North Carolina
CIVIL RIGHTS
Law Review

VOLUME 6 | SPRING 2026 | ISSUE 2

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North Carolina CIVIL RIGHTS Law Review

VOLUME 6 **SPRING 2026** **ISSUE 2**

CONTENTS

ARTICLES

SUPREMACY POLITICS: THE CODING OF POWER IN ARTIFICIAL INTELLIGENCE (AI).. Dana G. Jones 1

SCHOOL RESOURCE OFFICERS: WHY AND HOW WE SHOULD DEMAND CHANGE.. Jillian La Serna 52

WHITE PREDOMINANCE IS THE POINT........ Kimberly West-Faulcon 77

COMMENT

PROTECTING ABORTION BY PROTECTING SPEECH: REVISITING NORTH CAROLINA'S MANDATORY ULTRASOUND LAW AFTER *DOBBS* AND *NIFLA*………………………………….…. Kathryn S. Rowe 133

RECENT DEVELOPMENTS

MORE THAN JUST AN "ATYPICAL" HARDSHIP: HOW COURTS ARE MISSING THE MARK ON SOLITARY CONFINEMENT………….................................Kyra Goins 169

DISCRIMINATION DISGUISED AS PARENTAL EMPOWERMENT: A TITLE IX CHALLENGE TO NORTH CAROLINA'S BILL OF RIGHTS……………………………………..BETH LECROY 183

FORGOTTEN CAMPESINOS, FORGOTTEN COUNTIES: THE RAMPANT, FATAL CIVIL RIGHTS ABUSES AGAINST H-2A LABORERS IN NORTH CAROLINA AND THEIR FIGHT FOR BARGAINING POWER IN *N.C. FARM BUREAU FEDERATION V. U.S. DEPARTMENT OF LABOR*………………………………...….LUKE O. SMITH 198

SUPREMACY POLITICS: THE CODING OF POWER IN ARTIFICIAL INTELLIGENCE (AI) Health Equity and the Politics of Algorithmic Decision Making in U.S. Healthcare[*]

DANA G. JONES[**]

Supremacy politics within the realm of healthcare artificial intelligence (AI) transcends being a mere theoretical notion; it is a self-reinforcing system in which policy rollbacks, deregulation, and administrative rulemaking that authorize or incentivize algorithmic bias create conditions harmful to marginalized patients. The algorithm that denied your grandmother a ventilator during the COVID-19 pandemic exemplifies how embedded supremacy within technological systems can produce outcomes that are neither neutral nor objective. Likewise, the AI system that flagged your neighbor for insurance fraud and the predictive model that decided which patients received priority access to specialist care are biased. As artificial intelligence increasingly dictates life-and-death decisions in American healthcare, a concerning trend has become apparent: these seemingly objective systems systematically reinforce and magnify racial, economic, and social disparities under the guise of mathematical accuracy, resulting in a

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[*] © 2026 Dana G. Jones.

[**] Dana G. Jones, JD, LL.M, Assistant Professor of Law, North Carolina Central University School of Law; 2025-2026 NCCU Institute for Artificial Intelligence Emerging Leader. The author earned her Juris Doctor (JD) from North Carolina Central University School of Law and LL.M from Loyola University-Chicago School of Law Beazley Institute for Health Law and Policy. Dedicated to my students, to whom I have taught the power of advocacy, ensuring fairness prevails and access to health care, governance, and justice is guaranteed. Special thanks to Professor Paolo Farah, The University of Tulsa College of Law, for his invitation to workshop this paper at the 2025 SEALS conference discussion group on Emerging Technologies and the Law and to my fellow 2025 SEALS Health Law Workshop discussants for their input, opinions, and guidance. Dedicated to Irving L. Joyner, my law professor and colleague, whose example instilled in me the courage, conviction, and tenacity required to challenge systems of injustice and pursue meaningful change. I extend my gratitude and appreciation to the brilliant staff editors of the UNC North Carolina Civil Rights Law Journal for their contributions to this work; their comments, suggestions, and editorial polish contributed to its impact.

coded supremacy. Rather than functioning as impartial decision makers, such algorithms often reflect and perpetuate social biases and inequalities. These biases may be encoded in design unintentionally through flawed data sets, discriminatory criteria, or denials rooted in historic inequities. Recent executive orders mandating the development of artificial intelligence systems without consideration for diversity, equity, and inclusion (DEI) or the incorporation of wokeness[1] *ideology have raised significant concerns. DEI and critical race theory ideology are viewed as the existential threat to reliable AI*[2] *despite systemic bias and historic racial inequality. Policies that deliberately overlook differences in race, gender, age, and societal factors fail to address the needs of society's most vulnerable groups, thereby exacerbating the strain on an already fragile healthcare system.*

This article describes the development and implementation of these policies injected into AI-initiatives as supremacy politics. The term "supremacy politics", as introduced in this article, refers to the deliberate preservation and exercise of power by dominant social, political, and economic groups, typically those who are wealthy and connected, through policies, technologies, and institutional decisions that disproportionately burden populations with diminished access to protection, advocacy, and influence.[3] *While rooted in systems of racial hierarchy,*

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1. This article will not explore an in-depth examination of "wokeness ideology," it will attempt to discuss it through the lens of "supremacy-politics," as conceptualized by the author. The author relies ultimately on an underlying explanation of "wokeness" in the United States, as a critique manifested in several ways. Radical feminists contended that the legal system served as a medium for making male dominance both invisible and legitimate. *See generally* CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989). Critical race theorists argued that racism is the usual way American society does business. *See generally* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001). These perspectives eventually became part of public discourse, often used as default explanations for the inequalities present in American society, leading to a perception of American institutions as mere instruments of oppression.

2. Exec. Order No. 14,319, 90 Fed. Reg. 35389 (July 28, 2025).

3. Sandeep Dhaliwal, *The Criminal System Under Racial Capitalism*, 58 U.C. DAVIS L. REV. 1589, 1600-1602 (2025) for a description on unequal social relations and capitalism involving unequal divisions of power over the production and distribution of social wealth, with more power residing with owners, financers and less with workers and the poor. This unequal sharing of power arises, creates and sustains political inequality which is why capitalism sits in persistent tension with democracy. Racial categories serve the instrumental purpose of distributing access to

supremacy politics operates across multiple axis of marginalization, including age, socioeconomic status, disability, and gender nonconformity.[4] *It operates by shifting risk onto vulnerable groups, and diminishing the ability of those most impacted to engage in decision-making processes that affect their lives.*[5] *In exploring the application of artificial intelligence and algorithmic usage, this definition includes the intentional preservation and exercise of power by dominant social, political, and economic entities, thus making governance less democratic.*[6] *These policies, technologies, and institutional choices place an undue burden on communities with limited access to protection, advocacy, and influence to hold governments accountable and transparent.*[7] *Supremacy politics suppresses the democratic participation of historically oppressed groups by reinforcing structural marginalization.*[8] *It operates obscuring accountability, transferring risk to vulnerable populations, and undermining the democratic ability of those most affected to participate in shaping the decisions that govern their lives.*[9] *Given the significant power disparities, supremacy politics serves to reinforce existing inequities and structural barriers that hinder the efforts of oppressed groups to meaningfully engage in governance.*[10] *The entrenchment of supremacy politics through algorithms and AI arises from the unequal distribution of power within government and society, resulting in democratic inequality.*

When federal agencies discontinue testing for programmatic bias, withdraw funding from civil rights offices, and limit the collection of health data, they are not simply dismantling bureaucratic initiatives.

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wealth, power and information onto the unequal division of power over production and distribution of wealth. *Id.* at 1598.

4. *See* Eric V. Hull, *Environmental Injustice and Covid-19: Addressing the Link between Pandemics and Pollution in Racial and Ethnic Minority Communities Under the Clean Air Act*, 35 GEO. ENV'T L. REV. 113, 136, 141 (2024).

5. Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality and America Democracy*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/article/systematic-inequality-american-democracy/#:~:text=The%20United%20States%20is%20a,the%20fabric%20of%20American%20policymaking.

6. Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688, 1693.

7. *Id*. at 1697.

8. *Id.*

9. *Id.*

10. *See id.*

Instead, they lay the groundwork for a new form of segregation: one that is encoded in algorithms, deployed on a large scale, and shielded from the scrutiny of traditional civil rights.[11] *Drawing on critical race theory and employing a socio-legal methodology, this article demonstrates how existing legal frameworks, including Title VI of the Civil Rights Act, the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act, prove inadequate to address the systemic nature of algorithmic bias in healthcare. The analysis highlights a disconcerting paradox: as healthcare artificial intelligence systems grow in complexity, they simultaneously enhance their capacity to perpetuate discrimination, exacerbate structural racism*[12]*, and lead to a shortfall in legal accountability reinforced by the supremacy of politics.*

INTRODUCTION……………………………………………………….5
I. DEFINING SUPREMACY POLITICS…………………………………8
A. *White Supremacy a Historical Baseline……………….*8
B. *Operationalizing "Supremacy Politics"…………..…*10
C. *Supremacy Made Systemic: How Policy Becomes Pre-Text for Exclusion……………………………………………..…*16
II. THE CONVERGENCE OF SUPREMACY POLITICS AND ALGORITHMIC GOVERNANCE……………………………………………….…19
A. *Dismantling Diversity, Equity and Inclusion (DEI)……………………………………………………………*25

11. This concept captures how legislative and administrative rollbacks, such as the rescission of Executive Order 13,985 strip public-facing technologies, including AI systems, of the normative infrastructure required to mitigate systemic bias and advance equity. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021) *revoked by* Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 20, 2025); *see* Exec. Order No. 14,319, 90 Fed. Reg. 35389 (July 28, 2025). The term is introduced here to describe a distinct pattern of political and legal rollback in U.S. administrative law that intersects with emerging algorithmic systems in public health governance. The author defines "supremacy politics" as the deliberate dismantling of equity-promoting legal and administrative structures, particularly those addressing racial and social justice, through formal legal tools that embed exclusion into governance under the guise of neutrality.

12. Structural racism is defined as the macrolevel systems, social forces, institutions, ideologies, and processes that interact with one another to generate and reinforce inequities among racial and ethnic groups. *See* Gilbert C. Gee & Chandra L. Ford, *Structural Racism and Health Inequities: Old Issues, New Directions*, 8 DU BOIS REV. 115 (2011).

B. *From ideology to Infrastructure*…………………..28
III. THEORETICAL FOUNDATIONS: CRITICAL RACE THEORY AND WOKENESS MEET DIGITAL GOVERNANCE……………………..30
A. *Explaining Systemic Injustice: Anti-Subordination and Distributive Justice Approaches*……………………………..34
B. *Weaponization in Health Care Programs*…………37
1. Case Examples: Algoritmic Denials in Medicare Advantage……………………………………………………..37
IV. SDG-16 FRAMEWORK: PEACE, JUSTICE AND STRONG INSTITUTIONS IN AI GOVERNANCE……………………………………………..41
A. *SDG-16 As a Normative Framework*………………42
B. *Target 16.3: Rule of Law and Equal Access to Justice in Algorithmic Context*……………………………………….43
C. *Target 16.6: Accountable and Transparent Institution in AI-Driven Policy AI-Deployment*…………………………..44
D. *Target 16.7 Inclusive Decision-Making in Healthcare Technology*...…………………………………………………...45
V. REFORMS……………………………………………………..48
CONCLUSION…………………………………………………….50
APPENDIX A:…………………………………………………….51

INTRODUCTION

"We cannot play ostrich. Democracy just cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. America must get to work. In the chill climate in which we live, we must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. We must dissent from a nation that has buried its head in the sand, waiting in vain for the needs of its poor, its elderly, and it's sick to disappear and just blow away. We must dissent from a government that has left its young without jobs, education or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better**"** [13]

— *Justice Thurgood Marshall*

13. Robert Post, *Marshall as a Judge*, 88 FORDHAM L. REV. 13 (2019).

As Justice Marshall reminds us, intent is never truly concealed in public forums. It permeates our laws, institutions, and increasingly, in our algorithms as well. In healthcare policy, artificial intelligence (AI) is marketed as a neutral instrument capable of increasing efficiency, reducing fraud, waste, and abuse, and streamlining decision-making.[14] However, beneath these technical promises lies an ideological framework shaped by racial hierarchies, economic incentives, and political resistance to addressing historical injustices. This article introduces the concept of supremacy politics to describe how regulatory and political actors deliberately dismantle equity-focused protections while embedding discriminatory logics into automated systems. As diversity, equity, and inclusion (DEI) frameworks are rolled back and civil rights safeguards are weakened, algorithmic governance is transformed from a shield against injustice into a sophisticated tool for its perpetuation. This is a restructuring of healthcare governance in ways that reproduce and legitimize inequalities.

In the United States, the integration of AI into healthcare programs, such as Medicaid and Medicare Advantage, is occurring alongside the removal of equity mandates, civil rights oversight, and health-justice commitments.[15] These developments are not parallel, they are deeply intertwined. AI systems now make critical determinations about patient eligibility, treatment approvals, and discharge timelines, while the United States government works to dismantle the institutional capacity that ensures that these systems do not discriminate.[16] This intersection of AI adoption amid the deliberate erosion of equity safeguards represents a new paradigm of exclusionary governance. This article employs the United Nations Sustainable Development Goals (SDGs), particularly 16 (inclusive institutions), as a normative framework for understanding how these shifts compromise health equity and democratic accountability. AI tools are not politically neutral; they are coded reflections of the legal and administrative priorities of

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14. *See* Margaret Chustecki, *Benefits and Risks of AI in Health Care: Narrative Review*, 13 INTERACTIVE J. OF MED. RSCH., Nov. 2024, at 1.

15. *See Leveraging the Power of AI to Serve America's Healthcare Needs*, CTR. FOR MEDICARE & MEDICAID SERVS., https://ai.cms.gov/ (last visited May 13, 2026); Exec. Order No. 14,398, 91 Fed. Reg. 16147 (Mar. 26, 2026).

16. *See* Delaram Rezaeikhonakdar, *Artificial Intelligence in Healthcare: Governance, Compliance, and Data Privacy Beyond HIPPA,* 29 QUINNIPIAC HEALTH L.J. 177, 181 (2026) ("These LLM-based tools are increasingly integrated into healthcare workflows, assisting with patient triage, clinical scheduling, drafting discharge notes, assigning hospital beds, and responding to procedural inquiries.")

the actors who commission, design, and deploy them. When supremacy politics shapes these priorities, algorithmic governance reflects and reinforces discriminatory commitments, deepening structural inequities in access to care. The SDG framework considers whether an AI system will reduce inequalities and pushes developers and governments to consider long-term societal impacts, prioritizing human dignity, and considering fairness, accountability, transparency, and inclusion without resorting to supremacy thinking, politics, or governance.

Although this article outlines the structural harms resulting from the intersection of supremacy politics and algorithmic governance in healthcare, it does not aim to comprehensively address the complex regulatory questions these issues pose. A companion piece, *Supremacy Politics II: Coding Injustice; How Anti-Woke Governance and AI Reshape Inequality in American Healthcare*[17], develops a comprehensive framework of legal and policy interventions aimed at restoring transparency, accountability, and equity in the use of artificial intelligence across federally subsidized healthcare programs and the development of regulations around AI usage.

Section I defines supremacy politics in the digital era, examining how the rollback of DEI protections intersects with AI deployment to reinforce structural inequality. Section II analyzes the convergence of supremacy politics and algorithmic governance, and their influence on healthcare delivery, situating these developments within the broader patterns of political retrenchment. Section III explores the relationship between anti-DEI political campaigns, critical race theory discourse, and the design of AI systems, including examples from Medicare Advantage programs that reveal the human cost of algorithmic bias in healthcare settings. While this discussion is high-level, a more detailed examination of Medicare Advantage litigation and patient outcomes is developed in a companion work, *Artificial Intelligence Can Kill You*.[18] Section IV introduces SDG 16 as a framework for reimagining AI governance in healthcare, offering preliminary interventions while signaling that comprehensive solutions will be addressed in *Supremacy Politics II*. The article concludes by urging a deliberate choice: either permit supremacy politics to entrench

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17. Dana G. Jones, *Coding Injustice; How Anti-Woke Governance and AI Reshape Inequality in American Healthcare*, (forthcoming June 2026) (on file with author).

18. Dana G. Jones, *Artificial Intelligence Can Kill You*, 33 U. OF ILL. ELDER L. J. 401 (forthcoming 2026).

discriminatory practices in our technological infrastructure or commit to laws and institutions that ensure AI serves justice rather than undermining it. This essay provides a set of operational indicators which appear in Appendix A (Abbreviated Operational Criteria), with the expanded framework developed in *Supremacy Politics II: The Architecture of Repair (manuscript in progress)*.

I. DEFINING SUPREMACY POLITICS

A. *White Supremacy a Historical Baseline*

White supremacy[19] is a political, economic, and cultural system in which whites overwhelmingly control power and material resources, and in which white dominance and non-white subordination exist across a broad array of institutions and settings.[20] This definition of white supremacy primarily addresses the institutional structures that form its foundation.[21] It highlights how white supremacy is intertwined with societal frameworks that sustain racial dominance by unequally distributing power, resources, and authority.[22] These systems establish whiteness as the standard by which other races are evaluated. While the term white supremacy captures a historically specific arrangement of racial dominance, contemporary systems of control operate through a wider array of political, economic, and technological levers. Just as the Reconstruction Amendments[23] were succeeded by

19. *See* JEROME DOWD, NEGRO IN AMERICAN LIFE 493-97 (1926) (examining white supremacy and politics).

20. Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. SOC. JUST. 1, 3 (2018) (quoting Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n. 129 (1989)).

21. *Id.*

22. *Id.*

23. The Reconstruction Amendments, comprising the 13th, 14th, and 15th Amendments (1865-1870), were designed to secure rights for formerly enslaved individuals. The 13th Amendment (1865) abolished slavery and involuntary servitude. The 14th Amendment (1868) granted citizenship to all persons born or naturalized in the U.S., including formerly enslaved individuals, and guaranteed equal protection under the law. The 15th Amendment (1870) prohibited the denial of the right to vote based on race, color, or previous condition of servitude. *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 2.

decades of Jim Crow laws[24] that undermined their promise, today's civil rights and equity advancements are encountering a new era of regressive policies. Legislative and administrative rollbacks of diversity, equity, and inclusion (DEI) initiatives, often framed as "neutral" or "color-blind" reforms, echo the same structural logic, dismantling the very mechanisms intended to remedy systemic inequities.[25] These modern campaigns do not simply resist racial equity; they also target protections based on gender, age, disability, economic status, and other identity markers, reinforcing a hierarchy in which the most powerful consolidate their control over public institutions, policy agendas, and algorithmic decision-making systems. This broader and more adaptive configuration of power, intentionally designed to weaken inclusive structures and redistribute authority upward, is what this article terms "supremacy politics."[26]

Building on this foundation, supremacy politics describes the deliberate restructuring of power to undermine equity-promoting systems and concentrate authority in the hands of those who are politically, economically, and socially dominant. In contrast to the historically confined framework of white supremacy, which focuses on racial hierarchy, supremacy politics encompasses a broader, more adaptable system that operates across various axes of identity and vulnerability, including race, gender, age, disability, and economic status. It is not merely the passive residue of bias; it constitutes an intentional political project executed through legislation, administrative rulemaking, judicial interpretation, and, increasingly, through algorithmic design choices that, while seemingly neutral, perpetuate systemic inequity. In

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24. Jim Crow laws, enacted after Reconstruction, were state and local regulations primarily implemented in the Southern and some border states. These laws enforced racial segregation in public facilities, transportation, and voting rights, effectively circumventing the rights established by the Reconstruction Amendments. *See Jim Crow Laws and Racial Segregation*, VCU LIBRS., https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-andracial-segregation/ (last visited Mar. 31, 2026); U.S. CONST. amend. XIII; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 2.

25. Vianca T. Malick, *DEI—The Newest "Dirty Words*," 35 CONN. BAR ASS'N 34 (2025), https://www.ctbar.org/docs/default-source/publications/connecticut-lawyer/volume-35/5-mayjune-25/ctl_mayjune25; *see also* Suzanna Shery, *DEI and Antisemitism: Bred in the Bone,* 19 FIU L. REV. 901, 918 (2025) (arguing for the dismantling of "DEI bureaucracy").

26. For a condensed indicator set used here, *see infra* Appendix A (Abbreviated Operational Criteria).

this regard, supremacy politics functions as both a successor and an evolution of historical systems of dominance, employing contemporary tools such as technology, privatization, and deregulation to maintain hierarchies and restrict the scope of inclusive governance**.**

B. *Operationalizing "Supremacy Politics"*

Supremacy politics is not merely rhetorical; it manifests through concrete government actions such as the elimination of DEI offices and positions, executive orders banning race-conscious training or data collection, funding cuts to civil rights enforcement agencies, and legislative efforts to reframe anti-discrimination initiatives as ideological overreach.[27] This conceptualization extends beyond individual prejudice to encompass what critical race theorists have long recognized: that racial biases originate from a perceived objectivity, a belief that individuals can be fair and rational.[28] However, unconscious biases may function in ways that contradict explicit beliefs.[29] These implicit biases can be particularly detrimental because they sometimes contravene explicitly held commitments.[30] Furthermore, such costs may arise in contexts involving economically and socially significant decisions.[31]

Supremacy politics involves strategically using governmental power to dismantle institutional protections, furthering the subordination of the most vulnerable.[32] Implicit biases and supremacy politics interact to perpetuate systemic inequalities, both by covertly influencing decision-making and by overtly removing safeguards intended to prevent discrimination and marginalization.

In healthcare, supremacy politics do not simply influence artificial intelligence, they weaponize it. By embedding discriminatory priorities into automated systems, these politics transform AI from a tool of innovation into an instrument of exclusion, operating beyond

27. *See, e.g.*, Exec. Order No. 13,950, 85 Fed. Reg. 60683, 60685-86 (Sept. 22, 2020) (*revoked* 2021); S.B. 266, 125th Gen. Assembly, Reg. Sess. (Fla. 2023) (eliminating DEI programs in state universities).

28. Moran, Rachel F., *Whatever Happened to Racism?*, 79 SAINT JOHNS L. REV. 899, 907 (2005).

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1750-51, 1767, 1789 (1993).

the reach of traditional oversight and shielding it from public accountability.[33] According to a growing body of evidence, healthcare algorithms that power Al may include bias against underrepresented communities, thus amplifying existing inequalities in medicine.[34] Recent developments in generative artificial intelligence and its applications have allowed Al to perpetuate racial discrimination.[35] It is increasingly clear that the concentrated impact of algorithmic harm on marginalized communities threatens to erode essential democratic values and norms by reinforcing historic patterns of racial hierarchy through systemic civil and human rights violations.[36] The Al algorithms increasingly used to treat and diagnose patients can have biases and blind spots that could impede healthcare for Black and Latinx patients.[37] These systems do not merely reflect existing inequalities, they actively reproduce and amplify them through automated decision-making processes that operate at unprecedented scales and speeds. Through this, AI algorithms create "spirit murder," the daily assault on human dignity experienced by members of subordinated groups.[38]

The translation of supremacy politics into algorithmic systems is facilitated by several distinct pathways that connect political decisions to technological outcomes. The rollback of regulations and elimination of oversight contribute to this process. The potential for AI and algorithmic tools to amplify racial biases in healthcare is heightened by unclear regulations and a lack of

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33. *See* Clarence Okoh, *The Dilemma of Black Coding: Assessing Algorithmic Discrimination Legislation in the United States,* 59 CT. L. REV. 10, 10 (2023).

34. Isabella Backman, *Eliminating Racial Bias in Health Care AI: Expert Panel Offers Guidelines,* YALE SCH. OF MED. (Dec. 21, 2023), https://medicine.yale.edu/news-article/eliminating-racial-bias-in-health-care-ai-expert-panel-offers-guidelines/.

35. Ashwini K.P. (Special Rapporteur on the Human Rts. Council), *Racism and Al: "Bias from the Past Leads to Bias in the Future,"* U.N. Doc. A/HRC/56/68 (July 30, 2024).

36. *See e.g.*, Okah, *supra* note 33, at 12; SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION (2018); RUHA BENJAMIN, RACE AFTER TECHNOLOGY (2019).

37. Carrie Stetler, *AI Algorithms Used in Healthcare Can Perpetuate Bias*, RUTGERS U. NEWARK (Nov. 14, 2024), https://www.newark.rutgers.edu/news/ai-algorithms-used-healthcare-can-perpetuate-bias#:~:text=The%20AI%20algorithms%20increasingly%20used,a%20Rutgers%2DNewark%20data%20scientist..

38. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 73 (1991) (defining "spirit murder" as "disregard for others whose lives qualitatively depend on our regard").

transparency.[39] When federal agencies dismantle civil rights offices or reduce the requirements for algorithmic auditing, AI systems are deployed without sufficient bias testing or community oversight.[40] Data restrictions and collection limitations often restrict the collection of racial and ethnic health data under the guise of promoting color-blind policies.[41] The phenomenon, described as "epistemic violence"[42], refers to the systematic exclusion of knowledge regarding racial health disparities, which is essential for identifying and rectifying algorithmic bias. In the absence of disaggregated data, AI systems cannot be assessed for discriminatory outcomes, thus creating a feedback loop that perpetuates existing inequities.[43] "Algorithmic bias is neither inevitable nor merely a mechanical or technical issue. Conscious decisions by algorithm developers, algorithm users, health care industry leaders, and regulators can mitigate and prevent bias and proactively advance health equity."[44] Nonetheless, addressing such bias requires not only technical solutions but also institutional efforts.[45]

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39. Crystal Grant, *Algorithms Are Making Decisions about Health Care, Which May Only Worsen Medical Racism*, AM. C.L. UNION (Oct. 3, 2022), https://www.aclu.org/news/privacy- technology/algorithms-in-health-care-may-worsen-medical-racism.

40. Okoh, *supra* note 33, at 12.

41. *See* Brooke A. Cunningham & Andre S. M. Scarlato, *Ensnared by Colorblindness: Discourse on Health Care Disparities*, 28 ETHNICITY & DISEASE 235, 236 (2018).

42. This paper discusses how social justice is considered in the human computer interaction research and defines epistemic violence. This article will not engage in a full examination of this valuable concept. For a more comprehensive overview of epistemic violence, *see* Ishita Chordia et al., *Social Justice in HCI: A Systematic Literature Review*, PROC. OF THE 2024 CHI CONF. ON HUM. FACTORS IN COMPUTING SYS., https://doi.org/10.1145/3613904.3642704.

43. *See id.*

44. Marshall H. Chin et al., *Guiding Principles to Address the Impact of Algorithm Bias on Racial and Ethnic Disparities in Health and Health Care*, *in* 6 JAMA NETWORK OPEN, Dec. 15, 2023, at 2, https://doi.org/10.1001/jamanetworkopen.2023.45050.

45. For competing perspectives highlighting the potential of AI to reduce disparities and improve equity in healthcare settings, *see id.* at 4-8 (proposing human-centered AI frameworks to reduce inequities); Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCI. 447, 447 (2019), https://doi.org/10.1126/science.aax2342 (finding that algorithmic adjustments can mitigate racial inequities in predictive risk scoring); Glenn Cohen et al., *The Legal and Ethical Concerns That Arise from Using Complex Predictive Analytics in Health Care*, 33 HEALTH AFF. 1139, 1142–44 (2014),

The capacity to mount these institutional efforts is not diminished by inadvertence; it is systematically stripped away through supremacy politics. By dismantling DEI offices and eliminating diversity personnel, those in power erode the infrastructure necessary to detect, challenge, and remedy algorithmic harm, ensuring that inequities remain embedded and unchallenged.[46] In the absence of these equity-centered actors, AI systems are developed and deployed without substantial challenges to their underlying assumptions or ethical considerations.[47] Employment practices play a crucial role in determining access to opportunities and reveal the unequal distribution of advantages among different racial and gender groups in the United States.[48] This underscores the importance for employers to tackle systemic issues related to the under-hiring and promotion of minorities and genders that are underrepresented as part of their DEI initiatives.[49] Incorporating diversity and inclusion principles into AI can help address issues related to fairness and bias.[50] Studies indicate that diverse teams are more likely to identify and tackle biases within AI systems.[51] From a design standpoint, such teams offer varied perspectives on fairness and can pinpoint additional bias sources in data or algorithms.[52] From the perspective of users, engaging marginalized communities in AI development can enhance the technology's fairness

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https://doi.org/10.1377/hlthaff.2014.0048 (discussing how predictive models may improve resource allocation and outcomes when responsibly deployed). Although these frameworks underscore AI's constructive potential, this article instead brings to light the structural risks posed by algorithmic opacity, the political erosion of equity safeguards, and the operational entrenchment of supremacy politics within healthcare decision-making.

46. *See* Oni J. Blackstock et al., *Health Care is the New Battlefront for Anti-DEI Attacks*, *in* PLOS GLOB. PUB. HEALTH (Ijeoma Nnodim Opara ed., 2024), https://doi.org/10.1371/journal.pgph.0003131.

47. *See* Jana Fehr et al., *A Trustworthy AI Reality-Check: The Lack of Transparency of Artificial Intelligence Products in Healthcare*, 6 FRONTIERS DIGIT. HEALTH, Feb. 2024, at 2. ("Despite the available guidance, experts have raised concerns that principles and guidelines may not be enough to guarantee ethical AI because they lack specific requirements to translate principles into practice.")

48. Deven R. Desai et al., *Using Algorithms to Tame Discrimination: A Path to Diversity, Equity and Inclusion*, 56 U.C. DAVIS 1703, 1705-06 (2023).

49. *Id.*

50. Rifat A. Shams, Didar Zowghi & Muneera Bano, *AI and the Quest for Diversity and Inclusion: A Systematic Literature Review*, 5 AI ETHICS 411, 411 (2025).

51. *Id.*

52. *Id.*

and trustworthiness for these groups, thereby increasing its acceptance among them.[53] Supremacy politics recognizes that funding cuts and resource reallocation divert resources from equity-focused AI research and bias mitigation efforts. This economic dimension of program and position cuts creates a systematic misallocation of resources necessary to address algorithmic discrimination.

As previously stated, supremacy politics operates intersectionally, affecting multiple marginalized communities. Healthcare Al systems shaped by supremacy politics disproportionately harm racial minorities, women, individuals with disabilities, LGBTQ+ patients and economically disadvantaged populations.[54] For Indigenous communities, these harms violate the principles of data sovereignty, the right of Indigenous peoples to control data about their communities, cultures, and territories.[55] It also creates gender-based discrimination, creating particular vulnerabilities for women of color in healthcare settings.[56] Al systems trained on datasets that historically underrepresent women's health conditions may systematically misdiagnose or undertreat conditions that disproportionately affect women while simultaneously applying racialized assumptions about pain tolerance and treatment compliance.[57]

Empirical evidence supports the connection between supremacy politics and algorithmic discrimination in healthcare.[58] A pivotal study from 2019, featured in the journal *Science*, revealed that an algorithm designed to forecast healthcare requirements for over 100 million individuals exhibited bias against Black patients.[59] The algorithm relies on healthcare spending to predict future health needs. However, with less access to care, Black patients appeared to have lower health needs in the algorithmic model

53. *Id.*

54. *See* SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 1–2 (2018).

55. Maggie Walter & Stephanie R. Carroll, *Indigenous Data Sovereignty, Governance, and the Link to Indigenous Policy*, *in* INDIGENOUS DATA SOVEREIGNTY AND POL'Y 1, 1–2 (Tahu Kukutai & Stephanie R. Carroll eds., 2022).

56. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 263–264 (1997).

57. *See id.*

58. *See* Micharl P. Cary, Jr. et al., *Mitigating Racial and Ethnic Bias and Advancing Health Equity in Clinical Algorithms: A Scoping Review*, 42 HEALTH AFFS. 1359, 1365 (2023).

59. Obermeyer et al., *supra* note 45, at 447.

despite having more severe health conditions.[60] When civil rights enforcement is weakened and healthcare access is restricted for marginalized communities, these policy decisions become encoded in the data used to train Al systems, creating technological systems that perpetuate discrimination while appearing mathematically neutral.[61]

Datasets driving healthcare AI function as repositories of policy-engineered inequities, embedding the consequences of political choices into systems that appear objective.[62] This entrenchment necessitates an expanded understanding of supremacy politics, one that captures not only overt racial hostility, but also the structural and systemic modalities. Power is exercised via ostensibly neutral medical and technological systems that impose disproportionate burdens on women and the economically disadvantaged.[63] Scholars of critical race theory have long understood that racism functions not only through personal bias but also via systemic structures that consistently favor white individuals while marginalizing people of color.[64] A common viewpoint suggests that DEI programs are perceived as a modern corporate strategy aimed at presenting a socially responsible image while simultaneously avoiding meaningful engagement with genuine social injustices.[65] As anticipated, similar to how affirmative action often predominantly benefits white women, those individuals frequently lead DEI departments.[66] White women are often advanced in professional settings under the guise of "equity," thereby reaping the economic benefits that these initiatives purport to extend to marginalized groups. If DEI were assessed based on outcomes rather than intentions, it

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60. Ryan Levi & Dan Gorenstein, *AI in Medicine Needs to Counter Bias – and Not Entrench it,* NAT'L PUB. RADIO (June 6, 2023), https://www.npr.org/sections/health-shots/2023/06/06/1180314219/artificial-intelligence-racial-bias-health-care.

61. Obermeyer et al., *supra* note 45, at 453.

62. *See* Uwe Peters, *Algorithmic Political Bias in Artificial Intelligence Systems*, 35 PHIL. & TECH., Mar. 2022, at 2.

63. *See* Erika Bachiochi & Rachel N. Morrison, *Dobbs, Equality, and the Contested Meaning of Women's Rights*, 29 TEX. REV. L. AND POL. 11, 60 (2024).

64. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–14 (1993).

65. Damon Jones, *The Universal Fraud: How Policies for Black Americans Became Programs for Everyone Else*, BLACK WESTCHESTER, (July 27, 2025), https://blackwestchester.com/the-universal-fraud-how-policies-for-black-americans-became-programs-for-everyone-else/.

66. *Id.*

would show more advancement for privileged women than for those it claims to support.[67]

C. *Supremacy Made Systemic: How Policy Becomes Pre-Text for Exclusion*

As stated, in the context of AI-driven healthcare policy, supremacy politics manifests through algorithmic systems that embed and perpetuate racial, socioeconomic, and systemic inequalities.[68] It is notable that AI is predominantly portrayed as white.[69] The architecture of supremacy in algorithmic systems operates through multiple mechanisms: biased training data that reflect historical discrimination, exclusionary design processes that center on dominant group perspectives, and deployment strategies that prioritize efficiency over equity.[70] The U.S. legal landscape reveals both opportunities and obstacles in addressing algorithmic bias in healthcare. Title VI of the Civil Rights Act of 1964 prohibits discrimination in federally funded programs; however, its application to algorithmic systems remains controversial.[71] Disparate-impact laws enable individuals to file lawsuits for discrimination based on race, gender, or other protected characteristics without needing to demonstrate that the decision-maker had discriminatory intent.[72] This type of liability is essential for preventing discrimination in a world where complex algorithms increasingly make important decisions.[73] However, the current protections against algorithmic disparate impacts are inadequate.[74] They exist within a fragmented collection of federal statutes, many of which have been weakened by court decisions.[75] Stronger protections are necessary to safeguard Americans from algorithmic discrimination in healthcare.

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67. *Id.*

68. *See* Stephen Cave & Kanta Dihal, *The Whiteness of AI*, 33 PHIL. & TECH. 685, 686 (2020).

69. *Id.* at 699-700.

70. *See* VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018).

71. Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7.

72. Chirag Bains, *The Legal Doctrine that Will Be Key to Preventing AI Discrimination*, BROOKINGS (Sept. 13, 2024), https://www.brookings.edu/articles/the-legal-doctrine-that-will-be-key-to-preventing-ai-discrimination/.

73. *Id.*

74. *Id.*

75. *Id.*

Researchers and technologists have consistently demonstrated that algorithmic systems can produce biased results.[76] This bias can arise when the training data lack representativeness or when algorithms identify and perpetuate subtle patterns of human bias that are embedded within the training data.[77]

Historically, healthcare systems have supported DEI initiatives, acknowledging their significance in improving patient care, enhancing employee retention, and ensuring workforce representation.[78] Recent executive orders may impede recruitment initiatives designed to develop a healthcare workforce that reflects the demographics of the communities it serves.[79] Will hospitals and other healthcare entities be designated as federal contractors and be subject to this mandate? The federal government allocates significant financial resources to hospitals and other healthcare provider networks through Medicare and Medicaid reimbursements.[80] Several of President Donald Trump's executive orders apply only to the federal government, but some impact the private sector. Executive Order 14173, for example, applies to all private sector companies, as well as having additional implications and requirements for federal contractors and other grantees. Federal contractors are no longer required to create affirmative action plans for women and minorities in the workforce.[81] Additionally, it requires all agencies to include the following language in every federal contract and grant:

- A requirement for contractors and grantees to certify that they do not "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[82]
- A requirement for contractors and grantees to agree that their "compliance in all respects with all applicable Federal anti-

76. *Id.*

77. *Id.*

78. Lisa English Hinkle & Valerie Michael, *The Future of DEI in Healthcare: Navigating Compliance and Risk Under Federal Policies*, MCBRAYER BLOG, (Mar. 11, 2025), https://www.mcbrayerfirm.com/blogs-Healthcare-Law-Blog,the-future-of-dei-in-healthcare-navigating-compliance-and-risk-under-new-federal-policies.

79. *Id.*

80. *See generally* ELAYNE J. HEISLER ET AL., CONG. RSCH. SEV. R48081, SOURCES OF FEDERAL FUNDING FOR HEALTH CARE FACILITIES: FREQUENTLY ASKED QUESTIONS 5 (2024).

81. Exec. Order No. 14173, 90 Fed. Reg. 8633, 8634 (Jan. 31, 2025).

82. *Id.*

discrimination laws is material to the government's payment decisions" for purposes of the False Claims Act ("FCA").[83]

These provisions raise concerns that private hospitals may feel obligated to adhere to the executive order mandates. [84] Executive Order 14173 explicitly designates the medical industry as one that has "adopted and actively used dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion'".[85] Several prominent medical organizations have challenged this viewpoint, arguing that DEI initiatives are essential for addressing systemic healthcare disparities and enhancing patient outcomes in the medical field.[86] Against this backdrop, the practical question arises as to what legal constraints remain on hospitals' use of automated tools if the DEI is chilled. Existing federal policy like the Americans with Disabilities Act (ADA) provides potential avenues for challenging discriminatory AI systems. That being said, its enforcement mechanisms are limited in scope.[87] Section 1557 of the Affordable Care Act explicitly prohibits discrimination in healthcare programs.[88] However, its scope and enforcement in the context of AI remain ambiguous and unclear.[89] The Office for Civil Rights (ORC) within the Department of Health and Human Services (HHS) released a final rule on May 6, 2024, in accordance with Section 1557 of the Affordable Care Act. This rule prohibits discrimination based on race, color, national origin, sex, age, or disability in health programs that receive federal funding. This aligns with the Supreme Court's 2020 ruling in *Bostock v. Clayton County*, specifying that discrimination "on the basis of sex" under Section 1557 also encompasses sexual orientation and gender identity.[90] Additionally, the rule clarified that Section 1557's protections apply to the use of artificial intelligence by providers, particularly in "patient care decision support tools," and established a continuous obligation for providers to identify and address

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83. *Id.*
84. *Id*
85. *Id.* at 8633.
86. Hinkle & Michael, *supra* note 78.
87. 42 U.S.C. § 12101.
88. 42 USC 18116.
89. 42 U.S.C. § 18116.
90. Tammy Cahill & Ashley Durner, *New Affordable Care Act Final Rule Prohibits Discriminatory Use of AI*, DINSMORE (May 8, 2024), https://www.dinsmore.com/publications/new-affordable-care-act-final-rule-prohibits-discriminatory-use-of-ai/.

the risks of any tools that might be discriminatory.[91] Under the rule, a "patient care decision support tool" is "an automated or non-automated tool, mechanism, method, technology or combination thereof used by a covered entity to support clinical decision-making in its health programs or activities."[92] Examples of tools designed to support patient care decisions include predictive algorithms that evaluate the likelihood of patients experiencing serious health issues and systems that conduct medical necessity assessments to approve or reject medical claims.[93] The OCR emphasized that when utilizing these tools, it is crucial to consider the specific details and context of each patient, referencing studies that have shown how reliance on certain algorithms can lead to racial and ethnic disparities in health care.[94]

Understanding supremacy politics in the digital age requires recognizing that technological systems are not neutral tools but rather infrastructures that can either perpetuate or challenge existing relations of power and subordination.[95] The design, deployment, and governance of Al systems in healthcare policy thus become sites of political struggle over the fundamental question of whether technology will serve to democratize healthcare access or further entrench existing inequalities.

II. THE CONVERGENCE OF SUPREMACY POLITICS AND ALGORITHMIC GOVERNANCE

As AI continues to transform healthcare delivery in the United States, it is crucial to address the intersection of legal systems, policy issues, technological progress, and structural disparities. AI has revolutionized the way clinicians make decisions regarding patient care and treatment planning.[96] Machine learning algorithms, natural language processing, and computer vision techniques have enabled AI systems to analyze vast amounts of medical data and support clinical decision-making and personalized treatment.[97] They also learn,

91. *Id.*
92. 45 C.F.R. pt. 92 (2024).
93. Bains, *supra* note 72.
94. *Id.*
95. *See* Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121, 121 (1980).
96. Backman, *supra* note 34.
97. Dhruvitkumar Talati, *AI in Healthcare Domain*, 2 J. KNOWLEDGE LEARNING & SCI. TECH. 256, 256 (2023).

systematize, and deploy inequities that have long plagued American healthcare.[98] Predictive analytics, powered by AI, plays a crucial role in early disease prevention and diagnosis by identifying patterns and risk factors, contributing to improved patient outcomes and cost-effective health care.[99] AI-driven algorithms in medical imaging improve diagnostic accuracy by, whereas decision-support systems "streamline healthcare workflows by offering real-time insights based on patient data and clinical guidelines."[100] From the outset, supremacy politics has shaped this process. Political decisions that dismantle equity protections, suppress critical data, and weaken oversight structures directly influence the design, deployment, and accountability of AI tools in healthcare.[101] The result is a feedback system in which policy choices produce discriminatory AI outcomes that, in turn, reinforce the political and institutional structures that enabled them.

The interplay between supremacy politics and algorithmic governance in healthcare creates a self-reinforcing cycle. In the healthcare sector, where AI systems are increasingly mediating access to care, benefits, and essential resources, the decline of equity-focused governance signals a revival of supremacy politics that safeguard dominant interests by concealing structural harm.[102] When political actors dismantle DEI infrastructure, limit demographic data, or weaken civil rights enforcement, they reshape the legal and institutional landscape in which healthcare AI is developed. This effectively shields biased systems from scrutiny while disproportionately disadvantaging marginalized groups.[103] Supremacy politics thus manifests

98. *AI Implications for Health Equity: Shaping the Future of Health Care Quality and Safety*, HARV. MED. SCH. (Apr. 7, 2025), https://learn.hms.harvard.edu/insights/all-insights/ai-implications-health-equity-shaping-future-health-care-quality-and-safety

99. José Gabriel Carrasco Ramírez, *AI in Healthcare: Revolutionizing Patient Care with Predictive Analytics and Decision Support Systems*, 1 J. A.I. GEN. SCI. 31, 31 (2024).

100. *Id*. at 34.

101. *See* Darius Tahir, *Trump and Kennedy Seek to Relax Safeguards for AI Healthcare Tools*, KAISER FAM. FOUND. HEALTH NEWS (May 13, 2026), https://kffhealthnews.org/health-industry/ai-artificial-intelligence-ambient-scribes-ehr-electronic-health-records-hhs-deregulation/

102. Khiara M. Bridges, *Race in the Machine: Racial Disparities in Health and Medical AI,* 110 VA. L. REV. 243 (2024).

103. Re'Nika Moore, *Trump's Executive Orders Roling Back DEI and Accessibility Efforts, Explained*, AM. C.L. UNION (Jan. 24, 2025), https://www.aclu.

through algorithmic governance that seems race-neutral yet operates within policy frameworks intentionally stripped of the tools needed to identify and address injustice.

Political actions that dismantle DEI protections shape the conditions under which AI tools are developed in the US.[104] These AI systems, trained and deployed in inequitable contexts, generate discriminatory outcomes and create accountability barriers that shield biases from being scrutinized.[105] These harms reinforce the ideological and institutional drivers of supremacy politics in the United States.

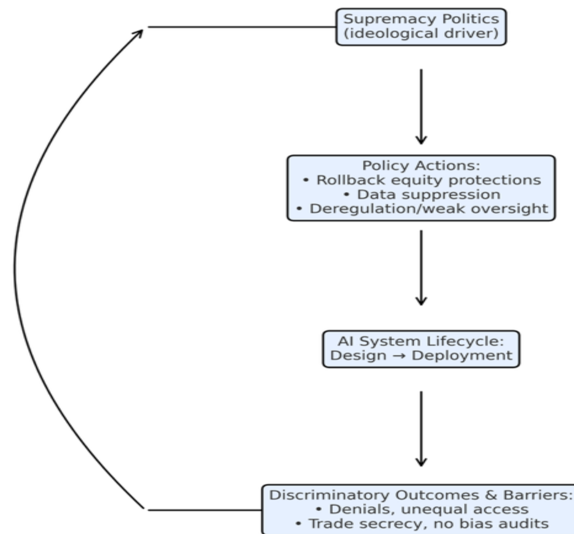

Figure 1. Cycle of Supremacy Politics Driving AI Decision-Making In Healthcare [106]

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org/news/racial-justice/trumps-executive-orders-rolling-back-dei-and-accessibility-efforts-explained?utm_source=chatgpt.com

104. *Id.*

105. *Id.*

106. *Figure 1:* This diagram illustrates the feedback loop in which supremacy politics drives policy actions—such as rollbacks of equity protections, data suppression, and deregulation—that shape AI system design and deployment. These systems generate discriminatory outcomes and barriers to accountability, which in turn reinforce the ideological and institutional drivers of supremacy politics.

Structural reforms are needed to address the political and regulatory conditions that feed the cycle to reduce inequities. As the Yale School of Medicine notes, "[e]xperts have identified numerous biased algorithms that require racial or ethnic minorities to be considerably more ill than their white counterparts to receive the same diagnosis, treatment, or resources."[107] Moreover, "[t]hese include models developed across a wide range of specialties, such as cardiac surgery and kidney transplantation.[108] AI visualization and imaging tools consistently discriminate between individuals with darker skin tones.[109] Studies have shown that standard AI models, such as Dall-E and Midjourney, tend to overrepresent lighter skin tones in generated medical images, thereby failing to accurately reflect the diverse demographic makeup of the population.[110]

In addition to clinical bias, AI has been shown to exhibit administrative bias.[111] A study revealed that an algorithm commonly used by health systems to identify patients for high-risk care management showed a substantial racial bias.[112] The algorithm, which affected up to 200 million Americans, systematically underestimated the health needs of Black patients compared with White patients sharing similar health conditions.[113] This occurred because the algorithm used past healthcare costs as a proxy for medical needs, failing to account for the systemic barriers that led to lower healthcare utilization among minority groups.[114] These instances of AI discrimination highlight a larger issue: AI learns these biases because these biases exist in real life. The larger challenge is to establish an overarching ethos in which the training of AI tools acknowledges and aggressively aims to mitigate these discriminatory tendencies in the first place.

Recent United States executive actions and proposed policies have further obfuscated this task. In the United States, there is neither a comprehensive statutory AI policy nor a clearly defined set of

107. *See* Backman, *supra* note 34.

108. *Id*.

109. Roxana Daneshjou et al., *Disparities in Dermatology AI Performance on a Diverse, Curated Clinical Image Set*, SCI. ADVANCES, Aug. 2022, at 1.

110. Dana G. Jones, *The Emperor Has No Clothes: Addressing AI-Powered Medical Device Bias: A Transatlantic Perspective on Regulation*, MICH. INT'L L. REV., (forthcoming 2026).

111. Obermeyer et al., *supra* note 45, at 447.

112. *Id.*

113. *Id.*

114. *See id.*

unified ethical guidelines.[115] This failure of policy and morality has established an ephemeral regulatory landscape that shifts with each presidential administration.[116] The current administration's posture is hostile toward diversity, antithetic toward fairness, and creates environments that hinder people's ability to thrive.[117] In the first six months of 2025, executive actions and the passage of the "One Big Beautiful Bill"[118] articulate the administration's aims to erode DEI principles.[119] Thus, in turn, the legislation[120], restructures or restrict access to Medicaid and the Affordable Care Act[121], and threaten veteran benefits.[122]

These contemporary policy shifts represent a resurgence of race-based political strategies that disadvantage low-income people, perpetuate health injustice, and embolden biased systems under the guise of efficiency, fairness, and reform. The ethics of dominant politics, coupled with an intentionally weakened statutory and regulatory environment, produces a future in which AI drives the worst possible outcomes in American healthcare.[123] Experts advocate for a comprehensive regulatory strategy that can address the entire spectrum of AI

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115. *AI Watch: Global Regulatory Tracker—United States*, WHITE & CASE (Sept. 24, 2025), https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states

116. *See* Michelle L. Price & Zeke Miller, *Trump's Orders to End DEI Programs Reflect His Push for a Profound Cultural Shift,* ASSOCIATED PRESS NEWS (Jan. 22, 2025, 5:05 PM), https://apnews.com/article/trump-executive-orders-dei7ef0bf4ce1d4
65f6b61f3fcfde544593.

117. *Id.*

118. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025).

119. *Trump's Executive Orders on Diversity, Equity, and Inclusion, Explained*, LEADERSHIP CONF. ON CIV. AND HUM. RTS. (Feb. 12, 2025), www.civilrights.org/resource/anti-deia-eos/.

120. Jacqueline Howard, *Trump Administration Cut $2.7 Billion in NIH Research Funding Through March, Senate Committee Minority Report Says*, CNN (May 13, 2025, 2:02 PM), www.cnn.com/2025/05/13/health/trump-administration-nih-funding-sanders-report.

121. Renuka Rayasam & Sam Whitehead, *U.S. Uninsured Rates Could Resurge If Trump's Budget Bill Passes*, NAT'L PUB. RADIO (June 27, 2025), www.npr.org/sections/shots-health-news/2025/06/27/nx-s1-5445275/uninsured-medicaid-aca-trump-congress.

122. Zachary Wolf & Tami Luhby, *Here's How Trump's Megabill Will Affect You*, CNN (July 3, 2025, 5:52 PM), www.cnn.com/2025/07/01/politics/congress-senate-bill-tax-spending-trump-gop-explainer.

123. *See* Margot E. Kaminski, *Regulating the Risk of A.I.*, 103 B.U. L. REV., 1347, 1364 (2023).

risks and harms to vulnerable communities, rather than relying on fragmented governance that leaves major structural vulnerabilities unresolved.[124] This lack of investment in comprehensive regulation increases the chances that AI systems lacking sufficient oversight will worsen existing inequalities and lead to unfair outcomes in areas such as healthcare delivery.[125] Systemic regulation, along with transparency and bias-mitigation frameworks, are essential to prevent these harms.[126]

It is essential to thoroughly assess the ethical obligations associated with incorporating dominance politics into AI-driven health and race policy efforts in the United States. As a guiding principle for America to model itself upon, the United Nations Sustainable Development Goal 16 framework[127] should be considered. The framework's normative foundation aligns with established human rights principles by promoting societies that respect individual rights.[128] These rights include privacy, freedom of expression, and access to information, while positioning peace as a fundamental precondition for social and economic development.[129]

The current landscape in America represents a critical juncture in AI governance in healthcare policies. In September 2024, Senators Edward J. Markey of Massachusetts and Mazie Hirono of Hawaii introduced the "AI Civil Rights Act to Eliminate AI Bias, Enact Guardrails on the Use of Algorithms in Decisions Impacting People's Rights, Civil Liberties and Livelihoods" (US AI Civil Rights Act).[130] The Act proposes establishing strict guardrails for the use of algorithms in consequential decisions by companies, aiming to ensure that

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124. *Id.* at 1365-69.

125. *Id.* at 1363-64.

126. *Id.* at 1378.

127. *Goal 16: Peace, Justice and Strong Institutions*, SUSTAINABLE DEV. GOALS, U.N., https://www.un.org/sustainabledevelopment/peace-justice/ (last visited July 21, 2025) (on file with the North Carolina Civil Rights Law Review).

128. *Id.*

129. *Id.*

130. Press Release, Sen. Edward J. Markey, U.S. Senator, introducing AI Civil Rights Act to Eliminate AI Bias, Enact Guardrails on Use of Algorithms in Decisions Impacting People's Rights, Civil Liberties, Livelihoods (Sep. 24, 2024), https://www.markey.senate.gov/news/press-releases/senator-markey-introduces-ai-civil-rights-act-to-eliminate-ai-bias-enact-guardrails-on-use-of-algorithms-in-decisions-impacting-peoples-rights-civil-liberties-livelihoods (on file with the North Carolina Civil Rights Law Review).

algorithms are thoroughly tested before and after deployment to eliminate and prevent bias.[131]

The US AI Civil Rights Act could influence healthcare policy by establishing guidelines to eliminate bias in AI systems, in a manner similar to the European Union Artificial Intelligence Act (EU AI Act), which addresses high-risk AI applications, including healthcare.[132] The EU AI Act mandates specific requirements for high-risk AI systems to ensure adherence to safety, transparency, and accountability norms. If used, these requirements could parallel the objectives of the US AI Civil Rights Act.[133] However, the Senator Markey proposal remains stalled in Congress[134], mired in bipartisan gridlock, with deliberate efforts to obstruct equitable and diverse resolutions that promote inclusivity, racial, and technological progress in the industry.[135] It is no surprise that these legislative efforts fall against the backdrop of systematic attacks on DEI initiatives across federal agencies and healthcare institutions.[136] The repeal of President Biden's February 2023 Executive Order 13985 on "Advancing Racial Equity and Support for Underserved Communities"[137], along with proposed restrictions on federal healthcare programs, represents what this analysis terms a "resurgence of race-based, supremacy-leaning, political strategies" that threaten to undermine equitable AI governance and protection.

A. *Dismantling Diversity, Equity and Inclusion (DEI)*

Donald Trump's return to the presidency looms heavily over the future of DEI efforts, both domestically and internationally. "His history of antagonism and outspoken opposition to these initiatives" marks the beginning of a new era characterized by significant policy

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131. *Id.*

132. Felix Busch et al., *Navigating the European Union Artificial Intelligence Act for Healthcare*, 7 NPJ DIGIT. MED. 1, 1 (Aug. 12, 2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11319791/.

133. *Id.* at 1–3.

134. Artificial Intelligence Civil Rights Act of 2024, S. 5152, 118th Cong. (2024).

135. Matt Brown and Matt O'Brien, *Markey Touts Win as U.S. Senate Scraps Proposal to Ban State AI Regulation*, WBUR (July 1, 2025), https://www.wbur.org/news/2025/07/01/ai-regulation-states-scrapped.

136. Exec. Order No. 13,985, 3 C.F.R. 409 (2021).

137. *Id.*

changes and a renewed emphasis on dismantling DEI.[138] Trump's rhetoric and legislation signal a rollback of progress made in recent years.[139] Previous anti-DEI agendas, such as those seen during President Trump's first term, created a climate of fear which exacerbated existing inequalities, and had a chilling effect on DEI initiatives across various sectors.[140] "Laws and policies prohibiting discussion of what the first Trump administration in 2020 labeled 'divisive concepts' hampered efforts to discuss, teach, and use the best and most state-of-the-art science to understand and improve US population health and health equity in the context of a growing body of literature on the science of racism and its effects on health".[141] Executive Order 13950, "Combating Race and Sex Stereotyping" prohibited among executive branch department and agencies, including federal contractors and federal grant recipient, trainings related to concepts that "promote divisiveness in the workplace and distract from the pursuit of excellence and collaborative achievements in public administration.[142] The concerning trainings discussed critical race theory, white privilege, intersectionality, systemic racism, positionality, racial humility, and unconscious bias, all of which were prohibited.[143]

Trump began his second term with a series of executive orders targeting federal DEI programs, gender expression, abortion, immigration, travel bans and foreign aid.[144] Three executive orders primarily drove his anti-DEI agenda[145]. The first effectively dismantled DEI

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138. Eddy Ng et al., *The Anti-DEI Agenda: Navigating the Impact of Trump's Second Term on Diversity, Equity and Inclusion*, 44 EQUAL., DIVERSITY AND INCLUSION: AN INT'L J. 137, 138 (2025).

139. *Id.* at 137–138.

140. *Id.* at 139.

141. Derek Griffith & Andrew Twinamatsiko, '*Divisive Concepts' Prohibitions: Implications For Health and Equity*, HEALTH AFFS. (Jan. 16, 2025) https://www.healthaffairs.org/content/briefs/divisive-concepts-prohibitions-implications-health-and-health-equity (on file with the North Carolina Civil Rights Law Review).

142. Exec. Order No. 13,950, 3 C.F.R. 433 (2020).

143. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-20-37, ENDING EMPLOYEE TRAININGS THAT USE DIVISIVE PROPAGANDA TO UNDERMINE THE PRINCIPLE OF FAIR AND EQUAL TREATMENT FOR ALL (2020).

144. *See* Brown and O'Brien, *supra* note 135; Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025); Exec. Order No. 14,170, 90 Fed. Reg. 8621 (Jan. 20. 2025).

145. *See* Brown and O'Brien, *supra* note 135; Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025); Exec. Order No. 14,170, 90 Fed. Reg. 8621 (Jan. 20. 2025).

efforts established under the previous President Joe Biden's administration, terminating mandates, programs, and funding.[146] The second goes further, aiming to eradicate DEI initiatives across the federal government by rescinding previous orders that promote equal opportunities and targeting specific practices deemed discriminatory.[147] The third order dismissals treat gender as purely ideological, ignoring the multifaceted and evolving biological understanding of gender experiences, which severely harmed the transgender community.[148] Federal research dollars are also at risk of drifting away from projects deemed too aligned with DEI or not aligned with the administration's definitions of biological sex.[149] These orders, along with drastic measures to downsize government agencies and defund medical research at higher education institutions, instilled fear and uncertainty, prompting numerous reactions and legal challenges.[150]

Since taking office, President Trump has issued multiple executive orders and supported federal actions aimed at dismantling DEI initiatives across the federal government and the private sector.[151] These include:

- **Executive Order 14173:** This order rescinds affirmative action requirements under EO 11246, mandates federal contractors to certify that they do not operate "illegal" DEI programs and directs the U.S. attorney general to identify enforcement targets in the private sector. This EO has False Claims Act (FCA) implications for noncompliance. It also orders the Office of Federal Contract Compliance Programs (OFCCP) to halt the enforcement of EO 11246, including all active litigation and audits related to affirmative action policies.[152]
- **Executive Order 14168:** Defines "sex" as an "individual's immutable biological classification as either male or female," eliminating protections for gender identity and seeking

146. Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025); Exec. Order 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

147. *See* Proclamation No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025); *see* Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

148. Proclamation No. 14,173, 90 Fed. Reg. 8633-34 (Jan. 21, 2025).

149. *See* Proclamation No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025).

150. *See id.*

151. Emma Beavins, *How Trump's DEI Executive Orders Could Impact Healthcare,* FIERCE HEALTHCARE (Jan. 27, 2025), https://www.fiercehealthcare.com/regulatory/trumps-dei-executive-orders-could-impact-healthcare.

152. Hinkle & Michael, *supra* note 78.

legislative action to overturn the Supreme Court's decision in *Bostock v. Clayton County*, the landmark United States Supreme Court civil rights decision in which the Court held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination based on sexuality or gender identity.[153]
- **Executive Order 14151:** Orders the removal of DEI offices and programs across the federal government, including eliminating DEI-related personnel, halting celebrations of certain demographic groups, and prohibiting the use of preferred pronouns in government e-mail addresses.[154]
- **DOJ memorandum on DEI enforcement:** Attorney General Pam Bondi directed the Department of Justice (DOJ) Civil Rights Division to investigate and penalize DEI initiatives in the private sector, including potential criminal investigations.[155]

B. *From Ideology to Infrastructure*

Through successive statutes and executive actions that narrow equity mandates, a legal architecture in which supremacy politics governs healthcare and AI oversight is slowly developing and eroding equity.[156] Influenced by Project 2025, an initiative developed by the Heritage Foundation aimed to advance conservative policies and principles within the United States, and the removal of anti-discrimination protections, such as rescinding President Lyndon Johnson's Executive Order 11246 mandating affirmative action by federal contractors, signifies a broad effort to eliminate DEI from federal regulations and legislation.[157] In right-wing narratives, the DEI label is frequently used to incite racial animosity.[158] It is increasingly being adopted as a subtle racist signal to cast doubt on and undermine the legitimacy, qualifications, and skills of individuals from racialized communities in the

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153. *Id.*

154. *Id.*

155. Memorandum from the U.S. Att'y Gen. on Ending Illegal DEI and DEIA Discrimination and Preferences (Feb. 5, 2025) (on file with the North Carolina Civil Rights Law Review).

156. *See* Tahir, *supra* note 101.

157. *Id.*

158. Jennifer Saul, *Why the Term "DEI" Is Being Weaponized as a Racist Dog Whistle*, THE CONVERSATION (April 24, 2024), https://theconversation.com/why-the-term-dei-is-being-weaponized-as-a-racist-dog-whistle-228074.

United States.[159] A "dog whistle" is a term that carries a dual function, with one aspect being less socially acceptable and concealed beneath the surface.[160] It represents a coded, indirect form of language that allows individuals to convey ideas that would be deemed too offensive if they were expressed openly.[161] DEI has now become a dog whistle.

The 2025 legislation titled "The Big Beautiful Bill," further erodes inclusivity by imposing restrictions on Medicaid, which provides government-sponsored healthcare for low-income and disabled Americans.[162] The U.S. The Congressional Budget Office estimates that the bill will result in 11.8 million Americans losing their Medicaid coverage over the next decade.[163] It also leaves the governance of AI to the states, a stark departure from the progress made under the Biden administration's Blueprint for an AI Bill of Rights, which emphasized that AI progress must not come at the expense of civil rights or democratic values.[164]

Presidents frequently use executive orders to push for policy changes when they encounter obstacles in the legislature. During President Trump's presidency, these orders became strategic instruments for implementing policies without requiring congressional approval, thus significantly influencing healthcare policy changes.[165] The executive orders enable swift policy shifts that bypass the typically legislative process, rapidly affecting healthcare accessibility and equity.[166] To comply with the President Trump's executive orders, federal agencies have eliminated health equity plans, strategies, and guidance focused on mitigating disparities.[167] For example, the administration

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159. *Id.*

160. *Id.*

161. *Id.*

162. Kaia Hubbard & Catlin Yilek*, Here's What's in Trump's "Big, Beautiful Bill" Passed by Congress*, CBS NEWS (July 4, 2025), https://www.cbsnews.com/news/whats-in-trump-big-beautiful-bill-senate-version/.

163. *Id*.

164. OFF. SCI. & TECH. POL'Y, EXEC. OFF. OF THE PRESIDENT, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022), https://bidenwhitehouse.archives.gov/ostp/ai-bill-of-rights/ (last visited July 4, 2025) (on file with the North Carolina Civil Rights Law Review).

165. C.J. Deering & F. Maltzman, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, 52 POL. RES. Q. 767, 767 (1999).

166. *Id*.

167. Latoya Hill et al., *Elimination of Federal Diversity Initiatives: Implications for Racial Equity*, KAISER FAM. FOUND. (Mar. 21, 2025),

ordered the Centers for Medicare and Medicaid Services to disband its Health Equity Advisory Committee, which was charged with addressing systemic barriers to access, including structural racism.[168] Furthermore, the Federal Drug Administration was prohibited from drafting guidance on diversity in clinical trials (although it was restored according to a court order).[169] Focused plans and initiatives aimed at mitigating health disparities seek to address the underlying inequities that drive these disparities and meet the needs and preferences of diverse populations.[170] This shift in presidential policy impacts research and development, thereby hindering the growth of equitable and inclusive AI systems. It further creates subliminal messaging that the absence of DEI initiatives could exacerbate existing disparities in healthcare delivery and its outcomes.

III. Theoretical Foundations: Critical Race Theory and Wokeness Meet Digital Governance

When creating and implementing AI in the healthcare sector, it is essential to emphasize the importance of equity and inclusivity.[171] It is important for developers and implementers to evaluate the suitability of the data used to develop AI tools, unpack the underlying biases in the data, consider how the tool should be deployed, and question whether various deployment environments can adversely affect equity and inclusivity in the long term. Health disparities are widely acknowledged to stem from various social determinants and flawed incentives in the current health-care system.[172] These technical choices are made within a policy regime shaped by supremacy politics that chills DEI initiatives and dilutes oversight.

Executive orders that attempt to sanitize critical race theory, diversity, and "wokeness" from AI development take an extreme course of action. "Wokeness" typically refers to a heightened

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https://www.kff.org/racial-equity-and-health-policy/issue-brief/elimination-of-federal-diversity-initiatives-implications-for-racial-health-equity/.

168. Amanda Becker, *Trump Disbands Health Equity Panel Examining Medicare and Medicaid*, 19TH (Feb. 20, 2025, 2:13 PM), https://19thnews.org/2025/02/trump-disbands-health-equity-advisory-medicare-medicaid/.

169. *Id*.

170. *Id*.

171. *See* Stephen Cave & Kanta Dihal, *The Whiteness of AI*, 33 PHIL. & TECH. 685, 685 (2020).

172. Backman, *supra* note 34.

awareness of social injustices faced by Black people.[173] In the United Staes, "wokeness" refers to political correctness gone awry, and the term itself is usually used sarcastically by Republican-leaning politicians to mock the Democrats.[174] The intersection of AI bias and racial justice underscores the importance of incorporating diverse perspectives into AI development and deployment. Ensuring that AI systems are *aware* of potential discriminatory impacts requires ongoing scrutiny and adjustment of algorithms and training data sets. However, the politicization of risk hampers meaningful progress toward equitable AI outcomes.

President Trump's Executive Order on AI, dated July 23, 2025, is specifically aimed at eliminating regulatory obstacles to bolster American leadership in the field of AI. The AI Action Plan aims to guarantee that the United States will continue to lead the world in AI, enhancing human prosperity, economic competitiveness, and safeguarding national security.[175] To uphold a leading role in AI innovation, the order emphasizes the importance of ensuring that AI systems remain free from ideological bias and are not designed to advance social agendas.[176] A subsequent order, "Preventing Woke AI In the Federal Government"[177], describes DEI as, "one of the most pervasive and destructive ideologies in the AI context".[178] The order recites that "DEI includes the suppression or distortion of factual information about race or sex; manipulation of racial or sexual representation in model outputs; incorporation of concepts like critical race theory, transgenderism, unconscious bias, intersectionality, and systemic racism; and discrimination on the basis of race or sex."[179] The executive order additionally notes that "DEI shifts the focus from a commitment to truth towards desired outcomes, posing a significant threat to the reliability of AI."[180]

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173. Aja Romano, *A History of "Wokeness"; Stay Woke: How a Black Activist Watchword Got Co-opted in the Culture War*, VOX (Oct. 9, 2020, 10:00 AM), https://www.vox.com/culture/21437879/stay-woke-wokeness-history-origin-evolution-controversy.

174. *Id*.

175. Exec. Order No. 14,179, 90 Fed. Reg. 8741 (July 23, 2025).

176. *Id*.

177. Exec. Order No. 14,319, 90 Fed. Reg. 35389 (July 23, 2025).

178. *Id*.

179. *Id*.

180. *Id*.

The Order points to examples of AI exhibiting problematic behavior; "one major AI model changed the race or sex of historical figures, including the Pope, the Founding Fathers, and Vikings, when prompted for images because it was trained to prioritize DEI requirements at the cost of accuracy".[181] By highlighting such cases, Executive Order 14319 is justified in its restrictive stance toward DEI; however, its scope is narrowly focused, and the directive applies exclusively to the federal government's procurement of AI systems.[182] This signals a targeted effort to reshape how public agencies evaluate and adopt emerging technologies under the guise of neutrality and objectivity.

"While it sets forth sweeping and broad requirements [regarding the type] of AI the federal government may purchase and deploy, it does not purport to restrict what AI companies can offer in the commercial marketplace, impose requirements on private employers' AI use, or create new legal obligations for AI developers serving non-government customers."[183] Notably, federal procurement standards have traditionally shaped wider market practices over time.[184] There is a concern that American tech companies, in their efforts to remain eligible to sell AI models to the government, might significantly modify their development strategies.[185] This revision potentially impacts the development and marketing of AI tools in the private sector.[186] These collaborative actions, whether addressing DEI within federal frameworks or critical race theory in educational environments, symbolize a wider ideological effort that frames equity-focused dialogue as a destabilizing influence, jeopardizing both societal harmony and the integrity of national institutions.

Recently, conservative legislators throughout the United States have targeted critical race theory, enacting laws to prohibit or restrict

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181. *Id.*

182. *Id.*

183. Anette Tyman & Joseph R. Vele, *Trump Administration Releases AI Action Plan and Three Executive Orders on AI: What Employment Practitioners Need to Know*, SEYFARTH (July 25, 2025), https://www.seyfarth.com/news-insights/trump-administration-releases-ai-action-plan-and-three-executive-orders-on-ai-what-employment-practitioners-need-to-know.html.

184. *Id.*

185. *Id.*

186. *Id.*

discussions about race in classrooms.[187] "Their argument is often framed as a defense [against] national unity and identity issues."[188] "Critics claim that teaching structural racism and inequality will cause students to feel ashamed of their country or adopt a hostile view of American history."[189] United States executive orders that roll back DEI initiatives, driven by concerns over critical race theory or "wokeness", may impede the progress of ethical AI applications in healthcare settings. This could affect both the private market and federal AI systems used by major federal agencies responsible for healthcare policy and benefits distribution. Responsible AI frameworks should prioritize inclusiveness and fairness, to ensure that AI solutions do not disadvantage specific groups.[190] DEI frameworks have historically served as ethical compasses in the development and deployment of AI tools, particularly in healthcare settings where disparities are deeply entrenched.[191] These initiatives help ensure that AI systems are designed with a nuanced understanding of diverse patient populations and structural inequities.[192] However, the repeal or erosion of DEI policies threatens to remove critical guardrails, thereby weakening the ethical infrastructure needed for responsible AI governance. In the absence of explicit integration of DEI principles, AI systems risk perpetuating bias, exacerbating health disparities, and undermining legal and ethical commitments to equity in care delivery. AI for health should be designed to respect human dignity, fundamental rights and values.[193] Systems should promote equity, fairness, inclusiveness and accountability.[194]

187. Eric Dolan, *Lack of Racial Knowledge Predicts Opposition to Critical Race Theory*, PSY POST (Apr. 9, 2025), https://www.psypost.org/lack-of-racial-knowledge-predicts-opposition-to-critical-race-theory-new-research-finds/.

188. *Id*.

189. *Id*.

190. *AI Principles*, ORG. FOR ECON. COOP. AND DEV., https://www.oecd.org/en/topics/sub-issues/ai-principles.html (visited July 24, 2025).

191. *See* Gaelle Cachat-Rosset & Alain Klarsfeld, *Diversity, Equity, and Inclusion in Artificial Intelligence: An Evaluation of Guidelines*, APPLIED A.I., e2176618-717, e2176618-720 (2023).

192. *See generally* Nicole Turner Lee et al., *Research: Health and AI: Advancing responsible and ethical AI for all communities,* BROOKINGS (March 3, 2025), https://www.brookings.edu/articles/health-and-ai-advancing-responsible-and-ethical-ai-for-all-communities/.

193. Rabaï Bouderhem, *Shaping the Future of AI in Healthcare Through Ethics and Governance*, HUMANS. & SOC. SCIS. COMMC'NS, Mar. 2024, at 2.

194. *Id.*

Although DEI frameworks offer the necessary ethical foundations for inclusive AI governance, they are increasingly vulnerable to political retrenchment. Executive orders that attempt to sanitize critical race theory, diversity, and wokeness from AI development take an extreme course of action. Supremacy politics includes ideological and regulatory efforts that resist the acknowledgment of racial differences and seek to dismantle protections for marginalized communities, particularly in algorithmic systems. Legislative and executive actions aimed at dismantling DEI mandates do more than shift public discourse; they systematically erode the normative architecture that enables algorithmic tools to address structural bias. In effect, the fear of "wokeness" becomes embedded in the design of public-facing AI, stripping these systems of their capacity to reduce inequality and rendering them vehicles for reproducing it. To confront these realities, this analysis turns to anti-subordination and distributive justice as guiding frameworks. These principles reject formal equality's thin commitments to neutrality and instead demand attention to the ways in which law, policy, and technology sustain hierarchies of race, class, and ableism. Anti-subordination theory, expanded by critical race scholars, reveals that algorithmic tools do not merely reflect bias; they often encode and enforce it.[195]

A. *Explaining Systemic Injustice: Anti-Subordination and Distributive Justice Approaches*

Unlike formal equality approaches that focus on equal treatment, anti-subordination theory examines how legal and social structures maintain the subordination of marginalized groups and seeks to dismantle these hierarchical arrangements.[196] Critical race theorists have expanded this framework to recognize that subordination operates through multiple intersecting systems of oppression that cannot

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195. Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data,* 105 IOWA L. REV. 1257, 1296 (2020) ("Laws that are based on anti-subordination principles are fundamentally about changing social and economic structures that reflect and reinforce historical discrimination. Proxy discrimination by AIs affirmatively thwarts this objective by reproducing and reinforcing these legacies of historical discrimination on the implicit ground that they make economic sense for discriminators.").

196. *See generally* Justin Driver, *The Strange Career of Anti-Subordination*, 91 U. CHI. L. REV. 651 (2024).

be understood in isolation from one another.[197] Anti-subordination theory reveals how the design process can embed subservient assumptions. "Discrimination can arise when algorithmic decisions are based on historical data, which [often] incorporate asymmetries, stereotypes, and injustices, as past inequalities are more prevalent."[198] The "rubbish in, rubbish out" effect occurs when the data is skewed.[199] Additionally, "biased or incomplete databases can incentivize algorithmic discrimination."[200] This "algorithmic invisibility" operates as a form of subordination by excluding specific communities from the benefits of technological innovation while subjecting them to harm. AI-driven resource allocation in healthcare presents particularly acute distributive justice challenges because these systems make life-or-death decisions regarding access to scarce medical resources.

The COVID-19 pandemic highlighted these issues when hospitals utilized algorithmic systems to monitor the virus, triage, screen patients, and identify those most likely to develop severe symptoms.[201] When integrated into a society's basic structure, AI should support citizens' fundamental liberties, promote fair equality of opportunity, and provide the most significant benefits to those who are the worst off.[202] Moreover, the deployment of AI outside the basic structure must be compatible with the institutions and values required to ensure justice.[203]

When AI systems developed in wealthy countries, such as the United States, are deployed in low-resource settings without adequate adaptation, they can exacerbate global health inequalities by providing care that is either inappropriate or ineffective.[204] Technological

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197. *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139, 140 (1989).

198. Miren Gutiérrez*, Invisibilsation and Algorithmic Discrimination*, DATOS.GOB.ES (June 10, 2023), https://datos.gob.es/en/blog/invisibilisation-and-algorithmic-discrimination.

199. *Id*.

200. *Id*.

201. Casey Ross, Rebecca Robbins, & Erin Brodwin, *STAT's Guide to How Hospitals Are Using AI to Fight Covid-19*, STAT NEWS (Mar. 31, 2020), https://www.statnews.com/2020/03/31/hospitals-artificial-intelligence-coronavirus/.

202. *Id.*

203. *Id*.

204. *See* Abeba Birhane, *Algorithmic Colonization of Africa*, 17 SCRIPTED 389 (2020).

colonialism operates through the imposition of algorithmic systems that reflect the priorities and contexts of dominant nations, rather than the needs of local communities.[205] The advancement of digital technologies has stimulated immense excitement about the possibilities of transforming healthcare, especially in resource-constrained contexts such as rural areas.[206] However, critics warn that if dominated by major powers, Al development risks creating a new form of digital colonialism, particularly in Africa and other parts of the Global South.[207]

These patterns of global Al inequality mirror the domestic health disparities examined earlier in this article, suggesting that the structural forces driving supremacy politics operate across multiple scales, from neighborhood-level environmental racism to international technological imperialism.[208] These interconnected challenges, from local environmental health disparities to global technological colonialism, point toward a fundamental institutional problem: the existing governance frameworks for Al in healthcare operate primarily at the national level, while the technologies themselves and their impacts are inherently global[209]. The theoretical tension at the heart of this analysis, between algorithmic efficiency and health equity, finds potential resolution through SDG 16's institutional framework, which rejects the false choice between technological progress and social justice.[210] Unlike narrower approaches that focus solely on technical bias mitigation or regulatory compliance, SDG 16 provides a comprehensive vision of institutional transformation that directly confronts the mechanisms through which supremacy politics operates.[211]

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205. *See id.*

206. *See id.*

207. ALEX KRADSODOMSKI ET AL., ARTIFICIAL INTELLIGENCE AND THE CHALLENGE FOR GLOBAL DOMINANCE: NINE ESSAYS ON ACHIEVING RESPONSIBLE AI 26-27 (2024).

208. *See* Mehdi Muhammad, *From Colonialism to Al: How the Global South Became the World's Inequality Hotspot*, DAWN, (July 11, 2025), https://www.dawn.com/news/1915399.

209. *See generally* Salvador Santino F. Regilme*, Artificial Intelligence Colonialism: Environmental Damage, Labor Exploitation, and Human Rights Crises in the Global South*, 44 SAIS REV. INT'L AFFS. 75 (2024).

210. *See id*. at 76.

211. *See generally* U.N. Deputy Sec'y-Gen., Remarks at the Opening of the ECOSOC Special Meeting "Harnessing Artificial Intelligence for Sustainable

B. *Weaponization In Health Care Programs*

An example of the weaponization of supremacy politics can be illustrated by how the elderly are denied medically necessary care. One of the most visible intersections between AI and supremacy politics emerges in the Medicare Advantage program, a federally subsidized, privately administered health plan serving over 30 million older adults.[212]

These denials intentionally coded to delay or refuse care to aging patients, exacerbate the theory of supremacy politics as the system favors profits over people, resulting in AI being the culprit in recipient deaths[213] While these systems are often framed as tools for efficiency and fraud prevention, their deployment within Medicare Advantage reflects the structural dynamics of supremacy politics. Elderly patients, the program's core population, face heightened vulnerability to these algorithmic determinations, especially when DEI oversight mechanisms are dismantled.[214] The removal of equity-focused review bodies within relevant federal agencies eliminates the institutional expertise needed to detect and mitigate bias, allowing cost-containment priorities to be embedded invisibly into technical decision-making systems.[215]

1. Case Examples: Algorithmic Denials in Medicare Advantage

In 2024, the Office of Inspector General (OIG) reported that some Medicare Advantage (MA) plans were inappropriately denying prior authorization for medically necessary care, often using automated tools to review requests.[216] Errors in programming or delays in

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Development Goals (SDGs)" (May 8, 2024), https://www.un.org/sg/en/content/dsg/statement.

212. Meredith Freed, Jeannie Fuglesten Biniek, Anthony Damico, & Tricia Neuman, *Medicare Advantage in 2024: Enrollment Update and Key Trends*, KAISER FAM. FOUND. (Aug. 8, 2024) https://www.kff.org/medicare/medicare-advantage-in-2024-enrollment-update-and-key-trends/.

213. Dana G. Jones, *Artificial Intelligence Can Kill You* (forthcoming).

214. *See* Sara Raza, et al., *Medicare Advantage Becoming a Disadvantage with Use of Artificial Intelligence in Prior Authorization Review*, NPJ DIGIT. MED., Feb. 2026, at 2.

215. *See* Hill et al., *supra* note 167.

216. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS.,

updating the claims processing systems of Medicare Advantage Organizations (MAOs) can lead to the denial of payments or care that should be authorized.[217] An MAO using automation initially rejected a $668 radiation therapy request for a 74-year-old prostate cancer patient, mistakenly claiming that there was no prior authorization on record for the service date.[218] The provider contested this decision and provided a screenshot as evidence that prior authorization had indeed been secured.[219] The MAO acknowledged that its system had failed to accurately recognize the authorized timeframe from the approved request.[220] Consequently, the MAO overturned the denial and announced that it had updated its system to rectify the mistake.[221] Seen in isolation, this radiation-therapy episode reads like a correctable "system error," but the architecture is not neutral. A denial-first authorization registry that forces clinicians to disprove the machine's memory operationalizes policy choices that tolerate predictable harm and make redress contingent on provider time, expertise, and persistence.

When age, frailty, and administrative lag compress that margin, as with 86-year-old JoAnne Barrows**,** the same design logic ceases to be a fixable glitch and becomes outcome-determinative. Plaintiff JoAnne Barrows was enrolled in the MA Plan through Humana.[222] In November 2021, 86-year-old JoAnne Barrows fell at home and fractured her leg.[223] On or around November 23, 2021, Ms. Barrows was admitted to the Methodist Hospital in St. Louis Park, Minnesota, where she was placed in a cast and put on a non-weight-bearing order for six weeks.[224] On or around November 26, 2021, Ms. Barrows was discharged from the Methodist Hospital and admitted to the Good Samaritan Society Ambassador rehabilitation facility in Robbinsdale,

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CARE. OEI-09-18-00260, SOME MEDICARE ADVANTAGE ORGANIZATION DENIALS OF PRIOR AUTHORIZATION REQUESTS RAISE CONCERNS ABOUT BENEFICIARY ACCESS TO MEDICALLY NECESSARY (2022).

217. *Id.*

218. *Id.* at 14.

219. *Id.*

220. *Id.*

221. *Id.*

222. Compl. at 12, Barrows v. Humana, Inc., No. 3:23-CV-00654, 2025 WL 2375645 (W.D. Ky. Dec. 12, 2023).

223. *Id.*

224. *Id.*

Minnesota.[225] On or around December 9, 2021, Humana informed Ms. Barrows that they would terminate her coverage in two days, after only approximately two weeks of care.[226] Ms. Barrows and her doctor were bewildered by Humana's premature termination of coverage because Ms. Barrows was still under a non-weight-bearing order for four weeks.[227] Ms. Barrows's doctor recommended that she continue rehabilitation treatment, but Humana refused to cover the additional treatment costs. [228]

Ms. Barrows and her family made a strong effort to contest Humana's refusal, but their attempts were in vain.[229] The appeals were rejected, and Humana decided that Ms. Barrows was fit to go home, even though she was bedridden and required a catheter.[230] Since Ms. Barrows was not yet ready to return home, her family had to cover the expenses of her stay at the Good Samaritan Society Ambassador Rehabilitation Facility.[231] Faced with the high costs of this facility, Ms. Barrows' family reluctantly opted to move her to a more affordable assisted living facility.[232] Unfortunately, the care at this new facility was inadequate, leading to a decline in Ms. Barrow's health and well-being.[233] Consequently, her family had to make another difficult decision to discontinue her care because of the poor quality of care she was receiving.[234] On December 22, 2021, Ms. Barrows returned home, but she was not physically capable of doing so safely.[235] She was unable to use her injured leg, needed help using the restroom, and had a catheter.[236] Humana's unjust denial of coverage severely affected Ms. Barrows's health, as she could not afford the necessary care.[237] She experienced considerable financial setbacks because she had to pay out-of-pocket for treatments that her plan should have covered.[238] On July 9, 2025, the court mandated that the plaintiff replace the designated party

225. *Id.*
226. *Id.* at 13.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 14.
238. *Id.*

with the Estate of Joanne Barrows.[239] Tragically, Ms. Barrows passed away before she could advance her claims, and her death was a direct result of the algorithmic care denials that impacted her health.[240]

This scenario exemplifies the conversion of supremacy politics into algorithmic processes, where institutional incentives and a lack of transparency dictate the distribution of prompt medical attention. In this setting, Barrows's case highlights the human toll when AI denial of care is coded unjustly.[241] Within the insurance industry, the prior-authorization infrastructure, which is increasingly automated[242], creates a denial-first posture. Medicare Advantage plans have issued tens of millions of prior-authorization decisions annually, with millions denied, and federal reviewers have documented denials even when requests met Medicare coverage rules.[243] Although the HHS's 2024 §1557 final rule bars discrimination through "patient care decision support tools" and imposes an ongoing duty to identify risk, current reforms to prior authorization remain largely procedural, leaving oversight fragmented and underenforced for those least able to appeal.[244]

This architecture is far from being a mere byproduct of modernization; it serves as an operational embodiment of supremacy politics. Policy decisions shift discretion away from clinicians and patients, placing it instead in the hands of opaque, privately controlled

239. Def.'s Mot. to Dismiss Pls' First Amendment Class Action Compl., Barrows v. Humana, Inc., No. 3:23-CV-00654-RGJ, 2025 WL 2375645 (W.D. Ky. July 8, 2025)

240. Order on Mot. to Substitute, Barrows v. Humana, Inc. No. 3:23-CV-00654-RGJ, 2025 WL 2375645 (W.D. Ky. July 8, 2025).

241. Compl., *supra* note 211, at 1.

242. Prasad Thammineni, *Prior Authorization is Going Electronic—What Small Practices Should Know About CMS-0057*, AGENTMAN (Feb. 24, 2026), https://agentman.ai/blog/prior-auth-is-going-electronic-what-small-practices-need-to-know.

243. Jeannie Fuglestein Biniek, Nolan Sroczynski, Meredith Freed & Tricia Neuman, *Medicare Advantage Insurers Made Nearly 50 million Prior Authorization Determinations in 2023,* KAISER FAM. FOUND., https://www.kff.org/medicare/issue-brief/nearly-50-million-prior-authorization-requests-were-sent-to-medicare-advantage-insurers-in-2023/ (last visited Jan. 28, 2025) (noting that in 2023 MA insurers fully or partially denied 3.2 million prior authorization requests, which are 6.4% of all requests).

244. *See* 45 C.F.R. § 92.210 (2024) (prohibiting discrimination in the use of "patient care decision support tools" and requiring covered entities to identify, mitigate, and monitor risk of discrimination).

tools.[245] This shift imposes a burden of proof and delay on those with the least power. This scenario highlights the governance gap that SDG 16 seeks to bridge: when the code enacts supremacy politics and patient rights are reduced to mere delays, the call for accessible justice and accountable, inclusive institutions becomes the essential corrective structure.[246]

IV. SDG-16 FRAMEWORK: PEACE, JUSTICE AND STRONG INSTITUTIONS IN AI GOVERNANCE

The 2030 Agenda for Sustainable Development, endorsed by all United Nations Member States in 2015, serves as a collective framework for ensuring peace and prosperity for both people and the planet, now and in the future.[247] Central to this agenda are the 17 Sustainable Development Goals (SDGs), which represent an urgent appeal for action from all nations, whether developed or developing, in global collaboration.[248] These goals emphasize that eradicating poverty and other hardships must be accompanied by strategies that enhance health and education, decrease inequality, and stimulate economic growth while addressing climate change and striving to protect our oceans and forests.[249]

Sustainability and Development Goal 16 (SDG 16), emphasizes access to justice and the development of inclusive, accountable institutions.[250] This goal serves as a normative benchmark for evaluating United States health governance. While a comprehensive analysis of how United States algorithmic policy in healthcare aligns (or fails to align) with SDG 16 standards will be presented in a companion piece *Supremacy Politics II*[251], this article identifies the preliminary fault lines between United States administrative practice and international human rights commitments. By invoking the SDGs as a diagnostic framework, this piece begins to surface a broader question: what

245. *See* Denise Anthony and Amanda Stanhaus, *Disrupting the Information Order in Health Care: Institutions, Policy Regimes, and the Value of Data*, 395 SOC. SCI. & MED., Apr. 2026, at 2.

246. SUSTAINABLE DEV. GOALS, *supra* note 127.

247. G.A. Res. 70/1, at 3 (Oct. 21, 2015).

248. *Id.* at 1; *The 17 Goals,* U.N. DEP'T OF ECON. & SOC. AFFS., https://sdgs.un.org/goals#history (last visited Sept. 12, 2025).

249. G.A. Res. 70/1, *supra* note 247, at 3-11.

250. *Id.* at 14.

251. Okidegbe, *supra* note 6.

happens when domestic administrative governance becomes increasingly disconnected from global legal principles designed to protect marginalized populations? The framework thus offers not merely critique of existing systems, but a pathway for reconstructing technology in service of justice rather than supremacy.

A challenge lies in finding a framework that assuages DEI fears while balancing transparency that informs and transforms practical governance mechanisms that can effectively regulate AI systems in the health care sector. This also involves preserving the beneficial potential of the guiding principles while balancing the influence of human decision makers and regulators who have developed race-based regulations and policies. The United Nations Sustainable Development Goals provide a comprehensive framework for understanding how artificial intelligence governance in healthcare should be anchored in the principles of peace, justice, and strong institutions.[252] This framework is particularly relevant as healthcare systems increasingly rely on algorithmic decision-making tools that can either perpetuate or mitigate existing inequalities.[253]

A. *SDG-16 As A Normative Framework*

The relationship between AI and the SDGs is symbiotic; AI provides tools and solutions to accelerate progress towards the SDGs, while the pursuit of these goals offers a framework for the responsible and ethical development and implementation of AI technologies.[254] SDG 16 aims to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels."[255] The SDG 16 framework provides normative guidance and practical tools for developing equitable AI governance systems in healthcare policies. By exposing the structural motivations behind algorithmic bias and

252. *See How do OECD AI Principles Support UN Sustainable Development Goals*, EVALCOMMUNITY ACAD. (Feb. 16, 2026), https://academy.evalcommunity.com/how-do-oecd-ai-principles-support-un-sustainable-development-goals/

253. *See* Ellison B. Weiner et al., *Ethical Challenges and Evolving Strategies in the Integration of Artificial Intelligence into Clinical Practice*, PLOS DIGIT. HEALTH (Apr. 8, 2025), https://doi.org/10.1371/journal.pdig.0000810.

254. *See* Ricardo Vinuesa et al., *The Role of Artificial Intelligence in Achieving the Sustainable Development Goals*, 11 NATURE COMMC'N, Jan. 2022, at 2, 6.

255. *Goal 16*, U.N. DEP'T OF ECON. & SOC. AFFS., https://sdgs.un.org/goals/goal16 (last visited Sept. 6, 2025).

emphasizing legal accountability, this analysis offers a pathway toward an AI infrastructure that respects human rights and promotes health equity. However, AI must be ethical and transparent in its use.[256] Amina J. Mohammed, the Deputy Secretary-General of the United Nations and the Chair of the United Nations Sustainable Development Group stated that "[w]e cannot simply take current AI models and datasets, which have bias and discrimination baked into them, and hope that they will rescue the SDGs. We need inclusivity in data that underpins these models, and diversity among the people that are building them."[257]

The three targets of SDG 16 represent the first principles for crafting the United States AI policy framework that mitigates bias and insulates society against swings in policy that currently occur with each successive presidential administration.

B. *Target 16.3: Rule of Law and Equal Access to Justice In Algorithmic Context*

Target 16.3 aims to "promote the rule of law at the national and international levels and ensure equal access to justice for all."[258] In fragile and conflict-affected states, increasing access to justice and the rule of law to benefits those left furthest behind aligns with the aspirations of the 2030 Agenda for Sustainable Development.[259] When applied to healthcare AI systems, this target requires the establishment of mechanisms that ensure that patients can meaningfully challenge algorithmic decisions that affect their care.[260]

The principle of equal access to justice in algorithmic contexts faces unique challenges because traditional legal frameworks assume that human decision-makers can be held accountable through established judicial processes.[261] Owing to issues with AI transparency,

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256. Deputy Sec'y-Gen., *supra* note 211.

257. *Id*.

258. G.A. Res. 70/1, *supra* note 247, at 25.

259. U.N. DEP'T OF ECON. & SOC. AFFS., *supra* note 255.

260. *See* Tao Yun and Le Zhang, *International Partnerships in AI-Driven Healthcare: Opportunities and Challenges for Advancing the UN Sustainable Development Goals—A Perspective*, HEALTHCARE, Aug. 2025, at 9; G.A. Res. 70/1, *supra* note 247, at 25.

261. Philip Sales, Just. of the Sup. Ct. of the U.K., Judicial Review Methodology in the Automated State, Presentation for the Conference on Automation in

some legal scholars have suggested that for algorithmic governance in privacy and data protection, priority should be given to accountability over openness.[262] However, for the use of AI applications in healthcare, institutions must develop new procedural safeguards that preserve the essence of due process while accounting for algorithmic decision-making. This includes establishing transparent chains of accountability that extend from algorithm developers to healthcare institutions to individual practitioners, ensuring that patients have meaningful recourse when AI systems make mistakes or exhibit biases.

C. *Target 16.6: Accountable and Transparent Institution in AL-Driven Policy AI-Deployment*

Strengthened institutions, the rule of law, and enforcement contribute to the implementation of multilateral environmental agreements and progress towards internationally agreed-upon global ecological goals.[263] Similarly, in healthcare AI governance, institutional accountability requires fundamental changes in how healthcare organizations make decisions regarding technology adoption and implementation.

Addressing these risks requires robust governance frameworks that ensure that AI systems are developed, tested, implemented, and maintained with a focus on fairness, transparency, and accountability. Researchers recommend "an adoption-centered governance framework as an essential structure for successfully implementing AI systems in clinical settings".[264]

Effective institutional accountability in AI-driven healthcare requires multilayered governance structures that extend beyond traditional hospital administrative models. Healthcare institutions need specialized AI ethics committees with diverse memberships, including

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Public Governance—Theory, Practice, and Problems 8 (Sept. 2024) (on file with the North Carolina Civil Rights Law Review).

262. *See* Petar Radanliev, *Privacy, Ethics, Transparency, and Accountability in AI Systems of Wearable Devices*, 7 FRONTIERS IN DIGIT. HEALTH, June 2025, at 8.

263. *Target 16.6: Develop Effective, Accountable and Transparent Institutions at All Levels*, SDG16 NOW, https://sdg16now.org/report/target16-6/ (last visited Feb. 15, 2026).

264. *See* Masooma Hassan, Elizabeth M. Borycki, and Andre W. Kushniruk, *Artificial Intelligence Governance Framework for Healthcare*, 38 HEALTHCARE MGMT. F. 125, 127 (2024)

clinicians, technologists, ethicists, and community representatives, with the authority to make binding decisions regarding AI deployment.

D. *Target 16.7 Inclusive Decision-Making In Healthcare Technology*

This target calls for "responsive, inclusive, participatory, and representative decision-making at all levels."[265] Experts from UCL Law helped define the UN's SDG Target on Civil Justice and provided guidance on measuring progress towards people-centered justice systems worldwide.[266] A people-centered approach is essential for deploying AI systems that impact patient care and community health outcomes.

The deployment of AI in healthcare often occurs without meaningful input from the communities most likely affected by these technologies.[267] This development raises numerous ethical concerns regarding the use of AI and machine learning in healthcare. Inclusive decision-making requires structural changes in how healthcare institutions approach technology adoption, moving beyond token consultations to genuine power-sharing arrangements.

Community advisory boards should be established with real authority over AI implementation decisions, including representatives from historically marginalized communities, patients with firsthand experience of the healthcare system, and advocates for vulnerable populations. These boards will require sufficient resources and technical support to meaningfully evaluate AI systems and understand their potential impact on diverse communities. An African American community in Tennessee, established by individuals formerly enslaved, is

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265. *Target 16.7: Ensure Responsive, Inclusive, Participatory, and Representative Decision-Making at all Levels*, SDG16 NOW, https://sdg16now.org/report/target16-7/ (last visited May 14, 2026).

266. *Developing an SDG Target that puts people at the heart of legal frameworks*, UNIV. COLL. LONDON, (Oct. 8, 2020), https://www.ucl.ac.uk/sustainable-development-goals/case-studies/2020/oct/developing-sdg-target-puts-people-heart-legal-frameworks; *see also Partnerships for the Goals*, THE GLOB. GOALS, https://globalgoals.org/goals/17-partnerships-for-the-goals (outlining the targets of the Global Goals).

267. *See* Athmeya Jayaram and Kellie Owens, *AI in Healthcare*, HASTINGS CTR. FOR BIOETHICS (Mar. 25, 2026), https://www.thehastingscenter.org/briefingbook/ai-in-healthcare/.

profoundly aware of the repercussions of the absence of community engagement in the development of artificial intelligence.[268] "Elon Musk quietly transformed a portion of a South Memphis, Tennessee, community established by a group of formerly enslaved people in 1863 into what the world's wealthiest man called "Colossus", the planet's most powerful supercomputer".[269] "The artificial intelligence venture turned an old manufacturing plant into a powerful 550-acre supercomputer designed to train Grok, which is his AI company's "anti-woke" chatbot that deliberately pushes boundaries on controversial topics.[270] The neighborhood, which remains predominantly Black, was already choking on industrial pollution, but Musk promised hundreds of jobs and millions in tax revenue." [271] Musk's company called xAI deployed three dozen gas-powered turbines across the purchased land site.[272] The company bypassed standard environmental review processes and has been operating dozens of unpermitted methane gas turbines without public notice, permits, or air pollution controls.[273] This is in a city known for experiencing some of the worst smog pollution in the nation and in a neighborhood with a cancer risk four times the national average.[274] Roughly 45% of the residents report poor or fair health, which is three times higher than the national average.[275] According to the Clean Air Act, facilities classified as "major" sources of emissions, such as a group of gas turbines, are required to obtain a Prevention of Significant Deterioration (PSD) permit.[276]

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268. *See* Adam Mahoney, *A Historic Black Community Takes on the World's Richest Man Over Environmental Racism*, CAPITAL B (June 18, 2025), https://capitalbnews.org/musk-xai-memphis-black-neighborhood-pollution/ (last visited Sep. 11, 2025).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. Ren Brabenec, *A Billionaire, an AI Supercomputer, Toxic Emissions and a Memphis Community that Did Nothing Wrong,* TENN. LOOKOUT (July 7, 2025, at 5:00 AM), https://tennesseelookout.com/2025/07/07/a-billionaire-an-ai-supercomputer-toxic-emissions-and-a-memphis-community-that-did-nothing-wrong/.

274. Bracey Harris, Jon Gerberg, and Stephanie Gosk, *Up Against Musk's Colossus Supercomputer, a Memphis Neighborhood Fights for Clear Air*, NBC NEWS (May 15, 2025, 3:54 PM), https://www.nbcnews.com/news/us-news/musk-xai-colossus-supercomputer-boxtown-memphis-tennessee-rcna206242

275. *Places: Local Data for Better Health*, CDC, https://experience.arcgis.com/experience/22c7182a162d45788dd52a2362f8ed65 (last visited Sep. 11, 2025).

276. Molly Taft, *Despite Protest Elon Musk Secures Air Permit for xAI*,

However, in August, officials from the Shelby County Health Department informed local journalists that xAI did not need this permit because its turbines were not intended to be permanently installed.[277] With growing local opposition, xAI eventually submitted a permit application to the Shelby County Health Department in January, several months after the turbines had become operational.[278]

Collectively, temporary exceptions, post-hoc permitting, and community exclusion illustrate the dynamics of supremacy politics, characterized by the exercise of administrative discretion to favor industrial entities while neglecting the health risks posed to marginalized communities. A similar power structure is evident in the deployment of AI, which often lacks adequate safeguards and meaningful community engagement in governance.[279] The deployment of AI systems in communities without sufficient safeguards poses the risk of exacerbating existing health inequities by embedding environmental racism[280] into algorithmic decision-making processes.[281] Inclusive decision making has the potential to significantly reduce pronounced disparities.

With concentrated environmental and health disadvantages, the framework of the United Nations' Sustainable Development Goal (SDG) 16 becomes particularly relevant.[282] SDG 16's call for peaceful, just, and inclusive societies provides both normative guidance and practical tools for developing equitable AI governance systems that

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WIRED (July 2, 2025), https://www.wired.com/story/xai-data-center-air-pollution-permit/.

277. *Id.*

278. *Id.*

279. *See* Esmat Zaidan & Imad Antonie Ibrahim, *AI Governance in a Complex and Rapidly Changing Regulatory Landscape: A Global Perspective*, 11 HUMANITIES & SOC. SCIS. COMMC'NS, Sept. 2024, at 4.

280. *See* Maudlyne Ihejirika, *What is Environmental Racism*, NAT. RES. DEF. COUNCIL (May 24, 2023), https://www.nrdc.org/stories/what-environmental-racism?utm_source=chatgpt.com ("The phrase *environmental racism* was coined by civil rights leader Dr. Benjamin F. Chavis Jr. He defined it as the intentional siting of polluting and waste facilities in communities primarily populated by African Americans, Latines, Indigenous People, Asian Americans and Pacific Islanders, migrant farmworkers, and low-income workers.").

281. Emari Pam, *How AI is Fueling a New Wave of Environmental Racism*, FEMINIST MAJORITY FOUND. (July 29, 2025), https://feminist.org/news/how-ai-is-fueling-a-new-wave-of-environmental-racism/.

282. SUSTAINABLE DEV. GOALS, *supra* note 127.

can address, rather than perpetuate, place-based health disparities.[283] By exposing the structural motivations behind algorithmic bias and emphasizing legal accountability, this analysis offers a pathway toward an AI infrastructure that respects human rights and promotes health equity. The framework outlines explicit methods for ensuring that legal responsibilities are fulfilled.[284] It provides specific guidance on building an AI infrastructure that supports equity and fundamental freedoms, aiming to create fair and democratic AI systems that are free from supremacist rhetoric.

As noted in the 2025 SDG report, which details the international progress on achieving the SDGs by 2030, implementing these changes demands significant investment, strong policies, and swift action.[285]It involves bridging the digital gap and ensuring that technology, including artificial intelligence, is used inclusively and responsibly.[286]

The domestic framework discussed in this article, grounding AI governance in SDG 16 principles of justice, accountability, and inclusion has significant implications for America's position in the emerging global landscape of AI regulation. As the European Union implements its comprehensive AI Act and other nations follow suit[287], the United States faces critical choices about how to balance innovation with equity in its international AI policy.

V. Reforms

The analysis above makes clear that without deliberate structural interventions, AI governance in U.S. healthcare will continue to reflect the logic of supremacy politics, a system of opaque decision-making, exclusion of affected communities, and consolidation of control in the hands of those least affected by the harms. SDG 16 offers a normative counterpoint: it envisions institutions that are transparent,

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283. *Id.*

284. *See id.*

285. U.N. DEPT. OF ECON. AND SOCIAL AFFS., THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2025, U.N. Sales No. E.25.I.4 (2025), https://unstats.un.org/sdgs/report/2025/The-Sustainable-Development-Goals-Report-2025.pdf

286. *Id.*

287. *EU Leads the Way on Artificial Intelligence Regulation*, BARCLAY DAMON (July 2, 2024), https://www.barclaydamon.com/alerts/eu-leads-the-way-on-artificial-intelligence-regulation

participatory, and accountable to the people they serve.[288] Translating this vision into practice requires targeted reforms. First, Congress and state legislatures should legislate algorithmic due process in healthcare, codifying enforceable rights for patients to challenge AI-driven decisions. These protections must mandate multilayered transparency—patient-facing, provider-facing, and developer-facing—so that algorithmic authority cannot be shielded from scrutiny. Such legal safeguards would ensure that the exercise of algorithmic power remains answerable to both the individuals it affects, and the public institutions charged with oversight.

Second, healthcare institutions must replace symbolic ethics reviews with standing multidisciplinary AI governance committees vested with binding authority over the procurement, deployment, and auditing of AI tools. By granting these bodies real decision-making power rather than merely advisory roles, governance shifts away from the supremacy politics dynamic in which corporate or administrative priorities eclipse patient protections.

Third, regulation must institutionalize community power in AI governance. Community advisory boards, representative of populations most affected by health inequities, should be given not only consultative input but also the authority to amend or veto AI adoption proposals. This structural redistribution of decision-making power transforms participation from a procedural formality into a substantive check on technological deployment, which could exacerbate inequality.

Fourth, the U.S. healthcare AI policy should be harmonized with global equity norms by embedding SDG 16's justice, accountability, and inclusion benchmarks into domestic regulatory frameworks and aligning with emerging international models, such as the EU AI Act.[289] Such alignment would resist the inward-looking policy reversals characteristic of supremacy politics and affirm equity as a non-negotiable standard in the governance of healthcare technologies.

Finally, AI systems must undergo both pre-deployment and periodic equity impact audits to identify and remediate any disparate effects. Public disclosure of audit results would disrupt the invisibility

288. SUSTAINABLE DEV. GOALS, *supra* note 127.

289. SUSTAINABLE DEV. GOALS, *supra* note 127; *EU AI Act: First Regulation on Artificial Intelligence*, EUR. PARL. (Aug. 6, 2023), https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence#ai-regulation-in-europe-the-first-comprehensive-framework-4.

that allows structural inequities to persist, ensuring that harm is not only identified but also addressed transparently. Taken together, these reforms reorient healthcare AI governance away from supremacist logics, where opacity, exclusion, and concentrated control dictate healthcare outcomes, and toward a rights-based framework that operationalizes justice in both the design and deployment of the technology.

CONCLUSION

This article mapped the converging harms of algorithmic opacity and structural inequality in public healthcare, arguing that supremacy politics—when embedded in the design and deployment of artificial intelligence—reproduces exclusion, harm, and abandonment in systems ostensibly designed to serve. By invoking *Sustainable Development Goal 16*, which calls for just, accountable, and inclusive institutions[290], this article establishes a normative baseline for evaluating supremacy leaning political action that impact AI governance and equitable, inclusive AI design. However, SDG 16 is only the starting point.

The global nature of AI development and deployment demands a broader view that considers comparative legal regimes, transnational data flows, and emerging diplomatic pressure. These dimensions will be explored in *Supremacy Politics II: Architecting Reform In Artificial Intelligence Governance,* which proposes a comprehensive policy and legal framework aimed at recalibrating AI governance in alignment with international human rights principles and domestic obligations to health equity for all.

This article is a critique and a call to action: a critique of the systemic neglect and tacit normalization of supremacy politics impacting digital healthcare infrastructures, and a call to reconceptualize algorithmic systems for public accountability and health justice.

290. SUSTAINABLE DEV. GOALS, *supra* note 127.

APPENDIX A: ABBREVIATED OPERATIONAL CRITERIA FOR IDENTIFING "SUPREMACY POLITICS" IN HEALTHCARE AI

This appendix lists the core observable indicators of a system that translates supremacy politics into code and governance. Each item flags what to look for and is a practical proxy.

1. Equity Rollbacks (Legal/Policy): Repeated narrowing of DEI/civil rights mandates.

   Indicators: rescinded directives, budget/FTE cuts to equity/civil-rights offices, dissolved committees, and timelines of repeal/replace.

2. Data Suppression & Knowledge Gaps: limits that make it difficult to detect harm.

   Indicators: missing/removed fields (race, ethnicity, gender, disability status); fewer stratified reports; algorithmic decision-making that lacks transparency in dataset training.

3. Denial-First Architecture (Deployment Rules): defaults that externalize risk onto patients/clinicians.

   Indicators: prior-auth denial rates, overturn rates/time on appeal, auto-denial flags, and shortened review windows.

4. Opacity + Weak Oversight: Barriers that block correction and accountability.

   Indicators: environmental racism; AI systems built in marginalized communities; lack of pre-deployment equity audit or continuous monitoring; sparse investigations/penalties; long time-to-resolution.

Inference cue: When two or more of these co-occur at moderate intensity, presume "Supremacy Politics" is operating unless the plan/vendor/state or federal actor shows effective mitigation and non-discriminatory justification.

SCHOOL RESOURCE OFFICERS: WHY AND HOW WE SHOULD DEMAND CHANGE*

JILLIAN LA SERNA**

The increasing presence of School Resource Officers (SROs) in public schools has generated significant debate over school safety, student discipline, and civil rights. While proponents argue that SROs enhance school security and foster safer educational environments, growing evidence demonstrates that their presence produces substantial negative collateral consequences, particularly for students of color and students with disabilities. This Article argues that the judicial system has failed to adequately protect students' constitutional rights by routinely treating SROs as school officials rather than law enforcement officers, thereby permitting diminished Fourth and Fifth Amendment protections in school settings, including reduced standards for searches and limited Miranda safeguards during student questioning. Because courts have largely declined to provide meaningful remedies for these infringements, legislative and policy intervention is necessary. Drawing on legal analysis, national empirical research, and a case study of school resource officer policy deliberations in a majority-white North Carolina school district, this Article demonstrates the disconnect between positive public perceptions of SROs and evidence of their disparate harms. It further argues that majoritarian decision-making frameworks are ill-suited to addressing these inequities, as they risk privileging perceptions of safety held by dominant stakeholder groups over the lived experiences of students most adversely affected by school policing. To remedy these failures, this Article proposes a counter-majoritarian policymaking framework that centers civil rights protections, equity-based impact assessment,

* © 2026 Jillian La Serna J.D., Ed.D.

** Dr. Jillian La Serna is a Research Assistant Professor at the Education Policy Initiative in the Department of Public Policy at the University of North Carolina at Chapel Hill. She holds an Ed.D. in Educational Leadership from the University of North Carolina at Chapel Hill and a J.D. from the University of North Carolina School of Law. She wishes to thank Professor Eisha Jain and Professor Deborah Weissman for their support and contributions to earlier drafts of this article.

and the voices of historically marginalized students in shaping school safety policy.

INTRODUCTION……………………………………………………...52
I. THE JUDICIAL SYSTEM APPROACH TO SCHOOL RESOURCE OFFICERS………………………………………………………...55
A. *Student Searches without Cause*…………………...55
B. *Questioning Without* Miranda *Warning*……………57
II. CURRENT POLICY DEBATE……………………………………...59
A. *Perceptions of School Resource Officers*…………..59
B. *Negative Collateral Consequences of SROs*…….……62
C. *Calls for SRO Policy Reforms or Removal of SROs from Schools*…………………………………………………….63
III. SCHOOL RESOURCE OFFICER POLICY: A CASE STUDY…………65
IV. LEGISLATIVE ACTION THROUGH A COUNTER MAJORITARIAN APPROACH…..…………………………………………………71
CONCLUSION……………………………………………………..75

INTRODUCTION

Over the past several decades, public schools have increasingly utilized School Resource Officers (SROs) as a security mechanism.[1] SROs are commissioned law enforcement officers selected, trained, and assigned to protect and serve education environments.[2] In the late 1970's fewer than 100 safety officers were assigned to public schools, whereas that number approached 20,000 by 2007.[3] This rise can be attributed in part to federal and state efforts aimed at combatting crime rates during the 1990s. The Violent Crime and Law Enforcement Act of 1994 included funding for SROs in schools as a part of community policing programs.[4]

1. *See* NATHAN JAMES & GAIL MCCALLION, CONG. RSCH. SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 19-20 (2013), https://www.everycrsreport.com/files/20130626_R43126_716a20191f13cf90064e9929ef6ee59611a90576.pdf.

2. *See Facts Sheet, School Resource Officers and School-based Policing*, OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST. (Dec. 2019), https://cops.usdoj.gov/pdf/SRO_School_Policing_Factsheet.pdf

3. *See* JAMES & MCCALLION, *supra* note 1.

4. 34 U.S.C. § 10381(b)(13).

The presence of SROs in school settings is a topic of national debate.[5] SRO proponents argue that they provide increased safety for students, staff, and families.[6] Research has also shown that education stakeholders feel safer with SROs present in school buildings.[7] However, in recent years, opponents have called for the removal of SROs from schools, citing the disparate negative impact their presence has on students of color and students with disabilities, as well as their ineffectiveness in preventing instances of mass violence in schools.[8]

Regardless of whether data demonstrates positive outcomes for students engaging with SROs, parents and community members care about the safety of children, and their perception of safety at school matters. Nonetheless, there are substantial issues with the current regulatory approaches that allow substantial negative collateral consequences for students.[9] As the debate about SRO presence in schools rages amongst K-12 policymakers, this paper contributes to the robust literature surrounding SROs by outlining how the judicial system's classification of SROs as school personnel, as opposed to law enforcement officers, has allowed for increased infringement on the constitutional rights of students. This paper argues that policy and law makers must act, since the courts have not, to pose a counter-majoritarian legislative scheme to address the negative collateral consequences resulting from the presence of SROs in schools.

In making this argument, this paper is divided into four parts. The first section traces judicial cases focused on civil rights and SRO-student interaction. Courts have repeatedly classified SROs as school officials, leading to ongoing infringement of constitutional rights for

5. *See Do Police Officers in Schools Help or Hinder Teachers?*, ECONOMIST (July 18, 2020), https://www.economist.com/united-states/2020/07/18/do-police-officers-in-schools-help-or-hinder-teachers?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.directresponse.anonymous&gclsrc=aw.ds&gad_source=1&gad_campaignid=17210596221&gbraid=0AAAAADBuq3JrBPSBkCUNr3FY3wMjOI6eV&gclid=CjwKCAjwwpDQBhAuEiwAa-4Wo63hnWP32UBw3XRPOqJuZd_4-BE47TCdq64WrDK1CuAsXNd4zm4QfxoCE5AQAvD_BwE

6. *See id.*

7. Samantha Viano et al., *The Third Administrator? Perceptions of School Resource Officers in Predominately White Elementary Schools*, 59 EDUC. ADMIN. Q. 633, 647 (2023).

8. *See* Barbara Fedders, *The End of School Policing*, 109 CAL. L. REV. 1443, 1445-46 (2021).

9. *See id.* at 1446.

students in school settings with no judicial remedy to protect students' civil rights.[10] The second section outlines current national policy debates pertaining to SROs, highlighting both arguments that support SRO presence in schools and arguments that call for their expulsion.[11] To examine these debates unfolding on the local level, the third section details a case study in a majority-white school district, illustrating how the perceptions of SROs, although positive, differ across demographic groups.[12] The case study also illustrates alignment with national studies on SRO-student interactions, illustrating disparate impact and outcomes for students.[13] The fourth and final section of the paper argues for legislative action as a mechanism to protect students' rights in the schoolhouse, calling for elected officials to act where the court system has not. To do so effectively, this section also argues that law and policy makers must take a counter majoritarianism approach given the differences between public perceptions and the evidenced-based outcomes of SROs, as well as the disparate impact that SROs have on students of color and students with disabilities.[14]

I. THE JUDICIAL SYSTEM APPROACH TO SCHOOL RESOURCE OFFICERS

Scholars such as Catherine Kim have questioned the truth of the infamous line offered by the United States Supreme Court stating that "students [do not] shed their constitutional rights . . . at the schoolhouse gate."[15] In reality, students do shed some of their rights each day when they enter a school building.[16] This section reviews how courts, more often than not, view and judge SROs as school officials, as opposed to law enforcement officers, at the expense of students' civil

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10. Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 861 (2012).

11. *See* Fedders, *supra* note 8.

12. *Board of Education Agenda Abstract*, CHAPEL HILL-CARRBORO CITY SCHS. (June 16, 2022), https://chccs.granicus.com/MetaViewer.php?view_id=2&clip_id=550&meta_id=36315.

13. Sagen Kidane & Emily Rauscher, *Unequal Exposure to School Resource Officers, by Student Race, Ethnicity, and Income*, URB. INST. (Apr. 6, 2023), https://www.urban.org/research/publication/unequal-exposure-school-resource-officers-student-race-ethnicity-and-income

14. Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 151–53 (2015).

15. *See* Kim, *supra* note 10.

16. *See id*.

rights.[17] Scholars have described a growing nexus between the criminal justice system and the education setting, thus questioning the doctrinal justification that insulates SROs from judicial scrutiny on the grounds that their actions are in the educational interest of suspect youth.[18]

Further problematizing the judicial stance on SRO infringement on students' rights is the limitation for students to seek remedy under Section 1983 for civil rights claims.[19] Section 1983 creates a federal cause of action against public officials who violate civil liberties.[20] There are a myriad of reasons for this limitation, including the dual roles that SROs serve as law enforcement and school administrators. Thus, SROs may raise a qualified immunity defense in response to Section 1983 claims.[21]

A. *Student Searches without Cause*

While the constitution protects against unreasonable searches and seizures under the Fourth Amendment, students do not have these same constitutional protections while in the school setting.[22] Absent a Supreme Court ruling, most states have upheld that SROs operate as school officials rather than law enforcement, resulting in reduced Fourth Amendment protections for students.[23] Courts imposing these limited constitutional rights do so by relying on the theory that school discipline benefits youth, and therefore restrictions on students' rights are justified.[24] Based on the premise that schools must maintain order, courts have held that it is unreasonable to require a probable cause prior to student search.[25] In determining if a search by a school official was permissible, courts will decide if the search was justified at its inception and whether the search was "reasonably related [to the]

17. *See id.* at 865.
18. *Id.* at 902-03.
19. Kerrin C. Wolf, *Assessing Students' Civil Rights Claims Against School Resource Officers*, 28 PACE L. REV. 215, 219 (2018).
20. 42 U.S.C. § 1983.
21. Wolf, *supra* note 19, at 219.
22. *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 FORDHAM L. REV. 2013, 2031 (2019).
23. *Id.* at 2016.
24. Kim, *supra* note 10, at 867.
25. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

scope and circumstances".[26] The standard at which a search is justified is much lower than outside of the school setting. A school official, or SRO, conducting a search need only for that search to (1) be reasonable under all circumstances – a standard much lower than probable cause and (2) have reasonable grounds for suspecting that the search will result in evidence that the student is violating either the law or school rules.[27] Examples of these searches play out in a multitude of ways. For instance, searching students based on proximity to an act coupled with a perception of suspicious behavior is sufficient to warrant a school search.[28]

Jurisdictions vary on their perspective of cause needed for SROs to engage in student searches, given the dual role SROs hold as both a law enforcement officer and school official. Multiple courts have ruled that SROs need only reasonable suspicion, like that of any school official, because they are viewed as such and not as law enforcement agents.[29] Other jurisdictions have required probable cause for searches, and classify SROs as law enforcement officers.[30] In the majority of states, SROs will need probable cause for student searches when involved in a law enforcement action.[31] When an SRO acts as a school official, which constitutes most student searches, they need only have reasonable suspicion.[32]

B. *Questioning without Miranda Warning*

Miranda warnings are required to safeguard the Fifth Amendment privilege against self-incrimination and protect against coercive interrogations.[33] Police must advise criminal suspects, prior to custodial interrogation, that anything they say can be used against them in court, they have the rights to remain silent, and consult with a lawyer

26. *Id.* at 341.
27. *Id.* at 341-42.
28. *See* Vassallo v. Lando, 591 F. Supp. 2d 172, 195 (E.D.N.Y. 2008).
29. Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 165-66 (2015).
30. *See* State v. Tywayne, 933 P.2d 251, 254 (N.M. Ct. App. 1997).
31. Wolf, *supra* note 19, at 230.
32. *Id.* at 232.
33. Natalie Short, *Mitigating "The Coercive Effect of the Schoolhouse Setting": Adolescents' Miranda Rights and Law Enforcement Interrogations at Schools*, 19 NEW CRIM. L. REV. 93, 95 (2016).

or to have one appointed in they are indigent.[34] Interrogation must stop if the suspect wishes to remain silent or until a lawyer is present if one has been requested.[35] In order for *Miranda* warnings to apply, an individual must be held in custody and interrogation takes place.[36]

There are several ways law enforcement avoids issuing *Miranda* warnings. For instance, a law officer can make clear that the individual is not in custody and can leave at any time; in these circumstances, any voluntary statement is allowed.[37] That being said, a judge may rule that the individual was held in custody, in which case there would be a *Miranda* warning violation.[38] Although admissions made to law enforcement while in custody prior to *Miranda* may not be admissible, any statements made later, voluntarily and knowingly, are admissible.[39] Moreover, individual accountability for law enforcement is lacking. Law officers are also not liable in a § 1983 claim for *Miranda* warning violations, even when the individual is eventually acquitted at trial.[40]

Turning to the school setting, there is a lack of protection for students' rights in the context of questioning during an investigation.[41] After outlining ways in which *Miranda* warnings have failed students in school interrogations, this section puts forth an argument that students should receive *more* protections under *Miranda* given that they are a vulnerable population and even more susceptible to abuse of authority.

Students do not receive *Miranda* warnings prior to questioning since school officials and SROs are not considered part of law enforcement.[42] A *Miranda* warning is not required even when a student asks for a lawyer because the student is "not in official custody when

34. Miranda v. Arizona, 384 U.S. 436, 469-474 (1966).

35. *Id.* at 473-74.

36. *See id*. at 444, 461, 475.

37. *See* Lauren E. Clatch, *Interrogating Miranda's Custody Requirement*, 103 N.C. L. REV. 69, 86, 101 (2024).

38. *See id*. at 102.

39. *See* Oregon v. Elstad, 470 U.S. 298, 232 (1985) ("Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.").

40. *See* Vega v. Tekoh, 597 U.S. 134, 150–152 (2022).

41. Wolf, *supra* note 19, at 233–236.

42. State v. Tinkham, 719 A.2d 580, 583 (N.H. 1998).

questioned, [and thus there is no] legal right to remain silent or speak to [a] lawyer."[43]

Like with student searches, various jurisdictions have made different rulings on whether an SRO must issue a *Miranda* warning. Upholding the *Miranda* warning requirements, Pennsylvania requires a *Miranda* warning for custodial investigations.[44] In Texas, *Miranda* warnings may also be required when questioning students behind closed doors.[45] Conversely, some courts view the school environment as non-threatening and distinct from a police station.[46] Questioning that takes place in a school administrator's office, without interrogating questions and taking a short amount of time, may be viewed as non-custodial questioning and does not require SROs to issue *Miranda* warnings.[47] Furthermore, when the questioning occurs for "educational purposes" rather than for a "criminal investigation," *Miranda* warnings may not be required.[48] This holds true regardless of whether any formal charges are filed against the student.[49]

While courts vary in their application of *Miranda* warning requirements for SROs, it is evident that student rights under *Miranda* are limited in comparison to the *Miranda* rights offered to individuals outside of a school setting due to the general judicial classification of SROs as a school official.[50] Although students are minors and highly susceptible to the influence of adults in positions of authority, courts have done nothing to mitigate their vulnerability. Failures to protect the rights of students through judicial decision-making coupled with systemic inequities have fueled policy debates about SROs across the nation.

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43. *In re* V.P., 55 S.W.3d 25, 33 (Tex. App. 2001).

44. *In re* R.H., 791 A.2d 331, 333 (Pa. 2002).

45. *See In re* D.A.R., 73 S.W.3d 505, 512–13 (Tex. App. 2002).

46. Wolf, *supra* note 19, at 235 (citing *In re* Erik E., No. 1 CA-JV 08-0024, 2008 WL 4216544 (Ariz. Ct. App. Sept. 11, 2008); *In re* J.H., 928 A.2d 643 (D.C. 2007); *In re* Welfare of B.M.K., No. A07-0852, 2008 WL 1972488 (Minn. Ct. App. 2008)).

47. *In re* Marquita M., 970 N.E.2d 598, 603–04 (Ill. App. Ct. 2012).

48. State v. C.D., 947 N.E.2d 1018, 1023 (Ind. Ct. App. 2011).

49. *Id.*

50. *Id.*

II. CURRENT POLICY DEBATE

Education researchers and legal scholars have conducted substantial research focused on perceptions of SROs, as well as outcomes of SRO presence in schools.[51] Debates surrounding SRO policies are commonplace in school systems, state legislatures, and federal agencies.[52] This section will begin by discussing studies that analyze public perception of SROs. Next, this section will provide an overview of studies that have demonstrated negative collateral consequences, school safety shortcomings, and disparate impact on student outcomes in connection with SRO interactions. Finally, the section will conclude by providing an overview of various reforms that have been suggested by scholars and activists to mitigate the detrimental effects produced by SRO presence in schools.

A. *Perceptions of School Resource Officers*

When considering public perception, it is important to recognize the time and context in which SRO presence in schools has vastly expanded. The expansion period began in the late 1990s, which was fraught with serious concern over school safety, reaching a fever pitch following the school shooting at Columbine High School.[53] Much of this fear was concentrated in white suburban and rural parents, who were more likely than parents of color to feel that a school shooting was likely to occur in their community.[54] Since the 1990s, schools have continued to experience school shootings, reinforcing the concerns for safety and prevention of mass violence.[55]

Interestingly, studies have shown that whether or not a school has an SRO present does not impact teacher worry about a school

51. Barbara Raymond, *Assigning Police Officers to Schools*, OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST. (Apr. 2010), https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p182-pub.pdf

52. *See* JAMES & MCCALLION, *supra* note 1.

53. Kim, *supra* note 10 at 877.

54. *Id.* (citing Mark Gillespie, *School Violence Still a Worry for American Parents*, GALLUP (Sep. 7, 1999), http://www.gallup.com/poll/3613/School-Violence-Still-Worry-American-Parents.aspx).

55. *Id.*

shooting occurring, or their belief that schools are safe places.[56] However, teachers in schools with SROs are more likely to believe that their school has adequate security and are more likely to feel physically safe during the workday as opposed to teachers in schools without SROs.[57] The perception of safety does not extend to how teachers think students feel. Teachers with an SRO in their schools are more likely to perceive students as concerned for their safety when compared to schools without an SRO.[58] In terms of the role that SROs play in schools, stakeholders often view the SRO as a "third administrator" who provides "general assistance similar to a vice principal."[59]

Studies have shown that school leaders in affluent areas believe SROs promote school safety, even if those leaders have no experience with SROs in their schools.[60] In mixed-methods studies, school leaders tend to overlook negative, systemic relationships between law and people of color, viewing SROs as race neutral.[61] Expanding on the belief that SROs are "race neutral," scholars have highlighted the way in which SROs engage in legal socialization.[62] For example, when SROs teach about law enforcement, critical discussions of policing is absent from the conversation, and criticisms are presented as fictional or unrepresentative of policing as a whole.[63] These studies exemplify how SROs can operate in schools with blinders on, ignoring the systemic racial discrimination issues with both the SRO program and policing in general.

Reactionary safety practices and policies, such as SROs, are often initiated in response to "highly publicized but extremely rare incidents of school rampage."[64] Eric Madfis cautions that the public's perception of safety measures needed in schools is out of proportion

56. Brandon J. Wood & Eric Hampton., *The Influence of School Resource Officer Presence on Perceptions of School Safety and Security*, 50 SCH. PSYCH. 360, 365 (2020).

57. *Id.*

58. *Id.*

59. Viano et al., *supra* note 7, at 634.

60. *Id.* at 655.

61. *Id.*

62. *See* Aaron Kupchik et al., *Police Ambassadors: Student-Police Interactions in School and Legal Socialization*. 54 L. & SOC'Y REV. 391, 396–99 (2020).

63. *Id.* at 410.

64. Eric Madfis, *"It's Better to Overreact": School Officials' Fear and Perceived Risk of Rampage Attacks and the Criminalization of Public Schools*, 24 CRITICAL CRIM. 39, 51 (2016).

with actual need.[65] When discussion and decision making pertaining to SRO presence is centered on risk calculations that are inaccurate and without understanding the negative aspects of enhanced security, perception is not aligned with reality.[66]

Compared to the perceptions of other education stakeholders such as administrators, teachers, students, and parents, SROs tend to over-estimate their positive effects, while under-estimating their role in school discipline.[67] Benjamin Fisher analyzed 73 interviews with SROs across two districts who were placed in schools with a variety of racial compositions.[68] Fisher found that SROs perceive three categories of threats: student-based, intruder-based, and environment-based threats.[69] These categories were persistent across schools, but in the district where there was a higher number of white students, SROs were primarily concerned about intruder-based and environment-based threats. SROs in districts with a larger proportion of Black students were primarily concerned with student-based threats.[70] This finding is key when considering the racially disparate impact of school policing discussed in the following subsection.

The perceptions of SROs in schools do not necessarily align with the stated purposes or realities of SRO presence. While SROs may offer benefits to some, including reducing the load on the local police force and school administrators, as well as providing a *feeling* of security, these benefits come at a high cost for students of color, especially Black boys, and students with disabilities.[71] Disparate impact on students of color and students with disabilities is further explored in the following subsection.

B. *Negative Collateral Consequences of SROs*

SROs in schools have a disproportionately negative impact on students of color and students with disabilities.[72] This is consequential

65. *See id.*
66. *See id.*
67. *See* Viano et al., *supra* note 7, at 656.
68. *See* Benjamin W. Fisher et al., *Protecting the Flock or Policing the Sheep? Differences in School Resource Officers' Perceptions of Threats by School Racial Composition*, 69 SOC. PROBS. 316, 323 (2022).
69. *Id.*
70. *Id.* at 316.
71. Fedders, *supra* note 8 at 2021.
72. Merkwae, *supra* note 14.

given the overrepresentation of children of color and children with disabilities in the juvenile justice system.[73] Scholars have spelled out the dangers of SRO presence in schools for these student groups, noting that children of color and children with disabilities are more likely to be referred to the justice system following contact with law enforcement.[74]

SRO presence impacts law enforcement reporting from schools.[75] In a robust study, researchers have found when an SRO is assigned to a school, the likelihood of reporting students to law enforcement increases, especially at the secondary level.[76] This finding is critical because when a student is referred to law enforcement, it increases the student's likelihood of dropping out of school.[77] The likelihood of dropping out of school is multiplied if the student is forced to appear in court.[78] Moreover, the presence of an SRO exacerbates administrative, school-based discipline measures such as suspensions and expulsions.[79] These findings are particularly concerning because in schools with SROs, suspensions, expulsions, and law enforcement contact disproportionately occur more for Black students, male students, and students with disabilities.[80] While researchers have also found that white students are just as likely as non-white students to bring a gun to school, SROs most frequently involve themselves in student discipline when students of color make up the majority of the student body.[81]

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73. *Id.* at 151–53 (2015).

74. *Id.* at 158.

75. *See* Raymond, *supra* note 51.

76. Michael Heise & Jason Nance, "*Defund the (School) Police"? Bringing Data to Key School-to-Prison Pipeline Claims*, 11 J. OF CRIM. L. & CRIMINOLOGY 717, 771 (2021); Lucy C. Sorensen et al., *The Thin Blue Line in Schools: New Evidence on School-based Policing Across the U.S.*, 42 J. OF POL'Y. ANALYSIS 941, 965 (2023).

77. Madeline Morris, *School Resource Officers: Do the Benefits of Student Safety Outweigh Their Negative Impacts?*, 41 CHILD. LEGAL RTS. 193, 196 (2021).

78. *Id.*

79. Lucy C. Sorensen et al., *The Thin Blue Line in Schools: New Evidence on School-Based Policing Across the U.S.*, 42 J. OF POL'Y ANALYSIS AND MGMT. 941, 965 (2023).

80. *Id.*

81. *Id.* at 943; Patricia Jewett et al., *Weapon Carrying Among Boys in US Schools by Race and/or Ethnicity: 1993-2019*, 149 AM. ACAD. OF PEDIATRICS (October 10, 2013, 6:00PM).

C. *Calls for SRO Policy Reforms or Removal of SROs from Schools*

While some scholars and advocacy groups have called for SRO reforms, others have called for their complete removal.[82] In response to concerns pertaining to the school-to-prison pipeline and the disproportional rate of arrests and criminal charges in school settings, reformers have suggested limiting the role of the SRO to serious infractions.[83] Other reforms suggest a compete separation from SROs and school discipline.[84] Discipline-based approaches to reform have also been discussed as a path forward. For instance, Eren Archend suggests that moving away from the criminal justice system to a restorative-justice model could shift school culture.[85] In a restorative-justice model, SROs would be contractually restricted from disciplining students and there would be a required participation in a restorative justice program.[86] The goal of this model is for students to understand the harm they cause through disruptive behaviors and teach them to prevent and respond to conflict in positive ways in the future.[87] Furthermore, reformers have called for changes to the judicial application of the limited Fourth Amendment rights pertaining to SRO-student interactions discussed in the first section of this paper.[88]

Scholars have also highlighted that there are better systems to provide protections from mass violence in schools than SROs.[89] A threat assessment model can be used to evaluate a student to determine if they have the motivation, means, and intent to carry out a threat.[90] Use of this model, which could have been effective in identifying many perpetrators violence in schools, serves as an alternative to SROs in school buildings while still addressing safety concerns.[91]

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82. *See* Fedders, *supra* note 8.
83. *See* Gupta-Kagan, *supra* note 22, at 2044.
84. *See* Erin R. Archerd, *Restoring Justice in Schools*, 85 U. CINCINNATI. L. REV. 761, 814 (2017).
85. *Id.*
86. *Id.*
87. *Id.*
88. *See* Gupta-Kagan, *supra* note 22, at 2033-34.
89. Devan Byrd, *Challenging Excessive Force: Why Police Officers Disproportionately Exercise Excessive Force Towards Blacks and Why This Systemic Problem Must End*, 8 ALA. C.R. & C.L. L. REV. 93, 113 (2017).
90. *Id.*
91. *See id.*

Reform efforts could center on the best strategies to provide school safety while removing the negative impact of SROs on historically marginalized students.[92]

Reformers have also called for systematic and proper training for SROs working with students in school settings.[93] Specifically, due to the disproportionate impact on students with disabilities, reformers have suggested specific training so SROs can quickly deescalate situations when students may be in crisis.[94] In an effort to protect students in crisis, schools and SROs could ban the practice of handcuffing at school.[95]

Federal offices, such as the Department of Education (DOE) have taken steps to reform SRO policies.[96] In 2016, the DOE published recommendations that schools collaborate with law enforcement for purposes separate from school discipline.[97] The guidance also suggested that SROs should be focused on the physical safety of the school and criminal conduct of persons other than students.[98] Partnering with the Department of Justice (DOJ), the DOE issued an explicit goal of closing the school-to-prison pipeline in 2016.[99] Various states have also issued reforms. For instance, South Carolina narrowed its criminal statute banning school disturbances to not include students, hopefully restricting SRO-student involvement.[100] Local memoranda between school districts or counties and local law enforcement agencies is another opportunity for reform efforts to separate SRO law enforcement from school discipline goals.[101]

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92. *See id.* at 113-14.

93. *See* Isabella Lefkowitz-Rao, *Examining the Impact of School Resource Officers and Possible Alternatives*, COAL. FOR JUV. JUST. (July 29, 2024), https://juvjustice.org/blog/examining-the-impact-of-school-resource-officers-and-possible-alternatives/

94. *See* Byrd, *supra* note 89, at 198 (reformers suggest increased training on Individualized Education Plans (IEPs) and Behavior Intervention Plans (BIPs)).

95. *Id.*

96. Press Release, U.S. Dep't of Just., Obama Administration Releases Resources for Schools, Colleges to Ensure Appropriate Use of School Resource Officers and Campus Police (Sept. 8, 2016), https://www.justice.gov/archives/opa/pr/obama-administration-releases-resources-schools-colleges-ensure-appropriate-use-school.

97. *Id.*

98. Gupta-Kagan, *supra* note 22, at 2047.

99. *Id.*

100. *Id.* at 2051.

101. *Id.* at 2055.

Other reformers have promoted complete removal of SROs from the school setting, suggesting that the many issues and negative collateral consequences of SROs in schools cannot be addressed through the minutia of hodgepodge reform.[102] In her article *The End to School Policing*, Barbara Fedders discusses the many reasons for elimination of SROs rather than continuing with reform efforts that have done little to address concerns.[103] She argues that even under the best reforms, SROs create more harm than safety.[104] SROs often override the administrator and teacher handling student discipline, blurring the line between law enforcement and school personnel, and stifling dissent while normalizing surveillance.[105] Fedders highlights that the role of an SRO as school official is especially problematic given that they are often unqualified for personnel roles.[106]

III. SCHOOL RESOURCE OFFICER POLICY: A CASE STUDY

Many school districts across the country are working to enact policies that can minimize the negative effects of SROs.[107] At the same time, districts are led by elected officials who may be swayed by public perceptions of safety that SROs may offer. This section examines these phenomena utilizing a case study of a Southeastern school district in a college town in North Carolina. The largest student demographic groups in the district are: 50 percent white, 18 percent Hispanic/Latinx, 14 percent Asian or Asian Pacific Islander, and 11 percent Black or African American.[108]

Beginning in the summer of 2020, the school district established a School Safety Task Force (SSTF) in response to the expiring Memorandum of Understanding (MOU) with the police department

102. *See* Fedders, *supra* note 8.
103. *Id.*
104. *See* Fedders, *supra* note 8, at 1448-49.
105. *Id.*
106. *Id.*
107. *See School Resource Officer Proposal*, DESMOINES PUB. SCHS. (Jan. 22, 2021), https://www.dmschools.org/wp-content/uploads/2021/02/SRO-Report-1.22.21.pdf
108. *Chapel Hill-Carrboro City Schools*, U.S. NEWS AND WORLD REPORT, https://www.usnews.com/education/k12/north-carolina/districts/chapel-hill-carrboro-city-schools111172#:~:text=Students%20at%20Chapel%20Hill%2DCarrboro,Hawaiian%20or%20other%20Pacific%20Islander.

that provided SROs at all secondary schools in the district.[109] Over the next two years, the task force collected SRO-student interaction data, conducted focus groups with stakeholders, and administered a system-wide survey to educators, families, and students.[110] With this data, the task force brought recommendations to the Board of Education in Summer 2022.[111]

Students who participated in focus groups emphasized relationships with adults as creating a positive school environment that feels safe.[112] Specific to SROs, students suggested creating a more clear role for the position and determining ways to measure the effectiveness.[113] Many of the students' ideas pertaining to school safety were not SRO specific, instead, students suggested increased consistency enforcing school rules, restorative circles, peer support structures, and better support for students experiencing high-stress.[114] The focus groups with adult stakeholders had a different take on SROs, highlighting the importance of school specific training and strong communication with administration.[115] Administrators also viewed SROs addressing concerns in the building as preferable to calling outside law enforcement, citing the established relationships that SROs might have with students and staff.[116] Furthermore, while principals in the district questioned the impact SROs may have on students who have negative relationships outside of the school building with policing agencies, one principal of color shared that his experiences with SROs as an educator have been vastly different than his personal experiences outside of school:

> As a person of color, my outside experiences haven't always mirrored what I see from SROs in the building. My history and interaction with police growing up were not [positive]. So, I think every person of color has had these experiences, and their children see it and

109. *Board of Education Agenda Abstract*, CHAPEL HILL-CARRBORO CITY SCHS. (June 16, 2022), https://chccs.granicus.com/MetaViewer.php?view_id=2&clip_id=550&meta_id=36315.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 3.

114. *Id.*

115. *Id.* at 4.

116. *Id.*

> their children come to our schools. My educator experience, however, has been very different. In the schools I've worked in, the SRO has become a part of the school community, has helped keep things from escalating, and has helped keep kids out of trouble when they should have been arrested. Although I have seen the bad side of policing, and my family has also experienced the bad side of policing, my experience in Chapel Hill and other districts has been that the SRO seems to be a trusted member of the school community.[117]

Staff focus groups overwhelmingly supported SROs.[118] Staff felt that SROs make the schools safer.[119] One staff member shared, "[y]es, so if you take the SRO away, which I don't know anybody that's in favor of that, what safety measures will replace them? We will be less safe without the SRO."[120] Most students also felt safer at schools with an SRO present, particularly with the perceived threat of mass violence.[121] One student shared, ""I haven't had interactions with the SRO, but as a student, I feel more comfortable on campus if there is an SRO in case there's a shooting."[122]

While most staff and students indicated they had no knowledge of differential treatment of students by race or ethnicity, a few students did feel that some of their classmates experience different treatment.[123] One student stated, "I don't think I've ever interacted with [our SRO], but I do think that there is a difference of the types of kids he has reached out to and interacted with. I do think that a lot of that may be based on race or ethnicity, like, and I don't know, like the reasoning for that, but I do see that happening."[124] Another student shared:

> Like I feel like they overlook what some of the white kids do rather than the Black or Hispanic kids for sure. And I think that's only because there's less of us. And

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 18.
121. *Id.*
122. *Id.* at.
123. *Id.* at 16.
124. *Id.* at 16.

> I don't know, they just remember all of the Black and Hispanic kids. I would say no, it's not fair. I can give you an example. So, a white girl got to leave campus that was a junior, but then this black girl tried to leave campus, that was a junior, they didn't let her, but oh, the white girl got to go. Why?[125]

The district also surveyed the community, students, parents, and educators, about their perceptions pertaining to school safety and SROs.[126] The survey data showed that students and educators answered more positively to "I feel safe" at school when compared to parents' perceptions of safety at school.[127] While 86 percent of students and 91 percent of staff felt safe on school grounds, only 79 percent of parents felt schools were safe.[128] This trend was consistent across all demographic groups, with parents' feelings of school safety significantly lower than students' perceptions of safety.[129] Significantly, white parents felt the school was the least safe, with only 60 percent agreeing that they felt the school is a safe place, compared to 63 percent of Latinx parents, 66 percent of Black parents, and 81 percent of Asian parents.[130] Feelings of safety at school also varied amongst students based on demographic group.[131] While over 80 percent of Latinx, white, and Asian students felt safe at school, only 75 percent of multiracial students and 71 percent of Black students felt safe at school.[132]

Overall, 80 percent of all stakeholders felt SROs treat people of all races, ethnicities, and abilities well, and that SROs contribute to the safety of the school.[133] Students, however had a notable difference across demographic groups.[134] Over 90 percent of Asian, Latinx, and white students state that SROs treat all their classmates well, whereas 85 percent of Black and multiracial students felt SROs only treat

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 27.
131. *Id.*
132. *Id.* at 21.
133. *Id.* at 27.
134. *Id.*

stakeholders well.[135] Multiracial and Black parents were also the least likely to feel that the SRO contributes to the overall safety at the school.[136]

Statistical data collection on SRO-student interaction for the district was also collected throughout the school year.[137] Most SRO interactions in the schools were categorized as "administrative support," aligning with studies that have shown SROs are viewed as a third administrator.[138] "Positive interactions" was the second highest category with "community engagement," "classroom visits," and "positive advice and counseling" rounding out the top five interaction types.[139] The lowest quantity of interactions were "diversion," "professional learning," and "family engagement."[140] The lack of professional learning is noteworthy given the calls from SRO reformers to require training that is more applicable to the school setting.

Statistics on SRO-interactions with students varied widely across student demographics.[141] Consistent with national data, SROs disproportionately interacted with Black students.[142] While Black students make up 12 percent of the school population, they account for 38 percent of SRO-student interactions.[143] White students who make of 50 percent of the school population account for 44 percent of SRO interactions.[144] Latinx students who make up 18 percent of the school, make up 17 percent of SRO interactions.[145] It is also important to consider the type of interactions that SROs are having with students. "Student discipline" made up 17 percent of the SRO interactions with Black students, whereas it made up 12 percent of SRO interactions with white students.[146]

The data collected in this case study is highly aligned with national studies pertaining to SROs.[147] SROs often contribute to the

135. *Id.* at 28.
136. *Id.* at 29.
137. *Id.*
138. *Id.* at 30.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 31.
143. *See id.* at 32.
144. *See id.*
145. *See id.*
146. *See id.*
147. *See* Kidane & Rauscher, *supra* note 13.

overall feelings of safety by the community.[148] However, while the *majority* of all groups perceived SROs positively and have a sense of safety at school, policy makers should not overlook differences *within* and *across* each group making up the majority. The data collected in the case study highlights that there are key differences across demographic groups.[149] This is not surprising when examining the SRO interaction data. Black students have a much higher chance of having an interaction with an SRO when compared to white students.[150] These disparities align with national data which demonstrate that Black students and students with disabilities disproportionately have interactions with SROs – often leading to negative educational and legal consequences.

Despite the alignment with national studies, the case study district did not focus on the research and national data during the decision process.[151] Links to some research studies were provided on the abstract for the Board of Education meeting, but most time was spent discussing internal data–most of which was perception-based.[152] Key decision-making data was missing from the report, such as rates of SRO arrests, as well data on civil rights issues such as student searches and questioning. This case study highlights the information utilized in SRO policy development in a majority white school district when taking a majoritarian approach. Ultimately, the district kept SROs in place with a modified MOU and a pilot program of replacing the SRO at one school with a mental health professional.

IV. LEGISLATIVE ACTION THROUGH A COUNTER MAJORITARIAN APPROACH

Section one of this paper illustrated the failures of the court system to adequately protect students' civil liberties during SRO interactions on school campuses. Section two highlighted the positive, although possibility misplaced, perceptions of SROs in schools related to safety. It also highlighted collateral consequences of SROs in schools, beyond civil rights violations, that are disproportionately felt by students of color and students with disabilities. This section also

148. *See* Viano et al., *supra* note 7.
149. *See* CHAPEL HILL-CARRBORO CITY SCHS., *supra* note 109.
150. *See id*.
151. *See id.* at 1.
152. *See id.* at 27, 36.

provided previously suggested reform concepts. Section three demonstrated the replication of national findings through a case study in which a majority white school district engaged in a 2-year process to consider changes to their SRO program. There are many calls for reform–from increased training to complete abolishment of SRO presence in schools. This section adds to the voices of scholars and practitioners calling for reform but offers a new perspective.

Under the majority view, SROs are considered school officials under the law, thus allowing SROs to engage in student searches and questioning in a manner that infringes on students' civil rights.[153] Classifying SROs as a school official has harmed civil rights for many students and will continue to do so barring a shift in judicial action. It is doubtful that true change pertaining to SROs can come from within the schools themselves. SROs are viewed positively by staff and administrators–and research has shown that educators often see SROs interactions with students as race neutral.[154] When perceived as an extra set of hands-on campus or an extra administrator, SROs provide service to the school when so many are understaffed. Finally, educators have demonstrated a greater perception of safety when SROs are in the building. Students and families feel similarly, although in varying degrees. Change at the local level is difficult given that from the majoritarian view, it seems like the simple answer is to keep SROs in school buildings.

Despite the value placed on the community feeling that schools are a safe place, the negative collateral consequences of SROs are well documented and cannot continue to be ignored. Not when vulnerable populations who need more protection from consequences that can have rippling impacts on them and their futures. Given that the judicial system and schools may be less likely to make substantial change or eliminate SROs, a different approach to decision-making is a way forward for policy makers at the district and state levels. However, this action requires caution. It is dangerous to allow majoritarianism to be a primary driver of policy pertaining to SROs, especially in the context of majority-white school settings. Remaining within a majoritarian framework for decision making will ultimately yield similar systems of school policing given the positive public perception of SROs. Policy makers who make a purposeful effort to engage in counter majoritarian approaches may uncover many of the negative impacts of SROs,

153. Wolf, *supra* note 10, at 231.
154. *See* Viano et al., *supra* note 7 at 634.

as well as the nuances within the majority viewpoints demonstrated in the local case study.

Policy makers must consider the differences within the majority views, as well as counter majoritarian perspectives. Although overall favorable, students, staff, and families perceive the impact of SROs on students differently. In majority white school systems, solely taking a *majority rules* approach stifles the voices of those that are most negatively impacted by the presence SROs. Thus, the elevation of the non-majority voice is especially important in majority white school systems where decision makers are elected by the populous. School boundary lines have a long history of segregation and continue to result in the creation of majority white spaces.[155] Peter McLauren cautions of "social amnesia", which he describes as a failure to recognize and acknowledge how white people are implicated in socializations of privilege and relations of domination and subordination.[156] Social amnesia is associated with modes of subjectivity within social sites and is considered to be normative.[157] In these majority white spaces, policy makers must pitfalls by moving away from majoritarian-based decision making and they must elevate the voices of those most impacted by their SRO policy decisions.

There are several districts across the country that have already taken steps to move in a counter majoritarian direction to inform SRO decision-making, although not always leading to complete removal. A district in La Crosse, Wisconsin commissioned a district-wide evaluation of their SRO program.[158] Aligned with national data on SRO programs, La Crosse's study demonstrated that the majority-white school district disproportionately disciplined students of color, students in poverty, students with disabilities, and male students.[159] Following the study, there was a heated debate that ultimately led to a reduction in SROs from five to three, and created annual funding for

155. *See* Erika Wilson, *Blurred Lines: The Privatization of Public Education Through School District Boundary Lines*, 51 WASH. UNIV. J.L. & POL'Y 189, 200 (2016).

156. Peter McLaren, *Whiteness Is . . . The Struggle for Postcolonial Hybridity*, *in* WHITE REIGN: DEPLOYING WHITENESS IN AMERICA 63-75 (J. Kincheloe & S. Steinberg ed., 1998).

157. *Id.*

158. Sarah Schwartz et al., *These Districts Defunded Their School Police. What Happened Next?* EDUC. WEEK (June 4, 2021), https://www.edweek.org/leadership/these-districts-defunded-their-school-police-what-happened-next/2021/06.

159. *Id.*

a social worker position and restorative justice reform.[160] Edmonds, Washington offers an alternative model to SROs.[161] Instead of having an SRO in school buildings, the district has a school liaison officer.[162] In this model, the school is part of an officer's patrol area, and that officer is responsible for responding to emergencies in the school.[163]

Sometimes, counter majoritarian reform in schools is led by advocates seeking change from the bottom up instead of the top down. In Columbus, Ohio, advocacy at the school board level led to the district allowing their MOU with law enforcement for SROs to expire.[164] Advocates in Ohio are cautious, however, since the district has yet to make an official decision regarding SROs.[165] Taking a counter majoritarian approach isn't easy, as a Madison, Wisconsin school district learned when they moved from SROs to restorative justice coordinators.[166] Despite the initial opposition of the teacher's union, the union eventually moved to support the effort while advocating for increased counselors and student support staff.[167] The union president referred to moving from the majoritarian public-perception to shifting mindsets:

> "For those in the high schools, there was some consternation at first. All of a sudden people's brains run to the worst-case scenario. And we've had honest-to-God experiences where students have weapons on them, and all-out brawls in the hallway . . . Honestly, logistically, it's easier to just send the kids home and call the parents. The harder and more effective one is to have a student sit down, and have that discussion, and find out how we can repair the harm."

These districts have all done counter majoritarian work, to varying degrees, to make changes in SRO policies.

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*

Another tool that could be used by policymakers in taking a counter majoritarian approach is impact assessments.[168] For example, an assessment published by *Race Forward* recommends key questions in ten categories that policy makers should ask prior to enacting policy: (1) identifying stakeholders, (2) engaging stakeholders, (3) identifying and documenting racial inequities, (4) examining the causes, (5) clarifying the purpose, (6) considering adverse impact, (7) advancing equitable impact, (8) examining alternatives or improvements, (9) ensuring viability and sustainability, and (10) identifying success indicators.[169] Utilizing a guide system such as this can serve as a counter majoritarian decision-making instrument. Instead of implementing the wishes of the majority, especially in majority white settings, an equity-based structure such as the one above assists in making sure policy decisions are not solely driven by the will of the majority, but in consideration of those that the policy would be most likely to harm.

Another approach to moving away from the majoritarianism is to delegate decision-making power for SRO policy to a counter majoritarian entity. School boards, county commissioners, and state legislators are all majoritarian, elected bodies, which creates challenges for counter majoritarianism change. As a result, policy makers could shift their authority to administrative agencies, district administrators, or even impartial third parties. Guidance could be provided to the delegates as they engage in approaching SRO policy outside of a majoritarian framework, away from the pressures that come with elected office.

This is not to say that positive public perception has no place in the policy making pertaining to SROs. It may be a valuable consideration, and policy makers must think about how to communicate empirical SRO outcome data and alternate methods deployed to ensure schools safety. However, when focusing primarily on the majoritarian viewpoint, it drowns out the negative impacts that are often not experienced by most individuals in the system. In determining SRO policy, school districts, state legislatures, and other policy makers must shift from a majoritarian decision-making framework given the well-

168. *Racial Justice Impact Assessment*, RACE FORWARD, https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment_v5.pdf (last visited December 11, 2023).

169. *Id.*

documented discrepancies between majority perceptions of SROs and real-world data demonstrating negative collateral consequences of SRO presence. Furthermore, the disparate impact that SROs have on students of color and students with disabilities makes this shift especially important in majority-white school systems.

CONCLUSION

While SROs in schools may create a perception of safety, they also have been shown to result in negative collateral consequences for students. This includes increased rates of suspension, expulsion, arrests, and referrals to law enforcement. These negative collateral consequences are not experienced equally across student groups. Black students and students with disabilities are disproportionately experiencing these negative outcomes. These findings have been demonstrated in national studies as well as in local contexts.

Through classifying SROs as school officials and not law enforcement, the courts allow SROs in school settings to infringe on the constitutional rights of students, exercising a lower cause needed for student searches and minimal requirements for *Miranda* warnings despite SROs work with a vulnerable population. Students are unlikely to find remedy for civil rights violations experienced in school settings by SROs in the judicial system.

This paper suggests that to find a remedy for negative collateral consequences caused by SROs, policy and law makers must act since the courts have not. Additionally, it is imperative that policymakers shift from a majoritarian approach to SRO policy decisions and instead engage in a counter majoritarian process. There is more than sufficient evidence to demonstrate why this shift is vital to ensure that those most harmed by SROs in schools are the driving factor for policy reform. Civil rights infringement, suspensions, expulsions, arrests, and referrals to law enforcement all occur at a disproportional rate for students of color and students with disabilities. These collateral consequences cannot continue to be obscured by the positive perceptions of the majority.

WHITE PREDOMINANCE IS THE POINT*

KIMBERLY WEST-FAULCON**

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.

INTRODUCTION……………………………………………..……….78
I. THE STATUTORY ENDGAME: MAKING WHITES VICTIMS WHO NEED SAVING FROM "WOKENESS"…………………………...…83
A. *The Not-Colorblind Decontextualized White Victimhood Narrative*…………………………………………….....84
B. *Section 1981 and Title VII Statutory Bans on Racialized Hierarchy*……………………………………………..93
1. History, Text, and Precedent of Section 1981 of the Civil Rights Act of 1866……………………………………96
2. Title VII of the Civil Rights Act of 1964, as Amended by the Civil Rights Act of 1991…………………………102
II. THE "ASK" AND WEAPONIZED DECONTEXTUALIZATION IN BLITZ-STYLE WHITE PREDOMINANCE ATTACKS……………………...109

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** AUTHOR—Professor of Law, James P. Bradley Chair in Constitutional Law, Loyola Law School, Los Angeles; B.A., Duke University; J.D., Yale Law School.

A. *The* AAER v. Fearless Fund *Ask and Protection of White Predominance by Decontextualization*……………….115
B. *AFL's EEOC Letter Ask and Warping of Title VII Doctrine*…...……………………………………………………119
CONCLUSION……………………………………………………130

INTRODUCTION

A new breed of "blitz-style"[1] legal attacks on racial diversity, equity, and inclusion (DEI) propagate the false narrative that "wokeness" in corporate America is victimizing Whites.[2] 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[3] to convert existing pro-race inclusion civil rights statutory doctrine into a tool for preserving white predominance[4] of the nation's most valued economic and workforce opportunities.[5] 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[6] 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,* PAYSCALE, 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[7]—42 U.S.C. § 1981's contract clause[8]—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."[9] 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[10]—Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.[11]

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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*[12] 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. [13] This is an examination of a letter sent by an anti-DEI organization named America First Legal (AFL)[14] to the EEOC that calls on the agency to investigate the

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/eeoc-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"[15] in violation of Title VII.[16] 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. [17]

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.

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 Premonitions 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.[18] 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.[19] 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."[20] The racist white supremacist murderer contended that his mass killing was "justified by data," not mere racial hate.[21] 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.[22] 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."[23] 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.

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"[24] of memes, graphs, data points, and factoids[25]—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.[26] "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."[27] The multitude of racist references in the Buffalo white supremacist shooter's murder monograph and "the more than 600-page 'diary'"[28] 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.[29]

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"[30] among the

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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 "decontextualized 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.

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.[31] That original post can be "traced back to a thread" on the unmoderated online forum 4chan.[32] 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.'"[33] Thus, this central tactic of citizen scientific racism can be understood as an ideologically-driven project of hyper-decontextualization.[34]

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.[35] 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.[36]

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.[37]

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."[38] 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."[39]

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.[40] 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

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-reaj/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."[41] 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.[42]

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.[43]

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.[44] 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[45] 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[46] 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."[47] 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.[48] 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

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[49] and Title VII[50] 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.[51] 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.[52] Many job categories in the modern United States align with racial hierarchies and occupational race segregation.[53] 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."[54]

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

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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)[57] and America First Legal (AFL)[58] 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.[59]

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.[60] 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* PAYSCALE, *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-dismantling Congressional acts that anti-DEI forces seek to warp through blitz-style legal attacks on racial DEI.[61]

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.[62] 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,

(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-a4ddf354423feee9697310366248f646 (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.[63]

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.[64] 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."[65] 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.[66] 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.[67]

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.[68] 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.[69]

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."[70] 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.[71] 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,[72] 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.[73] 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.[74] 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

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.[75]

Congress's overarching purpose in enacting the 1866 Act and other important Reconstruction-era federal laws[76] was to guarantee full citizenship inclusion for non-Whites, particularly African Americans.[77] 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.[78]

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

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[82] 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."[83] 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.[84] 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.'"[85]

Inclusion-motivated race consciousness by parties to contracts[86] is deemed nondiscriminatory under § 1981 of the Civil Rights

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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; s*ee* Kim Makuch, *Television Station Ownership Diversity* (Off. Econ. and Analytics, Fed. Commc'ns 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.[87] 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.[88]

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.[89]

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

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.[90] 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.[91] 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.[92] The doctrinal upshot is that, following the Supreme Court's interpretation of Title VII[93] in cases explained in the next section, considering race to remedy racism is legally permissible under § 1981.[94] 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.[95] 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

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.[96] It is a common anti-DEI tactic to deploy hyper-decontextualization of a single snippet of a lengthy and complex full text.[97] 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.[98] 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.[99] 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.[100] While

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.[101]

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.[102] 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.[103]

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.[104] 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.[105]

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.[106]

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.[107] 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.[108] 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.[109] In *Weber*, 98.17% of the workers in these categories were White, and only 1.83% were African American.[110] 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-USWA 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."[111]

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.[112] 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.[113] 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.[114] 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.[115]

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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*.[116] 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.[117] 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

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.*[118]

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.*[119]

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.[120] 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.[121]

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.[122]

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."[123] 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

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[124] and AFL.[125] White predominance blitz-style legal attacks by these two organizations began in August 2023, a few months after the

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' Ed-ward 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); s*ee* 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*.[126] 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"[127]—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.[128] 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

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-reaj/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."[129] 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.[130] 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.[131]

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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,[132] 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.[133] 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"[134] businesses as part of its "Fearless Strivers Grant Contest," aiming to address racial disparities in venture capital funding.[135] 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.[136]

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.[137] AAER wanted the federal courts to

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right." *Id.* at 783, 788 (Rosembaum, 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.businesswire.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.[138] 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.[139] This determination by the appellate court at the preliminary injunction stage led the parties to reach a settlement agreement.[140]

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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 FOUNDS., 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.[141] 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.[142]

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.[143]

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[144] 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. [145] 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.[146] 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[147] 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.[148] The anti-DEI blitz-style attacks by AFL ignore the *Weber-Johnson* precedent and

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 Consovoy 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,[149] the AFL letters' discussion ignores and egregiously misrepresents the Supreme Court-established Title VII legal doctrine.[150]

Examples of entities that AFL has accused of violating Title VII for inclusion-motivated consideration of race and sex include Activision Blizzard[151] as well as NASCAR.[152] 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."[153] Similarly, Activision Blizzard, a video game company, has a predominantly white workforce and corporate leadership.[154] Additionally, Activision

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.[155] 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.[156]

Much like citizen science racism tactics of relying on decontextualized factoids,[157] 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.[158] 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.[159] 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 (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/tylerroush/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."[160] 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),[161] *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),[162] *Texas v. Johnson* (which is inapplicable because the issue is whether laws banning burning of the American flag violate the First Amendment),[163] 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).[164]

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[165] illustrates the tactic of relying heavily on "shock and awe"[166] rhetoric but weakly on substantive law.[167] 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.[168]

First, using the tactic of hyper-decontextualization, the NASCAR AFL letter mislabels, as "[invidious race] discrimination,"[169] 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.[170] 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.[171] 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

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]."[172] 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.[173] The AFL letter also fails to mention NASCAR's multi-decade history of racism and racial exclusion.[174] 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

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-talladega-wendell-scott.

that the inclusion-motivated affirmative action policies are adopted to respond to a "manifest racial imbalance"[175] 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."[176]

In fact, there are few professions as white predominant as NASCAR driving.[177] 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."[178] Wallace is the only present-day Black driver to have a full-time entry in the top-tier NASCAR Cup-level series.[179] 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[180]—Wendell Scott, who, in 1963, was the first and last Black driver to win a NASCAR Cup Series race until Wallace did in 2021.[181] Over 92 percent of the 2020 Cup Series NASCAR drivers were White.[182] 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.

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 (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.[183] 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,[184] 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.[185] 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 (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.wsoctv.com/news/local/wendell-scott-racing-legend-nascars-first-blackdriver/I5MGOWTL6RG2NHXELCFK5SZGXA/; 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.[186]

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-eeoc-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/uloads/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[187] and a non-empirical, ahistorical, weaponized understanding of the terms "equity" and "discrimination."[188] 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.[189]

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.[190]

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,[191] corporate jobs,[192]

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

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 (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.[201] 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.

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/.

PROTECTING ABORTION BY PROTECTING SPEECH: REVISITING NORTH CAROLINA'S MANDATORY ULTRASOUND LAW AFTER *DOBBS AND NIFLA* [*]

KATHRYN S. ROWE[**]

INTRODUCTION……………………….……………………………134
I. HISTORY OF NORTH CAROLINA'S MANDATORY ULTRASOUND LAW…………………………………………...…………138
II. *STUART V. CAMNITZ*……………..……..………………………141
III. DISTINGUISHING *CAMNITZ* FROM CURRENT CONSTITUTIONAL ABORTION DOCTRINE………………………………………146
A. *Constitutional Abortion Doctrine*…………………147
1. Origins of Constitutional Abortion Doctrine: *Roe* and *Casey*……………………………………………..147
2. *Dobbs* and Resulting Changes to Abortion Doctrine..149
B. *Re-examining* Camnitz *and North Carolina's "Display of Real-Time View Requirement" After* Dobbs……………...150
1. *Dobbs* and *Camnitz* Implicate Different Constitutional Doctrines………………………...………………151
2. *Dobbs* Does Not Affect *Camnitz's* Rationale for Employing Heightened Scrutiny……………………152
3. *Conclusion*………………………………………..155
IV. *NIFLA'S* IMPLICATIONS FOR THE CONSTITUTIONALITY OF DISPLAY-AND-DESCRIBE LAWS………………………………………155
A. *Overview of* NIFLA………………………………155
B. NIFLA *Indicates the Display of Real-Time View Requirement Should be Subject to at Least Intermediate Scrutiny*...……………………………………………………157
1. *NIFLA* Supports Classifying the Display of Real-Time View Requirement as a Content-Based Regulation of Speech……………………………….…………...157

[*] © 2026 Kathryn S. Rowe.

[**] J.D. Candidate, University of North Carolina School of Law, Class of 2026.

2. *NIFLA* Supports Maintaining Elevated Constitutional Scrutiny for the Display of Real-Time View Requirement……………..…………………………158

C. *The Exceptions Permitting Reduced Scrutiny Under* NIFLA *do not Apply to the Display of Real-Time View Requirement*……………………………...………………160

1. Reduced Scrutiny when Regulating Factual, Noncontroversial "Commercial Speech"……………161

2. Reduced Scrutiny when Regulating Professional Conduct that Incidentally Burdens Speech………….163

CONCLUSION……………………...…………………………….167

INTRODUCTION

The fundamental right to abortion has never been fully shielded from legal attacks in the United States.[1] Even after the Supreme Court recognized a constitutional right to abortion in its landmark decision *Roe v. Wade*, 410 U.S. 113 (1973), state legislatures continued to enact burdensome regulations that restricted access as much as the law allowed.[2] When a divided Court overturned the right to abortion in *Dobbs v. Jackson Women's Health Organization*, erasing fifty years of precedent and revoking an established constitutional right for the first time in American history, the floodgates opened for states to restrict or ban abortion with minimal scrutiny.[3] Shortly after the *Dobbs* decision twenty-nine states passed abortion bans that would have previously been invalidated as

1. For the international community's recognition of abortion as a basic human right, *see, e.g.*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, *Your Health, Your Choice, Your Rights: International and Regional Obligations on Sexual and Reproductive Health and Rights* at 3 (2018).

2. Roe v. Wade, 410 U.S. 113 (1973). *See, e.g.*, Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 433–49 (1983); Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 591 (2016); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 56 (1976); Colautti v. Franklin, 439 U.S. 379, 381–82 (1979).

3. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 221 (2022); *see generally* Talia Curhan, *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (July 7, 2025), https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans.

violations of our most fundamental rights.[4] North Carolina is one of them.[5]

By eliminating the legal doctrines at the root of constitutional abortion jurisprudence, the *Dobbs* decision injected profound uncertainty into the abortion rights movement and its legal strategies. However, this uncertainty does not mean that *Dobbs* forecloses every constitutional challenge to abortion laws. As many scholars have noted, the fact that the Supreme Court no longer recognizes a constitutional right to abortion does not mean that all state abortion restrictions now satisfy the Constitution's demands.[6] State abortion laws must still comply with constitutional requirements beyond what *Dobbs* erased, and the absence of a right to abortion will not cure every constitutional infirmity.[7] This Comment examines this important caveat in the context of the First Amendment's protections of speech.

This Comment argues that constitutional free speech protections provide a separate basis for invalidating certain abortion restrictions that would otherwise withstand scrutiny after *Dobbs*. Specifically, the Comment examines this argument in the context of mandatory ultrasound laws, which require patients to receive an ultrasound before their abortion.[8] North Carolina is one of six states to impose a "display-and-describe" requirement, the strictest form of

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4. Kelly Baden, *The State Abortion Policy Landscape One Year Post-Roe*, GUTTMACHER INST. (June 16, 2023), https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe. See also *State Court Abortion Litigation Tracker*, BRENNAN CTR. FOR JUST. (Jan. 11, 2024), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker#iowa (tracking state laws stayed or repealed by litigation and ballot initiatives).

5. *See* Care for Women, Children, and Families Act, 2023 N.C. Sess. Laws 14 (codified at N.C. GEN. STAT. § 90-21.93) (describing North Carolina's abortion ban enacted after *Dobbs*, banning abortion after twelve weeks with limited exceptions).

6. *See, e.g.,* Brannon P. Denning, *Privacy and Autonomy Post-Dobbs*, 93 MISS. L.J. 1029, 1031 (2024) (exploring alternate constitutional strategies for invalidating abortion restrictions post-*Dobbs*); Danielle Zoellner, *Criminalizing the Doctor-Patient Relationship: How Abortion Aiding and Abetting Laws Violate a Physician's First Amendment Rights*, 65 B.C. L. REV. 1143, 1143 (2024).

7. Denning, *supra* note 6, at 1031 (2024)

8. *See* Talia Curhan, *Ultrasound and "Fetal Heartbeat" Test Requirements for Abortion*, GUTTMACHER INST. (Sep. 1, 2023), https://www.guttmacher.org/state-policy/explore/requirements-ultrasound.

mandatory ultrasound law.[9] These statutes require abortion providers to perform an ultrasound *and* simultaneously provide a detailed, verbal description of the fetus.[10] The North Carolina "Display of Real-Time View Requirement" imposes these obligations on every patient seeking abortion care except in medical emergencies.[11] Current radiology guidelines require ultrasounds to be conducted transvaginally during the first trimester, the timeframe when 93% of abortions occur.[12] As a result, North Carolina's statute requires the overwhelming majority of abortion patients to undergo an invasive internal procedure while simultaneously listening to a state-mandated description of their fetus, even in cases of rape, incest, and severe fetal complications, this requirement provides no opportunity for the patient or their physician to decline.

In *Stuart v. Camnitz*, the Fourth Circuit Court of Appeals upheld a permanent injunction on the Display of Real-Time View Requirement as an unconstitutional restriction on speech.[13] However, as a result of the Supreme Court's decision in *Dobbs*, constitutional abortion jurisprudence now differs substantially from when the Fourth Circuit vacated North Carolina's statute.[14] When the North Carolina legislature overhauled state abortion regulations post-*Dobbs*, it included a strengthened version of the display-and-describe

9. *See id*.

10. *See Requirements for Ultrasound*, GUTTMACHER INST. (Sep. 1, 2023), https://www.guttmacher.org/state-policy/explore/requirements-ultrasound; Maia Dunlap, *Challenging Abortion Informed Consent Regulations through the First Amendment: The Case for Protecting Physicians' Speech*, 2019 U. CHI. LEGAL F. 443, 454 (2019).

11. N.C. GEN. STAT. § 90-21.85 (2023).

12. *See* Katie Albus, *Exam Requirements: Obstetrical Ultrasound (Revised 8-23-2024)*, AM. COLL. OF RADIOLOGY (Aug. 23, 2024), https://accreditationsupport.acr.org/support/solutions/articles/11000062865-exam-requirements-obstetrical-; Jeff Diamant, Besheet Mohamed, & Rebecca Leppert, *What the Data Says about Abortion in the United States*, PEW RSCH. CTR. (Mar. 25, 2024), https://www.pewresearch.org/short-reads/2024/03/25/what-the-data-says-about-abortion-in-the-us/.

13. Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014).

14. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 361 (2022) (Breyer, J., dissenting); *see also* Denning, *supra* note 6, at 1029; Adrienne R. Ghorashi & DeAnna Baumle, *Legal and Health Risks of Abortion Criminalization: State Policy Responses in the Immediate Aftermath of Dobbs*, 37 J. L. & HEALTH 1, 9 (2023).

requirement.[15] These developments create a worrisome risk that *Camnitz* (and the overall constitutionality of display-and-describe laws) may be relitigated in the future. In addition, *Camnitz* did not completely resolve the First Amendment issues implicated in display-and-describe laws, and other circuits have reached differing conclusions about the applicable standard of review.[16]

This Comment re-examines North Carolina's "Display of Real-Time View" Requirement in light of the important developments in the Supreme Court's jurisprudence in the years since the Fourth Circuit decided *Camnitz*. First, this Comment examines the doctrinal aftermath of the 2022 *Dobbs* decision and argues that these changes do not affect the holding in *Camnitz* or its rationale. *Camnitz* did not examine the North Carolina statute as a restriction on abortion. As will be explained, the court invalidated the statute as an unconstitutional restriction on speech for any doctor-patient relationship, regardless of the procedure. The fact that the Supreme Court no longer recognizes additional protections for abortion care does not mean that all constitutional protections in healthcare settings are now obsolete. State laws that encroach upon the right to free speech should, and do, remain subject to heightened scrutiny.

Second, this Comment examines another Supreme Court decision released after *Camnitz*: *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), where the Court affirmed that speech restrictions may trigger constitutional scrutiny even when they take the form of professional regulations (an area typically subject to state control).[17] Although the Court's decision was directed at state

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15. *See* 2023 N.C. Sess. Laws 14, 15 (adding language that an abortion patient "has the right to view a real-time view image of the unborn child under this section and shall not be denied a real-time view of the unborn child due to a clinic policy or rule.")

16. This Comment focuses on jurisprudence applicable to North Carolina and the Fourth Circuit. For discussion of this circuit split as applied to display-and-describe laws, and for arguments that the Fourth Circuit's interpretation is superior, see Dunlap, *supra* note 10, at 467; *see also* Claire O'Brien, Casey*,* Camnitz*, and Compelled Speech: Why the Fourth Circuit's Interpretation of* Casey *Sets the Right Standard for Speech-and-Display Provisions*, 94 N.C. L. REV. 1036, 1043–65 (2016); Erika Schutzman, *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2019 (2015).

17. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 762 (2018).

restrictions on anti-abortion "crisis pregnancy centers," this Comment argues that the Court's rationale in *NIFLA* also affirms that speech protections exist in larger healthcare settings, including abortion care. As a result, *NIFLA* lends significant support to the Fourth Circuit's position that display-and-describe laws are subject to heightened scrutiny.

In Parts II and III, this Comment contextualizes its analysis by summarizing the history of the Display of Real-Time View Requirement and the Fourth Circuit's decision in *Camnitz*. Part IV distinguishes *Camnitz* from the doctrinal aftermath of *Dobbs* by tracing the major decisions shaping constitutional abortion jurisprudence, comparing the holdings of *Camnitz* and *Dobbs*, and arguing that *Dobbs*' doctrinal changes do not affect *Camnitz*'s holding that the Display of Real-Time View Requirement is unconstitutional. Finally, Part V examines the Supreme Court's decision in *NIFLA* and argues its rationale affirms *Camnitz*'s holding that display-and-describe laws are an impermissible restriction on speech.

I. HISTORY OF NORTH CAROLINA'S MANDATORY ULTRASOUND LAW

Like most states in the American South, North Carolina has had a complex history of abortion regulation, with significant variations as the constitutional landscape changed over time.[18] Abortion access remained heavily restricted until the Supreme Court's landmark 1973 decision in *Roe v. Wade*, after which the North Carolina legislature modified its abortion laws to accommodate the new constitutional protections and remove restrictions through twenty weeks of pregnancy.[19]

Despite the Supreme Court's recognition of a constitutional right to abortion in *Roe*, the North Carolina legislature continued to

18. *See generally* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 28–51 (2d ed. 1992) (surveying history of abortion regulations in the United States).

19. Roe v. Wade, 410 U.S. 113, 166 (1973); N.C. GEN. STAT. § 14-45.1 (1973); Bryant v. Woodall, 1 F.4th 280, 284 (4th Cir. 2021) (discussing history of abortion regulation in North Carolina and affirming district court's interpretation of *Roe* to require abortion access until fetal viability, which occurs after approximately twenty-four weeks of pregnancy).

enact various procedural requirements designed to impede abortion access.[20] This included the North Carolina Woman's Right to Know Act, which the General Assembly passed in 2011 over a gubernatorial veto.[21] The Woman's Right to Know Act amended the North Carolina General Statutes to include a new article ("Article 1L") specifically regulating abortion care.[22] It also established North Carolina's display-and-describe law (the "Display of Real-Time View Requirement"), which requires a physician to perform and display an ultrasound while simultaneously reciting a detailed description of the fetus to the patient.[23] This requirement is enforced in all cases except medical emergencies,[24] thus obligating the physician to provide this ultrasound and verbal description even when the patient is a victim of rape, experiencing a miscarriage, or if the fetus has a fatal condition.[25]

The original Display of Real-Time View Requirement never took effect, as a federal district court granted a preliminary injunction almost immediately after the bill's passage.[26] A few years later, in its 2014 *Stuart v. Camnitz* decision, the United States Court of Appeals for the Fourth Circuit formally struck down this provision of the Woman's Right to Know Act.[27] The Supreme Court denied certiorari in 2015, leaving the Fourth Circuit's decision intact.[28] Despite the federal judiciary's decisive rulings against North Carolina's display-and-describe law, the General Assembly seized the opportunity to

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20. *See Timeline of Abortion Restrictions in North Carolina*, AM. C.L. UNION OF N.C., https://www.acluofnorthcarolina.org/en/timeline-abortion-restrictions-north-carolina (last visited Feb. 8, 2025).

21. 2011 N.C. Sess. Laws 405.

22. *Id.*

23. *Id.* at 5 (Display of Real-Time View Requirement codified at § 90-21.85).

24. N.C. GEN. STAT. § 19-21.81(5) (narrowly defining "medical emergency" to mean "[a] condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions").

25. *See* 2011 N.C. Sess. Laws 405; J. Aidan Lang, *The Right to Remain Silent: Abortion and Compelled Physician Speech*, 62 B.C. L. REV. 2091, 2138 (2022).

26. Stuart v. Huff, 834 F.Supp.2d 424, 437 (M.D.N.C. 2011); *aff'd*, 706 F.3d 345 (4th Cir. 2013).

27. Stuart v. Camnitz, 774 F.3d 238, 250 (4th Cir. 2014).

28. Walker-McGill v. Stuart, 576 U.S. 1028 (2015).

revive the legislation in the aftermath of the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*.[29]

Dobbs injected substantial uncertainty into the landscape of abortion regulations across the country.[30] By eliminating the constitutional right to abortion that undergirded almost all state abortion jurisprudence, states became free to enact abortion bans that would have been unconstitutional under *Roe* and its progeny.[31] The North Carolina legislature used this opportunity to once again override a gubernatorial veto and enact comprehensive changes to the state's abortion laws, this time prohibiting most abortions after twelve weeks of pregnancy and instituting other stringent requirements.[32] As part of this overhaul of Article 1L regulations, the legislature had clear opportunity to repeal the Display of Real-Time View Requirement given the Fourth Circuit's permanent injunction. Instead, the legislature retained the provision and added a new subsection expressly declaring the patient "has the *right* to view a real-time view image of the unborn child under this section and shall not be denied a real-time view of the unborn child due to a clinic policy or rule."[33]

The enforceability of the renewed display-and-describe provision is unclear. No court has applied *Camnitz* or formally affirmed the constitutionality of display-and-describe laws in a post-*Roe* world, leaving providers uncertain as to where the law currently stands, as well as its long-term prospects.[34] Other circuits have reached opposing conclusions on mandatory ultrasound laws in other states, creating a doctrinal split between the courts of appeals for the Fourth,

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29. *See* generally Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

30. *See, e.g.*, David Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 5 (2023).

31. Ghorashi & Baumle, *supra* note 14, at 3; Curhan, *supra* note 3.

32. Care for Women, Children, and Families Act §90-21.82A; *see* House Roll Call Vote Transcript for Roll Call #380, N.C. GEN. ASSEMBLY (May 16, 2023, 8:39 PM), https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2023/H/380.

33. *Id.* at §90-21.85 (emphasis added).

34. *See* Rachel Crumpler, *A Clearer Picture is Emerging of the Impact of North Carolina's New Abortion Restrictions*, N.C. HEALTH NEWS (Oct. 11, 2023), https://www.northcarolinahealthnews.org/2023/10/11/a-clearer-picture-emerging-of-the-impact-of-north-carolinas-new-law-on-abortion-care/.

Fifth, Sixth, and Eighth Circuits.[35] Further, the legislature's decision to reinstate a stronger version of the Display of Real-Time View Requirement after *Dobbs* indicates they may attempt to challenge the injunction and resume enforcement of the provision in the future.[36] This Comment argues these challenges carry significant constitutional infirmities and would be unlikely to withstand scrutiny under the First Amendment. However, before expanding on this argument, it is helpful to first review the *Camnitz* decision invalidating the Display of Real-Time View Requirement in 2014.

II. *STUART V. CAMNITZ*

Almost immediately after the North Carolina legislature enacted the 2011 Women's Right to Know Act, litigation commenced challenging the display-and-describe provision of the statute.[37] Three years later, these challenges culminated in the Fourth Circuit's 2014 *Stuart v. Camnitz* decision.[38] In a unanimous opinion from a three-judge panel including two judges appointed by Republican presidents, the court in *Camnitz* deemed the Display of Real-Time View Requirement unconstitutional and affirmed the lower court's permanent injunction.[39]

Camnitz's primary inquiry was to determine the appropriate standard of constitutional scrutiny for the Display of Real-Time View Requirement.[40] As a preliminary matter, the court applied the Supreme Court's test from *Texas v. Johnson* and determined the statute "possesses sufficient communicative elements" to invoke the First

35. *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012); Planned Parenthood of Minn., N.D., S.D. v. Rounds, 686 F.3d 889 (8th Cir. 2012); EMW Women's Surgical Ctr., P.S.C. v. Beshar, 920 F.3d 421 (6th Cir. 2019). For further discussion of the circuit split and arguments that the Fourth Circuit's interpretation is superior, see sources *supra* note 17.

36. *See generally* Women's Right to Know Act, 2011 N.C. Sess. Laws 405 §90-21.80-92.

37. *See* Stuart v. Huff, 706 F.3d 345, 346.

38. *See* Stuart v. Camnitz, 774 F.3d 238, 240.

39. *Id.* at 242 (affirming Stuart v. Loomis, 992 F.Supp.2d 585, 588 (M.D.N.C. 2014)).

40. *See id.* at 244; Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., No. CV MJG-10-760, 2016 WL 10893970, at *11 (D. Md. Oct. 4, 2016), *aff'd*, 879 F.3d 101 (4th Cir. 2018).

Amendment.[41] The court held the statute "convey[s] a particularized message" on the state's behalf by discouraging patients from choosing abortion.[42] In fact, the state's own brief to the Fourth Circuit openly admits the intention and anticipated effect of the statute is to "persuad[e] pregnant women to opt for childbirth over abortion."[43] Further, the context in which the message is communicated (while the provider verbally describes the sonogram and the patient "is partially disrobed on an examination table") makes it likely the patient will understand the state's intended message, satisfying the second prong of *Johnson*'s test.[44]

Having concluded the Display of Real-Time View Requirement is subject to constitutional speech protections, the Fourth Circuit then determined the proper speech classification for the statute in order to discern the appropriate standard of constitutional review.[45] This is a difficult inquiry because speech regulations in the context of the medical profession invoke two conflicting presumptions. First, a statute is presumptively invalid and subject to strict scrutiny whenever it regulates the content of speech.[46] However, if a state statute regulates a licensed profession like medicine, the statute is presumptively constitutional as an exercise of the state's power to protect the public by regulating professional practice.[47] To balance these competing principles, the classification of professional regulations that restrict speech "slides along a continuum" between regulations of speech (subject to greater scrutiny) and regulations of conduct that incidentally burden speech (subject to lesser scrutiny).[48]

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41. *Camnitz*, 774 F.3d at 245 (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (2014) (a regulation is subject to the First Amendment if "[1] an intent to convey a particularized message was present and . . . [2] the likelihood was great that the message would be understood by those who viewed it.")).

42. *Id.*

43. *See* Br. of Defs.-Appellants at 29, *Camnitz*, 774 F.3d 238 (2014) (No. 14-1150).

44. *Camnitz*, 774 F.3d at 245.

45. *See id.* at 244.

46. *Id.* (quoting Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994)).

47. *Id.* at 248. For further discussion of professional regulations, *see, e.g.*, Hawker v. New York, 170 U.S. 189, 191 (1898) ("a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine"); *see also* O'Brien, *supra* note 16, at 1050–51.

48. *Camnitz*, 774 F.3d at 248 (internal quotations omitted).

In other words, the Display of Real-Time View Requirement will be subject to either (1) strict scrutiny as a content-based restriction on professional speech (*i.e.*, speech uttered by professionals while acting in that capacity), (2) rational basis review as a regulation of professional conduct, or (3) an intermediate level of scrutiny in between these standards.

The Fourth Circuit affirmed the district court's characterization of the Display of Real-Time View Requirement as "a content-based regulation of a medical professional's speech which must satisfy *at least* intermediate scrutiny to survive."[49] The court held the statute mandates "compelled speech," a form of content-based restriction entitled to heightened scrutiny under the First Amendment, because it "forces physicians to say things they otherwise would not say."[50] The speech is also "ideological," in that the state's admitted purpose for the statute is "to convince women seeking abortions to change their minds or reassess their decisions, which further supports classification as a content-based restriction."[51] Significantly, the court distinguished the medical profession from other areas of professional regulation, holding that because the profession is largely self-regulating, the state's interest in enacting further regulation is less compelling.[52]

Given the significant speech restrictions and comparatively weak state interests involved in the display-and-describe law support constitutional review under, *at minimum*, a "heightened intermediate scrutiny standard".[53] To survive heightened intermediate scrutiny, a regulation must "directly advance an important state interest in a manner that is drawn to that interest and proportional to the burden placed on the speech."[54] The Fourth Circuit acknowledged the Display

49. *Id.* at 245 (emphasis added).

50. *Id.* at 246.

51. *Id.* (citing Br. of Defs.-Appellants, *supra* note 43, at 29).

52. *See id.* at 248 (citing Moore-King v. Cnty. of Chesterfield, 703 F.3d 560, 570 (4th Cir. 2013)).

53. *See Camnitz*, 774 F.3d at 248; *see also* Timothy Zick, *Professional Speech Rights*, 47 ARIZ. ST. L. J. 1289, 1312 (2015) (explaining *Camnitz*'s rationale for imposing heightened scrutiny). Note that the Fourth Circuit never reached the question of whether the regulation must satisfy strict scrutiny, given that it fails the lower standard of intermediate scrutiny.

54. *Camnitz*, 774 F.3d at 251 (citing Sorrell v. IMS Health, Inc., 131 S.Ct. 2653, 2667–68 (2011)).

of Real-Time View Requirement implicates important state interests in protecting fetal life, ensuring the wellbeing of those seeking abortions, and maintaining the integrity of the medical profession.[55] However, the statute achieves those interests in a way that encroaches too far into constitutional speech protections.[56] It "interferes with the physician's right to free speech beyond the extent permitted for reasonable regulation of the medical profession," while compromising the state interests the requirement ostensibly promotes.[57]

Although proponents of the Display of Real-Time View Requirement characterized the statute as an informed consent requirement, *Camnitz* noted the statute deviates significantly from traditional informed consent principles and standard medical practice in three ways, and is therefore unable to achieve the interests it intended to serve.[58] As a result, the statute also differs substantially from North Carolina's general informed consent statute, which applies to all other medical procedures in the state.[59] First, the display-and-describe law requires physicians to perform and describe an ultrasound even when the patient has refused to listen.[60] The statute thus compels speech even when no listener will receive the message and the speech is incapable of promoting any state interests.[61] Second, by forcing the physician to directly convey a message that promotes the state's desired viewpoint (as opposed to written materials or other, more detached methods), the statute "render[s] the physician the mouthpiece of the state's message."[62] This undermines the trust necessary in a doctor-patient relationship, which directly contradicts the purpose of informed consent.[63] Third, the statute lacks any therapeutic exception that would allow the physician to decline or

55. *See id.* at 250–51.
56. *See* Zoellner, *supra* note 6, at 1182 n. 261.
57. *Camnitz*, 774 F.3d at 250.
58. *See id.* at 254; *see* Br. of Defs.-Appellants, *supra* note 43, at 22–25.
59. *Camnitz*, 774 F.3d at 244.
60. *Id.* at 252.
61. *Id.*
62. *Id.* at 254.
63. *Id.* at 252-53; *see also* Mayor of Balt. v. Azar, 973 F.3d 258, 288 (4th Cir. 2020) (affirming *Camnitz*'s holding that interference with doctor-patient communications to promote the state's desired viewpoint "undermines the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes").

delay the ultrasound process when it may cause the patient serious psychological or physical harm.[64] The statute thus obligates the physician to convey the required information even when doing so deviates from the physicians' medical judgment.[65]

While these three factors were most dispositive to the Fourth Circuit's conclusion, the court addressed other significant abnormalities in the statute that are worth reiterating. For instance, the court noted the informed consent process "typically involves a conversation between the patient, fully clothed, and the physician in an office or similar room before the procedure begins."[66] By contrast, display-and-describe laws impose informed consent requirements while the patient is "half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina."[67] In this vulnerable setting, a patient's "personal judgment may be altered or impaired," which hinders, rather than promotes, their ability to make an informed decision.[68] These provisions demonstrate that the Display of Real-Time View Requirement does not respect the patient autonomy and wellbeing that informed consent principles seek to uphold.

Further, the patient herself is prohibited from declining to receive this information.[69] The ultrasound and fetal description are required "irrespective of the needs or wants of the patient," which "interferes with the decision of a patient not to receive information that would make an indescribably difficult decision even more traumatic."[70] This not only risks harming the patient rather than informing them, but it also further erodes the doctor-patient relationship by forcing physicians to disregard the patient's wellbeing in order to promote the state's intended message.[71]

As a result of these contradictions, the Fourth Circuit concluded the Display of Real-Time View Requirement is ineffective at achieving the interests it claims to promote, and in many cases,

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64. *Camnitz,* 774 F.3d at 254.
65. *See id.*
66. *Camnitz*, 774 F.3d at 252.
67. *Id.* at 255.
68. *Id.*
69. *See id*.
70. *Id.*
71. *See id.*

works against these interests by jeopardizing patient wellbeing, the doctor-patient relationship, and the integrity of the medical profession.[72] The statute therefore fails to withstand the standard of scrutiny required to impose a content-based restriction on professional speech.[73] The Fourth Circuit thus affirmed the district court's ruling and issued an order enjoining enforcement of the Display of Real-Time View Requirement.[74]

III. DISTINGUISHING *CAMNITZ* FROM CURRENT CONSTITUTIONAL ABORTION DOCTRINE

The Fourth Circuit's decisive ruling against the constitutionality of the Display of Real-Time View Requirement, along with the Supreme Court's decision to decline certiorari, attach a sense of finality to the injunction barring enforcement of North Carolina's mandatory ultrasound law.[75] However, in order for the *Camnitz* injunction to remain good law, it must withstand the dramatic shifts to constitutional abortion doctrine resulting from the *Dobbs* decision.[76] This section examines the *Camnitz* decision alongside these doctrinal shifts. Subsection (A) surveys the major decisions shaping constitutional abortion doctrine, including the cases establishing the constitutional right to abortion and the *Dobbs* decision that eliminated it. Subsection (B) then places *Camnitz* within this constitutional backdrop and distinguishes its holding from the aftermath of *Dobbs*. In doing so, this section argues *Dobbs* does not affect the holding or rationale of the Fourth Circuit's decision in *Camnitz*, leaving the injunction against the Display of Real-Time Review Requirement intact.

72. *See id.* at 254.

73. *See id.* at 255–56.

74. *Id.* at 256; *see* Stuart v. Loomis, 992 F.Supp.2d 585, 588 (M.D.N.C. 2014).

75. *Camnitz*, 774 F.3d at 256; *see* Walker-McGill v. Stuart, 576 U.S. 1028 (2015).

76. *See* Dobbs v. Jackson Women's Health Org.*,* 597 U.S. 215, 361–62 (2022) (Breyer, J., dissenting).

A. *Constitutional Abortion Doctrine*

1. Origins of constitutional abortion doctrine: *Roe* and *Casey*

For the first fifty years of constitutional abortion jurisprudence, the Supreme Court recognized a right to choose abortion derived from the Fourteenth Amendment Due Process Clause.[77] Although the Court acknowledged abortion implicates important state interests which may justify certain restrictions, its precedent continually affirmed that abortion is entitled to the same due process protections as any other constitutional right.[78] At the time of the Fourth Circuit's decision in *Camnitz*, the Supreme Court's abortion doctrine derived primarily from two landmark decisions: *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992).[79] These cases established and refined the framework that governed federal abortion rights and maintained constitutional protections for abortion access nationwide.[80]

In *Roe*, the Supreme Court recognized that a person's constitutional right to privacy extends to their decision to have an abortion.[81] The Court held that although the Constitution does not expressly mention a right to privacy, the right is implicit in other constitutional provisions, including the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[82] To ensure abortion restrictions do not impermissibly encroach on this constitutional protection, the Court ruled that states could not ban abortions before fetal viability.[83] The

77. *See id.*; *see also* Denning, *supra* note 6, at 1031 (describing the "constitutional fabric" encompassing *Roe* and subsequent decisions that "protect[ed] autonomous decision making over the most personal of life decisions").

78. Rachel K. Jones, Elizabeth Witwer, and Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER (Sept. 2019), https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017.

79. *See* Roe v. Wade, 410 U.S. 113, 113-15 (1973); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 833-34 (1992) (retaining the essential holding of *Roe* and reaffirming "a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State").

80. Jones, *supra* note 78.

81. *Roe*, 410 U.S. at 153; *see* Lang, *supra* note 25, at 2106.

82. *Roe*, 410 U.S. at 152.

83. *See id.* at 163.

decision established a trimester framework that balanced the right to choose abortion with the state's interests in protecting maternal health and potential life.[84] Accordingly, states could not restrict abortion during the first trimester (through twelve weeks of pregnancy).[85] In the second trimester (from thirteen weeks of pregnancy through fetal viability), the state has a compelling interest in protecting maternal health and can enact regulations reasonably related to that end.[86] During the third trimester (from the point of fetal viability onward), the state has a compelling interest in protecting potential life and can prohibit abortion in all cases except those necessary to protect the life or health of the mother.[87]

Almost twenty years later, *Casey* reaffirmed the principles of *Roe* but modified its holding in important ways.[88] In *Casey*, the Court examined a Pennsylvania statute imposing various procedural restrictions on abortion, including a requirement that providers disclose certain information about the risks of abortion and childbirth.[89] While the Court upheld *Roe*'s central holding that the Due Process Clause guarantees a constitutional right to choose abortion, *Casey* relied on protected liberty interests rather than a right to privacy.[90] The Court also discarded *Roe*'s trimester framework, ruling that states could regulate abortion even before viability, as long as pre-viability restrictions did not impose an "undue burden" on the right to choose abortion.[91] While the Court continued to allow states to enact abortion regulations after *Casey*, the core principles of constitutional abortion doctrine remained intact, particularly the foundational principle that the Fourteenth Amendment Due Process Clause protects the right to choose an abortion before fetal viability.[92]

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84. *See id.* at 164–65; Lang, *supra* note 25, at 2106.

85. *Roe*, 410 U.S. at 164.

86. *Id.*

87. *Id.* at 164-65.

88. *See* Lang, *supra* note 25, at 2108; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 845-46 (1992).

89. *See Casey*, 505 U.S. at 844.

90. *See id.* at 839-40; Comment, *Constitutional Challenges to Compelled Speech—Particular Situations or Circumstances*, 73 A.L.R. 6th 281, Art. III § 9, Cumulative Supplement.

91. *Casey*, 505 U.S. at 839; Lang, *supra* note 25, at 2108.

92. *See* Dunlap, *supra* note 10, at 448; *See*, *e.g.*, Mazurek v. Armstrong, 520 U.S. 968, 971 (1997).

2. *Dobbs* and resulting changes to abortion doctrine

Stuart v. Camnitz was decided in a much different world than exists today. In the decades after *Roe* and *Casey*, the Supreme Court became increasingly willing to reconsider constitutional abortion doctrine, culminating in its 2022 decision in *Dobbs v. Jackson Whole Women's Health Organization*.[93] *Dobbs* expressly overturned the holdings of *Roe* and *Casey*, eliminating the constitutional right to abortion and reinstating a rational basis standard of review for abortion restrictions throughout pregnancy.[94] In doing so, the Supreme Court erased the foundation of nearly all abortion jurisprudence over the last fifty years.[95]

Dobbs rejected *Roe*'s central holding (as reaffirmed in *Casey*) that the Constitution establishes a right to choose abortion. First, the Court noted that abortion is not expressly mentioned anywhere in the Constitution.[96] More significantly, the Court held that a right to choose abortion cannot be derived from any existing protections in the Constitution, including the Fourteenth Amendment Due Process Clause.[97] Under the Supreme Court's post-*Dobbs* interpretation, the Due Process Clause protects two categories of substantive rights: (1) those expressly guaranteed by the first eight amendments in the Bill of Rights and (2) "a select list of fundamental rights that are not mentioned anywhere in the Constitution."[98] Rights within the latter category are those "deeply rooted in the Nation's history and traditions" and "implicit in the concept of ordered liberty."[99] *Dobbs* held the right to choose abortion does not fall under either category of Due Process protection.[100]

After a lengthy discussion of legal history and Due Process Clause jurisprudence, the Court concluded the right to abortion is not

93. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 350 (2022) (Roberts, C.J., concurring in part).

94. *See id.* at 301; Thomas J. Molony, *Immoderate Moderation: Chief Justice Roberts's Concurrence in Dobbs*, 31 WM. & MARY BILL RTS. J. 1111, 1119 (2024).

95. Molony, *supra* note 94, at 1112; *see also* Denning, *supra* note 6, at 1029.

96. *Dobbs*, 597 U.S. at 235.

97. *Id.* at 260.

98. *Id.* at 237.

99. *Id.* at 237–38 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

100. *See id.* at 262.

sufficiently entrenched in American tradition to warrant due process protection.[101] The Court declared abortion is "fundamentally different" from other rights found in the Due Process Clause because it involves the state's interest in the preservation of "fetal life."[102] Thus, the Constitution does not establish a fundamental right to abortion, and regulations that restrict abortion receive no heightened constitutional scrutiny.[103] In the absence of any heightened scrutiny applicable to abortion restrictions, states do not need to show that a restriction is narrowly drawn to serve compelling interests—as long as there is a rational basis for the legislation, it will pass constitutional muster.[104] However, as the next sections will explore, this shift does not mean all abortion restrictions now withstand constitutional scrutiny.

B. *Re-examining Camnitz and North Carolina's "Display of Real-Time View Requirement" after Dobbs*

With the avenues for challenging abortion restrictions severely limited after *Dobbs*, many state legislatures have felt emboldened to reenact laws previously deemed unconstitutional under *Roe* and its progeny.[105] However, while those seeking to revive legislation may believe *Dobbs* eliminated the full scope of constitutional abortion protections, many cases vacating abortion restrictions on constitutional grounds will survive in a post-*Roe* world. The Fourth Circuit's *Stuart v. Camnitz* decision was decided when *Roe* and *Casey* remained intact, and it incorporated many of those cases' holdings into its analysis.[106] However, this Comment argues overturning *Roe* and *Casey* does not invalidate *Camnitz*'s injunction—in other words, *Camnitz* is *not* a case whose underpinnings were washed away by *Dobbs*.

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101. *See id.* at 260.

102. *Id.* at 231.

103. *See id.* at 237; Darren Lenard Hutchinson, *Thinly Rooted:* Dobbs*, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385, 389–90 (2023) (summarizing the holding in *Dobbs*).

104. *See Dobbs*, 597 U.S. at 301.

105. *See* Curham, *supra* note 3; Ghorashi & Baumle, *supra* note 14, at 10-11.

106. *See* Stuart v. Camnitz, 774 F.3d 238, 250 (4th Cir. 2014); Schutzman, *supra* note 16, at 2036 n. 104.

1. *Dobbs* and *Camnitz* implicate different constitutional doctrines.

The primary distinction that shields *Camnitz* from the doctrinal impact of *Dobbs* is substantive. In *Dobbs*, the Supreme Court examined the constitutional implications of a statute's restrictions on abortion access.[107] By contrast, *Camnitz* looked to the implications of a statute's restrictions on speech.[108] Camnitz properly interpreted the Display of Real-Time View Requirement as a speech restriction even though it is codified among the abortion regulations in Article 1L.[109] A single piece of legislation may implicate multiple constitutional doctrines, and changes to one doctrine do not affect a statute's constitutionality under a separate doctrine.[110] In other words, if the same state law provision violates both the constitutional right to abortion and the constitutional right to free speech, the doctrinal changes from *Dobbs* would only cure the former issue, and the provision remains unenforceable under the latter.

Justice Alito's majority opinion in *Dobbs* makes this point clear. In response to allegations from the Solicitor General and other justices that *Dobbs* would eliminate constitutional freedoms beyond abortion, Alito emphasized the majority's decision "concerns the constitutional right to abortion and no other right," and that "[n]othing in this opinion should be understood to be cast doubt on precedents that do not concern abortion."[111] *Dobbs* is explicit that it confines its constitutional analysis to a statute's effects on abortion and does not disrupt decisions that rely on other doctrines.[112]

In *Camnitz*, the Fourth Circuit similarly emphasized the limited scope of its analysis, which only addressed First Amendment issues rather than constitutional abortion rights. Although *Roe* and

107. *Dobbs*, 597 U.S. at 290 ("we emphasize that our decision concerns the right to abortion and no other right.")

108. *Camnitz*, 774 F.3d at 249 (considering "the level of scrutiny courts should apply when reviewing a claim that a regulation . . . violates physicians' First Amendment free speech rights.")

109. *See id.*

110. *See* Dunlap, *supra* note 10, at 444.

111. *Dobbs*, 597 U.S. at 290; Br. for United States at 25-26, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392).

112. Denning, *supra* note 6, at 1029–30.

Casey were still in effect, the intermediate scrutiny *Camnitz* applied to the North Carolina statute was stricter than *Casey*'s undue burden standard.[113] *Camnitz* therefore needed to distance its analysis from the Supreme Court's abortion precedent for largely the same reasons that now arise after *Dobbs*—to justify a higher standard of review than would otherwise apply to an abortion statute.[114] In the process, *Camnitz* helpfully explained why its subject matter is independent from constitutional abortion doctrine, stating: "[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment."[115] While *Dobbs* eliminated the undue burden standard, *Camnitz*'s underlying point remains intact: the constitutionality of the statute as an abortion restriction is independent from its constitutionality as a speech restriction.[116] Thus, because *Camnitz* confronts a different constitutional subject than *Dobbs*, *Camnitz*'s conclusions about the Display of Real-Time View Requirement avoids the significant doctrinal shifts in the aftermath of *Dobbs*.

2. *Dobbs* does not affect *Camnitz*'s rationale for employing heightened scrutiny.

Because *Dobbs* and *Camnitz* address different constitutional subjects, their rationales about the applicable level of scrutiny also rest on different grounds. Although the Display of Real-Time View Requirement raises concurrent constitutional questions about abortion and free speech, *Dobbs*' influence on the former does not disrupt *Camnitz*'s analysis of the latter. Because the Fourth Circuit framed its analysis exclusively in terms of the statute's restrictions on speech, *Camnitz*'s reasoning stands independent of constitutional abortion doctrine and is unaffected by Dobbs' changes to this area of law.[117]

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113. *See* Dunlap, *supra* note 10, at 455.

114. *Id.* at 444 n.15.

115. Stuart v. Camnitz, 774 F.3d 238, 249 (4th Cir. 2014).

116. Dunlap, *supra* note 10, at 457–58 (using this principle to distinguish an undue burden analysis from a free speech analysis).

117. *Camnitz*, 774 F.3d at 251 (applying elevated scrutiny because "[a]ny state regulation that limits the *free speech* rights of professionals must pass the requisite constitutional test" (emphasis added)); *Id.* at 245 (holding the Display

This analytical separation would be blurred if Camnitz relied on the statute's speech and abortion protections to justify elevated scrutiny.[118] However, the court did not cite the statute's restrictions on the right to abortion when discerning the applicable standard of review.[119] *Camnitz* held only that the statute must "directly advance an important state interest in a manner that is drawn to that interest and proportional to the burden *placed on the speech.*"[120] Even if the Fourth Circuit can no longer consider the statute's burden on abortion access after *Dobbs*, this doctrinal shift does not affect the court's ability to consider the statute's burden on speech. *Camnitz* employs First Amendment principles that apply to state regulations throughout the medical profession, not just abortion care.[121] Thus, the test in *Camnitz* and its supporting rationale are not affected by *Dobbs*' new standard of review.

Further, the mere fact that a statute regulates abortion is insufficient to disrupt *Camnitz*'s standard of review in a post-*Roe* world. Nothing in *Dobbs* suggests that all professional regulations receive reduced scrutiny whenever the physician is performing an abortion—it only holds that the constitutional right to abortion is no longer a recognized basis for applying heightened scrutiny.[122] *Dobbs* removed one justification for applying heightened scrutiny to an abortion regulation; it did not eliminate all possible justifications.[123] This analytical concept is familiar to the Supreme Court, as it is common practice to apply elevated scrutiny to a statute based on one constitutional inquiry while holding another inquiry only warrants rational basis review.[124] Thus, *Dobbs* does not affect how compelling

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of Real-Time View Requirement is a "plainly an expressive act entitled to First Amendment protection."). *See* Dunlap, *supra* note 10, at 444.

118. *See* Dunlap, *supra* note 10, at 444.

119. *Id.* at 455.

120. *Camnitz*, 774 F.3d at 251 (emphasis added).

121. *See id.*; *see, e.g.,* Canterbury v. Spence, 464 F.2d 772, 782 (D.C.Cir. 1972) (explaining the state's authority to enact and enforce professional regulations through informed consent requirements).

122. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022).

123. *See, e.g.*, Denning, *supra* note 6, at 1031–32.

124. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 884 (1992) (applying elevated scrutiny due to the statute's restrictions on the right to abortion while declining elevated scrutiny on the First Amendment question).

state interests must be in order to restrict speech, even in the context of an abortion regulation.[125] *Camnitz*'s application of heightened scrutiny to the Display of Real-Time View Requirement therefore withstands *Dobbs*' declaration that abortion restrictions are entitled only to rational basis review.[126]

Finally, *Dobbs*' holding that abortion restrictions implicate important state interests does not alter *Camnitz*'s conclusion that these interests are insufficient to satisfy the standard of review it employs.[127] *Camnitz* itself acknowledged the Display of Real-Time View Requirement involves legitimate state interests, particularly in (1) "preserving, promoting, and protecting fetal life," in (2) "promoting the psychological health of women seeking abortions," and in (3) maintaining "the integrity and ethics of the medical profession."[128] Yet the Fourth Circuit still found these interests insufficient to outweigh the statute's restrictions on speech under a heightened intermediate standard of review.[129] While physicians may sometimes be subject to speech restrictions during the course of their professional activities, the court insisted that "professionals do not leave their speech rights at the office door."[130] In other words, the state cannot use its interests in abortion restrictions to justify regulations that violate providers' First Amendment protections.[131] *Camnitz*'s ultimate conclusion that a regulation is unconstitutional if it "interferes with the physician's right to free speech beyond the extent permitted for reasonable regulation of the medical profession," remains true regardless of the type of medical care being regulated, abortion or otherwise.[132] The interests *Dobbs* identified thus do not interfere with *Camnitz*'s analysis of the standard of review for restrictions on professional speech even in the context of abortion care.

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125. *See Dobbs*, 597 U.S. at 290; *See Camnitz*, 774 F.3d at 249.

126. *See Dobbs*, 597 U.S. at 301.

127. *See Camnitz*, 774 F.3d at 251.

128. *Id.* at 250–51.

129. *Id.* at 255; Dunlap, *supra* note 10, at 455.

130. *Camnitz,* 774 F.3d at 251; *see* Lowe v. SEC, 472 U.S. 181, 229–30 (1985) (White, J., concurring in judgment).

131. Lang, *supra* note 25, at 2112.

132. *Camnitz*, 774 F.3d at 250.

C. *Conclusion*

Camnitz is still good law, as it relies on a distinct doctrinal basis from the Supreme Court's decision in *Dobbs* and thus withstands *Dobbs*' massive disruptions to substantive due process jurisprudence. *Camnitz* examined the Display of Real-Time View Requirement as a restriction on speech and only employed a heightened standard of review based on the statute's First Amendment implications. By contrast, *Dobbs* examined the statute in that case as a restriction on abortion and only employed a rational basis standard of review based on the restriction's implications under the Fourteenth Amendment Due Process Clause. Therefore, the Fourth Circuit's analysis of the state interests involved in North Carolina's display-and-describe law, and its conclusion that these interests are insufficient to reduce speech protections under the First Amendment, remain unchanged after *Dobbs*.

IV. *NIFLA*'S IMPLICATIONS FOR THE CONSTITUTIONALITY OF DISPLAY-AND-DESCRIBE LAWS

Not only does *Camnitz*'s holding remain intact after *Dobbs*, but a Supreme Court decision rendered in 2018 also strengthens *Camnitz*'s conclusion that restrictions on physician speech are subject to elevated scrutiny. In *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), the Supreme Court struck down a California statute imposing certain notice requirements on facilities providing "pregnancy-related services."[133] While the ruling specifically addressed the free speech implications of disclosure requirements for anti-abortion crisis pregnancy centers, this section argues that *NIFLA*'s rationale also affirms the First Amendment rights of physicians providing actual healthcare, including abortion.

A. *Overview of* NIFLA

In 2015, California enacted the Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act, which intended to regulate "crisis pregnancy centers" providing anti-abortion

133. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).

counseling and limited pregnancy-related services.[134] If the center is a licensed healthcare facility, the FACT Act required it to disclose information about state programs offering low-cost family planning care, including abortion care (*NIFLA* refers to this requirement as the "licensed notice").[135] While the statute imposed separate notice requirements for unlicensed facilities, this section will focus on *NIFLA*'s analysis of the licensed notice, as this is most applicable to North Carolina's Display of Real-Time View Requirement and regulations of licensed professions.

NIFLA characterized the licensed notice requirement as a content-based restriction on speech that fails to satisfy the heightened scrutiny under the First Amendment.[136] Although the statute regulates professional speech in that the required disclosures are "uttered by professionals," *NIFLA* rejected the Ninth Circuit's conclusion that the statute falls within a distinct category of "professional speech" subject to reduced First Amendment scrutiny.[137] Instead, the Supreme Court maintained a heightened standard of review for content-based speech restrictions in professional contexts.[138]

As part of its analysis, *NIFLA* confirmed that speech restrictions on licensed professionals do not automatically invoke rational basis review simply because they take the form of a professional regulation.[139] As will be discussed, there are only two narrow circumstances in which the Court's precedents employ reduced scrutiny for content-based restrictions on speech in professional regulations, neither of which apply to the licensed notice.[140] The Court did not foreclose the possibility that speech restrictions like the licensed notice may receive intermediate review instead of strict scrutiny, but it did not reach the issue because it held the licensed notice would still fail this lower standard of review.[141]

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134. *Id.* at 761-62.

135. *Id.* at 762-63.

136. *See id.* at 773.

137. *Id.* at 767 (internal quotations omitted); *see* Nat'l Inst. of Fam. & Life Avocs. v. Harris, 839 F.3d 823, 839 (9th Cir. 2016).

138. *NIFLA*, 585 U.S. at 767–68.

139. *Id.*; Rebecca Krumholz Gottesdiener, *Reimagining* NIFLA v. Becerra*: Abortion-Protective Implications for First Amendment Challenges to Informed Consent Requirements*, 100 B.U. L. REV. 723, 760 (2020).

140. *See NIFLA*, 585 U.S. at 768.

141. *See id.* at 773.

Thus, although the Supreme Court has not directly examined the question at issue in *Camnitz*, *NIFLA* indicates that the Court examines professional speech restrictions with at least the same scrutiny employed in *Camnitz*, and may in fact subject these regulations to full strict scrutiny.[142]

B. NIFLA *indicates the Display of Real-Time View Requirement should be subject to at least intermediate scrutiny.*

1. *NIFLA* supports classifying the Display of Real-Time View Requirement as a content-based regulation of speech.

NIFLA's argument for applying heightened scrutiny to the licensed notice requirement under the First Amendment supports *Camnitz*'s parallel conclusion for display-and-describe laws. First, *NIFLA* classified the licensed notice as a "content-based regulation of speech."[143] Because the objectives of the licensed notice conflict with the objectives of crisis pregnancy centers, providers must change the content of their speech in order to comply with the statute's demands.[144] In other words, the licensed notice requires crisis pregnancy centers to disclose information about state-funded abortion options while those centers simultaneously try to dissuade patients from choosing abortion.[145] The statute therefore "plainly alters the content" of the providers' speech and falls within the class of content-based restrictions that are presumptively unconstitutional unless narrowly drawn to serve compelling state interests.[146]

This argument applies cleanly to the Display of Real-Time View Requirement at issue in *Camnitz*, supporting the Fourth Circuit's

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142. The 11th Circuit is the first Court of Appeals to apply strict scrutiny to restrictions on professional speech after *NIFLA*. *See* Otto v. City of Boca Raton, 981 F.3d 854, 859, 867-68 (11th Cir. 2020).

143. *NIFLA*, 585 U.S. at 766.

144. *Id.* ("By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly alters the content of petitioners' speech,") (internal quotations omitted) (citing Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

145. *Id.*

146. *Id.* (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)) (citing Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015)).

conclusion that the North Carolina statute is a content-based restriction on speech.[147] *NIFLA*'s conclusion that the licensed notice requires providers to alter the content of their speech mirrors the Fourth Circuit's holding that the Display of Real-Time View Requirement "forces physicians to say things they otherwise would not say."[148] Like the licensed notice requirement, display-and-describe laws conflict with the objectives of the speakers they bind. Whereas physicians aim to provide care consistent with their reasonable medical judgment and current standards of practice, display-and-describe laws require providers to perform and describe an ultrasound even when it requires them to violate their professional principles.[149] Display-and-describe laws therefore "plainly alter[] the content" of providers' speech, satisfying *NIFLA*'s criteria for a content-based restriction entitled to a heightened standard of review.[150]

2. *NIFLA* supports maintaining elevated constitutional scrutiny for the Display of Real-Time View Requirement.

Second, *NIFLA*'s conclusion that content-based restrictions do not automatically receive reduced scrutiny whenever they occur in the context of a professional regulation further supports a heightened standard of review for the Display of Real-Time View Requirement. In *NIFLA*, the Court rejected the Ninth Circuit's attempt to place the licensed notice in a distinct category of "professional speech" wherein content-based regulations receive reduced constitutional scrutiny.[151] *NIFLA* emphasized that professional speech is "a difficult category to define with precision."[152] The Court stressed that "[t]he dangers associated with content-based regulations of speech are also present in the context of professional speech," and discussed these risks in the

147. *See* Stuart v. Camnitz, 774 F.3d 238, 245 (4th Cir. 2014); *see* Zoellner, *supra* note 6, at 1172–73 (interpreting *Camnitz* and *NIFLA* as upholding the same proposition that "physicians maintain First Amendment rights when government regulations implicate speech.").

148. *Camnitz*, 774 F.3d at 246.

149. *See id.* at 255 (finding that physicians must communicate the information "irrespective of the needs or wants of the patient, in direct contravention of medical ethics and the principle of patient autonomy.").

150. *See NIFLA*, 585 U.S. at 766 (internal quotations omitted).

151. *Id.* at 767.

152. *Id.* at 773.

specific context of the medical profession.[153] The Court cited prior decisions indicating that content-based restrictions in this context "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information,"[154] that "[d]octors help patients make deeply personal decisions, and their candor is crucial";[155] and that "the people lose when the government is the one deciding which ideas should prevail"[156] in disagreements arising in professional practice.

The display-and-describe law at issue in *Camnitz* confronts the same problems with applying reduced scrutiny to a nebulous category of "professional speech." For instance, the contradictions in the Display of Real-Time View Requirement invoke *NIFLA*'s concern that speech restrictions may not serve a "legitimate regulatory goal," but are designed instead to "suppress unpopular ideas or information."[157] As discussed previously, the state's own brief in *Camnitz* affirms that requiring the provider to perform and describe an ultrasound is intended to discourage patients from choosing abortion.[158] In other words, the statute alters physician speech in hopes of preventing the listener from engaging in activity the state wants to suppress.[159] While states may express a preference for childbirth over abortion, they cannot enforce this preference by suppressing contrary ideas and policing the contours of how a physician speaks to their patient.[160] In doing so, the Display of Real-Time View requirement also invokes *NIFLA*'s concern about the need for candor in the doctor-patient relationship, particularly in the context of "deeply personal decisions" like abortion.[161]

Finally, *NIFLA* reinforces *Camnitz*'s holding that regulations of licensed professionals are not automatically subject to rational-basis

153. *See id.* at 771; *see* Gottesdiener, *supra* note 139, at 755.

154. *NIFLA*, 585 U.S. at 771 (quoting Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994)).

155. *Id.* (quoting Wollschlaeger v. Gov. of Fla., 760 F.3d 1195, 1217–25 (11th Cir. 2014)).

156. *Id.* at 772.

157. *See id.* at 771.

158. *See* Br. of Defs.-Appellants, *supra* note 43, at 29.

159. Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014); *see* Lang, *supra* note 25, at 2107.

160. *See* Lang, *supra* note 25, at 2143; *Camnitz*, 774 F.3d at 255.

161. *NIFLA*, 585 U.S. at 771 (internal citations omitted).

review.[162] It affirms that the Display of Real-Time View Requirement is not an acceptable content-based regulation simply because it regulates licensed healthcare facilities that satisfy the definition of professional service. As *NIFLA* acknowledged, reducing constitutional scrutiny for all regulations of licensed professions gives states too much freedom to use professional regulations to discriminate against viewpoints protected by the First Amendment.[163] While *NIFLA* examined this danger in the context of a state suppressing speech that discourages abortion, it also arises in the context of a state *compelling* speech that discourages abortion.[164] In both cases, the state is using its regulatory authority to alter the content of a professional's speech in order to promote the state's desired viewpoint over contrary information.[165]

In sum, the central holding of *NIFLA* lends significant support to *Camnitz*'s interpretation of the Display of Real-Time View Requirement as a content-based speech restriction entitled to elevated constitutional scrutiny. However, the Court in *NIFLA* also noted two circumstances in which the Court's precedents have permitted reduced scrutiny for speech restrictions in professional contexts.[166] As the next section will explore, none of *NIFLA*'s recognized exceptions apply to the North Carolina statute.

C. *The exceptions permitting reduced scrutiny under* NIFLA *do not apply to the Display of Real-Time View Requirement.*

NIFLA recognized two limited categories of "professional speech" where content-based regulation may be permitted under the First Amendment.[167] Examining past precedents, *NIFLA* concluded the Court has "been especially reluctant to 'exemp[t] a category of

162. *See id.* at 768; *Camnitz*, 774 F.3d at 249.

163. *NIFLA*, 585 U.S. at 771.

164. *Camnitz*, 774 F.3d at 245 ("[t]he First Amendment not only protects against prohibitions of speech, but also against regulations that compel speech").

165. *See* Kimberley Harris, *Ultra-Compelled: Abortion Providers' Free Speech Rights after NIFLA*, 35 ALB. L. REV. 95, 162-63 (2021-2022) (discussing *NIFLA*'s concern about whether an informed consent statute legitimately serves its stated goal or simply suppresses a particular viewpoint).

166. *NIFLA*, 585 U.S. at 768.

167. *Id.*

speech from the normal prohibition on content-based restrictions.'"[168] The Court will only single out a category of speech for lesser scrutiny when supported by "persuasive evidence . . . of a long (if heretofore unrecognized) tradition" of restrictions in that area.[169] *NIFLA* expressly held the Court's precedents "do not recognize such a tradition for a category called 'professional speech."[170] Content-based restrictions on professional speech have only withstood constitutional scrutiny in two scenarios. This Comment argues that the Display of Real-Time View Requirement does not fall under either of the exceptions *NIFLA* recognizes.

1. Reduced scrutiny when regulating factual, noncontroversial "commercial speech"

First, *NIFLA* found the Court has granted more deferential review of content-based restrictions that require "factual, noncontroversial" disclosures in professional activities.[171] The Court cited numerous decisions affirming this exception, but ultimately relied on the standard it created in *Zauderer v. Disciplinary Counsel*.[172] *Zauderer* specifically addressed required disclosures in attorney advertisements, but the Court held more broadly that states can enact professional regulations compelling certain disclosures of "purely factual and uncontroversial" information.[173] However, *NIFLA* noted two major limitations to the *Zauderer* standard—in upholding the content-based restriction at issue, *Zauderer* relied on the fact that the regulation (1) only applied to "commercial advertising" and (2) only compelled disclosures about the terms by which professional services would be rendered.[174]

Given *Zauderer*'s limitations, *NIFLA* quickly dispensed with the idea of placing the FACT Act within this narrow category of

168. *NIFLA*, 585 U.S. at 767 (quoting U.S. v. Alvarez, 567 U.S. 709, 722 (2012) (plurality opinion)).
169. *Id.* (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011)).
170. *Id.* at 768.
171. *Id.*
172. 471 U.S. 626 (1985).
173. *Id.* at 651.
174. *Id.*; *NIFLA*, 585 U.S. at 768.

professional speech.[175] The licensed notice requirement compels disclosure of state-sponsored pregnancy services and does not regulate crisis pregnancy centers' terms of service.[176] *NIFLA* also distinguished *Zauderer* because the licensed notice disclosures are not limited to "purely factual and *uncontroversial* information."[177] Rather, the licensed notice compels disclosures about abortion services, which the Court notes is "anything but an 'uncontroversial' topic."[178] The Court thus concluded *Zauderer* does not apply to the licensed notice and cannot be used to subject the statute to reduced scrutiny.[179]

NIFLA's conclusions also apply to the Display of Real-Time View Requirement, indicating that it falls outside the scope of *Zauderer*'s exception. Requiring abortion providers to perform and describe an ultrasound constitutes a much different form of compelled speech than commercial advertising disclosures.[180] First, the context in which the disclosures occur vary significantly. As the Fourth Circuit noted in *Camnitz*, display-and-describe laws compel speech in extremely personal settings, while the provider is actively treating a patient.[181] This is very different from the commercial advertising context contemplated in *Zauderer*.[182] As in *NIFLA*, the disclosures in the Display of Real-Time View Requirement also regulate the substance of the treatment relationship itself, rather than only regulating disclosures about the policies under which abortion care is available.[183] Lastly, because the Display of Real-Time View Requirement is intended to regulate abortion and requires disclosures about the abortion process, it invokes *NIFLA*'s concern that the statute covers "anything but an 'uncontroversial' topic."[184] For all of these reasons North Carolina's Display of Real-Time View Requirement

175. *NIFLA*, 585 U.S. at 768-69; Harris, *supra* note 165, at 135.
176. *NIFLA*, 585 U.S. at 769.
177. *Id.* at 768 (emphasis added).
178. *Id.* at 769.
179. *Id.*; *see* Harris, *supra* note 165, at 135.
180. *See* Gottesdiener, *supra* note 139, at 753.
181. *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014); *see* Dunlap, *supra* note 10, at 455.
182. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).
183. *Camnitz*, 774 F.3d at 253.
184. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 769 (2018).

cannot receive reduced scrutiny under *Zauderer*'s limited exception as interpreted by *NIFLA*.

2. Reduced scrutiny when regulating professional conduct that incidentally burdens speech

In addition to the *Zauderer* exception, *NIFLA* found the Court's precedents recognize another form of "professional speech" exempt from the general prohibition on content-based restrictions. Recognizing that states have reserved constitutional authority to regulate professional practice to protect public safety and welfare, the Court has upheld state "regulations of professional *conduct* that incidentally burden speech."[185] Applying this exception thus requires courts to distinguish between professional speech and professional conduct.[186]

NIFLA concluded the FACT Act does not fall within this exception because it is a regulation of professional speech, not conduct.[187] The Court cited *Casey* as an important decision illuminating this distinction.[188] As discussed in Part IV of this Comment, the statute in *Casey* required abortion providers to give patients information about the nature of the abortion procedure and the health risks of abortion and childbirth.[189] *Casey* held this requirement did not implicate the First Amendment because it should be interpreted as an informed consent requirement that regulates professional conduct, not speech.[190] In other words, requiring providers to share information necessary for a patient's informed consent constitutes a

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185. *Id.* (emphasis added); *see* U.S. CONST. amend. X. For further discussion of states' professional regulatory authority, see sources in *supra* note 53.

186. *NIFLA*, 585 U.S. at 769 (noting this task is difficult but "long familiar to the bar").

187. *Id.* at 768; *see* Gottesdiener, *supra* note 139, at 754.

188. *NIFLA*, 585 U.S. at 769 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)). Note *Casey*'s First Amendment analysis is extremely brief, comprising just one paragraph of the opinion. Many courts have emphasized it should be interpreted narrowly, given that such scant analysis is difficult to apply to statutes beyond what *Casey* examined directly. *See, e.g., Camnitz*, 774 F.3d at 248–49; Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institution*, 147 U. PA. L. REV. 771, 774 (1999).

189. *Id.* at 769-70.

190. *Casey*, 505 U.S. at 884.

regulation of the providers' conduct, even if it incidentally compels speech by requiring providers to communicate specific information.[191] The purpose of the statute is to establish procedural guidelines for "the practice of medicine," not to communicate the state's desired message.[192] Accordingly, the statute's effects on speech do not trigger elevated scrutiny.[193]

NIFLA examined *Casey*'s First Amendment analysis and held it does not support characterizing the licensed notice as a regulation of professional conduct exempt from the general prohibition on content-based speech restrictions.[194] First, *NIFLA* held the licensed notice is not an informed consent requirement.[195] Sharing information about state-funded pregnancy services does not facilitate informed consent, as it "provides no information about the risks or benefits" of abortion and childbirth.[196] Second, the licensed note does not exclusively regulate the practice of medicine. The statute compels the disclosure in every interaction between a crisis pregnancy center and a patient, "regardless of whether a medical procedure is ever sought, offered, or performed."[197] These discrepancies indicate the statute is not sufficiently tied to the practice of medicine to constitute a regulation solely of professional conduct; rather, the licensed notice reaches beyond the objectives of professional regulation and intends to "regulate[] speech as speech."[198] *NIFLA* thus concluded the distinction between regulations of professional speech and conduct elicited in *Casey* does not shield the licensed notice from heightened scrutiny.[199]

NIFLA's analysis of *Casey* strengthens *Camnitz*'s conclusion that the Display of Real-Time View Requirement is not merely a regulation of professional conduct subject to reduced scrutiny. *Camnitz* addressed this issue independently and distinguished *Casey*'s First Amendment conclusions when striking down the Display of

191. *See* Gottesdiener, *supra* note 139, at 754.
192. *NIFLA*, 585 U.S. at 770.
193. *See id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.; see* Gottesdiener, *supra* note 139, at 753–55.

Real-Time View Requirement.[200] Namely, the Fourth Circuit characterized *Casey*'s free speech discussion as a "particularized finding" specific to the Pennsylvania statute.[201] While those disclosures appropriately fell within the scope of a state's freedom to regulate professional conduct, this does not imply that all informed consent disclosures and speech requirements in the abortion context do the same.[202] As the court helpfully explained, "[t]he single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here."[203] The Display of Real-Time View Requirement's intentional restrictions on physician speech and drastic deviations from traditional principles of informed consent render *Casey*'s First Amendment analysis immaterial for the restrictions at hand.[204]

NIFLA adds powerful reinforcements to *Camnitz*'s analysis and supports the Fourth Circuit's conclusion that the Display of Real-Time View Requirement is not a professional regulation subject to rational basis review. First, it is clear the Display of Real-Time View Requirement is not an informed consent statute under *NIFLA*'s interpretation. Like the licensed notice, the statute in *Camnitz* "does not facilitate informed consent to a medical procedure."[205] As discussed in Part III, the statute not only *deviates* from traditional informed consent principles in ways that dramatically increase the burden on physician speech and jeopardize patient wellbeing, but the statute is also *ineffective* at promoting informed consent. By compelling physicians to speak even when the patient is not listening, the statute compels speech even when it is impossible to inform the

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200. Stuart v. Camnitz, 774 F.3d 238, 249 (4th Cir. 2014).

201. *Id.*; *see* Dunlap, *supra* note 10, at 456.

202. Lang, *supra* note 25, at 2121; *see, e.g.,* Wollschlaeger v. Gov. of Fla., 760 F.3d 1195, 1311 (11th Cir. 2014) 1311 (affirming *Camnitz*'s interpretation of *Casey*).

203. *Camnitz*, 774 F.3d at 249.

204. See Part III for a discussion of the uniquely burdensome characteristics of the Display of Real-Time View Requirements.

205. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 770 (2018). *See generally, Camnitz*, 774 F.3d at 252–55 (explaining how *Camnitz* is ineffective as an informed consent requirement).

patient's decision.[206] The state's further admission that the statute aims to discourage patients from choosing abortion conflicts with the nature of informed consent statutes, which aim to give patients sufficient information to make an independent choice rather than directing the patient towards a particular decision.[207]

Like the licensed notice in *NIFLA*, the *content* of the Display of Real-Time View Requirement is also ineffective at promoting informed consent. Namely, the compelled speech in the North Carolina statute "provides no information about the risks or benefits" of abortion and childbirth.[208] An ultrasound does not further the patient's informed consent to an abortion. As *Camnitz* noted, "[i]nformed consent has not generally been thought to require a patient to view images from his or her own body . . . much less in a setting where personal judgment may be altered or impaired."[209] Requiring the physician to explain the ultrasound display also does not inform the patient of the risks or benefits associated with the abortion procedure.[210] Any information about risks specific to the patient's pregnancy and their fetus is already communicated elsewhere in the informed consent process, in a manner far more similar to the disclosure requirements *Casey* affirmed.[211]

Finally, like the licensed notice at issue in *NIFLA*, the Display of Real-Time View Requirement does not merely regulate professional conduct. Applying *NIFLA*'s analysis of the distinction between professional speech and conduct, the North Carolina statute "regulates speech as speech."[212] The purpose of the statute's compelled speech is not simply to give patients information about the procedure and its alternatives, but to communicate a message "to discourage abortion or at the very least cause the woman to reconsider

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206. *Camnitz*, 774 F.3d at 252. Note also that during trial in the Middle District of North Carolina, the state's own witness testified that the compelled speech in this context is incapable of achieving the statute's purported goal of informed consent. *See* Stuart v. Loomis, 992 F.Supp.2d 585, 602 (M.D.N.C. 2014).

207. *Camnitz*, 774 F.3d at 252

208. *NIFLA*, 585 U.S. at 770.

209. *Camnitz*, 774 F.3d at 255.

210. *See* Harris, *supra* note 165, at 156–57.

211. *See* N.C. GEN. STAT. § 90-21.85 (2023); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 901 (1992).

212. *NIFLA*, 585 U.S. at 770.

her decision."[213] The Display of Real-Time View Requirement thus constitutes compelled speech for the same reasons the Court used in *NIFLA*. Significantly, the regulation in *Camnitz* involves an even more express regulation of physician speech than the statutes examined in *NIFLA* and *Casey*, given that it compels physicians to communicate information directly rather than simply inform patients of written disclosures elsewhere.[214] Thus, if *NIFLA* found the licensed notice to be a sufficient restriction on speech to fall outside *Casey*'s exception for professional regulations, then the statute in *Camnitz*, being an even clearer restriction on physician speech, should similarly fall outside this exception.

In sum, although the Court decided *NIFLA* intending to protect anti-abortion crisis pregnancy centers, its analysis also shields abortion providers from statutes that impermissibly infringe on their First Amendment rights. *NIFLA* affirms *Camnitz*'s conclusion that states cannot restrict speech simply because it occurs in the context of abortion care. *NIFLA* also helpfully clarifies the narrow exceptions in which restrictions on physician speech may be subject to reduced scrutiny, and the Court's analysis further indicates the Display of Real-Time View Requirement does not fall within either category. Finally, *NIFLA*'s analysis confirms that when examining the free speech implications of a statute that regulates abortion, the only relevant standard of review is that triggered by restrictions on speech, not abortion. This conclusion further shields *Camnitz* from the doctrinal aftermath of *Dobbs*, confirming the Fourth Circuit's First Amendment analysis remains good law.

CONCLUSION

North Carolina's Display of Real-Time View Requirement remains unconstitutional under the current legal framework, and the Fourth Circuit's injunction should remain in force. First, the Fourth Circuit's decision in *Stuart v. Camnitz* is unaffected by the Supreme Court's decision in *Dobbs*. Although both decisions examine abortion statutes, they concern different constitutional subject matters—

213. *Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014); Br. of Defs.-Appellants, *supra* note 43, at 29.

214. *See* 2011 N.C. Sess. Laws 405 § 90-21.85.

Camnitz examines a statute's restriction on the right to free speech, whereas *Dobbs* looks to a statute's restriction on right to abortion (or lack thereof). The fact that the courts examine different constitutional doctrines means that *Dobbs*' influence on the constitutional right to abortion does not affect *Camnitz*'s conclusion that the Display of Real-Time View Requirement is unconstitutional as a restriction on speech.

Second, the Supreme Court's 2018 decision in *NIFLA* bolsters *Camnitz*'s holding that restrictions on professional speech remain subject to elevated scrutiny. The Display of Real-Time View Requirement satisfies *NIFLA*'s criteria for a statute subject to the First Amendment as a form of compelled speech. Further, neither of the exceptions *NIFLA* recognized apply to the Display of Real-Time View Requirement, as the statute is not an uncontroversial disclosure requirement akin to *Zauderer* or a regulation of professional conduct akin to *Casey*.

As this Comment demonstrates, the Supreme Court's *Dobbs* decision dealt a significant blow to the abortion rights movement, but its impact was not lethal. Although the Supreme Court no longer recognizes abortion as a constitutional right, laws restricting abortion can still be invalidated on other constitutional grounds. It is imperative that legal advocates remain cognizant of this reality and seek out alternate constitutional arguments beyond what *Dobbs* erased.

These creative legal strategies are only stopgaps—they are not a permanent or comprehensive strategy for protecting abortion in a post-*Roe* world. However, as we continue to fight for a world that gives life to the fundamental right to choose abortion, legal advocates can use their knowledge and institutional access to chip away at obstacles to abortion access wherever possible. This Comment concludes that the First Amendment offers us a promising chisel.

MORE THAN JUST AN "ATYPICAL" HARDSHIP: HOW COURTS ARE MISSING THE MARK ON SOLITARY CONFINEMENT[*]

KYRA GOINS[**]

INTODUCTION……………………………..……………………169
I. FACTUAL AND PROCEDURAL BACKGROUND………………...…170
II. EXISTENCE OF A PROTECTED LIBERTY INTEREST……………….172
III. CONDITIONS IN *KIMBLE*……………………………….……173
A. *Conditions Within the Cell*……………...………174
B. *Time Spent Outside of the Cell*…………………….175
C. *Length of Time in the Restrictive Housing Unit*……177
IV. OTHER WAYS IN WHICH SOLITARY CONFINEMENT FAILS…...…179
CONCLUSION………………………..…………………………181

INTRODUCTION

> *It's hard to describe what solitary confinement can do to unnerve and defeat a man. You quickly tire of standing up or sitting down, sleeping or being awake. There are no books, no paper or pencils, no magazines or newspapers. The only colors you see are drab gray and dirty brown. Months or years may go by when you don't see the sunrise or the moon, green grass or flowers. You are locked in, alone and silent in your filthy little cell breathing stale, rotten air and trying to keep your sanity . . . . Physical torture may have ended, but there is still no torture worse than years of solitary confinement.*

— Captain Howard Rutledge, American prisoner of war during the Vietnam War[1]

[*] © 2026 Kyra Goins.
[**] J.D. Candidate, University of North Carolina School of Law, Class of 2026.
1. John Leach, *Psychological Factors in Exceptional, Extreme, and Torturous Environments*, 5 EXTREME PHYSIOLOGY & MED., June 2016, at 3.

Isolation is an inextricable part of the American prison system. On the one hand, incarceration is, at its core, taking people who have been convicted of a crime and isolating them from the rest of society in a secure environment. On the other hand, prison in the U.S. should hardly be a lonely place considering nearly two million people are currently incarcerated nationwide.[2] Incarcerated individuals experience a wide variety of social, living, and confinement conditions, including varying degrees of isolation from their fellow inmates.[3] Despite these variable conditions, solitary confinement remains a staple of prisons across the country: on a given day, over 120,000 inmates may be held in some form of isolated confinement.[4] The legal and humanitarian debates surrounding the merits of solitary confinement are nothing new,[5] and the Supreme Court has weighed in to establish some basic parameters regarding what constitute acceptable solitary confinement conditions.[6] Since the 2005 Supreme Court ruling in *Wilkinson v. Austin*, lower courts have grappled with how to apply the *Wilkinson* factors to individual cases of solitary confinement.[7] This Recent Development analyzes one such case from 2024 originating out of North Carolina: *Kimble v. Swink*. The Fourth Circuit ruled an inmate who was subjected to solitary confinement did not have his Fourteenth Amendment Due Process rights violated based on their application of the *Wilkinson* factors.[8] This Fourth Circuit ruling failed to fully appreciate the hardship created by solitary confinement conditions, and sets a dangerous precedent that may allow future courts to uphold psychologically and physically detrimental living conditions for inmates.

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2. Wendy Sawyer and Pete Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html.

3. *See id.*

4. *Solitary Confinement in the United States*, SOLITARY WATCH, https://solitarywatch.org/facts/faq/ (last visited May 13, 2026).

5. *Id.*

6. *See Wilkinson v. Austin*, 545 U.S. 209, 209 (2005).

7. *See Kimble v. Swink*, No. 22-6437, 2024 U.S. App. LEXIS 3854 (4th Cir. Feb. 20, 2024).

8. *Id.*

I. FACTUAL AND PROCEDURAL BACKGROUND

William J. Kimble was incarcerated in a North Carolina prison when, in February 2018, he was moved to a different unit within the North Carolina Department of Public Safety called the Rehabilitative Diversion Unit (RDU).[9] One of the key features of this unit is the housing of inmates in solitary confinement.[10] Prior to his placement in solitary confinement, Kimble had spent roughly two years in the general population at the Pasquotank Correctional Institution.[11] Following a disciplinary infraction, he was moved to the RDU of Marion Correctional Facility.[12] The RDU was structured into three distinctive phases, with the first two phases split into two sub-phases.[13] Each phase was required to last a minimum number of days: Phase I was to last a total of 130 days, Phase II a total of 140 days, and Phase III a total of 84 days.[14] Each phase had no maximum time, and if prison officials deemed appropriate, an inmate could be sent "backwards" to redo a phase they had already completed.[15] Prisoners could also be put on "non-participating status" as a disciplinary procedure, meaning the prisoner halts his progression through the RDU stages while remaining in the restrictive housing.[16] In summation, inmates placed in RDU were required to spend at least 354 days in the unit but could theoretically remain there indefinitely; for example, reports have revealed some prisoners have remained in RDU for as long as four years.[17]

The conditions of RDU vary based on the phase.[18] Phase I, in which Kimble spent 138 days, limits inmates to just five hours of recreation per week.[19] Some days, inmates receive no recreation time at all.[20] Interaction with others is severely limited: inmates must eat

9. *Id.* at *1.
10. *Id.*
11. *Id.* at *1.
12. *Id.* at *2.
13. *Id.* at *4.
14. *Id.*
15. *Id.* at *5, 6.
16. *Id.* at *5.
17. *Id.* at *4-5.
18. *See* Compl. at 29-30, Dewalt v. Hooks, 382 N.C. 340 (2022) (No. 19-CV-14089), 2019 WL 13099491, at 28.
19. *Id.* at 2.
20. See *Kimble*, 2024 U.S. App. LEXIS 3854, at *6.

alone in their cells, cannot receive or make any phone calls for 60 days.[21] After 60 days, they are only allowed to make a single fifteen-minute call every 30 days.[22] Throughout all three phases, inmates are confined to their cell for 22 hours a day.[23] Bright light shines in the cells from 5:45 AM to 11:30 PM, leaving only 6 hours and 15 minutes of relief each day for inmates.[24] Covering the lights in any way is prohibited.[25]

As a result of his time in the RDU, Kimble filed suit in the United States District Court for the Western District of North Carolina, alleging that "his placement in the RDU subjected him to solitary confinement conditions . . . without due process of law, in violation of the Fourteenth Amendment."[26] The suit Kimble filed sought redress for a violation of his rights, but the district court dismissed the complaint for failure to state a claim.[27] Kimble then appealed to the Court of Appeals for the Fourth Circuit.[28] In making a determination regarding the conditions Kimble endured in the RDU, the Fourth Circuit had to evaluate whether these conditions imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," a standard set forth by the Supreme Court decision *Wilkinson v. Austin*.[29]

In *Wilkinson*, the petitioner was an inmate who was housed in the Ohio State Penitentiary, a Supermax facility that keeps its inmates in solitary confinement.[30] Inmates remain in their cells for 23 hours a day, with a constant light that is only occasionally dimmed; any efforts to shield the light results in disciplinary action.[31] Human interaction is severely limited: meals are taken alone, and the rare opportunities for visitation happen through glass walls.[32] Additionally, placement in this facility is indefinite and is only limited by the length of the

21. *See* Compl., *supra* note 18, at 29.
22. *Kimble*, 2024 U.S. App. LEXIS 3854, at *6.
23. *Id.* at *7.
24. *Id.*
25. *Id.*
26. *Id.* at *1-2.
27. *Id.* at *2.
28. *Id.*
29. *Id.* at *10-11.
30. *Wilkinson v. Austin*, 545 U.S. 209, 218 (2005).
31. *Id.* at 214.
32. *Id.*

inmate's sentence.[33] Parole eligibility is also revoked during an inmate's stay at the facility.[34]

II. EXISTENCE OF A PROTECTED LIBERTY INTEREST

The key issue in *Wilkinson,* as in *Kimble*, was whether the petitioner's placement in restrictive housing conditions violated his Fourteenth Amendment Due Process rights.[35] In order for the question of Due Process violations to be legitimate, it must first be demonstrated that inmates had a "protected liberty interest" in avoiding assignment to the restrictive housing facilities at issue.[36] The standard for determining whether a protected liberty interest exists is based on the actual nature of the restrictive housing conditions "in relation to the ordinary incidents of prison life."[37] The inquiry is whether the restrictive housing conditions "present a dramatic departure from the basic conditions of the inmate's sentence," which is formalized into the following test: does assignment into the restrictive housing facility "impose[] atypical and significant hardship on the inmate in relation to ordinary incidents of prison life"?[38]

While the Supreme Court may have articulated a specific test for determining the existence of a "protected liberty interest," the application of the test remains murky.[39] The Court in *Wilkinson* notes that no baseline has been established to measure what constitutes an "atypical and significant hardship" in any given prison system, and the Supreme Court declines to provide any further guidance on how future courts might choose to do so.[40] Instead, the Court is satisfied that the conditions experienced by the petitioner in *Wilkinson* qualify as atypical and significant hardships "under any plausible baseline"[41] and spend no more than a single paragraph explaining this conclusion.[42]

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33. *Id.* at 214-15.
34. *Id.* at 215.
35. *Id.* at 213; *Kimble v. Swink*, No. 22-6437, 2024 U.S. App. LEXIS 3854, at *1-2 (4th Cir. Feb. 20, 2024).
36. *See Wilkinson*, 545 U.S. at 220.
37. *Id.* at 223.
38. *Id.*
39. *Id.*
40. *See id.*
41. *Id.*
42. *See id.* at 223-24.

Nevertheless, the *Kimble* court used the standards outlined in *Wilkinson* to draw the conclusion that Mr. Kimble had no liberty interest in avoiding placement in the RDU.[43] It is worth breaking down the factors that led to the different outcomes in the *Wilkinson* and *Kimble* case. Parsing through how the housing conditions in *Kimble* differed—or failed to differ—from the housing conditions in *Wilkinson*, where the Supreme Court ruled a "protected liberty interest" existed, this Article aims to showcase the inconsistent and largely trivial distinctions courts are making when applying the already fuzzy standard of "atypical and significant hardship."

III. CONDITIONS IN *KIMBLE*

In reviewing the conditions Kimble experienced in the RDU, the court concludes the conditions to be "less restrictive" than the conditions experienced by the petitioner in *Wilkinson*.[44] The Court specifically cites how the lights in Kimble's cell were only on from 5:45 AM to 11:30 PM—17 hours and 45 minutes—each day, versus in *Wilkinson*, where the lights were on 24 hours a day, in addition to noting how Kimble received five hours of outdoor recreation per week, while the petitioner in *Wilkinson* only received indoor recreation.[45] To be clear, these differences are not irrelevant; however, the analysis the Fourth Circuit offers of Kimble's housing conditions falls short of truly determining whether Kimble had a "protected liberty interest" in avoiding placement in the RDU.

The court here spends most of its analysis splitting hairs about the conditions of the RDU versus other solitary confinement conditions in different facilities, arguably undermining the very standard in *Wilkinson* which aims to compare the conditions of an inmate's restrictive housing *not* to that of *other inmate's restrictive housing,* but rather the "basic conditions of the inmate's sentence."[46] Perhaps even more troubling than this potential misapplication of *Wilkinson* is how the court's application essentially ignores the actual hardships experienced by an inmate in restrictive housing by comparing the inmate's present conditions with even more abhorrent conditions then deem the inmate's experience as "not as bad." The

43. *See Kimble v. Swink*, No. 22-6437, 2024 U.S. App. LEXIS 3854, at *19.
44. *Id.* at *17.
45. *Id.*
46. *Wilkinson*, 545 U.S. at 223.

same issue of comparison would arguably arise even if courts were to be stricter in *Wilkinson's* application by just looking at the conditions an inmate would experience if they remained in the general population. When conditions for even the general population are restrictive, very restrictive solitary conditions may still miss the mark of being "atypical" and "significant" compared to what an inmate would otherwise experience. This would in turn allow incredibly restrictive solitary confinement conditions for inmates across different prisons. These differences may overlap with demographics or wealth disparities.[47] For example, a prison is more restrictive as a result of a lack of funding to hire enough prison personnel, inmates could be held in more restrictive solitary conditions.

A. *Conditions within the Cell*

The Court in *Kimble* harked specifically on lighting in cells in the RDU compared to lighting in other solitary confinement environments brought to judicial attention.[48] To those who have never spent time in prison, lighting may seem rather trivial. However, lighting conditions can have a profound impact on inmates.[49] Lighting—specifically prolonged or constant exposure to artificial lighting—can impact inmates both physically and mentally.[50] In terms of indoor lighting conditions, people tend to prefer lighting that mimics "natural cycles," changing in quantity and quality based on the time of day, season, and weather.[51] This preference for natural daylight has been found to be virtually universal across decades of studies about indoor lighting design.[52] Exposure to only or primarily artificial lighting indoors and insufficient amounts of natural daylight can result in Vitamin D deficiency and depression.[53]

47. *See Living Conditions in Prison*, VERA, https://www.vera.org/ending-mass-incarceration/dignity-behind-bars/living-conditions-in-prison (last visited May 14, 2026).

48. *See Kimble*, 2024 U.S. App. LEXIS 3854, at *17.

49. *See* Alberto Urrutia-Moldes, *Light Behind Bars: How Light Impacts Mental Health in Prisons*, 21 INT'L J. PRISON HEALTH 347 (2025).

50. *See id.*

51. RICHARD E. WENER, THE ENVIRONMENTAL PSYCHOLOGY OF PRISONS AND JAILS 209 (2006).

52. *Id.*

53. *Id.*

Lighting is also very influential in how the body establishes—or fails to establish—a healthy circadian rhythm.[54] Circadian rhythm is critical for human's ability to sleep a healthy amount, and sleep soundly.[55] The body's creation of its natural rhythms is affected not only by sunlight, but also by artificial light.[56] For instance, the sleep-wake cycles of an individual correspond with regular exposure to light levels; healthy sleep patterns are dependent not just on the amount and quality of light, but also on a proper balance of light and dark during the right times of day.[57] Inmates exposed to constant bright lights, like the petitioner in *Wilkinson*, will understandably have a harder time achieving quality sleep schedules. While Kimble had breaks from the bright, artificial lights in his cell for 6 hours and 15 minutes a day, this is still less than the recommended minimum of 7 hours a night for adults.[58] Sleeping less than 7 hours a night may also result in additional health issues.[59]

B. *Time Spent Outside of the Cell*

Solitary confinement is, as suggested by the name, defined by social isolation. Prolonged social isolation comes with a whole host of potential psychological harms, including, but not limited to: anxiety, depression, paranoia, post-traumatic stress disorder (PTSD), and psychosis.[60] People assess and understand their reality based on contact with other people; taking away social contact can cause individuals to distort reality and struggle to distinguish the external from the internal.[61] One's sense of self is often crafted around interactions with other people, and in prolonged isolation, individuals

54. *Id.*

55. *Circadian Rhythm,* CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/circadian-rhythm (Mar. 15, 2024).

56. WENER, *supra* note 44, at 209.

57. *Id.* at 211.

58. *See About Sleep*, CDC (May 15, 2024), https://www.cdc.gov/sleep/about/index.html.

59. *How Much Sleep is Enough?*, NAT'L HEART, LUNG, & BLOOD INST. (Mar. 24, 2022), https://www.nhlbi.nih.gov/health/sleep/how-much-sleep.

60. Kayla James and Elena Vanko, *The Impacts of Solitary Confinement*, VERA (Apr. 2021), https://vera-institute.files.svdcdn.com/production/downloads/publications/the-impacts-of-solitary-confinement.pdf?dm=1617381199.

61. LEACH, *supra* note 1, at 3.

may struggle to stay in touch with their own personalities.[62] Social deprivation can also create a neurological phenomenon of "social pain," which is interpreted much like physical pain, and may "'fundamentally alter the structure of the human brain in profound and permanent ways.'"[63] Social pain can occur in people when they are denied their need for belonging and socially connecting to others.[64] These negative experiences can activate the same neural regions in the brain that physical pain triggers.[65]

Solitary confinement does not just limit an inmate's interactions with other inmates and prison staff, it also often limits an inmate's ability to interact with family on the outside.[66] This was the case for Kimble, who was barred from making any phone calls for the first 60 days in solitary confinement.[67] His visits were limited to one no-contact visit each month during "Phase I" of his time in the RDU, followed by two no-contact visits per month for the rest of his time in solitary.[68] In the general prison population Kimble would have been a part of, inmates receive one contact or non-contact visit weekly—double or quadruple the amount of outside visitation allowed for those in the RDU.[69] Research has demonstrated that continued contact with family is important not only to the well-being of inmates, but also to the well-being of their family members on the outside, particularly if those family members are children.[70] Maintaining contact with family can also play a crucial part in incarcerated individuals' ability to successfully reintegrate into their communities upon release.[71]

If the court was to have actually applied the *Wilkinson* standard as it was outlined by comparing the conditions Kimble faced in the RDU to the conditions of the general prison population, it would have

62. *Id.*

63. James and Vanko, *supra* note 52.

64. Naomi I. Eisenberger, *The Neural Bases of Social Pain: Evidence for Shared Representations with Physical Pain*, 74 PSYCHOSOMATIC MED. 126, 126 (2012).

65. *Id.*

66. *See Solitary: The Family Experience*, Citizens for Prison Reform, https://static.prisonpolicy.org/scans/Open%20MI%20Door%20Campaign%20and%20Citizens%20for%20Prison%20Reform/solitary__the_family_experience_final-compressed.pdf (last visited May 14, 2026).

67. *Kimble v. Swink*, No. 22-6437, 2024 U.S. App. LEXIS 3854, at *6.

68. *Id*.

69. *Id.* at *6-7, *9.

70. James and Vanko, *supra* note 52.

71. *Id.*

found an atypical hardship was imposed on Kimble.[72] In addition to substantially more visitation rights, inmates in the general population were only confined to their cells overnight and during count times[73], they were "able to move around to different locations such as dayrooms, dining halls, religious services, the canteen, and outdoor and indoor recreation spaces."[74] These freedoms stand in stark contrast to the 22 hours of every day that Kimble was confined to his cell.[75] Inmates in the general population also had the opportunity for social contact in the form of mealtimes outside of their cells and recreational activities like playing team sports.[76]

In comparison to the solitary conditions in *Wilkinson* that the Supreme Court ruled imposed an "atypical and significant hardship," the differences between the conditions of the two solitary units seem trivial. Specifically, the inmate in *Wilkinson* was confined to his cell for 23 hours a day, while Kimble was confined to his cell for 22 hours a day.[77] While an extra hour out of confinement may feel incredibly significant to an individual being housed in a solitary unit, the court here seems to greatly overvalue it. Isolating someone in a small cell for 22 hours every day instead of 23 is hardly a great humanitarian feat, nor does it remove the hardship individuals in those solitary conditions.

C. *Length of Time in the Restrictive Housing Unit*

Another artificial distinction made by the courts in evaluating the restrictive housing conditions endured by Kimble was the length of his stay in the RDU.[78] While Kimble only spent 398 days in the RDU, the petitioner in *Wilkinson,* as well as petitioners in other similar cases, spent over 20 years in restrictive housing.[79] However, even an incredibly short stay in solitary confinement can have significant

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72. *See Kimble*, 2024 U.S. App. LEXIS 3854 at *11-12 (for the atypical hardship test).

73. *See Id.*

74. *Id.* at *8.

75. *Id.* at *7.

76. *Id.* at *9.

77. *Id.* at *7; *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005).

78. *Kimble*, 2024 U.S. App. LEXIS 3854 at *17.

79. *Id.*

impacts on inmates.[80] The risks posed by even a short period of time have led the United Nations to classify solitary confinement as a form of torture if it is used for longer than 15 consecutive days.[81] As little as one week in solitary confinement can result in neurological changes, such as "slowed brain activity and poorer performance on intellectual and perceptual-motor tests."[82] Often, the results of even a short stint in solitary confinement can be deadly.[83] Overall, individuals who spend time in solitary confinement are 24 percent more likely to die during their first year out of prison than incarcerated individuals who spend no time in solitary confinement.[84] Additionally, individuals who stay in solitary confinement are 78 percent more likely to die by suicide and 54 percent more likely to die by homicide.[85] They are also 127 percent more likely to die from an opioid overdose within the first two weeks of release from incarceration.[86] These statistics indicate that, by at least some metrics, it is irrelevant that Kimble spent only a fraction of the time that the petitioner in *Wilkinson* did in solitary confinement: Kimble still faces heightened risk of neurological damage and premature death.

IV. OTHER WAYS IN WHICH SOLITARY CONFINEMENT FAILS

Outside the damaging impacts of solitary confinement on the individual imprisoned, solitary confinement is simply ineffective for its supposed uses.[87] Solitary confinement is often justified under the guise of promoting prison safety; by isolating individuals who are disruptive or violent, prisoners are prevented and deterred from

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80. *See* James Dean, *Short Stays in Solitary Can Increase Recidivism, Unemployment*, CORNELL CHRON. (June 16, 2020), https://news.cornell.edu/stories/2020/06/short-stays-solitary-can-increase-recidivism-unemployment

81. Tiana Herring, *The Research is Clear: Solitary Confinement Causes Long-lasting Harm*, PRISON POL'Y INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/.

82. James & Vanko, *supra* note 52, at 2.

83. *See* James Dean, Solitary Confinement Heightens Post-Incarceration Death Risk, CORNELL CHRON. (Feb. 5, 2020), https://news.cornell.edu/stories/2020/02/solitary-confinement-heightens-post-incarceration-death-risk

84. *Id.*

85. *Id.*

86. *Id.*

87. *Solitary Confinement and Prison Safety*, SOLITARY WATCH, https://solitarywatch.org/wp-content/uploads/2023/02/SW-Fact-Sheet-4-Prison-Safety-v230228.pdf (last visited May 27, 2026).

behaving violently.[88] However, there is no substantial evidence indicating that solitary confinement actually makes prisons safer, and some studies suggest the use of solitary confinement may actually result in more violence in prisons.[89] Several states across the country have opted to reduce their use of solitary confinement and have found no increase in prison violence.[90] For example, the state of Colorado has reduced its use of solitary confinement by 85 percent.[91] The result? The lowest rates of assault on prison staff since 2006.[92]

There is also evidence suggesting that solitary confinement undermines the general goal of prisons to make society at large safer.[93] The use of solitary confinement does not reduce recidivism rates.[94] In fact, people who spend any time in solitary confinement may be more likely to re-offend, and to do so violently.[95] In particular, individuals released directly from solitary confinement into society have markedly greater recidivism rates.[96] One study in Texas found that 60.8 percent of prisoners released directly from solitary in 2006 were re-arrested within three years, compared to the 48.8 percent of all prisoners released in 2006 who were re-arrested during that same three-year time period.[97]

Solitary confinement also reinforces inequities among different demographics that are already present in the prison system. For instance, a 2019 survey of state prisons across the country found that while black men comprised 40.5 percent of the male prison population, they made up 43.4 percent of the men in solitary confinement.[98] This disparity was even larger for black women: while black women comprised only 21.5 percent of the female prison population, they made up 42.1 percent of the women in solitary confinement.[99] Generally, people of color are more likely to be sent to

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88. Dean, *supra* note 83.
89. *Id.*
90. *Solitary Confinement: Inhumane, Ineffectual, and Wasteful*, S. POVERTY L. CTR. (Apr. 4, 2019), https://www.splcenter.org/20190404/solitary-confinement-inhumane-ineffective-and-wasteful.
91. *Id.*
92. *Id.*
93. SOLIDARY WATCH, *supra* note 87.
94. James & Vanko, *supra* note 52.
95. *Id.*
96. *Id.*
97. SOLITARY WATCH, *supra* note 4.
98. James & Vanko, *supra* note 52, at 6.
99. *Id.*

solitary confinement, and sent for longer periods of time than white inmates.[100] Studies have also shown that members of the LGBTQ+ community are more vulnerable to being placed in solitary confinement.[101] The Bureau of Justice Statistics found that in 2011 and 2012, 28 percent of lesbian, gay, and bisexual inmates were placed in solitary confinement, while only 18 percent of heterosexual individuals were placed in solitary confinement.[102] Disabled people also face additional obstacles when placed in solitary confinement.[103] Individuals who require mobility aids struggle greatly within already small solitary units.[104] Moreover, access to caretakers may be limited upon relocations to solitary confinement.[105] Individuals who are blind or deaf may experience sensory deprivation more intensely and harmfully than an able-bodied individual might experience while confined in isolation.[106]

CONCLUSION

Legal discussions surrounding solitary confinement, such as the discussions present in *Wilkinson* and *Kimble*, risk getting bogged down in procedural minutia or by splitting hairs about minor variations in prison conditions. Ultimately, regardless of if courts come to a favorable conclusion for inmate plaintiffs, something larger is being lost in how society views the use of solitary confinement. Regardless of how many hearings an inmate gets before placement in isolation or the exact number of minutes they are granted reprieve from the confinement in their cells and glaring fluorescent lights, the reality still stands that the United States' prison system is placing human beings in an environment considered by many to be outright torture.[107] To a certain extent, the legal issues decided in cases like *Kimble* are masking the real issue of the inhumanity of solitary confinement to begin with.

100. *Id.*
101. *See* S. POVERTY L. CTR., *supra* note 76.
102. *Id.*
103. *See id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* ("The United Nations considers solitary confinement exceeding 15 consecutive days . . . to be torture.")

It is worth reflecting on why the American criminal justice system is so comfortable with—and perhaps even partial to—the use of solitary confinement to manage prison populations. Even if one accepts the presumption that all individuals in prison are guilty of some crime—a certainly incorrect presumption—why should the debasing practice of solitary confinement be accepted? If solitary confinement is largely ineffective and runs the risk of being so profoundly psychologically and physically damaging to individuals, what purpose does it truly serve? Examining solitary confinement not as a series of legal hurdles that must be met to make it acceptable, but rather as a matter of human rights and dignity, may hold the key to moving towards more humane and effective prison practices.

DISCRIMINATION DISGUISED AS PARENTAL EMPOWERMENT: A TITLE IX CHALLENGE TO NORTH CAROLINA'S PARENTS' BILL OF RIGHTS*

BETH LECROY**

INTRODUCTION……………...……………………………………..183
I. WHAT IS NORTH CAROLINA'S PARENTS' BILL OF RIGHTS AND WHERE DID IT COME FROM?..185
A. *The Surge of the Parental Rights Movement*………185
B. *North Carolina's Parents' Bill of Rights and Public Response*…………………………………...………..…187
II. CAMPAIGN FOR SOUTHERN EQUALITY'S TITLE IX COMPLAINT WITH THE U.S. DEPARTMENT OF EDUCATION'S OFFICE OF CIVIL RIGHTS……………………………………………..……....189
A. *Campaign for Southern Equality's Title IX Complaint*…………………………….……..……………189
B. *What's Next?*..192
III. NORTH CAROLINA'S PARENTS' BILL OF RIGHTS VIOLATES TITLE IX AND IS AGAINST PUBLIC POLICY………………..………..194
A. *The Parents' Bill of Rights Violates Title IX*………194
CONCLUSION……………………...……………………………196

INTRODUCTION

In August 2023, the North Carolina General Assembly passed Senate Bill 49, coined the "Parents' Bill of Rights."[1] The law, generally, aims to expand parents' access to information regarding their children in public schools.[2] However, two sections of the new

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** J.D. Candidate, North Carolina School of law, Class of 2026.

1. Parents' Bill of Rights, ch. 114A, 2023 N.C. Sess. Laws 106 (codified as amended at N.C. GEN. STAT. § 114A).

2. Emily Walkenhorst, *New NC Law on Parents and Schools Begins Shaky Rollout*, WRAL NEWS, https://www.wral.com/story/new-controversial-law-on-parents-and-schools-begins-its-shaky-rollout-both-opponents-and-supporters-aren-t-happy/21207821/ (last updated Jan. 8, 2024).

bill have received the most attention. Section 115C-76.45(a)(5) requires schools to notify parents if their child asks school personnel to refer to them using a different name or pronoun.[3] Section 115C-76.55 prohibits instruction on gender identity, sexual activity, or sexuality to students in kindergarten through fourth grade.[4] Proponents of the bill have advocated that these sections advance the rights of parents to raise their children without government interference, while skeptics argue that the overbroad language stigmatizes LGBTQ+ students and creates a chilling effect within public school systems.[5] The first challenger of the law was the Campaign for Southern Equality, a non-profit advocacy group that works across the South to promote support, research, and political activism for LGBTQ+ individuals.[6] The organization filed a Title IX complaint with the U.S. Department of Education's Office of Civil Rights.[7] The decision from the Department is still outstanding but other states who have already enacted similar laws to North Carolina's may offer a window into what is to come.

This Article will argue that the Campaign for Southern Equality's complaint filed with the U.S. Department of Education's OCR should be successful because of the ways in which the two specific provisions of North Carolina's Parents' Bill of Rights discriminate against LGBTQ+ students. Specifically, the laws signal intolerance of LGBTQ+ identities, marginalizing a particular group of students. Moreover, it will be suggested that the two problematic provisions of the law are against public policy because the provisions, ironically, do not advance parental rights. The bill creates blanket exclusions on LGTBQ+ curriculum, rather than using an opt-out approach that has become commonplace in our public-school systems.[8] Wholly advancing one agenda while giving no space for

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3. N.C. GEN. STAT. § 115C-76.45(a)(5).

4. N.C. GEN. STAT. § 115C-76.55.

5. *See* Walkenhorst, *supra* note 2.

6. *Id.*; CAMPAIGN FOR S. EQUAL., https://southernequality.org/about/ (last visited Sep. 26, 2025).

7. *See* Campaign for S. Equal., Title IX Compl. to the U.S. Dep't of Educ.'s Off. for C.R. and C.R. Div. Re: Hostile Env't for LGBTQ Students in N.C. Pub. Schs. (Jan. 30, 2024), https://southernequality.org/wp-content/uploads/2024/01/Southern-Equality-Title-IX-Allegation-vs-NC-SBE-and-NC-DPI.pdf.

8. *See* James D. Kirylo, *The Opt-Out Movement and the Power of Parents*, KAPPAN (May 1, 2018), https://kappanonline.org/kirylo-opt-movement-power-parents/.

parents to exercise their constitutional right to direct the upbringing of their children creates tension that effaces public policy and the strong notion of parental rights in the United States.

Part I discusses North Carolina's Parents' Bill of Rights in greater detail and discusses the parental rights movement that precipitated the bill and similar legislation across the United States. This part looks at the public's response to the bill as well as the tangible changes that have been made in public school districts across the state to comply with the law. Part II describes the main legal challenge to the bill thus far, the Campaign for Southern Equality's OCR complaint, its arguments, and potential outcomes. Part III uses Florida's similar law, enacted two years prior to North Carolina's, as a case study to examine the legal challenges it has faced regarding the law and where the law stands now as a way of predicting what may be next for North Carolina. Lastly, Part IV assesses the strengths of the Campaign for Southern Equality's complaint and why the provisions of the North Carolina law are ultimately discriminatory in nature against LGBTQ+ students in public schools.

I. WHAT IS NORTH CAROLINA'S PARENTS' BILL OF RIGHTS AND WHERE DID IT COME FROM?

A. *The Surge of the Parental Rights Movement*

The North Carolina Parents' Bill of Rights, in its broadest description, was enacted to increase parental involvement and empowerment in schools by requiring public schools to give more information to parents about their children's education and health.[9] Most fundamentally, the notion of parental rights comes from the federal Constitutional right to direct the upbringing of one's children, which the bill references at the beginning of the chapter.[10] However, this bill is preceded by a recent surge in "parental rights" advocacy across the country.[11]

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9. Walkenhorst, *supra* note 2.

10. N.C. GEN. STAT. § 114A-10(1) ("A parent has the right to the following: To direct the education and care of his or her child.").

11. *See* Sarah Szilagy, *Parental Rights is a Movement with Deep Roots. It's Spreading Nationwide.*, MOTHER JONES (June 13, 2025), https://www.motherjones.com/politics/2025/06/parental-rights-is-a-movement-with-deep-roots-its-spreading-nationwide/.

Professor Maxine Eichner, in her article "Free-Market Family Policy and the New Parental Rights Laws," argues that the push for parental rights has been "orchestrated by a network of elite right-wing actors."[12] In entangling highly emotional and reactive responses to policies affecting people's children along with the weaponizing of political hot topics like "critical race theory" and vaccination requirements, right wing think tanks motivate their base to get to the ballot box.[13] Many "parental rights" organizations formed during the pandemic to fight COVID-19 restrictions in schools and after the diminishment of the disease, took up other agendas such as school curriculums focused on race, gender, and sexuality.[14] States began to match these movements with legislation, with Florida becoming the first state to enact a law banning the discussion of sexual orientation and gender identity in the classroom.[15]

Florida's law—dubbed by opponents as the "Don't Say Gay" law—was enacted in 2022 and prohibits instruction on sexual orientation and gender identity in public primary schools.[16] Since its enactment, six other states have enacted similar statutes banning the discussion of LGBTQ+ content in public schools.[17] North Carolina's Parents' Bill of Rights law goes even further than Florida's, with more specific requirements for teachers and greater enforcement mechanisms.[18]

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12. Maxine Eichner, *Free-Market Family Policy and the New Parental Rights Laws*, 101 N.C. L. REV. 1305, 1325 (2023).

13. *Id.* at 1323-24, 1326.

14. Elizabeth A. Harris & Alexandra Alter, *A Fast-Growing Network of Conservative Groups Is Fueling a Surge in Book Bans,* N.Y. TIMES (last updated Jan. 10, 2023), https://www.nytimes.com/2022/12/12/books/book-bans-libraries.html#:~:text=The%20growth%20comes%2C%20in%20part,books%20they%20regard%20as%20inappropriate.

15. *Florida Teachers can Discuss LGTBQ Topics Under "Don't Say Gay" Law, Settlement Says*, NAT'L PUB. RADIO (Mar. 11, 2024 at 7:16 ET), https://www.npr.org/2024/03/11/1237730819/florida-dont-say-gay-law-settlement-lgbtq.

16. *Id.*

17. *Id.* ("Other states used the Florida law as a template to pass prohibitions on classroom instruction on gender identity or sexual orientation. Alabama, Arkansas, Indiana, Iowa, Kentucky and North Carolina are among the states with versions of the law.").

18. Parents' Bill of Rights, S. 49, 2022 Gen. Assemb., Reg. Sess. (N.C. 2023) (enacted); Parental Rights in Education, H.B. 1557, 2022 Gen. Assemb., Reg. Sess. (Fla. 2022) (enacted).

B. *North Carolina's Parents' Bill of Rights and Public Response*

The two most controversial provisions in North Carolina's Parents' Bill of Rights are Section 115C-76.45(a)(5) and Section 115C-76.55. The first provision is titled "Notifications of student physical and mental health."[19] It states: "The governing body of a public-school unit shall adopt procedures to notify a parent of the following: Prior to any changes in the name or pronoun used for a student in school records or by school personnel, notice to the parent of the change."[20]

The second provision, titled "Age-appropriate instruction for grades kindergarten through fourth grade" states:

> Instruction on gender identity, sexual activity, or sexuality shall not be included in the curriculum provided in grades kindergarten through fourth grade, regardless of whether the information is provided by school personnel or third parties. For the purposes of this section, curriculum includes the standard course of study and support materials, locally developed curriculum, supplemental instruction, and textbooks and other supplementary materials, but does not include responses to student-initiated questions.[21]

The bill has sparked significant public reaction.[22] The vague aspects of the law, such as what is included in "curriculum," has frustrated schools and educators across the state attempting to comply.[23] Local school boards have traditionally had the authority to set their own policies based around state law.[24] However, such policies often grant individual schools and teachers much discretion.[25] This discretion, while potentially significant for teacher autonomy and localized issues, also has stirred confusion and in some instances over-cautionary compliance—a phenomenon known as the "chilling

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19. N.C. GEN. STAT. § 115C-76.45(a)(5).
20. *Id.*
21. N.C. GEN. STAT. § 115C-76.55.
22. *See* Greg Childress, Advocates File Federal Complaint Over 'Parents' Bill of Rights Law, NC NEWLINE (Jan. 31, 2024, 5:00 AM), https://ncnewsline.com/2024/01/31/advocates-file-federal-complaint-over-parents-bill-of-rights-law/.
23. Walkenhorst, *supra* note 2.
24. *Id.*
25. *Id.*

effect."[26] For example, in an abundance of caution, some elementary school teachers have removed books off of their classroom library shelves that include anything politicians might consider controversial, whether or not such books are indeed targeted by the statute.[27] Charlotte Mecklenburg County Schools (CMS) officials emailed all elementary school principals advising teachers "to remove any books from classroom libraries that have content related to gender identity, sexual activity or sexuality that students may access as part of independent reading tasks."[28] The CMS director of digital learning and library services followed up saying that "she screened books for 'alternative use of pronouns, same-sex couples, etc.'"[29] A sexual abuse prevention program in Orange County Schools and Chapel Hill-Carrboro City Schools was temporarily suspended after the law came out but has since been reinstated after getting approval from local officials.[30] Regarding the pronoun or name change notification provision, LGBTQ+ advocates suggest that queer youth "being kicked out of their homes for coming out is well documented," and this bill could put many students in dangerous situations or hyper stressful environments.[31] Opponents of the bill argue that the vagueness of the policies prompts a chilling effect because people, wanting to be law-abiding, will more often than not err on the side of conservatism.[32] This increased conservatism has prevented teachers from offering queer kids support, and has signaled an intolerance towards LGBTQ+ students, which opponents argue increases bullying and creates a hostile learning environment.[33]

Proponents of the bill argue that it isn't intended to target the LGBTQ+ community, but rather a parent's right to information about

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26. *See id.*; *In the Documents: North Carolina Educators Scramble to Comply with State's 'Don't Say Gay' Law*, AM. OVERSIGHT (Apr. 11, 2024), https://americanoversight.org/in-the-documents-north-carolina-educators-scramble-to-comply-with-states-dont-say-gay-law/.

27. Walkenhorst, *supra* note 2.

28. AM. OVERSIGHT, *supra* note 26.

29. *Id.*

30. Walkenhorst, *supra* note 2.

31. *Id.*

32. AM. OVERSIGHT, *supra* note 26.

33. Maura Barrett & Matt Lavietes, *LGBTQ Students Reflect on First School Year Under North Carolina's 'Don't Say Gay' Law*, NBC NEWS (last updated June 20, 2024), https://www.nbcnews.com/nbc-out/out-politics-and-policy/north-carolina-sb-49-law-lgbtq-students-rcna157177.

their children.[34] Parents, not teachers, they contend, should determine when it is appropriate to discuss topics of gender identity and sexual orientation with their kids.[35] Moreover, advocates of the bill suggest that the concerns opponents of the bill have about children facing backlash at home for name or pronoun changes should not be a central concern because there are state laws already in place designed to assist children who are abused or neglected.[36]

II. Campaign for Southern Equality's Title IX Complaint with the U.S. Department of Education's Office of Civil Rights

A. *Campaign for Southern Equality's Title IX Complaint*

Campaign for Southern Equality (CSE) is a non-profit based in North Carolina that works to advocate for and build support networks across the South for LGBTQ+ individuals.[37] On January 30, 2024, five months after North Carolina's enactment of the Parents' Bill of Rights, CSE filed a federal Title IX complaint with the U.S. Department of Education's Office for Civil Rights (OCR), arguing that the law marginalizes and discriminates against LGBTQ+ students. [38] Title IX "protects people from discrimination based on sex in education programs or activities that receive federal financial assistance."[39] The OCR enforces Title IX by evaluating, investigating, and resolving complaints.[40] CSE's complaint is the first legal action challenging the North Carolina bill.[41]

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34. Walkenhorst, *supra* note 2.

35. Barrett & Lavietes, *supra* note 33.

36. Walkenhorst, *supra* note 2.

37. *About,* THE CAMPAIGN FOR S. EQUAL., https://southernequality.org/about/.

38. *See* Greg Childress, *Advocates File Federal Complaint Over "Parents' Bill of Rights" Law*, N.C. NEWSLINE (Jan. 31, 2024), https://ncnewsline.com/2024/01/31/advocates-file-federal-complaint-over-parents-bill-of-rights-law/.

39. *Title IX and Sex Discrimination*, U.S. DEPT. OF EDU. (last reviewed Apr. 11, 2025), https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination.

40. *See About OCR*, U.S. DEPT. EDU. (last reviewed Mar. 4, 2026), https://www.ed.gov/about/ed-offices/ocr/about-ocr.

41. Laura Browne, *Complaint Alleges New Legislation Creates Discriminatory Environment for LGTBQ+ Students*, EDNC (Mar. 5, 2024),

The 113-page complaint by CSE was brought "on behalf of the LGBTQ+ students, families, staff and faculty who are subjected to sex-based discrimination in North Carolina's public schools."[42] It alleges that, based on Title IX, the North Carolina State Board of Education (SBE) and the North Carolina Department of Public Instruction (DPI) are discriminating against LGBTQ+ students and creating a hostile learning environment.[43] CSE seeks OCR to enforce a "safe, supportive, and welcoming school environment for LGBTQ students, families, and staff that complies with Title IX."[44]

The CSE complaint first argues that North Carolina schools are implementing policies, that discriminate against LGBTQ+ students.[45] Their first example of these policies is the Parents' Bill of Rights provision that prohibits curriculum about gender identity, sexuality, or sexual orientation.[46] The ban sweeps broadly, yet, CSE argues, there is only hyper surveillance over LGBTQ[47]-affirming content.[48] For example, *strict* compliance with the law would "bar reading stories about opposite-sex-led families, as surely heterosexuality is a sexual orientation and, hence, implicates sexuality."[49] Yet avoiding a total ban and interpreting the rule as one only banning LGBTQ+ content creates a target on LGBTQ+ communities, allowing, for example "a book with a mother and a father [to] be read in classrooms, while a book with two moms, two dads, or two male penguins raising a chick together [to be] out of bounds."[50]

CSE's next example of discriminatory policy is the Parents' Bill of Rights provision that requires schools to notify parents prior to any name or pronoun changes.[51] This policy has placed some students in untenable situations at home and has resulted in differing interpretations of the law.[52] Some schools have interpreted the

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https://www.ednc.org/03-05-2024-complaint-alleges-legislation-creates-discriminatory-environment-for-students/; *see* Childress, *supra* note 38.

42. Tile IX Compl., *supra* note 7, at 1.

43. *Id.* at 2.

44. *Id.*

45. *Id.*

46. Parents' Bill of Rights, ch. 114A, 2023 N.C. Sess. Laws 106 (codified as amended at N.C. GEN. STAT. § 114A).

47. Tile IX Compl., *supra* note 7, at 3.

48. *Id.* at 2-3.

49. *Id.* at 3.

50. *Id.*

51. *Id.* at 8.

52. *Id.* at 9-11.

provision as requiring parental permission before using a name change while others have applied the provision only to "gender nonconforming students and/or refused to honor a child's name or pronoun change even with parental approval."[53] One personal anecdote in the complaint described a teacher's policy of requiring the students to go by the name listed in the school records.[54] Even if students' parents were aware of their name change, the teacher did not honor it, upsetting several transgender students in the class.[55]

The CSE complaint next argues that North Carolina's educational establishment has failed to protect LGBTQ+ students following the enactment of the Parents' Bill of Rights.[56] North Carolina's SBE and DPI have failed to issue guidance on how to implement the Parents' Bill of Rights consistent with Title IX and other anti-bullying laws.[57] This lack of guidance has allowed for the political, anti-LGTBQ+ rhetoric to influence the bill's execution, and has created "chaotic, uneven local implementation leaving administrators, educators, parents, and students nowhere to turn."[58] In fear of noncompliance, educators have been overly cautious to screen out political hot topics – namely LGBTQ+ content, creating a lack of protection for LGBTQ+ students in North Carolina schools.[59]

Lastly, CSE argues that SBE and DPI have "created a hostile educational environment for LGBTQ+ students in North Carolina's public schools in violation of Title IX."[60] The lack of guidance from both SBE and DPI on the Parents' Bill of Rights has stripped LGBTQ+ support from schools, involuntarily outed students to their parents, and systemically fostered an intolerance towards their identity.[61] CSE argues that this discriminatory environment increases the risk of school dropouts and suicide.[62] In alignment with that claim, the Center for Disease Control "has found that inclusive policies lower in-school emotional distress, violence, and harassment for all students."[63]

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53. *Id* at 11.
54. *Id.* at 13.
55. *Id.*
56. *Id.* at 24.
57. *Id.* at 30.
58. *Id.*
59. *Id.* at 30-32.
60. *Id.* at 33.
61. *Id.* at 34.
62. *Id.* at 35.
63. *Id.*

The CSE calls on the OCR and federal executive branch to issue a determination on whether the provisions in the Parents' Bill of Rights violates Title IX and take remedial efforts to create a more inclusive, LGBTQ+ friendly environment in North Carolina schools, such as

> adopting policies that respect all students' gender identities—such as the use of the name the student goes by and pronouns that respect a student's gender identity—and implementing policies to safeguard students' privacy—such as maintaining the confidentiality of a student's birth name or sex assigned at birth if the student wishes to keep this information private, unless disclosure is legally required.[64]

CSE ends the complaint with 23 pages of testimonials from administrators, staff members, educators, parents and students from the North Carolina public school system sharing their personal experiences and stories with the Parents' Bill of Rights and learning environments in public schools.[65]

B. *What's Next?*

CSE is currently waiting for a decision from the OCR.[66] Since there are no legal deadlines for decisions to be issued, an investigation and rendered decision from the OCR can take up to a year or more for single schools.[67] Thus, in CSE's case for an entire state public school system, the process is likely to take much longer.

It is also important to consider the change in the political landscape that has occurred since CSE's filing. While the OCR is still technically enforcing Title IX provisions, the Trump administration's dismantling of the federal Department of Education and its rescission of the 2024 Title IX regulations, which made gender identity a protected class under Title IX, make it very unclear how CSE's

64. *Id.* at 38.

65. *Id.*

66. Browne, *supra* note 41, at 6.

67. *The Title IX Process*, EQUAL RTS. ADVOC., https://www.equalrights.org/issue/the-title-ix-process/ (last visited May 14, 2026).

complaint will fare.[68] While considering the potential changes and effects the new administration poses is necessary, because of its lack of clarity and precedent, the Article will proceed with my analysis of CSE's complaint based on more cemented precedent of the past. One way to do this is to look at Florida, a state that enacted a law similar to the "Parents' Bill of Rights" two years before North Carolina.[69] The trajectory of the Florida law may be useful as a predictor of what is to come for North Carolina as a whole.

Similarly to CSE's complaint filed with the OCR, a group of civil rights attorneys sued Florida education officials claiming that the law was unconstitutional.[70] It was dismissed by a federal judge in district court, appealed to the Eleventh Circuit, and subsequently settled.[71] The settlement required the government to clarify various aspects of the law, including affirming that students and teachers "can discuss sexual orientation and gender identity in Florida classrooms, provided it's not part of instruction."[72] It also required the Florida Board of Education to send out explicit instructions to every school district stating that the law "doesn't prohibit discussing LGBTQ+ people," "doesn't apply to library books not being used for instruction in the classroom," and that the law is neutral, "meaning what applies to LGBTQ+ people also applies to heterosexual people."[73] The civil rights attorneys justified the settlement by stating that the continuing lawsuit would have delayed meaningful resolution for several more years, outweighing the benefits of a win in the courts.[74]

Ultimately, while not a large-scale win for opponents of the bill, this settlement suggests that a suit or filed complaint could prompt clarity from the North Carolina State Board of Education. This would somewhat reduce the chilling effect seen across the state and also potentially bring the law to more people's attention, promoting further advocacy. However, there is also a strong argument that a settlement

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68. *Tuesday Takeaways: The Future of Title IX After Executive Order to Dismantle the Department of Education*, ICS BLOG (Mar. 25, 2025), https://icslawyer.com/the-future-of-title-ix-after-executive-order-to-dismantle-the-department-of-education/.

69. Parental Rights in Education, H.B. 1557, 2022 Gen. Assemb., Reg. Sess. (Fla. 2022) (enacted).

70. NAT'L PUB. RADIO, *supra* note 15.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

like this may not be necessary because the North Carolina Parents' Bill of Rights violates Title IX and public policy and therefore cannot remain intact. Part III will examine why the CSE complaint should find success in its argument that the North Carolina bill violates Title IX, and I suggest that the bill is also invalid as a matter of public policy.

III. NORTH CAROLINA'S PARENTS' BILL OF RIGHTS VIOLATES TITLE IX AND IS AGAINST PUBLIC POLICY

A. *The Parents' Bill of Rights Violates Title IX*

Under Title IX, sex-based discrimination can be proved using two different theories: a disparate treatment theory or a disparate impact theory.[75] Disparate treatment requires a showing of purposefully different treatment on the basis of sex, whereas disparate impact looks "to the consequences of a facially sex-neutral practice or policy, rather than examining intent."[76] Because proving specific intent is usually a difficult burden and the law here purports to be neutral on its face, the North Carolina Parents' Bill of Rights law would most likely fall into the category of disparate impact.

There is no doubt the two specific provisions of the North Carolina Parents' Bill of Rights have a disparate impact on LGTBQ+ individuals. Both provisions, while seemingly neutral on their face, target, isolate, and "other" LGBTQ+ groups.[77] The vague language of the laws place a chilling effect on teachers and administrators, resulting in removal of content deemed "political" or "controversial" which has become synonymous with any sexual orientations *other* than heterosexual.[78] This perpetuates the "notion that [any sexual orientation other than heterosexual] is taboo and unfit for discussion at any grade level, but that heterosexuality is not, itself imposes

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75. Alex J. Snow, *"Don't Say Gay": Florida's Suppression of LGBTQ+ Identities Under the Guise of Parental Empowerment*, 37 J. C.R. & ECON. DEV. 85, 93 (2024).

76. *Id.* at 94.

77. AM. OVERSIGHT, *supra* note 26, at 5 ("The records shows teachers and administrators were confused about whether to remove books or classroom materials but often leaned toward removal of anything politicians might consider controversial.").

78. Nicholas Serafin, *Born to Equality: Minor Children, Equal Protection, and State Laws Targeting LGBTQ+ Youth*, 75 U. CAL. L. J. 411, 426 (2024).

dignitary harm upon LGBTQ+ students."[79] The defenders of the bill, nonetheless, utilize pretext to justify the bill on parental rights and "child first" grounds.[80]

North Carolina Senate Member Amy Galey, when arguing for the bill, advanced the parental rights argument, stating that some parents "wanted to have their rights firmly established, that there can be no secrets kept from the parents by the school . . . [a]nd this law is a first step."[81] This argument has been used most consistently by the bill's supporters, but it is pretextual because the law does not in fact advance parents' rights and the law is modeled after its Florida predecessor, which has had more explicit commentary on its discriminatory reasoning.[82] Moreover, absent pretext, the law still harms and discriminates against children, meaning that it violates Title IX regardless of its intent.[83]

North Carolina's Parents' Bill of Rights does not advance parental rights. Currently, the public school system has adopted an opt-out approach to curriculums.[84] If a parent does not want their child to, for example, partake in sexual health education, they can opt to remove them from the classroom during that instruction.[85] This is a workable system, it allows a parent to direct the upbringing of their own child, but places the burden on the parent so as not to intrude on the rights of other children (and thus the rights of *other* parents). North Carolina's law does something different. North Carolina's law creates a blanket opt-out approach to an extremely overbroad category of education, which could inhibit children's learning on a wide spectrum, ranging from not being able to access library books to not being able to go by the name they feel most comfortable with at school. By placing a blanket prohibition on an extremely vague and broad category of education, the law encroaches on the rights of parents who want their children to be able to learn and discuss sexual identity. Therefore, advocates of the bill who advance that the bill is about parental rights are misguided.

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79. *Id.*

80. *See* Walkenhorst, *supra* note 2, at 1.

81. *Id.*

82. *See* Parental Rights in Education, H.B. 1557, 2022 Gen. Assemb., Reg. Sess. (Fla. 2022) (enacted).

83. 20 U.S.C. § 1681.

84. Serafin, *supra* note 78, at 422.

85. *Id.*

The bill is also pretextual as to its underlying goals. As suggested by the commentators of the Florida "Don't Say Gay" bill, the North Carolina bill is undoubtedly based their own on. While defending the "Don't Say Gay" law, Florida's Governor Ron DeSantis public stated that parents "should be protected from schools using classroom instruction to sexualize their kids as young as 5 years old."[86] Using "sexualize" in this way is deeply problematic and "exploits an ambiguity in the word," suggesting that "discussions of non-traditional human sexual orientations or gender identities are inherently erotic, and proponents of discussing LGBTQ+ identity thus must be attempting to introduce children to erotic materials."[87] The dissonance between heterosexuality and other sexual orientations and the othering of LGBTQ+ identities shows the bills true objective—to minimize and marginalize a specific group.

CONCLUSION

The North Carolina's Parents' Bill of Rights, while framed as a measure to empower parents, in reality codifies state-sanctioned discrimination against LGBTQ+ students. By requiring the forced outing of students and restricting inclusive instruction, the law creates a hostile educational environment that disproportionately harms LGBTQ+ youth. These provisions are not only harmful—they are unlawful under Title IX, which prohibits discrimination on the basis of sex, including gender identity and sexual orientation.[88] The Campaign for Southern Equality's Title IX complaint rightly challenges the bill for its failure to respect the rights of *all* students and parents, not just those whose values align with the state's current political leadership. Upholding federal protections and ensuring schools remain safe, affirming spaces for LGBTQ+ youth is a necessity. The Department of Education should find that the North Carolina Parents' Bill of Rights violates Title IX and act swiftly to prevent further harm to North Carolina youth.

86. *Id.* at 426.
87. *Id* at 427.
88. 20 U.S.C. § 1681.

FORGOTTEN CAMPESINOS, FORGOTTEN COUNTIES
THE RAMPANT, FATAL CIVIL RIGHTS ABUSES AGAINST H-2A LABORERS IN NORTH CAROLINA AND THEIR FIGHT FOR BARGAINING POWER IN *N.C. FARM BUREAU FEDERATION V. U.S. DEPARTMENT OF LABOR*[*]

LUKE O. SMITH[**]

INTRODUCTION……………………………………………………198
I. H-2A PROGRAM & REGULATION……………………………203
A. *H-2A: Modest Beginnings to Rapid Growth*……....203
B. *H-2A Abuses and Shortcomings*…………………...205
C. *The Farmworker Protection Rule*………………....205
II. ATTACK ON THE FINAL RULE………………………….…207
A. *Kansas et. al*………………………………………207
B. *N.C. Farm Bureau*………………………………...208
III. THE MUTUALLY EXCLUSIVE H-2A & NLRA…………...……..210
A. *The NLRA: Its Origins and Exclusion of Farm Workers*……………………………………………………....…...210
B. *Mutual Exclusivity*……………………...………213
IV. THE FINAL RULE'S LIFESPAN IN A *LOPER BRIGHT* WORLD……..214
CONCLUSION……...…………………………………………215

INTRODUCTION

When a priest visits an H-2A farm in Eastern North Carolina, the laborers gather and form lines of thirty to forty in waiting to receive a blessing.[1] Parish volunteers offer dinner and a Eucharistic

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** J.D. Candidate, University of North Carolina School of Law, Class of 2026.

1. Maria-Pia Negro Chin, *'We are human beings': North Carolina Pastoral Visit Reveals Farmworkers' Harsh Experiences*, OSV NEWS (Sep. 14, 2024), https://www.osvnews.com/we-are-human-beings-north-carolina-pastoral-visit-reveals-farmworkers-harsh-experiences/ (quoting Jesús García, "They make lines of 30–40 people waiting for a blessing").

celebration,[2] placing water bottles underneath folding chairs that face a makeshift altar.[3] When the workers are asked why they traveled so far from home for the temporary work, most of their reasons have a first and last name.[4] They recount the birthdays and graduations they have missed by returning to work at these farms year after year.[5] They fit as much as they can in one evening, for the workers have no command of their own time.[6]

It was at one of these observances where Father Peter Grace discussed blessing the body of Juan José Ceballos, a migrant worker who died working on a farm in Wayne County, NC.[7] On the day of his death, July 6, 2024, the temperatures reached 101 degrees Fahrenheit.[8] Like many temporary migrant farmworkers, Ceballos continued to work in the excessive heat amid the pressures of his employers.[9] Some supervisors push laborers "beyond what [is] reasonable" during a long workday, then proceed to "cram [them] in houses without adequate plumbing, with broken windows or appliances, or in trailers that would get too hot in the summer without air conditioning."[10]

Despite how these conditions violate requirements for the H-2A program, farmworkers are hesitant to report to authorities.[11] They fear being "blacklisted" from the recruiting organizations that send workers to these farms.[12] The organizations that could support them are hours away from the state's "forgotten counties."[13] Their living conditions, language barriers, and fragile immigration status—

2. Maria-Pia Negro Chin, *Raleigh Catholics Strive to Accompany Migrant Farmworkers in Often 'Forgotten' Counties*, OSV NEWS (Sep. 10, 2024), https://www.osvnews.com/raleigh-catholics-strive-to-accompany-migrant-farmworkers-in-oft-forgotten-counties/.

3. *USCCB Visits Eastern NC to Learn Realities of Migrant Farm Workers*, CATH. DIOCESE OF RALEIGH (Sep. 17, 2024), https://dioceseofraleigh.org/news/usccb-visits-eastern-nc-learn-realities-migrant-farm-workers.

4. Chin, *supra* note 2.

5. *Id.*

6. Chin, *supra* note 1.

7. Aaron Sánchez-Guerra, *Department of Labor Investigates Death of Migrant Mexican Farmworker in Eastern NC*, WUNC (July 29, 2024), https://www.wunc.org/race-class-communities/2024-07-29/migrant-mexican-farmworker-death-north-carolina-department-labor.

8. *Id.*

9. *Id.*; Chin, *supra* note 2.

10. Chin, *supra* note 2.

11. Chin, *supra* note 1.

12. *Id.*

13. Chin, *supra* note 2.

threatened by a lack of job security—all keep their constant struggles and pleas far from the public eye.[14]

Labor protections are not born out of thin air: they come from bargaining between employers and laborers. In the H-2A labor market, that bargaining power is virtually nonexistent due to the control farm labor contractors (FLCs) have over their employees.[15] Gracia & Sons LLC., the same FLC that recruited and employed Juan José Ceballos, was sued for human trafficking, wage theft, and mistreatment before reaching an eventual settlement with three plaintiffs in 2023.[16] Other contractors have been found to confiscate workers' passports immediately upon arrival into the United States to limit their mobility, fail to pay for their travel expenses, and unlawfully charge applicants fees reaching up to $8,000 to participate in the federal program.[17]

H-2A farm owners and FLCs are two wings operating in tandem to discourage pushback from laborers. On the FLC side, migrant workers rely on the contractor's access to farm owners and federal immigration services.[18] FLCs compile and provide H-2A workers to a farm in large groups at a time and for a set period,[19] giving them a dominant influence over the supply of labor. The farm owner side frequently provides the day-to-day supervision and management

14. *Know the Facts*, AGRIC. WORKERS ADVOC. COAL., https://www.awacoalition.org/know-the-facts (last visited Dec. 12, 2025).

15. *Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program*, CENTRO DE LOS DERECHOES DEL MIGRANTE, INC. (2020), https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf.

16. Guerra, *supra* note 6; *see also* Ivy Nicole-Jonét, *Three Labor Camp Cooks Represented by Legal Aid of North Carolina Farmworker Unit and the North Carolina Justice Center Settle their Human Trafficking and Wage Theft Claims with Gracia Harvesting, Inc.*, N.C. JUST. CTR., https://www.ncjustice.org/three-labor-camp-cooks-represented-by-legal-aid-of-north-carolina-farmworker-unit-and-the-north-carolina-justice-center-settle-their-human-trafficking-and-wage-theft-claims-with-gracia-harvesting-inc/ (last visited Dec. 12, 2025).

17. U.S. DEP'T OF LAB., 23-2116-ATL, DEPARTMENT OF LABOR DEBARS LABOR CONTRACTOR WHO THREATENED, INTIMIDATED FARMWORKERS; ASSESS $62K IN PENALTIES FOR ABUSES OF AGRICULTURAL WORKERS (2023) ("Lopez violated federal regulations by . . . [c]harging 21 H-2A workers fees ranging from $150 to $8,000 to participate in the program, despite provisions prohibiting employers from passing along operating costs to employees."), https://www.dol.gov/newsroom/releases/whd/whd20231023.

18. Cesar Escalante, *Hiring H-2A Workers through Farm Labor Contracts*, S. AG TODAY (July 24, 2024), https://southernagtoday.org/2024/07/24/hiring-h-2a-workers-through-farm-labor-contracts/.

19. *Id.*

of migrant workers.[20] In many instances, the FLC *is* considered the "employer," meaning the organization recruiting and certifying the group of workers also pay, house, and transport them.[21] However, farms may take on some of these responsibilities owed to laborers based on their agreement with an FLC.[22] Regardless of how these duties are distributed between farm owner and contractor, the migrant labor force has minimal influence and authority to bargain. Rather, the organizations they work for control every aspect of their living conditions, compensation, and even their ability to stay and work in the country.[23]

In such a cyclical system of abuse, the only effective interference is regulation enforcement.[24] The U.S. Department of Labor issued the *Farmworker Protection (Final Rule)* in attempt to shift *some* bargaining power and group protections to vulnerable employees.[25] The Final Rule revises otherwise insufficient provisions within the H-2A program in order to "empower[] workers to advocate on behalf of themselves and their coworkers regarding working conditions; improv[e] accountability for employers; [and] improv[e] transparency and accountability in the foreign labor recruitment process."[26] In a program so deeply flawed and discretely abusive,[27] the Final Rule's provisions offer a modest foundation for restoring civil liberties and autonomy to laborers making essential contributions to our domestic economy.[28]

As of June 2025, the Trump Administration's Department of Labor has suspended enforcement of the Final Rule.[29] The Wage and

20. *Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)*, U.S. DEP'T OF LAB. WAGE & HOUR DIV. (Feb. 2010), https://www.dol.gov/agencies/whd/fact-sheets/26-H2A.

21. *Id.* ("An H-2ALC is a person who meets the definition of an 'employer' under the H-2A Program and does not otherwise qualify as a fixed-site employer or an agricultural association . . . ").

22. *Id.*

23. Chin, *supra* note 1.

24. CENTRO DE LOS DERECHOS DEL MIGRANTE, *supra* note 15.

25. *See Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States*, U.S. DEP'T OF LAB. (June 28, 2024), https://www.dol.gov/agencies/eta/foreign-labor/farmworker-protection-final-rule.

26. *Id.*

27. CENTRO DE LOS DERECHOS DEL MIGRANTE, *supra* note 15.

28. U.S. DEP'T OF LAB., *supra* note 25.

29. Memorandum from Donald M. Harrison, III, Acting Adm'r, U.S. Dep't of Lab., Wage & Hour Div., to Reg'l Adm'rs and Dist. Dirs., Field Assistance Bull.

Hour Division contends this period of abeyance provides predictability for agricultural employers in continuing litigation and aligns with President Trump's commitment to strictly enforcing immigration laws.[30] At the time, seventeen states had already obtained an injunction against the rule, including Georgia, South Carolina, Tennessee and Virginia.[31] Despite the efforts of nearby states, North Carolina upheld the Final Rule in federal district court.[32] Prior to the nationwide suspension, *N.C. Farm Bureau Federation v. U.S. Department of Labor* made North Carolina the sole exception in affirming the Final Rule.[33]

This recent development examines the coordinated efforts by farm owners and employers to dissuade the Final Rule's enforcement in key agricultural centers. *Kansas, et al. v. U.S. Department of Labor* succeeded in blocking the Final Rule for seventeen of those states under the contention that the Final Rule violated the National Labor Relations Act in giving "NLRA-style rights" to a class of people excluded by Congress.[34] Using the same approach to prohibit the regulatory framework, the plaintiffs came short in *N.C. Farm Bureau Federation v. U.S. Department of Labor*.[35]

No. 2025-2, H-2A Farmworker Protection Rule Enforcement Guidance (June 20, 2025), https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-2.pdf.

30. Hunter Lovell, *US Department of Labor Issues New Guidance to Provide Clarity for Farmers on H-2A Worker Regulations*, U.S. DEP'T OF LAB. (June 20, 2025), https://www.dol.gov/newsroom/releases/whd/whd20250620.

31. Bill Shultz, *When Right Is Wrong and Always Has Been:* Kansas v. U.S. Dep't of Labor *and 400 Years of Farm Worker Exploitation*, GEO. ENV'T L. REV. (Nov. 7, 2024), https://www.law.georgetown.edu/environmental-law-review/blog/when-right-is-wrong-and-always-has-been-kansas-v-u-s-dept-of-labor-and-400-years-of-farm-worker-exploitation/; *see also* Barron Dickinson, *Federal Courts Expected to Decide Fate of DOL's Farmworker Protection Rule Soon*, SESO (Oct. 17, 2024), https://www.sesolabor.com/blog/federal-courts-expected-to-decide-fate-of-dol-s-farmworker-protection-rule-soon.

32. *See generally* N.C. Farm Bureau Fed'n, Inc. v. U.S. Dep't of Lab., 781 F. Supp. 3d 455 (E.D.N.C. 2025).

33. *See* Katherine Zehnder, *NC Farm Bureau Sues US Department of Labor*, THE CAROLINA J. (Oct. 28, 2024), https://www.carolinajournal.com/nc-farm-bureau-sues-us-dept-of-labor/.

34. Daniel Wiessner, *US Judge Blocks Biden Rule on H-2A Farmworker Union Organizing*, REUTERS (Aug. 27, 2024), https://www.reuters.com/legal/government/us-judge-blocks-biden-rule-h-2a-farmworker-union-organizing-2024-08-27/.

35. Compl., N.C. Farm Bureau Federation v. U.S. Dep't of Lab., 781 F. Supp. 3d 455 (E.D.N.C. 2025) (No. 5:24-CV-00527-FL).

The first section of this recent development provides a brief overview of the history, legislative intention, and evolution of the H-2A program. The following section explores the Final Rule and how the two above cases challenged its enforcement. The third section addresses the plaintiffs' argument by examining the National Labor Relations Act and its exclusion of farmworkers. Lastly, we will evaluate how the Final Rule and similar regulations are threatened by the modern wave of deregulation and upheaval in administrative authority.

In spite of the Final Rule's suspension, the decision in *N.C. Farm Bureau* remains notable. Considering the malfunction and under-regulation of the modern H-2A program; the antiquated motivations behind excluding farmers from the NLRA; and the overwhelming demand for migrant bargaining power; the Eastern District of North Carolina was right to preserve the Final Rule. It was a starting point to protect thousands of laborers from civil injustice and coercion, and to save their lives from fatal working conditions. The neglect of these lawful residents and rural communities must be answered through an expansion of regulation on the H-2A program and stricter enforcement on violating employers.

I. H-2A PROGRAM & REGULATION

A. *H-2A: Modest Beginnings to Rapid Growth*

The H-2A program was born in 1986 under the Reagan administration, enabled by the Immigration Reform and Control Act.[36] It was a new designation for legal immigration into the United States for the purpose of providing temporary labor.[37] Under the H-2A program, agricultural employers who predict they won't be able to access enough domestic workers for a critical harvesting period can apply with the Department of Labor to be a certified H-2A employer.[38] If certified, the employer may then recruit and submit applications for

36. Audrey Holtkamp, *Overview of the H-2A Visa Program*, IOWA STATE CTR. AGRIC. L. & TAX'N (Aug. 17, 2021), https://www.calt.iastate.edu/article/overview-h-2a-visa-program.

37. *Id.*

38. Berdikul Qushim, Zhengfei Guan, and Fritz M. Roka, *The H-2A Program and Immigration Reform in the United States*, U. OF FLA. INST. FOOD AND AGRIC. SCI. (Jan. 21, 2025), https://edis.ifas.ufl.edu/publication/FE1029.

prospective laborers to come to the United States for a specified period of no longer than a year.[39]

Employer-applicants must meet two conditions under the program: (1) they must demonstrate that there are insufficient numbers of domestic workers who are "willing and able" to perform the agricultural job, and (2) they must show that bringing in these migrant workers "will not adversely affect the earnings and working conditions of similarly employed US workers."[40] This is why the program is often described as a "win-win" by its advocates, as the program satisfies the demand for seasonal labor while providing foreign workers with the opportunity to lawfully enter the United States and receive higher wages than they would at home.[41]

For roughly the first two decades of its existence, the H-2A program was not widely used.[42] However, as FLCs and farms have grown accustomed to the program, it has expanded exponentially.[43] From 2005 to 2022, the number of certified temporary jobs increased from around 50,000 to over 370,000.[44] Nearly half of this growth occurred over a six-year period, indicating this trend is only accelerating.[45] In the 2023 fiscal year, North Carolina accounted for 26,146 certified positions – the fifth highest H-2A state in the country.[46]

Although FLCs are required to show an inability to hire domestic labor, there remains a growing reliance on migrant labor in the agricultural sector. At seventeen percent of the total share of the agricultural workforce,[47] H-2A employment now extends beyond a "last resort" for employers. Rather, H-2A workers make up an

39. *Id.*

40. *Id.*

41. CENTRO DE LOS DERECHOS DEL MIGRANTE, *supra* note 15.

42. Holtkamp, *supra* note 36.

43. Marcelo Castillo, *H-2A Temporary Agricultural Job Certifications Continued To Soar in 2022*, USDA ECON. RSCH. SERV. (Mar. 13, 2023), https://www.ers.usda.gov/amber-waves/2023/march/h-2a-temporary-agricultural-job-certifications-continued-to-soar-in-2022.

44. *Id.*

45. *Id.*

46. *H2-As: 5 States had 50% H-2A Jobs in FY23*, RURAL MIGRATION NEWS (Jan. 2024), https://migrationfiles.ucdavis.edu/uploads/rmn/blog/2024/01/Rural%20Migration%20News%20Blog%20340.pdf.

47. Samantha Ayoub, *Debunking H-2A Myths*, AM. FARM BUREAU FED. (Nov. 15, 2024), https://www.fb.org/market-intel/debunking-h-2a-myths#:~:text=5.,of%20the%20total%20agricultural%20workforce.

enormous share of the industry, and their widespread certification reflects the desperate demand for farm labor in rural America.

B. *H-2A Abuses and Shortcomings*

Untamed growth in the program has introduced a more urgent need for regulation enforcement, which the program has not met. A 2020 report from the Centro de los Derechos del Migrante (Center for Migrant Rights) found that ninety-four percent of migrant workers experienced three or more serious legal violations by their employer, forty-three percent were not paid wages they were promised, and nearly a third were subjected to serious verbal abuse, experienced restrictions on their mobility, and did not feel free to quit the program.[48] Workers are also denied basic health and safety measures, as forty-five percent of surveyed workers described overcrowded and unsanitary housing, some of which did not have functioning bathrooms and were infested with rats and pests.[49] Employers have taken advantage of the lack of enforcement over their pervasive violations, reducing the costs of migrant labor and keeping them in intimidating conditions that suppress their autonomy.

C. *The Farmworker Protection Rule*

Accounting for these shortcomings, President Biden's Department of Labor sought to enhance their "capabilities to monitor program compliance and take necessary enforcement actions against program violators" in the Farmworker Protection Final Rule.[50] The new rule clarifies it does *not* require H-2A employers to recognize unions, nor must employers engage in collective bargaining protected

48. *See* CENTRO DE LOS DERECHOS DEL MIGRANTE, *supra* note 15 (The "Major Findings At a Glance" table provides all of the mentioned statistics. "Serious Legal Violations" included the payment of recruitment fees, lack of reimbursement for travel, wage theft, sexual harassment, etc.).

49. *Id.* at 6.

50. Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts 651, 653, 655, 658 and 29 C.F.R. pt. 501) ("The revisions in this final rule focus on strengthening protections for temporary agricultural workers and enhancing the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators.").

in statutes like the NLRA.[51] Rather, the Final Rule requires that employers provide assurance "they will not intimidate, threaten, or otherwise discriminate against certain workers or others for engaging in 'activities related to self-organization.'"[52] The rule does not protect collective action; it deters mistreatment and abuse inflicted upon migrant workers who raise concerns about their health and safety.

The Final Rule additionally requires more transparency in the recruitment process due to the wave of cases exposing FLC human trafficking, unlawful application fees, and wage theft.[53] It requests that employers provide more identifiable information as to who is managing and operating the business, as well as which farms are contracted with the FLC.[54] It reasserts an existing provision that informs workers of protections in their living standards and contractual rights before accepting a job.[55] In response to the many labor trafficking violations, the Department of Labor prohibits employers from "holding or confiscating a worker's passport, visa, or other immigration or government identification documents,"[56] a strategy frequently used by employers to hold their employees captive in the H-2A system and coerce them into returning each season.

Among these changes and minor enhancements to housing and transportation enforcement, the Department provided an adequate transition period and announced the new rule would take effect on June 28, 2024.[57] Despite the moderate revision, it did not take long before the rule was met with pushback from employers and anti-union organizations across the country.[58]

51. *Id.* at 33901.
52. *Id.*
53. *See id.* at 33902.
54. *Id.*
55. *See id.*
56. *Id.* at 33903.
57. *Id.* at 33898.
58. *See* Dickinson, *supra* note 31.

II. ATTACK ON THE FINAL RULE

A. Kansas et. al

The seventeen-state roadblock to the Final Rule in *Kansas et. al* provided a framework for the attempt in North Carolina.[59] In the Southern District of Georgia, Judge Lisa Wood granted a preliminary injunction to halt the Final Rule in several states, holding it "violates the NLRA because the DOL attempts to unconstitutionally create law" by extending collective bargaining rights to H-2A farm workers.[60] The states argued the Final Rule would provide immigrant workers with rights which domestic agricultural employees do not enjoy.[61]

Although the agency did not exceed their authority under the H-2A program to make the rule on its face,[62] the language of the rule was ruled too similar to the NLRA and correspondingly "creates a right not previously bestowed by Congress."[63] The court reasoned, since agencies may only promulgate rights which Congress *intends* to create, the exclusion of agricultural workers from the NLRA implies there is no intention for some similar rights under the IRCA.[64]

This ruling contends with statutes such as the Federal Service Labor Management Relations Statute (FLSMRS), which provides collective bargaining protections for public employees, who are also excluded from the NLRA.[65] Nevertheless, the "NLRA-style" rights argument prevailed and kept thousands of farmworkers from the Final Rule's protections.[66] A few months later, the state of Kentucky reached the same outcome for their borders in *Barton, et al. v. U.S. Dep't of Labor*.[67]

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59. Mike Davis, *NC Farm Bureau Files Suit over H-2A Rule*, S. FARM NETWORK TODAY (Sept. 22, 2024, 11:57 PM), https://www.sfntoday.com/2024/09/23/nc-farm-bureau-files-suit-over-h-2a-rule/.

60. Kansas v. U.S. Dep't. of Lab., 749 F. Supp. 3d 1363, 1376 (S.D. Ga. 2024).

61. *Id.* at 1369.

62. *Id.* at 1373.

63. *Id.* at 1377.

64. *Id.*

65. *See* 5 U.S.C. §§ 7101–7135.

66. *Kansas*, 749 F. Supp. 3d at 1333.

67. *See* Barton v. U.S. Dep't of Lab., 757 F. Supp. 3d 766 (S.D. Ga. 2024).

B. N.C. Farm Bureau

The N.C. Farm Bureau Federation initiated the effort against the Final Rule in the state—a collective of NC farm owners who, in their own words, "consistently oppose the unionization of agricultural employees."[68] Their argument was nearly identical to the Attorney General in *Kansas et al.*, asserting the Department of Labor lacked authority to make rules which create rights for agricultural employees that are 'exclusive' to employees under the NLRA.[69]

Yet the Eastern District court diverged with *Kansas* and *Barton* on what the Final Rule sets out to do.[70] It views the NLRA as separate from the federal H-2A program and additionally finds the rule consistent with Congress's intention under the IRCA.[71] Since the Department of Labor is responsible to prevent exploitation and abuse of agricultural employees, it is within their authority to make rules which both preserve the integrity of the federally funded H-2A program and its residual effects on the domestic labor market:[72]

> [The Department of] Labor determined through program experience, recent litigation, challenges in enforcement, comments on this rulemaking as well as on prior rulemakings, and reports from various stakeholders that it is necessary to adopt stronger protections for agricultural workers to better ensure that employers, agents, attorneys, and labor recruiters comply with the law, and to enhance program integrity by improving the Department's ability to monitor compliance and investigate and pursue remedies from program violators.[73]

The court also made a key distinction on the scope of the Final Rule as compared to the NLRA.[74] The Final Rule does not *convey* a

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68. Compl., *supra* note 35, at 3 ("Farm Bureau's farmer members have consistently opposed the unionization of agricultural employees.").

69. *Id.*

70. N.C. Farm Bureau Fed'n, Inc. v. U.S. Dep't of Lab., 781 F. Supp. 3d 455 (E.D.N.C. 2025).

71. *Id.* at 473.

72. *See id.*

73. *Id.*

74. *See id.* at 477.

right to collectively bargain whereas the NLRA does.[75] "Collective bargaining" is a mutual obligation between employers and employees to bargain in good faith.[76] Nothing in the Final Rule imposes an obligation on employers and employees to collectively bargain or negotiate.[77] The rule merely encourages employers to refrain from threats and retaliation against migrant farm workers who engage in labor organization.[78]

Rather than attempting to influence collective bargaining on the H-2A program, the agency was acting "in order to fulfill its statutory mandate to protect the wages and conditions of U.S. agricultural workers."[79] The court in *N.C. Farm Bureau* took a more holistic view of the federal program, demonstrating that any opportunities for H-2A employers to retaliate against their employees injures the industry as a whole.[80] Where any farmworker faces a threat to their wages and autonomy, both domestic and migrant labor suffer.

Following this decision, the Farm Bureau appealed to the Fourth Circuit.[81] The Trump Administration took over the agency, suspended the Final Rule, and did not oppose the Farm Bureau's motion for abeyance .[82] Thus, the Fourth Circuit granted the motion and delayed a decision on the matter until new rulemaking is completed or the Final Rule is revived.[83]

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75. *Id.*

76. 29 U.S.C. § 158(d).

77. N.C. Farm Bureau Fed'n, Inc. v. U.S. Dep't of Lab., 781 F. Supp. 3d 455, 477 (E.D.N.C. 2025).

78. Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts 651, 653, 655, 658 and 29 C.F.R. pt. 501).

79. N.C. Farm Bureau Fed'n, 781 F. Supp. at 477.

80. *See generally id.*

81. N.C. Farm Bureau Fed'n v. U.S. Dep't of Lab., 2025 U.S. App. LEXIS 19073 (4th Cir. 2025).

82. *Id.*

83. *Id.*

III. THE MUTUALLY EXCLUSIVE H-2A & NLRA

A. *The NLRA: Its Origins and Exclusion of Farm Workers*

The NLRA is wholly separate from the H-2A program.[84] However, the NLRA has been selected by adversaries as the key analogous statute for blocking the final rule, notably because it provides union protections to private sector employees and excludes farm workers from the statute entirely.[85] However, the NLRA's origins and evolution reveal that the exclusion of agricultural workers was less justified by the interests of small farm owners, but rather a motivation to belittle minority bargaining power in the South.[86]

As one of the many New Deal policies, the NLRA was intended to bolster the working class during a period of economic struggle.[87] Passed in 1935, the Act gave employees the right to form, join, and bargain under a union.[88] It also required employers to recognize a duly certified union and negotiate with them in good faith.[89] Beyond unionization, the NLRA provided a foundation of protection for employees engaging in "concerted activities" such as discussing and petitioning over wages, working conditions, or any matter serving the purpose of "mutual aid or protection."[90] This was a critical shift in labor relations that continues to protect collective

84. *Id.* at 33901 n. 9 ("Nothing in this final rule alters or circumscribes the rights of workers who are already protected by the NLRA to engage in conduct and exercise rights afforded under that law.").

85. Wiessner, *supra* note 34; Dickinson, *supra* note 31.

86. Nat'l Park Serv., *Thirty Years of Farmworker Struggle*, *in* THE ROAD TO SACRAMENTO: MARCHING FOR JUSTICE IN THE FIELDS (2025), https://www.nps.gov/articles/000/a-new-era-of-farm-workerorganizing.htm#:~:text=But%20farmworkers%2C%20along%20with%20domestic,in%20economic%20and%20political%20power.

87. *See 1935 passage of the Wagner Act*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagneract#:~:text=In%20February%201935%2C%20Wagner%20introduced,rather%20than%20to%20mediate%20disputes (last visited May 13, 2026) (explaining that the Wagner Act "gave employees the right, under Section 7, to form and join unions, and it obligated employers to bargain collectively with unions selected by a majority of the employees in an appropriate bargaining unit.").

88. *Id.*

89. *Id.*

90. 29 U.S.C. § 157.

action, but its exclusion of the agricultural industry remains a point of contention—and confusion—to this day.

A coalition of Southern Democrats known as the "Farm Bloc" had significant influence in Congress with the intention of "using constitutional federalism to counteract the perceived power of transportation and banking corporations."[91] The Farm Bloc fought against several New Deal efforts, especially relating to programs that would reform the socio-economic hierarchy of the South.[92] During NLRA negotiations, the group argued that "farmworker unions could potentially threaten the nation's food supply and that higher wages would result in rising consumer prices for food and other basic commodities."[93] They also advocated for the exclusion of farm workers in another key piece of legislation, the Fair Labor Standards Act (FLSA).[94]

The Farm Bloc's support was contingent upon the exclusion of agricultural employees in the NLRA and FLSA, both of which succeeded.[95] As a result, Black, Mexican, and Filipino workers were disproportionately left without labor protections.[96] By that time, the number of Black sharecroppers in the South had reached a high of over 392,000.[97] Black economic mobility was diminished by the Farm Bloc's revisions.[98] A prior New Deal program, the Agricultural Adjustment Act, directly harmed sharecroppers by offering subsidies to farmers who would limit the production of certain crops.[99] The Agricultural Adjustment Act was intended to increase crop prices and limit their overproduction.[100] Accordingly, sharecroppers, whose

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91. Roderick M. Hills, Jr., *Farm-Bloc Federalism: The Rise, Fall (and Rise Again?) of a Constitutional Coalition*, 3 U. OF WIS. L. SCH. J. AM. CON. HIST. 445 (2025), https://doi.org/10.59015/jach.SHHJ4083.

92. *Id.* at 490.

93. Nat'l Park Serv., *supra* note 86.

94. *Id.*

95. *See id.* The FLSA was amended twice in 1966 and 1977 to extend coverage to agricultural workers for the majority of its standards.

96. *Id.*

97. RURAL BUS.-COOP. SERV., U.S. DEP'T OF AGRIC., RBS RESEARCH REPORT 194, BLACK FARMERS IN AMERICA, 1865-2000: THE PURSUIT OF INDEPENDENT FARMING AND THE ROLE OF COOPERATIVES 4 (2002).

98. *See generally* Hills, *supra* note 91, at 1.

99. Chris Dobbs, *Agricultural Adjustment Act*, NEW GA. ENCYC. (Jan. 29, 2016), https://www.georgiaencyclopedia.org/articles/business-economy/agricultural-adjustment-act/.

100. *Id.*

profits were determined by the share of each crop sold, lost substantial revenue from the decrease in production.[101]

Inconsistency in policy direction shines a light on the Farm Bloc's motivations during the New Deal era. On one end, they pushed the Agricultural Adjustment Act to help raise crop prices and bolster that sector of the economy.[102] However, their reasoning for excluding agricultural employees from the NLRA was to *prevent* "rising consumer prices for food."[103] These justifications do not align, and they generate confusion over the Farm Bloc's vision for developing the agricultural sector. The FLSA was eventually amended to include farmers during the Civil Rights Era in 1966,[104] and even expanded its coverage further in 1977, but the NLRA has remained steadfast in its exclusion.[105] Aside from price control, both the NLRA's exclusion and the Agricultural Adjustment Act have one quality in common: both acts deprived Black farmers of their benefits and protections, creating an even greater divide between Black and white laborers in the South.[106]

Even if the Final Rule is interpreted to give a few "NLRA-rights" to agricultural laborers (such as the majority found in *Kansas et al.*),[107] the historical basis for their exclusion is deeply rooted in racism and an intention to undercut minority bargaining power in the South. The motivation behind excluding farm workers from the NLRA in the first place is flawed and contrary to the general welfare. Congress' declaration of purpose in the NLRA states that protections for labor organization "collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by

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101. *See generally* RURAL BUS.-COOP., *supra* note 97.

102. Dobbs, *supra* note 99.

103. Nat'l Park Serv., *supra* note 86.

104. Lyndon B. Johnson, Remarks at the Signing of the Fair Labor Standards Amendments of 1966 (Sept. 23, 1966), *in* AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-fair-labor-standards-amendments-1966 ("very pleased to say [the amended act] includes farm workers for the first time [. . .] it will help minority groups who are helpless in the face of prejudice that exists.").

105. *History of Change to the Minimum Wage Law*, DEP'T OF LAB., https://www.dol.gov/agencies/whd/minimum-wage/history (last visited May 13, 2026).

106. *Id.*

107. Wiessner, *supra* note 34.

removing certain recognized sources of industrial strife and unrest."[108] All of these safeguards and benefits would still exist—and not be threatened by—the inclusion of agricultural employees.

B. Mutual Exclusivity

Although the racist origins of the NLRA are relevant to a greater discussion on labor relations, the Act's substance is independent of the protections and regulations for H-2A employees.[109] The Final Rule explicitly states it "does not require H–2A employers to recognize labor organizations or to engage in any collective bargaining activities such as those that may be required by the NLRA itself or by a State law" [110] and that "[n]othing in this final rule alters or circumscribes the rights of workers who are already protected by the NLRA."[111] Adversaries to the rule rely on an obscure depiction of "NLRA-style" rights,[112] claiming the Final Rule gives rights to farmers that are "almost identical" to the NLRA.[113] However, the magnitude of the NLRA is much greater than the Final Rule. The NLRA gives employees the right to engage in collective action and bargain as a unit, requires employers to bargain in good faith with a certified union, and protects its workers from retaliation.[114] The retaliation element is just one ingredient in a much larger system of labor relations.

Furthermore, the NLRA is not the sole indicator in granting union protection for all laborers, nor is the Act intended to limit the rights for the excluded workers. Public employees, who are covered

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108. 29 U.S.C. § 151 ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.")

109. Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898, 33901 (Apr. 29, 2024) (to be codified at 20 C.F.R. pts 651, 653, 655, 658 and 29 C.F.R. pt. 501).

110. *Id.*

111. *Id.* at 33901 n. 9.

112. Compl., N.C. Farm Bureau Fed'n v. U.S. Dep't of Lab., 781 F. Supp. 3d 455 (E.D.N.C. 2025) (No. 5:24-CV-00527-FL), at 27.

113. *Id.*

114. NLRB, *supra* note 87.

by FLSA but not the NLRA, were given their own set of collective bargaining protections by the Civil Service Reform Act of 1978, which is now known as the Federal Service Labor Management Relations Statute (FSLMRS).[115] The FSLMRS has protections that are far more comparable to the NLRA than the Final Rule, protecting "the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them."[116]

The mere existence of the FSLMRS demonstrates that collective bargaining rights do not begin and end with the NLRA. Legislation related to collective bargaining may exist in any industry in which there are employees and employers. If the FSLMRS and NLRA can exclusively govern their distinct classes of employees, the Final Rule can do the same. As evidenced by the Final Rule and its conservative grant of worker protections, the H-2A program is mutually exclusive and divorced from the NLRA.[117]

IV. THE FINAL RULE'S LIFESPAN IN A *LOPER BRIGHT* WORLD

Despite its lack of interference with the NLRA, it was no surprise when the Final Rule was met with immediate criticism from those who disfavor administrative rulemaking. The rule was made effective on the same day *Loper Bright Enterprises et al. v. Raimondo* was decided, which overturned the *Chevron* doctrine and bolstered the authority of judicial discretion when a federal agency relies on ambiguous language for a decision.[118] The shift to a new *Loper Bright* standard influenced a wave of challenges to administrative rulemaking in hopes that increased judicial discretion would provide new barriers to administrative rulemaking.[119] In combination with another recent decision in *Ohio v. EPA*, the judicial standard of review has made two

115. Federal Services Labor Management Relations Statute, 5 U.S.C. § 7101.

116. *Id.* at § 7101(a)(1).

117. Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33898, 33901 (Apr. 29, 2024).

118. *Id.* at 33898; *see generally* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

119. BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R48320, LOPER BRIGHT ENTERPRISES V. RAIMONDO AND THE FUTURE OF AGENCY INTERPRETATIONS OF LAW (2024).

notable changes as it relates to *N.C. Farm Bureau*.[120] First, the standard for blocking an agency rule as "arbitrary and capricious" is both upheld and more attainable.[121] Second, both decisions effectively eradicate the Major Questions Doctrine.[122] Even with the improved authority for courts to block agency rules, the Final Rule was not found in *Kansas et al.* to be "arbitrary and capricious."[123]

CONCLUSION

North Carolinians have a duty to protect their fellow laborers where their civil rights and autonomy are violated. This duty has been fulfilled in some instances, such as the recent efforts of the North Carolina Justice Center's recovery of over $300,000 in wage theft for H-2A employees against an FLC and farm in the state.[124] It is essential to expand regulations on the federal program so that states and organizations may step in and support migrant farmworkers from a system predisposed to coercion and abuse. The H-2A program cannot continue to be overlooked, and the basic needs of its farmworkers must not be forgotten.

120. Richard J. Pierce, Jr., *Two Neglected Effects of Loper Bright*, THE REGUL. REV. (Jul. 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/.

121. *Id.*

122. *Id.*

123. Kansas v. U.S. Dep't. of Lab., 749 F. Supp. 3d 1363, 1376 (S.D. Ga. 2024).

124. Clermont Ripley, *NC Justice Center Secures $305,000 Wage Theft Settlement for H-2A Visa Farmworkers*, N.C. JUST. CTR. (Mar. 23, 2026), https://www.ncjustice.org/justice-center-secures-305000-wage-theft-settlement-for-h-2a-visa-farmworkers/.