

# WHITE PREDOMINANCE IS THE POINT\*

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*This Article names and examines a new breed of legal attacks aimed at establishing automatic statutory illegality for inclusion-motivated, race-conscious policies that diminish, to any degree, white predominance of America’s most coveted business funding and employment opportunities. It explains that “blitz-style” attacks on racial diversity, equity, and inclusion (DEI) policies—such as lawsuits against Fearless Fund Management and letter complaints to a federal agency seeking investigation of entities like NASCAR—ignore the fact that considering race for inclusion of non-White groups is nondiscriminatory legal race consciousness under current federal civil rights doctrine. The Article’s central argument is that blitz-style anti-DEI legal attacks are part of a project to pervert existing federal civil rights doctrine into a legal regime that protects white predominance based on the falsehood that inclusion-motivated race awareness victimizes Whites.*

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## INTRODUCTION

A new breed of “blitz-style”<sup>1</sup> legal attacks on racial diversity, equity, and inclusion (DEI) propagate the false narrative that “wokeness” in corporate America is victimizing Whites.<sup>2</sup> Blitz-style

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1. See *infra* Part II pp. 109-114, for discussion of the label “blitz-style” (defining “white predominance blitz-style legal attacks” on racial diversity, equity, and inclusion (DEI) policies as employing disinformation tactics to create confusion that erodes understanding that considering race to rectify exclusion of non-Whites is categorized as legal and nondiscriminatory race consciousness according to federal civil rights statutes and as attacks that are “[l]odged in large quantities to shock, disorient, and make factual assessment difficult”). As a note, this Article uses the terms “blitz-style white predominance” and “blitz-style” interchangeably.

2. See, e.g., *Woke Corporations We’ve Exposed*, AM. FIRST LEGAL, <https://aflegal.org/woke-corporations/> (last visited Jan. 25, 2026); Kristen Mack & John Palfrey, *Capitalizing Black and White: Grammatical Justice and Equity*, MACARTHUR FOUND. (Aug. 26, 2020), <https://www.macfound.org/press/perspectives/capitalizing-black-and-white-grammatical-justice-and-equity#:~:text=We%20will%20also%20begin%20capitalizing,functions%20in%20institutions%20and%20communities.>

In addition to using “DEI” as a shorthand for both “race DEI” and “racial DEI,” this Article capitalizes the word white when it is a reference to those persons who identify and are categorized as members of the White racial group in America on the rationale that “[c]hoosing to not capitalize White while capitalizing other racial and ethnic identifiers would implicitly affirm Whiteness as the standard and norm” and because “[k]eeping White lowercase ignores the way Whiteness functions in institutions and communities.” *Id.* See also Nell Irvin Painter, *Why ‘White’ Should Be Capitalized, Too*, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/>. The author acknowledges there are very valid reasons for not taking this approach. See, e.g., David Bauder, *AP Says It Will Capitalize Black but Not White*, ASSOCIATED PRESS (July 20, 2020, at 06:58 ET) (“The AP said white people in general have much less shared history and culture, and don’t have the experience of being discriminated against because of skin color.”). However, this Article does not capitalize the word white when the word modifies terms such as “white predominance” and, thus, is not referencing Whites as a racial category in the United States. *Cf. id.* (reporting Associated Press decision not to capitalize white and that “CBS News said it would capitalize white, although not when referring to white supremacists, white nationalists or white privilege.”).

attacks on racial DEI policies ignore and seek to undo the existing federal civil rights doctrinal rule that considering race for the purpose of including non-Whites is nondiscriminatory and legal. Despite their flagrant advocacy against racial inclusion, it is insufficiently recognized that anti-DEI attacks are part of a project<sup>3</sup> to convert existing pro-race inclusion civil rights statutory doctrine into a tool for preserving white predominance<sup>4</sup> of the nation's most valued economic and workforce opportunities.<sup>5</sup> This Article corrects this failing by surfacing the statutory endgame of contemporary blitz-style legal attacks on racial diversity, equity, and inclusion—DEI—in corporate America: an automatic statutory illegality for inclusion-motivated<sup>6</sup> race-conscious policies. It explains that the anti-DEI doctrinal objective is not a universally colorblind set of legal rules but, instead, a yet-to-be-realized and unprecedentedly race-exclusionary perversion of the meaning of federal civil rights statutes. The ultimate objective of this Article is to explicate that the project to destroy DEI is an interim step toward the installation of a never-before-existing legal regime that would, if realized, make it illegal to diminish, to any extent, white predominance

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3. This is a multi-decade project with intellectual foundations that date back many years. *See, e.g.*, Clint Bolick, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* xi–xiv (1988).

4. This Article uses the term “predominance” for its meaning of “a situation in which one type of person or thing within a set is the largest in number.” *Predominance*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/predominance> (last visited Jan. 02, 2026). *See, e.g.*, Derek Thompson, *The 33 Whitest Jobs in America*, THE ATLANTIC (Nov. 6, 2013), <https://www.theatlantic.com/business/archive/2013/11/the-33-whitest-jobs-in-america/281180/> (discussing U.S. Bureau of Labor Statistics data findings). *See also* *The 10 Whitest Jobs in America*, PAYSACLE, <https://www.payscale.com/career-advice/the-10-whitest-jobs-in-america/> (last visited Mar. 30, 2026) (listing 10 of “33 occupations in which 9 out of 10 workers are white”).

5. Examples of the valued and valuable economic opportunities this Article argues anti-DEI forces seek to preserve for a predominantly White cohort are employees working in the most coveted U.S. companies and job sectors, entrepreneurs with access to U.S. venture capital funding, and persons and entities chosen to fulfill the billions of dollars in annual U.S. federal government contract work.

6. Various terms such as “voluntary affirmative action,” “remedial race consciousness,” and “race-conscious remedies” may be used to describe redressing of racialized exclusion of non-Whites in sectors with cohorts marked by white dominant racial hierarchies such as highly selective college admissions and highly coveted companies and occupations. This Article often uses the term “inclusion-motivated” to modify terms such as “race consciousness,” “attention to race,” and “race awareness,” *see infra* n. 111 *passim* to describe this type of anti-racist redress.

in America's most coveted business funding and employment opportunities.

Part I analyzes the purpose and current doctrinal meaning of a federal civil rights provision originally enacted by the U.S. Congress as § 1 of the Civil Rights Act of 1866<sup>7</sup>—42 U.S.C. § 1981's contract clause<sup>8</sup>—stating that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”<sup>9</sup> Starting with an analysis of the similarity between tactics used to promote white supremacist ideologies and the tactics used by opponents of DEI to create moral opposition to racial inclusivity policies, it examines the textual and historical context of § 1981's requirement that non-Whites be afforded the same contracting rights as Whites. This Part also sets forth the purpose and doctrinal meaning of the federal law that protects Americans from employment actions unlawfully based on race<sup>10</sup>—Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.<sup>11</sup>

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7. The Civil Rights Act of 1866, which became federal law in April 1866, was “an immediately post-Civil War legislative effort to ensure that newly freed slaves received the same rights as other citizens.” CHRISTINE BACK, CONG. RSCH. SERV., IF12535, 42 U.S.C. § 1981'S CONT. CLAUSE: RACIAL EQUAL. IN CONTRACTUAL RELATIONSHIPS (2023). “Following ratification of the Fourteenth Amendment, Congress reenacted the 1866 Act as part of the Enforcement Act of 1870, including § 1 of the 1866 Act.” *Id.* Section 1981's contract clause “was recodified in 1874, but its basic coverage did not change until 1991” and “[i]t is now codified at 42 U.S.C. § 1981.” *Id.*

8. Section 1981 applies to the making and enforcing of contracts outside of employment contracts and does not cover forms of discrimination other than race. 42 U.S.C. § 1981. Unlike Title VII claims, § 1981 does not require aggrieved parties to file a charge with the EEOC before filing a lawsuit. *Id.*

9. *Id.*

10. It should be noted, as is explained in Part II, that Title VII deems inclusion-motivated employment actions based on race, such as affirmative action employment policies, to be lawful. *See* 42 U.S.C. § 2000e-2(a)(1).

11. 42 U.S.C. § 2000e-2. Title VII prohibits employment discrimination on the basis of various characteristics. 42 U.S.C. § 2000e-2(a)(1) (defining unlawful employment practice as adverse employment actions with respect to hiring, discharge, compensation, terms, conditions, or privileges of employment taken against an individual “because of such individual's race, color, religion, sex, or national origin”). Since the Supreme Court's ruling in *Bostock*, Title VII also prohibits employment discrimination on the basis of sexual orientation. *Bostock v. Clayton Cty*, 590 U.S. 644, 683 (2020).

Part II examines a contemporary lawsuit that weaponizes § 1981 against a business investment firm for funding Black female entrepreneurs. Specifically, it explains how the *American Alliance for Equal Rights v. Fearless Fund*<sup>12</sup> case, filed in 2023, exemplifies what this Article terms a blitz-style white predominance attack on DEI. Following on prior analysis of Title VII doctrine, this Part presents a second example of a blitz-style white predominance legal attack. It discusses a 2023 complaint letter that calls on the U.S. Equal Employment Opportunity Commission (EEOC)—the federal agency statutorily tasked with enforcing Title VII—to investigate a privately owned sports entertainment company’s adoption of policies to increase inclusion of women of all races and non-White men in the job categories of race car driver, pit crew member, and intern.<sup>13</sup> This is an examination of a letter sent by an anti-DEI organization named America First Legal (AFL)<sup>14</sup> to the EEOC that calls on the agency to investigate the

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12. *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC.*, 103 F.4th 765, 777 (11th Cir. 2024).

13. *See generally* Letter from Nicholas R. Barry, Am. First Legal Fund., to Evangeline Hawthorne, Dir. of the EEOC Miami Dist. and Robert E. Weisberg, Reg’l Att’y, Miami Dist. Off., U.S. Equal Emp. Opportunity Comm’n, (Nov. 2, 2023), <https://aboutblaw.com/bbg0> [hereinafter NASCAR Letter] (requesting an investigation of NASCAR and Rev Racing, LLC). The EEOC enforces Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e. *See* Oni Harton, *EEOC’s Charge Processing Procedures*, FINDLAW (Nov. 27, 2023), <https://www.findlaw.com/employment/employment-discrimination/eoc-s-charge-processing-procedures.html>. Title VII doctrine incentivizes racial inclusivity in American workplaces. *See, e.g.*, Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*, 46 WAKE FOREST L. REV. 1035, 1046–47 (2011). *See also* Kimberly West-Faulcon, *Exposing the Deceit About Disparate Impact*, 40 HOFSTRA LAB. & EMPL. L.J. 349, 353 (2023).

14. *See generally, Mission*, AM. FIRST LEGAL FOUND., <https://aflegal.org/mission/> (last visited May 14, 2026). America First Legal (AFL) is a 501(3)(c) organization founded by a key figure in the U.S. President Donald Trump’s Oval Office, Stephen Miller. Miller “has been referred to as a ‘lead architect’ of the administration’s immigration agenda, which has so far been characterized by mass deportation and tighter border security.” *Stephen Miller: Understanding the Man who Became ‘Trump’s Brain’ through his Chronicle Opinion Column*, DUKE CHRON., <https://dukechronicle.com/article/duke-university-stephen-miller-chronicle-opinion-column-miller-time-conservative-controversial-trump-administration-deputy-chief-of-staff-for-policy-trumps-brain-20250228> (describing Miller as remembered by his former California classmates for his strong “exclusionary ideology” and often “condescending” tone).

National Association for Stock Car Auto Racing, LLC (NASCAR) for allegedly engaging in “illegal discrimination against white, male Americans”<sup>15</sup> in violation of Title VII.<sup>16</sup> In addition to touching on how AFL’s tactics mirror tactics used to mainstream white supremacist ideologies, Part II contrasts the erroneous assertions about Title VII’s meaning presented in AFL’s letter to the EEOC with the Supreme Court’s currently binding Title VII precedent.<sup>17</sup>

The Article’s conclusion synthesizes its identification of the change in law—the federal statutory doctrinal consequences of the tactical deployment and distortion of the Civil Rights Acts of 1866, 1964, and 1991—for which the project to destroy racial DEI in corporate America is merely an interim step. It calls for recognition that the project of destroying DEI programs it examines is a project to preserve white predominance.

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AFL, the organization Miller leads, is just one of the ever-growing alphabet soup of anti-DEI organizations within the Heritage Foundation’s Project 2025 network focused on changing American laws. The ideologically right-wing Heritage Foundation launched a sweeping initiative referred to as “Project 2025” that includes a coalition of over 100 organizations—many of which, like AAER and AFL, oppose DEI efforts—and explicitly aim to dismantle existing civil rights frameworks and take down the administrative state. *Project 2025 Explained*, AM. C.L. UNION, <https://www.aclu.org/project-2025-explained> (last visited May 14, 2026) (noting Project 2025’s aim to “take down the Deep State” and restructure the federal government in alignment with far-right goals); Khaleda Rahman, *Project 2025: Full List of Organizations Behind Proposals*, NEWSWEEK, <https://www.newsweek.com/project-2025-full-list-organizations-proposals-1923240> (last updated July 11, 2024, 9:33 AM); Toni Aguilar Rosenthal, *Ken Paxton, America First Legal, and Premotions of Project 2025*, THE AM. PROSPECT (Mar. 15, 2024), <https://prospect.org/power/2024-03-15-ken-paxton-america-first-legal-project-2025/> (describing the Conservative Partnership Institute (CPI) as having seven “sub-organizations spanning many issue areas . . . , including those detailed in Project 2025’s notorious policy agency” and “CPI’s organizations include the Center for Renewing America (CRA), the Election Integrity Network (EIN), the State Freedom Caucus Network (SFCN), America First Legal (AFL), the American Accountability Foundation (AAF), American Cornerstone Institute, and American Moment (AM)”).

15. NASCAR Letter, *supra* note 13.

16. Title VII defines unlawful employment practices with respect to race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1).

17. AFL’s EEOC letter accusing NASCAR of violating Title VII is one of many such letters AFL has sent and publicized. See *DEI Meets its Doom*, WASH. TIMES (Jan. 27, 2025), <https://www.washingtontimes.com/news/2025/jan/27/editorial-dei-meets-doom/> (reporting “[t]he activist group America First Legal has filed more than two dozen [letters to the] EEOC [as] complaints against businesses, including Activision and Williams Sonoma.”).

### I. THE STATUTORY ENDGAME: MAKING WHITES VICTIMS WHO NEED SAVING FROM “WOKENESS”

As self-described opponents of race diversity, race equity, and race inclusion, anti-DEI groups are, as this Article points out, definitionally proponents of maintaining existing high levels of disproportionate dominance by Whites, as a racial group, of America’s most coveted business sectors. However, to date, anti-DEI forces have been quite successful in using colorblindness terminology to gloss over the white predominance-protecting goal of their attacks on race DEI. The first section of this Part connects tactics employed to execute blitz-style white predominance attacks on race DEI to those employed by a modern racism movement—the “citizen scientific racism” movement.<sup>18</sup> It does so to demonstrate that such attacks on race DEI are by no means colorblind. It identifies that, by using tactics similar to those employed by the citizen scientific racism movement to promote white supremacist views about race and intelligence, the organizations and individuals attacking DEI do so under a false pretext—that inclusion-motivated attention to race is anti-White racism. Additionally, it makes explicit the white supremacist underpinnings of the presumption upon which attacks on race DEI rely—the false and racist presumption that Whites, as a racial group, enjoy job ability superiority to non-Whites, particularly Black and Latino non-Whites.

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18. Researchers explain citizen scientific racism as follows:

[D]riven largely by people without certified positions or credentials (some of whom forge partnerships with academics, thus blurring scientific boundaries) and an antidemocratic politics aiming to naturalize social hierarchies and discriminatory policies[,] CSR is decentralized but not disorganized; it uses recusant and problematic knowledge practices but is not anti-science or scientifically ignorant; it manifests mainly in a variety of online spaces with different reach and affordances (far-right media, blogs, and discussion boards; mainstream and extreme-right social media; and online journals); and it involves actors with various motivations and talents. But this tacit social movement is unified by a fixation on racial biology, inegalitarian and right-wing politics, and a perception of the corruption of a scientific mainstream that refuses racial hereditarian interpretations.

Aaron Panofsky, Kushan Dasgupta, Nicole Iturriaga, & Bernard Koch, *Confronting the “Weaponization” of Genetics by Racists Online and Elsewhere*, 54 HASTINGS CTR. REP. 1, 2 (2024).

The remaining two sections point out that blitz-style white predominance legal attacks on inclusion-motivated race consciousness by American corporations misread and mischaracterize § 1981, a contracting federal antidiscrimination law.<sup>19</sup> It further identifies that lawsuits like *AAER v. Fearless Fund* act as a delivery mechanism for an anti-DEI narrative that Whites are victims of “wokeness” who need colorblindness to save them.

A. *The Not-Colorblind Decontextualized White Victimhood Narrative*

The heavily armed White male gunman who stormed a supermarket in a predominantly Black neighborhood on May 14, 2022 in Buffalo, New York, where “[h]e shot thirteen Black people, killing ten, before police captured him” supported his racialized murderous act with a “‘manifesto’ decrying the ‘great replacement’ of white people by Black people, orchestrated by Jews.”<sup>20</sup> The racist white supremacist murderer contended that his mass killing was “justified by data,” not mere racial hate.<sup>21</sup> A group of American sociologists has spent nearly a decade studying the deployment of scientific research on human genetics by white nationalists and far-right political movements.<sup>22</sup> These researchers highlight the tactical use of “analogical argumentation, decontextualized [trivial facts, also known as] factoids, appeals to common sense, and humor or irony” to warp “genetic findings and figures” for “materials processed, packaged, and distributed,” primarily online, “by [what they call] the [‘citizen scientific racism,’] CSR[,] movement.”<sup>23</sup> Anti-DEI forces use citizen scientific racism tactics to pervert the purpose and doctrine of federal antidiscrimination statutes to attack the efforts of private companies to advance racial inclusion.

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19. 42 U.S.C. § 1981. Section 1981 requires that non-Whites enjoy the same contracting rights as Whites.

20. Aaron Panofsky et al., *supra* note 18, at 1.

21. *Id.* The deadly anti-Black, white supremacist ideology expressed in the Buffalo killer’s manifesto identifies him as a consumer of “easily digestible units” of citizen science racism material, which is available “in many quarters of the internet, [and] which contributes to the violent radicalization of some young men and the confusion of others.” *Id.* at 3.

22. *Id.* at 1.

23. *Id.* at 1, 3-4.

In citizen scientific racism, the “memetic replication”<sup>24</sup> of memes, graphs, data points, and factoids<sup>25</sup>—briefly stated trivial facts—draws on “a combination of humour, current pop aesthetics, and old tropes” to promote the extremist false narrative that Whites, as a racial group, are at risk of being replaced or eradicated by non-Whites.<sup>26</sup> “The use of humour, importantly, allows for the whitewashing of violence and facilitates the dissemination of controversial political messages among less extreme and even mainstream [web]sites, as their ideological charge is somewhat obscured by their flashy [visual] aesthetics and witty punchlines.”<sup>27</sup> The multitude of racist references in the Buffalo white supremacist shooter’s murder monograph and “the more than 600-page ‘diary’”<sup>28</sup> he logged on the chat app, Discord, are demonstrative of the citizen scientific racism movement’s tactic of reproducing a text fragment from a lengthy, complex, and nuanced body of text in a manner that warps the selected snippet of words’ in-context true meaning with the movement’s ideologically-charged falsified replacement meaning.<sup>29</sup>

A prime example of this tactic of creating falsified replacement meaning is the racist Buffalo shooter’s inclusion, in his murder manifesto, of “a paper colloquially known as the ‘EA3’ study”<sup>30</sup> among the

24. See *infra* note 25.

25. *Id.* at 1. The term “factoid” has two meanings. It can refer to both a falsehood “invented” to seem like a fact and “a briefly stated and usually trivial fact.” *Factoid*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/wordplay/some-facts-about-factoids> (last visited Mar. 30, 2026) (explaining two meanings of the term “factoid”). For the most part, this Article uses the phrase “de-contextualized factoid” to refer to a briefly stated trivial fact. It should be noted that the tactics employed in attacking DEI do also, as this Article states explicitly, include inventing and promoting falsehoods as facts.

26. Tahir Abbas, Ines Bolanos Somoano, Joana Cook, Isabelle Frens, Graig R. Klein & Richard McNeil-Willson, *The Buffalo Attack – An analysis of the manifesto*, INT’L CTR. FOR COUNTER-TERRORISM (May 18, 2022), [https://www.researchgate.net/publication/360688932\\_The\\_Buffalo\\_Attack\\_-\\_An\\_analysis\\_of\\_the\\_manifesto](https://www.researchgate.net/publication/360688932_The_Buffalo_Attack_-_An_analysis_of_the_manifesto).

27. *Id.*

28. *Id.*

29. Jedidiah Carlson, *Spread This Like Wildfire!*, SCI. FOR THE PEOPLE MAG. (Sept. 26, 2022), <https://magazine.scienceforthepeople.org/online/spread-this-like-wildfire/>.

30. *Id.*; The study known as the “EA3” study among the consumers and producers of the citizen scientific racism movement is a scientific study of a variation in a single nucleotide that occurs at a specific position in the genome referred to as

many memes, graphics, and other materials offered by him to support his murderous anti-Black shooting rampage. The original post that initiated the “EA3 meme” was an anonymous online post that took a table—an out-of-context decontextualized snippet of a longer written text—from a scientific study, published in 2018 in *Nature Genetics*, to further a white-supremacist-supporting decontextualization project.<sup>31</sup> That original post can be “traced back to a thread” on the unmoderated online forum 4chan.<sup>32</sup> The poster of this snipped figure with data from a lengthy, complex, multi-authored genetic scientific study decontextualized the figure to transform the genetic scientists’ work into an online meme that promotes white supremacist ideologies. That person did so by turning the figure into “a plain-looking document [] proclaiming[:] ‘The latest findings on genetics and intelligence show that biological factors contribute to the gap in intelligence between European and African populations.’”<sup>33</sup> Thus, this central tactic of citizen scientific racism can be understood as an ideologically-driven project of hyper-decontextualization.<sup>34</sup>

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SNP’s (single-nucleotide polymorphisms). See James J. Lee et al., *Gene Discovery and Polygenic Prediction from a Genome-wide Association Study of Educational Attainment in 1.1 Million Individuals*, 50 NATURE GENETICS 50, 1112, 1112–21 (2018), <https://doi.org/10.1038/s41588-018-0147-3>.

31. Lee et al., *supra* note 30, at 1114.

32. Carlson, *supra* note 29.

33. *Id.* Notably, the proclamation that accompanies the figure snipped and reproduced wholly out of its context—the full text of the “(Lee, et al., published in 2018)” study—uses the article “the” instead of “a” to promote the white supremacist idea that such a racialized “gap” exists.

34. The tactical use by citizen scientific racism of this decontextualized snippet from a 2018 scientific study operates as “a significant force”:

The responses to this thread rapidly crystallized into a simple propaganda strategy: turn these “findings” into a standalone unit of easily-digestible visual information—or a meme, for lack of a better term—and let it organically spread across other online spaces. Shortly thereafter, another user took these suggestions to task and independently reproduced the original post’s analysis, presenting the results in a table[]. Within hours, this image began to circulate in other 4chan threads and mutate into alternate versions, often accompanied by zealous calls for diffusing these memes throughout the internet. “SPREAD THESE IMAGES LIKE WILDFIRE,” encouraged one user. “This is the new IOTBW” said another, referring to the racist slogan, “It’s OK to be white.” The meme was even passed on to a cabal of popular alt-right bloggers and Youtubers who “have several PhDs and can give you a

Blitz-style white predominance attacks on DEI deploy ideologically-driven hyper-decontextualization tactics similar to those employed in the citizen scientific racism movement. Proponents of the preservation of white predominance breed erroneous meanings of race-inclusive federal civil rights statutes, Supreme Court rulings, and statements made by storied civil rights icons by mischaracterizing decontextualized snipped portions of terms, phrases, and sentences of those full-length texts to propagate false meanings that are the polar opposite of those texts' in-context true meaning.<sup>35</sup> These various hyper-decontextualization projects serve to support the anti-race-inclusion movement's ultimate legal endgame of installing a race-inclusion illegality federal statutory regime in the United States.<sup>36</sup>

Much like how citizen scientific racism distorts and weaponizes genetic science, contemporary anti-DEI legal attacks use obfuscation to falsely present their project to protect white predominance as colorblind anti-racism. The nature of this obfuscation is illuminated by considering how the anti-DEI movement's hyper-decontextualization tactic distorts the positions of social justice political movement

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hand . . . plus they're fantastic propagandists." This collective enthusiasm for propagandizing the EA3 study appears to have been wildly successful. Altogether, variations of this meme have been posted over 5,100 times on 4chan and regularly appear on more mainstream social media platforms like Reddit, Twitter, and Quora. Contrary to the scientific community's prevailing narrative that the shooter was an isolated extremist who happened to stumble upon the study, these data demonstrate that the EA3 study has been a significant force in empowering far-right extremists for years, virtually since the day it was first published.

*Id.*

35. For an example *see, e.g.*, Coleman Hughes, *Actually, Color Blindness Isn't Racist*, THE FREE PRESS (Dec. 20, 2022), <https://www.thefp.com/p/actually-color-blindness-isnt-racist> (an anti-DEI advocate offering a false narrative about Martin Luther King that is wholly at odds with his positions and explicit statements in favor of inclusion-motivated race awareness).

36. In addition to decontextualization, both the citizen scientific racism and the anti-DEI movements employ appeals to common sense, humor, irony, and analogical arguments to produce falsified new meanings. Although this Article focuses on attacks on racial DEI, anti-DEI forces, like the America First Legal Foundation, not only attack racial DEI, but also attack sex, sexual orientation, and gender identity DEI efforts. *See, e.g.*, Letter from Reed D. Rubinstein, Am. First Legal Found., to Susan E. Arnold, Chairman of the Bd., The Walt Disney Co. (Apr. 5, 2022), <https://aflegal.org/wp-content/uploads/2022/04/Disney-Compliance-Notice-04052022-pdf-1.pdf>.

leader Reverend Dr. Martin Luther King (MLK). MLK is the renowned civil rights icon who explicitly advocated for race affirmative action, DEI, and anti-racism-oriented federal statutes like the Civil Rights Act of 1964. MLK called for affirmative action and DEI throughout his lifetime, a lifetime cut short by an assassin's bullet in 1968.<sup>37</sup>

Nefariously, a sentence from MLK's most famous political speech is a prime example of text decontextualized by the opponents of racial inclusivity policies. The decontextualized snippet from MLK's 1963 "I Have a Dream" speech—a sentence regularly taken and used out of context by opponents of race inclusivity to criticize affirmative action and other inclusion-motivated considerations of race—that is employed to falsely paint MLK as being anti-DEI is: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."<sup>38</sup> Ignoring the rest of the speech, anti-DEI advocates have, for decades, relied on this one sentence to "fuel[] a culture war over the merits of affirmative action and diversity and inclusion efforts."<sup>39</sup>

The important historical context of the speech is that MLK delivered it as part of this nation's largest protest of racial exclusion of non-Whites from the American job market—the *March on Washington for Jobs and Freedom* that took place on August 28, 1963, on the National Mall in Washington, D.C.<sup>40</sup> The important textual context of the sentence is that the overarching substance of the "I Have a Dream" speech is that King declares that America owes African Americans jobs and justice—explicitly saying in the speech that America gave African Americans a "bad check" that "has come back marked insufficient funds" with respect to America's promise made by the

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37. See MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 4 (1967).

38. *Read Martin Luther King Jr.'s 'I Have a Dream' Speech in its Entirety*, NAT'L PUB. RADIO: TALK OF THE NATION (Jan. 16, 2023, at 10:32 AM ET), <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety>.

39. Kara Nelson, *How Clashing Interpretations of Martin Luther King's Legacy Fuels the Fight over DEI and Affirmative Action*, CNN (Jan. 14, 2024, 10:00 AM), <https://www.cnn.com/2024/01/14/us/martin-luther-king-legacy-affirmative-action-reaaj/index.html>.

40. NAT'L. PARK SERV., *March on Washington for Jobs and Freedom* (last updated Nov. 20, 2023), <https://www.nps.gov/articles/march-on-washington.htm>.

“architects of our republic [in] the magnificent words of the Constitution and the Declaration of Independence.”<sup>41</sup> Far from calling for inattention to race, MLK’s “I Have a Dream” speech is decidedly and unabashedly race aware, and is a call for urgent race attentiveness to the exclusion of non-Whites, particularly “the Negro [African Americans]” from American jobs.<sup>42</sup>

King’s speech, delivered at a protest march explicitly focused on racial inclusivity in employment, further observed:

And so we’ve come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice. We have also come to this hallowed spot to remind America of the fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy.<sup>43</sup>

Presenting the “color of their skin” sentence out-of-context to promote a white predominance-protecting ideology that is polar opposite to the meaning and message of MLK’s “I Have a Dream” full speech is emblematic of the decontextualization tactic that is central to the false framing of the attacks on DEI as colorblind anti-racism.<sup>44</sup> Not only does the full text, historical context, and in-context true meaning of the speech embrace race consciousness for purposes of racial inclusivity, MLK’s 1963 “I Have a Dream” speech is an entreaty for the exact race-conscious remedial government policies and an explicit and full-throated endorsement of policies like affirmative action<sup>45</sup> that are wholly at odds with the project to destroy DEI.

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41. NAT’L PUB. RADIO: TALK OF THE NATION, *supra* note 38.

42. *Id.*

43. *Id.*

44. For an example of a notable opponent of inclusion-motivated race consciousness, Roger Clegg, employing this sentence to support positions contrary to MLK’s, see, e.g., *MLK’s “Content of Character” Quote Inspires Debate*, CBS NEWS (Jan. 20, 2013, 5:34 PM EST), <https://www.cbsnews.com/news/mlks-content-of-character-quote-inspires-debate/>.

45. See, KING, *supra* note 37, at 81-82. MLK explicitly supported inclusion-motivated attention to race in employment, education, housing, and political power in the following statement:

The deliberate misrepresentation of MLK’s views to promote legal attacks on race DEI bears significant similarity to the deliberate misrepresentation of civil rights statutory doctrine that is the focus of the rest of this Article. Both the decontextualization of MLK’s words about skin color from the civil rights leader’s opprobrium of American anti-Black racism and the disconnecting of the “color of their skin” sentence from the rest of the “I Have a Dream” speech and from the rest of prolific MLK’s other speeches and writings about inclusion-motivated attention to race are congruous to the tactics employed in anti-DEI legal attacks to misrepresent federal antidiscrimination law doctrine. Decontextualizing text fragments from federal civil rights statutes such as §1981 and Title VII is a method employed by those attacking race inclusivity in corporate America. In so doing, these protectors of white predominance in American business intentionally promote the falsehood that considering race to include non-Whites violates federal antidiscrimination employment and contracting laws—which is the diametric opposite of the full text, purpose, history, and court-interpreted doctrinal meaning of these race-inclusion-promoting civil rights laws.

In addition to the tactic of decontextualization, the contemporary spate of blitz-style attacks by anti-DEI forces to preserve white predominance of the nation’s most coveted employment and business positions and sectors<sup>46</sup> deploy humor as a tactic—using the tongue-in-

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[A]bsolute justice for the Negro simply means, in the Aristotelian sense, that the Negro must have “his due.” There is nothing abstract about this. It is as concrete as having a good job, a good education, a decent house and a share of power. It is, however, important to understand that giving a man his due may often mean giving him special treatment. I am aware that has been a troublesome concept for many liberals, since it conflicts with their traditional ideal of equal opportunity and equal treatment of people according to their individual merits. But this is a day which demands a new thinking and the reevaluation of old concepts. A society that has done something special *against* the Negro for hundreds of years must now do something special *for* him, in order to equip him to compete on a just and equal basis.

*Id.* (emphasis in original).

46. See Andrea Hsu, *How Trump’s EEOC is Attacking DEI and Emphasizing White People*, KUOW (Mar. 31, 2026, 2:00 AM), <https://www.kuow.org/stories/how-trump-s-eeoc-is-attacking-dei-and-emphasizing-white-people>.

cheek pejorative label of “woke.”<sup>47</sup> The goal behind the use of the term “wokeness” is to pervert the common sense understanding of racial inclusivity as morally good—to build moral opposition to racial inclusivity—and to, thus, perversely and falsely, claim the moral high ground of being anti-racist for those attacking race DEI. Giving racial inclusivity in employment the mocking label of “woke” normalizes white monopolizing of superior job opportunities in America at the same time it trivializes Congress’s pro-racial inclusivity purpose for enacting federal civil rights laws like § 1981 and Title VII.

Here again, like the decontextualized tactical deployment of genetic science by citizen scientific racism to distort genetic science, contemporary anti-DEI legal attacks use obfuscation to falsely present their project to protect white predominance as colorblind anti-racism by using appeals to common sense, humor, irony, and analogical arguments. To accomplish this, anti-DEI forces center the false narrative of White men as victims of racial inclusivity, using witty “wokeness” rhetoric to deceptively package white supremacist ideology as purported colorblind legal advocacy. This narrative echoes messages employed by the citizen scientific racism movement—a movement that promotes the false notion that Whites, as a racial group, are intellectually superior to persons with African ancestry.<sup>48</sup> Attacks on DEI in corporate America promote the narrative that Whites, as a racial group, are racially superior workers, particularly in comparison to African Americans, and thus deserve to be predominant in coveted job categories and workplaces.

The anti-DEI blitz-style lawsuit and EEOC letter that the rest of this Article examines focus on their inclusion of tactics and assertions that distort federal civil rights statutes in a manner parallel to how anti-DEI forces propagate the falsehood that MLK opposed inclusion-motivated race consciousness. Far from opposing the consideration of race to redress racism, MLK promoted it. Similarly, far from legally banning inclusion-motivated race consciousness, the federal

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47. See, e.g., AM. FIRST LEGAL, *supra* note 2; AM. FIRST LEGAL, *infra* note 187.

48. Aaron Panofsky, Dir., UCLA Institute for Soc’y and Genetics, *Citizen Scientific Racism: White Nationalist Appropriations of Genetic Research* (Jan. 4, 2021), <https://bec.ucla.edu/event/aaron-panofsky-citizen-scientific-racism/>.

civil rights statutes § 1981<sup>49</sup> and Title VII<sup>50</sup> encourage it. To illuminate this latter point, this Article next examines the anti-DEI lawsuits against Fearless Fund Management and a letter sent to the EEOC calling for an investigation of NASCAR. It identifies both legal attacks as part of a project to undo the current statutory meaning of § 1981 and Title VII by decontextualizing the term and concept of “race discrimination” in an ahistorical manner that ignores the full text, history, and racial-caste-dismantling purpose of these two American civil rights laws.

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49. See 42 U.S.C. § 1981. See also John Hope Franklin, *Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1136 (1989) (observing that § 1981 was a principal provision of the Civil Rights Act of 1866 that Congress included in the Revised United States Code in 1874).

50. Title VII is the federal law enacted by the 1964 and 1991 iterations of Congress to codify the presumption of job-ability equivalence between non-Whites and Whites, as well between men and women and among heterosexuals and sexual orientation minorities. See, e.g., Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*, 46 WAKE FOREST L. REV. 1035, 1046–47 (2011) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)) (observing that “the U.S. Supreme Court interpreted, unanimously in *Griggs*, Title VII to adopt a general presumption of racial group equivalence in job ability based on the statute’s goal of achieving racial equality in the U.S. workforce”). Title VI, 42 U.S.C. § 2000d, is a provision enacted by the 1964 Congress to confer on non-Whites access to and equal treatment by government and non-government programs and entities that opt to accept federal taxpayer funds in exchange for promises to be racially inclusive to all racial groups in America. See, e.g., CHRISTINE BACK, CONG. RSCH. SERV., R46534, THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW (2020).

Although AAER and AFL also weaponize Title VI to preserve white predominance, see, e.g., Compl. at 18, Fac., Alumni, and Students Opposed to Racial Preferences v. Nw. Univ., No. 1:25-cv-01129 (N.D. Ill. Jan. 31, 2025) (alleging the Northwestern University Law Review violated Title VI by “giv[ing] discriminatory preferences to women, racial minorities, homosexuals, and transgender people when selecting their members and editors” and by “giv[ing] discriminatory preferences to articles written by women, racial minorities, homosexuals, or transgender people, while rejecting far better articles written by White men”), it is beyond the scope of this Article to examine Title VI.

B. *Section 1981 and Title VII Statutory Bans on Racialized Hierarchy*

“[O]ccupations are generally inherited” in caste systems.<sup>51</sup> Like caste in nations like India, America’s racial caste system, a system that segments and designates persons into groups based on socially constructed categories designated as “races,” has caste-based occupation segregation as a longstanding feature.<sup>52</sup> Many job categories in the modern United States align with racial hierarchies and occupational race segregation.<sup>53</sup> Disproportionately white occupations are managerial and skilled construction jobs controlled by trade unions with racist histories of “shut[ting] [B]lacks and Hispanics out of these highly coveted lines of work.”<sup>54</sup>

The purpose of federal civil rights laws like § 1981 and Title VII is to dismantle this nation’s racialized job hierarchy.<sup>55</sup> While occupational segregation in the U.S. is centuries old, corporate DEI policies are, for the most part, new—less than five years old.<sup>56</sup>

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51. The key features of caste identified by the prominent Indian sociologist G.S. Ghurye are: (1) a society segmented into a system of groups that are predetermined at birth; (2) the system is hierarchical; (3) the system restricts social interactions between upper and lower castes, such as eating together; (4) different castes are segregated; (5) occupations are generally inherited; and (6) endogamy (marriage within one’s own caste) prevails. Vina M. Goghari & Mavis Kusi, *An Introduction to the Basic Elements of the Caste System of India*, 14 *FRONT PSYCH.* 213, 214 (2023).

52. *Id.*

53. See Marina Zhavoronkova, Rose Khattar, and Matthew Brady, *Occupational Segregation in America*, *CTR. FOR AM. PROGRESS* (Mar. 29, 2022), <https://www.americanprogress.org/article/occupational-segregation-in-america/>.

54. Thompson, *supra* note 4.

55. See *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 628, 107 S.Ct. 1442, 1450 (1987) (explaining that in the Supreme Court’s holding in *United Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2730 (1979), the Court observed that “[w]e upheld the employer’s decision to select less senior black applicants over the white respondent, for we found that taking race into account was consistent with Title VII’s objective of “break[ing] down old patterns of racial segregation and hierarchy”). See also *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730 (holding that Title VII was “designed to break down old patterns of racial segregation and hierarchy”).

56. Many of the DEI initiatives under blitz-style attack were initiated by companies in response to the 2020 national and international racial justice movement that began with widespread protests over the racist police killings of George Floyd and Breonna Taylor roughly five years ago. Nicquel Terry Ellis &

Nevertheless, blitz-style white predominance legal attacks on DEI propagate a false narrative—the lie—that dismantling racial hierarchies in which the White racial group occupies the dominant caste position is racism against Whites.

This section presents examples of the anti-DEI legal attacks by the American Alliance for Equal Rights (AAER)<sup>57</sup> and America First Legal (AFL)<sup>58</sup> to explain how these organizations promote perverted

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Catherine Thorbecke, *DEI Efforts Are Under Siege. Here's What Experts Say Is At Stake*, CNN, <https://www.cnn.com/2024/01/07/us/dei-attacks-experts-warn-of-consequences-reaj/index.html> (last updated Jan. 11, 2024, 5:11 PM) (“When the murder of George Floyd by Minneapolis police set off a wave of racial unrest across the country in 2020, corporate America responded swiftly with renewed and public commitments to diversity, equity, and inclusion (DEI).”). Reports also connect the increased focus on including women and non-Whites to the MeToo and Black Lives Matter movements. Jeff Green, *Boards Are Adding More Women and Minorities Ahead of Nasdaq Rule*, DETROIT NEWS (May 16, 2021, 8:00 PM), <https://www.detroitnews.com/story/business/2021/05/17/boards-adding-more-women-and-minorities-ahead-nasdaq-rule/5094113001/>. DEI efforts to make corporate boards more inclusive are not limited to the U.S. *See, e.g.*, Huw Jones, *UK Sets Target of 40% Women on Company Boards*, REUTERS (Apr. 20, 2022, 8:03 AM), <https://www.reuters.com/world/uk/uk-watchdog-sets-target-40-women-company-boards-2022-04-20/>. However, similar attacks have been waged on race affirmative action, federal voting rights, and anti-discrimination laws for decades.

57. *See infra* note 107. Created as an anti-racial-inclusion-in-employment-focused not-for-profit 501(c)(3) organization, the American Alliance for Equal Rights (AAER) is led by the same individual who leads the organizational plaintiff in the 2023 *SFFA v. Harvard* anti-affirmative action admissions lawsuit. In recent years, AAER founder Edward Blum has increasingly articulated his litigation and policy goal of ending inclusion-motivated attention to race in U.S. workplaces and industries. *See, e.g.*, 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> (describing Blum as having his “eye on” as inclusion-motivated racial DEI policies “in the employment arena, contracting arena, [and] internships”). To camouflage their race-exclusionary policy and litigation goals, Edward Blum has, first, chosen names for the organizations he leads and promotes that include terms like “equal rights” and “fairness,” *see id.*, and, second, often described his organizations as following in the footsteps of organizations like the NAACP Legal Defense and Educational Fund, Inc.—the legal organization founded by Thurgood Marshall in 1957. SCOTUSblog, *SCOTUSblog on Camera: Edward Blum (Complete)*, (Aug. 18, 2024) <https://www.youtube.com/watch?v=xZyR3Ty35Og>; *See Hayter, infra* note 107.

58. By contrast to Blum’s fairness-named legal entities, the first two words of AFL’s full name—“America First Legal”—shed the effort to seem associated with racial justice and civil rights in favor of openly associating the organization with the regressive “Make America Great Again” (MAGA) policy and ideological agenda of

meanings of two federal laws—§ 1981 and Title VII. In other words, it explicates how two legal attacks on racial DEI seek to install a legal regime to protect racialized occupational hierarchies in America which § 1981 and Title VII are meant to eradicate.<sup>59</sup>

Today, federal civil rights statutes impose race-inclusion-of-non-Whites obligations greater than those imposed under the Supreme Court’s current interpretation of the Constitution’s Equal Protection Clause.<sup>60</sup> In particular, while inclusion-motivated race consciousness

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now second-term U.S. President Donald Trump. See Jill Colvin & Rob Gillies, *Trump, the ‘America First’ Candidate, Embraces New Imperialist Agenda*, PBS NEWS (Jan. 9, 2025, 2:41 PM), <https://www.pbs.org/newshour/politics/trump-the-america-first-candidate-embraces-new-imperialist-agenda> (referring to various Trump positions and views with the label “America First” and describing such language as “reflecting a 19th century world view that defined European colonial powers”); see also Ryan Teague Beckwith, *Read Donald Trump’s ‘America First’ Foreign Policy Speech*, TIME, <https://time.com/4309786/read-donald-trumps-america-first-foreign-policy-speech> (last updated Apr. 27, 2016, 1:37 PM).

59. This nation’s racialized work occupation system began in 18th and 19th century America under its federal, state, and local legal systems protecting the right of slavers to enslave humans for lifelong labor exploitation with African Americans comprising this exploited, terrorized, and “regularly raped” enslaved workforce. Mary Elliot & Jazmine Hughes, *A Brief History of Slavery That You Didn’t Learn in School*, N.Y. TIMES MAG. (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html>. After the U.S. Civil War and by the end of the American Reconstruction era in 1877, the paid workforce remained racialized to the detriment of African Americans, whose occupations often focused on providing White people services that were denied to African Americans. See, e.g., Andrew Joseph Pegoda, *What People Still Get Wrong About Segregation*, TIME (Feb. 3, 2020, 1:00 PM), <https://time.com/5775300/segregation-separation/>. In modern-day America, African American exclusion still occurs in the most coveted and well-paid craft job categories and business sectors. See, e.g., Thompson, *supra* note 4; see also PAYSACLE, *supra* note 4 (identifying ten of “33 occupations in which nine out of 10 workers are white” and noting the percentages of Whites in the following ten professions: (1) Veterinarians: 96 percent [White], (2) Farmers: 95.8 percent [White], (3) Mining Machine Operators: 95.4 percent [White], (4) Speech-Language Pathologists: 94.5 percent [White], (5) Millwrights: 94.3 percent [White], (6) Chemical-Processing Machine Workers: 94.1 percent [White], (7) Cost Estimators: 93.9 percent [White], (8) Sheet Metal Workers: 93.5 percent [White], (9) Aircraft Pilots: 93 percent [White], and (10) Small Engine Mechanics: 92.9 percent [White]).

60. That said, equal protection jurisprudence dating back to the years just after the U.S. Civil War and through to the landmark cases *Loving v. Virginia* and *Palmore v. Sidoti* interpret the Fourteenth Amendment Equal Protection Clause as requiring the judiciary to scrutinize race consciousness employed to promote or facilitate white supremacy. *Strauder v. State of West Virginia*, 100 U.S. 303, 307-08

must be justified under stringent legal standards to be lawful under the Equal Protection Clause, considering race to redress the exclusion of non-Whites is both lawful and judicially recognized as central to the purpose of federal civil rights statutes such as § 1981 and Title VII. The following subsection presents the text, historical context, and precedential meaning of § 1981 and Title VII, two racial caste-dis-mantling Congressional acts that anti-DEI forces seek to warp through blitz-style legal attacks on racial DEI.<sup>61</sup>

### 1. History, Text, and Precedent of Section 1981 of the Civil Rights Act of 1866

Section 1981 was enacted as part of the Civil Rights Act of 1866, and, in 1874, the provision became part of the United States Code.<sup>62</sup> The text of the key provision of § 1981 reads:

*All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,*

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(1879); *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984). The post-Civil War American legal system contains constitutional provisions enacted for the purpose of conferring full citizenship status on all persons born in the United States without regard to their race and national origin. U.S. Const. amend. XIV, § 1 cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States”); U.S. Const. amend. XIV, § 1, cl. 2 (“No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

61. See, e.g., Anne D’Innocenzio & Alexandra Olson, *DEI Opponents Using an 1866 Civil Rights Law to Challenge Equity Policies in the Workplace*, ASSOCIATED PRESS, <https://apnews.com/article/dei-corporate-diversity-supreme-court-affirmative-action-a4ddf354423feec9697310366248f646> (last updated Jan. 14, 2024, 8:27 PM) (discussing the use of the Civil Rights Act to challenge racial DEI).

62. 42 U.S.C. § 1981. The Civil Rights Act of 1866 was enacted in April 1866. CONG. GLOBE, 39th Cong., 1st Sess. 1857-61 (1866). See also John Hope Franklin, *supra* note 49 (explaining “the principal provisions of the Civil Rights Act of 1866 became section 1981 of the Revised United States Code” in 1874 “when Congress revised the United States Code”).

penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>63</sup>

Thus, the text of § 1981 explicitly communicates that the statute's purpose is to give all persons in the United States rights to enter into contracts that are on par with the citizenship rights of Whites in America.

The historical context necessary to understand this racial justice-protecting statute is rooted in the American Civil War and Reconstruction eras.<sup>64</sup> When it seceded from and declared war against the United States in 1861, the Confederate States of America sought to form their own separate nation “devoted to securing a society in which enslavement to white people was the permanent and inherited condition of all people of African descent.”<sup>65</sup> President Abraham Lincoln, who shepherded the country during the Civil War, was assassinated by Confederate government sympathizer John Wilkes Booth, just five days after the Confederate Army surrendered to end the Civil War.<sup>66</sup> The Civil Rights Act of 1866 was enacted soon after Lincoln's murder by a vote of the U.S. Congress that overrode the presidential veto of President Andrew Johnson, Lincoln's successor, who lacked Lincoln's commitment to full citizenship inclusion of African Americans.<sup>67</sup>

The Civil Rights Act of 1866 is one of the most important pro-racial inclusion enactments in American history, and is a landmark piece of legislation from America's Reconstruction era.<sup>68</sup> Reconstruction was a nineteenth-century period of multiracial American democracy and inclusivity based on the idea, born during the Civil War, that

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63. 42 U.S.C. § 1981 (emphasis added).

64. See Runyon v. McCrary, 427 U.S. 160, 168–70, 96 S.Ct. 2586, 2593–2594 (1976) (tracing the origins of 42 U.S.C. § 1981 to the Civil Rights Act of 1866 and recognizing Congress's intent to prohibit racial discrimination in private contractual relationships shortly after the Civil War).

65. Stephanie McMurry, *The Confederacy Was an Antidemocratic, Centralized State*, THE ATLANTIC (June 21, 2020, 7:00 AM), <https://www.theatlantic.com/ideas/archive/2020/06/confederacy-wasn'twhat-you-think/613309/>.

66. *John Wilkes Booth*, PBS: THE CIVIL WAR, A FILM BY KEN BURNS, <https://www.pbs.org/kenburns/the-civil-war/john-wilkes-booth/> (last visited Mar. 31, 2026). The Confederacy and its army surrendered to end the U.S. Civil War in April 1865 at Appomattox. *Id.*

67. See PHILIP DRAY, *CAPITOL MEN* 24–27 (2008).

68. See, e.g., Franklin, *supra* note 49, at 1137 n.16.

the powerful nation-state of America should, and would, protect the fundamental rights of non-White American persons and citizens.<sup>69</sup>

During the Reconstruction era that followed the American Civil War, African Americans “were accorded political equality and the Federal Government sought to impose interracial democracy upon the South.”<sup>70</sup> The Constitution’s three Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—were enacted and ratified during this period. Section 1981’s contract clause was enacted twelve months after the Civil War ended in April 1865, between the passage and ratification of the Thirteenth Amendment, which abolished slavery in the United States, and the passage and ratification of the Fourteenth Amendment, which established birthright citizenship without regard to race and protected privileges or immunities, equal protection, and due process of law for all persons in the United States.<sup>71</sup> The Civil Rights Act of 1866, which includes § 1981, served as the template for the Fourteenth Amendment.

Introduced in early 1866 by a bipartisan congressional committee,<sup>72</sup> a central purpose of the Civil Rights Act of 1866 was to thwart white supremacist state police power laws enacted after the Confederacy’s surrender in the Civil War.<sup>73</sup> The white power protecting laws, known as “Black Codes,” were enacted by anti-Black, Confederate-sympathizing state legislatures to subjugate African Americans in as close to the same manner as pre-Reconstruction enslavement as possible.<sup>74</sup> Two other important purposes of the Civil Rights Act of 1866 were to protect African Americans from racial discrimination by White persons who were not formally part of any government entity—to end “abuses by private white[s] . . . who committed the most numerous acts violating the basic rights of their former

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69. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 575-87 (1988).

70. Eric Foner, *Redemption II*, N.Y. TIMES: (Nov. 7, 1981), <https://www.nytimes.com/1981/11/07/opinion/redemption-ii-by-ericfoner.html>.

71. BACK, *supra* note 7.

72. The post-Civil War committee was the Congressional Joint Committee of Fifteen. DRAY, *supra* note 67, at 26.

73. The anti-Black and racially subjugating laws “Black Codes” were “controls” imposed on African Americans that aligned with the sentiments of American Whites, particularly those in Confederate states in the American South that the federal orders and laws declaring enslavement illegal were “temporary” and would eventually be corrected by “divine truth.” *See id.* at 24–25.

74. *Id.*

slaves”—and to “give substance and meaning to the [T]hirteenth [A]mendment,” the constitutional amendment abolishing enslavement.<sup>75</sup>

Congress’s overarching purpose in enacting the 1866 Act and other important Reconstruction-era federal laws<sup>76</sup> was to guarantee full citizenship inclusion for non-Whites, particularly African Americans.<sup>77</sup> Before this time, the United States—a nation with a centuries-old racial caste system that designates persons who are White to the dominant racial caste and African Americans to the lowest racial caste—had never included non-Whites as equal citizens. Because of the success of Reconstruction-era legislation such as the Civil Rights Act of 1866, the white supremacist state police power Black Codes laws were thwarted during the period of Reconstruction. In addition to undermining the Black Codes, the laws passed by the U.S. Congress during the period of American Reconstruction resulted in African Americans enjoying more realized full citizenship than at any other time in U.S. history. In particular, significant numbers of African American men were elected to the U.S. Congress and state legislatures.<sup>78</sup>

The Supreme Court’s understanding of the purpose and history of § 1981 is delineated in the Court’s important 1976 *Runyon v. McCrary*<sup>79</sup> decision. In *Runyon*, the Supreme Court ruled that Bobbe’s School, a nursery school version of a whites-only “segregation academy,”<sup>80</sup> violated § 1981 by refusing African American children daycare services it made available to Whites.<sup>81</sup> The nursery school had advertised in telephone books and mailed brochures generally addressed to “resident[s],” but then told African American parents of a

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75. Franklin, *supra* note 49, at 1141-42.

76. The other bill established the Bureau of Refugees, Freedmen, and Abandoned Lands. DRAY, *supra* note 67, at 26-27.

77. See generally Franklin, *supra* note 49; DRAY, *supra* note 67, at 26 (describing Congress’s intent to overrule *Dred Scott*).

78. IDA A. BRUDNICK AND JENNIFER E. MANNING, CONG. RSCH. SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE U.S. CONGRESS: 1870-2020 6 (2020).

79. 427 U.S. 160 (1976).

80. See, e.g., Elizabeth Spiers, *What Nikki Haley — and I — Learned at a Segregation Academy*, N.Y. TIMES (Jan. 14, 2024), <https://www.nytimes.com/2024/01/14/opinion/nikki-haley-slavery-civil-war.html>.

81. *Runyon v. McCrary*, 427 U.S. 160, 165 96 S.Ct. 2586, 2591 (1976).

two-year-old<sup>82</sup> who received and responded to the preschool’s advertisement mailers “that only members of the Caucasian race were accepted” and that the school was not “[racially] integrated.”<sup>83</sup> Reaffirming the § 1981 precedent established in *Runyon*, the 2020 *Comcast v. National Ass’n of African-American-Owned Media* Supreme Court decision also interpreted § 1981 as conferring the rights that Whites enjoy on non-Whites.<sup>84</sup> In this contemporary ruling, the Supreme Court, replacing the term “Negro” used by the *Runyon* Court in 1976 with the term “African-American,” reaffirmed its *Runyon* interpretation “that § 1981 was ‘designed to eradicate blatant deprivations of civil rights,’ such as where ‘a private offeror refuse[d] to extend to [an African-American], . . . because he is [an African American], the same opportunity to enter into contracts as he extends to white offerees.’”<sup>85</sup>

Inclusion-motivated race consciousness by parties to contracts<sup>86</sup> is deemed nondiscriminatory under § 1981 of the Civil Rights

82. Matt Blitz, *A Future NFL Player, a Preschool and the Supreme Court Case That Changed History*, ARLINGTON MAG. (Jan. 15, 2018), <https://www.arlingtonmagazine.com/future-nfl-player-preschool-supreme-court-case-changed-history/>. The child, who was a two-year-old in 1972 named Michael McCrary, grew up to be an All-Pro NFL football player, “playing 10 seasons for Seattle and Baltimore (where he won a Super Bowl) as a defensive end.” *Id.*

83. *Runyon*, 427 U.S. at 165, 96 S.Ct. at 2591 (1976) (ruling the school in question is not covered under the “private club” exemption of § 201(e) of Title II of the Civil Right Act of 1964).

84. *Comcast v. Nat’l Ass’n of Afr.-Am.-Owned Media*, 589 U.S. 327, 335-36 (2020)

85. *Id.* (citing *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375, 388 (1982)). The *Comcast* decision raised the evidentiary bar for § 1981. *Id.* (holding that, under the 1866 federal civil rights law, “a [§ 1981] plaintiff bears the burden of showing that race was a but-for cause of its injury”). The case was filed by an African American television network owner alleging that a sector with 99.5% white predominance of television households and markets in 2023 refused to enter a contract with him to carry his Black-owned stations; see Kim Makuch, *Television Station Ownership Diversity* (Off. Econ. and Analytics, Fed. Comm’n Comm’n, Working Paper No. 54, 2023), <https://docs.fcc.gov/public/attachments/DOC-390667A1.pdf>.

86. See *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024). *AAER v. Fearless Fund* has spotlighted the legal question as to when and whether a grant can be considered a contract subject to § 1981 law. If the grant “is offered as consideration in return for some performance by the grantee, even if to benefit some other party or parties, the grant agreement may be considered an enforceable contract.” Gene Takagi, *Anti-Discrimination Laws – Section 1981*, NONPROFIT L. BLOG (Nov. 10, 2021) <https://nonprofitlawblog.com/anti->

Act of 1866 based on Title VII legal precedents.<sup>87</sup> Even as it ruled on the side of the anti-DEI AAER organization in the lawsuit against the Fearless Fund venture capital firm examined in depth in Part II of this Article, the Eleventh Circuit Court of Appeals reaffirmed the many decades-old Title VII test that identifies an inclusion-motivated “remedial-program” as nondiscriminatory under Title VII. Thus, the circuit court recognized that the Title VII doctrine that inclusion-motivated acts are nondiscriminatory—race consciousness to *include* non-Whites is legal and legally distinguishable from invidious race consciousness to *exclude* non-Whites—also applies in §1981 cases.<sup>88</sup>

Recognizing that lower federal courts must abide by the Supreme Court’s Title VII precedent that protects inclusion-motivated race-conscious employment actions, the three-judge panel of the Eleventh Circuit that decided *AAER v. Fearless Fund* acknowledged:

It would indeed be . . . ironic if the Civil Rights Act of 1866 was used now to prohibit the only effective remedy for past discriminatory employment practices against blacks and other minorities, when the Act was virtually useless to prevent the occurrence of such discrimination for more than a century. . . . We conclude that the Supreme Court, by approving race-conscious affirmative action by employers [under Title VII] . . . , implicitly approved the use of race-conscious plans to remedy past discrimination under section 1981. To open the door for such plans under [T]itle VII and close it under section 1981 would make little sense.<sup>89</sup>

This is notable for two reasons. First, anti-DEI attacks are trying to destroy the Supreme Court’s pro-affirmative action Title VII precedent without publicly acknowledging its existence. When AAER attacked the Fearless Fund business grant contest, the organization’s leader Edward Blum failed to acknowledge § 1981 acceptance of

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discrimination-laws-section-1981/. However, “[i]f the grant is in the form of a pure gift [and] there is no legal consideration from the grantee in return,” “[t]his would likely also mean that the grant agreement is not a legally enforceable contract” and thus would not be subject to § 1981. *Id.*

87. See *infra* Part II (discussing *Johnson* criteria for designating inclusion-motivated race consciousness nondiscriminatory under Title VII).

88. *Fearless Fund*, 103 F.4th at 777.

89. *Setser v. Novack Inv. Co.*, 657 F.2d 962, 966 (8th Cir. 1981).

inclusion-motivated race-attentiveness as nondiscriminatory and legal.<sup>90</sup> Second, even in a case initiated by an anti-DEI organization to destroy a racial DEI policy, the federal judiciary recognized and affirmed the Supreme Court’s pro-affirmative action Title VII precedent.<sup>91</sup> Although the lawsuit was part of an anti-DEI project to create a legal regime that protects white predominance in coveted business and investment opportunities, the Eleventh Circuit’s ruling in *AAER v. Fearless Fund* nevertheless acknowledges and follows longstanding Supreme Court precedent, making it clear that § 1981 deems inclusion-motivated race consciousness, such as race affirmative action in employment, as nondiscriminatory if executed consistently with the parameters set forth by the Court in its Title VII caselaw.<sup>92</sup> The doctrinal upshot is that, following the Supreme Court’s interpretation of Title VII<sup>93</sup> in cases explained in the next section, considering race to remedy racism is legally permissible under § 1981.<sup>94</sup> The next section more specifically discusses the Title VII case precedent designating inclusion-motivated race consciousness by employers as nondiscriminatory and legal under Title VII.

## 2. Title VII of the Civil Rights Act of 1964, as Amended by the Civil Rights Act of 1991

Passed by Congress to rectify the pervasive racism in employment in the United States, Title VII of the Civil Rights Act of 1964 prohibits employers from taking employment actions that are “unlawful” as defined by the statute.<sup>95</sup> The meaning of a federal statute like Title VII is the Supreme Court’s interpretation of the statute, as articulated in the Court’s legally binding holdings from its written rulings. Like genetic science studies, a non-professional reading of a decontextualized snippet from the Title VII statute is not an accurate

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90. See, e.g., Press Release, Am. All. for Equal Rts., Concludes Lawsuit Against the Fearless Fund’s Black-Only “Strivers Grant Contest” (Sep. 11, 2024), <https://americanallianceforequalrights.org/american-alliance-for-equal-rights-concludes-lawsuit-against-the-fearless-funds-black-only-strivers-grant-contest/>.

91. *Fearless Fund*, 103 F.4th at 777.

92. *Id.*

93. Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended (Civil Rights Act of 1991).

94. Civil Rights Act of 1866, 42 U.S.C. § 1981.

95. 42 U.S.C. § 2000e-2(a).

understanding of the true legal rule(s) established by the landmark employment law statute. It is not categorically illegal to consider race to comply with Title VII's incentivizing employers to increase racial inclusivity in their workforce.

In short, the doctrinal reality is that—under the Title VII Supreme Court case precedents explained in this section—inclusion-motivated race awareness is not categorically defined as an unlawful employment act taken “because of” race, sex, religion, sex orientation, gender identity, or pregnancy.<sup>96</sup> It is a common anti-DEI tactic to deploy hyper-decontextualization of a single snippet of a lengthy and complex full text.<sup>97</sup> Specifically, to promote falsehoods regarding the meaning of the Title VII statute, blitz-style attacks on race inclusivity ignore the overarching statutory purpose of Title VII by turning the three-word phrase “because of . . . race” (from Title VII's definition of unlawful employment acts) into a decontextualized factoid.<sup>98</sup> Without offering substantive context as to how courts and the discipline of law ascribe doctrinal meaning to Title VII, the white-predominance-protecting opponents of DEI thus hyper-decontextualize just a few words from Title VII. This factoid-based presentation of Title VII's legal meaning operates to promote the false notion that Title VII deems inclusion-motivated race awareness categorically illegal. This inaccurate depiction misstates the binding interpretation of Title VII that has been settled and established by the Supreme Court for more than four decades.

It is clear under the Supreme Court's Title VII case precedent that inclusion-motivated consideration of Title VII protected traits is lawful.<sup>99</sup> Highly relevant to understanding the weakness and flagrant falsehoods of the claim made in Title VII-based, blitz-style white predominance attacks on DEI, is that Title VII also prohibits employers from operating segregated workplaces and job categories.<sup>100</sup> While

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96. *Id*

97. *See infra* text accompanying notes 35-45.

98. 42 U.S.C. § 2000e-2(a); *see also supra* note 25 (explaining two meanings of factoid).

99. *See* sources cited *supra* note 55 (discussing the Supreme Court's holdings in *Steelworkers v. Weber* and *Johnson v. Transportation Agency*).

100. *See Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 642, 107 S.Ct. 1442, 1457 (1987) (upholding inclusion-motivated employment race affirmative action that the Court deemed “a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the [employer's] work force”).

employers are not obligated to do so, they have the discretion, if they so choose, under Title VII doctrine to adopt affirmative action policies to ensure that job categories in their workplaces are diverse and inclusive, rather than segregated.<sup>101</sup>

Title VII doctrine permits employers to make racially inclusive employment decisions and avoid unjustified racial disparities in hiring. In the context of America's longstanding historical and contemporary occupational racial segregation, it is common for a company's workforce to mirror the racial hierarchies associated with America's racial caste system.<sup>102</sup> When Whites and men predominate the most coveted job categories in a company, inclusion-motivated attention to sex and race to include women of all races and non-White men is legal and nondiscriminatory under Title VII caselaw.<sup>103</sup>

Employers aspiring to achieve racial DEI in their workforce and workplace, using race (and sex-based) affirmative action or otherwise considering race or sex for racial and sex inclusivity, are governed by Title VII of the Civil Rights Act of 1964.<sup>104</sup> In 1991, the U.S. Congress amended Title VII to include text that recodifies and clarifies the purpose of Title VII as banning and discouraging both disparate treatment discrimination, including but not limited to race and sex discrimination, and disparate impact discrimination by employers.<sup>105</sup>

101. *Id.*

102. See Zhavoronkova, Khattar, and Brady, *supra* note 53.

103. *Johnson*, 480 U.S. at 642, 107 S.Ct. at 1457.

104. Title VII prohibits unlawful employment decisions taken "because of race," but inclusion-motivated race awareness that constitutes a legitimate nondiscriminatory reason does not violate Title VII, *see* Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)–2000(e-17). In the landmark Title VII case *Griggs v. Duke Power*, the Duke Power company operated racially segregated job categories that relegated African American workers to the lowest paying and most physically demanding, menial job categories and blocked African Americans from working in the whites-only, more financially lucrative and coveted positions at the Duke power facility. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426–27, 91 S.Ct. 849, 851 (1971).

105. Unlike Title VI today, disparate impact violations of Title VII by employers are privately enforceable. The prospect of private Title VII lawsuits on behalf of non-Whites means employers are incentivized by Title VII to maximize racial inclusivity in their workforces—to avoid racially and sex-segregated job categories—to the greatest extent possible and consistent with their business necessities in order to avoid costly litigation. The leading cases on these Title VII disparate treatment and disparate impact theories are, respectively, the lines of cases building on the Supreme Court's rulings in *McDonnell Douglas Co.* and *Duke Power Co.* *See*

Private businesses have the discretion to prioritize diversity, equity, and inclusion in employment practices without the articulation of such a priority constituting a violation of Title VII.<sup>106</sup>

Legally binding Supreme Court decisions deem affirmative action-related race attentiveness in employment as lawful and nondiscriminatory as a matter of Title VII law. Specifically, in *United Steelworkers v. Weber* and *Johnson v. Santa Clara Transportation Agency*, the Court upheld the affirmative action employment policies of a private aluminum company and a government transportation agency.<sup>107</sup> For nearly half a century, the Court has held Title VII of the Civil Rights Act of 1964 to leave “area[s] of discretion” for “the private sector voluntarily to adopt affirmative action plans” to eliminate “racial imbalance” in white-predominant jobs.<sup>108</sup> One of the early Supreme Court rulings in this area was the 1979 *Weber* decision, which upheld affirmative action in an aluminum plant with a predominance of White workers in its higher-paying, skilled job categories.<sup>109</sup> In *Weber*, 98.17% of the workers in these categories were White, and only 1.83% were African American.<sup>110</sup> The Court’s ruling in *Weber* established the long-standing Title VII rule that consideration of race by

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*generally* McDonnell Douglas Co. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) (interpreting Title VII as banning disparate treatment discrimination, including but not limited to race and sex discrimination); *Duke Power Co.*, 401 U.S. at 424, 91 S.Ct. at 849 (interpreting Title VII as banning disparate impact as well as disparate treatment discrimination).

106. *See, e.g.*, *United Steelworkers v. Weber*, 443 U.S. 193, 209, 99 S.Ct. 2721, 2730 (1979) (“We conclude, therefore, that the adoption of the Kaiser-USW A plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”); *Johnson*, 480 U.S. at 642, 107 S.Ct. at 1457.

107. *See Weber*, 443 U.S. at 255, 99 S.Ct. at 2753; *Johnson*, 480 U.S. at 642, 107 S.Ct. at 1457. The *Ricci v. DeStefano* case was not a case about an employment affirmative action policy. *See Ricci v. DeStefano*, 557 U.S. 557, 562-63, 129 S.Ct. 2658, 2664 (2009). That case was about the legality of an employer’s decision not to make promotions based on racially-skewed test scores. *See id.* The New Haven fire department did not have and was not operating a race affirmative action policy. *See id.*

108. *See Weber*, 443 U.S. at 209, 99 S.Ct. at 2730.

109. *Id.* at 198-99, 99 S.Ct. at 2724-2725.

110. *See id.* at 198-99, 99 S.Ct. at 2724-2725. Brian Weber, a White employee, sued his employer and labor union when he was not one of the six White and seven African American employees selected for a training program during the company’s first year of operation in 1974. *See id.* at 199, 99 S.Ct. at 2725.

employers is a nondiscriminatory form of race consciousness when the racial composition of job categories exhibits a “manifest racial imbalance.”<sup>111</sup>

Title VII leaves the same discretion for government employers to operate affirmative action policies. In *Johnson v. Transportation Agency* in 1987, the Supreme Court reiterated the Title VII legality of affirmative action in the context of a government employer and its women-inclusive affirmative action policy.<sup>112</sup> The Santa Clara Transportation Agency’s affirmative action plan considered candidates’ sex for a position in a 100% male-predominant job category—an extreme “manifest [sex] imbalance” disfavoring women.<sup>113</sup> Building on the *Weber* precedent which upheld a race-affirmative action policy, the Supreme Court’s *Johnson* precedent held that the city transportation agency’s affirmative action program was nondiscriminatory as a matter of Title VII law.<sup>114</sup> In addition to constituting an affirmative action legality precedent, the *Johnson* case establishes important Title VII pro-affirmative action precedent that distinguishes between the manifest imbalance employers must establish for inclusion-motivated race consciousness to be legal under Title VII from the requirement the Court has deemed inappropriately onerous and thus rejected.<sup>115</sup>

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111. *See id.* at 208, 99 S.Ct. at 2730. Affirmative action policies are not permitted to “create an absolute bar to the advancement of white employees.” *Id.*, 99 S.Ct. at 2730. The Court’s reasoning in *Weber* hinged on the program’s focus on “*eliminat[ing]* a manifest racial imbalance.” *Id.*, 99 S.Ct. at 2730 (emphasis added). Thus, private employers concerned about anti-DEI lawsuits may point to race, sex, and sexual orientation imbalances in particular job categories in their workforce as evidence that their inclusion-motivated attention to race is legally deemed nondiscriminatory under Title VII doctrine. *See id.* at 208–09, 99 S.Ct. at 2730; *cf. id.* at 198–99, 99 S.Ct. at 2725 (“[O]nly 1.83% (5 out of 273) of the skilled craftworkers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black.”).

112. *Johnson*, 480 U.S. at 627, 629 n.7, 640–42, 107 S.Ct. at 1449, 1450, 1456–57 (invoking *Weber* to analyze and uphold an agency’s women-inclusive affirmative action policy and defending *Weber*’s “conclusion that Title VII does not prohibit voluntary affirmative action programs.”).

113. *See id.* at 621, 107 S.Ct. at 1446 (“[N]one of the 238 Skilled Craft Worker positions was held by a woman.”); *see id.* at 631, 107 S.Ct. at 1451–52 (citing *Weber*, 443 U.S. at 197, 99 S.Ct. at 2724); *see id.* at 634, 107 S.Ct. at 1453.

114. *Id.* at 642, 107 S.Ct. at 1457 (holding that the public agency’s affirmative action plan “is fully consistent with Title VII”).

115. *See id.* at 632–33, 107 S.Ct. at 1452. A company need not make a full Title VII case of its own exclusion of non-Whites in violation of Title VII against

The clear doctrinal legality of affirmative action in *Johnson* reaffirms the Court's holding in *Weber*, and its subsequent 1986 holding in *Firefighters v. Cleveland*.<sup>116</sup> In *Johnson*, the Supreme Court yet again rejected the anti-DEI argument that Title VII prohibits employment actions that consider race to dismantle racial hierarchies in employment, with a concurring Justice labeling it a perverse irony too inconsistent with the purpose of the Title VII statute to be taken seriously.<sup>117</sup> In his concurrence, Justice Stevens explained why inclusion-motivated race consciousness is nondiscriminatory under its Title VII precedents by referencing the Court's prior precedents:

In *Firefighters*, we again acknowledged Congress' concern in Title VII to avoid "undue federal interference with managerial discretion." 478 U.S., at 519, 106 S.Ct., at 3074. As construed in *Weber* and in *Firefighters*, the statute does not absolutely prohibit preferential hiring in favor of minorities; it was merely intended to protect historically disadvantaged groups *against* discrimination and not to hamper managerial efforts to benefit members of disadvantaged groups that are consistent with that paramount purpose. The preference granted by respondent in this case does not violate the statute as so construed; the record amply supports the conclusion that the challenged employment decision served the legitimate purpose of creating diversity in a category of employment that had been almost an exclusive province of males in the past. Respondent's voluntary

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itself prior to redressing a manifest imbalance in its workforce. *See supra* text accompanying notes 106-114 (discussing *Weber-Johnson* parameters under which inclusion-motivated race awareness by employers is to be treated as nondiscriminatory under Title VII).

116. *See Firefighters v. City of Cleveland*, 478 U.S. 501, 516, 106 S.Ct. 3063, 3072 (1986).

117. *Johnson*, 480 U.S. at 645, 107 S.Ct. at 1459 (Stevens, J., concurring) ("As we observed last Term, '[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.'") (citing *Firefighters*, 478 U.S. at 516, 106 S.Ct. at 3072 (quoting *Weber*, 443 U.S. at 204, 99 S.Ct. at 2727)).

decision is surely not prohibited by Title VII as construed in *Weber*.<sup>118</sup>

The final paragraph of the 6-3 Supreme Court majority decision in *Johnson* reads as follows:

We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is *Affirmed*.<sup>119</sup>

Thus, in addition to the nondiscriminatory reason of remedying the employer's own discrimination, inclusion-motivated race awareness—like employing affirmative action—to redress traditionally racially segregated job categories is also among the incontrovertibly lawful reasons employers can consider race.<sup>120</sup> Further explaining

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118. *Id.* at 646, 107 S.Ct. at 1460.

119. *Id.* at 643, 107 S.Ct. at 1457.

120. Commercial airlines are examples of businesses with traditionally segregated job categories because the top-paying and highest-prestige jobs are those that have historically been overwhelmingly white male-dominated. This is revealed by demographic data to hold true for pilots as well. See Eileen Bjorkman, *White Men Have Ruled the Sky as Airline Pilots, but That's Finally Changing*, CHI. SUN-TIMES (Sep. 19, 2023, 11:05 AM), <https://chicago.suntimes.com/2023/9/19/23879313/airline-pilots-white-men-diversity-race-gender-training-eileen-bjorkman> (“Just 3.4% of U.S. airline pilots are Black, 2.2% are of Asian descent, and a paltry 0.5% are Hispanic or Latino. Women make up just 4.6%.”). See also Ginger Pinholster, *New Embry-Riddle Study Explores Gender and Ethnic Biases in Aviation*, EMBRY-RIDDLE NEWS (Mar. 20, 2024, 10:28 AM), <https://news.erau.edu/headlines/new-embry-riddle-study-explores-gender-and-ethnic-biases-in-aviation#> (“As of 2022, only 6.34% of FAA-certified pilots identified as female [and] . . . [t]he U.S. Bureau of Labor Statistics has reported that 93% of the country's aircraft pilots and flight engineers in 2021 identified as ‘white, non-Hispanic.’”).

the *Weber* precedent, the U.S. Supreme Court majority in *Johnson* observes:

*Weber*'s decisive rejection of the argument that the "plain language" [, the decontextualized snippet tactic to falsify Title VII's meaning,] of the [Title VII] statute prohibits affirmative action rested on (1) legislative history indicating Congress' clear intention that employers play a major role in eliminating the vestiges of discrimination and (2) the language and legislative history of § 703(j) of the statute, which reflect a strong desire to preserve managerial prerogatives so that they might be utilized for this purpose.<sup>121</sup>

Accordingly, there is well-settled Title VII precedent that inclusion-motivated attention to race by employers is not only permissible but also necessary to comply with the obligation to avoid operating race- or sex-segregated job categories.<sup>122</sup>

## II. THE "ASK" AND WEAPONIZED DECONTEXTUALIZATION IN BLITZ-STYLE WHITE PREDOMINANCE ATTACKS

Blitzkrieg is a "military tactic calculated to create psychological shock and resultant disorganization in enemy forces through the employment of surprise, speed, and superiority in [military equipment] or firepower."<sup>123</sup> Lodged in large quantities to shock, disorient, and make factual assessment difficult, "white predominance blitz-style legal attacks" on racial diversity, equity, and inclusion—race DEI—employ a variety of disinformation tactics to create confusion that erodes understanding that race consciousness to dismantle America's longstanding white-favoring racial hierarchies is nondiscriminatory, legal, and desirable as a matter of public policy according to the text, history, purpose, and doctrinal meaning of federal civil rights laws like § 1981 and Title VII. A key feature of "blitz-style" attacks on race DEI is their goal of normalizing the world-upside-down

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121. *Johnson*, 480 U.S. at 629 n.7, 107 S.Ct. at 1450 (citation omitted) (citing *Weber*, 443 U.S. at 201–07, 99 S.Ct. at 2726–29).

122. *Id.*, 107 S.Ct. at 1450.

123. Raymond Limbach, *Blitzkrieg*, ENCYC. BRITANNICA (Mar. 18, 2025), <https://www.britannica.com/topic/blitzkrieg>.

falsehood that it is racist against Whites to reduce and rectify racism against non-Whites.

Two organizations are currently executing a rapid succession of legally oriented, race-exclusion-promoting blitz-style attacks:

AAER<sup>124</sup> and AFL.<sup>125</sup> White predominance blitz-style legal attacks by these two organizations began in August 2023, a few months after the

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124. Founded in 2023, the American Alliance for Equal Rights (AAER) is one of the many 501(c)(3) non-profit organizations founded by Edward Blum, AAER's figurehead and president. Michael E. Hartmann, *A Conversation with the American Alliance for Equal Rights' Edward Blum*, GIVING REV. (Sept. 26, 2023), <https://thegivingreview.com/a-conversation-with-the-american-alliance-for-equal-rights-edward-blum-part-2-of-2/>. Blum, a longtime leader of multiple anti-DEI organizations, is a multi-decade opponent of the Voting Rights Act of 1965 and opponent of race affirmative action. See, e.g., Julian Maxwell Hayter, *Edward Blum's Crusade Against Affirmative Action Has Used the Legal Strategy Developed by Civil Rights Activists*, THE CONVERSATION (Nov. 30, 2023, 2:30 PM), <https://theconversation.com/edward-blums-crusade-against-affirmative-action-has-used-the-legal-strategy-developed-by-civil-rights-activists-215223>. *Contact Us*, AM. ALL. FOR EQUAL RTS., <https://americanallianceforequalrights.org/contact-us/> (last visited May 14, 2026) (on file with the North Carolina Civil Rights Law Review). Blum holds the same presidential role for the organizational plaintiff, Students for Fair Admissions (SFFA), that successfully challenged the race-conscious components of the Harvard and University of North Carolina at Chapel Hill undergraduate admissions policies. See *About*, STUDENTS FOR FAIR ADMISSIONS, <http://studentsforfairadmissions.org/about/> (on file with the North Carolina Civil Rights Law Review). He added AAER to the many exclusion-promoting organizations of which he is a spokesperson and president, such as the Alliance for Fair Board Recruitment (AFBR). Archive of AFBR's *Join Us* Webpage, INTERNET ARCHIVE WAYBACK MACH. (Jan. 17, 2025), <https://web.archive.org/web/20250117223041/https://fairrecruitment.org/join-us#expand> (on file with the North Carolina Civil Rights Law Review). The media reports AFBR's formation as 2021, Robert Barnes, *How One Man Brought Affirmative Action to the Supreme Court. Again and Again*, WASH. POST (Oct. 24, 2022), <https://www.washingtonpost.com/politics/2022/10/24/edward-blum-supreme-court-harvard-unc/> ("Last year, he formed the Alliance for Fair Board Recruitment."), which is the two years before AAER was formed with Blum as spokesperson-president for both anti-DEI entities, Michael E. Hartmann, *A Conversation with the American Alliance for Equal Rights' Edward Blum*, GIVING REV. (Sept. 26, 2023), <https://thegivingreview.com/a-conversation-with-the-american-alliance-for-equal-rights-edward-blum-part-2-of-2/> ("Edward Blum has founded several nonprofit public-interest legal organizations . . . . Groups [that] include the Project on Fair Representation, Students for Fair Admissions, and the new American Alliance for Equal Rights."). AFBR has successfully advanced its race exclusion agenda to maintain white predominance among those who sit on paid boards of directors of U.S. corporations. See *All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159 (5th Cir. 2024) (striking down a NASDAQ rule on corporate board diversity in a 9-8 en banc decision). Despite not being a lawyer, Blum worked in the 2000s as Director of Legal Affairs at the American Civil Rights Institute (ACRI) in an anti-DEI spokesperson role similar to that played by California anti-DEI activist Ward Connerly. See LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED*

CHALLENGE TO RACIAL AND GENDER JUSTICE 31–32, 40 (2003). Before the ACRI, Blum served as president of Campaign for a Color Blind America in the 1990s. *Id.* at 40. There are no news reports of the dissolution of any of Blum’s at least half dozen roles as president over the past four decades.

In contrast to the Trojan horse-style tactics employed over the past decades by earlier Blum-founded organizations, Blum’s 2023-created AAER group has launched frontal attacks in the upper echelons of legal employment and business that fall within the attack style this Article names blitz-style white predominance attacks. See Kimberly West-Faulcon, *The SFFA v. Harvard Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355 (2024); see Nikole Hannah-Jones, *The “Colorblindness” Trap: How a Civil Rights Ideal Got Hi-jacked*, N.Y. TIMES (Mar. 13, 2024), <https://www.nytimes.com/2024/03/13/magazine/civil-rights-af-firmative-action-colorblind.html> (reporting on Blum’s AAER “su[ing] law firms to stop their diversity fellowships” despite only “[a]bout 5 percent of practicing attorneys are Black” and on AAER, in August 2023, also “su[ing] the Fearless Fund, a venture-capital firm founded by two Black women . . . [that] giv[es] small grants to businesses that are at least 51 percent owned by Black women” despite “Black women receiv[ing] just 0.34 percent of venture-capital funds in the United States”). “Blum’s organizations’ most recent legal attacks are direct and frontal.” West-Faulcon, *The SFFA v. Harvard Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. at 1402.

125. Compared to Blum’s over forty years in various presidential roles, the few years that thirty-nine-year-old Trump White House senior advisor Stephen Miller, the head of AFL, has been in the role of figurehead for a media-attention-garnering anti-DEI legal organization has shown Miller to be an aggressive protector of white predominance. *Cf.*, e.g., Robert Draper, *America First Legal, A Trump-Aligned Group, Is Spoiling for a Fight*, N.Y. TIMES (Mar. 21, 2024), <https://www.nyt.com/2024/03/21/us/politics/stephen-miller-america-first-legal.html> (on file with the North Carolina Civil Rights Law Review) (explaining that Stephen Miller founded AFL in 2021, months after he ended his four-year stint as part of the first Donald Trump presidential administration). In a March 2024 article, *The American Prospect* describes Stephen Miller as follows:

AFL president Stephen Miller is one of Donald Trump’s longest-serving aides and “catch-all symbol of the racism and malice” of Trump’s White House. Miller has also previously promoted explicitly white nationalist books and articles and has long-standing ties to prominent white nationalists, like Richard Spencer. Miller was also the architect of some of the Trump administration’s most heinously cruel immigration policies. Miller, notably, has also been floated as a potential attorney general under a second Trump administration.

Toni Aguilar Rosenthal, *Ken Paxton, America First Legal, and Premonitions of Project 2025*, AM. PROSPECT (Mar. 15, 2024), <https://prospect.org/power/2024-03-15-ken-paxton-america-first-legal-project-2025/> (on file with the North Carolina Civil Rights Law Review). Miller also serves in two influential roles in the second Trump administration—“Deputy Chief of Staff overseeing domestic policy and Homeland

Supreme Court issued its ruling in *SFFA v. Harvard*.<sup>126</sup> What this Article identifies as “blitz attack”-styled, white predominance-protecting—blitz-style white predominance—lawsuits and letter attacks employ decontextualized factoids about federal civil rights laws in service of an obscured legal project. This Article seeks to illuminate that vanquishing the target of race DEI policies of U.S. businesses is part of a broader campaign to bring an unprecedentedly race-exclusionary legal regime into existence—to shift inclusion-motivated consideration of race from statutory legality to illegality. Like military blitz attacks, blitz-style anti-DEI legal attacks can be discombobulating—“curious”<sup>127</sup>—in their willingness to disrupt the prior order, which, in

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Security Adviser.” *Who is Stephen Miller? America’s ‘Most Powerful Unelected Man’ Shaping Trump’s Immigration Agenda*, FIN. EXPRESS (June 10, 2025), <https://www.financialexpress.com/world-news/who-is-stephen-miller-americas-most-powerful-unelected-man-shaping-trumps-immigration-agenda/3875135/> (on file with the North Carolina Civil Rights Law Review). When Miller’s AFL is in its version of stealth mode, it employs monikers such as Center for Legal Equality (CLE). *Center for Legal Equality*, AM. FIRST LEGAL, <http://aflegal.org/center-for-legal-equality/> (on file with the North Carolina Civil Rights Law Review) (describing CLE as a “project of AFL” and setting forth its anti-DEI ideology against what it terms the “tyranny of equity” that is allegedly “in purposeful and direct conflict with the harmonious ideal of equality”). AFL’s website takes credit for Faculty, Alumni & Students Opposed to Racial Preferences (FASORP), which exemplifies AFL’s strategy of suing as counsel in the name of entities with unclear structures and one-page boilerplate websites. *Compare* Press Release, Am. First Legal, *America First Legal Sues Northwestern University for Discriminating Against White Men in Faculty Hiring* (July 2, 2024), <https://aflegal.org/america-first-legal-sues-northwestern-university-for-discriminating-against-white-men-in-faculty-hiring> (on file with the North Carolina Civil Rights Law Review) (announcing that AFL, “along with co-counsel Jonathan F. Mitchell and Stone Hilton PLLC” have sued Northwestern University and its student-run law review “for discriminating against white men”), *with Faculty, Alumni, & Students Opposed to Racial Preference* (FASORP), FASORP, <https://fasorp.org/> (on file with the North Carolina Civil Rights Law Review) (introducing FASORP as the complainant against Northwestern University).

126. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181 (2023). The Supreme Court’s *SFFA* ruling dealt with college admissions, not employment decisions, and applied Equal Protection Clause doctrine to the admissions process. *Id.* at 191. Equal protection doctrine only applies to government entities. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), whereas Title VI of the Civil Rights Act of 1964—not discussed separately in the Supreme Court’s *SFFA* ruling—is doctrinally relevant to private entities that accept federal funding. 42 U.S.C. § 2000d.

127. *Cf.* Janell Ross, *The Fearless Fund Is Investing in Women of Color—and Fighting in Court*, TIME (Feb. 1, 2024, 8:00 AM),

this context, is the existing legal order deeming inclusion-motivated consideration of race nondiscriminatory under federal antidiscrimination statutes. A central feature of blitz-style white predominance attacks on race DEI employing § 1981 and Title VII is their objective of mutating the racial inclusivity-protecting meaning of these two federal laws in furtherance of a race-exclusionary hope of transforming them into tools to make inclusion of non-Whites categorically illegal.

This Part presents examples of anti-DEI legal attacks by organizations that this Article identifies as committed to attacking racial inclusion policies for the purpose of mutating existing civil rights laws to prohibit what they currently encourage—racial equity and inclusion of non-Whites. AAER and AFL lawsuits and letter attacks fit this Article’s definition of blitz-style legal attacks on racial DEI because they make false, and essentially doctrine-less, contentions about the meaning of settled civil rights law in such a doctrinally misrepresentative manner that the claims are outright disorienting to lawyers who are experts in and familiar with § 1981 of the Civil Rights Act of 1866 and Title VII of the Civil Rights Act of 1964.<sup>128</sup> This anti-DEI federal civil rights statutory endgame seeks to turn what is now incentivized nondiscriminatory, inclusion-motivated, race consciousness under § 1981 and Title VII—remedial race consciousness—into statutorily categorically prohibited so-called “discrimination.” The following

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<https://time.com/collection/closers/6564920/arian-simone-ayana-parsons/> (quoting Damon T. Hewitt, President and Executive Director, Lawyers’ Committee for Civil Rights Under Law, who describes the period that began after the Supreme Court’s *SFFA v. Harvard* decision as one in which organizations like AAER are “trying to do” unprecedented and strange things with civil rights laws and then calling “that a defense of civil rights”).

128. AAER’s leader, Ed Blum, garnered national notoriety through Trojan horse storytelling, alleging fealty to the civil rights vision of Black civil rights leaders like Martin Luther King. See Kara Nelson, *How Clashing Interpretations of Martin Luther King’s Legacy Fuels the Fight over DEI and Affirmative Action*, CNN (Jan. 14, 2024, 10:00 AM), <https://www.cnn.com/2024/01/14/us/martin-luther-king-legacy-affirmative-action-reaaj/index.html> (describing Blum’s perversion of King’s invocations of “colorblindness” and “color” in furtherance of the anti-DEI project to dismantle the “various mechanisms that were intended to bring about a more equitable society” (quoting Bernice King)). Martin Luther King’s *I Have a Dream Speech* is an ardently pro-race-inclusion argument. See NAT’L PUB. RADIO, *supra* note 38. Instead of purporting to embrace 1950s civil rights values, AFL expressly embraces a narrative of white racial victimhood and imagery on its website and in its calls for anti-DEI whistleblowing. See *infra* notes 187-189.

sections describe illustrative examples of these lawsuit and letter attacks.

A. *The AAER v. Fearless Fund Ask and Protection of White Predominance by Decontextualization*

The existing and long-standing doctrinal meaning of § 1981, as discussed above, arose from cases challenging the exclusion, not the inclusion, of African Americans. The leading precedent articulating the doctrinal meaning of § 1981 was established in cases where the Court held it unlawful for secular private childcare facilities and schools to declare themselves “whites-only.”<sup>129</sup> In a historically and factually distinct contemporary context—the contemporary venture capital startup funding sector in which funding has never excluded the White racial group, the anti-DEI AAER organization filed a lawsuit in 2023 that flagrantly ignored white predominance of access to venture capital funding in the United States and likewise ignored the historical context surrounding the adoption and purpose of § 1981. In *AAER v. Fearless Fund*, AAER deployed the Reconstruction-era § 1981 civil rights statute to challenge a private company’s effort to remedy the near-total exclusion of Black women from those receiving funding to start American businesses.<sup>130</sup> In other words, AAER’s lawsuit used § 1981 as an anti-DEI weapon to maintain and preserve the overwhelming white predominance of U.S. venture capital startup funding.<sup>131</sup>

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129. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 172-73, 96 S.Ct. 2586, 2595-96 (1976).

130. *See Am. All. for Equal Rts. v. Fearless Fund Mgmt. LLC*, 103 F.4th 765, 769-70 (11th Cir. 2024) (setting forth factual background that “[t]he American Alliance for Equal Rights [AAER], a § 501(c)(3) membership organization that according to its founder [Edward Blum] is dedicated to “ending racial classifications and racial preferences in America,” filed a lawsuit alleging that “an entrepreneurship funding competition” for “black females who are . . . legal U.S. residents” established by a venture capital fund, Fearless Fund, with the “stated mission” to “bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies” violated § 1981).

131. AAER won a ruling granting a preliminary injunction before the Eleventh Circuit in a two-to-one panel decision. *Id.* at 780. Judge Rosenbaum explains his dissenting vote against AAER’s request for an injunction by stating that AAER failed to establish organizational standing as it failed to show that the three unidentified AAER members “would otherwise have standing to sue in their own

Contrary to the historical context and racial-hierarchy-dismantling purpose of § 1981, AAER’s lawsuit against the Fearless Fund blitzed America with an ahistorical and acontextual narrative about § 1981 law. In 2023,<sup>132</sup> despite data from 2020 indicating that African American women received less than one percent of venture capital funds in the United States, AAER sued the foundation of an Atlanta-based venture capital firm founded by two Black women, only a few years into its establishment.<sup>133</sup> The Fearless Fund’s grant contest program, run in partnership with Mastercard, offered four awards of up to \$20,000 to “51% black woman owned”<sup>134</sup> businesses as part of its “Fearless Strivers Grant Contest,” aiming to address racial disparities in venture capital funding.<sup>135</sup> The grants attacked by AAER were minuscule in relation to the overall amount of venture capital distributed in the United States—“a record \$347.5 billion” in 2021.<sup>136</sup>

*AAER v. Fearless Fund* is a blitz-style white predominance legal attack on a program that granted funds to African American female business entrepreneurs as a “contract,” making it subject to § 1981 according to the Eleventh Circuit.<sup>137</sup> AAER wanted the federal courts to

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right.” *Id.* at 783, 788 (Rosebaum, J., dissenting) (citation omitted) (observing that unidentified AAER members “Owners A, B, and C” failed to show that they “would otherwise have standing to sue in their own right” because their “cookie-cutter declarations” were “thread-bare and devoid of substance”).

132. See Ross *supra* note 127 (reporting that African American women receive roughly 0.35 percent of venture capital funds in the United States).

133. See Krystal Hu, *Fearless Fund: Diversity Funds and Black Founders Feel Chill*, REUTERS (July 2, 2024, 3:44 PM), <https://www.reuters.com/legal/us-court-decision-casts-shadow-diversity-venture-capital-funding-2024-07-02/>.

134. *Fearless Fund*, 103 F.4th at 770.

135. *Fearless Fund Case Summary*, COUNCIL ON FOUNDS., <https://cof.org/page/fearless-fund-case-summary>; See *Mastercard Furthers Support for Black Women Entrepreneurs with Multi-Million Dollar Investment in Fearless Fund, a Venture Capital Firm Built by Women of Color for Women of Color*, BUS. WIRE, <https://www.busineswire.com/news/home/20210420005443/en/Mastercard-Furthers-Support-for-Black-Women-Entrepreneurs-with-Multi-Million-Dollar-Investment-in-Fearless-Fund-a-Venture-Capital-Firm-Built-by-Women-of-Color-for-Women-of-Color>.

136. N.Y.C. ECON. DEV. CORP., *DIVERSITY IN VENTURE CAPITAL: CHALLENGES AND OPPORTUNITIES FOR NEW YORK CITY* 10 (2023).

137. *Fearless Fund*, 103 F.4th at 770 (noting that “[o]riginally, the contest’s rules expressly warned applicants, in all caps, that “BY ENTERING THIS CONTEST, YOU AGREE TO THESE OFFICIAL RULES, WHICH ARE A CONTRACT . . .”). Based significantly on the fact the term was included in the contest

determine that the venture capital firm’s program for Black female business entrepreneurs violated § 1981.<sup>138</sup> The Eleventh Circuit Court of Appeals ruled that AAER was likely to prevail on the merits because the court did not find that the Fearless Fund grant program met the factual requirements to qualify as a remedial affirmative action program.<sup>139</sup> This determination by the appellate court at the preliminary injunction stage led the parties to reach a settlement agreement.<sup>140</sup>

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rules, the Eleventh Circuit Court of Appeals ruled AAER was likely to win the case on the merits. *See id.* at 769. This determination by the appellate court at the preliminary injunction stage led the parties to reach a settlement agreement. *AAER v. Fearless Foundation Settlement Update*, COUNCIL ON FOUNDATIONS., <https://cof.org/page/aaer-v-fearless-foundation-settlement-update> (last visited Mar. 31, 2026).

138. *Fearless Fund*, 103 F.4th at 770.

139. The two justices in the Eleventh Circuit majority adopted the anti-DEI white predominance-protecting view that the term “racial discrimination” applies to contexts in which Whites, as a racial group, enjoy the vast majority of the most coveted positions and are historically and currently dominant among the persons selected for coveted resources. *See Fearless Fund*, 103 F.4th at 777 (rejecting Fearless Fund’s argument that its funding of Black female business owners does not “absolute[ly] bar” White business owners). Deploying the Supreme Court’s decision in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976), the two-judge panel joined in AAER’s project to excise the white-predominant context of new business funding and the startup/venture capital sector’s overwhelming exclusion of Black women. *Fearless Fund*, 103 F.4th at 777 n.6 (rejecting Fearless Fund’s argument that its contest’s funding of only Black females was a private company program to address the manifest anti-Black-female racial imbalance in U.S. venture capital funding). In 1976, the Supreme Court majority ruled §1981 and Title VII protections are available to persons belonging to the White racial group in the “unlikely” factual circumstance that “white citizens would encounter substantial racial discrimination of the sort proscribed under the Act.” *McDonald*, 427 U.S. at 295-96. The Eleventh Circuit panel split on whether AAER was likely to successfully show the awarding of a handful of \$20,000 awards in a sector in which “far less than one percent of all [of the hundreds of billions in U.S.] venture-capital funding in recent years” constitutes invidious race-based deprivation of the “right to contract” under §1981. *See Fearless Fund*, 103 F.4th at 781 n.1 (Rosenbaum, Circuit Judge, dissenting) (“Indeed, a study found that ‘firms started by Black women received only .0006% of [venture capital] funding raised by startups between 2009 and 2017.’”). Judge Rosenbaum dissented based on his conclusion that AAER and its members did not have Article III standing because AAER and its members failed to show they suffered “an injury in fact” as a result of the Fearless Foundation’s Strivers Grant Contest “designed to help Black women in the business world, where they are grossly underrepresented as business owners.” *Id.* at 781-82.

140. *See Fearless Fund*, 103 F.4th at 769. *See also* Alexandra Olson, *VC Firm Forced to Close Black Women’s Grant Program After Lawsuit from*

Thus, although the Eleventh Circuit’s ruling in *AAER v. Fearless Fund* sided with AAER, it recognized that §1981 precedent treats the consideration of race to remedy racial exclusion as legal.<sup>141</sup> Instead of the substantive rejection of long-standing Supreme Court § 1981 precedent that AAER hoped for, the circuit court decision acknowledged that the Supreme Court has long interpreted Title VII to permit race-conscious remedial programs when it explained:

The Supreme Court initially devised the remedial-program exception to Title VII’s antidiscrimination provision in *United Steelworkers of America, AFL-CIO-CLC v. Weber* and it articulated a test to evaluate such programs several years later in *Johnson v. Transportation Agency*. A private, race-conscious remedial program, the Court said, is valid if it (1) addresses “manifest racial imbalances” and (2) doesn’t “unnecessarily trammel” the rights of others or “create[ ] an absolute bar to” the advancement of other employees. Because Title VII and § 1981 claims are often brought together in the employment context, we have since extended the remedial-program exception to employment-discrimination cases arising under § 1981.<sup>142</sup>

Thus, even though *AAER v. Fearless Fund* is an emblematic blitz-style white predominance lawsuit, the ruling in the case reinforces that § 1981 law remains settled on the point that inclusion-motivated race attentiveness that remedies race discrimination is legally permissible under § 1981.<sup>143</sup>

This section has explained that the legal objective of blitz-style white predominance lawsuits like *AAER v. Fearless Fund* is to undermine the racial-inclusivity-increasing function of § 1981—a law enacted at the end of the American Civil War by the 1866 U.S. Congress to confer non-Whites with the same rights to enter contracts enjoyed

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*Conservative Activists*, FORTUNE (Sept. 11, 2024, 4:23 PM), <https://fortune.com/2024/09/11/vc-firm-fearless-fund-ends-black-womens-grant-program-conservative-activists-lawsuit/>.

141. See *Fearless Fund*, 103 F.4th at 769.

142. *Id.* at 776 (citations omitted).

143. Due to factual circumstances specific to terms used by Fearless Fund in describing its contest program, Fearless Fund ended its grant program in exchange for AAER agreeing to end its litigation against it. See Olson, *supra* note 140; See *AAER v. Fearless Foundation Settlement Update*, *supra* note 137.

by American Whites. The next section examines anti-DEI blitz-style letter attacks that similarly seek to undermine the racial-hierarchy-dismantling function of Title VII enacted and reinforced by the 1964 and 1991 U.S. Congresses, respectively. Examining an anti-DEI attack on the National Association for Stock Car Auto Racing (NASCAR), it illuminates the obscured legal endgame harbored by anti-DEI forces: to make it illegal under Title VII of the Civil Rights Acts of 1964 and 1991<sup>144</sup> to diminish white predominance in prized American industries, companies, sectors, and job categories, no matter, as is the case for NASCAR, how overwhelmingly they are predominated by Whites.

### B. *AFL's EEOC Letter Ask and Warping of Title VII Doctrine*

America First Legal (AFL) initiated a highly publicized letter-writing campaign falsely alleging that DEI in employment decisions violates Title VII.<sup>145</sup> It does not. Yet, in a tactic similar to AAER's weaponization of § 1981 discussed above, AFL's blitz-style, anti-DEI attacks on private companies propagate a false narrative about the meaning of Title VII federal employment antidiscrimination law—the falsity that considering race to dismantle racialized hierarchies in American businesses is prohibited by current Supreme Court Title VII doctrine. AFL contends that NASCAR Enterprises, LLC and the NASCAR-affiliated Rev Racing, LLC engaged in “ongoing, deliberate, and illegal discrimination against white, male Americans.” AFL also contends that NASCAR and Rev Racing violate Title VII by the mere fact they operate the “Diversity Driver Development Program,” the “Diversity Pit Crew Program,” and the “Diversity Internship Program” and by the mere fact that it is stated in a press release that these three programs “provide training and opportunities for women and minorities in the driver's seat and on pit crews within the NASCAR industry.” AFL's letter to NASCAR, like almost all of its EEOC letters, falsely suggests that it is an illegal and “discriminatory employment practice” for companies to articulate in writing that they are committed

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144. Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended (Civil Rights Act of 1991).

145. *See, e.g.*, NASCAR Letter, *supra* note 13. The AFL website has a list of over four dozen companies that it names “Woke Corporations,” alleging the companies have violated Title VII in letters to the EEOC. *Woke Corporations We've Exposed: Driving Lasting Change in Corporate America*, AM. FIRST. LEGAL, <https://aflegal.org/woke-corporations/> (last visited Jan. 28, 2026).

to race and sex inclusivity in hiring, contracting, and make up of their Boards of Directors.

AFL's blitz-style white predominance attack on NASCAR employs the anti-DEI movement's hyper-decontextualization tactic when it ignores the racial composition of the workplace—NASCAR—that AFL is accusing of victimizing Whites by employing diversity and inclusion policies. The decontextualization tactic is, first, a project of description. AFL describes NASCAR's consideration of race for purposes of inclusion (1) without any mention of the extent to which Whites predominate particular job categories of NASCAR's various business enterprises and (2) without any mention of the extent to which the company's workforce manifests a racialized white-advantaging hierarchy. Second, the decontextualization tactic is a project of (1) taking snippets of the Title VII statute out of their full textual context within the statute and (2) employing rhetoric of white victimhood in lieu of contending with existing Title VII Supreme Court precedents that deem inclusion-motivated race consciousness in employment decision-making to be lawful. As previously explained, the doctrinal reality is the opposite under Title VII.<sup>146</sup> It is Title VII's protection of race affirmative action and other forms of race DEI that organizations like AFL fail to acknowledge, but, at the same time, target for destruction.

AFL<sup>147</sup> appears to have two or three staff attorneys whose names appear on several dozen primarily boilerplate letters sent to the EEOC and companies falsely claiming that inclusion-motivated attention to race violates Title VII of the Civil Rights Act of 1964, as amended by the 1991 Civil Rights Act.<sup>148</sup> The anti-DEI blitz-style attacks by AFL ignore the *Weber-Johnson* precedent and

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146. See *supra* text accompanying notes 106-115.

147. The status of AAER and AFL as 501(c)(3) nonprofit organizations allows wealthy right-wing donors to receive lucrative, taxpayer-subsidized tax deductions for funding attorneys such as Jonathan Mitchell and partners at the Consoy McCarthy law firm who regularly “co-counsel” or serve as counsel for AAER and AFL. *American Alliance for Equality*, PROPUBLICA: NONPROFIT EXPLORER, <https://projects.propublica.org/nonprofits/organizations/871453126>, (last visited Jan. 29 2026); *America First Legal Foundation*, PROPUBLICA: NONPROFIT EXPLORER, <https://projects.propublica.org/nonprofits/organizations/862190372>, (last visited Jan. 29 2026); *America First Legal Foundation Rakes in Millions to Push Radical Agenda*, ACCOUNTABLE.US (Nov. 17, 2023), <https://accountable.us/america-first-legal-foundation-rakes-in-millions-to-push-radical-agenda/>.

148. See *infra* text accompanying notes 150-152.

mischaracterize § 1981 and Title VII doctrine to hide the truth about the present-day meaning of civil rights laws and obscure the fact that AFL's doctrinal goal is to convert federal statutes banning race discrimination into tools for preserving white predominance. When AFL's blitz-style EEOC letters do mention the pro-affirmative action Title VII *Weber-Johnson* case precedent,<sup>149</sup> the AFL letters' discussion ignores and egregiously misrepresents the Supreme Court-established Title VII legal doctrine.<sup>150</sup>

Examples of entities that AFL has accused of violating Title VII for inclusion-motivated consideration of race and sex include Activision Blizzard<sup>151</sup> as well as NASCAR.<sup>152</sup> The audacity of selecting these particular entities is indicative of a blitz-style white predominance attack. NASCAR is "a largely white sport where Confederate flags were prevalent until they were banned in 2020."<sup>153</sup> Similarly, Activision Blizzard, a video game company, has a predominantly white workforce and corporate leadership.<sup>154</sup> Additionally, Activision

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149. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 194-97, 99 S.Ct. 2721, 2723-24 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616, 616-17, 107 S.Ct. 1442, 1443-44 (1987).

150. See, e.g., Letter from Reed D. Rubinstein, Am. First Legal Found., to Deborah Kane, Area Dir., & Debra Lawrence, Regional Att'y, Pittsburg Area Off., U.S. Equal Emp. Opportunity Comm'n (July 13, 2022), <https://aflegal.org/wp-content/uploads/2022/07/Dicks-Sporting-Goods-EEOC-071322-Final-Signed.pdf> (asserting falsely that "[d]ecades of case law holds that—no matter how well intentioned—such policies [referring to inclusion-motivated race attentiveness in hiring, training, and contracting] are prohibited" (citing *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730; *Johnson*, 480 U.S. at 621-41, 107 S.Ct. at 2736-46)). As this Article explains, the *Weber* and *Johnson* cases hold the exact opposite. See *supra* text accompanying notes 106-115.

151. Letter from Nicholas R. Barry, Senior Litig. Couns., Am. First Legal Found., to Christine Park-Gonzalez, Dir., & Anna Y. Park, Reg'l Att'y, L.A. Dist. Off., U.S. Equal Emp. Opportunity Comm'n (Aug. 15, 2023), <https://media.aflegal.org/wp-content/uploads/2023/08/15182424/Activision-EEOC-Letter-08152023.pdf> [hereinafter Activision Letter].

152. NASCAR Letter, *supra* note 13.

153. Emily Birnbaum, *Trump Allies Attack Corporate 'Bigotry' Against White Men*, BLOOMBERG NEWS (Dec. 11, 2023, at 7:00 EST), <https://news.bloomberglaw.com/environment-and-energy/bigotry-against-white-men-targeted-in-trump-2025-plan>.

154. *Diversity at Activision Blizzard and Nintendo*, DIVERSIO, <https://diversio.com/diversity-at-activision-blizzard-and-nintendo/> (last updated Apr. 12, 2022, at 8:38 EST) (illustrating Activision Blizzard's lack of racial diversity and white predominance in light of the 0% racial and ethnic diversity in executive

Blizzard was the focus of several major and highly-publicized sexual harassment scandals, settlements of various state and federal investigations, and lawsuits by the SEC, EEOC, and California Civil Rights Department over sexual assault, mistreatment of, and discrimination against women because of Activision's "frat boy" workplace culture.<sup>155</sup> AFL's claim in its letter to the EEOC that "Activision's [inclusivity-driven] employment practices are patently illegal" does not accurately describe Title VII law.<sup>156</sup>

Much like citizen science racism tactics of relying on decontextualized factoids,<sup>157</sup> AFL's letter complaint to the EEOC charging Activision's DEI policies of violating Title VII strings together Supreme Court cases that are inapposite to the legality of the race, sex, religion, national origin, and sexual orientation DEI practices.<sup>158</sup> AFL says Activision "admits to engaging in" DEI policies and asserts such policies to be "unlawful employment practices" without pointing to a Supreme Court ruling to support its assertion.<sup>159</sup> Strikingly missing from AFL's EEOC letter is a reference to the Supreme Court's *Weber-Johnson* case precedent, which means the letter flagrantly fails to acknowledge what the Eleventh Circuit's *AAER v. Fearless Fund* ruling refers to as the "test" for establishing when an employer's race-conscious policy constitutes a *Weber-Johnson*-permitted "remedial-

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leadership and anecdotes of experiences with racism at Blizzard). For more information on the lack of diversity and inclusion in the video game industry, see Ryan Browne, *The \$150 Billion Video Game Industry Grapples with a Murky Track Record on Diversity*, CNBC (Aug. 14, 2020, at 1:23 EDT), <https://www.cnbc.com/2020/08/14/video-game-industry-grapples-with-murky-track-record-on-diversity.html> (discussing the video game industry's historically poor diversity metrics, including underrepresentation of Black game developers); JOHANNA WESTSTAR, EVA KWAN & SHRUTI KUMAR FOR INT'L GAME DEVS. ASS'N, DEVELOPER SATISFACTION SURVEY SUMMARY REPORT 13 (2019), [https://s3-us-east-2.amazonaws.com/igda-website/wp-content/uploads/2020/01/29093706/IGDA-DSS-2019\\_Summary-Report\\_Nov-20-2019.pdf](https://s3-us-east-2.amazonaws.com/igda-website/wp-content/uploads/2020/01/29093706/IGDA-DSS-2019_Summary-Report_Nov-20-2019.pdf) (revealing that 81% of game developers identified as White, while only 2% identified as Black and 7% as Hispanic).

155. Ty Roush, *Activision Blizzard Will Pay SEC \$35 Million to Settle Claims*, FORBES (Feb. 3, 2023, at 14:34 EST), <https://www.forbes.com/sites/tyleroush/2023/02/03/activision-blizzard-will-pay-sec-35-million-to-settle-claims-over-its-workplace-misconduct-disclosures/>.

156. *California Sues Activision Blizzard Over Alleged Harassment*, BBC (July 22, 2021), <https://www.bbc.com/news/technology-57929543>.

157. See *supra* text accompanying notes 25-34.

158. Activision Letter, *supra* note 151.

159. *Id.*

program.”<sup>160</sup> Rather than referencing the controlling Title VII legal standard applicable to an employer’s inclusion-motivated affirmative action use of race and sex—that such race and sex consciousness enjoys Title VII statutory legality, the AFL Activision letter to the EEOC includes cites to only four legal authorities, each of which are inapposite Supreme Court rulings—*Bob Jones Univ. v. United States* (which is inapplicable because the legal issue in the case involves Section 501(c)(3) of the Internal Revenue Code),<sup>161</sup> *Brown v. Board of Education* (which is inapplicable because the legal issue is the Supreme Court’s landmark holding that whites-only school laws violate the Equal Protection Clause),<sup>162</sup> *Texas v. Johnson* (which is inapplicable because the issue is whether laws banning burning of the American flag violate the First Amendment),<sup>163</sup> and *League of United Latin Am. Citizens v. Perry* (which is inapplicable because the issue in the case is the legality of voting districts under the Voting Rights Act).<sup>164</sup>

Similar to AFL’s doctrine-weak letter attacking DEI programs announced by Activision, the AFL letter contending that NASCAR’s inclusion-motivated race awareness violates Title VII<sup>165</sup> illustrates the tactic of relying heavily on “shock and awe”<sup>166</sup> rhetoric but weakly on substantive law.<sup>167</sup> Specifically, employing the citizen science racism

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160. See *supra* text accompanying note 142.

161. Activision Letter, *supra* note 151. (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983)).

162. *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 484, 494 (1954)).

163. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 418 (1989)).

164. *Id.* (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part)).

165. NASCAR Letter (“An investigation is especially proper here because the evidence strongly suggests that NASCAR and Rev Racing have chosen to continue their unlawful employment practices under the cloak of a ‘diverse backgrounds and experiences’ rebranding.”).

166. Harlan Ullman, *20 Years On, ‘Shock and Awe’ Remains Relevant*, THE HILL, (Mar. 20, 2023, at 8:00 EST), <https://thehill.com/opinion/national-security/3907622-20-years-on-shock-and-awe-remains-relevant/> (describing U.S. Army General Tommy Franks’ reference to the U.S. onslaught in Iraq as a “shock and awe” strategy).

167. NASCAR Letter, *supra* note 13 (AFL purporting that NASCAR’s Diversity Internship Program, Diversity Pit Crew Development Program, and Diversity Driver Development Program violate a provision of Title VII, 42 U.S.C. § 2000e-2(d), which deems it unlawful for an employer to discriminate on the basis of race in selection for an internship, and 42 U.S.C. § 2000e-3(b), which deems it unlawful for notices of programs to indicate “preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin”).

tactic of using analogical arguments, the AFL letter analogizes NASCAR adopting policies to include non-White men and women to sordid and morally degraded anti-Black-racist policies that subjugated Black and other non-White Americans for generations. To make this impertinent comparison and to promote the falsehood that efforts to dismantle racialized employment hierarchies in NASCAR jobs victimize White men, the AFL letter accusing NASCAR of violating Title VII includes decontextualized text from the Supreme Court's 1954 *Brown v. Board of Education* ruling.<sup>168</sup>

First, using the tactic of hyper-decontextualization, the NASCAR AFL letter mislabels, as “[invidious race] discrimination,”<sup>169</sup> the redressment of racial exclusion in a sector in which Whites, as a racial group, historically and currently hold the overwhelming majority of the most coveted positions—drivers and pit crew workers in the privately owned NASCAR sports entertainment business. Second, the AFL letter challenging the legality of DEI efforts by NASCAR and Rev Racing inaccurately ignores the vast distinctions between the factual and historical contexts of the *Brown* case and NASCAR jobs as it uses the tactic of analogical argument, likening the race-attentive Rev Racing program that seeks to increase inclusion of non-Whites in NASCAR positions that have previously been whites-only to the racialized white supremacist system of whites-only laws that codified 1950s America's legally-sanctioned racial caste system.

Under the 1950s system, African American children, like Linda Brown on whose behalf the *Brown* litigation was filed, were subject to school assignment laws that deemed them too racially inferior to Whites to attend white-designated schools.<sup>170</sup> The AFL letter to NASCAR employs a decontextualized snippet from the *Brown* ruling to improperly analogize Rev Racing's DEI internship program to the whites-only school assignment laws at issue in the landmark *Brown* equal protection case precedent.<sup>171</sup> In so doing, this letter accusing NASCAR and Rev Racing of race discrimination against White men exemplifies clearly the impertinence with which white predominance blitz-style attacks inaptly appropriate facts to ignore and misrepresent

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168. NASCAR Letter, *supra* note 13 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

169. *Id.*

170. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

171. NASCAR Letter, *supra* note 13.

the law of iconic Supreme Court rulings like *Brown v. Board of Education*.

A specific example of AFL's inapt hyper-decontextualization and factual misappropriation of the *Brown* legal precedent is particularly shocking and discombobulating. AFL's letter lifts text from the *Brown* opinion to make the unsubstantiated assertion that diminishing white predominance in NASCAR job categories constitutes victimizing White men, calling Rev Racing's program "discrimination" and making the unsubstantiated contention that policy efforts to redress white male predominance in the most coveted positions in the NASCAR workforce "generates [in White men] a feeling of inferiority" "that may affect their hearts and minds in a way unlikely to ever be [un]done [sic]."<sup>172</sup> This appropriation of *Brown*'s description of the negative psychological effects that exclusion by whites-only school assignment laws had on African American children is odd and, frankly, perverse. It is wholly inapt to compare the racial stigmatization criticized by the Court's *Brown* decision to efforts by NASCAR to counter the predominance at NASCAR enjoyed by White men.

It would be far more apt to analogize the exclusion of African American and other non-White men and women from NASCAR driver and pit crew positions to the anti-Black race exclusion deemed unconstitutional in the Court's *Brown* ruling. But, like the rest of AFL's EEOC letter, this rhetorical invocation of factually and legally decontextualized words from *Brown* and Title VII leaves unmentioned that inclusion-motivated race consciousness and sex and sexual orientation consciousness have, for many decades, been deemed nondiscriminatory under Title VII if that consciousness fits within the parameters the Supreme Court has established.<sup>173</sup> The AFL letter also fails to mention NASCAR's multi-decade history of racism and racial exclusion.<sup>174</sup> This is a feat of historical and legal hyper-decontextualization.

The AFL letter's failure to acknowledge that inclusion-motivated race awareness policies are legal if the employer demonstrates

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172. *Id.* (citing *Brown*, 347 U.S. at 494).

173. *United Steelworkers v. Weber*, 443 U.S. 193, 209, 99 S.Ct. 2721, 2730 (1979).

174. Andrew Lawrence, *Nascar Failed to Fight Racism for 72 Years. Don't Praise its Support of Bubba Wallace Yet*, THE GUARDIAN (June 23, 2022, 11:37 PM), <https://www.theguardian.com/sport/2020/jun/23/nascar-bubba-wallace-racism-tal-ladega-wendell-scott>.

that the inclusion-motivated affirmative action policies are adopted to respond to a “manifest racial imbalance”<sup>175</sup> in its workforce is demonstrative of the blitz-style tactic of egregiously misrepresenting Title VII legal doctrine. AFL’s audacity to claim White men are victimized in job categories at NASCAR that, as a factual matter, are predominated by White men reveals how egregiously blitz-style attacks misrepresent the factual context of DEI programs like Rev Racing. Far from a factual context in which White men are victimized, the job category of race car driver at NASCAR is a quintessential example of a position in which there has long been a “manifest racial [and sex] imbalance.”<sup>176</sup>

In fact, there are few professions as white predominant as NASCAR driving.<sup>177</sup> In 2020, a rope tied in the exact distinctive manner as a life-sized noose was found hanging “in one area of the garage—that of the 43 car of Bubba Wallace.”<sup>178</sup> Wallace is the only present-day Black driver to have a full-time entry in the top-tier NASCAR Cup-level series.<sup>179</sup> In NASCAR’s 77-year history, there has been just one other Black full-time entry driver to NASCAR’s top-tier Cup Series level<sup>180</sup>—Wendell Scott, who, in 1963, was the first and last Black driver to win a NASCAR Cup Series race until Wallace did in 2021.<sup>181</sup> Over 92 percent of the 2020 Cup Series NASCAR drivers were White.<sup>182</sup> Three years later, when AFL sent its letter to the EEOC

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175. *Weber*, 443 U.S. at 209, 99 S.Ct. at 2730.

176. *Id.* at 209, 99 S.Ct. at 2730.

177. See Kayla McDuffie, Sev Allton, and Nicole Rojas, *Meet 5 Gen Z Drivers Challenging NASCAR Stereotypes in Charlotte*, CHARLOTTE OBSERVER (Apr. 17, 2023, 8:30 AM), <https://www.charlotteobserver.com/charlottefive/c5-people/article274317785.html>

178. *NASCAR Releases Image of Noose Found in Bubba Wallace’s Garage, Says Concern Was ‘Real,’* ESPN (June 25, 2020), [https://www.espn.com/racing/nascar/story/\\_/id/29364817/nascar-releases-image-noose-found-bubba-wallace-garage-says-concern-was-real](https://www.espn.com/racing/nascar/story/_/id/29364817/nascar-releases-image-noose-found-bubba-wallace-garage-says-concern-was-real).

179. Cian Brittle, *The Reluctant Activist: How Bubba Wallace Went from a Kid Racing Cars to Driving Change in NASCAR*, BLACKBOOK MOTORSPORT (Oct. 10, 2023), <https://www.blackbookmotorsport.com/features/bubba-wallace-interview-nascar-23xi-racing-activism-diversity-racism/>.

180. *Id.*

181. *Id.*

182. Only three drivers from non-White backgrounds competed in the NASCAR Cup Series in 2022. See Randall Williams, *Inside NASCAR’s Forever Race for Diversity*, BOARDROOM (May 27, 2022), <https://boardroom.tv/nascar-diversity-initiatives/>; see also *2020 NASCAR Cup Series Drivers*, ESPN, [https://www.espn.com/racing/drivers/\\_/year/2020](https://www.espn.com/racing/drivers/_/year/2020) (last visited Oct. 10, 2025).

falsely alleging that NASCAR's racial DEI efforts violate Title VII, just one NASCAR Cup Series driver was African American—Bubba Wallace.<sup>183</sup> The empirical reality of the overwhelming degree of white predominance among NASCAR drivers since the racing company was founded, including Cup Series drivers, is much more extreme. The merely two African American NASCAR Cup Series-level drivers, one of whom drove over a half century ago,<sup>184</sup> and Bubba Wallace, who joined that NASCAR level in 2018, make up such a small portion of the overall number of NASCAR drivers in the most coveted driver category over the past six decades that the white predominance among such NASCAR drivers is still 100 percent unless taken out to an unreasonable decimal place.<sup>185</sup> AFL's execution of blitz attacks on

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183. See generally Williams, *supra* note 182; see also *2023 NASCAR Cup Series Standings*, ESPN, [https://www.espn.com/racing/standings/\\_/year/2023/sort/championshipPts](https://www.espn.com/racing/standings/_/year/2023/sort/championshipPts) (indicating that Wallace is the one African American driver of 41); *NASCAR's Three National Series, How They Work*, ESPN, <https://nascar101.nascar.com/2021/07/22/nascars-three-national-series-how-they-work/> (last visited Oct. 10, 2025) (explaining that “The Cup Series is the most elite level of all three series.”). There have been only two African American Cup Series-level NASCAR drivers since NASCAR's founding in 1948. Rajah Caruth, who is African American, has been racing in the third-tier NASCAR Craftsman Truck for the past few years. See *Rajah Caruth*, NASCAR, <https://www.nascar.com/drivers/rajah-caruth/> (last visited Oct. 10, 2025).

184. Scott's experience driving as a NASCAR driver in a Cup Series race is demonstrative of NASCAR's extreme white predominance and its anti-Black racism during Scott's tenure as a driver. “When Scott finished the final lap ahead of the other drivers, there was no checkered flag to signal the end of the race” and “his achievement wasn't initially acknowledged”— “[i]nstead, the checkered flag, trophy and victory-circle celebration went to Buck Baker, the second-place finisher, whom Scott had lapped twice.” Rich Griset, *Wendell Scott, First Black NASCAR Driver, Is Finally Getting His Due*, WASH. POST (Feb. 1, 2024), <https://www.washingtonpost.com/history/2024/02/01/wendell-scott-black-nascar-driver/> (explaining that NASCAR officials held a “two-hour closed meeting” to make the correction that Scott won the race, though Scott was the overwhelmingly clear winner over the White second-place driver by lapping him twice). See also, e.g., DaShawn Brown, *The Life and Legacy of NASCAR Racing Legend Wendell Scott*, WSOC-TV (Feb. 10, 2022, 11:28 AM), <https://www.wsoc.tv/news/local/wendell-scott-racing-legend-nascars-first-blackdriver/15MGOWTL6RG2NHXELCFK5SZGXA/>; Les Montgomery, *Inside NASCAR Wendell Scott Part 1* (Aug. 1, 2010), <https://www.youtube.com/watch?v=o1KJsLBZr9w> (describing Scott's winning 1963 race in Jacksonville, FL that was declared third place despite Scott lapping the second-place white NASCAR driver three times).

185. Cf. Mike Freeman, *Claim of NASCAR Bias Against White Men Isn't Just Buffoonery. It's Downright Dangerous.*, USA TODAY (Nov. 4, 2023, 9:14 AM),

efforts by companies as overwhelmingly white predominant as NASCAR exhibits AFL's utter disregard of contemporary employment discrimination and workplace racism and racial exclusion experienced by non-Whites.<sup>186</sup>

AFL's blitzing of corporations across the nation with anti-DEI lawsuit threats and letters to the EEOC further illuminates that the desired endgame is a legal doctrine that establishes a rule of automatic illegality, which is directly at odds with existing Title VII doctrine. The AFL letters reveal a pro-racial-exclusion ideology and interest in laws and policies so extreme that the mere existence of company policies or programs that articulate an organization's mission as one that seeks to include non-Whites is framed as illegal by AFL. This is a giveaway that AFL's ultimate legal objective is to preserve white predominance in institutions, workplaces, and job categories that have always been white predominant. An illegality rule for anything that poses the slightest prospect of diminishment of white predominance appears to be AFL's ultimate legal objective.

Analysis of the blitz-style white predominance legal attacks this Article centers reveals an ideological preference on the part of anti-DEI forces for laws that protect and preserve the racial exclusion of non-Whites from coveted job categories and business funding. Seeking to install a legal system that maintains high levels of white predominance in coveted American business sectors while the use of race remains legally permissible for law enforcement, imprisonment, border enforcement, and exclusionary racial stereotyping purposes is not a race-inattentive project; it is a white predominance preservation

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<https://www.usatoday.com/story/sports/columnist/mike-freeman/2023/11/04/nascar-discrimination-eoc-white-men-diversity/71428107007/> (referring to NASCAR drivers as "being 99.999999 percent white"); NASCAR, *NASCAR Cup Series Drivers*, <https://www.nascar.com/drivers/nascar-cup-series/> (last visited May 8, 2026).

186. AFL exhibits no interest in exclusion and employment discrimination violations against persons who do not identify as men, whether they be White or non-White, and likewise exhibits no interest in challenging corporate practices that exclude and discriminate against persons who are not heterosexual. AFL targets companies for carrying merchandise discussing the topic of "trans or nonbinary" identity. See Letter from Ian D. Prior, Senior Advisor, Am. First Legal Found., to Mattel, Inc., (Dec. 19, 2023), <https://media.aflegal.org/wp-content/uploads/2023/12/19214238/Mattel-Board-Letter-12192023.pdf>. The anti-DEI organization also targets companies that celebrate LGBTQ+ Pride. See Letter from Gene Hamilton, Vice President and Gen. Couns., Am. First Legal Found., to Target Corporation, (June 6, 2023), <https://media.aflegal.org/wp-content/uploads/2023/06/0614129/06062023-Target-Demand-Letter.pdf>.

project. Accordingly, the “asks” made by anti-DEI groups in attacking corporate policies that increase race inclusivity reveal the anti-DEI endgame as a legal system under which it violates United States statutory law to diminish even very high levels of white predominance.

Like the rest of the contemporary war on DEI, the EEOC letters and threat letters to companies sent by AFL are categorically race aware, not colorblind. The objective of blitz-style white predominance legal attacks is to erode the existing legality of affirmative action under the Title VII *Johnson v. Transportation Agency* legal test. Their project is to preserve white predominance by promoting a doctrineless and erroneous narrative about Title VII law that contradicts the holdings in cases like *Weber* and *Johnson*. AFL also promotes and solicits unverified and often anonymous stories of white male victimhood<sup>187</sup> and a non-empirical, ahistorical, weaponized understanding of the terms “equity” and “discrimination.”<sup>188</sup> These white male victimhood narratives are central to blitz-style white predominance attacks because they are the mechanism by which AFL’s promotion of exclusion of non-Whites from coveted job categories and businesses is falsely framed as colorblind.<sup>189</sup>

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187. See generally *Center for Legal Equality—A Project of America First Legal*, AM. FIRST LEGAL, <https://aflegal.org/center-for-legal-equality/> [<https://perma.cc/SK4C-27WP>] (last visited Mar. 31, 2026) (featuring Stephen Miller above a photo of an unidentified White man, standing with his arms crossed wearing a dress shirt and tie, with text alongside the man’s photo declaring that: “It is Time to Stand Up” against “a pernicious new” and “fundamentally un-American” ideology that “must be defeated” with text continuing to further declare that: “Often, this ideology of exclusion, segregation, and discrimination advances under the banner of ‘equity,’ ‘Diversity, Equity, and Inclusion,’ or ‘woke values,’ but these gentle-sounding euphemisms are designed to mask a brute force agenda of social engineering, Marxist dehumanization, and overt racism and sexism.”).

188. See *id.* (calling for victims of “the new ‘equity’ crusade that has overtaken Big Business, Big Education, and Big Government” to contact AFL, stating further that “[i]f you or someone you know is the victim of woke ideology, equity-based exclusion, abusive DEI policies” and “if you have been illegally discriminated against in the workplace or in search of a contract or government benefit under the Orwellian guise of ‘diversity,’ ‘equity,’ ‘inclusion,’ please contact us TODAY.”).

189. AFL’s website touts a handful of lawsuits, hordes of EEOC and threat letters, and large numbers of press releases that use decontextualization to promote the falsehood that anti-Black exclusion—preserving white predominance—victimizes Whites, most particularly White men. See generally *Featured Litigation*, AM. FIRST LEGAL, <https://aflegal.org/litigation/>. For similar decontextualized promoting of the preservation of white predominance, see, e.g., President Donald J.

## CONCLUSION

A key tactical feature of blitz-style white predominance attacks on race DEI is deployment of a pejorative version of colorblindness terminology—using the term “wokeness”—to erroneously paint the inclusion-motivated dismantling of job category racial hierarchies as racism against Whites. In addition to its naming of blitz-style white predominance attacks and its explanation that blitz-style legal attacks on racial DEI policies are flagrantly at odds with the existing 42 U.S.C. § 1981 and Title VII precedent and doctrinal rules, this Article makes the novel contribution of observing that the legal attacks on the racial inclusivity policies of entities like the Fearless Fund and NASCAR echo tactics employed in white supremacist deployment of genetics research.<sup>190</sup>

Considering race to increase inclusion of non-Whites in employment and business-funding contexts where White persons enjoy high levels of white racial predominance is not racism against Whites. It is a dismantling of America’s longstanding racialized hierarchies and a counterbalance to contemporary vestiges of America’s centuries-old racial caste system in which the White racial group is assigned to the dominant racial caste. Nevertheless, contemporary anti-DEI forces seek to preserve existing overwhelmingly high levels of white predominance in selective university admissions,<sup>191</sup> corporate jobs,<sup>192</sup>

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Trump, Inaugural Address (Jan. 20, 2025) (Donald Trump, on the first day of his second term as U.S. President, using the word “colorblind” in his inauguration day speech to announce his policy agenda to end racial inclusivity and other types of DEI policies); *see also generally* Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (eliminating the executive orders of several U.S. Presidents dating back to 1964 purportedly to combat “illegal DEI”).

190. *See* AFL’s EEOC letter, *supra* note 17.

191. *See, e.g.*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org> (last updated Apr. 15, 2025).

192. *See, e.g.*, Mike Delikat & Ernan Kiselica, *Litigation Targeting Large Company DEI Programs on the Rise*, HARV. LAW SCH. F. ON CORP. GOVERNANCE, (Sep. 18, 2024), <https://corpgov.law.harvard.edu/2024/09/18/LITIGATION-TARGETING-LARGE-COMPANY-DEI-PROGRAMS-ON-THE-RISE/>; Julian Mark and Taylor Telford, *Conservative Activist Sues 2 Major Law Firms Over Diversity Fellowships*, WASH. POST (Aug. 22, 2023), <https://www.washingtonpost.com/business/2023/08/22/diversity-fellowships-lawsuit-affirmative-action-employment/>.

venture capital funding,<sup>193</sup> racecar team and video game development internships,<sup>194</sup> student editors of law journals,<sup>195</sup> news anchors,<sup>196</sup> television writers,<sup>197</sup> air traffic controllers,<sup>198</sup> the U.S. Vice Presidency,<sup>199</sup> city mayors and fire chiefs,<sup>200</sup> and other elected government

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193. *See, e.g.*, Press Release, Am. All. For Equal Rights, American Alliance for Equal Rights Concludes Lawsuit Against the Fearless Fund’s Black-Only “Strivers Grant Contest,” (Sep. 11, 2024), <https://americanallianceforequalrights.org/american-alliance-for-equal-rights-concludes-lawsuit-against-the-fearless-funds-black-only-strivers-grant-contest/> (detailing a settlement barring venture capital group Fearless Fund from maintaining a grant specifically for Black women).

194. *See e.g.*, Activision Letter, *supra* note 151; NASCAR Letter, *supra* note 13.

195. *See, e.g.*, Compl. at 36, Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) v. Nw. University, No. 1:25-cv-01129 (N.D. Ill. Jan. 31, 2025).

196. *See, e.g.*, *America First Legal Files Lawsuit Against CBS for Alleged Anti-White and Anti-Male Employment Practices Involving Emmy Award-Winning News Anchor*, AM. FIRST. LEGAL (Jul. 2, 2024), <https://aflegal.org/america-first-legal-files-lawsuit-against-cbs-for-alleged-anti-white-and-anti-male-employment-practices-involving-emmy-award-winning-news-anchor/>.

197. *See id.*

198. *See, e.g.*, Minho Kim, *Vance and Duffy Echo Trump in Blaming D.E.I. for Crash Near Washington*, N.Y. TIMES (Feb. 2, 2025), [www.nytimes.com/2025/02/02/us/politics/vance-duffy-trump-dei-crash.html](http://www.nytimes.com/2025/02/02/us/politics/vance-duffy-trump-dei-crash.html) (reporting erroneous statements by U.S. President Donald Trump, Transportation Secretary Dean Duffy, Vice President JD Vance, and Senator Eric Schmitt blaming a military helicopter’s midair collision with a commercial jet on “D.E.I.” and non-existent hiring “quotas” for air traffic controller hiring even though “years of employee turnover, lack of funding and difficulties with in-person training during the coronavirus pandemic, not diversity hiring practices,” have caused “[r]ecent staffing shortages” of air traffic controllers).

199. *See, e.g.*, Nicquel Terry Ellis, *What is DEI? Republicans Are Using the Term to Attack Kamala Harris, But Experts Say It’s Widely Misunderstood*, CNN (Jul. 24, 2024, 8:08 ET), <https://www.cnn.com/2024/07/24/politics/dei-kamala-harris/index.html> (reporting Tennessee U.S. Congressman Tim Burchett referring to then-Vice President Kamala Harris as “One hundred percent . . . a DEI hire”).

200. *See, e.g.*, See Melanie Mason, *Republicans Blame DEI for the LA Fires. The Fire Captain Disagrees.*, POLITICO (Jan. 15, 2025), <https://www.politico.com/news/2025/01/15/republicans-dei-la-fires-00198551> (describing anti-DEI attack on Los Angeles Mayor Karen Bass Mayor, the first Black woman to run the city, and Los Angeles Fire Chief Kristin Crowley, the first woman and openly gay person to run the fire department, after hurricane-wind-driven fires instigated two unprecedented residential fire conflagrations—the Palisades and Eaton fires—that burned thousands of homes). Bass was criticized for the Eaton fire even though it

positions.<sup>201</sup> If the statutory race inclusion illegality regime anti-DEI forces are promoting comes to pass, their project to pervert federal civil rights laws like §1981 and Title VII to protect white predominance will succeed.

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occurred in an unincorporated community called Altadena, of which Bass is not the mayor and Crowley is not the fire chief. *Id.* Altadena’s status as a historically Black unincorporated community is tied to the steering of African Americans away from the most coveted residential neighborhoods in which federal, state, and local American governments were either directly involved or complicit over decades and even centuries. *Cf.* Cristina Gomez-Vidal & Anu Manchikanti Gomez, *Invisible and Unequal: Unincorporated Community Status as a Structural Determinant of Health*, 285 *SOC. SCI. & MED.* 114292, 114293 (2021) (“Until the mid-20th century, racialized municipal processes (racially restrictive covenants, red-lining, black codes, block busting, and racial steering) segregated people of color, many into unincorporated communities . . .”).

201. *See, e.g.*, Anagha Srikanth, *New Study Finds White Male Minority Rule Dominates US*, *THE HILL: CHANGING AM.* (May 26, 2021), <https://thehill.com/changing-america/respect/diversity-inclusion/555503-new-study-finds-white-male-minority-rule/>.