

DEI: Definitely Earned It—A Review of Contemporary DEI Initiatives Against Emerging Legal Frameworks

JOSEPH CREMONA[†]

Since 2024, Diversity, Equity, and Inclusion (DEI) programs have ignited a volatile political debate. Fierce opposition continues to attack their very existence. On one hand, proponents of DEI programs argue that such initiatives are a pivotal mechanism for ensuring that historically marginalized communities receive professional opportunities in America. On the other hand, opponents of DEI insist that these programs are detrimental because they prioritize the advancement of minority groups at the expense of their majority counterparts. With the recent enactment of multiple executive orders by President Trump, DEI programs have become the target of a plethora of lawsuits. These legal challenges proceed through various avenues and appear aimed at dismantling DEI initiatives altogether. This Note examines the evolution of modern DEI programs and analyzes them under current legal frameworks. This Note argues that while modern DEI efforts may face legal challenges, they are not inherently unlawful under Title VII and can coexist within the bounds of the First Amendment. Additionally, this Note serves as a guide to both public- and private-sector employers by predicting changes to existing law that will influence the future of DEI programs.

[†] I am deeply grateful to my family, especially my mom, dad, sister, and grandmother Ellen for their unwavering support throughout my life and legal education. A special thank you to my late grandmother, Rita, and my late grandfather, Vinny, whose encouragement and love continue to inspire me every day. I wish they were here to see this journey, but I know they are cheering me on from above. To my professors who helped me write this Note, thank you for your guidance, insight, and for challenging me to think critically and write thoughtfully. I am also thankful to my friends, whose encouragement helped me through the toughest moments in law school. Finally, I extend my sincere appreciation to the staff and editors of the *UC Law Journal*, whose tireless work and collaboration made this publication possible.

TABLE OF CONTENTS

INTRODUCTION.....	247
I. WHAT IS DEI?.....	248
A. HIRING.....	257
B. TRAINING	260
C. “COURSE OF EMPLOYMENT”	261
D. “EGREGIOUS” PROGRAMS	264
II. DOES DEI VIOLATE TITLE VII?.....	264
A. DEI PROGRAMS ARE NOT INHERENTLY VIOLATIVE OF TITLE VII.....	264
B. DISPARATE IMPACT & DEI	266
C. REVERSE DISCRIMINATION & DEI.....	269
D. DEI UNDER HOSTILE WORK ENVIRONMENT	275
III. CAN DEI PROGRAMS BE HARMONIZED WITH THE FIRST AMENDMENT?.....	279
A. PLAINTIFF’S USE OF THE FIRST AMENDMENT	280
1. First Amendment Retaliation.....	281
2. Compelled Speech Claims.	284
B. THE FIRST AMENDMENT AIDING DEI	286
CONCLUSION	286

INTRODUCTION

Diversity, Equity, and Inclusion (DEI) programs have become a highly contested political issue. Today, U.S. companies spend approximately \$8 billion a year on DEI trainings,¹ and this number is expected to double by 2026.² Additionally, forty-three percent of companies continue to maintain and promote DEI goals.³ For example, a 2024 Forbes study found that sixty-seven percent of companies have contacted talent programs to recruit diverse employees, and seventy percent of companies have supplier diversity programs that prioritize sourcing businesses owned by underrepresented groups.⁴ Companies expend considerable resources when it comes to implementing DEI programs.

However, since the start of President Donald Trump's second term, DEI has faced significant opposition, including opposition from the White House. Opponents of DEI programs maintain that these programs create a division among racial and ethnic groups by prioritizing marginalized groups over their majority counterparts.⁵ Opponents also argue that DEI programs curtail free speech among employees.⁶

These concerns soon manifested into concrete policy measures. On January 21, 2025, President Donald Trump issued an executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."⁷ Although this executive order was primarily focused on public sector agencies, it included a section directed at the private sector.⁸ Section 4 instructed the Attorney General to issue a report within 120 days that contained "recommendations for enforcing Federal civil rights-laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI."⁹

1. Joan C. Williams & Jamie Dolkas, *Data-Driven Diversity*, HARV. BUS. REV. (Mar. 2022), <https://hbr.org/2022/03/data-driven-diversity>.

2. JOAN C. WILLIAMS, REBECCA L. RAY, RACHEL M. KORN, ASMA. GHANI & RAAFIYA ALI KHAN, TRADITIONAL BIAS TRAINING DOESN'T WORK—BIAS INTERRUPTERS DO 4 (The Conf. Bd. 2024), <https://biasinterrupters.org/wp-content/uploads/2024/06/Traditional-Bias-Training-Doesnt-Work-Bias-Interrupters-Do.pdf>.

3. Julie Kratz, *Despite DEI Pushback, News Reports Shows Companies Stay Committed to DEI*, FORBES (Nov. 20, 2024, at 08:00 ET), <https://www.forbes.com/sites/juliekratz/2024/11/20/despite-dei-pushback-new-report-shows-companies-stay-committed-to-dei>.

4. *Id.* A supplier diversity program is a corporate initiative that prioritizes or encourages sourcing goods and services from businesses owned by underrepresented or minority groups. Michael R. Hatcher & Jennifer E. Burgess, *Ensure Your Supplier Diversity Program Meets Legal Requirements and Thrives*, JACKSON LEWIS (Oct. 16, 2024), <https://www.jacksonlewis.com/insights/ensure-your-supplier-diversity-program-meets-legal-requirements-and-thrives>.

5. Marybeth Gasman, *What's With the Objection to DEI Work?*, FORBES (June 20, 2023, at 08:43 ET), <https://www.forbes.com/sites/marybethgasman/2023/06/20/whats-with-the-objection-to-dei-work>.

6. *Id.*

7. Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

8. *Id.*

9. *Id.* at 8635.

Although the report was not made publicly available, on July 29, 2025, Attorney General Pam Bondi released a memorandum directed at all federal agencies detailing best practices for avoiding the “[I]legal pitfalls of DEI [p]rograms.”¹⁰ Therein, General Bondi took aim at practices such as race-based scholarships and programs, the use of personal and diversity statements, and “cultural competence” requirements while preserving practices such as the importance of sex-separated intimate spaces and athletic competitions.¹¹

In light of the seemingly deliberate efforts to dismantle DEI initiatives, a critical question emerges: Can DEI programs continue to exist under current law, and if so, what are the implications for the hundreds of companies implementing them nationwide? In exploring that question, this Note argues that contemporary DEI programs do not inherently violate existing federal employment law or an employee’s First Amendment rights.

Part I begins by examining the history of DEI programs and how they have evolved by describing three approaches: hiring practices, trainings, and decisions made in the “course of employment.” Part II then evaluates whether DEI initiatives are permissible under Title VII, and how the Trump administration and opponents of DEI might attempt to alter these standards. Part III examines the First Amendment within the context of employee claims and how it may preserve expressive conduct through DEI programs. This Note concludes that despite the current resistance to DEI, employers retain autonomy to implement a wide range of DEI programs.

I. WHAT IS DEI?

DEI has become a widely used buzzword, used by both private citizens and government actors in various contexts that often share little meaning or connection.¹² By way of illustration, critics use DEI to explain vice presidential selections,¹³ mayoral appointments,¹⁴ plane crashes,¹⁵ and even catastrophic wildfires.¹⁶ With so many competing uses of the term, Americans have struggled

10. U.S. DEP’T OF JUST., GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING REGARDING UNLAWFUL DISCRIMINATION 2 (July 29, 2025).

11. *Id.*

12. Conor Friedersdorf, *DEI Has Lost All Meaning*, ATLANTIC (Mar. 2, 2025), <https://www.theatlantic.com/ideas/archive/2025/03/dei-buzzword-debate-harms/681882>.

13. See Mike Gonzalez, *Yes, Kamala Is a DEI Hire. Shouldn’t the Left Be Happy About That?*, HERITAGE FOUND. (July 30, 2024), <https://www.heritage.org/progressivism/commentary/yes-kamala-dei-hire-shouldnt-the-left-be-happy-about>.

14. See Shaun Harper, *The L.A. Fires Have Nothing to Do with DEI*, TIME (Jan. 13, 2025, at 15:30 ET), <https://time.com/7206543/the-los-angeles-fires-have-nothing-to-do-with-dei>.

15. See Curtis Bunn, Kayla Guilfoil & Janelle Griffith, *Trump Sparks Outcry with Implication that DEI Policies Are at Fault in D.C. Midair Collision*, NBC NEWS (Feb. 1, 2025, at 15:33 PT), <https://www.nbcnews.com/news/nbcblk/trump-plane-crash-dei-press-conference-biden-faa-washington-dc-rcna190020>.

16. See Harper, *supra* note 14.

to define “DEI.”¹⁷ This may be because DEI has “no universal or broadly shared definition.”¹⁸ Beyond the common understandings of the terms “diversity,” “equity,” and “inclusion,” governmental entities, institutions, organizations, and corporations define DEI differently, sometimes even in conflicting ways.¹⁹ Nonetheless, most DEI programs are implemented to achieve the same goal: to foster diversity and eliminate bias in the workplace.²⁰

To gain a more comprehensive understanding of what DEI is today, the acronym can be broken down into its respective parts. Defined separately, “diversity” stands for the presence and participation in society of individuals with varying backgrounds and perspectives who are a part of traditionally marginalized groups.²¹ “Equity” means equal access to opportunities and fair, impartial treatment from the employer.²² “Inclusion” refers to fostering a sense of belonging that brings diverse ideas, viewpoints and perspectives into the workplace.²³ These three initiatives are implemented with the goal of putting marginalized groups on an equal footing with their majority counterparts.²⁴ Marginalized groups at the forefront of DEI efforts include, but are not limited to, women, the LGBTQIA+ community, historically discriminated racial and ethnic groups (such as African Americans, Latinx, and Asian communities), first-generation college applicants, and individuals of lower socio-economic class.²⁵ In the workplace, DEI initiatives are implemented to remedy the lack of opportunities for prospective employees from marginalized communities and dispel workplace biases.²⁶

17. See Interest in DEI in the United States Over the Past Five Years, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=today%205-y&geo=US&q=%2Fg%2F11sfpd6b6dm,dei> (showing that since Trump began his third presidential campaign on November 15, 2022, Google searches including the term “DEI” have peaked twice).

18. See Friedersdorf, *supra* note 12.

19. *Id.*

20. *Unlocking the Power of DEI in Workplace*, WOMEN BACK TO WORK, <https://womenbacktowork.org/unlocking-the-power-of-dei-in-workplace> (last visited Oct. 6, 2025).

21. Michael Boyles, *DEI: What Is It & How to Champion It in the Workplace*, HARV. BUS. SCH. ONLINE (Oct. 3, 2023), <https://online.hbs.edu/blog/post/what-is-dei> (explaining the difference between “diversity” and “inclusion”); *Equity, Diversity, and Inclusion*, AM. PSYCH. ASS’N, <https://www.apa.org/topics/equity-diversity-inclusion> (last visited Oct. 6, 2025) (same); *What Are Diversity, Equity, and Inclusion (DEI)?*, UNIV. VA. DEP’T PSYCH., <https://psychology.as.virginia.edu/what-are-diversity-equity-and-inclusion-dei> (last visited Oct. 6, 2025).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Your Guide to Diversity, Equity & Inclusion (DEI) in the Workplace*, QUALTRICS (Oct. 30, 2024), <https://www.qualtrics.com/experience-management/employee/dei> (last visited Oct. 6, 2025).

26. See generally, e.g., U.S. DEP’T OF JUSTICE, COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: UNDERSTANDING BIAS: A RESOURCE GUIDE (Sep. 29, 2021), https://www.justice.gov/d9/fieldable-panel-panes/basic-panes/attachments/2021/09/29/understanding_bias_content.pdf? (explaining that “[explicit [or conscious] bias is the traditional conceptualization of bias. With explicit bias, individuals are aware of their prejudices and attitudes toward certain groups. Positive or negative preferences for a particular group are conscious. Overt racism and racist comments are examples of explicit biases.”); see 12 *DEI Initiatives to Implement in the Workplace*,

Despite a recent increase in awareness of DEI programs,²⁷ DEI initiatives are not a new concept. DEI initiatives in the workplace first gained footing during the civil rights movement.²⁸ Title VII of the Civil Rights Act of 1964 (Title VII) prohibited qualifying employers from discriminating against their employees based on race, color, religion, sex, or national origin.²⁹ This law marked the first major piece of legislation that addressed inequitable workplaces.³⁰ Additionally, the creation of the Equal Employment Opportunity Commission (EEOC) in 1972 added an extra set of teeth to this new anti-discrimination law as the agency was imbued with the power to hold workplaces accountable for discrimination, including the authority to investigate complaints, subpoena evidence, and file lawsuits directly against employers.³¹

After the enactment of Title VII and the subsequent creation of the EEOC, employees inundated the agency with workplace discrimination filings.³² In response, companies adopted initiatives to remain legally compliant with Title VII,³³ giving rise to DEI initiatives.³⁴ But, in these early days, “DEI” was not used to describe these types of practices.³⁵ They were called “affirmative action” policies.³⁶ Early DEI initiatives formulated during this time consisted of tools that are now common in the American workforce, such as formal job tests, career ladders, and annual performance evaluations.³⁷

As employers developed tools to comply with Title VII, they were simultaneously tested in courts. In 1971, the Supreme Court established the

TALKSPACE (Sep. 17, 2025), <https://business.talkspace.com/articles/dei-initiatives>; see also Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work?*, 10 ANTHROPOLOGY NOW 48, 52 (2018) (evaluating the effectiveness of certain DEI trainings in rooting out unconscious bias).

27. Jared Sharpe, *National UMass Amherst Poll Finds Increased Awareness—and Continuing Support for—Diversity, Equity and Inclusion Programs*, UNIV. MASS. AMHERST (Apr. 22, 2025), <https://www.umass.edu/news/article/national-umass-amherst-poll-finds-increased-awareness-and-continuing-support-diversity>.

28. Nicquel Terry Ellis, *What is DEI, and Why is it Dividing America?*, CNN (Jan. 23, 2025, at 13:15 ET), <https://www.cnn.com/2025/01/22/us/dei-diversity-equity-inclusion-explained/index.html>.

29. 42 U.S.C. § 2000e-2(a).

30. Kiara Alfonseca, *A Look at What DEI Means Amid Trump Executive Orders*, ABC NEWS (Jan. 24, 2025, 10:47 PT), <https://abcnews.go.com/US/dei-programs/story?id=97004455>.

31. 42 U.S.C. § 2000e-4(k).

32. *Id.*

33. *EEOC History: The Law*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/history/eeoc-history-law> (last visited Oct. 6, 2025); see also Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1212–13 (2007).

34. Dobbin & Kelly, *supra* note 33, at 1216.

35. See Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management*, 41 AM. BEHAV. SCI. 960, 964–65 (1998).

36. *Id.* at 963; see also Linda F. Bisson et al., *From Affirmative Action to Inclusion*, in UPROOTING BIAS IN THE ACADEMY: LESSONS FROM THE FIELD 3, 6 (Linda F. Bisson, Laura Grindstaff, Lisceth Brazil-Cruz & Sophie J. Barbu eds., 2022).

37. Frank Dobbin, Alexandra Kalev & Erin Kelly, *Diversity Management in Corporate America*, 6 AM. SOCIO. ASS'N 21, 22–23 (2007).

disparate impact theory in *Griggs v. Duke Power Co.*³⁸ In *Griggs*, the Court held that seemingly neutral policies that disproportionately affect a protected group are illegal, even if there is no intent to discriminate.³⁹ This case laid the groundwork for affirmative action policies aimed at combating disproportionate discrimination in the workplace.⁴⁰ In 1978, the Court in *Regents of the University of California v. Bakke* upheld the Regents' use of race as a factor when making admissions decisions.⁴¹ In the same breath, the Court in *Bakke* ruled that racial quotas were unconstitutional.⁴² *Bakke* helped illuminate which DEI policies could be permissible in an era of development.

Just one year later, in *United Steelworkers v. Weber*, the Court elaborated on its sentiment regarding DEI policies. In *Weber*, the Court upheld a voluntary affirmative action plan that set aside training positions for African American workers in unions.⁴³ The Court held that Title VII does not prohibit private, voluntary, race-conscious affirmative action plans.⁴⁴ *Weber* affirmed that such programs are permissible if they aim to eliminate racial imbalances and do not “unnecessarily trammel” the interests of employees of other races as the plan did not require the discharge of white employees, replacement of white employees, nor created an absolute bar to the advancement of white employees.⁴⁵ This holding empowered organizations to develop new policies aimed at rooting out discrimination.

However, the 1980s marked a period of regression and rebranding for these initiatives. By then, a majority of corporations had positions—and even departments—dedicated to improving workplace opportunities for women and minorities.⁴⁶ Companies also started to create initiatives such as race-relations workshops and special recruitment systems.⁴⁷ But, during this time, then-President Ronald Regan championed corporate deregulation and advocated for companies

38. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (creating the “disparate impact theory” by explaining that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.”).

39. *Id.*

40. NCC Staff, *When the Supreme Court First Ruled on Affirmative Action*, NAT'L CONST. CTR. (June 28, 2023), <https://constitutioncenter.org/blog/when-the-supreme-court-first-ruled-on-affirmative-action>.

41. 438 U.S. 265, 320 (1978).

42. *Id.* at 319–20. Racial quotas are policies that reserve a certain number of employment or membership positions for members of certain ethnic groups. *See id.* at 266, 288–89.

43. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

44. *Id.* at 209.

45. *Id.* at 208.

46. *See Dobbin et al.*, *supra* note 37, at 21; *see also* Rohini Anand & Mary-Frances Winters, *A Retrospective View of Corporate Diversity Training From 1964 to the Present*, 7 *ACAD. MGMT. LEARNING & EDU.* 356, 357–59 (2008).

47. Anand & Winters, *supra* note 46 at 361.

to handle discrimination internally, rather than through government mandates.⁴⁸ This shift rebranded DEI initiatives, which went from the proactive integration known as affirmative action to a more subtle method of integrating diversity: “diversity training.”⁴⁹ Accordingly, equal opportunity managers became diversity managers trained in “sensitivity.”⁵⁰ Corporations introduced specialized training programs designed to develop managerial skills.⁵¹

This also marked the beginning of a broader shift from traditional notions of “affirmative action” toward a focus on diversity. For instance, in 1987, the Supreme Court upheld a public transportation agency’s sex-conscious promotion scheme.⁵² In *Johnson*, the court held that the agency’s affirmative action program did not create an absolute barrier to men from advancing in the specific job.⁵³ *Johnson* shone a glimmer of hope back into DEI programs, and they soon regained momentum.

In the 1990s, the definition of “DEI” was broadened. For context, legislation such as the Americans with Disabilities Act (ADA) was signed into law which extended workplace protections to individuals with disabilities.⁵⁴ This marked a key step in expanding DEI to include those with disabilities. This time also saw a challenge to how race and sex were treated in the workplace.⁵⁵ During the developmental phase for DEI programs, opponents’ complaints were overpowered by corporations’ rush to comply with Title VII and advocates advancing DEI initiatives.⁵⁶ But during the 1990s, opponents’ concerns regarding the “unfairness” of DEI programs started to attract attention.⁵⁷

Legally, DEI during the 1990s saw two different ends of the spectrum. On one hand, the Court in *Adarand Constructors, Inc. v Peña* significantly limited

48. See *id.* at 358; see also Abdallah Fayyad, *What Comes After the DEI Backlash?*, VOX (Feb. 18, 2025, 03:00 PT), <https://www.vox.com/policy/399952/dei-history-success-failure-diversity-equity-inclusion?3>. Because President Regan promoted deregulation, the EEOC, headed by Clarence Thomas, moved away from large discrimination lawsuits and prosecuted narrower individual cases, removing major pressure from corporations to ensure diversity. This shift was associated not only with fewer African Americans in corporate positions but also with a broader increase in Black unemployment. See Calvin Schermerhorn, *Ronald Regan’s Policies Continue to Exacerbate the Racial Wealth Gap*, TIME (Dec. 4, 2023, 08:57 PT), <https://time.com/6334291/racial-wealth-gap-reagan-history>.

49. Dobbin & Kelly, *supra* note 33, at 1211.

50. *Id.*

51. The specialized training programs were implemented with the assumption that incoming workers from underrepresented groups might lack such managerial experience. Dobbin et al., *supra* note 37, at 23; Anand & Winters, *supra* note 46, at 358.

52. See *Johnson v. Transp. Agency*, 480 U.S. 616, 635–36 (1987) (upholding the employer’s sex-conscious affirmative action plan as consistent with Title VII because the plan was designed to remedy gender imbalance in a traditionally male-dominated job category).

53. *Id.* at 637–38.

54. 42 U.S.C. §§ 12101–12213.

55. Anand & Winters, *supra* note 46, at 359.

56. *Id.* at 356.

57. *Id.* at 359.

federal affirmative action policies by holding that all race-based government programs, even those intended to benefit minorities, are subject to strict scrutiny.⁵⁸ On the other hand, the settlement in *Roberts v. Texaco* marked a major advancement for DEI. In *Texaco*, a class of African American plaintiffs were able to secure one of the largest race discrimination settlements in history.⁵⁹ Along with a hefty 115-million-dollar settlement, Texaco was obligated to implement comprehensive diversity reforms including the creation of an independent equality and tolerance task force, company-wide diversity and sensitivity training, and structural changes to hiring, promotion, and human resources practices.⁶⁰ With unclear parameters surrounding DEI and the fear of punitive litigation looming, the 1990's saw many experimental DEI programs.

For instance, some companies implemented training programs focused on getting privileged participants to “admit [their] guilt.”⁶¹ These types of approaches, while also ineffective, contributed to the growing perception of reverse discrimination, which would later evolve into the legal challenges DEI faces today.⁶² Other companies implemented a more “watered-down” approach that implemented initiatives that focused on DEI, but instead focused on making sure everyone felt comfortable during trainings.⁶³ Methods such as the ones described elicited concerns among opponents of DEI, causing opposition to begin growing.

The 1990s also saw the discovery of unconscious bias.⁶⁴ In response, DEI initiatives emerged to address this, some of which led to legal complications. For example, a common practice at this time was known as “adjectives.”⁶⁵ While one of its goals was to acknowledge the persistence of such biases, the training frequently failed to do so, instead leading to co-worker conflict.⁶⁶ In one instance, this initiative even resulted in legal action with employees citing

58. 515 U.S. 200, 224 (1995).

59. *Roberts v. Texaco, Inc. (Texaco Discrimination Litigation)*, BLB&G, <https://www.blbglaw.com/cases-investigations/roberts-v-texaco-inc#:~:text=In%201994%2C%20six%20highly%20qualified,caucasian%20employees%20in%20similar%20positions> (last visited Feb. 9, 2026).

60. Stipulation and Settlement Agreement at 7, 10–36, *Roberts v. Texaco Inc.*, No. 94 Civ. 2015 (CLB) (S.D.N.Y. Jan. 21, 1997).

61. Anand & Winters, *supra* note 46, at 359.

62. *See infra* Part.II.

63. Anand & Winters, *supra* note 46, at 360.

64. Jenny Okonkwo, *Implicit Bias in the Workplace*, ASS'N FOR FIN. PRO'S, <https://www.afponline.org/career-hub/management-resources/diversity-equity-and-inclusion-resources/implicit-bias-in-the-workplace> (last visited Oct. 7, 2025).

65. This practice required participants to write down the first thing that came to mind when thinking about certain minority groups and post them under their respective labels. Anand & Winters, *supra* note 46 at 361.

66. *Id.* at 361–62.

supervisors' documented responses from the exercises as evidence of discriminatory bias or intent.⁶⁷

The early 2000s then signaled the curtailment of DEI-focused programs and policies following two Supreme Court decisions involving race-based affirmative action programs: *Grutter v. Bollinger* and *Gratz v. Bollinger*.⁶⁸ Both cases set boundaries on race-conscious practices in school admissions processes, but both spoke on race-conscious decisions as a whole. Although the Court upheld the use of race-conscious law school admissions criteria in *Grutter*, the 5–4 majority emphasized that such programs are rarely constitutionally permissible.⁶⁹ The Court found that the University of Michigan Law School's admissions policy satisfied strict scrutiny only because it was narrowly tailored to serve a compelling governmental interest—obtaining the educational benefits that flow from a diverse student body.⁷⁰ The majority was careful to underscore that the decision did not amount to blanket approval of all affirmative action programs.⁷¹

In contrast, in *Gratz*, the Court struck down the University of Michigan's undergraduate admissions policy, which automatically awarded points to applicants from certain racial or ethnic minority groups.⁷² The Court held that this mechanized, point-based system was not narrowly tailored to achieve the asserted interest in diversity.⁷³ Unlike the individualized, holistic review process upheld in *Grutter*, the policy in *Gratz* failed strict scrutiny because it did not provide sufficient individualized consideration.⁷⁴ The subtle differences that defined the outcomes in *Grutter* and *Gratz* signaled a warning to affirmative action policies.

During the 2000s, there was also significant judicial preference for anti-bias training. A few years before *Grutter* and *Gratz*, the Court established the *Ellerth-Faragher* affirmative defense.⁷⁵ This defense allows employers to avoid liability for supervisory harassment, provided that they take preventative measures.⁷⁶ Among the practices considered appropriate at the time was the use

67. See *Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259, 307–08 (N.D. Cal. 1992) (finding that subjective and ambiguous promotion and training practices, coupled with supervisors' documented responses made at these training sessions, contributed to discriminatory intent and disparate impact against female employees).

68. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

69. *Grutter*, 539 U.S. at 306.

70. *Id.* at 325.

71. *Id.* at 345.

72. *Gratz*, 539 U.S. at 270.

73. *Id.* at 272; see *Grutter*, 539 U.S. at 309.

74. *Gratz*, 539 U.S. at 275.

75. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780, 807 (1998).

76. See *Ellerth*, 524 U.S. at 745; *Faragher*, 524 U.S. at 806–07.

of proactive training programs.⁷⁷ This sentiment continued throughout the 2000s with many courts holding that regular trainings effectively prevent and address harassment⁷⁸ and that they effectuate the policies behind Title VII.⁷⁹

DEI programs did not see another major shift until 2017. Following the “Me Too” movement, which gained significance in 2017, and the Black Lives Matter movement, which was revitalized in May 2020 following George Floyd’s death, many companies focused their efforts on diversity.⁸⁰ In the face of growing social concerns, companies issued anti-racist statements and were quick to fund DEI programs, like Nike’s “For Once, Don’t Do It” campaign and \$40 million commitment to racial equity initiatives, or Starbucks’ commitment to invest \$100 million in community programs and expand its anti-bias training.⁸¹ Further, an Indeed study conducted three months after George Floyd’s death highlighted that job listings for DEI positions increased by 123%.⁸²

Company responses to social pressure during this time highlighted the importance of DEI in corporate America, but the seeds of opposition were also sewn.⁸³ From 2017 to 2022, DEI was treated as a quick fix to a complex, systematic problem.⁸⁴ Instead of addressing workplace discrimination,

77. See ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, No. 915.002, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N (June 18, 1999), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors>.

78. See *Erickson v. Wis. Dep’t of Corr.*, 469 F.3d 600, 605–06 (7th Cir. 2006) (noting that employers should prevent harassment with “proactive steps such as . . . training employees”); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 877 (9th Cir. 2001) (finding that the defendant exercised reasonable care to prevent sexual harassment in the workplace by maintaining an anti-harassment policy and a “company-wide [anti-harassment] training programs”).

79. See CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N: SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 44–54 (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace>.

80. See Kanishka Singh, *What is DEI, a Practice Trump is Trying to Dismantle?*, REUTERS (Jan. 30, 2025, at 15:34 ET), <https://www.reuters.com/world/us/what-is-dei-practice-trump-is-trying-dismantle-2025-01-30/>; see also Monica Anderson & Colleen McClain, *Americans See Pressure, Rather than Genuine Concern, as Big Factor in Company Statements About Racism*, PEW RSCH. CTR. (Aug. 12, 2020), <https://www.pewresearch.org/short-reads/2020/08/12/americans-see-pressure-rather-than-genuine-concern-as-big-factor-in-company-statements-about-racism> (detailing a study finding that “52% of U.S. adults say it is very or somewhat important that companies and organizations make public statements about political or social issues,” but that the percentage rose substantially for people of color—75% for Black respondents, 70% for Asians, and 66% for Hispanics).

81. See *NIKE, Inc. Statement on Commitment to the Black Community*, NIKE, <https://about.nike.com/en/resources/nike-inc-statement-on-commitment-to-the-black-community> (last visited Oct. 8, 2025); see also *Starbucks Community Resilience Fund: Advancing Racial Equality and Environmental Resilience*, MISSION DRIVEN FIN., <https://www.missiondrivenfinance.com/invest/missing-middle/starbucks-community-resilience-fund> (last visited Oct. 8, 2025).

82. See Kelsey Minor, *Three Years After George Floyd’s Murder: Where Is DEI Now, and What Have Companies Learned?*, SENIOR EXEC. (Feb. 10, 2023), <https://seniorexecutive.com/three-years-after-george-floyds-murder-where-is-dei-now-and-what-have-companies-learned>.

83. Robert Roche & Aisha Leach, *The Death of DEI: What It Means for Fair Chance Employment*, LAST MILE (Jan. 13, 2025), <https://thelastmile.org/death-of-dei>.

84. *Id.*

companies threw money at DEI as a way to signal values.⁸⁵ This led to companies promulgating concepts like “equity” without truly defining what it meant. With such a broad interpretation came room for confusion and alienation by the opposition leading to legal attacks on all DEI programs.⁸⁶

Currently, DEI is on a legal recessionary path. In 2023, the Court held in the landmark case *Student’s for Fair Admissions v. Harvard College* that affirmative action in college admissions was unconstitutional.⁸⁷ The Court’s decision signaled that race-conscious decisions are no longer acceptable under Title VII.⁸⁸ As such, scholars predict that DEI programs will meet a similar fate.⁸⁹ Following the Court’s lead, states started to target corporate diversity programs by attempting to ban them entirely.⁹⁰ In addition, the Trump administration has moved forward with its plan to gut DEI programs in corporate spaces.⁹¹ In response to mounting legal risks, major corporations and law firms have quietly and significantly scaled back their DEI initiatives through budget reductions and the elimination of dedicated diversity roles.⁹²

Through DEI’s complex and evolving history, legal boundaries have emerged that provide guideposts as to what are lawful and unlawful practices. Courts consistently hold that explicit class-conscious hiring, promotion, and termination decisions based solely on a protected characteristic, such as race and gender, are unlawful under federal anti-discrimination statutes and constitutional

85. *Id.*

86. *Id.*

87. 600 U.S. 181, 230 (2023).

88. *See id.*

89. *See U.S. Supreme Court SFFA College Affirmative Action Ruling: Implications for Corporate DEI*, MCGUIREWOODS (July 5, 2023), <https://www.mcguirewoods.com/client-resources/alerts/2023/7/us-supreme-court-sffa-college-affirmative-action-ruling-implications-corporate-dei>.

90. *Id.*; see Nick Niedzwiedek, *Ruling on College Admissions Could Fuel Attacks on Corporations’ Diversity Efforts*, POLITICO (June 29, 2023, at 14:33 ET), <https://www.politico.com/news/2023/06/29/supreme-court-ruling-puts-dei-under-the-microscope-00104194> (discussing the impact of SFFA on DEI programs).

91. Exec. Order No. 14,151, 90 Fed. Reg. 8339–40 (Jan. 20, 2025) (revoking Executive Order 11246 and dismantling DEI initiatives in the federal government); Associated Press, *Trump’s Orders to End DEI Programs Reflect His Push for a Profound Cultural Shift*, U.S. NEWS & WORLD REP. (Jan. 22, 2025), <https://www.usnews.com/news/politics/articles/2025-01-22/trumps-orders-to-end-dei-programs-reflect-his-push-for-a-profound-cultural-shift>.

92. Taylor Telford, *As DEI Gets More Divisive, Companies Are Ditching Their Teams*, WASH. POST (Feb. 18, 2024), <https://www.washingtonpost.com/business/2024/02/20/corporate-diversity-job-cuts> (noting that DEI roles declined sharply in 2023 and 2024 and many major firms dismantled DEI teams); Kate Gibson & Emmet Lyons, *Meta Ends Diversity Programs, Joining McDonald’s, Walmart and Other Major Companies to Back off DEI*, CBS NEWS (Jan. 16, 2025, at 14:56 ET), <https://www.cbsnews.com/news/meta-dei-programs-mcdonalds-walmart-ford-diversity>; Mike Spector, Brad Heath, Kristina Cooke, Joseph Tanfani & David Thomas, *How Trump’s Crackdown on Law Firms is Undermining Legal Defenses for the Vulnerable*, REUTERS (Aug. 3, 2025), <https://www.reuters.com/investigations/trumps-war-big-law-leads-firms-retreat-pro-bono-work-underdogs-2025-07-31> (reporting that elite law firms scaled back DEI initiatives in response to executive actions targeting diversity programs).

equal protection principles.⁹³ By contrast, efforts to address workplace discrimination through training programs—as well as programs focused on equity and inclusion like blind hiring and objective performance standards—have generally not seen the same legal challenges.⁹⁴ The Trump Administration and opponents of DEI, however, are seeking to expand the category of unlawful DEI practices to include a wider range of DEI programs.⁹⁵

To examine whether opponents of DEI can expand these guideposts, it is important to first define what a DEI program is. DEI initiatives in the workplace generally fall into three key categories: hiring, training, and decisions or actions made in the “course of employment.”

A. HIRING

One type of DEI policy that companies often implement involve modified hiring practices.⁹⁶ But recently, “DEI hire” has become a disparaging term due to misconceptions surrounding the nature of DEI hiring.⁹⁷ One common misunderstanding of DEI hirings is that protected groups are recruited *because of* their marginalized status. For instance, tech billionaire and Tesla founder Elon Musk criticized United Airlines for “prioritiz[ing] DEI hiring over [consumer] safety.”⁹⁸ Musk insinuated that DEI-driven hiring practices were responsible for “killing hundreds of people” because the company hired less qualified workers solely for the sake of diversity.⁹⁹

This reasoning promulgates an inaccurate vision of what DEI hiring initiatives are. Instead, DEI hiring practices focus on ensuring two goals: (1)

93. See *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 641 (1987); *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023); see also Devon Lee, *Timeline of Major U.S. DEI-Related Laws and Movements: Framing Equity as a Sustainable Strategy*, CTR. FOR URB. & RACIAL EQUITY, <https://urbanandraciaequity.org/deitimeline/#:~:text=The%201970s%20and%201980s%20asaw,%E2%97%8F> (last visited Oct. 8, 2025) (detailing the timeline of key DEI-related cases).

94. See Christopher Wilkinson, Emily Edwards & Kaneem Antar Thorton, *Employers See Wins in Title VII Suits Over DEI Trainings*, PERKINS COIE (May 16, 2025), <https://perkinscoie.com/insights/update/employers-see-wins-title-vii-suits-over-dei-trainings-0>; Jonathan M. Crotty, *Eighth Circuit Rejects Employees’ Challenge to Equity Training*, PARKER POE (Sep. 20, 2024), <https://www.parkerpoe.com/news/2024/09/eighth-circuit-rejects-employees-challenge-to-equity-training> (noting that public records show plaintiffs in DEI training lawsuits have largely failed to meet the threshold for hostile work environment or discrimination claims).

95. Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

96. See *Diversity Hiring: A Complete Guide to DEI Recruitment*, HUM. RES. CONSULTING GRP. (Dec. 12, 2023, at 13:59 PT), <https://www.hr-consulting-group.com/hr-news/diversity-hiring-a-complete-guide-to-dei-recruitment>.

97. See *Misconceptions About DEI Initiatives Are Leading to Their Decline*, U.C. IRVINE NEW UNIV.: OFF. CAMPUS NEWSPAPER (Feb. 7, 2025), <https://newuniversity.org/2025/02/07/misconceptions-about-dei-initiatives-are-leading-to-their-decline>.

98. David Ingram, *Elon Musk Criticized by Civil Rights Groups Over Claim That Diversity Efforts Make Flying Less Safe*, NBC NEWS (Jan. 11, 2024, at 20:24 PT), <https://www.nbcnews.com/tech/internet/elon-musk-boeing-dei-diversity-x-posts-pilots-rcna133351>.

99. *Id.*

workplace diversity and (2) bias-free hiring decisions. For example, in early 2022, United Airlines launched its flight school to expand its hiring pool to include more women of color.¹⁰⁰ By doing so, United Airlines expanded its talent recruitment to ensure that individuals from historically underrepresented groups had equitable access to aviation careers. The initiative was not about hiring candidates solely because they belong to a protected class; it was about creating fair opportunities for qualified individuals who previously lacked access.

Hiring-based DEI initiatives manifest in various forms. One method employers use to make the hiring process more equitable starts with the recruitment process itself. Companies may devote resources to recruiting from increasingly diverse channels.¹⁰¹ Recruitment efforts include targeting job listings at Historically Black Colleges and Universities (HBCUs), implementing mentorship programs, or collaborating with community groups.¹⁰² Employers can broaden their candidate pool to attract more talented applicants who may not have the traditional opportunities to enter the corporate space. For example, IBM offers a free online training program to individuals from marginalized groups.¹⁰³ As a result, IBM can expand its pool of potential applicants by allowing them to learn key skills that enable them to participate in the technology sector.¹⁰⁴

Another common practice is using inclusive language in job postings.¹⁰⁵ In doing so, the pool of candidates applying for the job expands since the job posting attracts candidates who would otherwise not apply.¹⁰⁶ For example, studies have found that women are less likely to apply for jobs where the description includes “masculine-coded language.”¹⁰⁷ Therefore, when a

100. Karen Jordan, *‘Diversifying the Cockpit:’ United Airlines Recruiting 5K Pilots for New Flight School; Half Will Be Women and People of Color*, ABC7 (Apr. 6, 2021), <https://abc7chicago.com/united-airlines-pilots-women-female/10492479>.

101. See Maliha Shoaib, *Fixing Retail’s Leadership Diversity Problem*, VOGUE BUS. (Jan. 18, 2024), <https://www.voguebusiness.com/story/companies/fixing-retails-leadership-diversity-problem>; *Diversity Recruitment Best Practices: Sourcing Candidates from Inclusive Channels*, RAKUNA: DIVERSITY QUITTY INCLUSION (Jan. 23, 2025), <https://www.rakuna.co/blog/diversity-recruitment-best-practices>.

102. Allaya Cooks-Campbell, *Diversity Sourcing: 7 Tips for Expanding Your Talent Pools*, LINKEDIN (May 16, 2023), <https://www.linkedin.com/business/talent/blog/talent-acquisition/diversity-sourcing-tips-for-expanding-talent-pools>; Keith McIntosh, Jeffrey Pomerantz, Helena Rodrigues, Craig Smith & Melissa Woo, *Expanding Your Recruitment Pool through Increasing Diversity, Equity, and Inclusion*, EDUCAUSE REV. (June 5, 2017), <https://er.educause.edu/articles/2017/6/expanding-your-recruitment-pool-through-increasing-diversity-equity-and-inclusion>.

103. *IBM SkillsBuild*, IBM, <https://skillsbuild.org> (last visited Oct. 10, 2025).

104. *Id.*

105. Melissa DellaBartolomea, *DEI Hiring: How to Create Inclusive Job Descriptions*, INCLUSIONHUB (Nov. 11, 2020), <https://www.inclusionhub.com/articles/inclusive-job-descriptions>.

106. *Id.*; see also *Diversity Hiring*, *supra* note 96 (explaining how often employers and recruiters design job descriptions in a way that excludes certain demographics).

107. See Danielle Gaucher, Justin Friesen & Aaron C. Kay, *Evidence That Gendered Wording in Job Advertisements Exists and Sustains Gender Inequality*, 101 J. PERS. & SOC. PSYCH. 109, 112 (2011); Sandra L. Bem & Daryl J. Bem, *Does Sex-Biased Job Advertising “Aid and Abet” Sex-Discrimination*, 3 J. APPLIED SOC.

company refrains from using gender-specific language and adopts more neutral language, more women are likely to apply.¹⁰⁸ Encouraging the use of neutral language in job postings also allows employers to eliminate the unconscious biases of those who draft the postings.

By way of illustration, suppose the president of a company is seeking to fill a management position. Subconsciously, the president's paradigm of the ideal candidate is male. In the job posting, his paradigm manifests into words that fit his subconscious idea of the candidate—"competitive" and "dominant."¹⁰⁹ Accordingly, out of the ten candidates who apply for this position, only one is female.¹¹⁰ Now, imagine the words "competitive" and "dominant" were removed. Out of the ten candidates that applied, five are now female. Not only was the pool of candidates expanded, but the president may now consider qualified candidates who may not align with his preferred profile (here, a male) yet nonetheless possess the requisite qualifications and skills required for the role.

"Blind hiring" is another approach regularly employed by companies. Also referred to as "blind recruiting" or "anonymous recruiting," this method of hiring removes or redacts demographic information relating to race, color, sex, religion, or national origin, along with other information that may suggest those classes.¹¹¹ This information is omitted in pivotal hiring stages, including application, submission, and candidate screening steps. "Blind hiring" allows employers to focus on an applicant's experience and skills, rather than a characteristic or trait attached to one's immutable status.¹¹² Without these demographic markers, there is no opportunity for the hiring entity to allow bias to affect the process. Through "blind hiring," potential candidates are equalized in the selection process, hitting at the heart of what DEI stands for.

A holistic review of the most common hiring practices reveals that hiring programs are less susceptible to litigation than other practices.¹¹³ Because these hiring methods focus on equalization and not preferential treatment, the legal risk is low. Thus, if an employer commits to expand their talent pool or

PSYCH. 6, 13–14, 16 (1973); Inger Askehave & Karen Korning Zethsen, *Gendered Constructions of Leadership in Danish Job Advertisements*, 21 GENDER, WORK & ORG 531, 542–543 (2014).

108. Gaucher, et. al, *supra* note 106, at 118.

109. For a study on the impact of using "masculine-themed words" in job advertisements, see *id.* at 110–11.

110. See *id.* at 118–19.

111. Beth Kempton, *What is Blind Hiring? How It Can Affect Your DEI Initiatives*, UPWORK (Jan. 7, 2025), <https://www.upwork.com/resources/blind-hiring>.

112. *Id.*

113. See *Negligent Hiring Risk Less Than Employers Believe*, SOC'Y FOR HUM. RES. MGMT. (Nov. 9, 2023), <https://www.shrm.org/topics-tools/news/talent-acquisition/negligent-hiring-risk-less-than-employers-believe> (detailing a recent report by the Legal Action Center and National Workrights Institute that examined every reported negligent hiring decision from 1974 to 2022 and found that approximately 435 trial court decisions held employers liable for negligent hiring during that time—an average of nine cases per year).

implement “blind hiring” practices, they should not be too worried about facing legal scrutiny. However, some DEI hiring practices still present legal risks. As illustrated above, courts have taken great disfavor in reserving spaces for protected groups. Therefore, where a hiring practice is more conscious of a protected class (i.e., seeking to hire directly from a subset of people), the hiring practice is more likely to violate Title VII.

B. TRAINING

One of the most contentious applications of DEI is training programs because of their potential to have discussion-based and participatory elements.¹¹⁴ This Note argues that the discussion-based and participatory elements are more likely to lead to litigation under both the First Amendment and Title VII because such programs can require employees to speak, respond, or affirm to viewpoints in ways that can raise concerns about compelled speech and workplace discrimination. DEI training programs come in various forms; however, three types have emerged as the most prominent: unconscious bias trainings, allyship trainings, and bystander communication trainings.

Unconscious bias trainings are the most prevalent type.¹¹⁵ The objective of these trainings are to help employees recognize and mitigate the effects of their unconscious bias against historically marginalized groups.¹¹⁶ These types of trainings are widely used and even mandated by six states, in specific industries.¹¹⁷ Under this also exists anti-bias training. Anti-bias trainings are mini courses implemented to recognize and address unconscious bias. These trainings are the source of most Title VII litigation.¹¹⁸

Another type of DEI training program is known as allyship training. Allyship trainings teach individuals from represented groups how to support those in marginalized or underrepresented communities in the workplace.¹¹⁹ These trainings provide tools for adequately represented employees to

114. *See infra* Parts.II.C, II.D.

115. AUBREY BLANCHE, VIVIAN WOO, FRESIA JACKSON, PATRICIA MARTINEZ, KELLY LUC & LILY TIDHAR, *WORKPLACE DIVERSITY, EQUITY, & INCLUSION REPORT: UNDERSTANDING THE DEI LANDSCAPE*, CULTURE AMP 23 (2022), <https://www.cultureamp.com/resources/diversity-inclusion-campaign/2022-workplace-dei-report> (explaining that of the 60% of companies that hold general DEI trainings, 54% reported that they hold unconscious bias trainings specifically).

116. *What is DEI Training?*, ASS'N FOR TALENT DEV., <https://www.td.org/talent-development-glossary-terms/what-is-dei-training> (last visited Oct. 11, 2025).

117. ALEX MONTAGUE & SARAH HOOPER, *INTRODUCED IMPLICIT BIAS TRAINING BILLS IN THE UNITED STATES, 2019–2022*, U.C.S.F.: CALIFORNIA PRETERM BIRTH INITIATIVE (July 31, 2022), https://pretermbirthca.ucsf.edu/sites/g/files/tkssra15601/files/Introduced%20IBT%20Bills%20Chart_v03.1.pdf.

118. *See infra* Part.II.D.

119. *Supra* note 115.

acknowledge their privilege and use it in a way that combats unconscious bias.¹²⁰

Finally, the last common type of DEI trainings are known as bystander communication trainings. Bystander communication trainings teach participants to recognize their own unconscious biases and, in some programs, encourage observers to intervene when they witness the effects of implicit bias in order to prevent further harm to the affected individual.¹²¹ These trainings seek to challenge workplace norms by leveraging the influence of represented groups.¹²² Furthermore, these trainings help facilitate an assertive way to eliminate unconscious bias.¹²³ Encouraging bystanders to intervene and address harassing behavior promptly not only notifies the perpetrator that their actions are unacceptable, but demonstrates to all observers that such conduct will not be tolerated in the workplace.

DEI trainings, however, are experiencing substantial pushback from employees for two main reasons: (1) the way “white privilege” is addressed and (2) the requirements to attend them. In addressing white privilege, employers often make white employees feel as though they are experiencing reverse discrimination.¹²⁴ Mandatory attendance requirements can also create tension among employees who disagree with the subject matter, leading to legal implications surrounding the training’s discussion-based nature. Further, recent scholarships have seriously questioned the value of DEI training. While some researchers argue that targeted adjustments to existing programs could improve their effectiveness,¹²⁵ many scholars contend that DEI training often fails to advance and may even undermine the goals of DEI.¹²⁶

C. “COURSE OF EMPLOYMENT”

DEI initiatives also target actions and decisions made during the “course of employment.” These actions are divided into two categories: (1) decisions

120. *Id.*

121. *Id.*

122. *Id.*

123. Francesca Gino & Katherine Coffman, *Unconscious Bias Training That Works*, HARV. BUS. REV. (Sep.–Oct. 2021), <https://hbr.org/2021/09/unconscious-bias-training-that-works>.

124. As discussed in Part II.C, this leads to hostile work environment claims.

125. See e.g., Monica L. Wang, Alexis Gomes, Marielis Rosa, Phillipe Copeland & Victor Jose Santana, *A Systematic Review of Diversity, Equity, and Inclusion and Antiracism Training Studies: Findings and Future Directions*, 14 TRANSLATIONAL BEHAV. MED., 156, 169 (2024)

126. Patricia G. Devine & Tory L. Ash, *Diversity Training Goals, Limitations, and Promise: A Review of the Multidisciplinary Literature*, 73 ANN. REV. PSYCH. 403, 419 (2022); Frank Dobbin & Alexandra Kalev, *Why Doesn’t Diversity Training Work? The Challenge for Industry and Academia*, 10 ANTHROPOLOGY NOW 48, 49 (2018); Elizabeth Levy Paluck, Roni Porat, Chelsey S. Clark & Donald P. Green, *Prejudice Reduction: Progress and Challenges*, 72 ANN. REV. PSYCH. 533, 543 (2021).

that directly or indirectly affect one's employment status and (2) DEI programs that indirectly affect the employment relationship.¹²⁷

The first category consists of methods such as performance evaluations, promotion decisions, benefits, and grievance procedures. This category is the most contentious under Title VII and the First Amendment as these decisions directly change one's "terms and conditions" of employment.¹²⁸ For example, promoting a candidate directly changes their terms, conditions, or privileges of employment.¹²⁹ Thus, if practices are intentionally bolstering candidates *because of* their protected class, then the practices violate Title VII. But, much like the rest of DEI initiatives, these practices are intended to equalize, not to rank, employees. For example, performance evaluations are regularly used by employers to create bias-free evaluation criteria.¹³⁰ The fine line between equalization and a decision due to a protected class determines whether a DEI program is illegal or not, and employers often struggle with this distinction.

The second category includes employee resource groups (ERGs), DEI positions in the workplace, and mentoring. This category is less contentious under existing employment discrimination statutes as practices that fall under this category do not address "terms and conditions" of employment; they are implemented to bolster and maintain diversity.¹³¹ However, this category nevertheless still leads to disputes. Often, employees feel that groups like these promulgate an anti-white and/or anti-male environment in the workplace.¹³²

127. See *What You Should Know About DEI-Related Discrimination at Work*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *What You Should Know*, U.S. EQUAL EMP. OPPORTUNITY COMM'N], <https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work> (last visited Oct. 11, 2025) (explaining that unlawful discrimination can occur in various aspects of employment, including hiring, firing, promotion, compensation, and access to training or mentoring programs).

128. *Id.*

129. *What To Do If You Experience Discrimination Related to DEI at Work*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work> (last visited Oct. 11, 2025).

130. See *Four Ways to Mitigate Bias in Performance Evaluations*, MGMT. CTR., <https://www.managementcenter.org/resources/four-ways-to-mitigate-bias-in-performance-evaluations> (last visited Oct. 11, 2025) (recommending the use of evaluation rubrics to reduce bias because they establish clear and consistent criteria for performance assessments); *Tips for Reducing Bias in Performance Evaluations*, NAT'L CTR. FOR WOMEN & INFO. TECH., <https://newit.org/resources/tips-for-reducing-bias-in-performance-evaluation> (last visited Oct. 11, 2025) (advising employers to scrutinize performance criteria and "common sense" assumptions to ensure that they do not include unintentional biases).

131. Mentoring Programs Support Inclusion, CHRONUS, <https://chronus.com/dei-mentorship-program> (last visited Oct. 11, 2025) (describing mentoring programs as tools to promote inclusive work cultures and support employees from diverse backgrounds); Matthew Reeves, *11 Employee Resource Group Guidelines for Building Inclusive Workplaces*, TOGETHER (Dec. 27, 2023), <https://www.togetherplatform.com/blog/11-employee-resource-group-guidelines-for-building-inclusive-workplaces> (noting that ERGs and DEI positions are implemented to bolster and maintain diversity).

132. See Natalie Runyon, *How to Address DEI Concerns of White Men Who Feel They're Being Disadvantaged*, THOMSON REUTERS (Sep. 30, 2022), <https://www.thomsonreuters.com/en-us/posts/news-and-media/addressing-dei-concerns>; Mishell Parreno Taylor, *Today's Affinity Groups: Risks and Rewards*, LITTLER MENDELSON (Oct. 15, 2019),

ERGs can be subject to litigation under Title VII.¹³³ An ERG is an employee-led, often volunteer-based, initiative that is implemented to foster community and DEI progress.¹³⁴ They are frequently led by employees who share similar, marginalized characteristics.¹³⁵ But, despite the positive impact ERGs can have on workplace culture such as community support and assistance in professional development,¹³⁶ they also carry legal implications, particularly under Title VII.¹³⁷ ERGs, while generally intended to provide support and amplify the voices of underrepresented groups, may invite litigation if they restrict membership of certain individuals outside the class they were created to protect.¹³⁸ For example, selective membership is inconsistent with the purpose of Title VII—to prohibit discrimination *regardless of a* protected class.¹³⁹ In litigation, courts may examine whether the ERG created unequal opportunities or conditions for employees, and whether these actions are consistent with anti-discrimination laws.¹⁴⁰ This will likely become a source of litigation for employers as ERGs are prevalent in ninety percent of Fortune 500 companies.¹⁴¹

<https://www.littler.com/news-analysis/asap/todays-affinity-groups-risks-and-rewards>; Jacqueline M. Prats, *Diversity Initiatives and the Backlash of Reverse Discrimination Claims*, 95 FLA. BAR J. 42 (2021), <https://www.floridabar.org/the-florida-bar-journal/diversity-initiatives-and-the-backlash-of-reverse-discrimination-claims>.

133. See e.g., Complaint at 7, *Missouri v. Starbucks Corp.*, No. 4:25-CV-00165 (E.D. Mo. Feb. 11, 2025); Jennifer B. Rubin, Michael S. Arnold, Corbin Carter & Nikki M. Rivers, *EEOC and DOJ Release Guidelines on “DEI-Related Discrimination,”* MINTZ (Mar. 20, 2025), <https://www.mintz.com/insights-center/viewpoints/55026/2025-03-20-eoc-doj-release-guidelines-dei-related-discrimination>; Michael R. Hatcher, Weldon H. Latham & Felicia K. Marsh, *How Companies Can Best Benefit from Employee Resource Groups (ERGs)*, JACKSON LEWIS (Dec. 27, 2022), <https://www.jacksonlewis.com/insights/how-can-companies-continue-benefit-employee-resource-groups-todays-dei-compliance-environment> (explaining legal considerations to ensure ERGs comply with Title VII).

134. Annette Tyman & Andrew L. Scroggins, *EEOC Issues New Technical Assistance on “DEI-Related Discrimination,”* SEYFARTH SHAW (Mar. 19, 2025), <https://www.seyfarth.com/news-insights/eoc-issues-new-technical-assistance-on-dei-related-discrimination.html>.

135. Claire Hastwell, *What Are Employee Resource Groups (ERGs)?*, GREAT PLACE TO WORK (Jan. 7, 2023), <https://www.greatplacetowork.com/resources/blog/what-are-employee-resource-groups-ergs>.

136. Matthew French, *Employee Resource Groups: The Historical and Present Impacts of ERGs on Business*, VILLANOVA UNIV. (Aug. 4, 2024), <https://connections.villanova.edu/blog/2024/10/10/employee-resource-groups-the-historical-and-present-impacts-of-ergs-on-business>.

137. See Kalina Bryant, *The Impact of Employee Resource Groups in the Workforce*, FORBES (Sep. 15, 2023, at 17:18 ET), <https://www.forbes.com/sites/kalinabryant/2023/09/15/the-impact-of-employee-resource-groups-in-the-workforce> (explaining the positive impacts ERG’s can have in the workplace); see also *What You Should Know*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 127 (explaining that certain implementations of ERG’s can be illegal).

138. *Id.*

139. 42 U.S.C. § 2000e-2(a)(1); see also *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 309 (2024) (explaining that Title VII’s text applies to “any individual”—not just members of minority groups).

140. Rebecca Klar, *Employer Cutbacks to Worker Diversity Groups Pose Legal Risks*, BLOOMBERG L.: DAILY LAB. REP. (Sep. 10, 2024, at 8:39 PT), <https://news.bloomberglaw.com/daily-labor-report/employer-cutbacks-to-worker-diversity-groups-pose-legal-risks>.

141. Natacha Catalino, Nora Gardner, Drew Goldstein & Jackie Wong, *Effective Employee Resource Groups Are Key to Inclusion at Work. Here’s How to Get Them Right*, MCKINSEY & CO. (Dec. 7, 2022), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/effective-employee-resource-groups-are-key-to-inclusion-at-work-heres-how-to-get-them-right>.

D. “EGREGIOUS” PROGRAMS

“Egregious” programs, are initiatives that have been held as outright illegal and must be avoided by employers.¹⁴² Racial quota hiring practices, for example, refer to a policy where employers set a specific, numerical target for hiring individuals from certain racial or ethnic groups.¹⁴³ One illustrative case may involve an employer reserving four out of ten seats on a company board exclusively for individuals of Latinx heritage. These programs are generally prohibited as they require an employment decision based on race.¹⁴⁴

Other “egregious” programs are ones that specifically consider a protected class. Consider the hypothetical company, ABC Co. ABC Co. needs to boost its diversity and has two incoming candidates, Emi and Zoe. Emi is African American and Zoe is Caucasian. They are equally qualified, but ABC Co. chooses to hire Emi solely to boost their diversity rates. This is an example of a DEI initiative that violates the law, as race was a determinative factor in the decision. Other programs that explicitly use a protected classes as the sole criterion for employment decisions such as awarding promotions or using hiring preferences are illegal. These “egregious” programs violate Title VII, and employers should refrain from implementing them in the workplace.

II. DOES DEI VIOLATE TITLE VII?

A. DEI PROGRAMS ARE NOT INHERENTLY VIOLATIVE OF TITLE VII

Following the Court’s decision in *Students for Fair Admissions*, all eyes turned to DEI.¹⁴⁵ Since the decision, employers nationwide have dealt with increased litigation targeting workplace DEI programs.¹⁴⁶ One of the vessels used to challenge these initiatives is Title VII.¹⁴⁷ Since 2024, majority-group

142. See *supra* Part.I.

143. See *EEO Terminology*, NAT’L ARCHIVES: EQUAL EMP. OPP’Y PROGRAM, <https://www.archives.gov/eo/terminology.html> (last visited Sep. 28, 2025) (defining a “quotas” in the context of DEI).

144. See *e.g.*, *Regents of U.C. v. Bakke*, 438 U.S. 265, 289 (1978) (holding that racial quotas in admissions decisions are unconstitutional); *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) ((holding that an employer may not engage in race-based decision making to achieve a desired racial balance in promotions absent a strong basis in evidence of Title VII liability).

145. Ketan Bhird & Simeon Brier, *A Year Since Students for Fair Admissions v. Harvard: State Attorneys General Are Split on DEI Programs*, REUTERS (Aug. 27, 2024), <https://www.reuters.com/legal/legalindustry/year-since-students-fair-admissions-v-harvard-state-attorneys-general-are-split-2024-08-23>.

146. Katharine Fogarty & Gabrielle Talvacchia, *Supreme Court’s Ruling in Students for Fair Admissions and Its Impact on DEI Initiatives in the Workplace*, LEGAL INTELLIGENCER (Nov. 8, 2024), <https://www.law.com/thelegalintelligencer/2024/11/08/supreme-courts-ruling-in-students-for-fair-admissions-and-its-impact-on-dei-initiatives-in-the-workplace>.

147. See *Diemert v. City of Seattle*, 689 F. Supp. 3d 956, 962 (W.D. Wash. 2023); *De Piero v. Pa. State Univ.*, 711 F. Supp. 3d 410, 415 (E.D. Pa. 2024); see also *EEOC and Justice Department Warn Against Unlawful DEI-Related Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Mar. 19, 2025), <https://www.eeoc.gov/newsroom/eeoc->

plaintiffs have taken the position that DEI initiatives are either racist or sexist, claiming that they prioritize other races or genders above their own.¹⁴⁸ However, courts have historically disagreed.

At its core, Title VII is meant to be prophylactic.¹⁴⁹ The Supreme Court noted that Title VII's primary goal is not "to provide redress but to avoid harm."¹⁵⁰ DEI programs are meant to do just that—*prevent* bias from seeping into the workplace and increase diversity. Courts and agencies agree that DEI methods further Title VII's goal of preventing workplace discrimination.¹⁵¹ Since the origins of DEI programs, courts have recognized that anti-discrimination trainings and other anti-bias mechanisms are pivotal to preventing workplace discrimination.¹⁵² For example, courts have found that mandatory diversity training¹⁵³ and discussions on implicit biases after "very real instances of radicalized violence"¹⁵⁴ do not violate Title VII. Courts have routinely held that the DEI programs instituting standard bias trainings do not violate an employee's rights under Title VII.¹⁵⁵ Thus, opponents' claims that DEI inherently violates Title VII is misguided in the light of the history of DEI jurisprudence.

However, as the current presidential administration continues to target DEI initiatives, it is unclear whether courts will continue to rule this way. In anticipation of forthcoming litigation, three distinct routes of challenges under Title VII must be assessed: (1) a broad challenge under the "disparate impact theory," (2) individual claims alleging reverse racism, and (3) workplace harassment theories. This Note will then provide a roadmap to preserve DEI programs by offering potential solutions, evaluating legal strategies, and assessing the implications for employers and employees navigating contemporary DEI policies.

and-justice-department-warn-against-unlawful-dei-related-discrimination (explaining that certain Diversity, Equity, and Inclusion policies may violate Title VII of the Civil Rights Act of 1964 if they involve discrimination based on race, sex, or other protected characteristics, and encouraging people to seek assistance if they believe a policy has violated their rights under Title VII).

148. *Id.*

149. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

150. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–06 (1998).

151. *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605–06; *see also* FELDBLUM & LIPNIC, *supra* note 79, at 53 (explaining that regular trainings have proven effective in preventing and addressing harassment).

152. Makena K. Felten, Margaret R. Kurlinski & Rebeca M. López, *EEOC Informal Guidance on "Unlawful DEI": What It Says, What It Means, and Key Takeaways*, GODFREY & KHAN (Apr. 10, 2025), <https://www.gklaw.com/Insights/EEOC-Informal-Guidance-on-Unlawful-DEI-What-It-Says-What-It-Means-and-Key-Takeaways.htm>.

153. *See Norgren v. Minn. Dep't. of Hum. Servs.*, 96 F.4th 1048, 1057–58 (8th Cir. 2024) (explaining that requiring all employees to undergo diversity training does not plausibly show that the employer required the plaintiff to affirmatively agree with the content of the trainings).

154. *De Piero v. Pa. State Univ.*, 711 F. Supp. 3d 410, 424 (E.D. Pa. 2024).

155. *Id.*; *infra* Part.II.D.

B. DISPARATE IMPACT & DEI

Claims brought under the disparate impact theory present legal challenges to contemporary DEI policies.¹⁵⁶ This doctrine allows plaintiffs to challenge neutral practices that disproportionately affect protected groups.¹⁵⁷ Disparate impact is particularly appealing to those challenging DEI programs because it permits claims without proof of intentional bias.¹⁵⁸ To succeed on a disparate impact claim, an employee must show that their employer's policy had a discriminatory effect on a protected group.¹⁵⁹ Further, an employee must demonstrate a connection between the employer's policy and the discriminatory outcome.¹⁶⁰ This requires the employee to identify a specific policy that caused the disparate impact and show its discriminatory effect.¹⁶¹ Once the plaintiff establishes a *prima facie* case of disparate impact, the burden shifts to the employer, who then must demonstrate that the practice in question is essential to the business's operation and serves its intended purpose. If the employer satisfies this burden, the plaintiff must then point to alternative employment practices that have a lesser discriminatory effect and still achieve the employer's goals.¹⁶²

For example, assume a large corporation, ABC Co., introduces a DEI initiative to diversify its leadership. Consequently, ABC Co. creates a leadership program open only to employees who have worked in a management role for at least five years. While this initiative appears neutral, the only employees at ABC Co. who meet this criterion are Caucasian workers. Penny, an African American employee who has worked at ABC Co. for ten years but has not held a managerial position, would like to join this leadership program but is not qualified. Penny seeks to challenge this policy. Under the disparate impact doctrine, Penny does not need to prove that ABC Co. acted with discriminatory animus when they created this policy. Penny only needs to prove that the policy has a discriminatory effect on a protected group and that the policy effectuated the discriminatory outcome. ABC Co. would then have a chance to rebut this allegation by providing that managerial program is essential to their business operations.

156. See text accompanying notes 38–42; Matt Nusbaum, *Private Plaintiff Attorneys Step Up in Title VII Disparate Impact Cases*, BERKSHIRE (June 24, 2025), <https://www.berkshireassociates.com/blog/private-plaintiff-attorneys-step-up-in-title-vii-disparate-impact-cases>.

157. 42 U.S.C. § 2000e-2(k).

158. *Id.*; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988).

159. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

160. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Wards Cove Packing v. Atonio*, 490 U.S. 642, 656–57 (1989).

161. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 241–42 (2005).

162. *Griggs*, 401 U.S. at 432.

Challenging contemporary DEI programs under the disparate impact theory presents multiple issues. First, plaintiffs in these cases will likely have to provide statistical evidence of the discrimination.¹⁶³ Courts have held that employee statistics must reflect a disproportionate effect on qualified employees, meaning that the “bare assertion of racial imbalances in the workforce is not enough to establish a Title VII disparate impact claim.”¹⁶⁴ This requires one of two showings: Employer statistics showing how the policy disproportionately affects employees, or statistics from external labor markets or applicant flow data that supports an inference of adverse impact.¹⁶⁵

Regarding employer statistics, employees often lack the “smoking gun” statistics required to plead their *prima facie* case.¹⁶⁶ Accordingly, a plaintiff must then provide very specific statistics about the policy that demonstrates the particular practice has a universally discriminatory effect.¹⁶⁷ With a wide, diverse range of DEI policies being implemented by companies, it is difficult for an employee to pinpoint an exact study to substantiate their claim.¹⁶⁸ However, author and legal scholar William Dix suggests that plaintiffs equipped with researchers Frank Dobbin and Alexandra Kalev’s data would easily meet this component.¹⁶⁹ In 2022, professors Frank Dobbin and Alexandra Kalev published research on the efficacy of over thirty years of DEI initiatives, asserting that traditional DEI initiatives are often regressive and ineffective.¹⁷⁰ William Dix argues that Dobbin and Kalev’s research may be the key in supporting disparate impact claims.¹⁷¹ According to Dix, plaintiffs may claim that a company implementing so-called “regressive” DEI policies is liable under the data found by Dobbin and Kalev because discriminatory effect is found in their study.¹⁷² But even if this data survives judicial scrutiny (which is arguable), it is unlikely that disparate impact claims involving modern DEI initiatives would be able survive subsequent burden shifting stages.

If a plaintiff successfully provides sufficient statistical evidence, the burden then shifts to the employer to demonstrate that the challenged practice is job-

163. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *Wards Cove Packing Co.*, 490 U.S. at 650.

164. *Bennett v. Nucor Corp.*, 656 F.3d 802, 818 (8th Cir. 2011).

165. *Id.* at 817.

166. *Id.*; see also *Watson*, 487 U.S. at 994; *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015); *Dothard v. Rawlinson*, 433 U.S. 321, 330–31 (1997); William C. Dix, *Corporate DEI Reexamined*, 49 J. CORP. L. 653, 662 (2024).

167. See *Dothard*, 433 U.S. at 330–331; Dix, *supra* note 166.

168. Dix, *supra* note 166.

169. See *id.* at 660–62.

170. See generally FRANK DOBBIN & ALEXANDRA KALEV, *GETTING TO DIVERSITY: WHAT WORKS AND WHAT DOESN’T* 9 (2022) (analyzing decades of data to assess the effectiveness of workplace diversity initiatives and recommending systemic changes over individual-focused approaches).

171. Dix, *supra* note 166, at 670.

172. *Id.*

related and necessary for business.¹⁷³ Accordingly, the second hurdle plaintiffs face is that it is not difficult for an employer to provide a reason that the policy is necessary for business.¹⁷⁴ Although DEI programs originated from compliance concerns related to Title VII,¹⁷⁵ these programs have been reframed to address legitimate business objectives—recognizing that a diverse workforce fosters a more inclusive workplace, which in turn boosts business performance.¹⁷⁶ Modern DEI programs focus on eliminating unconscious bias, such as expanding hiring pools or prioritizing objective hiring criteria.¹⁷⁷

If a plaintiff reaches the final stage of the disparate impact framework, there is one more challenge that the employee may face: they must provide an alternative method to achieve the same intended goal.¹⁷⁸ Beyond Kalev and Dobbins' suggestions, a multitude of other methods have been advanced as suitable alternatives.¹⁷⁹

However, numerous obstacles make it difficult for plaintiffs to successfully bring a disparate impact claim.¹⁸⁰ First, scholars have noted that disparate impact cases have a strikingly limited impact and are an extremely difficult to bring.¹⁸¹ Second, the passage of the Civil Rights Act of 1991 made compensatory and punitive damages unavailable for disparate impact claims, reducing incentives to pursue pure disparate impact claims.¹⁸² Third, the theory seeks to remedy broad societal discrimination, making courts reluctant to find discrimination as compared to a case of intentional discrimination.¹⁸³

Among the changes in the upcoming legal landscape, employers should not scale back neutral policies due to concerns that they will be found illegal under

173. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (holding that employment practices must be shown to have a “manifest relationship to the employment in question” to withstand a disparate impact challenge); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (quoting *Griggs*, 401 U.S. at 432 (reaffirming that an employer must demonstrate that a challenged practice is job related and consistent with business necessity)).

174. *Griggs*, 401 U.S. at 432; *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 984 (1988).

175. *See supra* Part.I.

176. *See supra* Part.I.

177. *See generally* Dina Dalessandro, *Legally Compliant Diversity Initiatives Can Eliminate Bias in Hiring*, 21 *CAMPUS LEGAL ADVISOR* 1 (2021) (explaining how institutions can implement legally compliant diversity initiatives).

178. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

179. Other methods include tracking demographics at different stages of hiring, teaching managers what biases look like, and avoiding common derailers. *Supra* note 2. *See also* JOAN C. WILLIAMS, *BIAS INTERRUPTED: CREATING INCLUSION FOR REAL AND FOR GOOD* 4–5 (2021).

180. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. REV.* 701, 705, 738–43 (2006) (noting that disparate impact plaintiffs succeeded in only 19.2% of appellate cases and 25.1% of district court cases, compared to approximately 35% success rates for employment discrimination cases generally, and that the theory has proven successful almost exclusively in written employment test cases with virtually no meaningful impact in other contexts.)

181. *Id.* at 705–06.

182. *Id.* at 735–36. Civil Rights Act of 1991, 42 U.S.C. § 1981(a)(2000).

183. *Supra* note 182, at 771.

a disparate impact theory. On April 23, 2025, President Trump issued an executive order to his government agencies “to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible.”¹⁸⁴ This executive order seems to show that the current regime is choosing to broaden employer autonomy in implementing policies. This is beneficial for DEI initiatives as there will be less government scrutiny into employer’s DEI policies. However, this stance also suggests that minority plaintiffs seeking substantive remedies for discriminatory policies may face greater difficulty pursuing their claims. Ultimately, while the diminished role of disparate impact under the current administration may grant employers greater flexibility in policy implementation, it simultaneously raises concerns about the reduced legal avenues available to address systemic discrimination.

While concerns about disparate impact liability may persist, employers should not be overly cautious in advancing DEI initiatives as several barriers stand in the way of flagrant doctrine use. Instead, employers should adopt alternative strategies, such as bias interrupters, proposed by scholars and experiment with neutral policies in a time of relaxed regulation.

C. REVERSE DISCRIMINATION & DEI

Plaintiffs seeking to challenge private DEI initiatives often base their claims on reverse discrimination.¹⁸⁵ These lawsuits generally assert that DEI programs unlawfully favor minority groups over their majority counterparts.¹⁸⁶ For example, imagine Danny and Lisa both work as assistant managers at ABC Co. They have worked at ABC Co. for the same amount of time and have similar performance evaluations and leadership experience. But, ABC Co. recently adopted a DEI initiative aimed at promoting greater diversity in its leadership ranks. The company’s stated goal is to advance individuals from historically underrepresented groups. When a managerial position opens, Lisa, a woman of color, is promoted over Danny, a white woman. Although both women were equally qualified on paper, internal communications later revealed that the

184. Exec. Order No. 14,281, 90 Fed. Reg. 17537 (Apr. 28, 2025).

185. Ling Ling Lim Ang & Elizabeth Hart Newlon, *Reverse Discrimination in the Spotlight: Recent Developments and Econometric Approaches*, AM. BAR ASS’N (Aug. 5, 2025), https://www.americanbar.org/groups/business_law/resources/business-law-today/2025-august/reverse-discrimination-developments-econometrics; Jessica Guynn, *DEI Under Siege: Why More Businesses are Being Accused of ‘Reverse Discrimination,’* USA Today (Dec. 26, 2023, at 11:23 ET), <https://www.usatoday.com/story/money/careers/2023/12/20/dei-reverse-discrimination-lawsuits-increase-woke/71923487007>.

186. Mike Delikat & Ernan Kiselica, *Litigation Targeting Large Company DEI Programs on the Rise*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 18, 2024), <https://corpgov.law.harvard.edu/2024/09/18/litigation-targeting-large-company-dei-programs-on-the-rise>; see also DiBenedetto v. AT&T Servs., Inc., No. 21-CV-04527 (N.D. Ga. Nov. 2, 2021) (alleging counts of unlawful discrimination based on race, age, and gender against employer AT&T); Meyersburg v. Morgan Stanley & Co. LLC, No. 1:23-CV-07638 (S.D.N.Y. Aug. 29, 2023).

decision may have been influenced by the company's desire to comply with its new DEI policy. Danny then files a complaint claiming that she did not get the position because she is white. Cases like Danny's illustrate the fundamental challenge facing courts: determining when employer efforts to increase diversity cross the line from permissible DEI into unlawful reverse discrimination.

In *Santa Fe Trail Transportation Co. v. State of New Mexico*, the Supreme Court held that a reverse discrimination claim under Title VII is valid when actions adversely affect a white person's employment opportunities.¹⁸⁷ As a result, since 1976, plaintiffs like Danny increasingly seek to challenge DEI initiatives by claiming reverse discrimination. However, plaintiffs nevertheless face significant challenges to surviving summary judgment.

To succeed under a reverse discrimination theory, the plaintiff must first attempt to provide direct evidence of discriminatory intent by the employer.¹⁸⁸ If direct evidence cannot be produced, the employee must satisfy the *McDonnell Douglas prima facie* requirements and prove discriminatory intent indirectly through circumstantial evidence.¹⁸⁹ As it relates to the types of practices that opponents of DEI are challenging, a plaintiff would face great difficulty in proving direct evidence of discriminatory intent from a DEI action.¹⁹⁰ Unless the initiative egregiously violates Title VII, like racial quota hiring practices, classification-based promotions, or hiring preferences, a plaintiff is unlikely to bring the direct, "smoking-gun" evidence required to substantiate their claim. Thus, plaintiffs are forced to pursue the *McDonnell Douglas* burden-shifting framework to prove that their employer acted with discriminatory intent.

The first step of the *McDonnell Douglas* framework requires a plaintiff to establish a *prima facie* case of discrimination.¹⁹¹ A plaintiff must prove that (1) they are part of a protected class, (2) they met their employer's legitimate work expectations, (3) they experienced an adverse employment action, and (4) the action occurred under circumstances giving rise to an inference of discrimination.¹⁹² After a plaintiff has plausibly pleaded a *prima facie* case of discrimination, the second step of the *McDonnell Douglas* framework shifts the

187. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286–87 (1976) (holding that a reverse discrimination claim under the Equal Protection Clause is valid when government actions adversely affect a white person's employment opportunities).

188. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

189. *Id.*

190. See Jenny R. Yang & Jane Liu, *Strengthening Accountability for Discrimination: Confronting Fundamental Power Imbalances in the Employment Relationship*, ECON. POL'Y INST., June 2021, at 32, <https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship> (explaining that plaintiffs in employment discrimination cases often lack access to direct evidence and must rely on circumstantial evidence).

191. *Id.* at 31.

192. *Id.*

burden to the employer.¹⁹³ The employer is then required to give a non-discriminatory reason for the adverse action taken.¹⁹⁴ The employer does not have a high standard to meet—the law only requires a general, non-discriminatory reason.¹⁹⁵ The third step of the *McDonnell Douglas* framework shifts the burden back to the plaintiff, where they are tasked with showing that the alleged non-discriminatory reason is pretextual.¹⁹⁶

The *McDonnell Douglas* framework acts as a gatekeeper and defends an employer's autonomy to implement a broad range of legal DEI programs. Contemporary, legal DEI practices are generally not tied to a specific adverse action, nor do they result in the kind of tangible harm that the *McDonnell Douglas* framework requires.¹⁹⁷ As it pertains to DEI programs, a *prima facie* case of discrimination is difficult to prove when examined against the motion for summary judgment standard, where a plaintiff would be required to prove that there is no dispute of material fact that satisfies all four elements.¹⁹⁸

Furthermore, even if an employee surpasses the first stage of *McDonnell Douglas*, the subsequent burden shifting stages presents substantial challenges. Showing pretext is a daunting task.¹⁹⁹ Courts typically give deference to employers' reasoning even when examining subjective criteria, such as leadership potential or team compatibility, as it may constitute legitimate reasons for employment decisions so long as they are applied consistently and not as a proxy for bias.²⁰⁰ This deference is particularly relevant in the context of modern DEI programs because they emphasize more objective criterion and actively seek to avoid decisions based on bias.²⁰¹ Given this alignment, it becomes very difficult for a reverse discrimination claim to overcome the motion for summary judgment stage. In addition, most modern DEI programs will not provide the level of potent evidence needed.

193. *McDonnell Douglas*, 411 U.S. at 802.

194. *Id.*

195. *Id.* (the defendant's burden is one of production, not persuasion; the employer must only "articulate some legitimate, nondiscriminatory reason" for the employment action) (emphasis added); see also *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993) (explaining that the employer's burden is merely to produce evidence, not to persuade).

196. *McDonnell Douglas*, 411 U.S. at 802.

197. See *supra* Part.I.

198. FED. R. CIV. P. 56 (providing that a party may move for summary judgment when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law").

199. Sandra F. Sperino, *Irreconcilable: McDonnell Douglas and Summary Judgment*, 102 N.C. L. REV. 459, 502 (2024), https://northcarolinalegallawreview.org/wp-content/uploads/sites/5/2024/02/Sperino_FinalforPrint.pdf.

200. See *Burdine*, 450 U.S. at 259 (holding that courts must defer to an employer's legitimate, nondiscriminatory reasons for employment decisions, even when based on subjective criteria, so long as the reasons are applied consistently and are not pretexts for discrimination).

201. See *supra* Part.I.

Scholars in the field of employment law recognize the procedural challenges that the *McDonnell Douglas* framework presents.²⁰² As part of a broader strategy to dismantle DEI programs, opponents, including the Trump Administration, are advancing policies geared at facilitating an increase in reverse discrimination cases.

For example, the Trump administration is currently wielding the EEOC against DEI initiatives. The EEOC's current acting chair, Andrea Lucas, has focused the agency's attention on DEI programs by making anti-DEI policies clear in press releases and sending letters to private companies to root out discrimination wherever it may rear its head.²⁰³ As signaled in his executive order, President Trump believes that DEI programs facilitate reverse discrimination.²⁰⁴ In response, there will likely be an uptick in the number of reverse discrimination cases and right to sue letters initiated by the EEOC.²⁰⁵

The Court has also signaled its willingness to hear more reverse discrimination cases. In 2024, the Court heard arguments in *Ames v. Ohio Department of Youth Services*. In *Ames*, plaintiff Marlean Ames raised a reverse discrimination claim, alleging that she was not given a promotion and was demoted because she is straight.²⁰⁶ Both her current and prospective jobs were given to gay men whom the plaintiff alleges were not qualified for the jobs.²⁰⁷ The Sixth Circuit held that Ames had sufficiently pleaded the first four elements of the *McDonnell Douglas* test.²⁰⁸ However, because the Sixth Circuit subscribed to the "background circumstances rule" which adds another prong to the *McDonnell Douglas* test, Ames's claim was dismissed on summary judgment. The court reasoned that she failed to produce evidence sufficient to satisfy the additional prong.²⁰⁹

The "background circumstances rule" derives from a handful of courts that recognized that Title VII was created to address racism in employment actions against minority groups, not majority groups.²¹⁰ The background circumstances rule was first applied in *Parker v. Baltimore & Ohio Railroad*, where the D.C.

202. James Poindexter, *McDonnell Douglas—The "Interloper" on the Ropes*, 99 FLA. B. J. 32, 36 (2025).

203. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Acting Chair Andrea Lucas Sends Letters to 20 Law Firms Requesting Information About DEI-Related Employment Practices (Mar. 17, 2025), <https://www.eeoc.gov/newsroom/eeoc-acting-chair-andrea-lucas-sends-letters-20-law-firms-requesting-information-about-dei>.

204. Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan 20, 2025).

205. The EEOC in the fiscal year of 2024 saw 88,531 new discrimination charges, an increase of 9.2% compared to fiscal year 2023. *Annual Performance Report: Fiscal Year 2024*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 17, 2025), https://www.eeoc.gov/2024-annual-performance-report#_Toc186809492.

206. *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822, 824 (6th Cir. 2023).

207. *Id.*

208. *Id.*

209. *Id.* at 825.

210. *Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

Circuit recognized that “membership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context . . . [can there be an inference of] discriminatory motive from the unexplained hiring of an outsider rather than a group member.”²¹¹ The court further reasoned that although “[w]hites are also a protected group under Title VII, . . . it defie[d] common sense to suggest that [for example] the promotion of a black employee justifies an inference of prejudice against white co-workers.”²¹² In considering these values, the court held that a majority-group plaintiff must point to “background circumstances [which] support the suspicion that the defendant is that unusual employer who discriminates against the majority.”²¹³ This added requirement for reverse discrimination cases was adopted by the Sixth, Seventh, Eighth, and Tenth Circuits.²¹⁴

In *Ames*, the Court granted certiorari to address the issue of whether the background circumstances rule was a valid requirement under Title VII.²¹⁵ And, the answer was a resounding no. The Court unanimously eradicated the background circumstances rule, holding that majority-group plaintiffs should not be required to adhere to a heightened burden of producing evidence under Title VII.²¹⁶ As demonstrated through their previous rulings, such as *Griggs* and *Bostock*, the Court reasoned that Title VII created a path for majority and minority plaintiffs to receive equal treatment.²¹⁷ This holding in jurisdictions that require adherence to the background circumstances rule will now find it easier to challenge employer decisions and DEI policies.

However, some members of the Court foreshadowed their desire to eliminate the *McDonnell Douglas* framework as well. During the *Ames* oral arguments, Justice Gorsuch asked the counsel for *Ames* whether he believed that the *McDonnell Douglas* framework should apply at all during the summary judgment stage.²¹⁸ Additionally, Justice Gorsuch and Justice Thomas co-authored a dissenting opinion on the denial of certiorari in *Hittle v. City of Stockton California* (2025).²¹⁹ The central issue in *Hittle* was whether the Court should overrule the *McDonnell Douglas* framework.²²⁰ In their dissent, Justice Gorsuch and Justice Thomas articulated their desire to eliminate the *McDonnell*

211. *Id.*

212. *Id.*

213. *Id.*

214. See *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 455–57 (7th Cir. 1999); *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004); *Notari v. Denver Water Dep’t*, 971 F.2d 585, 588–89 (10th Cir. 1992).

215. See *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 308 (2025).

216. *Id.* at 308–12.

217. *Id.*

218. Transcript of Oral Argument at 14, *Ames*, 605 U.S. 303 (2025) (No. 23-1039).

219. 145 S. Ct. 759 (2025) (Thomas & Gorsuch, JJ., dissenting).

220. *Id.* at 760 (Thomas & Gorsuch, JJ., dissenting).

Douglas framework and demanded instead that the regular standard for summary judgment should apply.²²¹ So, what do these attempted changes mean for legally permissible DEI programs? Very little.

First, Plaintiffs would still have to sufficiently plead a *prima facie* case of discrimination and survive the regular standard for the motion for summary judgment stage.²²² Contemporary legal DEI programs are unlikely to produce sufficient evidence to meet even these burdens.

Second, while the Court's decision in *Ames* to eliminate the background circumstances rule will likely cause an influx of reverse discrimination cases, it is unlikely that these cases will bring about significant challenges to DEI for two reasons. Most circuits do not abide by the "background circumstances rule," and the circuits that do are not flooded by reverse discrimination cases.²²³ Plaintiffs still have to plausibly plead the rest of the *McDonnell Douglas* factors and prove pretext—both steps that are extremely difficult to accomplish.²²⁴ If Justice Thomas and Justice Gorsuch's scheme to eliminate the *McDonnell Douglas* test is attained, there may be problems for current DEI programs. Relaxing the summary judgment standard would make it easier for plaintiffs to survive the procedural stage²²⁵ and result in a clearer path to a trial. However, the majority plaintiff would still have to provide some sufficient evidence to rebut the defendant's assertion that there is a "genuine dispute as to any material fact"—that the employer discriminated.²²⁶

Ultimately, while proposed doctrinal shifts in Title VII litigation seek to open the door for more reverse discrimination claims, they are unlikely to undermine modern DEI initiatives. Most modern DEI programs have been distilled and designed to exist within the legal boundaries of Title VII. As a result, even in an evolving legal landscape, DEI initiatives will remain largely intact.

221. *Id.* at 762–64 (Thomas & Gorsuch, JJ., dissenting).

222. *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 252–53 (1981).

223. Samuel M. Mitchell, *Supreme Court Poised to Strike Down Reverse Discrimination Standard*, HUSCH BLACKWELL (Feb. 28, 2025), <https://www.huschblackwell.com/newsandinsights/supreme-court-poised-to-strike-down-reverse-discrimination-standard> (noting that the First, Second, Fourth, Fifth, and Ninth Circuits do not apply the "background circumstances rule" in reverse discrimination cases, and these circuits have not seen a significant increase in such litigation).

224. Poindexter, *supra* note 202, at 32 (addressing the difficulties plaintiffs face in engaging in the *McDonnell Douglas* framework); *see also* Sperino, *supra* note 199, at 467 (same).

225. Memorandum from Joe Cecil & George Cort on Estimates of Summary Judgment Activity in Fiscal Year 2006 to Judge Michael M. Baylson (2007) (reporting that summary judgment motions were granted in whole or in part in 77% of employment discrimination cases in federal district courts, with nearly all grants favoring defendants).

226. *See* FED. R. CIV. P. 56.

D. DEI UNDER HOSTILE WORK ENVIRONMENT

The most common and successful method of challenging DEI under Title VII is through hostile work environment claims.²²⁷ But, the victories these claims have obtained in court are limited to the motion to dismiss stage. Beyond this stage, plaintiffs fail to provide adequate evidence that their harassment was severe or pervasive enough. Standard DEI initiatives that employ mechanisms such as simple anti-bias training do not rise to the level of severity and pervasiveness necessary to succeed on a hostile work environment claim and are thus currently legal under Title VII.

When a workplace is “permeated with discriminatory intimidation, ridicule and insult” that is severe or pervasive enough to alter the terms and conditions of one’s employment, Title VII is violated.²²⁸ However, this can be difficult to prove. In a workplace harassment claim, a plaintiff must prove that (1) they were subjected to verbal or physical conduct because of their protected class, (2) the conduct was unwelcome, and (3) the conduct was both subjectively and objectively severe and persuasive enough to alter the conditions of the plaintiff’s employment.²²⁹ As it relates to DEI, these cases hinge on the third factor.²³⁰ To determine the degree of severity and pervasiveness, a court must look to the totality of the circumstances.²³¹ This includes weighing factors such as frequency, severity, and whether the conduct was physical threatening or humiliating or unreasonably interferes with work performance.²³² This is a sliding scale approach, meaning that the less pervasive something is, the more severe it can be and vice versa.²³³ Severity and pervasiveness must also be both objectively and subjectively reasonable.²³⁴ The requirements needed to plead a successful workplace harassment complaint indicate that these inquiries are very fact-specific.²³⁵

Most contemporary DEI initiatives do not rise to a level of severity or pervasiveness that would implicate Title VII. When examining these claims under the motion to dismiss stage, a court accepts all of the complaint’s well-

227. Chris Marr, *Hostile Work Environment Claims Aimed at DEI Gain Early Traction*, BLOOMBERG L. (Dec. 27, 2024, at 02:15 PT), <https://news.bloomberglaw.com/daily-labor-report/hostile-work-environment-claims-aimed-at-dei-gain-early-traction>.

228. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

229. *Manatt v. Bank of Am.*, 339 F.3d 792, 798 (9th Cir. 2003).

230. *See e.g.*, *Young v. Colo. Dep’t of Corr.*, No. 23-1063 (10th Cir. 2024); *Diemert v. City of Seattle*, 689 F. Supp. 3d 956, 962 (W.D. Wash. 2023); *De Piero v. Pa. State Univ.*, 711 F.Supp.3d 410, 421 (2024).

231. *Harris*, 510 U.S. at 18.

232. *Id.*

233. *Id.*

234. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

235. *Harris*, 510 U.S. at 22–24 (explaining that the determination of whether an environment is hostile or abusive is not subject to a mathematically precise test and can only be determined by looking at all of the circumstances).

pleaded factual allegations as true and construes the pleadings in a light most favorable to the plaintiff.²³⁶ This is not a difficult standard to meet and plaintiffs frequently succeed.²³⁷ However, as these cases progress beyond the summary judgment phase, they frequently falter under the more demanding evidentiary standard of Rule 56.²³⁸ District courts have recently found that plaintiffs are struggling to produce sufficient evidence to demonstrate that they were subject to severe and/or pervasive harassment.²³⁹ This pattern appears to be emerging amongst the district courts that have been grappling with these cases on first impression.

Consider plaintiff Joshua Diemert, for instance. In *Diemert v. City of Seattle*, the plaintiff filed a complaint alleging that his employer's DEI program created a hostile work environment.²⁴⁰ Diemert argued that the City of Seattle "infus[ed] race into all city functions" and functionally "reduc[ed] [him] to an embodiment of his race."²⁴¹ The City of Seattle required Diemert to complete two activities under their DEI program titled the "City's Race and Social Justice Initiative" (RSJI).²⁴² To fulfill this requirement, employees could complete training, attend city-sponsored events, or participate in outside activities approved by the city.²⁴³ Failure to complete the required training, however, did not impact Diemert's performance evaluation in any way.²⁴⁴

The United States District Court for the Western District of Washington allowed Diemert's initial claim to pass the motion to dismiss stage.²⁴⁵ The court found that Diemert successfully pleaded the elements of a workplace harassment claim based on race.²⁴⁶ To plead that he was subject to severe and pervasive harassment, Diemert offered evidence that he heard racially derogatory comments against white people as a matter of "daily occurrence."²⁴⁷ He also

236. FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

237. H. Joseph Acosta, *Why Avoidance Actions Are Difficult to Dismiss by a Rule 12(b)(6) Motion*, JD SUPRA (July 2, 2021), <https://www.jdsupra.com/legalnews/why-avoidance-actions-are-difficult-to-6752535> (explaining that Rule 12(b)(6) motions are rarely granted because courts must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff, making it relatively easy for plaintiffs to meet the pleading standard).

238. See *Vavra v. Honeywell Int'l, Inc.*, 106 F. 4th 702, 706 (7th Cir. 2024) (holding that the "severity and pervasiveness" standard was not met); *Young v. Colo. Dep't of Corr.*, 94 F.4th 1242, 1251 (10th Cir. 2024) (same); *Diemert v. City of Seattle*, 689 F. Supp. 3d 956, 967 (W.D. Wash. 2023) (same); *DePiero v. Pa. State Univ.*, 711 F.Supp.3d 410, 421 (2024) (same).

239. *Id.*

240. *Diemert*, 689 F. Supp. 3d at 961.

241. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment at 1–2, *Diemert v. City of Seattle*, No. 2:22-CV-01640 (W.D. Wash. Sep. 6, 2024).

242. *Diemert*, 689 F. Supp. 3d at 960.

243. *Diemert*, 2:22-CV-01640 at 1–2.

244. *Id.*

245. *Diemert*, 689 F. Supp. 3d at 967.

246. *Id.* at 963.

247. *Diemert*, 2:22-CV-01640 at 7.

testified that he was accosted at RSJI trainings and the RSJI trainings resulted in a general workplace hostility toward white people.²⁴⁸

But the plaintiff's claim was quickly dismissed in the summary judgment stage. The court held that "Diemert [had] not set forth facts from which a jury could find severe or pervasive racial hostility."²⁴⁹ The court found that the statements Diemert relied on did not rise to a severe or pervasive level for three reasons. The first two were limited to the context of Diemert's specific case, but the third reason addressed the broader issue of why it is unlikely that statements made in DEI trainings are not severe or pervasive.²⁵⁰ The district court emphasized the context, reasoning that comments made during the RSJI trainings were "better framed as attempts to express perspectives or challenge ideas within the training's scope."²⁵¹ Because such comments were made in the presence of a skilled facilitator who "can be addressed constructively, [and] turn[] the moment into a learning opportunity," this situation differs from instances made on, for example, a sales floor of a retail store—a place that does not offer an educational purpose.²⁵² *Diemert* is a case of first impression, but other courts seem to be heading in the same direction.²⁵³

Other cases affirm the idea that contemporary DEI practices are neither severe nor pervasive enough to make a hostile work environment. In *Young v. Colorado Department of Corrections*, the plaintiff objected to mandatory DEI training, claiming that it violated his rights under Title VII.²⁵⁴ Young alleged that the training demeaned him because of his race and "promoted divisive racial and political theories" that were created to harm him.²⁵⁵ The Tenth Circuit held that the department's training were neither severe nor pervasive enough to create an "ongoing presence permeating the workplace" because the training occurred only once and did not allow harassing conduct.²⁵⁶ In *De Piero v. Pennsylvania State University*, a white professor alleged that a culmination of incidences over a span of three and a half years created a hostile work environment.²⁵⁷ The incidences included a workplace discussion of the George Floyd shooting, a Juneteenth commemoration email, and a professional development meeting on

248. *Id.* at 26.

249. *Diemert v. City of Seattle*, 776 F.Supp. 3d 922, 941 (W.D. Wash. Feb. 10, 2025) (granting summary judgment).

250. *See id.* at 942, 947–48 (explaining that (1) the comments made in Diemert's case were not as harsh as other comments the Ninth Circuit has upheld, and (2) Diemert was the aggressor in some of the comments that were used against him).

251. *Id.* at 942.

252. *Id.*

253. *See e.g.*, *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1013 (D.C. Cir. 1981).

254. 94 F.4th 1244, 1244 (10th Cir. 2024).

255. *Id.*

256. *Id.* at 1245.

257. 769 F. Supp. 3d 329, 351 (E.D. Pa. Mar. 6, 2025) (granting summary judgment).

racism in writing assessments.²⁵⁸ Like Diemert and Young, De Piero's claim was dismissed on summary judgment because the Court held that no reasonable juror would find any of these instances severe or pervasive enough to meet the hostile work environment standard.²⁵⁹ These decisions reflect a broader judicial trend that courts routinely find that challenges to DEI programs under a hostile work environment theory fail at summary judgment because the alleged conduct is neither severe or pervasive enough to create such an environment.

Recently, opponents of DEI have pushed to loosen the severe and pervasive requirement and thus allow more claims to reach a jury. Five states have enacted laws that either loosened or entirely erased the severe or pervasive requirement.²⁶⁰ However, it is unclear whether the Trump Administration will invoke this method to combat DEI. In other contexts, the Trump Administration has taken a seemingly opposite stance. During President Trump's first term, the Department of Education issued regulations that raised the bar for cases involving sexual misconduct in universities to actions that are severe, pervasive, and objectively offensive.²⁶¹ Although these regulations are limited to the context of sexual misconduct in public schools, it is unclear whether the Trump Administration will adopt the same approach as it relates to DEI. Historically, left-leaning advocates are the ones who championed relaxation in these requirements.²⁶² This is because a relaxation of the severe or pervasive requirements, outside the context of DEI, would allow more plaintiffs to challenge their employers' action.²⁶³ However, with the rise of cases looking to challenge DEI, the pendulum may swing in the other direction.

258. *Id.*

259. *Id.* at 337–38.

260. Caroline J. Berdzik & Christopher P. Maugans, *Update: Expansive Harassment and Discrimination Legislation Signed Into Law in New York*, GOLDBERG SEGALLA (Aug. 13, 2019), <https://www.goldbergsegalla.com/news-and-knowledge/knowledge/update-expansive-harassment-and-discrimination-legislation-signed-into-law-in-new-york> (New York); Raabia Cheema, *Is It on Your Reading List? The EEOC Releases New Guidance on Workplace Harassment*, EXTENSIO L. (May 30, 2024), <https://www.extensiolaw.com/legal-updates/2024/5/30/for-your-reading-list-eeoc-releases-new-guidance-on-workplace-harassment> (Maryland); David Gartenberg & Mona Rainwater, *Colorado's POWR Act Significantly Expands Workplace Harassment Laws, Limits Nondisclosure Provisions, and Makes Numerous Other Changes to Employment Law*, LITTLER MENDELSON P.C. (June 8, 2023), <https://www.littler.com/publication-press/publication/colorados-powr-act-significantly-expands-workplace-harassment-laws> (Colorado); Brian Joseph, *State Lawmakers Lowering Bar for Workplace Harassment*, LEXISNEXIS: CAPITOL J. (Apr. 24, 2024), <https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/state-lawmakers-lowering-bar-for-workplace-harassment> (California); Brian Joseph, *State Lawmakers Lowering Bar for Workplace Harassment*, LEXISNEXIS: CAP. J. (Apr. 24, 2024), <https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/state-lawmakers-lowering-bar-for-workplace-harassment> (District of Columbia).

261. Nicole Bedera, *Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point*, TIME (May 14, 2020, at 13:32 ET), <https://time.com/5836774/trump-new-title-ix-rules>.

262. Eric A. Bachman, *A Movement Is Afoot to Redefine Hostile Work Environment/Harassment Laws*, FORBES (Jan. 6, 2021, at 13:43 ET), <https://www.forbes.com/sites/ericbachman/2021/01/06/a-movement-is-afoot-to-redefine-hostile-work-environment-harassment-laws>.

263. *Id.*

Although there have been some courts that do not see DEI-related harassment as severe or pervasive enough, other courts disagree.²⁶⁴ Thus, without doctrinal consistency, any relaxation of this requirement could present legal challenges for DEI programs that involve expressive or instructional components, such as workplace trainings or workshops that address race, gender, or privilege.

For now, the severe or pervasive requirement seems to be the last stop for plaintiffs claiming harassment under Title VII. Employers should exercise caution, however, as emerging interpretations of this standard relating to DEI training have not faced ample litigation. Given the unclear path this will take, employers should cautiously implement expressive DEI content—like the mandatory training in *Diemert* that involves discussions of identity, privilege, or systemic bias—until greater judicial clarity is established. Conversely, DEI practices that focus on structural reforms, such as blind hiring processes or the implementation of metrics-driven promotion systems, are less likely to be affected, as they do not involve discussion or engagement with co-worker's views. Accordingly, employers should steer away from methods that elicit discussion and engagement and use methods focused on structural reform.

III. CAN DEI PROGRAMS BE HARMONIZED WITH THE FIRST AMENDMENT?

The First Amendment has long been regarded as a cornerstone of American democracy.²⁶⁵ Designed by the Framers as a safeguard against government overreach, the First Amendment has always been viewed as an emblem of individual liberty and autonomy.²⁶⁶ Amidst emerging concern for DEI programs, the First Amendment has become a tool for both challenging and upholding DEI initiatives—providing arguments used by both critics and proponents. While plaintiffs have invoked the First Amendment to challenge DEI policies on the grounds that requiring participation in DEI programs violates their freedom of speech rights, the First Amendment has also been interpreted to permit certain uses of DEI policies. This diverging use of the First Amendment highlights the growing litigation of DEI in all aspects of the law.

264. *Cf. De Piero v. Pa. State Univ.*, 711 F. Supp 3d 410, 423–24 (E.D. Pa. 2024) (contrasting with the notion in *Diemert* and explaining that “the way these conversations are carried out in the workplace matters: When employers talk about race—any race—with a constant drumbeat of essentialist, deterministic, and negative language, they risk liability under federal law.”).

265. UP FIRST FROM NPR: *The State of Free Speech in America* (Spotify, Apr. 13, 2025).

266. Jeffrey Rosen, From Jefferson to Brandeis: The First Amendment, the Declaration, and the Constitution: Remarks at the National Constitution Center's First Amendment Tablet Dedication Ceremony 4 (May 2, 2022) (transcript available at <https://constitutioncenter.org/go/firstamendment>) (exploring how the First Amendment was designed to protect individual freedoms by preventing government interference in matters of conscience, speech, and religion, reflecting the framers' commitment to liberty and autonomy).

A. PLAINTIFF'S USE OF THE FIRST AMENDMENT

DEI critics have used, and will continue to use, the First Amendment as a tool to discontinue DEI programs.²⁶⁷ For example, consider public school teacher John Grande.²⁶⁸ Mr. Grande—a white, male physical education teacher—was required to attend a mandatory “Professional Development (PD) session focused on race and privilege.”²⁶⁹ During this training, Mr. Grande was subject to a discussion about white privilege, which he felt “targeted a certain class of people, including him, and was an exercise of critical race theory, rather than one aimed at improving the education of students.”²⁷⁰ After the training, participants were divided into individual break-out groups to share their opinions on the privilege presentation.²⁷¹ Mr. Grande expressed his discomfort with the presentation, stating that he had just been “man-bashed and white-shamed” and that he was not “buying into this white-bashing BS.”²⁷² Following these comments, the school board decided to open an investigation regarding the “inappropriate and aggressive comments” Mr. Grande made during the breakout session.²⁷³ As a result of the investigation, the board issued a letter of reprimand and a threat of termination to Mr. Grande.²⁷⁴ Mr. Grande challenged the constitutionality of the school board’s actions in federal court.²⁷⁵ In *Grande v. Hartford Board of Education*, Mr. Grande claimed that the school board’s actions resulted in First Amendment retaliation, and compelled Mr. Grande’s speech.²⁷⁶ Mr. Grande’s case provides just one example of First Amendment claims confronting DEI.²⁷⁷ These types of cases compel the question of whether DEI initiatives can be harmonized with the First Amendment.

267. See e.g., *Norgren v. Minn. Dep’t of Hum. Servs.*, 96 F.4th 1048, 1052 (8th Cir. 2024) (utilizing the First Amendment as a device to challenge DEI initiatives); *Henderson v. Springfield R-12 Sch. Dist.*, 116 F.4th 804, 808 (8th Cir. 2024) (same); Complaint at *10, *Grande v. Hartford Bd. of Educ.*, No. 3:24-CV-00010 (D. Conn. 2024) (same).

268. *Grande*, No. 3:24-CV-00010 at *14–15.

269. *Id.* at *22.

270. *Id.* at *25.

271. *Id.* at *28.

272. *Id.* at *31, *35.

273. *Id.* at *50–51.

274. *Id.* at *83, *85.

275. *Id.* at *10 (filing the complaint in the District Court of Connecticut).

276. *Id.*

277. See also Complaint for Declaratory and Injunctive Relief at *1, *Johnson v. Watkin*, No. 1:23-CV-00848, *remanded sub nom.*, *Johnson v. Fliger*, 2025 WL 2427606 (9th Cir. 2025) (recommending a preliminary injunction against enforcement of DEIA mandates at Bakersfield College, alleging that Bakersfield College’s DEIA mandates violated his First Amendment rights).

1. First Amendment Retaliation

The first step to determining how DEI and the First Amendment can be reconciled is to identify what types of contemporary DEI programs are susceptible to First Amendment scrutiny. Programs that elicit discussion regarding the trainees' views are particularly vulnerable. This involves situations such as Mr. Grande's, where an employee is punished for sharing his views during a DEI-related program.²⁷⁸ Similarly, policies that explicitly prohibit discussion surrounding trainees' views are also susceptible to challenges. For example, imagine a community college implements a policy prohibiting employees from posting, sharing, or expressing any personal views on social media that undermine or contradict the employee's DEI goals. Such a policy could capture a wide range of speech on contested issues such as affirmative action, gender identity, or the role of DEI in education. By prohibiting only speech that "undermines" institutional DEI goals, it risks operating as impermissible viewpoint discrimination subject to heightened First Amendment scrutiny. If enforced against public employees speaking as private citizens on matters of public concern, it may also support claims of unlawful retaliation under the framework established by *Pickering v. Board of Education* and *Connick v. Myers*.

Next, the bounds of speech restrictions under current First Amendment jurisprudence provides carve-outs that contemporary DEI programs fit squarely into. While private sector employers are generally allowed to impose broad speech restrictions on their employees,²⁷⁹ public sector employers are not afforded the same autonomy. Thus, this assessment varies based on the sector in question. As it relates to First Amendment retaliation claims, the illustrative cases *Pickering* and *Garcetti v. Ceballos* provide guidelines for how these cases might shake out.

In order to plead a case of First Amendment retaliation, a plaintiff must demonstrate that (1) they have engaged in expression subject to the protection of the First Amendment, (2) the employer took an adverse action likely to deter a reasonable person from exercising free speech, and (3) there is a causal connection between the protected speech and the adverse action.²⁸⁰ In matters regarding public employees, First Amendment jurisprudence requires one more element, (4) that the employees speech was of public concern and the interest of

278. See *supra* text accompanying notes 267–277.

279. Steven L. Winer & Lynnette V. Macomber, *Free Speech in the Workplace?*, ORR & RENO (Apr. 4, 2023), <https://orr-reno.com/2545-2> (explaining that private employers generally have broad authority to regulate employee speech within the workplace, as the First Amendment does not apply to private sector employers).

280. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

the employee as a citizen outweighs the administrations interest in promoting the efficiency of the public services it performs.²⁸¹

The fourth element involves the balancing test articulated in *Pickering*, and refined by *Garcetti*.²⁸² In *Pickering*, the Court held that when faced with a public sector employment matter, courts must apply a balancing test to determine whether a public employee's speech is protected.²⁸³ This test considers the employees' interest as a citizen speaking on matters of public concern against the government's interests in efficient administration.²⁸⁴ But *Garcetti* complicates this analysis. In *Garcetti*, the Court held that when public employees make statements in the course of their official duties, they are not speaking as private citizens for First Amendment purposes and, thus, their communication speech is not protected.²⁸⁵

Applying the *Pickering* and *Garcetti* doctrines to DEI claims, the law is unsettled.²⁸⁶ The question depends on the employee's capacity during the time the statement was made. If an employee is disciplined or retaliated against for opposing, refusing to participate in, or expressing criticism regarding a DEI training or policy, courts will first assess whether the expression occurred in the employee's capacity as a public citizen.²⁸⁷ If the speech was made within the scope of their professional responsibilities—such as participating in a DEI training that was required by the employer, like Mr. Grande—it likely falls under *Garcetti*, foreclosing First Amendment protection.²⁸⁸ But if the speech was outside of this scope, it may be protected, and courts would then apply the *Pickering* balancing test to weigh the employee's interest in speaking against the government's interest in efficient operations.

In addition, courts will likely examine the subject, manner, and context of the speech to assess whether it pertains to responsibilities that are essential to

281. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006).

282. *Id.*

283. *Pickering*, 391 U.S. at 568.

284. *Id.*

285. *Garcetti*, 547 U.S. at 421.

286. See generally *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767 (9th Cir. 2022) (analyzing First Amendment claims in the context of opposition to DEI-like programs).

287. *Garcetti*, 547 U.S. at 418–19.

288. *Id.* at 421.

the employee's role.²⁸⁹ Under this analysis, statements made during DEI programs—especially those that are part of institutional training—are likely to be viewed as protected workplace speech.²⁹⁰ This conclusion is further supported by the fact that modern DEI programs, even when they involve expressive elements, typically occur in professional settings and are directly related to job performance. However, if the court determines that the speech was not made during official duties, then the *Pickering* balancing test applies.

Under the balancing test, it is unclear how courts will balance the interests between people articulating their views against DEI and the government's interest in promoting it. The Court in *Connick* noted that the *Pickering* balancing is a fact-intensive analysis.²⁹¹ For DEI, this means that the context in which the speech arises is crucial to the determination of whether the speech is protected.

There are two indicia for how the courts may weigh this balancing test. First, in the early 1990s, a similar debate was held amongst scholars around sexual harassment law and the First Amendment. Scholars and courts grappled with the question of whether Title VII was becoming too restrictive on the First Amendment.²⁹² The consensus amongst scholars was that, through numerous rulings, courts have carved out room for the government to impose some limitations on speech.²⁹³ Similarly, DEI programs seem to fit squarely into one of the arguments presented at the time: "Speech may be more readily subject to restrictions when a school or work audience is 'captive' and cannot avoid the objectionable speech."²⁹⁴ DEI programs fall under this, as employees must complete trainings that employers have business interests in promoting.

Second, courts seem to recognize DEI initiatives as a means of furthering the objectives of Title VII and, thus, tend to place significant weight on the government's interest in promoting such policies.²⁹⁵ However, the Trump Administration has actively sought to dismantle DEI-related programs, signaling

289. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (explaining that "the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.").

290. See *Henderson v. Springfield R-12 Sch. Dist.*, 116 F.4th 804, 811–12 (8th Cir. 2024) (evaluating employee speech during institutional training).

291. *Connick v. Myers*, 461 U.S. 138, 154 (1983) (noting that the *Pickering* balancing test is a fact-intensive inquiry that requires careful consideration of the circumstances surrounding the employee's speech).

292. See generally Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (exploring whether anti-harassment laws created inconsistencies with First Amendment protections).

293. *Id.* at 482–83.

294. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (acknowledging that captive audience considerations may affect the scope of permissible speech restrictions in schools and workplaces).

295. See *supra* Part.II.A; see also *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (concluding that any Title VII objective "falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans").

a shift in federal priorities. Therefore, it is likely that individuals asserting a personal or citizen interest in speaking out against DEI will face a more favorable legal climate for such claims during the remainder of the Trump Administration. As a result, employers looking to implement DEI initiatives that force conversations around individuals' viewpoints or are positioned to elicit more conversation amongst the workers should be cautious for the time being until more litigation surrounding these claims occurs. Instead, employers should prioritize structural changes that promote workforce equity, such as blind hiring, programs that expand talent pools, and the use bias interrupters as articulated in part I.²⁹⁶

2. Compelled Speech Claims.

With respect to compelled speech claims, challenges against DEI also seem to falter. In *West Virginia v. Barnette*, the Court assessed whether the First Amendment prohibited a state law compelling public-school students to salute the flag and say the Pledge of Allegiance.²⁹⁷ The Court held that the law was unconstitutional and the government cannot compel individuals to express beliefs they do not believe.²⁹⁸ The Court emphasized that the freedom of speech includes the right not to speak.²⁹⁹ In *Wooley v. Maynard*, a New Hampshire law required all non-commercial vehicles to display a license plate with the state motto.³⁰⁰ The Court held that the state cannot require individuals to use their private property as a vehicle for expressing a message.³⁰¹ Significantly, the Court reinforced the prohibition of compelled speech even when the message was relatively passive.³⁰² *Rumsfeld v. FAIR* provided the first limitation on compelled speech.³⁰³ In *Rumsfeld*, students from a law school argued that allowing the military on their campus violated their First Amendment rights by compelling them to speak or associate with the military's message.³⁰⁴ The Court rejected this argument, holding that requiring law schools to provide military recruiters equal access to campus facilities or risk losing federal funding did not violate the First Amendment because it regulated conduct, not speech, and compelled speech was merely incidental to the regulation.

Compelled speech cases seem to be meritless when framed in the context of modern DEI practices. Contemporary DEI policies typically have a

296. WILLIAMS, *supra* note 180, at 2.

297. 319 U.S. 624, 631 (1943).

298. *Id.* at 642.

299. *Id.* at 634.

300. 430 U.S. 705, 707 (1977).

301. *Id.* at 717.

302. *Id.*

303. *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 63 (2006).

304. *Id.* at 51–52.

participatory nature, and do not usually require people to share their viewpoint.³⁰⁵ For example, Mr. Grande was not required to share his viewpoint; he voluntarily gave it.³⁰⁶ Mr. Grande and many similarly situated plaintiffs have the right not to speak. As long as DEI programs only encourage, and do not require, participants to discuss matters, then a colorable compelled speech claim is unlikely. This conclusion was reached in *Norgren v. Minnesota Department of Human Services*.³⁰⁷ In *Norgren*, the plaintiff was required to complete workplace trainings titled “How to be Anti-Racist” and “Understanding Gender Identity and Expression.”³⁰⁸ Norgren alleged that the trainings instructed employees on which certain political issues to engage with and to stop using the term “I am not a racist” as a defense to statements made aligning with their ideology.³⁰⁹ The Eighth Circuit held that Norgren failed to plausibly allege that the department forced Norgren to adopt those messages as his own because there was no allegation that employees were forced to affirmatively agree with any of the statements and there was no threatened penalty for using or not using the terms highlighted in the training.³¹⁰ *Norgren* thus reinforces the principle that mandatory DEI programs that allow employees to opt out or do not compel agreement with specific messages generally do not violate the First Amendment.

In this current political moment, employers should continue implementing DEI initiatives without fear of violating the First Amendment, as long as their initiative does not force participation or the training does not reprimand anti-DEI sentiment. If the employer does require participation, they may have a harder time escaping liability. Maintaining voluntary participation not only helps safeguard constitutional rights but also encourages genuine engagement, fostering a workplace culture where employees are more likely to internalize DEI principles rather than comply out of fear of discipline.³¹¹ Ultimately, structuring DEI programs to respect free expression ensures both legal compliance and the long-term effectiveness of inclusion efforts.

305. *See supra* Part.I.

306. *See* Complaint at *31, *35, Grande v. Hartford Bd. of Educ., No. 3:24-CV-00010 (D. Conn. 2024).

307. *Norgren v. Minn. Dep’t of Hum. Servs.*, 96 F.4th 1048, 1057–58 (8th Cir. 2024).

308. *Id.* at 1052.

309. *Id.*

310. *Id.* at 1057–58.

311. Patricia G. Devine & Tory L. Ash, *Diversity Training Goals, Limitations, and Promise: A Review of the Multidisciplinary Literature*, 73 ANN. REV. OF PSYCH. 403, 409 (2022) (explaining that voluntary DEI initiatives are more likely to lead to increased employee buy-in and long-term effectiveness).

B. THE FIRST AMENDMENT AIDING DEI

The First Amendment has also been used to uphold DEI programs. Most recently, in *Honeyfund.com Inc. v. DeSantis*, the Eleventh Circuit upheld an injunction on a Florida state law.³¹² Florida's Individual Freedom Act prohibited employers from requiring attendance at any training that "espouses, promotes, advances, inculcates, or compels the employee to believe" certain concepts related to race, color, sex, or national origin that legislators found offensive.³¹³ While this law, referred to as the "Stop W.O.K.E. Act," was in practice a direct attack on DEI, the plaintiffs alleged that this was also an attack on viewpoint-based speech regulation.³¹⁴ The court applied strict scrutiny and held in favor of the plaintiffs.³¹⁵ The court held that Florida had no "compelling interest in creating a per se rule that some speech, regardless of its context or the effect it has on the listener, is offensive and discriminatory."³¹⁶ The Eleventh Circuit also held that the law's broad scope and ban on speech related to diverse political viewpoints rendered the law unconstitutional from the outset.³¹⁷

While *Honeyfund* may protect an employer's right to implement DEI trainings, it may also embolden other employers and organizations to challenge similar state-level restrictions targeting DEI initiatives. The *Honeyfund* decision could serve as a legal tool for contesting these restrictive measures on First Amendment grounds. Organizations facing state laws that seek to restrict the content, scope, or mandatory nature of DEI initiatives in broad ways can use *Honeyfund* to argue that such regulations are unconstitutional content and viewpoint-based restrictions. Ultimately, the decision may not only shield existing programs from legal attack but also encourage public employers to continue developing robust DEI initiatives without fear of infringing on constitutional protections. This reinforces both diversity goals and free speech rights in the workplace.

CONCLUSION

Both Title VII and the First Amendment provide legal avenues to challenge DEI programs. But these avenues are not designed to be flagrantly used by opponents seeking to rid America of diversity efforts. Properly understood, these laws protect the principles of equal opportunity while allowing for diversity initiatives that are lawful, voluntary, and inclusive. Yet, ongoing efforts to redefine what "equal opportunity" means alongside shifts in the legal and

312. *Honeyfund.com Inc. v. Governor, Fla.*, 94 F.4th 1272, 1283 (11th Cir. 2024).

313. See 2022 Fla. Laws 72; see also *Honeyfund.com*, 94 F.4th at 1275–76 (outlining Florida House Bill 7).

314. *Honeyfund.com*, 94 F.4th at 1277.

315. *Id.* at 1280–81.

316. *Id.* at 1281.

317. *Id.*

political climate have chipped away at the foundation of DEI initiatives that have existed since the 1960s. As a result, DEI initiatives now face mounting legal challenges with a noticeable focus on the types of programs that elicit expressive conduct. Although these programs remain intact, all three branches of government have revealed weaknesses in their ability to oppose efforts to redefine the boundaries of permissible DEI—initiatives for better, or for worse. Employers should pay close attention to evolving litigation surrounding DEI programs, as discussed throughout this Note.

Nevertheless, the overarching legal framework continues to support the majority of DEI initiatives. In this new legal regime, most DEI practices remain not only permissible but essential to advancing equal opportunity in the modern workplace.
