PRESERVING THE TOOTHLESS TIGER: HOW THE TRUMP ADMINISTRATION'S ANTI-DEI AGENDA DEFIES THE EEOC'S STATUTORY ROLE

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* Georgetown University Law Center, J.D. 2025; Wake Forest University, B.A. 2022. All views expressed in this article are my own and are not attributable to any past or present employer. Writing this article would not have been possible without the contributions of many brilliant people. Professor Eloise Pasachoff's thoughtful comments helped me develop and refine this article. Will Ervin's Midas touch turned each draft to gold. And the members of the *Virginia Journal of Social Policy & the Law*, including Emma Allen, David Baik, Katelyn Brunson, Julia Calland, Kaitlyn Chalker, Hennessy Chism, Himani Gubbi, Shannon Hicks, Ashlyn Hinton, Katie Malloy, Gregory McKnight, and Nikita Zinzuwadia, edited this article with care. Thank you, all, for your help and support.

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One of the second Trump administration's defining policy goals is to eliminate diversity, equity, and inclusion (DEI) from the workplace. To achieve this end, the administration has relied on the federal agency tasked with combatting identity-based employment discrimination—the Equal Employment Opportunity Commission (EEOC). Following the administration's marching orders, the Trump EEOC pressured law firms to abandon their DEI efforts by threatening them with legal action. And its acting chair unilaterally changed the agency's longstanding, formal position supporting DEI.

This article argues that the Trump administration's anti-DEI agenda exceeds the EEOC's statutory authority and forces the agency out of its proper role. When Congress created the EEOC in 1965, it was meant to be a "toothless tiger" with modest investigation and mediation powers. Even when Congress endowed the agency with litigation authority in 1972, it still intended for EEOC enforcement of civil rights laws to be reactive to employee allegations of discrimination. By taking unlawful and overbroad actions to implement the anti-DEI agenda, the Trump EEOC abandoned its limited role. And this departure is problematic because the EEOC's existing processes are well-suited to address any majority-group discrimination that stems from DEI.

Although the merits of DEI and the Trump administration's crusade against it have been discussed at length in the media and in legal scholarship, this article makes the unique contribution of analyzing the anti-DEI agenda from an administrative-law perspective. Instead of normatively defending DEI, this article focuses on how the anti-DEI agenda tests the limits of the EEOC's power. And to fix an administrative-law problem, it proposes administrative-law solutions. Namely, it suggests that EEOC civil servants employ internal-separation-of-powers mechanisms to check the Trump administration's power and signal the need for congressional intervention.

INTRODUCTION

On January 29, 2025, a commercial airplane making its descent into Washington, D.C. collided with a Black Hawk helicopter seconds

before landing.[1] Both aircrafts plunged into the Potomac River.[2] Despite the efforts of first responders, none of the sixty-seven people on board survived.[3]

Hours after the crash, freshly inaugurated President Donald Trump held a press conference to address a panicked and grieving nation.[4] Vice President JD Vance, Secretary of Defense Pete Hegseth, and Secretary of Transportation Sean Duffy joined him.[5] When asked about the cause of the horrific accident, the four men agreed that one thing was to blame—diversity, equity, and inclusion (DEI).[6]

President Trump began by criticizing the Biden administration for "actively recruiting people with severe intellectual disabilities" for air traffic controller positions.[7] Secretaries Duffy and Hegseth echoed the president, saying that the Federal Aviation Administration must only "accept the best and the brightest"[8] and that "the era of DEI is gone at the Defense Department."[9] Vice President Vance alleged that many air traffic controllers received their positions only after suing the government for racial discrimination.[10] When asked how he and his compatriots

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[1] Faris Tanyos, Emily Mae Czachor & Jordan Freiman, *What we know about the American Airlines plan and Army helicopter crash over D.C.'s Potomac River*, CBS NEWS (Feb. 8, 2025, 6:35 PM), https://www.cbsnews.com/news/crash-reagan-national-airport-washington-dc/.

[2] *Id.*

[3] Julia Reinstein, Peter Charalambous & T. Michelle Murphy, *DC plane crash victims: Kansas City Chiefs superfan among the 67 killed*, ABC NEWS (Feb. 5, 2025, at 10:58 ET), https://abcnews.go.com/US/dc-crash-victims-aboard-american-airlines-flight-5342/story?id=118250442#:~:text=There%20were%20no%20survivors%20in%20the%20crash%2C%20officials%20said.&text=Sixty%2Dseven%20people%20are%20dead,commercial%20airline%20crash%20since%202009; Tanyos, Czachor & Freiman, *supra* note 1.

[4] Alex Gangitano & Brett Samuels, *5 takeaways from Trump's briefing on National Airport plane crash*, THE HILL (Jan. 30, 2025, at 13:21 ET), https://thehill.com/homenews/administration/5116606-5-takeaways-trump-briefing-dca-plane-crash/.

[5] Amethyst Martinez, *Trump Lackeys Turn D.C. Crash Presser Into Kiss-Up Session*, YAHOO! NEWS (Jan. 30, 2025, at 12:58 ET), https://www.yahoo.com/news/trump-lackeys-turn-d-c-175853965.html.

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

[7] WFFA, *Donald Trump full press conference on deadly plane crash in Washington, D.C.*, at 08:01 (YouTube, Jan. 30, 2025), https://www.youtube.com/watch?v=PJ-zuj50tMk.

[8] *Id.* at 18:05.

[9] *Id.* at 21:06.

[10] *Id.* at 22:16.

concluded that DEI caused the crash, President Trump cited "common sense."[11]

The Trump administration's response to the plane crash underscores its broader war on DEI in the workplace. On the campaign trail, President Trump particularly appealed to young, white, working-class men[12] who felt abandoned by the country's shift toward "woke" ideas during the Biden presidency and the racial justice movement of the 2020s.[13] Project 2025, a policy blueprint outlining the framework for a second Trump presidency, crafted plans to eradicate critical race theory and "left-wing…gender ideology."[14] During his first days in office, President Trump fulfilled the promises of Project 2025 by signing executive orders[15] to radically transform the agency tasked with combating identity-based[16] employment discrimination—the Equal Employment Opportunity Commission (EEOC).[17]

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[11] *Id.* at 28:54.

[12] David Smith, *Wrecking ball: Trump's war on 'woke' marks US society's plunge into 'dark times'*, THE GUARDIAN (Feb. 2, 2025, at 6:00 ET), https://www.theguardian.com/us-news/2025/feb/02/trump-woke-dei-culture-wars; Elizabeth Spiers, *Trump Offered Men Something That Democrats Never Could*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/11/06/opinion/trump-white-young-men.html. *But see* Ronald Brownstein, *Trump made historic gains with minority voters in 2024. They are already pulling back in 2025*, CNN (May 11, 2025, at 6:00 ET), https://www.cnn.com/2025/05/11/politics/gop-voter-coalition-2024-trump.

[13] Teresa Hopke, *White Men Are Feeling Left Out Of DEI. Why Should We Care and What Should We Do?*, FORBES (Mar. 30, 2022, at 7:00 ET), https://www.forbes.com/sites/teresahopke/2022/03/30/white-men-are-feeling-left-out-of-dei-diversity-equity--inclusion-why-should-we-care-and-what-should-we-do/.

[14] DAREN BAKST ET AL., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (Paul Dans & Steven Groves eds., 2023).

[15] *See, e.g.*, Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

[16] As this paper will explain further, identity-based discrimination is "unfair treatment of individuals or groups based on aspects of their identity." *Identity-Based Discrimination – Definition and Explanation*, THE OXFORD REV. BRIEFINGS, https://oxford-review.com/the-oxford-review-dei-diversity-equity-and-inclusion-dictionary/identity-based-discrimination-definition-and-explanation/ (last visited Sept. 13, 2025). For example, some of the protected traits under Title VII—the statute that covers employment discrimination—include race, color, religion, sex, and national origin. *See infra* note 27 and accompanying text.

[17] President Trump's attacks on DEI are not limited to the employment context; he also seeks to eliminate DEI from education, the military, and public contracting. *See* Alexis Agathocleous, Kim Conway & ReNika Moore, *Trump on DEI And Anti-Discrimination Law*, AM. C.L. UNION (July 2, 2024), https://www.aclu.org/trump-on-dei-and-anti-discrimination-law; Ayana Archie, *Trump signs executive order taking aim at DEI programs in the military*, NPR (Jan. 28, 2025, at 5:01 ET), https://www.npr.org/2025/01/28/nx-s1-

This article argues that the Trump administration's anti-DEI agenda defies the EEOC's limited statutory role. Because Congress initially gave the EEOC no enforcement power, the agency was meant to be a "toothless tiger."[18] Even when Congress endowed the EEOC with litigation and charge-filing authority, its enforcement was still supposed to be responsive to employee allegations of discrimination. The Trump EEOC has ignored its narrowly circumscribed role by taking proactive, overbroad, and unnecessary actions to implement the anti-DEI agenda.

This article proceeds in four parts. Part I details the origins of the EEOC, including its history, its statutory mandate, and how it functions today. Part I also defines DEI and characterizes it as a prototypical example of voluntary employer compliance with Title VII. Next, Part II details the Trump administration's anti-DEI agenda and the actions the EEOC has taken to implement it. Additionally, Part II contextualizes the anti-DEI agenda as the natural next step in a broader legal movement to eradicate affirmative action. Part III then highlights the procedural and substantive flaws of the anti-DEI agenda and argues that these flaws unnecessarily force the EEOC out of its limited statutory role. Given these issues, Part IV argues that EEOC civil servants should employ internal-separation-of-powers mechanisms to ensure that the agency adheres to its proper role. By using these tools, Part IV maintains, civil servants can provide an internal check on the EEOC's overreach and signal the need for external checks from Congress.

I. CREATING THE TOOTHLESS TIGER: BACKGROUND ON THE EEOC AND DEI

To appreciate the extent to which the Trump administration has transformed the EEOC, it is important to first understand the agency's origins, statutory authority, and core functions. This Part aims to lay that foundation. Subpart A tracks the evolution of the EEOC from its incipience during the civil rights movement to modern day. Although the EEOC's procedural capabilities and substantive jurisdiction have changed over time, the agency has largely remained a toothless tiger due to its modest investigation and mediation functions, as well as its emphasis on employee-led litigation. Next, subpart B explains how the modern EEOC uses its limited enforcement and interpretive functions to fulfill its statutory mission. Finally, subpart C provides background information on DEI and

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5276839/trump-executive-order-dei-military. This article only focuses on President Trump's efforts to eliminate DEI in the workplace because his other anti-DEI plans are distinct and present unique issues.

[18] Alfred Blumrosen, the EEOC's first chief of conciliations, was the first person to refer to the EEOC as a "toothless tiger." Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 312 n.14, 323 n.51 (2001); *see also infra* note 38 and accompanying text.

characterizes it as an archetypal employer response to the EEOC's reactive enforcement of civil rights laws.

A. Origins of the EEOC

The creation of the EEOC was the culmination of executive and legislative efforts to combat discrimination in the wake of the Civil Rights Movement. In 1941, President Roosevelt took the first presidential action to address employment discrimination—an executive order prohibiting government contractors from discriminating based on race, color, or national origin.[19] Presidents Truman and Kennedy followed suit by issuing executive orders to desegregate the armed forces and to establish the President's Committee on Equal Employment Opportunity, respectively.[20] In 1963, Congress passed its first employment-discrimination law, the Equal Pay Act, which prohibited sex-based wage discrimination.[21]

Building on these early efforts, Congress passed the landmark Civil Rights Act of 1964 (CRA) to provide comprehensive protections against identity-based discrimination.[22] The CRA aimed to "extend to [Black] citizens the same opportunities that white Americans take for granted."[23] Congress subdivided the CRA into subject-matter-based titles,[24] and it dedicated Title VII to employment discrimination.[25] When discussing Title VII, Congress recognized that "discrimination in employment is the most pervasive and pernicious practice affecting minorities" because "[u]nemployment falls with special cruelty on minority groups."[26] Accordingly, Title VII prohibits employers from failing to hire, firing, adversely limiting, segregating, or classifying, and otherwise discriminating against employees based on their race, color, religion, sex, or national origin.[27]

To ensure that individuals would enjoy unrestricted access to their new statutory protections, Congress created the EEOC.[28] The EEOC was to be a five-member, bipartisan commission composed of no more than three commissioners from the same political party, each of whom would

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[19] *EEOC History: The Law*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-law (last visited Sept. 13, 2025).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] RAYMOND J. CELADA, EQUAL EMPLOYMENT OPPORTUNITY: LEGISLATIVE HISTORY AND ANALYSIS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 1 (1965).
[24] *See, e.g.*, 42 U.S.C. §§ 2000a (places of public accommodation), 2000d (federally funded programs).
[25] *EEOC History: The Law*, *supra* note 19.
[26] CELADA, *supra* note 23, at 1–2.
[27] 42 U.S.C § 2000e-2(a).
[28] *EEOC History: The Law*, *supra* note 19.

serve a five-year term.[29] This structure gave the agency independence to enforce Title VII in an even-handed and apolitical fashion.

A central focus of the congressional debates over Title VII was the scope of the EEOC's authority.[30] Civil rights advocates argued that the EEOC needed robust cease-and-desist powers to effectively address employment discrimination.[31] However, Republicans who opposed centralized economic regulation and southern Democrats whose economies relied on racial hierarchies banded together to neuter the EEOC.[32] These congresspeople believed that they should neither give the EEOC "de novo enforcement powers in its own right" nor allow commissioners "to take enforcement powers into [their] own hands."[33] After a fifty-seven-day filibuster, the proponents of Title VII decided to concede and strip the EEOC of enforcement authority entirely.[34] In lieu of cease-and-desist powers, Congress gave the EEOC limited authority to "investigate[,]…persuade, conciliate, [and] mediate."[35] As a compromise, Congress also provided an extra-agency means of enforcing Title VII—a private right of action for aggrieved employees.[36] Disappointed that the EEOC was "one of the weakest regulatory agencies in the United States,"[37] civil rights lawyers referred to it as a "toothless tiger."[38]

Despite their frustrations, EEOC leaders learned how to maximize the agency's circumscribed powers. One way they did so was by exercising its interpretive authority. Immediately after the EEOC was created, the agency devoted itself to developing comprehensive definitions of key terms in Title VII.[39] Because the EEOC knew that employee-led litigation was the only means of enforcing Title VII, it construed the statute's provisions in the light most favorable to aggrieved plaintiffs.[40] Creating these early definitions was crucial because the EEOC was the first body to interpret Title VII.[41] As a result, plaintiffs bringing Title VII lawsuits had favorable legal authorities to support their allegations of discrimination.[42] And courts navigating Title VII's uncharted waters often incorporated the

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[29] *Id.*
[30] CELADA, *supra* note 23, at 35.
[31] QUINN MULROY, AGENTS OF JUSTICE: HOW THE AMERICAN BUREAUCRACY MOBILIZES PRIVATE LAWSUITS TO MAKE POLICY WORK 68 (2025).
[32] *Id.*
[33] CELADA, *supra* note 23, at 36.
[34] MULROY, *supra* note 31, at 68–69.
[35] CELADA, *supra* note 23, at 36.
[36] MULROY, *supra* note 31, at 68–69.
[37] *Id.* at 66.
[38] U.S. EQUAL EMP. OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS, 1965-2000 5 (2000); *see* Green *supra* note 18.
[39] *Id.*
[40] MULROY, *supra* note 31, at 76.
[41] *Id.*
[42] *Id.* at 77.

EEOC's plaintiff-friendly definitions into their decisions, thus giving them the force of law.[43]

The EEOC also used its resources to gather information about the nature and extent of discriminatory employer practices. To do so, the agency required employers[44] to submit annual workplace demographic data,[45] and it hosted public hearings to learn about employment-discrimination issues that plagued certain geographic regions and industries.[46] These techniques allowed the EEOC to "pinpoint major zones of employment discrimination" and "identify major patterns of exclusion."[47] The EEOC also supplied the information it gathered to private plaintiffs and civil rights groups to facilitate employee-led litigation.[48]

Although the EEOC had no proactive enforcement powers, the agency served as a valuable intermediary between employers and employees. In its first years of existence, the agency secured redress for thousands of aggrieved employees by facilitating conciliation and filing amicus curiae briefs in employee-led litigation.[49] It also sought to reduce future discrimination by educating employers and employees about Title VII.[50] For example, the EEOC hosted conferences and workshops to encourage employers to voluntarily comply with Title VII.[51] And to apprise employees of their new statutory rights, the EEOC made educational videos and trainings.[52]

Finally, the EEOC supported and facilitated private lawsuits under Title VII. Although EEOC leaders initially felt defeated by the agency's lack of enforcement powers, they embraced the private right to sue and focused on developing "incentive structures to mobilize private equal employment litigation en masse."[53] For example, agency leaders coordinated with civil-rights groups, such as the National Association for the Advancement of Colored People, to develop impact-litigation strategies driven by private

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[43] *Id.* at 76–77.

[44] Employers with more than 100 employees and federal contractors with more than fifty employees were, and still are, required to submit this data. *EEO Data Collections*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/eeo-data-collections (last visited Sept. 13, 2025).

[45] This kind of information is called EEO-1 data. *EEO-1 (Employer Information Report) Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/eeo-1-employer-information-report-statistics (last visited Sept. 13, 2025). The EEOC uses this data for research and to inform enforcement decisions. *EEO Data Collections*, *supra* note 44. It also shares the data with other federal agencies and the public. *Id.*

[46] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 38, at 9–10.

[47] *Id.* at 9.

[48] MULROY, *supra* note 31, at 82.

[49] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 38, at 5.

[50] *Id.* at 14.

[51] *Id.*

[52] *Id.*

[53] MULROY, *supra* note 31, at 67.

lawsuits.[54] The EEOC supplied these groups with discrimination-charge forms and guides to navigating Title VII litigation.[55] And understanding that civil-rights groups had limited resources, the EEOC sponsored internship programs to train a generation of private-sector, plaintiff-side employment lawyers.[56] Through these efforts, the EEOC came to view the private right to sue as the preferred means of combatting employment discrimination.[57]

In 1972, the toothless tiger found its bite when Congress granted the EEOC enforcement powers in the Equal Employment Opportunity Act.[58] Specifically, the Act gave the EEOC's Office of the General Counsel the authority to sue on behalf of aggrieved employees following unsuccessful conciliation.[59] Although the Johnson administration had been fighting for the EEOC to gain cease-and-desist powers, the Nixon administration changed course by granting the agency comparatively modest litigation authority.[60] The Nixon Administration believed that the procedural safeguards of litigation preserved the proper balance between federal and state governments as well as the public and private sectors.[61] Moreover, then-EEOC Chairman William H. Brown III[62] stressed that it was crucial for private lawsuits to remain the engine of Title VII enforcement, as opposed to administrative remedies, because they were "the very essence" of civil-rights progress.[63] Therefore, even with litigation authority, Congress and the president wanted the EEOC to maintain the restraint and priorities that it had when it was truly toothless.

The Act also fortified the EEOC's existing tools to combat discrimination. For one, the Act allowed EEOC commissioners and field offices[64]

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[54] *Id.* at 81.
[55] *Id.* at 82.
[56] *Id.* at 83.
[57] *Id.* at 67; Michael Z. Green, *(A)Woke Workplaces*, 2023 WIS. L. REV. 811, 851 (2023).
[58] *EEOC History: The Law*, *supra* note 19.
[59] *Id.*; *see infra* note 87 and accompanying text.
[60] MULROY, *supra* note 31, at 86.
[61] *Id.* at 88.
[62] Brown was initially appointed to serve as the EEOC's chairman by President Lyndon B. Johnson. *William H. Brown III*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/william-h-brown-iii (last visited Sept. 13, 2025). However, Brown was not confirmed by the Senate until 1969, after President Nixon took office. *Id.*; *see* The American Presidency Project, *Remarks at the Swearing In of William H. Brown III as a Member of the Equal Employment Opportunity Commission*, UNIV. OF CAL. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/remarks-the-swearing-william-h-brown-iii-member-the-equal-employment-opportunity (last visited Sept. 13, 2025).
[63] MULROY, *supra* note 31, at 88.
[64] Field offices are local branches of the EEOC that serve as the "first line of contact" for both aggrieved employees and employers seeking compliance

to initiate investigations of discriminatory employers.[65] Additionally, the Act altered Title VII's coverage to make it easier for plaintiffs to bring suit. Specifically, the Act elongated the statute of limitations for discrimination charges and expanded the covered employers to include educational institutions, state, local, and federal governments, and private employers of fifteen or more employees.[66] In sum, the Act endowed the EEOC with (still limited) enforcement powers and provided victims of alleged employment discrimination with more robust protections for their statutory rights.

In addition to broadening these enforcement mechanisms, Congress and the courts gradually expanded the agency's substantive jurisdiction by extending Title VII's coverage to new causes of action and protected traits. Whereas Title VII originally applied only to disparate-treatment claims,[67] it evolved to include causes of action for disparate impact,[68] retaliation,[69] harassment,[70] and hostile work environments.[71] Additionally, the protected traits under Title VII expanded to include sexual orientation,[72] disability,[73] age,[74] pregnancy,[75] and genetic information.[76]

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assistance. *EEOC Office Overviews*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc-office-overviews#field (last visited Sept. 13, 2025). Field offices "receive inquiries and investigate charges of employment discrimination under the federal employment statutes; provide education, outreach and technical assistance to employers, employees, advocacy organizations and other individuals; and resolve discrimination claims through mediation, negotiated settlement, conciliation and litigation." *Id.*

[65] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 38, at 15.

[66] *EEOC History: The Law*, *supra* note 19.

[67] Disparate treatment occurs when an employer "intentionally excludes individuals from an employment opportunity on the basis" of a protected trait. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1988-13, CM-604 THEORIES OF DISCRIMINATION (1988).

[68] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (recognizing that policies causing a disparate impact on certain groups violate Title VII); 42 U.S.C § 2000e-2(k) (codifying disparate-impact liability).

[69] 42 U.S.C § 2000e-3(a) (creating a cause of action for retaliation); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (refining the standard for retaliation).

[70] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (recognizing that sexual harassment violates Title VII); Burlington Indus. v. Ellerth, 524 U.S. 742, 753–54 (1998) (fortifying harassment protections).

[71] Meritor Sav. Bank, 477 U.S. at 66 (recognizing that hostile work environments violate Title VII).

[72] Bostock v. Clayton County, 590 U.S. 644, 662 (2020) (recognizing that discrimination based on sexual orientation violates Title VII).

[73] 42 U.S.C. § 12132.

[74] 29 U.S.C. § 623.

[75] 42 U.S.C. § 2000e(k).

[76] 42 U.S.C. § 2000ff-1(a).

The origins of the EEOC make clear that the more things change, the more they stay the same. Although the EEOC's capabilities and Title VII's coverage evolved over the years, the agency's focus on supporting employee-led litigation remained steadfast. And because the EEOC never received proactive cease-and-desist powers, it remained a relatively toothless tiger with a modest, but crucial, role in fighting employment discrimination.

B. The Modern EEOC

Today, the EEOC's mission is to "prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace."[77] Likewise, its stated vision for the future is "[r]espectful and inclusive workplaces, with equal employment opportunity for all."[78] As mentioned in subpart A,[79] the EEOC has two primary tools to execute its mission and work toward its vision: enforcing and interpreting Title VII.[80] This subpart explains how the modern EEOC uses these tools to combat employment discrimination.

True to its original reactive enforcement model, the EEOC primarily relies on employees to alert it to discrimination by filing charges.[81] The agency employs two different charge-filing processes—one for non-federal-sector employees and another for federal-sector employees.[82] The non-federal-sector enforcement process begins when an employee files a charge of discrimination. After receiving a charge, the EEOC has 180 days to investigate and determine whether reasonable cause[83] exists.[84] If the agency does not find reasonable cause, it dismisses the charge, and the suit ends.[85] But should it find reasonable cause, the EEOC attempts to conciliate, meaning that it tries to persuade the employer to stop its unlawful

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[77] U.S. EQUAL EMP. OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) STRATEGIC PLAN FOR FISCAL YEARS 2018-2022 3 (2018).
[78] *Id.*
[79] *See supra* Part I.A.
[80] *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview (last visited Sept. 13, 2025).
[81] *Enforcement*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/enforcement (last visited Sept. 13, 2025).
[82] *Id.*
[83] Reasonable cause exists if the EEOC determines that discrimination occurred based on the evidence obtained during its investigation. *Definitions of Terms*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/definitions-terms (last visited Sept. 13, 2025).
[84] *Formal Complaint & Investigation Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/formal-complaint-investigation-process (last visited Sept. 13, 2025).
[85] *What You Can Expect After a Charge is Filed*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed (last visited Sept. 13, 2025).

practice.[86] If conciliation fails, the EEOC can, but does not have to, sue on behalf of the aggrieved employee.[87] Should the EEOC choose not to bring suit, it must issue the employee a right-to-sue letter.[88] Once the employee obtains a right-to-sue letter, she has ninety days to initiate her lawsuit.[89]

The federal-sector enforcement process is also employee-driven. First, the employee must contact an Equal Employment Opportunity (EEO) counselor within forty-five days of the discriminatory conduct to schedule a meeting.[90] In the meeting, which must be held within thirty days of the employee's outreach, the EEO counselor informs the employee of her rights, explains how the complaint process works, and attempts to informally resolve the issue.[91] If the EEO counselor and employee cannot reach a resolution, the counselor may authorize the employee to file a complaint with her employer.[92] Upon receiving the complaint,[93] the employer investigates the issue.[94] After the employer completes the investigation, the employee can request an immediate final decision from the employer or a hearing before one of the EEOC's administrative-law judges.[95] If the employee is dissatisfied with the employer's or administrative-law judge's decision, she can appeal[96] it to the EEOC.[97] Once the

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[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Federal EEO Complaint Processing Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/federal-eeo-complaint-processing-procedures (last visited Sept. 13, 2025).
[91] *Id.*
[92] *Id.* The complaint must be filed within fifteen days. *Id.*
[93] If the complaint contains at least one issue that must be appealed to the Merit Systems Protection Board (MSPB), it is a "mixed case complaint" or "mixed case appeal" that must be processed under the MSPB's procedures. *Id.*
[94] *Facts About Federal Sector Equal Employment Opportunity Complaint Processing Regulations (29 CFR Part 1614)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/facts-about-federal-sector-equal-employment-opportunity-complaint-processing (last visited Sept. 13, 2025).
[95] *Id.*
[96] While appeals of an employer's decision must be filed within thirty days of receipt, appeals of an administrative law judge's decision must be filed within forty days of receipt. *Id.*
[97] *Id.* After the EEOC reviews the appeal and renders a decision, it publishes it online for the benefit of the public. *Id.* The agency also uses its appellate decisions for outreach and training purposes. *Id.*

employee exhausts[98] this administrative process, she may file a civil action in federal court.[99]

As mentioned in Part I.A, commissioners and field offices can also initiate discrimination charges.[100] Even this EEOC-led process is still reactive to individual allegations of discrimination. Typically, commissioners file charges in response to tips from EEOC field offices, members of the public, or state and local organizations.[101] They can also file their own charges when private plaintiffs' complaints exclude actionable claims.[102] Commissioner charges must satisfy the same substantive requirements as all other EEOC charges.[103] And they only procedurally differ from private plaintiffs' charges during the pre-investigation phase of the process. For a commissioner charge brought by an EEOC field office to proceed to investigation, at least one of the five commissioners must sign[104] it.[105] And for a commissioner-initiated commissioner charge to proceed to investigation, the commissioner must consult with the Office of Field Programs before signing.[106] Once either type of commissioner charge is filed, it follows the same investigation process[107] as private discrimination charges.[108] Throughout the process, commissioners and field offices must maintain strict confidentiality about the existence and target of a charge.[109]

The EEOC's other core function is interpreting Title VII. The agency publishes its interpretations in regulations and guidance documents. Both of these interpretive materials articulate the EEOC's official position on employment-discrimination issues.[110] They also advise employers on how

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[98] Exhaustion can occur at four different stages of the process: (1) within ninety days of receipt of the final action where no administrative appeal has been filed, (2) after 180 days of filing the complaint if neither an administrative appeal has been decided nor a final action has been taken, (3) within ninety days of receipt of the EEOC's final appeal decision, and (4) after 180 days of filing an EEOC appeal if no decision has been rendered. *Federal EEO Complaint Processing Procedures*, *supra* note 90.

[99] *Id.*

[100] *See supra* notes 64–65 and accompanying text.

[101] *Commissioner Charges*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/commissioner-charges#:~:text=While%20most%20investigations%20by%20the,may%20initiate%20charges%20as%20well (last visited Sept. 13, 2025).

[102] *Id.*

[103] *Id.*

[104] When a commissioner signs a charge, she swears to its validity under penalty of perjury. 29 C.F.R. §§ 1601.3(a), 1601.11(a).

[105] *Commissioner Charges*, *supra* note 101.

[106] *Id.*

[107] The only difference from the regular complaint-review process is that commissioner charges are excluded from the EEOC's mediation program. *Id.*

[108] *Id.*; *see supra* notes 81–99 and accompanying text.

[109] 29 C.F.R. §§ 1601.3(a), 1601.11(a).

[110] *EEOC Legal Resources*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc-legal-resources (last visited Sept. 13, 2025).

to comply with Title VII.[111] The only difference between these documents is the level of formality required to promulgate them. On the one hand, regulations must comply with the Administrative Procedure Act's notice-and-comment rulemaking requirements,[112] and the EEOC publishes them in the Federal Register.[113] Guidance documents, on the other hand, require only a majority of the commissioners' votes to be published, and they usually appear as amendments to or modifications of the EEOC's compliance manual.[114]

Just as it did in its infancy, the modern EEOC uses interpretation to shape employment law. For example, a 2024 final rule broadened the scope of pregnancy discrimination under the Pregnant Workers Fairness Act to cover discrimination based on infertility and fertility treatment, pregnancy-related sickness, lactation, contraception, termination of pregnancy, and menstruation.[115] Additionally, a 2024 guidance document expanded the definition of sexual harassment under Title VII to include disclosure of an employee's gender identity without permission, sex-stereotyping, failure to use an employee's chosen pronouns, and denial of sex-segregated bathroom access consistent with transgender employees' gender identities.[116] Courts adjudicating issues in these areas have relied on the EEOC's interpretations and adopted its definitions.[117]

Together, the EEOC's enforcement and interpretive tools help the agency address past or ongoing discrimination and prevent future harm. However, the EEOC remains a somewhat toothless tiger because both

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[111] *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2024-1, ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE (2024).

[112] Notice-and-comment rulemaking consists of four steps. First, the agency issues a notice of proposed rulemaking that describes the proposed rule, cites its legal basis, and provides the public with an opportunity to comment. ADMIN. CONF. OF THE U.S., IIB-014, NOTICE-AND-COMMENT RULEMAKING (2021). Second, the interested parties provide input on the proposed rules during a specified window of time. *Id.* Third, the agency considers the public's comments and develops a final rule that is responsive to the public's comments. *Id.* Finally, the agency publishes the final rule in the federal register. *Id.*

[113] *Regulations and Guidelines*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/regulations-and-guidelines (last visited Sept. 13, 2025).

[114] *EEOC Guidance*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc-guidance (last visited Sept. 13, 2025).

[115] 29 C.F.R. § 1636.3 (2024).

[116] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 111.

[117] *See, e.g.*, Lange v. Houston County, 101 F.4th 793, 798 n.4 (11th Cir. 2024) (citing the EEOC guidance to conclude that failure to ensure gender-affirming care violated Title VII); Bellotte v. Austin, No. 5:24-CV-0876-JKP, 2025 U.S. Dist. LEXIS 143420, at *12 (W.D. Tex. July 28, 2025) ("An issued regulation lists 'lactation and conditions related to lactation' as part of the 'non-exhaustive' list of 'Pregnancy, childbirth, or related medical conditions.'"). *But see* Texas v. Equal Emp. Opportunity Comm'n, No. 2:24-CV-173-Z, 2025 U.S. Dist. LEXIS 93206, at *41 (vacating portions of the EEOC guidance that expand "the definition of 'sex' beyond the biological binary").

tools rely on other actors to give the agency's positions the force of law. Enforcement actions cannot occur unless an employee—or other private actor—notifies the EEOC of discrimination and a court agrees that discrimination occurred. Regulations require public participation through the notice-and-comment process. And guidance documents are only binding if they are adopted by a court or codified by Congress. Thus, although the tiger technically has teeth, these institutional checks ensure that the EEOC exercises the same restraint that it did when it was toothless.

C. Defining DEI

As subparts A and B explained, EEOC enforcement is meant to be reactive, not proactive. The agency can only investigate, conciliate, and sue on an employee's behalf if the employee first alerts it to discrimination. Even when they bring commissioner charges, EEOC employees respond to evidence of discrimination that aggrieved employees or other actors show them. Due to the EEOC's modest role, voluntary compliance is "the preferred means to achieve Title VII's goals."[118] Indeed, employers electing to follow Title VII is a sign that the EEOC is functioning as it should. As this subpart explains, DEI programs are one such example of voluntary employer compliance.

"DEI"[119] refers to "a varied set of initiatives broadly designed to counter pervasive biases and stereotypes, and to cultivate more diverse, equitable, and inclusive institutions."[120] Employers implement numerous activities and programs to achieve the goals of DEI, including mentorship programs;[121] inclusive recruitment, hiring, and onboarding;[122] employee

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[118] Green, *supra* note 57.

[119] The definition of DEI is an amalgamation of its three component terms. "Diversity" refers to a "difference or variety of a particular identity." DANIELLE BEAVERS, DIVERSITY, EQUITY AND INCLUSION FRAMEWORK: RECLAIMING DIVERSITY, EQUITY AND INCLUSION FOR RACIAL JUSTICE 3 (2018). "Equity" refers to "resources and the need to provide additional or alternative resources so that all groups can reach comparable, favorable outcomes." *Id.* "Inclusion" refers to "internal practices, policies, and processes that shape an organization's culture[] [and] speaks to how community members of a shared identity experience their environment." *Id.*

[120] Letter from Kathryn Abrams, Herma Hill Kay Distinguished Professor of L., UC-Berkeley L. Sch. et al., to Colleagues, Univ. Offs. of Gen. Couns., & Univ. Leaders 1 (Feb. 20, 2025).

[121] *See, e.g.*, *Mentoring Programme*, COVINGTON & BURLING LLP, https://www.cov.com/en/careers/lawyers/london/our-opportunities/mentoring-programme (last visited Sept. 13, 2025).

[122] *See, e.g.*, *Recruiting Initiatives*, COVINGTON & BURLING LLP, https://www.cov.com/careers/lawyers/north-america/law-students/recruiting-initiatives (last visited Sept. 13, 2025).

resource and affinity groups;[123] unconscious bias, cultural sensitivity, and other trainings;[124] DEI committees and officer positions;[125] diversity fellowships;[126] and flexible work[127] arrangements.[128] Because DEI encompasses many different programs, it looks different in every workplace. Some employers implement only one kind of DEI program while others use a combination of techniques.[129]

DEI programs are a common way to remedy past Title VII violations. For example, a typical outcome of Title VII conciliation and litigation is the entry of a consent decree.[130] A consent decree is a court-approved, binding settlement in which employers promise to change their discriminatory practices and address any systemic harms they have caused.[131] For decades, consent decrees have required employers to implement DEI programs.[132] As a result, many employers perceive DEI programs as "liability

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[123] *See, e.g.*, *Global Affinity Groups, Networks & Coalitions*, LATHAM & WATKINS, LLP, https://www.lw.com/en/global-citizenship/belong-as-you-are/global-affinity (last visited Sept. 13, 2025).

[124] *See, e.g.*, *Diversity & Inclusion in the Workplace Training – Online DEI Training*, COMPLIANCE TRAINING GRP., https://compliancetraining-group.com/courses/workplace-diversity/ (last visited Sept. 13, 2025).

[125] *See, e.g.*, *Diversity, Equity, and Inclusion Committee*, AM. BAR ASS'N, https://www.americanbar.org/groups/business_law/about/committees/diversity-equity-and-inclusion/ (last visited Sept. 13, 2025); *About*, TISH ARCHIE-OLIVER, https://tisharchieoliver.com/about (last visited Sept. 13, 2025).

[126] *See, e.g.*, *US 1L Diversity Fellowship*, COOLEY LLP, https://www.cooley.com/careers/law-students/us-1l-diversity-fellowship (last visited Sept. 13, 2025).

[127] *See, e.g.*, *Legal Careers*, BAKER MCKENZIE, https://australia-careers.bakermckenzie.com/en/legal#inclusive (last visited Sept. 13, 2025) ("Our bAgile program also encourages a range of flexible work opportunities for all.").

[128] Jennifer Sokolowsky, *Examples of DEI Initiatives and How to Ensure They Make a Difference*, CHRONUS, https://chronus.com/blog/dei-initiatives-examples (last visited Sept. 13, 2025); *7 DEI Initiatives Examples in the Workplace*, EMPATHABLE, https://empathable.com/blog/dei-initiatives-examples/ (last visited Sept. 13, 2025).

[129] Michael Boyles, *DEI: WHAT IT IS & HOW TO CHAMPION IT IN THE WORKPLACE*, HARVARD BUS. SCH. ONLINE: BUS. INSIGHTS BLOG (Oct. 3, 2023), https://online.hbs.edu/blog/post/what-is-dei.

[130] *How to Handle EEOC Consent Decrees and Title VII Employee Rights Violations?*, COMPLIANCE TRAINING GRP. (Oct. 27, 2021, at 11:01 ET), https://compliancetraininggroup.com/2021/10/27/eeoc-title-vii-training/.

[131] *Id.*

[132] Tanya Katerí Hernández, *Can CRT Save DEI? Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action*, 71 UCLA L. REV. DISCOURSE 282, 290–91 (2024) (explaining that 89% of class-action consent decrees issued over an eight-year period required DEI training).

circumvention devices," and they voluntarily implement them in their workplaces.[133]

In addition to addressing past wrongs, employers voluntarily adopt DEI measures to prevent future discrimination. In fact, the Supreme Court empowered them to do so in *Burlington Industries v. Ellerth*[134] and *Faragher v. City of Boca Raton*.[135] In these cases, the Court held that employers can escape harassment liability under Title VII if they take reasonable steps to promptly address workplace harassment and the harassed employee unreasonably fails to take advantage of any "preventative or corrective opportunities provided by the employer."[136] Thus, to stop harassment from happening—and to avoid liability if it does—many workplaces choose to administer some form of diversity training.[137]

Before the second Trump presidency, the EEOC's official position had long been supportive of DEI programs[138]—regardless of presidential administration.[139] In particular, the agency encouraged employers "to implement lawful and appropriate [DEI] practices that proactively identify and address barriers to equal employment opportunity, help employers cultivate a diverse pool of qualified workers, and foster inclusive workplaces."[140] Despite a growing legal movement to oppose affirmative action,[141] the EEOC maintained that employer efforts "designed to ensure that all employees have a full and equal opportunity to participate, contribute, and succeed in the workforce typically do not make or encourage decisions to be made on the basis of race or another protected characteristic."[142] Nonetheless, as Part II details, the EEOC's position has since

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[133] *Id.* at 291.
[134] 524 U.S. 742 (1998).
[135] 524 U.S. 775 (1998).
[136] *Id.* at 807.
[137] *See* Green, *supra* note 57, at 853–54.
[138] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC STRATEGIC ENFORCEMENT PLAN 2024–2028 17 (2024); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2006-1, SECTION 15 RACE AND COLOR DISCRIMINATION 31 (2006).
[139] For example, during George W. Bush's presidency, the EEOC said that "Title VII permits diversity efforts designed to open up opportunities to everyone[,]" and it encouraged "voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII." U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 138. And excerpts of the Biden EEOC's DEI guidance are quoted above. *See infra* notes 140–42 and accompanying text.
[140] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 138.
[141] *See* discussion *infra* Part II.B.
[142] Brief for Equal Emp. Opportunity Comm'n as Amicus Curiae Supporting Defendants on the Issue Addressed Herein, at 1 n.1, Roberts v. Progressive Preferred Ins. Co., No. 1:23-cv-01597 (N.D. Ohio Feb. 22, 2024) (internal quotations omitted) (quoting N.Y. STATE BAR ASS'N, REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ADVANCING DIVERSITY 57 (2023)).

radically changed because it has become a key player in President Trump's war on DEI.

II. UNLEASHING THE TOOTHLESS TIGER: IMPLEMENTATION AND JUSTIFICATION OF THE ANTI-DEI AGENDA

Building on the background information established in Part I, Part II outlines President Trump's plans to use the EEOC to dismantle DEI in the workplace. First, subpart A details the evolution of the anti-DEI agenda and the actions the EEOC has taken to further it. Then, subpart B explains how President Trump's legal justification for the anti-DEI agenda mirrors the arguments made by opponents of affirmative action.

A. The Anti-DEI Agenda and the EEOC

This subpart details how the Trump administration implemented its anti-DEI agenda in the EEOC. First, this subpart describes the parallel anti-DEI frameworks outlined in Project 2025 and President Trump's executive orders. It then explains the actions President Trump has taken to eliminate resistance to the anti-DEI agenda from within the EEOC. Finally, this subpart explains how the EEOC has used its core enforcement and interpretation functions to effectuate the anti-DEI agenda.

Project 2025[143] first previewed President Trump's plans to eradicate workplace DEI. The policy blueprint prescribes two "needed reforms" for the EEOC: "[r]evers[ing] the DEI [r]evolution in [l]abor [p]olicy" and "[e]liminat[ing] [r]acial [c]lassifications and [c]ritical [r]ace [t]heory [t]rainings."[144] It also suggests specific executive actions to achieve the reforms. The EEOC-specific directives include instructing the EEOC to invalidate racial classifications, quotas, and DEI trainings that promote critical race theory under Title VII;"[145] to eliminate EEO-1 data collection[146] and disparate-impact-liability[147] theories;[148] and to reorient EEOC enforcement around pro-family goals.[149]

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[143] *See* BAKST ET AL., *supra* note 14 and accompanying text.
[144] *Id.* at 582.
[145] *Id.* at 582–83.
[146] *Id.* at 583. *See* discussion *supra* note 45.
[147] An employer causes a disparate impact when "a neutral policy or practice has a significant negative impact on one or more protected groups, and either the policy or practice is not job-related and consistent with business necessity or there is a less discriminatory alternative and the employer has refused to adopt it." EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 138.
[148] BAKST ET AL., *supra* note 14, at 583.
[149] *Id.* at 587 (directing the EEOC to prioritize religious and pregnancy discrimination, excluding abortion).

Although President Trump disavowed Project 2025 on the campaign trail,[150] he borrowed its anti-DEI framework when he regained the presidency. On his first day in office, President Trump signed Executive Order 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity.[151] The executive order directs the EEOC to enforce "longstanding civil-rights laws;" to combat "illegal private-sector DEI preferences, mandates, policies, programs, and activities;" and "to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements."[152] The executive order claims that "dangerous, demeaning, and immoral" DEI programs *can*, but do not automatically, violate Title VII.[153] It also argues that DEI undermines the "American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system."[154]

To ensure his agenda's implementation, President Trump took the unprecedented[155] action of firing[156] two Democratic EEOC

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[150] Zolan Kanno-Youngs & Erica L. Green, *Trump Disavowed Project 2025 During the Campaign. Not Anymore.*, N.Y. TIMES (Nov. 29, 2024), https://www.nytimes.com/2024/11/29/us/politics/trump-project-2025.html.

[151] Exec. Order No. 14173, 90 Fed. Reg. 8633, 8633 (Jan. 21, 2025). President Trump signed another executive order that impacts DEI— Executive Order 14281: Restoring Equality of Opportunity and Meritocracy. The order instructs the EEOC to stop allowing employees to sue under disparate-impact-liability theories because they "transform America's promise of equal opportunity into a divisive pursuit of results preordained by irrelevant immutable characteristics, regardless of individual strengths, effort, or achievement." Exec. Order. No. 14281, 90 Fed. Reg. 17,537, 17,537 (Apr. 23, 2025). Although this executive order relates to DEI, it will not be a focus of this article.

[152] Exec. Order No. 14173, 90 Fed. Reg. at 8633.

[153] *Id.*

[154] *Id.*

[155] A few months after taking office, President Biden fired the Social Security Administration's (SSA) commissioner. Jeff Zeleny & Rachel Janfaza, *Biden fires top official at Social Security Administration after he refuses to resign*, CNN (Jul. 9, 2021, at 21:54 ET), https://www.cnn.com/2021/07/09/politics/social-security-commissioner-fired-by-biden. However, this action is dissimilar to President Trump's firing of the EEOC commissioners because the SSA is not a bipartisan, multi-member body of experts. *See Organizational Structure of the Social Security Administration*, SOC. SEC. ADMIN., https://www.ssa.gov/org/ (last visited Sept. 13, 2025). Instead, the SSA is led by a single commissioner, and that commissioner can be removed by the executive at will. *Id.*; Collins v. Yellen, 594 U.S. 220, 250–51 (2020).

[156] President Trump also fired the EEOC's general counsel, Karla Gilbride. Matthew Goldstein & Emily Steel, *Trump Fired E.E.O.C. Commissioners in Late-Night Purge*, N.Y. TIMES (Jan. 28, 2025), https://www.nytimes.com/2025/01/28/business/trump-eeoc-commissioners-fired.html. This action is not unprecedented or unlawful—President Biden fired the Trump-appointed EEOC general counsel when he took office in 2021, and the Ninth

commissioners.[157] When President Trump took office, the EEOC had four commissioners: three Democrats, one Republican, and one vacancy.[158] By firing two Democratic commissioners, President Trump destroyed the Democratic majority and created more vacancies that he could fill with Republicans committed to implementing his anti-DEI agenda. He also rendered the EEOC without its requisite three-member quorum,[159] meaning that the agency lacked the power to take many enforcement and interpretative actions.[160]After Trump fired her, former Democratic EEOC commissioner Jocelyn Davis sued President Trump, alleging that her removal was unconstitutional.[161]

Whether President Trump had the constitutional authority to remove the Democratic commissioners is a contested issue. Ordinarily, the president is free to fire agency leaders for any reason, including without cause, because they exercise executive power.[162] However, under the Supreme Court's decision in *Humphrey's Executor v. United States*,[163] there is an increasingly narrow exception that allows Congress to insulate bipartisan, multi-member bodies of experts that have quasi-judicial functions with for-cause removal because they exercise regulatory power.[164] As the law currently stands, President Trump's removal of the Democratic EEOC commissioners plainly violates *Humphrey's Executor*.[165] But the Supreme Court indicated its willingness to cosign President Trump's actions when it vacated a lower-court order requiring President Trump to reinstate prematurely-removed commissioners of another bipartisan, multi-member, expert agency—the National Labor Relations Board.[166]

Circuit held that the removal was constitutional. Nat'l Lab. Rels. Bd. v. Aakash, Inc., 58 F.4th 1099, 1103 (9th Cir. 2023).

[157] Alexandra Olson & Claire Savage, *Trump fires two Democratic commissioners of agency that enforces civil rights laws in the workplace*, ASSOCIATED PRESS (Jan. 29, 2025, at 12:22 ET), https://apnews.com/article/trump-eeoc-commissioners-firings-crackdown-civil-rights-c48b973cb32bad97e9da9e354ba627db.

[158] *The State of the EEOC: Frequently Asked Questions*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/wysk/state-eeoc-frequently-asked-questions (last visited Sept. 13, 2025).

[159] *Id.*

[160] Lindsey White, Andrew F. Maunz & Richard J. Mrizek, *Quorum-Less EEOC and New Acting Chair: What Are the Impacts for Employers?*, JACKSON LEWIS PC (Feb. 7, 2025), https://www.jacksonlewis.com/insights/quorum-less-eeoc-and-new-acting-chair-what-are-impacts-employers.

[161] *See* Samuels v. Trump, No. 1:25-cv-01069 (D.D.C. 2025).

[162] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010).

[163] 295 U.S. 602 (1935).

[164] *Id.* at 626.

[165] Trump v. Wilcox, 145 S. Ct. 1415, 1418 (2025) (Kagan, J., dissenting).

[166] *Id.* at 1416.

With the Democratic majority out of the way, the Trump-appointed acting chair of the EEOC, Andrea Lucas, unilaterally changed the quorumless agency's position[167] on DEI in two guidance documents. The first document[168] explains how DEI-related discrimination can give rise to liability based on disparate treatment,[169] harassment,[170] retaliation,[171] and adversely limiting, segregating, or classifying employees.[172] The document acknowledges that DEI is a broad and undefined term, which makes DEI discrimination hard to pinpoint.[173] It also provides a non-exhaustive list of potential sources of DEI discrimination, including quotas, racial balancing, and DEI trainings.[174] The second document tells employees how to bring suit based on DEI discrimination.[175] Just as the early EEOC created infographics to inform people of their rights under Title VII, the new guidance document walks potential victims of DEI discrimination through the charge-filing process and lists examples of employer actions that can constitute DEI discrimination.[176]

While the EEOC's guidance documents acknowledge that DEI does not categorically violate Title VII, its enforcement actions leave no room for nuance. For example, in an executive order condemning the big-law firm Perkins Coie LLP for implementing DEI practices, President Trump directed Acting Chair Lucas to investigate "representative large, influential, or industry leading law firms for consistency with Title VII."[177] In response, Acting Chair Lucas sent official EEOC letters[178] to twenty big-

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[167] *See infra* Part III.A.

[168] *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 Sept. 13, 2025).

[169] The document's definition of DEI-based disparate treatment mirrors the general definition of disparate treatment provided in Title VII. *Id.*

[170] The document does not provide a DEI-specific definition of harassment. Rather, it generally defines harassment and says that DEI trainings can cause it to occur. *Id.*

[171] Again, the guidance provides only a general description of retaliation and says that opposing DEI and facing adverse consequences from one's employer could give rise to a cause of action. *Id.* The definition is not DEI-specific. *Id.*

[172] The guidance says that examples of this kind of DEI discrimination include limiting membership to affinity and resource groups and separating employees during DEI trainings. *Id.*

[173] *Id.*

[174] *Id.*

[175] *What You Should Know About DEI-Related Discrimination at Work*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work (last visited Sept. 13, 2025).

[176] *Id.*

[177] Exec. Order No. 14230, 90 Fed. Reg. 11,781, 11,782 (Mar. 6, 2025).

[178] After the EEOC sent its law-firm letters, twelve Republican state attorneys general requested that the law firms forward the same DEI information to them.

law firms that have publicly supported DEI initiatives demanding information about their employment practices and implicitly threatening them with legal action.[179] Each letter begins by quoting language from the firms' websites touting their diverse hiring practices, metrics, and awards.[180] After listing these accomplishments, the letters express concern that the firms achieved them by "disparately provid[ing] access to certain privileges of employment…based on its employees' race[s] or other protected characteristics."[181] The letters then mandate that the firms provide information about their hiring practices to the EEOC so it can confirm that they did not achieve their diversity through discrimination.[182] The requested information includes the names, demographic information, law schools, GPAs, and contact information for all applicants to the firms' diversity programs, pre-law fellowships, and training programs.[183] They also ask for similar information about firm employees chosen for firings, promotions, and project staffing.[184]

At the time of this writing, six of the twenty targeted law firms have settled[185] with the EEOC without admitting liability.[186] In doing so, the firms voluntarily "disavowed" their commitments to DEI.[187] The settlements require the firms to commit to "merit-based hiring, promotion, and retention," eliminate their DEI programs, and refrain from using the term "DEI" to describe lawful practices.[188] Though few firms have publicly

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See Letter from Ken Paxton, Tex. Att'y Gen. et al., to Perkins Coie LLP et al. (Apr. 3, 2025).

[179] *EEOC Acting Chair Lucas Sends Letters to 20 Law Firms Requesting Information About DEI-Related Employment Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 17, 2025), https://www.eeoc.gov/newsroom/eeoc-acting-chair-andrea-lucas-sends-letters-20-law-firms-requesting-information-about-dei.

[180] *See, e.g.*, Letter from Andrea Lucas, Acting Chair, Equal Emp. Opportunity Comm'n, to Rachel Proffitt, Chief Exec. Off., Cooley LLP 1–5 (Mar. 17, 2025).

[181] *Id.* at 4.

[182] *Id.* at 5.

[183] *See id.* at 6–9.

[184] *See id.* at 10–11.

[185] The EEOC characterizes the agreements between itself and the law firms as "settlement agreements" even though neither the EEOC nor a private plaintiff took formal legal or administrative action taken against them. *See In EEOC Settlement, Four 'BigLaw' Firms Disavow DEI and Affirm Their Commitment to Merit-Based Employment Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 11, 2025), https://www.eeoc.gov/newsroom/eeoc-settlement-four-biglaw-firms-disavow-dei-and-affirm-their-commitment-merit-based.

[186] *Id.*; Debra Cassens Weiss, *6 firms resolved EEOC probes with pro bono deals, they told state attorneys general*, ABA J. (May 13, 2025, at 9:16 CT), https://www.abajournal.com/news/article/six-law-firms-resolved-eeoc-probes-with-pro-bono-deals-they-told-state-attorneys-general.

[187] *In EEOC Settlement, Four 'BigLaw' Firms Disavow DEI and Affirm Their Commitment to Merit-Based Employment Practices*, *supra* note 185.

[188] *Id.*

commented on their reasons for settling, one cited a desire to avoid costly litigation.[189] And another said that it wanted to prevent disclosure of the confidential client, employee, and applicant information that the EEOC solicited.[190]

Acting Chair Lucas's efforts to implement the anti-DEI agenda were met with immediate backlash from former EEOC officials. In response to the new guidance documents, ten former EEOC commissioners published an open letter asserting that Acting Chair Lucas lacked the authority to unilaterally change the agency's position on DEI.[191] They also explained that DEI rarely violates Title VII.[192] Additionally, after Acting Chair Lucas sent the law-firm letters, seven former EEOC commissioners criticized her for soliciting "extensive information" and implying "a duty to respond without any basis in the laws that the EEOC enforces."[193]

The enforcement actions also triggered legal action. For example, three students affiliated with the targeted law firms sued the EEOC for attempting to obtain their sensitive personal information.[194] Additionally, three members of Congress initiated an investigation into the EEOC's involvement in "the White House's unlawful effort to coerce major U.S. law firms."[195] In a letter to Acting Chair Lucas, the lawmakers characterized her enforcement actions as a "sham" and "shakedown" that made "a mockery of due process."[196]

Although the anti-DEI agenda is in its infancy, the EEOC's actions have already tested legal limits. Acting Chair Lucas's aggressive enforcement strategy suggests that she wants to transform the toothless tiger into a creature with serious fangs. Substantively, these policies also diverge from both the original, affirmative-action-oriented policy goals[197] of the

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[189] Jessica Silver-Greenberg, Matthew Goldstein & Kenneth P. Vogel, *Angst Builds Inside Federal Agency Over Trump's Moves Against Law Firms*, N.Y. TIMES (Apr. 22, 2025), https://www.nytimes.com/2025/04/22/business/eeoc-trump-dei-law-firms.html.

[190] Abigail Adcox, *Skadden, Milbank Say EEOC Request Is Resolved as Part of Deal With Trump*, LAW.COM (May 9, 2025, at 14:55 ET), https://www.law.com/nationallawjournal/2025/05/09/skadden-milbank-say-eeoc-request-is-resolved-as-part-of-deal-with-trump/.

[191] Letter from Charlotte A. Burrows, former Chair and Comm'r, U.S. Equal Emp. Opportunity Comm'n et al., to Legal Community 1 n.1 (Apr. 3, 2025).

[192] *Id.* at 1–4.

[193] Letter from Charlotte A. Burrows, former Chair and Comm'r, U.S. Equal Emp. Opportunity Comm'n et al. to Andrea Lucas, Acting Chair, U.S. Equal Emp. Opportunity Comm'n 1 (Mar. 18, 2025).

[194] Doe 1 v. Equal Emp. Opportunity Comm'n, No. 1:25-cv-01124 (D.D.C. 2025).

[195] Letter from Jamie Raskin, Ranking Member, House Comm. on the Judiciary et al., to Andrea Lucas, Acting Chair, U.S. Equal Emp. Opportunity Comm'n 1 (July 9, 2025).

[196] *Id.* at 1, 4.

[197] *See supra* notes 23–27 and accompanying text.

EEOC and the agency's longstanding position on DEI.[198] However, as subpart B explains, recent trends in the law have delegitimized the EEOC's foundational values.

B. The Anti-DEI Agenda as an Outgrowth of the Anti-Affirmative-Action Movement

Now that subpart A has described the anti-DEI agenda, this subpart will explore the legal framework underpinning it. This subpart first explains the Trump administration's justification for its anti-DEI policies. It then contextualizes the anti-DEI agenda as a natural next step in a broader legal movement to protect majority-group[199] members from affirmative-action-related discrimination.

President Trump justifies the anti-DEI agenda by claiming that it ensures the even-handed enforcement of Title VII. As mentioned in Part I,[200] Title VII prohibits employers from failing to hire, refusing to hire, discharging, classifying, and otherwise discriminating against individuals based on protected traits.[201] President Trump views DEI practices as a form of "illegal discrimination" under Title VII because they deprive majority-group members of opportunities based on their status[202] as members of the majority group.[203] He argues that DEI policies diminish majority-group candidates' "individual merit, aptitude, hard work, and determination" by prioritizing candidates based on "how [they] were born instead of what they are capable of doing."[204]

This logic is nothing new. In fact, it inspired a legal movement to eradicate affirmative action in higher-education. After the Supreme Court first deemed race-conscious admissions policies constitutional in *Regents of the University of California v. Bakke*,[205] anti-affirmative-action activists began sponsoring litigation to restore "colorblindness" [206] to higher

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[198] *See supra* Parts I.A., I.C.

[199] Throughout this article, the terms "majority-group member" or "majority-group plaintiff" refers to people with a protected trait that have not been historically marginalized. So, under Title VII and related employment-discrimination laws, examples of majority-group members include American, white, male, straight, able-bodied, not pregnant, or younger-than-forty employees.

[200] *See supra* Part I.A.

[201] 42 U.S.C. § 2000e-2(a).

[202] This kind of discrimination is sometimes called "reverse discrimination." *See infra* note 228.

[203] Exec. Order No. 14173, 90 Fed. Reg. 8633, 8635 (Jan. 31, 2025).

[204] *Id.* at 8633.

[205] 438 U.S. 265 (1978).

[206] *See* Coleman Hughes, *Actually, Color-Blindness Isn't Racist*, STUDENTS FOR FAIR ADMISSIONS (Dec. 20, 2022), https://studentsforfairadmissions.org/actually-color-blindness-isnt-racist/.

education.[207] For example, the Center for Individual Rights[208] argued two cases[209] before the Supreme Court on behalf of well-qualified white women who claimed that they were denied admission to the University of Michigan because of their races.[210] Moreover, legal activist Edward Blum[211] founded an organization—Students for Fair Admissions— to fund litigation on behalf of similarly rejected and high-achieving Asian and white students.[212] Echoing President Trump, these and other members of the anti-affirmative-action movement argued that race-conscious admissions improperly reduced students to their races and perpetuated racial discrimination.[213]

After decades of litigation, the anti-affirmative-action movement ultimately triumphed in *Students for Fair Admissions v. Harvard* (*SFFA*).[214] In *SFFA,* the Supreme Court held that affirmative-action programs in higher education violate the Fourteenth Amendment's Equal Protection Clause.[215] In *SFFA*, Harvard University and the University of North Carolina argued that admissions systems designed to advance historically

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[207] Wil Del Pilar, *A Brief History of Affirmative Action and the Assault on Race-Conscious Admissions*, EDTRUST (June 15, 2023), https://edtrust.org/blog/a-brief-history-of-affirmative-action-and-the-assault-on-race-conscious-admissions/; *see infra* notes 214–19 and accompanying text.

[208] The Center for Individual Rights is a politically conservative, public-interest legal group devoted to protecting free speech and equal protection of the law. *Priority Issues*, CTR. FOR INDIVIDUAL RTS., https://cir-usa.org/issue-areas/ (last visited Sept. 13, 2025).

[209] *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003). The Center for Individual Rights also successfully litigated one of the most consequential lower-court cases for affirmative action—Hopwood v. Texas. 78 F.3d 932 (5th Cir. 1996). In *Hopwood*, the Fifth Circuit prohibited every state in its jurisdiction from using race in admissions. *Id.* at 935.

[210] *Gratz v. Bollinger; Grutter v. Bollinger*, CTR. FOR INDIVIDUAL RTS. (Oct. 14, 1997), https://cir-usa.org/cases/gratz-v-bollinger-grutter-v-bollinger/ (last visited Sept. 13, 2025).

[211] Some of the most notable cases that Blum has sponsored include Fisher v. University of Texas (affirmative action), Shelby County v. Holder (voting rights), and Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (affirmative action). Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html; *see About*, STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/about/ (last visited Sept. 13, 2025).

[212] STUDENTS FOR FAIR ADMISSIONS, *supra* note 211; *see* Garcia-Navarro, *supra* note 211.

[213] Brief for Petitioner at 49, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707).

[214] 600 U.S. 181 (2023).

[215] *Id.* at 230.

underrepresented groups further in the review process[216] did not disadvantage historically well-represented white and Asian students. Instead, the schools argued that their systems merely credited some applicants for their backgrounds without penalizing others.[217] In other words, the schools argued that affirmative action involves benign racial classifications that are justified by a compelling interest in diversity.[218] The Court rejected this reasoning, explaining that admissions are a "zero-sum" game such that a "benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[219] This reasoning resembles President Trump's argument that DEI recruitment, hiring, and training programs give benefits to minority-group employees to the detriment of the majority group.[220]

Since *SFFA*, anti-affirmative-action arguments have made their way to the Title VII context. In *Ames v. Ohio Department of Youth Services*,[221] the Court evaluated a Sixth Circuit rule[222] that required only majority-group plaintiffs to make an additional showing at the prima-facie-case stage of a Title VII lawsuit.[223] For minority-group plaintiffs in any jurisdiction, the prima-facie burden is "not onerous."[224] They simply must produce evidence that they applied for an available position, they were qualified for the position, the employer rejected them, and the circumstances

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[216] Harvard's application system included an initial multi-step review process in which application-reviewers considered an applicant's race. *Id.* at 194. Next, at a full committee meeting, the reviewers ensured that the school would not have a "dramatic drop-off in minority admissions from the prior class" when reviewing applications. *Id.* (internal quotation omitted). At the final stage of the process, Harvard trimmed its list of tentatively admitted students, and race was one of four factors it considered when determining who to cut. *Id.* at 195. In UNC's application process, an initial reader reviewed applications and considered race when assigning scores to them. *Id.* at 195–196. Readers then wrote comments recommending applicants for admission in which they could give an applicant a "plus" based on her race. *Id.* at 196. The applications then went through a final review in which the admissions committee could consider race. *Id.* at 196–97.

[217] *Id.* at 218.

[218] Brief for Respondent at 28–37, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1199).

[219] 600 U.S. at 218–219.

[220] *See* Exec. Order No. 14173, 90 Fed. Reg. 8633, 8633.

[221] 605 U.S. 303 (2025).

[222] The Seventh, Eighth, Tenth, and D.C. Circuits also imposed a higher evidentiary burden for majority-group plaintiffs. *See* Petition for a Writ of Certiorari at 14, Ames v. Ohio Dep't. of Youth Servs., 605 U.S. 303 (2025) (No. 23-1039). The Third and Eleventh Circuits explicitly rejected the higher burden. *Id.* at 19. And the First, Second, Fourth, Fifth, and Ninth Circuits always treated majority- and minority-group plaintiffs the same without explicitly addressing whether a higher evidentiary requirement was appropriate. *Id.* at 21.

[223] 605 U.S. at 305.

[224] Tex. Dep't. of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

of the rejection give rise to an inference of discrimination.[225] However, after carrying this burden, majority-group plaintiffs in the Sixth Circuit also had to show that their employers were the "unusual"[226] type that discriminate against the majority group, as evidenced by "background circumstances"[227] of so-called "reverse discrimination."[228] To prove background circumstances, majority-group plaintiffs had to produce evidence that is not required at the prima-facie-case stage, such as statistical proof of the employer's pattern of majority-group discrimination or evidence that the decisionmaker belonged to a minority group.[229]

Throughout the litigation, the majority-group plaintiff echoed President Trump's and the anti-affirmative-action movement's rhetoric. In her briefs, the plaintiff claimed that applying different standards to certain groups perpetuates discrimination.[230] And at oral argument, her attorney insisted that she only wanted "equal justice for all."[231]

Ultimately, the Court unanimously agreed with her, reasoning that "Congress left no room for courts to impose special requirements on majority-group plaintiffs."[232] In particular, the Court explained that because Title VII establishes protections for every individual, it is inappropriate to draw distinctions based on majority- or minority-group membership.[233] Again, this logic resembles the Trump administration's because it too believes that any differential treatment between minority- and majority-group members violates Title VII.[234] Moreover, by eliminating the background circumstances requirement, the Court made it easier for majority-group plaintiffs to litigate Title VII claims, including those based on DEI-related reverse discrimination.

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[225] *Id.*

[226] Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 825 (6th Cir. 2023).

[227] *Id.*

[228] Reverse discrimination occurs when an employer disadvantages majority-group members because of their status as members of the majority group. *See supra* note 202 and accompanying text. In *Ames*, the majority-group member was a straight woman who claimed that her employer gave a gay woman a promotion over her because she was gay. Brief for Petitioner at 1–2, Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303 (2025) (No. 23-1039). She also alleged that her employer replaced her with a gay man because he was gay. *Id.*at 2.

[229] Ames, 87 F.4th at 825.

[230] Brief for Petitioner*, supra* note 228, at 21.

[231] Sarah Parshall Perry, *Supreme Court Justices Seem Favorable to Woman's "Reverse" Employment Discrimination Claim in Ames v. Ohio Department of Youth Services*, THE FEDERALIST SOC'Y (Feb. 27, 2025), https://fedsoc.org/commentary/fedsoc-blog/supreme-court-justices-seem-favorable-to-woman-s-reverse-employment-discrimination-claim-in-ames-v-ohio-department-of-youth-services.

[232] Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303, 310 (2025).

[233] *Id.*

[234] *See supra* notes 203–204 and accompanying text.

In sum, the anti-DEI agenda is a product of the anti-affirmative-action movement. By framing DEI as discrimination against majority-group members, the administration lumps DEI into the same category of unconstitutional ways to address systemic discrimination as affirmative action. Accordingly, the administration primes courts to invalidate DEI. But as Part III explains, DEI is not categorically unlawful.

III. TAMING THE TOOTHLESS TIGER: CRITIQUE OF THE ANTI-DEI AGENDA

This Part argues that the procedural and substantive flaws of the anti-DEI agenda defy the EEOC's limited statutory role. The first two subparts take each of these flaws in turn. Subpart A contends that the agenda ignores the procedural limits of the EEOC's enforcement and interpretive powers. And subpart B explains that the agenda's substantive overbreadth contradicts the EEOC's purpose of combatting employment discrimination. After detailing these two issues, subpart C argues that it is ultimately unnecessary for the Trump Administration to force the EEOC out of its proper role because Title VII and the Constitution already proscribe reverse discrimination.

A. The EEOC's Implementation of the Anti-DEI Agenda Exceeds Its Statutory Authority

The anti-DEI agenda challenges the EEOC's statutory role because it lacks the statutory authority to implement it. This subpart identifies three reasons why the EEOC's enforcement and interpretive actions violate Title VII: 1) Acting Chair Lucas took them when the EEOC lacked a quorum, 2) she took them unilaterally, and 3) her actions are inconsistent with the EEOC's purpose.

First, EEOC commissioners cannot take formal enforcement or interpretation actions while the agency lacks a quorum.[235] As mentioned in Part II, the EEOC only has two current members because President Trump fired two Democratic commissioners before their terms expired.[236] Title VII forbids the EEOC from exercising its core enforcement and interpretative functions when it has less than three active commissioners.[237] Therefore, Acting Chair Lucas unilaterally issuing guidance documents and soliciting law firms clearly contravenes Title VII.

Second, even if the EEOC had a quorum, Acting Chair Lucas's unilateral actions violate EEOC procedures. Specifically, a commissioner cannot unilaterally and publicly request information from an employer.[238] As mentioned in Part I, the proper way for a commissioner to investigate discrimination allegations is through the same charge-filing process as

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[235] *The State of the EEOC: Frequently Asked Questions*, *supra* note 158.
[236] *See supra* note 157 and accompanying text.
[237] *See supra* note 160 and accompanying text.
[238] Burrows et al., *supra* note 193.

individual claimants.[239] According to that process, commissioners must swear to the validity of the charge under oath and penalty of perjury to avoid frivolous lawsuits.[240] The existence and target of a charge must also be confidential.[241] The confidentiality provision is a "bedrock principle," because Congress did not want the EEOC "to intimidate employers through public pressure before any finding of discrimination that results in a court proceeding."[242] Acting Chair Lucas's law-firm letters ignore almost every one of these fundamental procedural safeguards. Eschewing the charge-filing process, Acting Chair Lucas publicly accused the firms of violating Title VII purely based on marketing materials affirming their commitments to DEI.

Acting Chair Lucas also ignored the procedural requirement that the EEOC obtain a majority vote to change the agency's policy position.[243] As mentioned in Part I,[244] although guidance documents do not need to receive public comments, three of the five EEOC commissioners must vote to approve them.[245] And, again, such a vote cannot be held when the EEOC lacks a quorum.[246] Acting Chair Lucas flouted these procedures by singlehandedly publishing her own guidance documents that directly contradict the EEOC's longstanding formal position supporting DEI programs when the agency had only two active commissioners. [247]

Finally, transforming the EEOC into some kind of employment-discrimination prosecutor is incompatible with the agency's statutory purpose and enforcement mechanisms. As discussed in Part I, the EEOC was meant to be a toothless tiger. [248] Congress only wanted the agency to have modest investigation and mediation powers.[249] Although Congress gave the EEOC litigation authority, EEOC enforcement is still designed to be reactive to charges filed by private claimants.[250] And even commissioner charges are supposed to be responsive to credible allegations of discrimination that the EEOC receives from private actors.[251] The agency is neither supposed to proactively seek out discrimination nor coerce employers into compliance with Title VII. In fact, Congress rejected such an enforcement model by repeatedly declining to grant the EEOC cease-and-desist

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[239] *Commissioner Charges*, *supra* note 101.
[240] *See supra* note 104.
[241] *See supra* note 109 and accompanying text.
[242] Burrows et al., *supra* note 193, at 1–2.
[243] *Id.* at 2; *see also Commission Votes*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/commission-votes (last visited Sept. 13, 2025).
[244] *See supra* Part I.B.
[245] *See supra* note 114 and accompanying text.
[246] *See supra* notes 159–60 and accompanying text.
[247] *See supra* notes 139–142 and accompanying text.
[248] *See supra* notes 30–38 and accompanying text.
[249] *See supra* note 35 and accompanying text.
[250] *See supra* Part I.B.
[251] *See supra* notes 101–02 and accompanying text.

powers.[252] Accordingly, the EEOC's aggressive attacks on law firms defy the agency's narrowly circumscribed role.

B. The EEOC's Enforcement of the Anti-DEI Agenda Is Overbroad

In addition to their procedural flaws, the Trump EEOC's anti-DEI enforcement actions have been substantively overbroad. This subpart first contends that the EEOC's essentialization of DEI is inappropriate because the EEOC's purpose is to combat employment discrimination, not lawful DEI. It then argues that the EEOC's existing procedures are better suited to distinguish lawful from unlawful DEI than Acting Chair Lucas's overbroad enforcement actions.

As a preliminary matter, DEI is not monolithic. As outlined in Part I,[253] there are many kinds of programs that fall under the DEI umbrella. And among those programs categorized as DEI, not all are created equal.[254] There are certainly some DEI initiatives that are more likely to violate Title VII than others. For example, fellowships reserved exclusively for members of certain groups tend to raise legal red flags.[255] But general workplace diversity and bias training programs typically comply with Title VII.[256]

However, trying to place generic categories of DEI programs on a legality spectrum would be futile because the way employers implement their programs is what matters. Seemingly suspect DEI programs can be implemented in ways that comply with Title VII. Conversely, seemingly permissible DEI programs can be executed in ways that are illegal. Returning to the examples above, a diversity fellowship that is open to all applicants who write a personal statement about their life experiences,

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[252] *See supra* notes 35, 60 and accompanying text.
[253] *See supra* Part I.C.
[254] Abrams et al., *supra* note 120, at 5.
[255] *See, e.g.*, *Fish & Richardson 2022 1L Diversity Fellowship Program*, MITCHELL HAMLINE SCH. OF L., (Nov. 1, 2021), https://mitchellhamline.edu/students/2021/11/01/fish-richardson-2022-1l-diversity-fellowship-program/#:~:text=Our%201L%20Diversity%20Fellowship%20Program,up%20to%20a%20%2430%2C000%20award ("Eligibility for the Fellowship must include being a member of a racial/ethnic group that has been historically underrepresented in the legal profession, or identifying as a person with disabilities, openly LGBTQ, and/or a military veteran.").
[256] *See, e.g.*, *Training and Education (DEI-Centered)*, AM. BAR. ASS'N, https://www.americanbar.org/groups/diversity/resources/toolkits/dei-success-toolkit/training-and-education/ (last visited Sept. 13, 2025) (recommending that employers "[i]mplement education and training for all key partners, managers and employees" and suggesting that "gaining full company support" is key to success). Even Edward Blum, the architect of *SFFA* has said that DEI trainings are not illegal. *See* Garcia-Navarro *supra* note 211 ("It is not illegal for a corporation to hire a D.E.I. officer and staff that office with dozens or hundreds of people and compel employees to listen to speeches. That's not actionable.").

including majority-group members, likely complies with Title VII.[257] But a diversity training that negatively stereotypes majority-group members likely violates it.[258] Therefore, a blanket prohibition on DEI fails to capture nuance and penalizes employers for legal and illegal conduct alike. This overbreadth is problematic because the EEOC's mandate is to combat employment discrimination. It is not the EEOC's job to police lawful DEI programs.

The best way to avoid essentialization and overbreadth is to evaluate the legality of DEI programs on a case-by-case basis. The good news is that the EEOC's existing complaint-review process already entails fact-intensive, case-specific analyses.[259] As described in Part I, the EEOC has thorough, multi-step processes to address discrimination alleged by any kind of employee. [260] An essential part of each of these processes is a detailed investigation to determine whether reasonable cause exists.[261] Through these processes, the agency can examine whether challenged DEI programs comply with Title VII or support an inference of reverse discrimination. Whereas the Trump EEOC would throw the baby out with the bath water, the EEOC's normal review process distinguishes between the two.

However, to execute its anti-DEI agenda, the Trump EEOC has eschewed the charge-filing process in favor of overbroad enforcement actions.[262] Although both Executive Order 14173[263] and Acting Chair Lucas's guidance documents acknowledge that DEI does not categorically violate Title VII,[264] the EEOC's settlements with law firms require them

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[257] *See, e.g.*, *US 1L Diversity Fellowship*, COOLEY LLP, https://www.cooley.com/careers/law-students/us-1l-diversity-fellowship (last visited Sept. 13, 2025) (describing a fellowship open to all law students who can participate in the summer program, are not related to a Cooley employee, and demonstrate a commitment to promoting diversity, equity, and inclusion in their communities); *1L Fellowships*, GOODWIN PROCTER LLP, https://www.goodwinlaw.com/en/careers-pages/1l-fellowships (last visited Sept. 13, 2025) (describing a fellowship open to all law students who write a personal statement explaining their interest in the firm, practice area preferences, leadership abilities, and success in overcoming challenges).

[258] *See, e.g.*, De Piero v. Pa. State Univ., 711 F. Supp. 3d 410, 416–18, 424 (E.D. Pa. 2024) (holding that allegations of trainings that singled out and stereotyped white employees were sufficient to survive a motion to dismiss). The court later granted the employer summary judgment because the majority-group plaintiff failed to produce sufficient evidence to support the complaint's allegations. *See* De Piero v. Pa. State Univ., 769 F. Supp. 3d 329, 357 (E.D. Pa. 2025).

[259] *See supra* Part I.B.

[260] *Id.*

[261] *See supra* notes 83–84, 94, 107–08 and accompanying text.

[262] *See supra* notes 177–90 and accompanying text.

[263] 90 Fed. Reg. 8633 (Jan. 21, 2025).

[264] *See id.* at 8633 ("[D]angerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called [DEI] … *can* violate the civil-rights

to stop all DEI programs, regardless of lawfulness.[265] And what's more, they forbid law firms from *using the term* "DEI," even to describe legal employment practices.[266] In doing so, the settlements improperly treat DEI as a monolith by failing to distinguish between permissible and impermissible DEI.

In sum, there are DEI programs that comply with Title VII, and there are DEI programs that violate it. The EEOC can investigate allegations of noncompliant DEI programs and hold employers accountable for them. In fact, the anti-affirmative-action movement empowers it to do just that.[267] But President Trump's anti-DEI agenda is troublesome because it goes beyond targeting noncompliant DEI programs and seeks to terminate entirely lawful ones too. Eliminating legal DEI is not within the EEOC's purview, so the agency's resources should not be wasted on doing so.

C. Directing the EEOC to Target DEI and Abandon Its Statutory Role Is Unnecessary

As subparts A and B have established, the anti-DEI agenda has forced the EEOC to depart from its statutory role. Such a departure is unnecessary, this subpart argues, because Title VII and the Constitution already prohibit majority-group discrimination.

DEI-specific guidance is unnecessary because Title VII already forbids reverse discrimination. As mentioned in Part I, Title VII prohibits employers from refusing to hire, firing, adversely limiting, segregating, or classifying, and otherwise discriminating against employees based on protected traits. [268] By its terms, Title VII does not only protect minority-group members—it covers anyone who faces discrimination because of a protected trait.[269] For example, if an employer refuses to hire a white employee because she is white, the employer likely[270] violates Title VII. This reading of Title VII is precisely why the Supreme Court unanimously struck down the "background circumstances" test in *Ames*.[271] As the Court explained, "Title VII does not vary based on whether or not the plaintiff is

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laws of this Nation.") (emphasis added); *What To Do If You Experience Discrimination Related to DEI at Work*, *supra* note 168 ("Different treatment based on race, sex, or another protected characteristic *can* be unlawful discrimination, no matter which employees are harmed.") (emphasis added).

[265] *See* supra note 188 and accompanying text.

[266] *Id.*

[267] *See supra* Part II.B.

[268] *See supra* note 27 and accompanying text.

[269] Janice C. Whiteside, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413, 419–20 (1998) (noting that all circuits recognize reverse-discrimination claims and only differ in how they apply the McDonnell Douglas proof paradigm to them).

[270] Again, a fact-intensive EEOC investigation would be the only way to reach a more definitive conclusion outside of a trial.

[271] *See supra* notes 226–29 and accompanying text.

a member of the majority group."[272] Thus, although it does not categorically bar DEI, Title VII already forbids DEI programs that actually discriminate against majority-group members.

Moreover, the anti-DEI agenda is unnecessary because the Constitution also guards against reverse discrimination. As discussed in Part II, affirmative-action admissions policies that benefit minority-group members at the expense of majority-group members are unconstitutional.[273] The Supreme Court seems poised to extend *SFFA*'s logic to Title VII either by invalidating DEI programs under the Fourteenth Amendment or construing Title VII just as narrowly.[274] If so, majority-group plaintiffs will be able to challenge DEI programs that even Title VII permits. For example, Title VII currently prohibits only those trait-based classifications that negatively impact the terms and conditions of one's employment.[275] Accordingly, benign trait-based classifications are permissible under Title VII. But, in the future, the Court could import *SFFA*'s logic and invalidate all trait-based classifications.[276] Such an outcome is not merely speculative; in fact, in the years following *SFFA*, anti-affirmative-action groups have filed dozens of lawsuits asking the Supreme Court to invalidate DEI under the Fourteenth Amendment.[277] If the Court extends *SFFA*'s logic to Title VII as expected, majority-group members will have additional constitutional protection from reverse discrimination.

Given that the law adequately addresses reverse discrimination, the Trump administration's decision to center the anti-DEI agenda primarily serves to elevate harmful rhetoric about the inferiority of those who benefit from DEI. As discussed in Part II, the executive order announcing President Trump's anti-DEI agenda promises the restoration of merit.[278] Specifically, it calls for the end of DEI's "unlawful, corrosive, and pernicious identity-based spoils system," and it beckons the return of "hard work, excellence, and individual achievement."[279] But underlying those statements is an assumption that those who benefit from DEI are categorically "unqualified," "presumptively incompetent," and "intellectually inferior."[280] Exemplifying this assumption, the Trump administration and its

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[272] Ames v. Ohio Dep't. of Youth Servs., 605 U.S. 303, 310 (2025).
[273] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).
[274] *See* Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS UNIV. PUB. L. REV. 255, 257 (2012); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1148 (2010).
[275] 42 U.S.C. § 2000e-2(b).
[276] *See* Spann, *supra* note 274.
[277] Lauren Aratani, *How the US supreme court's affirmative action ruling unleashed anti-DEI cases*, THE GUARDIAN (Sept. 6, 2024, at 7:00 ET), https://www.theguardian.com/law/article/2024/sep/06/dei-affirmative-action-lawsuits.
[278] *See supra* note 151 and accompanying text.
[279] *See supra* note 154 and accompanying text.
[280] Abrams et al., *supra* note 120, at 6.

allies made a scapegoat of any minority-group member involved in the tragic D.C. plane crash.[281] Specifically, they blamed disabled[282] and racial-minority[283] air traffic controllers, a transgender member of the Virginia national guard (who was not in the crash),[284] the helicopter's woman pilot,[285] and the airplane's Hispanic pilot[286] for the accident. Thus, the anti-DEI agenda serves as a catalyst for "pernicious stereotypes,"[287] rather than a necessary driver of change.

IV. PRESERVING THE TOOTHLESS TIGER: SOLUTIONS TO ADDRESS THE TRUMP EEOC'S OVERREACH

As Part III explained,[288] the anti-DEI agenda exceeds the limits of Title VII. While EEOC enforcement is supposed to react to employee allegations of discrimination,[289] the Trump EEOC has assumed a proactive, prosecutorial role.[290] In doing so, the agency has tested Title VII's outer limits. This Part explains how internal-separation-of-powers mechanisms can be used to rein in the Trump EEOC and preserve the toothless tiger. First, this Part defines "internal separation of powers" and explains why it would be an effective tool to address the dissonance between the EEOC's mandate and the anti-DEI agenda. Next, this Part suggests three internal separation-of-powers mechanisms that EEOC civil servants should employ: adhering to the EEOC's usual charge-filing process, voicing opposition to agency leaders, and informing key stakeholders of the Trump EEOC's overreach. If EEOC civil servants use these tools, this Part

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[281] *See* Tanyos, Czachor & Freiman, *supra* note 1.
[282] Joseph Shapiro, *People with intellectual disabilities do lots of jobs — but they don't direct air traffic*, NPR (Jan. 30, 2025, at 20:22 ET), https://www.npr.org/2025/01/30/nx-s1-5280368/intellectual-disabilities-air-traffic-controllers-faa-trump.
[283] Michelle Stoddart & Stacey Dec, *Trump rails against DEI after DC plane crash, but it doesn't apply to air traffic controllers*, ABC NEWS (Jan. 30, 2025, at 18:47 ET), https://abcnews.go.com/Politics/trump-evidence-appears-blame-faa-diversity-initiatives-factor/story?id=118272015.
[284] Rachel Leingang, *'I became collateral damage': the trans pilot falsely targeted over Washington DC crash*, THE GUARDIAN (Feb 11, 2025, at 6:00 ET), https://www.theguardian.com/us-news/2025/feb/11/washington-dc-plane-crash-diversity-trans-jo-ellis.
[285] Jennifer M. Wood, *Female Pilot in Crash Trump Blamed on DEI Was Top 20% Army Cadet*, YAHOO! NEWS (Feb. 2, 2025, at 00:00 ET), https://www.yahoo.com/news/female-pilot-crash-trump-blamed-050059036.html.
[286] Peter Charalambous, *'Infuriating': Former fiancee of American Airlines Flight 5342 pilot rebukes Donald Trump's DEI allegations*, ABC News (Feb. 4, 2025, at 12:59 ET), https://abcnews.go.com/US/infuriating-former-fiancee-american-airlines-flight-5342-pilot/story?id=118429420.
[287] Abrams et al., *supra* note 120, at 6.
[288] *See supra* Part III.
[289] *See supra* Part I.A.
[290] *See supra* Part II.A.

argues, they can signal the need for congressional oversight and invite external checks on the Trump EEOC from Congress.

Administrative-law scholars refer to the ability of executive-branch employees to provide checks on executive overreach as "internal separation of powers."[291] Internal separation-of-powers mechanisms are built into our government. Traditional examples include statutory protections for civil servants,[292] "offices of goodness"[293] within agencies that are designed to enforce these statutory protections,[294] and structurally insulated agency watchdogs.[295] These tools protect agencies from political pressure and ensure that the executive branch follows the law.

Internal separation-of-powers mechanisms are effective tools to address bureaucratic dissonance. Civil servants have a strong sense of their agency's core mission, values, and responsibilities.[296] They also operate within and submit to the government's hierarchy, at the top of which sits the executive.[297] Due to these dual loyalties, civil servants experience dissonance when executive directives contradict their agency's values and bureaucratic norms.[298] During his first administration, President Trump blamed civil servants for his policy failures, and the civil service responded with bureaucratic resistance.[299] Likewise, the anti-DEI agenda engenders bureaucratic dissonance because it forces EEOC employees to choose between the norm of executive obedience and the agency's fundamental values. Therefore, EEOC employees seem poised to use internal separation-of-powers tools to restore the agency's proper role.

The trouble is that the Trump administration has weakened many of these mechanisms. In the first weeks of his second administration, President Trump fired thousands of civil servants,[300] leaders of watchdog

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[291] TODD D. RAKOFF ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW, CASES AND COMMENTS 1055 (13th ed. 2023).
[292] *See, e.g.*, Pendleton Act of 1883, 5 U.S.C. § 3301; Hatch Act of 1939, 5 U.S.C. § 7323, Civil Service Reform Act of 1978, 5 U.S.C. §§ 1302, 2301–02, 3502.
[293] Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60–62 (2014).
[294] An example is the Department of Homeland Security's Office for Civil Rights and Civil Liberties. RAKOFF ET AL., *supra* note 291, at 1059.
[295] *Id.* Inspectors general are examples of agency watchdogs. Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429 (2009).
[296] Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 651 (2019).
[297] *Id.*
[298] *Id.*
[299] RAKOFF ET AL., *supra* note 291, at 1057.
[300] Elena Shao & Ashley Wu, *The Federal Work Force Cuts So Far, Agency by Agency*, N.Y. TIMES (May 12, 2025), https://www.nytimes.com/interactive/2025/03/28/us/politics/trump-doge-federal-job-cuts.html.

agencies,[301] and inspectors general.[302] Additionally, President Trump ignored the guidance of offices of goodness and excluded them from his decision-making processes.[303] Even in the absence of these reliable tools, there are other internal separation-of-powers mechanisms that EEOC civil servants can employ to check President Trump's power. And EEOC civil servants are well-positioned to implement them because, unlike other agencies, its workforce has largely remained intact.[304]

The most straightforward way that civil servants can curtail the Trump EEOC's overreach is continuing to evaluate discrimination charges on a case-by-case basis. As Part II mentioned, Acting Chair Lucas promulgated a guidance document that encourages majority-group members to report DEI discrimination through the EEOC's charge-filing process. Thus, EEOC civil servants may encounter reverse-discrimination charges. Rather than place a blanket "unlawfulness" label on DEI, civil servants reviewing these charges should determine whether each challenged DEI program comports with Title VII.

However, this approach is no panacea. EEOC employees might be forced to comply with President Trump's agenda due to pressure, sanctions, and scrutiny from supervisors, political appointees, or President Trump himself.[305] Indeed, during the first Trump administration, President Trump's political appointees stripped EEOC lawyers of litigation decision-making authority.[306] While EEOC leaders historically trusted the Office of the General Counsel to choose which discrimination charges the agency should pursue, the first Trump administration required every litigation decision to be ratified by the full commission.[307]

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[301] The Associated Press, *The fired head of a federal watchdog agency says he's ending his legal fight*, NPR (Mar. 6, 2025, at 13:01 ET), https://www.npr.org/2025/03/05/nx-s1-5319326/trump-hampton-dellinger-watchdog-appeals-court.

[302] *Trump's Illegal Firing of Inspectors General*, AM. OVERSIGHT (Feb. 25, 2025), https://americanoversight.org/investigation/trumps-illegal-firing-of-inspectors-general/.

[303] Charlie Savage, *Trump Sidelines Justice Dept. Legal Office, Eroding Another Check on His Power*, N.Y. TIMES (Apr. 4, 2025), https://www.nytimes.com/2025/04/04/us/politics/trump-office-of-legal-counsel-doj.html; Charlie Savage, *How Trump Has Tuned Out a Key Justices Dept. Legal Office*, N.Y. TIMES (Apr. 4, 2025), https://www.nytimes.com/2025/04/04/us/politics/trump-orders-office-of-legal-counsel.html.

[304] Jonathan M. Crotty, *Could EEOC Cuts Result in More Discrimination Lawsuits?*, PARKER POE ADAMS & BERNSTEIN LLP (Mar. 14, 2025), https://www.parkerpoe.com/news/2025/03/could-eeoc-cuts-result-in-more-discrimination-lawsuits.

[305] *See* Jennifer Nou, *Civil Service Disobedience*, 94 CHI.-KENT L. REV. 349, 379–80 (2019).

[306] Bryce Covert, *The Trump Administration Gutted the EEOC*, THE NATION (Jan. 28, 2021), https://www.thenation.com/article/society/janet-dhillon-eeoc/.

[307] *Id.*

If EEOC employees face pressure to acquiesce, the agency's civil-servant leaders or remaining Democratic commissioner should create a mechanism for employees to internally oppose the anti-DEI agenda. A successful example of facilitating dialogue between leaders and concerned civil servants is the State Department's dissent channel. The dissent channel gives "any officer in any embassy the ability and power to disagree with the position taken by the ambassador or high-ranking officials."[308] After filing a dissent, the employee receives a confirmation of receipt in two days.[309] Then, the policy-planning staff, the Secretary of State, the deputy, and any other leaders involved in the matter review the dissent and substantively respond to it in two months.[310] The State Department's dissent channel is effective because State Department leaders encourage its use by publicly praising it and administering awards to Foreign Service officers who make the best use of it.[311]

An EEOC dissent channel would allow civil servants to voice their opposition to illegal, overbroad, and unnecessary targeting of DEI programs. EEOC leaders should establish the channel, encourage its use, and take the feedback received seriously. A dialogue between civil servants and agency leaders, including political appointees, could expose the flaws in the anti-DEI agenda, motivate the agency to narrow its position, and ensure that its case-by-case evaluation of DEI-related discrimination charges remains in use. However, President Trump's hyper-partisan appointees may be unwilling to listen to the views of civil servants. And even if EEOC leaders implement a dissent channel, employees may fear retaliation if they use it.[312] For example, during the first Trump administration, State Department employees who used the dissent channel to voice opposition to the President Trump's travel ban were excluded from the department's decision-making processes and threatened with termination.[313]

If internal communication fails, civil servants can bring their concerns to the public's attention by leaking information.[314] In the past, civil servants have covertly opposed executive directives by confiding in civil society groups, members of Congress, committees that oversee their agencies, businesses, the press, and state and local officials.[315] However, this

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[308] Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2328 (2006).
[309] *Id.* at 2329.
[310] *Id.*at 2328–29.
[311] *Id.*at 2329.
[312] Shah, *supra* note 296, at 643.
[313] Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1381 (2017).
[314] RAKOFF ET AL., *supra* note 291, at 1058. The Administration referred 334 leaks for criminal prosecution. Ken Klippenstein, *TRUMP ADMINISTRATION REFERRED A RECORD NUMBER OF LEAKS FOR CRIMINAL INVESTIGATION*, THE INTERCEPT (Mar. 2, 2021, at 18:51 ET), https://theintercept.com/2021/03/02/trump-leaks-criminal-investigation/.
[315] RAKOFF ET AL., *supra* note 291, at 1057.

approach is risky, because the first Trump administration closely tracked leaks and referred a record number of them for criminal investigation.[316]

The Whistleblower Protection Act[317] offers a legal alternative to leaking that also raises public awareness of executive overreach in agencies. The Act empowers employees to report perceived abuses of power by establishing procedures through which they can share their concerns with agency officials or congressional committees.[318] Indeed, whistleblower protections exist because Congress wants to respond to concerns raised by civil servants.[319] EEOC employees can and should invoke these protections and tell their allies that the anti-DEI agenda contravenes Title VII. They can also take advantage of whistleblower protections by formally reporting political appointees' power abuses and illegal actions that are not public knowledge. These actions would inform the public of how the anti-DEI agenda violates Title VII and motivate it to demand change through the political process.

Internal separation-of-powers mechanisms also signal the need for external checks from Congress. As mentioned above, internal separation of powers is a classic response to civil servant dissonance. Thus, Congress knows that coordinated bureaucratic resistance is a symptom of conflict between the executive's goals and an agency's values.[320] Further, executive backlash to such resistance can make the need for congressional intervention even more apparent because it highlights the deterioration of internal agency systems that are designed to "reconcile bureaucratic values and political aims."[321]

In response to EEOC civil servants' SOS signals, Congress should conduct oversight investigations. Oversight investigations are congressional inquiries into social, political, economic, or other problems.[322] Although the Constitution does not afford Congress an express investigatory power, the Supreme Court held that Congress nonetheless possesses a broad power to investigate so that it can make informed policy decisions.[323] Any member of Congress or congressional committee can initiate an investigation.[324] And these actors have a panoply of investigatory tools, including subpoenas, whistleblower tips, testimony from congressional hearings, and data from the Government Accountability Office, the Congressional Research Service, and inspectors general.[325] Although

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[316] *Id.* at 1058.
[317] 5 U.S.C. § 2302(b)(8)–(9).
[318] RAKOFF ET AL., *supra* note 291, at 1057.
[319] Shah, *supra* note 296, at 658.
[320] *Id.* at 658.
[321] *Id.* at 655.
[322] Carl Levin & Elise Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 WAYNE L. REV. 1, 4 (2018).
[323] *Id.* at 1, 3.
[324] *Id.* at 9.
[325] *Id.* at 11–14.

Congress's findings, standing alone, are non-binding, they gain legal effect if Congress incorporates them into legislation. [326]

This solution is feasible because Congress has already proven willing to hold the Trump EEOC accountable. As mentioned in Part II, three members of Congress initiated an investigation of Acting Chair Lucas following her public attacks on law firms.[327] EEOC civil servants should keep Congress apprised of any further power abuses that occur behind closed doors through internal separation of powers. That way, Congress can be just as responsive to internal executive overreach as it was to Acting Chair Lucas's public and unlawful actions.

The downside of congressional oversight is that it is non-binding and lacks the force of law. Agencies are free to ignore committee findings and can refuse to cooperate with investigations. The risk of the Trump administration's noncooperation is especially acute because it has a track record of impeding congressional oversight. Specifically, the first and second Trump administrations have refused to provide information to Congress in over 100 investigations and inquiries.[328]

However, congressional oversight still serves as an effective check on the executive because it can "inform policy discourse, influence public opinion," and pressure the "executive to change course."[329] If Congress investigates the Trump EEOC, it can raise public awareness about the agency defying its statutory role. In turn, if the public disapproves, it can demand that the Trump administration abandon the anti-DEI agenda. And if the administration fails to conform to the public's wishes, the public can hold the administration and its allies accountable through the political process.

Although Congress could pass a law to address the Trump EEOC's overreach, this article does not endorse that solution because Title VII already forbids the EEOC's actions. As explained in Part III,[330] Title VII imposes clear limits on the EEOC to ensure that it remains a reactive, toothless tiger. When obeyed, these guardrails allow the EEOC to vigorously combat employment discrimination while respecting the rights and interests of employers, employees, and all other stakeholders. Thus, if Congress wants to address the Trump EEOC's actions, it should focus on securing the agency's adherence to Title VII's existing requirements.

Internal-separation-of-powers mechanisms, on their own, will not completely solve the problems stemming from the anti-DEI agenda. They also may be challenging to implement, especially due to the hyper-partisan takeover of the EEOC. And even if they invite congressional

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[326] *See id.* at 4 (explaining how Congress's power to legislate necessitates and justifies its power to investigate).
[327] *See supra* note 195 and accompanying text.
[328] CO-EQUAL, TRUMP ADMINISTRATION OVERSIGHT PRECEDENTS 6 (2024).
[329] Douglas Kriner, *Can Enhanced Oversight Repair "The Broken Branch"?*, 89 B.U. L. REV. 765, 785 (2009).
[330] *See supra* Part III.

oversight, there is no guarantee that the EEOC will voluntarily comply with the law. Nonetheless, "in high-profile contexts, even internal checks with limited effect may be preferable to no checks at all."[331]

CONCLUSION

Although the EEOC's lack of enforcement power was initially a concession to appease wary congresspeople,[332] the agency's toothlessness has become its strength. Without enforcement power, the EEOC was forced to develop creative ways to indirectly enforce Title VII, such as empowering private parties to enforce their own statutory rights, training private employment lawyers, collecting data to reveal patterns of systemic discrimination, and liberally construing Title VII.[333] Even after the EEOC gained litigation authority, Title VII enforcement remained reactive and employee-driven.[334]

The Trump administration's efforts to eradicate DEI from the workplace exemplify the benefits of the EEOC's toothlessness. To effectuate its anti-DEI agenda, the Trump EEOC has abandoned its modest role in favor of overbroad enforcement actions.[335] Because everything looks like a nail to a hammer, the Trump EEOC seeks to eliminate lawful and unlawful DEI alike. Ironically, the EEOC's existing tools are best-suited to address DEI discrimination because, as the Trump administration admits,[336] DEI is nuanced. Through its usual charge-filing process, the EEOC can conduct fact-specific analyses of discrimination charges, investigate employers, and determine when DEI discrimination occurs.

Because the Trump administration has transformed the toothless tiger into an unrecognizable creature, it is imperative that the civil service ensures that the EEOC adheres to its proper role. Through the internal-separation-of-powers tools described in Part IV,[337] civil servants can resist the Trump administration's attempts to force the agency into an aggressive, prosecutorial role. That way, the EEOC can remain the toothless tiger it is meant to be.

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[331] Metzger, *supra* note 295, at 425.
[332] *See supra* note 32 and accompanying text.
[333] *See supra* notes 39–57 and accompanying text.
[334] *See supra* notes 61–63 and accompanying text.
[335] *See supra* Part II.A.
[336] *See supra* notes 153, 173 and accompanying text.
[337] *See supra* Part IV.