

February 2, 2024

Office of the Secretary  
U.S. Department of Commerce  
1401 Constitution Ave. NW  
Washington, D.C. 20230

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

**RE: Request for Information on Proposed Business Diversity Principles,  
DOC-2023-0003**

To Whom It May Concern,

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we submit the following comments in response to the U.S. Department of Commerce's Request for Information on its proposed Business Diversity Principles (the Principles). Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization.<sup>1</sup> LDF has a long history of fighting for economic justice and equal opportunity in the workforce, including litigating the seminal 1971 Supreme Court case *Griggs v. Duke Power Company*, which recognized the disparate impact theory of liability under Title VII of the Civil Rights Act of 1964.<sup>2</sup> Since then, LDF has continued to challenge public and private policies and practices that deny Black Americans equal employment opportunities.<sup>3</sup>

All Americans benefit when workers can bring their full selves to work, and when Black, white, Latino, Asian, Native, and Middle Eastern people have equal access to good jobs and the opportunity for advancement. Companies whose workforces reflect the diversity of talent in our country have higher sales revenue and are more innovative, making them better able to find solutions to the critical problems we face today. Unfortunately, talented and qualified Black people and other people of color are often excluded from job opportunities due to intentional discrimination and unfair barriers that are unrelated to their abilities. Programs that break down barriers to opportunity help employers comply with existing civil rights laws and benefit from the contributions of people from all backgrounds. Companies can advance these objectives by investing in developing their own workforce and in supporting the communities around them, especially underserved communities. While opponents of civil rights have sought to extend the Supreme Court's decision in *Students for Fair Admissions v. Harvard/University of North*

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<sup>1</sup> LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.

<sup>2</sup> 401 U.S. 424 (1971).

<sup>3</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); and *Lewis v. City of Chi.*, 560 U.S. 205 (2010).

Carolina (UNC)<sup>4</sup> to contexts outside of higher education admissions, that ruling does not directly implicate the legality of these employer efforts.

We appreciate the Department of Commerce's efforts to synthesize best practices to ensure equal access to employment opportunities and foster inclusive workplaces. The federal government has long played an important role in ensuring that Black people and other people of color can fully participate in the nation's economy, including by passing and enforcing civil rights laws such as Section 1 of the Civil Rights Act of 1866 (later codified as Section 1981)<sup>5</sup> and Title VII.<sup>6</sup> The Principles have the potential to provide employers with further guidance on how to effectively meet those obligations. In order to ensure that the Principles are as effective as possible, we urge the Department of Commerce to uplift evidence-based measures that can substantively address racial barriers; make the Principles' recommendations more concrete and specific and ensure that they are consistent with existing legal standards; and communicate to employers and the general public that the recommendations ensure compliance with anti-discrimination obligations.

I. The Nation Benefits When Companies Break Down Barriers to Employment Opportunities and Attract and Retain Talented Individuals from All Backgrounds

Workers, companies, and the country as a whole benefit when people can fully bring their skills and knowledge to work. Companies that can attract and retain talented individuals of all backgrounds are more profitable, more innovative, and better able to solve the complex problems of today.

Workers thrive in diverse and inclusive workplaces. Such workplaces foster feelings of representation, recognition, and solidarity, and workers seek out employers who have demonstrated their commitment to these shared values.<sup>7</sup> For example, in a 2021 CNBC survey, 80 percent of respondents reported that it was important for them to work at an organization that prioritizes diversity and inclusion, and more than half said it is very important to them.<sup>8</sup> A 2023 study by the Pew Research Center similarly found that a majority of workers said focusing on increasing diversity, equity and inclusion at work is mainly a good thing, and more than 70 percent reported that policies that ensured that people were treated fairly in hiring, pay, or promotions had a positive impact at work.<sup>9</sup> Finally, a recent Harris Poll commissioned by the Black Economic Alliance Foundation found that a majority of people surveyed believe that corporations should take active steps to ensure their businesses reflect the diversity of the country.<sup>10</sup>

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<sup>4</sup> 600 U.S. 181 (2023).

<sup>5</sup> 42 U.S.C. § 1981.

<sup>6</sup> 42 U.S.C. § 2000e *et seq.*

<sup>7</sup> *E.g.* Susan Caminiti, *Majority of employees want to work for a company that values diversity, equity and inclusion, survey shows*, CNBC (Apr. 30, 2021 9:00 AM ET), <https://www.cnbc.com/2021/04/30/diversity-equity-and-inclusion-are-important-to-workers-survey-shows.html>.

<sup>8</sup> *Id.*

<sup>9</sup> Rachel Minkin, Pew Research Ctr., *Diversity, Equity and Inclusion in the Workplace* (2023), [https://www.pewresearch.org/social-trends/2023/05/17/diversity-equity-and-inclusion-in-the-workplace/#:~:text=6%25\).-](https://www.pewresearch.org/social-trends/2023/05/17/diversity-equity-and-inclusion-in-the-workplace/#:~:text=6%25).-)

<sup>10</sup> *The%20importance%20of%20a%20diverse%20workforce,%2C%20age%2C%20and%20sexual%20orientation.*

<sup>10</sup> Press Release, Black Econ. Alliance Foundation, *New Poll by The Black Economic Alliance Foundation/The Harris Poll: Corporate Diversity Initiatives Overwhelmingly Supported Across Racial, Ideological, and Generational Lines* (Aug. 23, 2023), <https://foundation.blackeconomicalliance.org/press-release/new-poll-by-the-black-economicalliance->

By contrast, people struggle if their workplace culture does not foster inclusion. A 2023 study by Deloitte and the Meltzer Center for Diversity, Inclusion, & Belonging at NYU School of Law found that 66 percent of Asian workers, 65 percent of Black workers, 62 percent of Latino workers, 64 percent of cisgender women, and 69 percent of non-heterosexual people reported “covering” at work—i.e., changing their appearance, behavior, or other parts of their identity in order to avoid negative stereotypes and be seen as competent and/or valuable in the workplace.<sup>11</sup> These rates are even higher for Black women (80 percent) and Asian women (86 percent).<sup>12</sup> Over 50 percent of workers who engage in “covering” say that the need to cover at work negatively impacts their overall well-being and their commitment to the organization.<sup>13</sup>

Companies that are able to attract and retain talented people from all backgrounds are more successful. For example, a 2009 meta-analysis found that “racial diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits.”<sup>14</sup> The analysis was repeated in 2017, with similar results.<sup>15</sup> Similarly, a 2015 McKinsey & Co. report found that public companies in the top quartile for racial diversity in management were 35 percent more likely to have financial returns above their industry mean, and those in the top quartile for gender diversity were 15 percent more likely to have returns above the industry mean.<sup>16</sup> A 2019 study also found that companies in the top quartile for ethnic and cultural diversity on their executive teams succeeded financially, “with a 36 percent higher likelihood of outperformance on [earnings before interest and taxes] margin” compared to more homogenous companies.<sup>17</sup>

Ultimately, the country as a whole benefits when we break down barriers to inclusion. Our national security, our ability to solve complex problems like climate change, and our capacity to compete in a global economy depend on scientific and technological innovation. Teams that bring together people with different backgrounds and experiences engage in a more rigorous and thoughtful decision-making, making them better equipped to find innovative solutions.<sup>18</sup> As a result, a 2018 study found that companies with more diverse managers; hiring policies that opened up employment for people with disabilities; and personnel policies that included LGBTQ+ employees, among other measures, were more likely to have a larger “number of new product announcements per R&D dollar spent by a firm.”<sup>19</sup> The study also found that the “positive effect

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foundation-the-harris-poll-corporate-diversity-initiatives-overwhelmingly-supported-across-racial-ideological-and-generational-lines./.

<sup>11</sup> DELOITTE & THE MELTZER CENTER FOR DIVERSITY, INCLUSION, & BELONGING AT NYU SCHOOL OF LAW, UNCOVERING CULTURE: A CALL TO ACTION FOR LEADERS (2023), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/dei/us-uncovering-culture-a-call-to-action-for-leaders.pdf?dl=1>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 208 (2009).

<sup>15</sup> Cedric Herring, *Is Diversity Still a Good Thing?*, 82 AM. SOC. REV. 868 (2017) (updating and reinforcing this analysis).

<sup>16</sup> Dame Vivian Hunt, et al., *Why Diversity Matters?*, MCKINSEY & CO. (Jan. 1, 2015), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/why-diversity-matters>.

<sup>17</sup> MCKINSEY & CO., *DIVERSITY WINS: HOW INCLUSION MATTERS 20* (2020), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf>.

<sup>18</sup> David Rock & Heidi Grant, *Why Diverse Teams are Smarter*, HARV. BUS. REV. (Nov. 4, 2016). See William J. Holstein, *Diversity is Even More Important in Hard Times*, N.Y. TIMES (Feb. 13, 2009) (“[I]t’s difficult, if not impossible, for [a] homogenous board[] to challenge and offer different perspectives, unique experiences and the broad-based wisdom that makes the board, and therefore the company, as effective as they can be.”).

<sup>19</sup> Roger C. Mayer et al., *Do Pro-Diversity Policies Improve Corporate Innovation?*, 47 FIN. MGMT. 617 (2018).

of pro-diversity policies on innovative efficiency is stronger during recessions . . . suggesting that building a reputation of pro-diversity and a culture of inclusion pays off” long-term.<sup>20</sup>

Remediating discrimination will also help grow the economy. A 2020 study by Citi estimates that the United States’ aggregate economic output would have been \$16 trillion higher since 2000 if we had closed racial gaps in wages, access to higher education, lending, and mortgage access.<sup>21</sup> Researchers at McKinsey estimated that the racial wealth gap alone will cost the U.S. economy between \$1 trillion and \$1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028.<sup>22</sup>

## II. Unfair Barriers Prevent Talented and Qualified Black Workers from Accessing Equal Employment Opportunities

Unfortunately, talented, qualified Black workers still struggle to access well-paying jobs and senior roles because of unfair barriers. Research shows that equally qualified Black workers are still at a disadvantage compared to white workers when trying to enter certain industries or seeking to advance in their field. Racial disparities in which industries people can find employment and what positions they can attain—known as occupational segregation—is the result of discriminatory practices rather than lack of skills or personal preferences.

Black people remain relegated to lower wage jobs and less lucrative industries compared to white people with similar levels of education. Indeed, while the number of Black people with college degrees has increased in the last 20 years, the level of occupational segregation has worsened.<sup>23</sup> For example, a 2023 study published by the National Bureau of Economic Research found that Black workers with a college degree are disproportionately employed in middle-wage jobs—ex., social workers, tax examiners, and education administrators—rather than higher wage jobs in technology or finance when compared to white people with a similar level of education.<sup>24</sup> Similarly, skilled Black workers who do not have a four-year degree are disproportionately in low-wage jobs—ex., home health aides, security guards, janitors and bus drivers—and have less access to higher-paying unionized jobs in manufacturing compared to similarly-educated white people.<sup>25</sup> This occupational segregation contributes to the racial wealth gap: a quantitative analysis of the 1972-2012 waves of the American National Longitudinal Survey of Youth found that occupational segregation was, in part, responsible for 15 percent of the racial pay gap between Black and white men and 24 percent of the pay gap between Black and white women.<sup>26</sup> The researchers concluded that the “differential job placement of blacks and whites, even when highly educated, in occupational structures contributes to race gaps in pay.”<sup>27</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> DANA M. PETERSON & CATHERINE L. MANN, CITI GPS, CLOSING THE RACIAL INEQUALITY GAPS: THE ECONOMIC COST OF BLACK INEQUALITY IN THE U.S. 7 (2020).

<sup>22</sup> Nick Noel, et al., *The economic impact of closing the racial wealth gap*, MCKINSEY & CO. (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap>.

<sup>23</sup> *Id.*

<sup>24</sup> Ashley Jardina, et al., *The Limits of Educational Attainment in Mitigating Occupational Segregation Between Black and White Workers*, NAT’L BUREAU OF ECON. RESEARCH (Aug. 2023), <https://doi.org/10.3386/w31641>.

<sup>25</sup> *Id.*

<sup>26</sup> Michelle J. Budig, et al. *Racial and Gender Pay Disparities: The Role of Education*, SOC. SCI. RESEARCH, vol. 98 (Aug. 1, 2021) 102580. <https://doi.org/10.1016/j.ssresearch.2021.102580>.

<sup>27</sup> *Id.*

Black people also have fewer opportunities for promotions and advancement. An analysis of 2009-2014 data found that white men were 28 percent more likely to move into managerial positions and 16 percent more likely to hold blue color supervisory roles compared to Black men.<sup>28</sup> Whereas white men had a 36 percent predicted likelihood of accessing managerial positions, Black men had a significantly lower probability (16 percent) of accessing such opportunities.<sup>29</sup> Similarly, researchers found that, in 2015, Black women and men each constituted less than 4 percent of middle management within private sector employers with 100 or more employees and federal contractors with 50 or more employees meeting certain criteria.<sup>30</sup> While white men composed 62 percent of middle management and white women composed 30 percent,<sup>31</sup> Black men and women each occupied less than 2 percent of senior management roles.

Black people are segregated in lower-paying jobs and less senior positions not because of personal preferences or a lack of qualifications or skills, but because of ongoing discrimination.<sup>32</sup> In the absence of discrimination, researchers would expect to see similar distributions of workers of different races across industries. However, as the 2023 National Bureau of Economic Research study concluded, the level of occupational segregation in the United States today is substantially higher than what would be expected in a race-neutral environment, even when educational attainment, gender, and geography are taken into account.<sup>33</sup> In 2019, 22.1 percent of college-educated Black workers would have needed to change occupations to achieve an even distribution of white and Black workers.<sup>34</sup> For Black workers without a bachelor's degree, that figure would have risen to 27.6 percent.<sup>35</sup> Numerous other studies have found similar levels of occupational segregation.<sup>36</sup> While some may speculate that occupational segregation is the result of worker preferences for types of work, research has shown that Black people apply for jobs across a greater range of occupational characteristics and categories compared to white people,<sup>37</sup> indicating that their opportunities may be limited by prejudice rather than choice.

By contrast, there is robust literature documenting racial discrimination in employment against Black people<sup>38</sup> and other people of color. In 2021, for example, economists from the University of California at Berkeley and the University of Chicago found that resumes with white-sounding names were 10 percent more likely to get chosen for an interview than resumes with

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<sup>28</sup> George Wilson, et al., *Particularism and Racial Mobility into Privileged Occupations*, Soc. Sci. Research, vol. 78 (Feb. 1, 2019), <https://doi.org/10.1016/j.ssresearch.2018.10.015>.

<sup>29</sup> *Id.*

<sup>30</sup> Katrina R. Bloch, et al., *An Intersectional Approach to the Glass Ceiling: Gender, Race and Share of Middle and Senior Management in U.S. Workplaces*, SEX ROLES vol. 84, no. 5 (Mar. 1, 2021), <https://doi.org/10.1007/s11199-020-01168-4>.

<sup>31</sup> *Id.*

<sup>32</sup> Steve Lohr, *Occupational Segregation Drives Persistent Inequality, Study Says*, N.Y. TIMES (Sept. 4, 2023), <https://www.nytimes.com/2023/09/04/business/black-workers-education-segregation.html>; Ashley Jardina, et al., *supra* note 24.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Black workers are disproportionately overrepresented in occupations that provide low compensation and pose a greater risk to well-being. Janette Dill & Mignon Duffy, *Structural Racism and Black Women's Employment in The US Health Care Sector*, HEALTH AFFAIRS vol. 41, no. 2, p. 265-72 (Feb. 2022), <https://doi.org/10.1377/hlthaff.2021.01400>; F.D. Blau, et al., *Who are the essential and frontline workers?*, BUS. ECON. vol. 56, p. 168-178 (2021), <https://doi.org/10.1057/s11369-021-00230-7>.

<sup>37</sup> Devah Pager & David S. Pedulla, *Race, Self-Selection, and the Job Search Process*, 120 AM. J. OF SOCIOLOGY 1005 (2015).

<sup>38</sup> Jardina, *supra* note 24 (reviewing the literature).

Black-sounding names.<sup>39</sup> Workers of color also report that race impacts their work: According to the 2023 Pew survey, Black, Latino, and Asian workers reported that their race makes it harder to be successful where they work.<sup>40</sup> Numerous employers have also been found liable in recent years for failing to hire, promote, or otherwise discriminate against people of color, or for creating a hostile work environment,<sup>41</sup> and the U.S. Equal Employment Opportunity Commission has documented pervasive racial and gender discrimination in industries such as construction.<sup>42</sup>

Discrimination, in turn, fosters further occupational segregation. Because many people learn about jobs and opportunities for advancement through their social networks, the lack of diversity in particular industries and roles can limit Black people's access to higher-paying jobs or more senior positions. Moreover, students and young people of color may not pursue careers in industries where they see that people of color are excluded.

Occupational segregation caused by discrimination and unfair barriers leads us all to lose the opportunity to benefit from the contributions of talented people of color. Moreover, as discussed below, employers that allow such policies and practices to persist risk legal liability under existing civil rights laws.

### III. Targeted Recruitment Programs and Other Lawful Measures Can Help Employers Break Down Barriers to Employment and Comply with Civil Rights Laws

Fortunately, social science research has found that employers can reduce barriers to employment opportunities and improve representation of Black workers in senior positions by using interventions such as employing full-time diversity, equity, and inclusion (DEI) staff or a DEI taskforce; mentoring programs; and targeted recruitment programs. Such programs help employers comply with their obligations under existing civil rights laws such as Title VII<sup>43</sup> and Section 1981,<sup>44</sup> which prohibit racial discrimination in employment. The Supreme Court's recent decision in *Students for Fair Admissions v. Harvard/UNC* does not directly impact the legality of these programs.<sup>45</sup>

Employers can use several evidence-based methods to ensure equal access to employment opportunities. In general, social science research has found that diversity initiatives work best when designed to fit a specific organizational context and when a specific manager is responsible for implementing the intervention. Equity audits may be a promising tool for organizations to identify issues and tailor their programs. Moreover, the following interventions have been shown to succeed in a variety of contexts:

- Full-Time DEI Positions and Taskforces: Making managers a part of the solution, by appointing a full-time diversity manager, creating an interdepartmental taskforce, or

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<sup>39</sup> Patrick Kline, et al. *Systemic Discrimination Among Large U.S. Employers*, 137 QUARTERLY J. OF ECON. 4, 1963 (2022), <https://doi.org/10.1093/qje/qjac024>.

<sup>40</sup> Minkin, *supra* note 9.

<sup>41</sup> See, e.g., U.S. Equal Employment Opportunity Comm'n, Significant EEOC Race/Color Cases (Covering Private and Federal Sectors), <https://www.eeoc.gov/initiatives/e-race/significant-eeoc-racecolor-casescovering-private-and-federal-sectors#hiring> (last visited Dec. 20, 2023).

<sup>42</sup> See, e.g., REPORT OF CHAIR CHARLOTTE BURROUGHS, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, BUILDING FOR THE FUTURE: ADVANCING EQUAL EMPLOYMENT OPPORTUNITY IN THE CONSTRUCTION INDUSTRY (2023), <https://www.eeoc.gov/building-future-advancing-equal-employment-opportunity-construction-industry>.

<sup>43</sup> 42 U.S.C. § 2000e *et seq.*

<sup>44</sup> 42 U.S.C. § 1981.

<sup>45</sup> 600 U.S. 181 (2023).

assigning managers as mentors, helps promote diversity. An analysis of data on more than 800 employers between 1971 and 2002 revealed that hiring an equal employment opportunity specialist (DEI staff position) has significant positive effects on increasing the share of women and people of color in management, leading to a 10 percent increase in the proportion of white women in management and a 15 percent increase in the proportions of Black men and women within a 5-7 year timespan.<sup>46</sup> Diversity taskforces can similarly lead to significant increases in the numbers of Black, Latino, and Asian men and women and white women in managerial positions<sup>47</sup> because they help pinpoint specific problems that prevent advancement and identify solutions.<sup>48</sup> Companies with a DEI team are also slightly more likely to hire diverse candidates than companies without a DEI team.<sup>49</sup> Finally, according to Pew's 2023 study, 60 percent of workers report that DEI staff positions had a positive impact on the workplace.<sup>50</sup>

- **Mentoring:** Mentoring programs can also reduce barriers that prevent people of color from advancing.<sup>51</sup> A 2015 study found that leaders of color identified mentoring (31 percent) and networking (20 percent), in addition to education (33 percent), as the most useful activities for their success, with younger respondents reporting that mentoring had a more significant impact than education.<sup>52</sup> Researchers have found that, in industries with significant numbers of college-educated non-managerial workers eligible for promotion to management jobs, mentoring programs can increase the ability of historically excluded groups (Black, Latino, and Asian men and women and white women) to enter management roles.<sup>53</sup> A 2005 study similarly found that personal guidance and support by mentors is the most effective at facilitating career development.<sup>54</sup>
- **Targeted Recruitment:** Active recruitment of people of color, women, and other underrepresented groups can help employers reach talented workers who might otherwise not learn about job opportunities. Several studies have shown that these programs can help companies increase the diversity of their workforce.<sup>55</sup>

Other interventions merit further study. For example, the 2023 Pew survey found that 60 percent of workers reported that affinity or employee resources groups, when available, had a positive

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<sup>46</sup> Alexandra Kalev, et al., *Best practices or best guesses? Diversity management and the remediation of inequality*, 71 AM. SOC. REV. 589 (2006).

<sup>47</sup> Frank Dobbin, et al. *Diversity management in corporate America*, CONTEXTS vol. 6, no. 4, p. 21–28 (2007); Emilio Castilla, *Social networks and employee performance in a call center*, 110 Am. J. of Soc. 1243 (2005).

<sup>48</sup> Frank Dobbin and Alexandra Kalev, *The origins and effects of corporate diversity programs*, in THE OXFORD HANDBOOK OF DIVERSITY AND WORK (Quinetta M. Roberson, ed.) (2013).

<sup>49</sup> Reyhan Ayas, et al., *Cutting Costs at the Expense of Diversity*, REVELIO LABS (Feb. 7th, 2023), <https://www.reveliolabs.com/news/social/cutting-costs-at-the-expense-of-diversity/>.

<sup>50</sup> Minkin, *supra* note 9. Other research has similarly confirmed that companies with DEI teams are (slightly) more likely to have higher ratings of employee satisfaction with workplace culture. Ayas, et al., *supra* note 51.

<sup>51</sup> Dobbin, et al., *supra* note 49; Castilla, *supra* note 49.

<sup>52</sup> Ryan Smith, *Contributions and barriers to developing black and Latino leadership in the public and nonprofit sectors of the economy* 15, in HOW GLOBAL MIGRATION CHANGES THE WORKFORCE DIVERSITY EQUATION (PM. Pilati, et al., eds.) (2015).

<sup>53</sup> Kalev, *supra* note 48.

<sup>54</sup> Castilla, *supra* note 49.

<sup>55</sup> Harry Holzer & David Neumark, *What does affirmative action do?*, 53 INT'L LABOR RELATIONS REV. 240 (2000), <https://journals.sagepub.com/doi/10.1177/001979390005300204>; Lauren Edelman & Stephen Petterson, *Symbols and substance in organizations' response to civil rights law*, 17 RES. IN SOC. STRATIFICATION & MOBILITY 107 (1999); Alison Konrad & Frank Linnehan, *Formalized HRM structures—coordinating equal-employment opportunity or concealing organizational practices*, 38 Acad. of Mgmt. J. 787 (1999).

impact on the workplace.<sup>56</sup> However, more research is needed to determine if they have overall effects on workplace climate, employee retention and advancement, and other key measures. Similarly, there is less evidence that diversity trainings have an impact on these key outcomes, as the research to date has often looked at other proxies for success.<sup>57</sup>

Programs that break down barriers to employment, like the ones described above, help employers comply with their obligations under federal civil rights laws.<sup>58</sup> For example, Title VII prohibits covered employers from discriminating against employees on the basis of their race, color, religion, sex,<sup>59</sup> or national origin in all terms and conditions of employment, including but not limited to hiring and firing; promotions and demotions; compensation decisions; or access to benefits.<sup>60</sup> Title VII's prohibitions on discrimination cover both disparate treatment (i.e., explicitly treating employees differently based on a protected characteristic) and disparate impact discrimination (i.e., policies or practices that appear neutral but result in an unjustifiable discriminatory effect). Section 1981 also prohibits disparate treatment discrimination on the basis of race, color, and ethnicity when making and enforcing contracts, including employment contracts.<sup>61</sup> Importantly, Title VII and Section 1981 permit remedial, race-conscious employment decisions in limited circumstances to address past discrimination.<sup>62</sup>

Programs that help employers create inclusive workplaces, decrease harassment, and eliminate barriers to opportunity are consistent with these laws.<sup>63</sup> Title VII and Section 1981 were intended not only to prevent discriminatory conduct, but to allow employers to use race-conscious and race-neutral means to remediate past practices that prevented Black people from competing equally with other workers.<sup>64</sup> Programs that break down barriers to inclusion are thus consistent with the purpose of these laws. Moreover, many programs aimed at creating inclusive workplaces do not involve using race or other protected characteristics as a criterion in hiring, promotion, pay, or other employment decisions, and thus comply with civil rights laws. For example, the U.S. Equal Employment Opportunity Commission has stated that an employer may “adopt strategies to expand the applicant pool of qualified [Black] applicants, such as recruiting at schools with high Black enrollment,” to expand its applicant pool,<sup>65</sup> and such strategies do not involve making hiring decisions based on race. Courts have held that targeted recruitment and other DEI

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<sup>56</sup> Minkin, *supra* note 9.

<sup>57</sup> Patricia G. Devine & Tory L. Ash, *Diversity Training Goals, Limitations, and Promise: A Review of the Multidisciplinary Literature*, 73 ANN. REV. OF PSYCH. 403 (2022), <https://www.annualreviews.org/doi/10.1146/annurev-psych-060221-122215>

<sup>58</sup> *E.g.* 42 U.S.C. § 2000e-2.

<sup>59</sup> Notably, discrimination on the basis of sex includes pregnancy, childbirth, sexual orientation, and gender identity.

<sup>60</sup> 42 U.S.C. §§ 2000e - 2000e17.

<sup>61</sup> *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (holding that Section 1981 “affords a federal remedy against discrimination in private employment on the basis of race”).

<sup>62</sup> *See, e.g., Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *judgment vacated on other grounds*, 461 U.S. 477 (1983); *United States v. City of Miami, Fla.*, 614 F.2d 1322 (5th Cir. 1980), *on reh'g*, 664 F.2d 435 (5th Cir. 1981); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir. 1981); *Local Union No. 35 of Intern. Broth. of Elec. Workers v. City of Hartford*, 625 F.2d 416, 2 (2d Cir. 1980).

<sup>63</sup> U.S. Equal Employment Opportunity Commission Compliance Manual Section 15 Race and Color Discrimination, Part IV(C) (stating that diversity “initiatives may also help to avoid discrimination”).

<sup>64</sup> *Amicus Br. of Lawyers' Committee for Civil Rights Under Law, et al., American Alliance for Equal Rights v. Fearless Fund, et al.*, No. 23-13138 (11<sup>th</sup> Cir. Dec. 13, 2023); *see also, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979); 29 CFR § 1608.1.

<sup>65</sup> *Id.*



programs are both themselves lawful and are not evidence of discriminatory intent in an employment decision.<sup>66</sup>

Opponents of civil rights have sought to extend the Supreme Court's decision in *Students for Fair Admissions v. Harvard/UNC* to employment, incorrectly arguing that employer efforts to create diverse and inclusive workplaces are categorically unlawful. In *Students for Fair Admissions v. Harvard/UNC*, the U.S. Supreme Court held that Harvard and the University of North Carolina's use of race in their admissions policies violated the Equal Protection Clause of the U.S. Constitution and Title VI of the Civil Rights Act of 1964. However, the Court did not decide any issues related to Title VII or Section 1981, which are governed by separate and distinct bodies of law in addition to different statutes. Indeed, the Court in *Students for Fair Admissions* cited prior Title VII caselaw upholding a race-based remedy to address prior discrimination.<sup>67</sup> As U.S. Equal Employment Opportunity Commission Chair Charlotte A. Burrows confirmed, "the decision in [*Student for Fair Admissions*] . . . does not address employer efforts to foster diverse and inclusive workforces to engage the talents of all qualified workers, regardless of their background . . . . It remains lawful . . . to ensure that workers of all backgrounds are afforded equal opportunity in the workplace."<sup>68</sup> Litigants arguing otherwise are attempting to expand the scope of the decision, but lower courts remain bound by prior precedent interpreting Title VII and Section 1981.

#### IV. The Business Diversity Principles Should Be Strengthened

We applaud the Department of Commerce for developing its proposed Business Diversity Principles. These Principles can provide needed guidance to employers on how to effectively ensure that opportunities are open to all by investing in their own workforces and their communities. The Department of Commerce should strengthen these Principles to ensure that the principles reflect evidence-based, best practices that can dismantle obstacles to opportunity and help employers comply with their civil rights obligations.

First, the Principles should encourage employers to rely on evidence-based measures that result in substantive improvements to redress and remove racial barriers within the workforce. While the specific means will vary based on the circumstances of each company, having full-time DEI staff or DEI taskforce, mentoring programs, targeted recruitment programs, and equity audits all show promise. The Department of Commerce should consider how to spur additional research on which practices actually create more inclusive workplaces and encourage employers to collect their own data on the outcomes of their initiatives. Finally, the Principles should make clear that, rather than measuring success based on the existence of particular initiatives,

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<sup>66</sup> See, e.g., *Mlynczak v. Bodman*, 442 F.3d 1050 (7th Cir. 2006) (finding that U.S. Department of Energy's recruitment policy was intended to ensure "diversity in the applicant pool for positions at the agency" and was not evidence of discrimination because they "were of the type that expand the pool of persons under consideration, which is permitted"); *Duffy*, 123 F.3d at 1038-39 ("An employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination. . . . An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment.").

<sup>67</sup> 600 U. S. 181, slip op. at 24 (citing *Franks v. Bowman Transp. Co.*, 424 U. S. 747, 763 (1976)).

<sup>68</sup> Charlotte A. Burrows, U.S. Equal Employment Opportunity Commission, *Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs* (Jun. 29, 2023), <https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action>.

employers should focus on whether those programs make tangible improvements in workplace culture and employment opportunities.

In addition to the programs outlined above, the Principles should recommend that employers adopt the following best practices to invest in their workforces and communities, particularly underserved communities, many of which are already referenced in the proposal:

- Build robust pipelines by ensuring that all internship, fellowship, and mentoring programs include students from universities that disproportionately serve communities that are underrepresented in the organization's economic sector, such as Historically Black Colleges and Universities, and create pipeline programs with communities, schools, or institutions that serve a disproportionate share of individuals who are underrepresented in the organizations' economic sector.
- Establish aspirational goals to address underrepresentation of excluded groups through lawful and effective means, such as targeted recruiting.
- Diligently comply with anti-discrimination laws, such as by conducting a privileged audit to identify criteria used in employment decisions that inadvertently exclude or disadvantage candidates from certain communities.
- Remove or significantly limit criminal history<sup>69</sup> and credit checks,<sup>70</sup> which can improperly screen out qualified candidates for non-job-related reasons and have an adverse disparate impact on Black and Latino candidates.
- Foster an inclusive work environment by evaluating policies to ensure that they accommodate workers with caregiving responsibilities; allow for religious garb, cultural or natural hairstyles, and fluid gender identities; and enable people to bring their full selves to work.
- Ensure that firms owned by people of color have a meaningful opportunity to compete for business by assessing the pool of applicants and identifying unnecessary barriers that may prevent firms from learning about and competing for opportunities.
- Collect data and measure progress on key diversity and inclusion metrics to better understand whether everyone is afforded an equal opportunity to advance without regard to race, ethnicity, national origin, sex, gender, gender identity, sexual orientation, disability, or age, including the demographic makeup of the applicant pool, candidates invited to interview, candidates who made it to a second or third round of interviews, and candidates offered a position. Employers should keep similar records regarding promotions, pay equity, attrition, and surveys measuring employee satisfaction and perceptions of workplace culture.
- Modify the application process for scholarships, incubator programs, and community-based initiatives to reduce burdens on promising applicants with limited resources and experiences.

Above all, the Principles should encourage organizations to remain steadfast in the laudable and lawful goal of advancing equity and inclusion.

Second, in order to make the Principles as impactful as possible, we urge the Department of Commerce to make the recommendations more concrete and specific, guided by the available

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<sup>69</sup> RACHEL M. KLEINMAN & SANDHYA KAJEEPETA, NAACP LEGAL DEFENSE & EDUC. FUND, INC. THURGOOD MARSHALL INST., BARRED FROM WORK: THE DISCRIMINATORY IMPACTS OF CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT (2023), <https://tminstitutelf.org/wp-content/uploads/2023/07/Barred-from-Work.pdf>

<sup>70</sup> H.R. Rep No. 116-305, at 3 (2019), <https://www.congress.gov/116/crpt/hrpt305/CRPT-116hrpt305.pdf>.

evidence of what works to increase employment opportunities and the applicable legal standards. In some cases, the draft Principles could encompass multiple activities that could vary greatly in effectiveness. For example, it is vital for businesses to make effective investments to support the communities around them, especially underserved communities. However, the recommendation that organizations “[i]nvest in capacity building and innovation within communities and ensure the organization’s community investment initiatives are accessible to all and promote economic mobility” could encompass efforts ranging from publishing grant applications online in formats accessible to people with disabilities and low English proficiency to offering technical assistance and creating pipeline programs. Companies would benefit from additional guidance regarding which programs are most impactful. The Department of Commerce should also ensure that the Principles clearly and accurately reflect what employers can and cannot do under current law. There is presently much confusion and misinformation about the types of policies and practices that might conflict with federal anti-discrimination law, causing some employers to fear implementing diversity, equity, and inclusion programs altogether. However, to suggest that breaking down barriers to equal opportunity in the workplace for marginalized communities—including specific racial and ethnic communities—is itself discriminatory would turn anti-discrimination law on its head. It is, therefore, incumbent upon the Department of Commerce to provide sufficient guidance to businesses so they may confidently develop and implement lawful programs that further the laudable goal of ensuring equal opportunity for all.

Finally, the Department of Commerce should widely communicate—and should encourage employers to widely communicate—that following these Principles will help employers comply with their anti-discrimination obligations and benefit from the diversity of talent in this country. Employers that ignore barriers to opportunity in their organizations could face legal risks and may struggle, where more diverse and inclusive companies succeed.

Thank you for the opportunity to comment. If you have any questions, please contact Amalea Smirniotopoulos, Senior Policy Counsel, at [asmirniotopoulos@naacpldf.org](mailto:asmirniotopoulos@naacpldf.org).

Sincerely,



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