fourth Circuit upheld the admissions policy, finding that its “central aim is to equalize opportunity for those students hoping to attend one of the nation’s best public schools, and to foster diversity of all stripes among TJ’s student body.”⁷⁷ In light of the school board’s careful balancing of relevant factors, the court was “satisfied that [its] adoption of the challenged admissions policy fully comports with the Fourteenth Amendment’s demand of equal protection under the law.”⁷⁸ The Supreme Court subsequently declined to hear the case, leaving the Fourth Circuit’s decision intact.⁷⁹

Similar strategies to expand access to crucial education resources have survived attacks in Massachusetts. In 2023, the First Circuit upheld an admissions plan for three selective Boston public schools that was based on grades and zip code — with preference given to students with top grades from lower-income zip codes — which was adopted to address persistent racial disparities in admissions.⁸⁰ The challengers have requested that the Supreme Court review the First Circuit’s decision, and if the court takes the case, we will weigh in, as we did in the First Circuit,⁸¹ to ensure that equal protection standards are not distorted and that the court is well-informed of the multitudinous importance of diversity and open opportunity in education.

These cases demonstrate courts will still uphold meaningful and effective tools to tackle unequal educational access in order to remedy historical discrimination. As Justice Brett Kavanaugh, who joined the majority in the

72 *Amicus Br. of ACLU et al. in Coal. for TJ v. Fairfax Cnty. Sch. Bd.* (4th Cir. Cert denied); see also *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 52 (1st Cir. 2023), pet. for cert. filed No. 23-1137 (Apr. 19, 2024).

73 *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 874–75 (4th Cir. 2023), cert. denied, 218 L. Ed. 2d 71 (Feb. 20, 2024).

74 *Supra* no. 72.

75 *Supra* no. 73.

76 *Supra* no. 72.

77 *Supra* no. 73.

78 *Supra* no. 73.

79 Adam Liptak, *Supreme Court Won’t Hear New Case on Race and School Admissions*, N.Y. Times (Feb. 20, 2024), <https://www.nytimes.com/2024/02/20/us/supreme-court-race-school-admissions.html>.

80 *Bos. Parent Coal. for Acad. Excellence Corp.*, 89 F.4th 46, 53.

81 *Br. of ACLU et al. as amicus curie, Boston Parent Coalition for Academic Excellence v. The School Committee of the City of Boston et al.*, Nos. 21-1303, 22-1144, 2022 WL 6376133.

affirmative action cases, has acknowledged, “governments and universities still ‘can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.’”⁸² The Supreme Court has been clear that government actions undertaken to ensure that opportunities are “equally open” to people of all races are still permissible.⁸³ Indeed, even race-conscious approaches should be upheld if they are designed to remediate “specific, identified instances of past discrimination,”⁸⁴ and where they are necessary to “avoid imminent and serious risks to human safety” in specific contexts.⁸⁵

Further, in *SFFA*, the court left affirmative action policies at military academies intact “in light of the potentially distinct interests that military academies may present.”⁸⁶ Seeking to expand on the *Harvard/UNC* decision, *SFFA* subsequently filed two new lawsuits challenging race-conscious admissions policies at the U.S. Naval Academy and West Point. While the Biden administration has strongly defended those admission policies, the Trump campaign has promised to abandon the federal government’s defense of both lawsuits. Given the Supreme Court’s observations about potential distinct interests at these two institutions, that retreat is unwarranted and the ACLU is prepared to mitigate its effects. We filed amicus briefs in both military academy lawsuits on behalf of Black women military veterans, and we will work closely with current and former military members of color to ensure that their interests are represented in the litigation and any related changes to admissions. The Trump campaign’s promise to abandon military academies’ use of affirmative action would be more restrictive of opportunity than the Supreme Court’s ruling requires.⁸⁷ To respond to this unwarranted dismantling of a key tool

advancing diversity in military academies, the ACLU and our allied organizations will consider engaging Congress for fairer opportunities for potential military academy applicants of color at other points in the pipeline to admission.⁸⁸

In this new legal landscape, the ACLU will continue to defend vital efforts to counteract historical discrimination and unequal access to educational opportunity around the country in the face of a Trump administration assault. We will continue to pursue litigation on behalf of K-12 students and other stakeholders to defend *SFFA*-compliant steps taken by school districts to increase access for disadvantaged students, including those disadvantaged by race, and support public high schools offering unique resources and opportunities that are working to redress the systemic racial exclusion caused by deeply flawed, test-only admissions policies.⁸⁹ And we will do so even if the DOJ abandons its historical commitments, and itself attacks these programs and policies.

Advocacy Response

The ACLU will also advocate on the state and federal level to permit post-secondary institutions to utilize lawful programs and practices to advance diversity goals amongst students and faculty. The ACLU will work with coalition partners to aggressively lobby against state and federal bills that would preclude those institutions from requiring, requesting, or considering any “diversity statements” from current or prospective students or faculty members, given that the Supreme Court has explicitly found that higher education institutions may consider “an applicant’s discussion of how race affected the applicant’s life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular

82 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 317 (2023) (Kavanaugh, J. concurring).

83 *Allen v. Milligan*, 143 S. Ct. 1487, 1501 (2023).

84 *Supra* no. 82.

85 *SFFA* at 207 (citing *Johnson v. California*, 543 U.S. 499, 512-13 (2005)).

86 *SFFA* at 213 n. 4.

87 *Student for Fair Admissions v. The United States Military Academy at West Point et al.*, 7 U.S. 8262 (2023); *Students for Fair Admissions v. The United States Naval Academy et al.*, 1:23 U.S. 02699 (2023).

88 For example, all applicants must be nominated by a member of Congress or other U.S. official, with approximately two-thirds of enrolled student having received a Congressional nomination. See GATEKEEPERS TO OPPORTUNITY: *Racial Disparities in Congressional Nominations to the Military Service Academies*, 3 (2021), <https://ctveteranslegal.org/wp-content/uploads/2021/03/3.16.2021-Final-Embargoed-Gatekeepers-to-Opportunity-Racial-Disparities-in-Congressional-Nominations-to-the-Service-Academies.pdf>. Yet, because members of Congress disproportionately nominate more white candidates than Black, Latine, Asian- American or Pacific Islander candidates, *id.*, we will push for more opportunities in the nomination process for candidates of color.

89 *Amicus Br. of ACLU et al. in Coalition for TJ v. Fairfax County School Board* (4th Cir. Cert denied); see also *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 52 (1st Cir. 2023), *pet. for cert. filed No. 23-1137* (Apr. 19, 2024); *Christa McAuliffe Intermediate School PTO v. Bill de Blasio, Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. 2019).

applicant can contribute” to the institution.⁹⁰ Similarly, statements from prospective or current faculty members explaining how their teaching, research, or service has or would promote diversity are clearly relevant to a faculty member’s professional experiences and scholarship.

The ACLU will challenge aggressive and unlawful rollbacks of critical federal anti-discrimination protections.

Trump also threatens to double down and even expand on his prior administration’s attempts to roll back critical federal protections designed to combat discrimination in, and ensure access to, housing, education, health care, and other essential resources.

Legal Analysis/Litigation & Advocacy Response

In 2020, for example, the Trump administration U.S. Department of Housing and Urban Development (HUD) issued a rule that significantly narrowed disparate impact liability under the FHA by adding new pleading and proof requirements for parties pursuing FHA claims, and new defenses for actors and entities named in those challenges. These actions made it more difficult to establish that policies and practices that disproportionately harm

people of color and other protected groups violate the FHA.⁹¹

The ACLU, with partners, served as counsel for the Open Communities Alliance and Southcoast Fair Housing to challenge the Trump administration’s gutting of the disparate impact standard.⁹² In companion litigation, a federal court enjoined the Trump administration’s regressive rule, concluding that its key provisions could not be “found in any judicial decision” and were “inadequately justified.”⁹³ Ultimately, in 2023, and after we commented on the critical need to do so,⁹⁴ HUD reinstated the 2013 discriminatory effects rule in the form of the Restoring HUD’s Discriminatory Effects Standard Final Rule.⁹⁵ In so doing, HUD emphasized that the 2013 rule is more consistent with how the FHA has been applied in the courts and by HUD for more than 50 years, and that it more effectively implements the Act’s broad remedial purpose of eliminating unjustifiable discriminatory practices from the housing market.⁹⁶

Similarly, in 2018, the Trump administration suspended the 2015 Affirmatively Furthering Fair Housing (AFFH) Rule,⁹⁷ and in 2020 issued a new Preserving Community and Neighborhood Choice Rule, thus repealing the 2015 AFFH Rule.⁹⁸ The suspension and eventual repeal of the 2015 AFFH Rule undermined critical fair housing

90 600 U.S. 181, 188 (2023).

91 Department of Housing and Urban Development, 24 C.F.R. § 100 (2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-24/pdf/2020-19887.pdf>.

92 *Open Communities Alliance et al. v. Carson et al.*, No. 20-cv-01587 (D. Conn. 2020).

93 *Mass. Fair Hous. Ctr. v. HUD*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020) (holding that the 2020 Rule’s “new and undefined terminology, altered burden-shifting framework, and perplexing defenses accomplish the opposite of clarity”).

94 Ronald Newman et al., *ACLU Comments to Hud on Reinstatement of the 2013 FHA Disparate Impact Standard* (Nov. 10, 2021), ACLU <https://www.aclu.org/documents/aclu-comments-hud-reinstatement-2013-fha-disparate-impact-standard>.

95 Department of Housing and Urban Development 24 C.F.R. § 100 (2023), <https://www.federalregister.gov/documents/2023/03/31/2023-05836/reinstatement-of-huds-discriminatory-effects-standard> <https://www.federalregister.gov/documents/2023/03/31/2023-05836/reinstatement-of-huds-discriminatory-effects-standard>.

96 Press Release, U.S. Department of Housing and Urban Development, *HUD Restores “Discriminatory Effects” Rule* (Mar. 17, 2023), https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_054.

97 *Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments*, 83 Fed. Reg. 23927 (May 23, 2018) (The ACLU was among the counsel for the National Fair Housing Alliance and other plaintiffs that challenged the suspension of the 2015 AFFH Rule); *Nat’l Fair Hous. All. v. Carson*, No. 18-cv-01076 (D.D.C. May 8, 2018).

98 *Preserving Community and Neighborhood Choice*, 85 Fed. Reg. 47899 (Aug. 7, 2020).

advancements and substantially weakened HUD's authority and ability to meet its AFFH obligation under the FHA.⁹⁹ The 2015 AFFH Rule represented a critical step to ensure that entities such as HUD, states, local jurisdictions, and public housing authorities fulfilled their AFFH obligations by creating a framework to remove unfair barriers to housing, dismantle housing practices that entrench segregation, and increase access to housing and community assets for people of color and other vulnerable and marginalized groups. The 2015 rule required cities and towns to create a plan to address segregation and discrimination and to lay out concrete goals for bringing fair housing and opportunity to members of all the groups protected by the FHA.¹⁰⁰

Examples of these goals included building affordable housing in areas well-served by transit and prohibiting landlords from discriminating against people who use a government subsidy to pay rent. In the first few years it was in effect, the AFFH Rule was instrumental in making strides in attacking deeply rooted segregation and expanding access to housing. The AFFH Rule also proved valuable in surfacing harmful fair housing issues that were often overlooked. For example, the city of Ithaca, New York used the AFFH process to prioritize addressing policies and practices that displace victims of domestic violence, sexual assault, and stalking.¹⁰¹

The ACLU, with partners, represented the National Fair Housing Alliance and other plaintiffs to challenge this suspension of the 2015 AFFH Rule.¹⁰² Like our challenges to the Trump administration's 2020 disparate impact standard, this lawsuit provided an essential check on unlawful regulatory actions that gutted rules designed to root out discrimination in access to housing and undermined the fight for more inclusive communities – and are critical to ensure that unlawful actions to repeal or otherwise undermine regulations do not go into effect and harm the communities we serve. Should a second Trump administration renew its attacks on key fair housing protections and other essential civil rights protections through rulemaking or other executive action, the ACLU will again forcefully respond, building on the strategies we developed to oppose attacks on these rules and other actions under the prior Trump administration.

We will also file comments on any proposed notices of rulemaking or other federal regulatory action to explain the harms that these anticipated proposals will have on people of color, and other protected and historically marginalized groups, and why such actions are unlawful. These comments often play a critical role in forcing the federal government to consider the implications of their proposed actions on the communities we serve. They are also an essential step in creating the requisite

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- 99 See, e.g., Justin P. Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 *Hous. Pol'y Debate* 736, 747-49 (explaining how HUD's review and initial nonacceptances of the required Assessments of Fair Housing ("AFHs") "represent a strength of the [2015 AFFH] Rule and HUD's implementation of it" and the benefit of the 2015 AFFH Rule in, among other things, helping municipalities to set meaningful goals and analyze fair housing issues); Decl. of Madison Sloan ¶¶ 13-17, *Carson*, ECF No. 2-5 (explaining how the 2015 AFFH Rule's regulatory requirements prompted jurisdictions in Texas to improve AFHs, and how HUD's notice of suspension stopped progress for such jurisdictions); Decl. of Deborah Goldberg ¶ 9, *Carson*, ECF No. 2-6 ("When HUD suspended the AFFH rule in January 2018, HUD removed all of the benefits of efficiency and thought that had gone into the AFH process and returned to the previous [Analysis of Impediments] process which is deeply flawed and lacks the AFH's organized process, consistent template, and common data sources and maps."); Decl. of RuthAnne Visnauskas, *Carson*, ECF No. 26-1 (explaining how the suspension of the 2015 AFFH Rule's requirements would frustrate New York's ability to identify barriers to housing and affirmatively further fair housing statewide).
- 100 Office of the Secretary HUD, 80 F.R. § 42272 (2015), <https://www.federalregister.gov/documents/2015/07/16/2015-17032/affirmatively-furthering-fair-housing>.
- 101 City of Ithaca, *Assessment of Fair Housing 2017*, City of Ithaca, NY, <https://www.cityofithaca.org/DocumentCenter/View/7134/Ithaca-Assessment-of-Fair-Housing-AFH-Goal-Summary-Table-32918?bidId=> at 9; ACLU, *Safe at Home: Fair housing for Survivors of Domestic Violence*, (Dec. 31, 2007), <https://www.aclu.org/documents/safe-home?redirect=cpreirect/33417>.
- 102 See *Nat'l Fair Hous. All. v. Carson*, No. 18-cv-01076 (D.D.C. May 8, 2018).

record for successful challenges to these unlawful agency actions in any legal challenges brought under the Administrative Procedure Act (APA), which authorizes legal action to stop agency rules or other actions that are arbitrary, unsupported by substantial evidence, or otherwise contrary to law.¹⁰³ To ultimately defeat efforts to undermine civil rights protections, we must engage in this record-making process.

For example, during the first Trump Administration, the ACLU submitted comments opposing the gutting of the AFFH Rule,¹⁰⁴ and the proposal to substantially weaken HUD's ability to impose disparate impact liability on bad actors.¹⁰⁵ We have also submitted a comment in support of HUD's more recent Notice of Proposed Rulemaking that built on steps previously taken in HUD's 2015 AFFH Rule, while proposing critical improvements to requirements for states, local jurisdictions, public housing authorities, and other entities receiving HUD funding to create and implement equity plans — including with respect to community engagement — transparency, goal-setting, ways in which to measure progress, and accountability.¹⁰⁶ We will work tirelessly to ensure that the AFFH Rule is restored, and to ensure that federal government actors understand how critical it is to combatting segregation and creating more inclusive communities.

The ACLU will insulate state and local DEI policy interventions designed to remedy persistent inequalities in critical areas such as public health and employment from attack.

In addition to fighting the rollback of federal

anti-discrimination policies and attacks on racial justice efforts in court, the ACLU will work to insulate state and local policy interventions to address persistent inequalities in critical arenas and expand opportunity — policies that are often the fruits of considerable mobilization and advocacy by affected communities — from Trump administration attacks. In partnership with local affiliates on the ground, we can provide critical legal and strategic advice to ensure that such programs meet current legal standards.

DEI programs and initiatives date back to the civil rights movement. The landmark Civil Rights Act of 1964 enforced school desegregation, outlawed employment discrimination based on race, religion, sex, color, and national origin, and established the Equal Employment Opportunity Commission. In response, public and private sector entities began utilizing initiatives and trainings to recruit and retain more people of color and women, and to create inclusive and welcoming educational institutions and workplaces.¹⁰⁷ In addition, federal, state, and local governments used incentives and public contracting programs to expand opportunities for minority- and women-owned businesses.¹⁰⁸ Over time, these initiatives and programs expanded access to education, employment, and public contracting opportunities for women, communities of color, LGBTQ+ communities, active military and veterans, and persons from low-income backgrounds.

These initiatives have also impacted critical fields, such as public health, and programs that provide critical interventions into persistent, deeply rooted inequalities. We know, for example, that there are significant racial disparities in healthcare that are closely linked to structural racism: According to the CDC, Black women are three times more likely to die from a pregnancy-related

103 5 U.S. Code § 706 (2) et seq. In APA challenges, courts must determine if the agency “articulate[d] a satisfactory explanation for its action,” and must identify a “rational connection between the facts found and the choices made” based on the record that was before the agency when it made its decision. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 31 (1983). Indeed, the APA requires that a “court shall review the whole record or those parts of it cited by a party,” 5 U.S.C. § 706, and “[o]rordinarily, courts confine their review to [that] “administrative record.” *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); see also *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (the “full administrative record” is what “was before the Secretary at the time he made his decision”); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”).

104 Press Release, ACLU, *ACLU Files Public Comment Opposing HUD's Proposed Rule Impacting Fair Housing* (Mar. 10, 2020), <https://www.aclu.org/press-releases/aclu-files-public-comment-opposing-huds-proposed-rule-impacting-fair-housing>.

105 Ronald Newman et al., *ACLU Files Public Comment Opposing Hud's Proposed Rule On the Fair Housing Act's Disparate Impact Standard*, ACLU (Oct. 18, 2019), <https://www.aclu.org/documents/aclu-files-public-comment-opposing-huds-proposed-rule-fair-housing-acts-disparate-impact-standard>.

106 See American Civil Liberties Union, *ACLU Comment on HUD's Proposed Rule on Affirmatively Furthering Fair Housing* (Apr. 24, 2023), <https://www.aclu.org/documents/aclu-comment-huds-proposed-rule-affirmatively-furthering-fair-housing-docket-no-fr-6250-p-01>.

107 *Supra* no. 39.

108 See e.g., Minority Business Development Agency, <https://www.mbda.gov/about/history>.

cause than white women due to variation in quality health care and implicit bias.¹⁰⁹ Meanwhile, there is a significant underrepresentation of Black and Latine people in the medical profession.¹¹⁰ Research led by the Health Resources and Services Administration concluded that, on average, every 10 percent increase in the representation of Black primary care physicians in certain counties was associated with 30.6 days of greater life expectancy among Black people in those areas.¹¹¹ To remedy historical discrimination and address these health outcome disparities, public and private scholarship and fellowship programs have been set up to support pathways to the medical profession for underrepresented medical professionals. In response, an organization named Do No Harm has brought a series of legal challenges to these scholarship and fellowship programs, as well as implicit bias trainings in the medical sector.¹¹²

Similarly, guaranteed income programs, delivered alongside other material benefits like housing, childcare, and health care, have emerged as important tools to assist people struggling to make ends meet. A guaranteed income can come in a variety of forms such as a periodic cash payment or an expansion of already existing tax credits. The goal is to make these payments significant enough to put those who most need them on a path to economic security and self-determination; and these programs have had great success. Over 100 guaranteed income pilots have emerged in cities and counties nationwide to provide life-changing, direct assistance to over 38,000 households combined.¹¹³ However, conservative legal activists have made increasing demands, backed by the threat of litigation, that local jurisdictions end guaranteed income programs that

provide basic economic support for the most economically vulnerable, including people of color and LGBTQ+ people.¹¹⁴

Legal & Advocacy Response

We anticipate these attacks would intensify under a Trump administration and be joined by the federal government itself. In partnership with our network of state affiliates and chapters in all 50 states, the District of Columbia, and Puerto Rico, we will seek to intervene in litigation to defend programs addressing racial disparities and fight further erosion of equal protection standards. We will also ramp up our existing work providing legal and strategic advice on current legal standards to local and state actors administering such programs, making sure that they are in the best position to both advance their mission and defend their work against a potential challenge.

At the federal level, the ACLU will work with organizations and policy researchers to explore and document the harmful impact of current anti-DEI laws. The ACLU will also work with coalitions to lobby the congressional caucuses and committees to investigate and document the dismantling of DEI programs in the public and private sector and the resulting social and economic impact on families and state and local governments. And, at the state and local level, the ACLU will lobby state governors and mayors to issue executive orders to create and expand state and locally funded DEI programs and initiatives.

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- 109 Office of Health Equity, *Working Together to Reduce Black Maternal Mortality* (Apr. 8, 2024), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>.
- 110 Hector Mora et al., *The National Deficit of Black and Hispanic Physicians in the U.S. and Projected Estimates of Time to Correction*, JAMA Network (Jun. 1, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9161019/#:~:text=Recent%20work%20has%20found%20that,in%20increased%20underrepresentation.%E2%80%9D3%20These>.
- 111 John E. Snyder, et al., *Black Representation in the Primary Care Physician Workforce and Its Association With Population Life Expectancy and Mortality Rates in the US*, JAMA Network (Apr. 14, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2803898?resultClick=1>. For additional discussion of research documenting the important benefits of representation within the medical professions, see Patrick Boyle, *Do Black patients fare better with Black doctors?*, AAMC (June 6, 2023), <https://www.aamc.org/news/do-black-patients-fare-better-black-doctors>.
- 112 Do No Harm, https://donoharmmedicine.org/litigation/?location=all&case_status=all&topic=all.
- 113 Stanford Basic Income Lab [cartographer], *Global Map of Basic Income Experiments*, <https://basicincome.stanford.edu/experiments-map/>; Economic Security Project, *Champions for Guaranteed Income Celebrate the Announcement of the 100th Guaranteed Income Pilot Program in Five Years*, (Sep. 23, 2022), <https://economicsecurityproject.org/news/champions-for-guaranteed-income-celebrate-the-announcement-of-the-100th-guaranteed-income-pilot-program-in-five-years/>.
- 114 American Civil Rights Project, *Notice of Intent to Sue Over Discriminatory Programs*, (Mar. 21, 2023), <https://www.americancivilrightsproject.org/blog/submissions/notice-of-intent-to-sue-ca-entities/>; Kenneth Niemeyer, *A conservative group is suing to stop a San Francisco basic income program that gives 55 struggling trans residents \$1,200 a month*, Business Insider (Apr. 7, 2024), <https://www.businessinsider.com/judicial-watch-sues-san-francisco-basic-income-program-trans-people-2024-4>

CONCLUSION

Should Trump take office for a second term, he will pose an immediate and sweeping threat to our multi-racial democracy. In an attempt to silence discussions about race and gender, his administration would attack academic freedom and students' constitutional right to learn. Foundational legal principles of civil rights and equal protection law would be in the crosshairs, as would

policies to reduce racial inequality. In the face of these threats, the ACLU stands ready to use all the tools available to us, including litigation and legislative and policy advocacy, to fight for the promise of our democracy and for full and equal freedoms for all of us, whether Black, Latine, Indigenous, Asian or white.

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