Independent® Women's Forum

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House Oversight Committee

Hearing: "Standing up for the Rule of Law: Ending Illegal Racial Discrimination and Protecting Men and Women in U.S. Employment Practices"

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Distinguished members of the Oversight Committee, I am honored to testify at today's much-needed hearing on Ending Illegal Racial Discrimination and Protecting Men and Women in U.S. Employment Practices.

I currently serve as Senior Policy and Legal Analyst with Independent Women's Forum and Independent Women's Law Center. For almost 30 years, IWF has been the leading national women's organization dedicated to enhancing women's freedom and well-being. Independent Women's Law Center supports that mission by advocating for individual liberty, equal opportunity, and respect for the constitutional order.

Americans overwhelmingly agree that employers should be forbidden by law from discriminating on the basis of race and sex. In the Civil Rights Act of 1964, Title VII codified this hard-fought principle into law, declaring that employers could not refuse to hire, fire, or otherwise "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." Title VII further forbids employers from limiting, segregating, or classifying "employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

But is this fundamental promise of the Civil Rights era, as applied to the workplace, being fulfilled by today's interpretation and enforcement of Title VII? I would argue that unfortunately, it is not.

Instead of upholding a system in which all employees, regardless of their race, sex, or other characteristics irrelevant to work performance, are judged on their merit, talent, qualifications, grit, intelligence, or any other of the myriad qualities that make a good hire, too often Title VII in practice as it exists today not only fails to do so, it does the opposite.

Employees feel forced to walk on eggshells, afraid to offer their thoughts at work because employers are held hostage to the most sensitive or easily offended employees. Further, they have to obey the ever-evolving diktats of a diversity and inclusion training industry worth billions, and generally feel stuck in a workplace culture in which protected characteristics often seem to outweigh merit in hiring and promotion decision making. Contrary to corporate-speak assertions, these add nothing to the bottom lines of companies and nothing to the wealth of the country or citizens. Instead, they're the result of an unpredictable and politically motivated compliance industry that hobbles free speech, squashes diversity of thought, and brings us further from—not closer towards—the ideal of being judged by the content of our character, not our checkbox characteristics, at work.

In this testimony, I argue that three major factors have contributed to the subversion of Title VII's goal of a colorblind workplace.

First, the Equal Employment Opportunity Commission (EEOC), which is tasked with being the first line of enforcement of Title VII, is both over- and under-enforcing its mandates, creating a situation in which a company trying to make merit-based decisions has to constantly look over its shoulder, while a company that openly declares its intent to discriminate on the basis of prohibited characteristics is given a free pass so long as those discriminated against are the "wrong" color or sex.

Second, the EEOC has followed the Biden administration's Department of Education in its condemnable Title IX redefinition of the word "sex" to include gender identity, which in the Title VII context destroys women's rights to have single-sex spaces that protect their privacy and safety in the workplace.

Third, while the text and legislative history show clearly this was never Title VII's intent, revisions in the 1990s and some Supreme Court precedents have lent themselves to interpretations of the Civil Rights Act that have created perverse incentives in enforcement, and undermined the law's most fundamental protections against race and sex discrimination.

At the end of this testimony, I'll also offer what I hope can be a starting point list of non-exhaustive solutions that would bring us back toward the colorblind workplace, where employees rightfully expect to be judged on their merit and what they bring to the table rather than their skin color or sex.

Unintended consequences of changes to the Civil Rights Act in 1991, combined with politically selective under- and over-enforcement of Title VII by the EEOC and bureaucratic redefinitions of the basic words of Title VII itself, have created the legal conditions in which the admirable moral imperative of the civil rights era—that Americans should have confidence that their successes and failures in the workplace are based on merit and performance, rather than invidious discrimination—has been inverted and undermined.

EEOC Over- and Under-Enforcement Both Contribute to Discrimination in the Workplace

EEOC Arbitrarily Decides What Employment Practices Are Illegal, Even Without Discriminatory Intent

The EEOC is supposed to enforce a simple legal principle with which the overwhelming majority of Americans agree: no employee should lose a job opportunity or a promotion, or be fired on the basis of his or her race, sex, or other protected characteristics instead of merit, objective qualifications, or performance. Instead, the EEOC has grown into a tangled bureaucracy of over 2,000 employees, micromanaging some aspects of the employee-employer relationship and inserting its own novel interpretations of highly contested subjects like gender identity. At the same time it invents or over-enforces some aspects of Title VII, the EEOC ignores obvious facial violations of the plain text of the law when not politically convenient, even when companies go so far as to proudly announce their non-compliance.

For example, the EEOC has consistently scrutinized hiring policies that screen out applicants with felonies, on the basis that such requirements have a disparate impact on racial minorities. But Title VII says nothing about how or whether employers should be required to help return former convicts to mainstream life, however advisable or inadvisable one might find such a policy. The EEOC recently sued the popular convenience store chain Sheetz, alleging that their practice of screening out felons has a disparate impact on black and Native American applicants. Even the EEOC's lawsuit itself acknowledges that the company was not motivated by race when making these employment decisions.[1] Yet the company now has to shoulder the burden of proving that its facially neutral criteria, wholly unmotivated by race, are "necessary to ensure the safe and efficient performance" of the job.

But the disparate impact analysis used by the EEOC in this case and others, unfortunately endorsed by the Supreme Court in *Griggs v. Duke Power Co.* and

[1] "Press Release: EEOC Sues Sheetz, Inc. For Racially Discriminatory Hiring Practice," U.S. Equal Opportunity Employment Commission, April 18, 2024, https://www.eeoc.gov/newsroom/eeoc-sues-sheetz-inc-racially-discriminatory-hiring-practice.

debatably written into the Civil Rights Act of 1991, rests on the false assumption that discrimination is the only, or at least the primary, reason for group disparities. If this sounds familiar, it's because it's the exact argument that Ibram Kendi and other critical race scholars have made, reasoning that has rightly become unpopular with Americans as they've seen how it swallows meritocracy and excellence in favor of racial preferences and rigid quotas everywhere from K-12 schools to university admissions to the workplace. Do we want surgeons at hospitals or pilots at airlines to be selected by racial quota in order to avoid under- or over-representation by certain racial groups alleged to exist because of unintended or unexplainable racial discrimination?

It's also reasoning that is logically at odds with the principles articulated in the recent *Students for Fair Admissions* case.

Economist Thomas Sowell wrote of the assumption undergirding disparate impact analysis:

"The implicit assumption is that such statistics about particular outcomes would normally reflect the percentage of people in the population. But, no matter how plausible this might seem on the surface, it is seldom found in real life, and those who use that standard are seldom, if ever, asked to produce hard evidence that it is factually correct, as distinct from politically correct."[2] Further, Sowell lists examples of group disparities all over the world that are obviously *not* due to discrimination: the overrepresentation of men among lightning strike victims, the underrepresentation of whites and Asians among basketball stars, even the overrepresentation of Germans among faculty in an Estonian university established by czarist Russia.

Some of these group differences may come down to culture or interest, such as the continued dominance of men among petroleum engineering majors and the corresponding dominance of women among sociology majors. Some might be due to the accident of a particular history, such as the overwhelming overrepresentation of Vietnamese-Americans among nail salon workers and owners, which can be traced to the American actress Tippi Hedren, who first connected Vietnamese refugees with the nail tech training that began many family traditions in the business.[3]

Regardless of how these disparities come about—some perhaps concerning and worthy of mitigation attempts through policy or legislation, some not—they belie the assumption that undergirds disparate impact analysis: the fanciful notion that, but

[2] Dr. Thomas Sowell, "The 'Disparate Impact' Racket," Creators.com, March 10, 2015, https://www.creators.com/read/thomas-sowell/03/15/the-disparate-impact-racket.
[3] "Ms. Tippi Hedren - The Godmother of the Vietnamese Nail Industry," Vietnamese Heritage Museum, https://vietnamesemuseum.org/details/ms-tippi-hedren/.

for discriminatory practices of employers, every job would represent some perfect quota reflection of all different American racial groups and the two sexes.

None of this reflects the original language or intent of Title VII. The Act's bill co-managers in the Senate wrote in a memorandum to their colleagues, "There is no requirement in [T]itle VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better… than members of other groups."[4]

In addition to all that, however, the fact is that disparate impact analysis also gives, as a matter of practicality, the EEOC the absurd power to declare virtually anything illegal. As University of San Diego Law professor Gail Heriot titled her indispensable article in the NYU Journal of Law & Liberty, "Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal."[5] It turns out that disparate group results, and not perfect racial or sexual parity, are the background norm in nearly every field or endeavor, so much so that it's impossible to think of any employer hiring practice *other than illegal racial quotas* that would deliver results free of "disparate impact."

Because of this, the dividing line between practices considered illegal and discriminatory by the EEOC and those that are not is largely dependent, not on the actions of employers, but on what the EEOC chooses to look at. For example, one common requirement for an increasing number of job descriptions is a four-year college degree. This requirement *also* results in a disparate racial impact, as well as one on the basis of sex, since whites, Asians, and women are more likely to have completed a bachelor's than blacks, Hispanics, or men, on the basis of group averages. For that matter, Unitarians are overrepresented among four-year degree holders when measured against Baptists, and Title VII includes religion among its protected characteristics.[6] Yet the EEOC has not and likely has no intention of telling employers they cannot use this qualification to hire and promote, especially since that would be quite a blow to the bloated and over-praised American university system.

So in the context of the employment practices the EEOC chooses—at its discretion—to look at, the presumption is against employers, who are stuck with the burden of showing a very tight connection to business necessity and disproving discrimination, even if it is acknowledged there is no intent to discriminate. The investigation or lawsuit is based merely on a pattern of disparate impact which arises in virtually any kind of screening process for employees whatsoever.

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[4] Heriot, Gail L., "Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal," . 14 N.Y.U. J. L. & Liberty 1 (2020), https://ssrn.com/abstract=3482015.
[5] Ibid.
[6] Ibid.

On the other hand, we have employers proudly announcing their intention to implement clearly discriminatory practices, such as explicit racial quotas for new hires or leadership roles, and mysteriously, except for the wonderful work of Commissioner Andrea Lucas warning companies that they are blatantly in violation of Title VII,[7] the EEOC largely looks the other way.

EEOC Ignores Obvious and Public Racial Discrimination by Companies When Politically Convenient

Despite examples abounding to the contrary, it has *never* been legal for employers to discriminate, put a "thumb on the scale," or even use race as a "motivating factor" in employment decisions.[8] The affirmative action exceptions the Supreme Court had carved out for racial discrimination for the "right reasons," recently struck down in *Students for Fair Admissions v. Harvard* (*SFFA*), never extended to the employment context. But after the *SFFA* decision, which doesn't just clarify the Equal Protection Clause standards for public institutions, but also recognizes that Title VII similarly prohibits private entities from discriminating on the basis of race, there is absolutely no excuse for the kind of open discrimination that unfortunately has become rampant in the private sector under the guise of "diversity and inclusion."

While the EEOC arbitrarily examines the minutiae of employment practices it admits are not intended to discriminate, it has mostly chosen to ignore obvious violations of the plain text protections of Title VII when those violations suit its political agenda. When obvious discrimination exists against protected groups disfavored by ostensible efforts to expand diversity in the workplace, even when corporations announce them publicly to the press, the EEOC has been nowhere to be found.

In a letter to Fortune 100 companies, the attorneys general of 13 states lay out numerous examples of facially discriminatory policies that blatantly contravene the simple and straightforward *SFFA* standard that "eliminating racial discrimination means eliminating all of it."[9]

And these examples are not difficult to find. More than two dozen executives in industries in the banking, technology, and consulting sectors came forward in 2020 to promise to hire a concrete quota of 100,000 black, Latino, and Asian workers in the

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[7] Andrea R. Lucas, "With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs," Reuters, June 29, 2023, https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.

[8] Kristen Altus, "Mark Cuban may face lawsuits after defending DEI in viral post: 'Law's crystal clear,' EEOC commissioner says," Fox Buisness, Jan. 20, 2024, https://www.foxbusiness.com/business-leaders/mark-cuban-lawsuits-dei-laws-crystal-clear-equal-employment-opportunity-commissioner.

[9] *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College,* 600 U.S.1-8 (2023).

next decade. Google, meanwhile, promised to fill a quota of 30% of its leadership positions with employees of "underrepresented groups" by 2025; Adidas declared that 30% of its new positions would be filled by black or Latino workers by the same year. Microsoft, not content with setting hard transaction volume quotas for black-owned suppliers, demanded that all its suppliers provide it with "diversity disclosures" so it could punish them by withholding business from those that failed to racially discriminate sufficiently.[10] These public admissions of racial quota use could put even the easily apparent affirmative action of evasive university admissions departments to shame.

By the EEOC's favorite metric, disparate impact, there can be no doubt that the discrimination pendulum in America's biggest companies has swung past equality and meritocracy and towards discriminating against employees who are white, male, or lack other favored race, sex, or other characteristics. In 2020, at the height of the Black Lives Matter movement, corporate America made a lot of promises to change the composition of its workforce, many of them facially discriminatory like the examples above. And they actually followed through on these racially discriminatory promises; of the 300,000 jobs added by the S&P 100 in the year following the summer of 2020, 94% of them went to "people of color," according to Bloomberg reporting.[11]

A reply to the original letter from another list of state AGs tries to justify these practices based on the alleged business benefits of discriminatory diversity programs, but those benefits are very much in doubt.[12] Just last March, a series of McKinsey & Company studies purporting to show those benefits were debunked by a paper in Econ Journal Watch, finding that the results they claim cannot be replicated. The article authors sum up their findings by saying, "Our inability to [replicate McKinsey's] results suggests that… they should not be relied on to support the view that U.S. publicly traded firms can expect to deliver improved financial performance if they increase the racial/ethnic diversity of their executives."[13]

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[10] Matthew Lavietes, " 'Watershed Moment': Corporate America Looks to Hire More Black People," Reuters, Aug. 19, 2020, https://www.reuters.com/article/us-usa-race-hiring-idUSKCN25F2SY/.
[11] "Corporate America Promised to Hire a Lot More People of Color. It Actually Did." Bloomberg, September 25, 2023, https://www.bloomberg.com/graphics/2023-black-lives-matter-equal-opportunity-corporate-diversity/.
[12] "Fortune 100 CEO Letter," State of Nevada Office of the Attorney General, July 19, 2023, https://illinoisattorneygeneral.gov/News-Room/Current-News/Fortune%20100%20Letter%20-%20FINAL.pdf.
[13] Jeremiah Green and John R.M. Hand, "McKinsey's Diversity Matters/Delivers/Wins Results Revisited," Econ Journal Watch, March 2024, https://econjwatch.org/articles/mckinsey-s-diversity-matters-delivers-wins-results-revisited.

And while Commissioner Andrea Lucas has sounded the alarm[14] about the violations of Title VII's anti-discrimination mandate that many "diversity initiatives," ESG commitments, and other programs represent, the EEOC as a whole has been oddly quiet about corporate employment practices which, were the favored and disfavored classes reversed, would surely provide fodder for slam dunk cases.

All the way back in 2007, Chief Justice John Roberts nicely eviscerated arguments that some kinds of racial discrimination are better than others. "The way to stop discrimination on the basis of race," wrote Roberts in *Parents Involved in Community Schools v. Seattle School District No. 1*, "is to stop discriminating on the basis of race."[15] *SFFA* has now made this just principle even clearer.

The EEOC has an obligation to enforce Title VII as written by Congress and interpreted by federal courts, not as its bureaucrats wish it to be. That means making it clear that it's illegal for companies to discriminate on the basis of race in employment decisions, whether the people being discriminated against are white, black, or any other race, and regardless of whether EEOC bureaucrats approve or disapprove of the political rationale behind the discrimination.

EEOC Redefines "Sex" and Strips Women of Workplace Protections for Privacy and Safety in Favor of "Gender Identity"

The EEOC has a responsibility to protect women from sexual harassment and discrimination on the basis of sex in the workplace, but in a recently released guidance on harassment, the Commission does the opposite by redefining sex to include gender identity in a way that denies female employees their rights, privacy, and safety. The Commission's April 2024 guidance makes it "harassment" under Title VII to maintain sex-segregated private spaces, such as bathrooms, showers, and locker rooms.[16] Additionally, the same guidance infringes on all employees' freedom of speech and religious liberty by classifying "repeated and intentional" use of pronouns inconsistent with a person's wishes as "harassment" under Title VII.[17] Instead of preventing discrimination and harassment on the basis of sex as its mandate demands, the EEOC with this guidance requires employers to engage in both.

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[14] Andrea R. Lucas, "With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs," Reuters, June 29, 2023, https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.

[15] *Parents Involved in Community Schools v. Seattle School District No. 1* (PICS), 551 U.S. ___, 127 S.Ct. 2738, 2746 (2007).

[16] Enforcement Guidance on Harassment in the Workplace, U.S. Equal Employment Opportunity Commission, April 29, 2024.

[17] Ibid.

As the preeminent legal organization dedicated to preserving the common sense, biological definition of sex, the Independent Women's Law Center has received inquiries from women who have already been subjected to the results of this confusion and redefinition, now encouraged by the EEOC's guidance. One woman who contacted us works with chemicals in an Ohio factory, the handling of which necessitates employees shower after work every day. The employer allowed a male, with full male anatomy, to shower with the women on the basis of proclaimed gender identity. When female employees complained about this obviously uncomfortable situation, the male was given a shower curtain, leaving the women in an intimate space, naked, with a man as a condition of their employment.

Another woman who contacted our Law Center tours with major concerts as part of her job, often in venues with group showers, until now separated by sex. Again, a man, with fully intact male genitals, was "accommodated" with access to the female showers. Even when the female employees tried to time their showers to avoid him, the male employee waited for them in order to shower alongside them. Unbelievably, in the age of microaggressions and EEOC-encouraged firings over mild jokes or offhand remarks blown up into harassment, allowing a man to hang out, waiting to watch his female coworkers shower is actually required, not prohibited, by the EEOC.

These are just two examples of situations where the privacy, safety, and comfort of women in the workplace have been sacrificed on the altar of gender identity politics required nowhere in the plain language of Title VII. The EEOC guidance explicitly states that employers who do not provide access to single-sex spaces on the basis of gender identity will be in violation of Title VII, forcing women to use the restroom, pump breast milk, and in some cases change or shower with male colleagues as a condition of employment.

The EEOC claims its guidance rests on - indeed is required by - *Bostock v. Clayton County*. But the holding in *Bostock* is much narrower than the EEOC suggests in its April guidance. *Bostock* still acknowledges and relies on the immutable biological sex binary when it cites sex discrimination as the reason for protections against firing, e.g., a male employee for wearing a skirt, while a female employee would not be fired for the same act. And the Court was very clear to limit the reach of its holding, saying it did not "purport to address bathrooms, locker rooms, or anything else of the kind" under Title VII, exactly what the EEOC guidance forges ahead in doing.[18]

In truth, the EEOC guidance uses *Bostock* as a fig leaf to do something the Court did not do, and Congress chose not to when it repeatedly rejected the Equality Act:

[18] *Bostock v. Clayton County,* 590 U.S. 644, 667-69 (2020) at 681.

extend Title VII protections to the categories of sexual orientation and gender identity, even though neither are listed in the text of Title VII.

The EEOC does not have the power to rewrite the protected categories of Title VII, and the EEOC's invented definitions of the word "sex" in the statute are creating exactly the kind of workplace situations that subject female employees to discrimination and harassment that the EEOC actually *is* empowered to prevent. If a male employee repeatedly showing his penis to unwilling female coworkers does not qualify as sexual harassment under Title VII, it's honestly hard to see what workplace behavior would.

Perverse Incentives in the 1991 Act Have the Consequence of Stifling Speech and Mandating Wokeness at Work

Not all current problems can be blamed on over- and under-enforcement or interpretation by the EEOC. If we do not want workplaces that stifle speech, hand power to the most sensitive and aggrieved, and to generally live in an employment culture that forces people to conform to the ever-evolving standards of political correctness, critical theory, or wokeness, we need to take a hard look at the law itself. Encouragements to use discredited disparate impact analysis, whether introduced by statute revisions or Supreme Court precedent, as well as a perfect storm of changing remedies and loosened standards, have allowed Title VII to be twisted into what it has become today.

The original Title VII of 1964 limited an employee's remedies to injunction (for example, being offered the job denied on the basis of race or sex) and lost wages. This had the natural effect of limiting cases to those in which the allegations of discrimination were serious enough to result in termination, whether direct or constructive. Similarly, in the harassment context, racial or sexual harassment, even though vaguely defined, nevertheless initially did not open a Pandora's box of ever-more minor grievances because the unacceptable workplace behavior had to rise to the level of someone being fired or quitting without a job lined up, causing lost wages.

In the 1991 Act, however, these guardrails were all removed, and additional incentives were put in place that forced companies to try to prevent more and more frivolous cases of employee offense by micromanaging employee behavior and speech. Emotional and punitive damages were added to a litigant's possible winnings, alongside the 1964 Act's originally reasonable provision for attorney's fees. The definition of harassment remained vague, but that vagueness became a much bigger problem when freed from the limitations of lost employment and wages.

Combined with also-reasonable rules against retaliation for complaints, by the 1990s, the law made it sensible for companies to start policing the jokes, conversations, or minor behaviors of their employees; what were previously considered small annoying aspects of any job were treated as on-par with quid-pro-quo offers of career advancement for sex or racial slurs in the office. Conflating serious harassment that amounts to discrimination with the more minor and scattered offenses that often qualify as indicators of a "hostile work environment" today does a disservice both to victims of the former, and to the workplace as a whole.

It's not an accident that what was then termed "political correctness"—today's "wokeness" or identity politics—along with the diversity training industry first rose to prominence after the passage of the 1991 Act. If we are dissatisfied with the consequences of the stifling corporate culture today, in which 60% of U.S. employees feel unable to discuss their thoughts at the office and afraid to contribute in the workplace, we should look to reform the incentives in the law made that environment inevitable, one in which ever more minor subjective offenses must be heavily policed lest the company open itself to expensive and damaging lawsuits.[19] Each of these inducements, awards, and incentives in themselves may have been understandable, but their cumulative effect has been to force the work environment to cater to the most sensitive of sensibilities, and worse, reward people for characterizing every office disagreement as a racial or sexual grievance.

Solutions

- Demand that EEOC enforcement falls in line with the colorblind principles articulated in *SFFA* against racial discrimination, even if that discrimination favors minorities and disfavors white or male employees.

- Make it clear to CEOs and corporations that many of their current "diversity and inclusion" initiatives open them to legal liability for discrimination. Congress can also hold CEOs accountable through public hearings and asking corporate leadership to justify their promises of discriminatory decision-making.

- Rescind or overrule EEOC guidance that removes important protections for women in the workplace by denying the biological reality of sex in favor of protections for self-defined gender identity that exist nowhere in Title VII.

- Define harassment objectively by adapting a similar standard as that for Title IX in *Davis v. Monroe County Board of Education*: harassment must be "so

[19] "2023 Freedom at Work Survey," Viewpoint Diversity Score, March 14, 2023, https://www.viewpointdiversityscore.org/polling.

severe, pervasive, and objectively offensive, that it effectively bars the victim's access" to the workplace.. Stop vague enforcement that equates serious harassment with stray remarks, curbs speech, and incentivizes companies to micromanage employee speech and behavior at work. This will arrest the growth of an expensive, divisive and often political harassment training industry.

- Consider the cumulative effect of remedy changes made in the 1991 Act that incentivize companies to micromanage any possible subjective offense imaginable by their employees. In addition to a tighter definition of harassment, reconsider whether disparate impact analysis has any role beyond that of evidence in a showing of discriminatory intent and action.

Conclusions

Both reforms to the language of Title VII and EEOC decision-making have contributed to a sad reality: for many workers in America today, promises of equal opportunity and meritocracy are mere illusions. While the law still protects many against the invidious discrimination it was meant to hold at bay, in other contexts its chosen enforcement has led to more discrimination on the basis of race and sex in the workplace, not less.

On the one hand, employers of goodwill like Sheetz, Inc. are being dragged through the mud for common sense practices such as being more cautious about hiring those with felony records. On the other, America's largest corporations routinely promise to make hiring and promotion decisions that impermissibly include race or sex as a factor, or even as the "but for" factor, as is the case with racial quotas. This is not the Civil Rights Act Congress, or the public that elected them, thought they were signing up for when they fulfilled America's founding promises of equality in 1964, 1991, or today.

Instead of training its enforcement on clear violations of Title VII, the EEOC, comprised of people who have never had to run for elected office and who are unaccountable to American voters, has taken it upon itself to redefine one of the most basic words in the English language, scrapping the realities, differences, and vulnerabilities of biological sex for the fluidly self-defined concept of "gender identity." Notably, this concept is nowhere in the text or legislative history of Title VII, made all the more obvious by the fact that Congress has considered and repeatedly chosen not to pass exactly such an expansion of Title VII's protected categories in the form of the Equality Act.

American workers want to be judged by their employers on the basis of the quality of their credentials and work, not their skin color, sex organs, or other protected

characteristics. They want Title VII's basic protections against discrimination and harassment to be enforced sanely, fairly, and without choosing favored and disfavored classes based on political theories or ideological commitments. To meet these just requirements, reforms should be made to reign in out-of-control interpretations contrary to the plain text of the law, and to balance incentives to focus enforcement on actual cases of serious discrimination and harassment, not payouts for hurt feelings, returning Title VII to its worthy, original, and textual purpose.