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Enhancing Faculty Diversity: Policy, Law and Strategy Perspectives

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Introduction

This article focuses on law and policy considerations, and associated strategies, for effective and legally sustainable faculty diversity efforts. It references student diversity where helpful to draw distinctions in the legal regimes governing faculty and student diversity efforts, or where student diversity is relevant to faculty diversity. Student and faculty diversity clearly are complementary objectives for any institution of higher education (IHE) whose mission requires a broadly diverse academic community.

Each of the article's four parts addresses a distinct set of legal, policy or strategic considerations relevant to faculty diversity efforts:

- **Part I:** ***The Diversity Imperative***—This Part briefly addresses certain high level demographic, economic and educational mission-associated rationales for why the creation and success of diverse faculties and student bodies are vital to the roles, missions and excellence of many IHEs.
- **Part II:** ***Overview of Federal Law***—This Part addresses the character and key elements of legal regimes governing race, ethnicity and sex "affirmative action" in faculty employment, with their remedial and equal opportunity orientation. Those legal regimes are distinguished from the corresponding regimes governing student diversity, with their educational benefits and outcomes orientation. A text box, ***Remedial Bases***, provides the definitions and measures of the remedial justifications for affirmative action in employment. At the end of this Part is a text box, ***Continuum of Diversity Strategies: Key Definitions and Examples***, that provides additional diversity-related key definitions and outlines the continuum of diversity strategies that IHEs might pursue, from hardest to easiest to sustain under applicable legal principles. Readers may wish to refer to these text boxes whenever helpful throughout the article.
- **Part III:** ***A Deeper Dive: Title VII and EEOC Regulations***—This Part addresses different types of regulated employment actions in the affirmative action context and associated legal limitations. Included are "disparate treatment" (race-, -ethnicity-, and sex-conscious employment action) and "disparate impact" (neutral employment action with greater adverse impact on some races, ethnicities or sex than others). Also addressed is the importance of taking a stepped approach to applying the continuum of strategies (outlined in the Continuum of Diversity Strategies text box in Part II) when a remedial justification exists for affirmative action. In addition, Part III includes a text box on ***Capacity-building Programs to Address Artificially Limited Labor Pools***, which are caused by an employer's and/or union's exclusion of some groups from opportunities (e.g., training and mentoring programs, certain jobs) to gain skills, credentials and experience for employment and promotion.
- **Part IV:** ***The Educational Diversity Rationale as a Supplementary Justification***—This Part addresses the potential for the educational benefits of diversity (the primary justification for race-conscious diversity efforts in the student context) to provide additional justification for faculty diversity efforts, when combined with a baseline remedial justification (but not on its own at this time).

A conclusion brings all of these concepts together to create top-line parameters for action.

I. The Diversity Imperative

Demographic and economic trends inform whether quality U.S. higher education is accessible to all talent and serving society's and students' needs for a healthy democracy, strong economy, rich cultural life, national security, and overall prosperity in the near- and long- term. The success of U.S. higher education is measured by its accessibility to all students of promise, student outcomes in college, students' ability to contribute to society after graduation, and the quality of pedagogy and faculty contributions to knowledge. In a global and highly connected world, U.S. IHEs need to support the success of U.S. students to compete in a global economy—while also welcoming and contributing to the success of other nations, and supporting the participation of international students in our nation's education endeavor, as well as our students' participation in theirs. Thus, the mission of many IHEs encompasses delivering excellent educational experiences for all of their students; producing excellent scholarship and research to increase knowledge; and serving a global and diverse society's greatest needs. As further addressed in this article, practice, research and the courts have recognized that higher education's mission, in its many institution-specific iterations, is achieved by supporting the intellectual, teaching and service endeavors of a broadly diverse faculty and preparing a broad diversity of students to live fulfilling and productive lives. Indeed, higher education's excellence depends on a diverse and inclusive academic community at many institutions.

Demographic and Economic Trends. When considering demographic and economic trends and jobs, what skills are needed and will a majority of the U.S. population have the greatest opportunities? According to U.S. Census data, by 2020, people of color will comprise the majority (in numbers) of the population of individuals under the age of 18 in the U.S.;[1] by 2045, people of color will comprise the majority of the total U.S. population;[2] and by 2060, "about one in six people living in the United States" are projected to be born in another country.[3]

Job preparation is not by far the only measure of higher education's value, but it is a part of IHEs' contributions to students and society-at-large. Concurrently with the demographic shifts noted above, by 2020, "65 percent of all jobs in the economy will require postsecondary education and training beyond high school."[4] With 55 million job openings from retirements (31 million openings) and new jobs (24 million) in the economy through 2020, the U.S. will fall short by five million workers with postsecondary education.[5] Thirty-five percent of the job openings will require at least a Bachelor's degree; 30 percent of jobs will require some college or an Associate's degree. Furthermore, half of today's work activities could be automated by 2055, if not 20 years earlier; and it is projected that 37 percent of Millennials are "at risk of redundancy."[6]

Moreover, those who have a college education that provides them with science or engineering technical skills have among the best job opportunities in the U.S. economy.[7] College graduates with those skills (whether or not in science and engineering occupations) are the highest paid; and science and engineering occupations are among the fastest growing and most stable.[8] Most (but not all) science and engineering "occupations are generally assumed to require at least a bachelor's degree level of education in a [science or engineering] field…."[9]

In light of these trends and persistent race-based, and in some fields sex-based, inequities in education and employment opportunities, mainly affecting individuals identified as Latinx, Black, American Indian and Native Alaskan or women, broad diversity, including racial, ethnic and sex diversity, in the student body and faculty of colleges and universities, in STEM and other fields, very much matters to fulfilling higher education's mission, and hasn't been broadly achieved. For example, "African Americans represent 12 percent of the U.S. population, but are underrepresented in the number of degree holders in college majors associated with the fastest-growing, highest-paying occupations—…STEM, health, and business" and people of color (other than some Asians) and women continue to be underrepresented in STEM education and careers in many STEM fields.[10]

II. **Overview of Federal Law**[11]

Federal law generally prohibits discrimination in education and employment on the basis of race, ethnicity and sex by public institutions of higher education under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, and by public and private institutions of higher education that receive federal funding under federal statutes. Title VI[12] applies equal protection principles to federal funding recipients, prohibiting racial and ethnic discrimination in conferring educational benefits on students; faculty employment is not a primary focus of Title VI. Title IX[13] prohibits discrimination by federal funding recipients on the basis of sex, including (at least as concerns sex-stereotyping) gender identity and expression and sexual orientation, in educational programs (broadly defined) and the functions supporting them, including faculty employment. Title IX overlaps in the area of sex discrimination in employment with the primary federal employment statute, Title VII. Title VII[14] prohibits discrimination on the basis of race, color, sex, religion, or national origin in employment (hiring, layoff, firing, promotion, wages, job assignments, fringe benefits and other terms and conditions), by all public employers and most private employers.[15] Considering race, ethnicity or sex in deciding whether or not to confer an educational or employment benefit on an individual is generally prohibited under these laws. However, where certain legally recognized objectives of importance can't be achieved without considering race, ethnicity and sex—these factors may be voluntarily considered in limited ways in admitting or conferring other educational benefits on students or in hiring, conferring benefits of employment on, or taking certain other employment actions respecting, faculty.[16]

While higher education has a strong interest in both student body and faculty diversity, different legal regimes govern efforts to advance student and faculty diversity. Court-defined strict (for race and ethnicity) or heightened (for sex) scrutiny standards apply in both contexts—requiring a legally recognized, compelling (for race and ethnicity) or an important (for sex) aim, and evidence that any race-, ethnicity- or sex- based means are necessary, limited and well-tailored (not over-broad or over-burdensome on others) to achieve the compelling or important aim.[17]

The legally recognized interest that the Supreme Court has held justifies consideration of the race and ethnicity of students in educational programs, with evidence of need, is grounded in an "educational benefits" rationale—i.e., obtaining specific diversity-associated educational outcomes and experiences that benefit all students and advance the institution's educational mission.[18] For sex, the Court has looked for important educational interests that do not reflect stereotyping and are "exceedingly persuasive."[19]

The different legally recognized interest that justifies consideration of race, ethnicity and sex in employment programs, when necessary, is grounded in a "remedial" or "equal opportunity" rationale—i.e., remedying a "manifest imbalance" or "underutilization" in an IHE's workforce determined by comparing, and identifying a sufficient disparity between, the representation of racial groups and sexes in the available, qualified pool from which an IHE may recruit, with such groups' representation in the institution's own workforce, in particular disciplines and job categories.[20] Remedying an IHE's own (but not societal) discrimination can justify consideration of race, ethnicity and sex in educational programs and in the employment context.[21]
Respecting both regimes, however, the Supreme Court has been clear that it is impermissible to consider race, ethnicity or sex in conferring or declining to confer a benefit if neutral strategies (or lesser consideration of such factors) would suffice, or if the burdens on others are too great.[22] The Supreme Court also has been consistent in rejecting, as unconstitutional and contrary to Title VI and Title VII, two particular goals when used to justify consideration of an individual's race, ethnicity or sex in decision-making about who will (and will not) receive benefits. They are (1) **racial and sex balancing**—seeking to mirror in a faculty or student body the representation of racial groups or a sex in society-at-large or setting caps or quotas per race or sex, and (2) **social justice**—seeking to remedy general or past societal discrimination and inequity on these bases.[23]

What this means requires an appreciation of a subtle, Court-constructed, distinction between (1) a **legally impermissible aim**—i.e., racial balancing or righting societal wrongs[24] —as a **justification for race-conscious individual decision-making** (with similar concepts applicable to sex)**;** and (2) being aware of population demographics and issues of race- and sex- based inequities in society or a particular field, as a **context for legally permissible educational and employment goals.** Awareness of demographics and matters of race and sex in society is legally permissible; and it is important as a focal point for educational and faculty employment goals of the many IHEs that require diverse educational experiences and the broad perspectives they bring to all students. Indeed, as a focal point of its mission, goals and programming, an institution is perfectly free to invest in preparing students to thrive in a diverse society, and supporting faculty and students to contribute to advancing a more racially and otherwise just and inclusive society that well-serves all people. (See neutral strategies in the text box, Continuum of Diversity Strategies: Definitions and Examples, below.) Awareness of societal demographics, as well as demographics of the available and qualified labor pool, are important foundations for diversity-enhancing employment goals. The legal limitations arise when the **means** to achieve these goals include consideration of individuals' races, ethnicities or sexes.

While the Supreme Court has provided 40 years of precedent governing consideration of race in admission of college students, with the most recent decision in 2016, establishing strict scrutiny principles that apply whenever race or ethnicity is considered in conferring or withholding educational benefits on individual students,[25] there is much less recent Supreme Court precedent relating to diversity efforts in employment, and none relating to enhancing college faculty diversity. There is scant and more dated precedent on sex discrimination in college admission.[26]

Faculty Diversity and the "Remedial" Justification for Race, Ethnicity-, and Sex-Conscious Action in Employment[27]

In ways distinguishable from student diversity efforts, the legal justification for taking race-, ethnicity-, and sex-conscious action to achieve broad faculty diversity has a "remedial" basis. To qualify for an exception from the general federal law prohibition against considering race or sex in decision-making regarding hiring, promotion and other employment terms, conditions, and benefits, it is necessary under existing U.S. Supreme Court decisions and administrative agency regulations to establish a remedial justification—either remedying an IHE's own discrimination or furthering Title VII's equal opportunity in employment purposes. The Supreme Court has not definitely drawn all relevant boundaries of what is "remedial" and what furthers Title VII's equal opportunity purposes.[28] A key area where the Supreme Court provides some, but not complete, guidance concerns the interplay of the Equal Protection Clause and Title VII. The Court has raised the specter that the Equal Protection Clause of the U.S. Constitution would impose stricter nondiscrimination standards for public employers than Title VII's equal opportunity and nondiscrimination standards impose on public and private employers; but the difference has not been fully determined.[29] The requirements of equal opportunity executive orders administered by the Office of Federal Contract Compliance Programs (OFCCP) also apply to IHEs that are federal contractors (virtually all IHEs).

Remedial Bases. Generally, in order to take race-, ethnicity-, or sex-conscious action in employment, it is necessary to do a discipline- and category of position- specific analysis; and there must be evidence of one of the following conditions, and the action must be aimed at remedying it:

- *a **prima facie** (i.e., on its face) **showing of an IHE's own actual discrimination*** against people of particular races or sex (often people of color and women), which the courts have found to be evidenced by a disparity of two or more standard deviations between the representation of a race or sex in a particular discipline and job category at an institution and their representation in the available and qualified labor pool (from which faculty could be recruited);[30] or
- a ***manifest imbalance*** in the representation of certain races or sex in certain job categories at the IHE in a discipline as compared to their representation in the available and qualified labor pool, which is a court-recognized but not precisely defined, somewhat lesser but still substantial disparity;[31] or
- an ***underutilization*** of people of particular race or sex in certain job categories at an IHE in a discipline,[32] which is measured under a number of regulatory tests, including the most popular and reasonably conservative—the 80 percent test of OFCCP. Under this test, OFCCP defines underutilization to exist when the representation of racial groups or a sex at an IHE in a discipline is less than 80 percent of their representation in the available and qualified labor pool for that discipline and job category. (OFCCP *requires* federal contractors to make and implement reasonable affirmative action plans with goals, but not quotas, to remedy underutilization, but expects hiring, promotion, and layoff decisions to be made on a non-discriminatory basis.)

Nature of OFCCP Requirements for Federal Contractors

OFCCP, which is responsible for administering equal employment opportunity executive orders, Executive Order 11246, as amended, requires federal contractors with 50 or more employees and government contracts of $50,000 or more to annually assess and establish flexible goals (not quotas) and plans for increased opportunities, and to use good faith efforts to remedy "underutilization" of minorities and women in the contractor's workforce. However, OFCCP does not require or sanction consideration of race, ethnicity or sex in hiring, promotion or other decisions conferring or denying an employment benefit. "Underutilization" is defined as "having fewer minorities or women in a particular group than would reasonably be expected by their availability" (most often determined under the 80 percent test summarized above).[33]

Continuum of Diversity Strategies: Key Definitions and Examples. The following provides key definitions for, and a continuum of, diversity strategies, from hardest to easiest to justify and sustain under applicable legal principles:

Race- and Ethnicity-Conscious Strategies consider race or ethnicity in conferring (or not) an employment or educational benefit on individuals, and other differential treatment on the basis of race or ethnicity. Race and ethnicity conscious programs are legally "suspect" and subject to strict judicial scrutiny—requiring a compelling objective and narrowly tailored, limited consideration of race to achieve it, without unduly burdening others.[34] Satisfying this judicial standard and sustaining these programs is difficult. However—if adequate evidence exists that the consideration of race or ethnicity is necessary, and the manner and extent to which race or ethnicity is considered is narrowly tailored to achieve a legally recognized compelling purpose (i.e., there is no workable alternative that uses race less or not at all), without unduly burdening others—it is possible to satisfy the standard.[35] In the employment context, applying a Title VII overlay, remedying the present effects of an employer's own discrimination or promoting equal opportunity by remedying a "manifest imbalance" in an employer's own workforce (discussed in the Remedial Bases text box above) is a compelling interest. As a subset of *race-conscious programs, race-exclusive programs* are programs that condition participation or receipt of a benefit on membership in a particular race. These programs are the most legally "suspect" and correspondingly

hardest to sustain under strict judicial scrutiny. Racial exclusivity (quotas, caps) in the college and graduate school admission decision-making process is prohibited. While undecided and difficult, it may be possible to sustain racial exclusivity in some other education and employment programs, if the burden is not equivalent to the "in or out" nature of an admission decision and evidence of need for exclusivity is strong (demonstrating that neutral strategies and lesser consideration of race are inadequate to achieve compelling goals).[36]

Sex- Conscious Strategies consider sex of individuals in conferring (or not) a benefit on them and other differential treatment of individuals on the basis of sex. These programs are subject to heightened judicial scrutiny and require a showing that there is "an exceedingly persuasive justification" for sex-based action, which does not amount to sexual stereotyping about "talents, capacities, or preferences of males or females"[37] to achieve an important objective and with the sex-based action substantially related to achieving that objective. In the employment context, applying a Title VII overlay, remedying the present effects of an employer's own discrimination or promoting equal opportunity by remedying a "manifest imbalance" in an employer's own workforce (discussed in the Remedial Bases text box above) is an important interest.[38] As a subset of *sex-conscious programs, sex-exclusive programs* are programs that condition participation or receipt of a benefit on membership in a particular sex. As a general rule, they are harder than more general sex-conscious programs to sustain, although it is not impossible to satisfy the standard with evidence of inadequacy of other means. While the heightened scrutiny standard (and evidence of need) that applies to consideration of sex as the means to achieve that interest is, in theory, easier to satisfy than the strict scrutiny standard that applies to race and ethnicity, it is still a high standard. The differences between heightened and strict scrutiny have not, in practice, been delineated recently by the Supreme Court.[39] In the current legal environment, prudence may counsel treating the two similarly in the design and implementation of strategies, while maintaining the right to assert Supreme Court precedent's recognition of differences.

Race-, Ethnicity- and Sex- Neutral Strategies, including a Neutral Inclusionary Record and Equity Commitment Criterion, do not on their face consider race, ethnicity or sex of any individual in making decisions on who will (and will not) receive a benefit. Facial neutrality is not necessarily determinative, however. A neutral strategy also must have an authentic, mission-tied aim apart from increasing racial, ethnic or sex compositional diversity or conferring benefits on individuals on the basis of their race, ethnicity or sex (e.g., an authentic aim of socioeconomic diversity in the childhood backgrounds of faculty and students). In addition, certain race-, ethnicity- or sex- conscious strategies are still considered neutral, if they do not allocate significant benefits to individuals based on such status and have an inclusive effect overall. (See outreach and some barrier removal examples below.) If a strategy meets these criteria, it should retain its neutral character and not be subject to strict or heightened scrutiny, even if, as an ancillary matter, it also increases racial, ethnic or sex diversity, and that ancillary benefit is expected and welcome, as is the case in the following examples:

- Along with other applicable capability and accomplishment criteria for faculty and student hiring, admission or other programs, seek individuals (of any race or sex) who demonstrate the "plus factor" criterion of *having a commitment to and record of inclusionary conduct in work, educational and social contexts, and/or having a sincere desire to serve populations affected by societal inequities* (referenced in this article as an "**inclusionary record and (or) equity commitment**"). Articulating that an IHE needs both students and faculty who satisfy this criterion to promote full participation of all students and faculty and reap the educational benefits of diversity at the IHE, can help demonstrate the authenticity of the IHE's diversity-associated interest and need for these attributes.
- In addition to other applicable capability and accomplishment criteria for faculty hiring, use inclusionary record and (or) equity commitment, extraordinary accomplishment (e.g., top prize winner in a field), and unique expertise in a field as criteria, any one of which, if satisfied by the individual hired, enables a department to obtain institutional funding or other benefits for the department as a whole (most clearly

inclusionary), or for particular positions or programs within it, under a "target of opportunity" initiative. Such initiatives may apply to hiring, resourcing or retaining faculty who bring truly exceptional contributions to the IHE, or to departments that provide such faculty, particularly advancing mission.
- Establish imperatives to hire, invest in and promote faculty (of any race or sex) whose pedagogical approaches and/or areas of scholarship address—and to develop curricular and co-curricular programs that raise understanding of—issues of race and sex in society and are effective with a broad diversity of students. Such programming may also explore, e.g., how to build a more equitable and stronger democracy and a healthy, growing economy in light of demographic and economic trends, while engaging a range of political views and underlying research on these issues. The key to this strategy's neutrality is its focus on race- and sex- based subject matter—not the race, sex or political views of individuals who deliver the subject matter or participate in programs involving it.

Inclusive Outreach targets certain racial, ethnic or sex groups for tailored outreach by an IHE or a discipline within it, focused on effective communications for all relevant audiences and encouraging applications from a broad diversity of people. Inclusive outreach strategies are defined by conveying the same consequential information and welcome to all potentially qualified applicants, employees or students for a job or educational opportunity. This is done through robust general outreach to all who are potentially qualified, with some targeted outreach to those individuals of races or sex who are not reached as well by the general outreach. (It is helpful to have some evidence that general communications are statistically less effective with the targeted groups.)[40]

- For example, formally track people of color and women with promise at an IHE's own and other institutions through undergraduate and graduate school, academia and industry, as part of an overall effort to track promising faculty prospects of any race or sex and reach out to them as their readiness and opportunities arise. Leadership by deans/unit heads and respected faculty members who are committed and provide assistance, to oversee tracking and enlist participation of other faculty are keys to success.
- Neutrality and inclusive effect is destroyed and strict or heightened scrutiny applies, however, if race or sex is considered in an outreach strategy that confers a real benefit, such as a paid campus visit, or if disproportionate resources or consequential information is provided to some individuals and not others, based on race or sex.

Barrier Removal Strategies remove unnecessary barriers to access, opportunity or participation that affect or burden individuals of certain racial or ethnic groups or sex, exclusively or more than others, and are inclusive in effect. They should be regarded as neutral, and should not trigger strict or heightened scrutiny, and include these examples:

- Adopting hiring policies that, at the start of a search, require or promote intentional evaluation of qualification criteria for employment opportunities to eliminate unnecessarily restrictive or ineffective qualifications. Such unnecessarily restrictive criteria include, e.g., assuming the most qualified fellows or junior faculty come from a limited number of PhD programs that are familiar to a predominantly White male department. In STEM, e.g., sometimes faculty members of a department and their students are dominated by individuals of a particular nationality, which may relate to the demographics of the qualified, available pool or may result from implicit bias of faculty recruiters. The qualified pool is also unnecessarily limited when a field is more narrowly defined than relevant and sufficient expertise require. Another example is foreclosing opportunities to those who have taken non-customary or otherwise non-traditional education or career paths or whose advancement has taken more time than expected (i.e., is outside the dominant "norm"), even when there are reasons for these outcomes and they do not diminish ability in relation to a position. Providing funding to pursue "cluster hires" of multiple faculty may enable a broader definition of the field(s) of expertise needed, expanding opportunities for applicants.

- Providing periodic and episodic implicit bias and other training for search committees and faculty generally.
- Adopting hiring policies that require a senior official (e.g., a dean) to confirm the robustness and adequacy of outreach to build a diverse, qualified applicant pool, *before* closing the application period and *before* selecting any applicants for interviews. Adequate outreach is measured, not in large part by the diversity of the applicant pool itself but, rather, where an applicant pool is not diverse in race and sex, by serious conduct of outreach to all possible sources that offer reasonable potential to produce qualified applicants.
- Adopting employment benefits and enhanced climate that are available to all who need them (regardless of race or sex) but which address subjects that tend to impose disproportionate burdens on people of color or women, e.g., providing flexible work schedule options; providing parental and other family leave with an accommodation in the tenure timeline; and spousal and domestic partner relocation benefits including access to a networking and recruitment consortium, career counseling, adjunct opportunities.
- Participate in the SEA Change initiative of the American Association for the Advancement of Science, which supports IHEs in voluntary and accountable action to remove barriers to the inclusion of all talent in STEM.[41]

Community Building and Mentoring Strategies may be inclusive when aimed at integrating those who are otherwise isolated in the institution's community, and supporting their success by creating networks of individuals with shared experience or addressing disparities in their access to information and preparation for advancement. To be viewed as inclusive, clear evidence (assembled, e.g., via surveys or focus groups) should demonstrate that the targeted group is isolated and less knowledgeable than others in the community about requirements and opportunities for success. Documented evidence should demonstrate that others receive information and opportunities that the targeted group does not—or that individuals in the targeted group feel isolated, unable to fully participate, and lack a sense of community and belonging, whereas others have that community. Multi-variable regression analyses may be helpful to demonstrate that—all other factors of success being equal (e.g., educational and career attainment and record, socio-economic family background, parental educational attainment, etc.)—being a member of a particular racial group or sex makes an individual statistically more likely to face barriers to information access, inclusion, and success (respecting hiring, securing research funding, being nominated for honors, being promoted, etc.). Community-building programs for particular groups should be viewed in the context of many broadly available community building opportunities (e.g., as a focus group within a broader program) where possible. All who need such support should have access to it. Neutral community building and mentoring should not be subject to strict scrutiny (or should satisfy it), if sufficient evidence of inclusive effect exists, although this has not been tested in the courts.

Macro-Race and Sex-Attentive Strategies (our term, not the Supreme Court's) do not take race or sex of any individual into account in decision-making, but are pursued with the significant aim of increasing racial or sex diversity (e.g., faculty exchanges and recruitment collaborations with HBCUs, HSIs and MSIs, women's colleges, fellowship and other preparatory programs that have already achieved high rates of participation by instructors of color and women, or institutions in zip codes with high concentrations of people of color). The Supreme Court has acknowledged in the student admission context that some facially neutral strategies have clear aims to increase racial compositional diversity (percentage plans for college admissions applied to racially segregated school and residential districts) and are not neutral. But, where race is not considered in individual decision-making (e.g., in such percentage plans and use of zip codes known to have high concentrations of people of color), the Court has neither applied strict scrutiny, nor ruled on whether such scrutiny would apply were the issue raised.[42]

III. A Deeper Dive: Title VII and EEOC Regulations

Title VII prohibits employment classifications and discrimination, including limitation of opportunities, on the basis of race, color, sex, religion, or national origin. Its scope includes hiring, firing, promotion, wages, job assignments, fringe benefits, and other terms and conditions of employment. Title VII applies to private employers with 15 or more employees and to all public employers.[43] Thus, Title VII applies to all IHEs. It *permits* but does not *require* certain voluntary affirmative action with a remedial justification. The Equal Employment Opportunity Commission (EEOC) administers Title VII through regulations and guidance.

Types of Discrimination Prohibited by Title VII: Disparate Treatment (Intentional Discrimination)

Intentional differential treatment of employees and applicants for employment on the basis of race or sex violates Title VII (disparate treatment);[44] and may be established with direct evidence of the discrimination [45] or, alternatively, by satisfying a Supreme Court burden-shifting framework.[46] The latter method requires a plaintiff to first make a *prima facie* case inferring discrimination (i.e., that the plaintiff was a member of a protected class; that the plaintiff was eligible and applied for the position or program in question; that s/he was rejected; and that the defendant selected individuals outside the protected class, or the position or program remained open and the defendant continued to accept other applications). Then, the defendant may rebut the inference by offering a legitimate, non-discriminatory reason for the employment action. The plaintiff ultimately has the burden of persuasion and must show that the employer's proffered reason is a pretext—*i.e.*, that the employer's true motivation was discriminatory on the basis of race or sex. Title VII's nondiscrimination requirements also extend to training and apprenticeship programs; and use of different test score requirements and standards in hiring or promotion. When there is a mixed motive for an employment action that includes both differential treatment on the basis of race or sex and a non-discriminatory motive, the action is discriminatory.[47]

Title VII expressly permits differential employment treatment on the basis of religion, sex, or national origin if those characteristics "constitute a bona fide occupational qualification ('BFOQ') reasonably necessary to the normal operation of that particular business or enterprise…," although the criteria for BFOQ status limits its application to avoid its use for stereotyping.[48] Title VII does not include a race-based BFOQ.

Types of Discrimination Prohibited by Title VII: Disparate Impact (Unintentional Discrimination)

The statute also prohibits unintentional, "disparate impact" on individuals based on race and sex. An "unlawful employment practice based on disparate impact is established" if it is "demonstrate[d] that [an employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (b) [it is proven that] an alternative employment practice [is available that has less disparate impact and the employer] refuses to adopt such alternative employment practice."[49] Title VII thus includes a "business necessity" defense to disparate impact claims. "Business necessity," however, is not a defense to intentional discrimination (disparate treatment).[50]

To satisfy prohibitions against disparate impact under Title VII and Title IX, where neutral strategies have a disparate adverse impact on individuals of some races or sex, it is important to show that such neutral strategies are job-related and satisfy the IHE's (often educational) business need, and that there is no known alternative that would equally satisfy the need without having as much disparate impact.[51] For example, as matter of business necessity, an IHE could determine it needs faculty and students, whatever their race or sex, who have an inclusionary record and (or) equity commitment in order to realize desirable educational outcomes for all students associated with broad diversity and advance the institution's contributions to society. Such IHE could

establish a hiring criterion reflecting that preference. If that criterion were to result in more faculty of color or women being hired, with a disparate impact on White faculty and men, the necessity of the criterion should sustain its use, if other neutral strategies (e.g., targeted outreach and barrier removal) would not have less adverse impact or are inadequate to meet the need (and the reasons and evidence are articulated and documented).

When May Disparate Treatment (Intentional Discrimination) Be Used To Remedy Disparate Impact?

The Supreme Court has determined the interplay of disparate treatment and disparate impact employment actions, holding that mere threats of disparate impact claims cannot justify taking actions constituting disparate treatment on the basis of race or other protected classes. Rather, a "strong basis in evidence to believe that it [the employer] will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action" must exist.[52]

Voluntary Affirmative Action

Title VII does not "require" any employer to grant "preferential treatment" because of an "imbalance" in its workforce; affirmative action to address imbalance is voluntary.[53] However, the EEOC's regulations[54] do encourage "[v]oluntary affirmative action to improve opportunities for minorities and women" in furtherance of Congressional intent by taking those actions appropriate "to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity."

EEOC's regulations[55] provides guidance on when and what kind of voluntary affirmative action is appropriate:

- When "analysis…reveals…actual or potential adverse impact [is] likely to result from existing or contemplated practices" (clause (a));
- To "correct the effects of prior discriminatory practices…identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force" (clause (b)); and
- When, due to the effects of "historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited (clause (c)).

Note that the voluntary nature of Title VII means that states may enact laws that prohibit consideration and classifications of race and sex in employment actions, even when Title VII (and the Equal Protection Clause) would allow them. Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington state have done so through state constitutional amendments, statutes and executive orders that apply to public institutions. Recently, Washington state became the only one of these states to largely repeal its ban (while retaining a ban on race and sex quotas and use of race or sex as deciding factors in decision-making); a petition to restore the ban is underway.[56] Specific legal advice under a state's law is required to determine what actions would be permitted, although neutral strategies should pass muster.

Justification of Voluntary Affirmative Action In Different Types of Employment Actions

In efforts to enhance faculty diversity, "[p]olicies [involving consideration of race and sex] that affect actual employment decisions, such as hiring, promotions, and layoffs, have been treated differently than policies that do not affect actual employment decisions, such as targeted recruitment and outreach designed to increase the pool of qualified applicants, and data collection and analysis conducted to ensure compliance with anti-discrimination laws."[57] A stepped approach is good practice for IHEs, beginning with barrier removal, neutral criteria and inclusive outreach; then, if a remedial justification exists, capacity-building; and, only if a remedial justification

exists and it is necessary, limited consideration of race, ethnicity or sex (as a highly individual context for individual experience) in hiring and promotion decision-making (but not in layoffs or firing).

Barrier Removal, Neutral Criteria, and Inclusive Outreach [58]

A remedial justification for affirmative action is absent when the representation of people of color or a particular sex in the available, qualified pool is so low that even limited or no representation of that group in an IHE's workforce in particular fields or job categories does not constitute underutilization. This is often the case when there is little representation of Black, Latinx, certain groups of Asian, and women faculty in STEM fields. If more diversity is sought in such circumstances the following practices are critical because a remedial justification for affirmative action is likely absent. Even when underutilization does exist in order to satisfy strict scrutiny standards, the IHE is well-advised to adopt the following practices before considering race, ethnicity or sex in hiring or promotion decisions. (See the text box on the Continuum of Diversity Strategies: Definitions and Examples, in Part II above, for specific strategies and associated detail on design elements that are key to neutrality and inclusive effect.) Barrier removal, neutral criteria and (when strong evidence of absence of preferences exists) inclusive outreach are particularly important in states that prohibit use of race-, ethnicity-, and sex-based "preferences" by public institutions of higher education even when there is underutilization.

- **Remove barriers** to the excluded races and sex, which requires intentional action, best championed by committed faculty, to effectively elevate understanding among their faculty peers of the need for inclusion of all talent to achieve excellence in fields. *(This strategy should be suitable for all jurisdictions and whether or not a legally recognized remedial justification exists.)*
- **Include race-, ethnicity-, and sex-neutral "plus factor" criteria** such as seeking faculty with an inclusionary record and (or) equity commitment tied to an articulated priority focus of the IHE's educational mission, in addition to considering other criteria relating to accomplishments, service and promise. *(This strategy, if pursued authentically (not as a pretext) without regard to any individual's own race or sex, should be suitable for all jurisdictions and whether or not a legally recognized remedial justification exists.)*
- **Target outreach** to people of color or a particular sex, when needed for effective communications with this audience, as well as conducting robust generic outreach. *(Have good evidence that this strategy does not create a preference but merely provides effective communication to all audiences if there is no remedial justification or, whether or not there is a remedial justification, if the IHE is public and in a state that bans racial and sex preferences in public higher education.)*

Outreach to Build a Diverse Pool vs. Selecting Applicants to Interview

Note that pursuing some targeted outreach to increase the racial, ethnic or sex diversity of the applicant pool, without disproportionately allocating outreach resources to such efforts, depriving others of consequential information or affecting others' awareness or opportunity to apply or be considered, has not generally been regarded as part of the employment decision-making and should be sustainable.[59] However, *selecting candidates to interview* from an applicant pool has been regarded as part of that process and, consequently, subject to the same strict requirements for a remedial justification and demonstration of need to consider race, ethnicity or sex if affirmative action is being taken.[60]

Race-, Ethnicity- and Sex -Conscious Faculty Hiring or Promotion

To consider race, ethnicity or sex in a hiring or promotion decision under Title VII, Title IX (which applies to faculty as well as students), and (for public IHEs) the Equal Protection Clause, an institution must assemble substantial institution-specific evidence of the need to do so to remedy the effects of its own discrimination or to remedy a manifest imbalance *in a discipline and job category* within its workforce. That requires evidence of inadequacy of barrier removal, neutral strategies, and outreach.[61] Consideration of race, ethnicity and sex in hiring and

promotion also likely requires a showing that consideration of such factors (but not exclusivity of such factors) is undertaken in capacity building efforts but those efforts are inadequate. (See the Capacity Building text box below.)

When limited consideration of race, ethnicity or sex in actual hiring or promotion decisions may be justified in states that do not bar their consideration by public IHEs, the process and criteria should be the same for all applicants. Each individual should be assessed in a holistic fashion, with these factors, among many others, being flexibly considered as a context for understanding the unique experiences, accomplishments and potential contributions of each individual (not weighed the same for all candidates of one race or sex and not used in a manner that constitutes stereotyping). Everyone should be able to compete for all positions or promotional opportunities under the same criteria, in the same process (although limited barrier removal in the process may be sustainable with strong evidence of remedial need). When examining a race- or sex- conscious hiring or promotion strategy under Title VII, the Supreme Court looks to whether the plan creates "an absolute bar to the advancement of white employees."[62] This concern needs particular consideration in the context of faculty hiring and promotion if vacancies or opportunities arise infrequently and an IHE is looking to fill or elevate only one position.[63]

Consideration of race, ethnicity and sex should be time limited to the period needed to remedy the effects of the institution's own discrimination or a legally recognized manifest imbalance or underutilization. The need to do so should be evaluated and documented on an ongoing basis, which ideally could be undertaken annually as part of developing the OFCCP-required affirmative action plan. When pursuing hiring or promotion programs that take race, ethnicity or sex into consideration, careful design and authenticity in implementation are important to ensure that such considerations are both justified and do not wholly predetermine the outcome of decision-making even if they are factors.

Capacity-building Programs to Address Artificially Limited Labor Pools. Strategies such as guest lecture and visiting opportunities, limited time research, teaching support, and training opportunities, or other temporary measures (that are not regular positions) may help to build the capacity and competitiveness for employment and promotion of individuals of certain underutilized races, ethnicities or sex, as well as others with need in fields and positions where a labor pool is "artificially limited." Potential capacity building strategies may be designed as barrier removal, neutral strategies, outreach, or race and sex conscious strategies and a stepped approach in design is prudent. (See the text box above on the Continuum of Diversity Strategies: Definitions and Examples.)

Section 1608.3(c) of EEOC's regulations provides support of affirmative action to address artificially limited labor pools. It provides: "(c)…Because of historic restrictions by employers, labor organizations, and others there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers…may, and are encouraged to take affirmative action in such circumstances, including, but not limited to the following: (1)Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions; (2) Extensive and focused recruiting activity; (3) Elimination of the adverse impact caused by invalidated selection criteria…; (4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures."[64] ***Having an EEOC guideline endorsing training programs to address artificially limited labor pools is particularly important because Title VII includes a provision that affirmative action taken in good faith reliance on and conformance with "written interpretation or opinion of the [EEOC]" shields an employer from liability under the statute.***[65]

The concept of a "trainable cohort" as part of EEOC-sanctioned and OFCCP- required affirmative action arises out of the U.S. Supreme Court's *Weber* case.[66] *Weber* upheld as permissible voluntary affirmative action under Title

VII, a temporary plan in a collective bargaining agreement that reserved 50 percent of the positions in an on-the-job craft training program for African-American general production laborers at an aluminum factory, where African-Americans were historically excluded from skilled craft positions. The training program trained unskilled general production workers of all races at the plant for craft positions, so employees of other races also had training opportunities. The participants in the program were selected by seniority, with adjustments made to ensure that 50 percent of the positions went to African-American workers until the percentage of African-American skilled craft workers at the plant "approximated" or was "commensurate" with the percentage of African-Americans in the applicable labor market (the local market of trainable general laborers). The Court looked at the representation of African-Americans in skilled craft positions at the plant and found that only 1.83 percent of these positions were held by African-Americans. The Court found that African Americans comprised 39 percent of the applicable labor market from which the plant recruited general laborers. The company and a labor union had previously required prior experience for skilled craft positions (requiring greater expertise than needed for general labor), which had the effect of excluding all but a very few African-Americans from these positions because the union had long excluded African Americans from membership and deprived them of the requisite experience. However, the company had ample representation of African-Americans in their workforce of trainable general production laborers. This case held that voluntary affirmative action, through employee training programs to break down barriers of historic exclusion in skilled jobs by building capacity of trainable African-American workers and opening opportunities for them to compete for these jobs—without foreclosing opportunities for others to obtain training and also compete for jobs—furthers the purposes of Title VII. *Weber* continues to have precedential effect, although the propriety of racial or sex based quotas in voluntary employee training programs under Title VII is unclear in light of more recent case law disfavoring quotas under equal protection principles.

In fields such as many STEM disciplines, where there is a "pipeline problem" at IHEs because there are very few people of color or women in the available and already qualified labor pool, underutilization and manifest imbalance often can't be shown. However, there may be a "trainable cohort" of graduate students, fellows, and adjunct or junior faculty at an institution who could be prepared to compete successfully for tenure-track positions and tenure. Arguably, with appropriate evidence that an IHE historically created barriers and limited access to preparation for certain disciplines (as other IHEs did) for women and people of color, targeted appropriately designed and implemented capacity-building programs, such as certain time-limited assistantships, fellowships, and visiting appointments, involving consideration (but not exclusive criteria) of race and sex, may be justified under EEOC regulations and *Weber.* Enabling others in need to compete for participation in such programs is important. However, the concept of an artificially limited labor pool has not been applied by the Supreme Court or, to our knowledge, the EEOC, in a higher education setting, without the formality of a union's exclusionary practices. Institution-specific analysis, evidence of prior exclusionary practices, and legal advice are warranted.[67]

Changing Employment Criteria in the Middle of any Employment Process Can Be Discriminatory

When consideration of race or sex is justified in an employment action, the criteria should be established up front (not changed mid-course for diversity-aimed or impacting reasons).[68] The action held to be intentionally discriminatory by the Supreme Court in its *Ricci* decision was changing qualification criteria in the middle of a promotion process to the disadvantage of some races—for the asserted purpose of avoiding or remedying an unintentional disparate impact on other races.[69] Under *Ricci,* an employer should not change criteria for employment benefits (at least regarding promotion-associated tests, but likely any impactful criteria) in the middle of a process, once identifiable applicants or candidates have relied upon the criteria (giving rise to a kind of entitlement), without strong evidence of liability for disparate impact were the change not to be made.

This is an important principle to keep in mind in designing faculty recruitment, hiring and promotion initiatives. For example, an IHE may want to hire or promote two people on a particular occasion, if an opportunity presents itself to address different needs of the position and the institution. (The second individual may have expertise complementary and relevant, but not as directly on-point, to that required for an advertised position or promotion, and also bring a particularly strong inclusionary record and (or) equity commitment, such as designing or using effective pedagogy in diverse learning environments.) The possibility of hiring two people, if a second person with relevant expertise and high promise to contribute to educational priorities of the IHE is identified, should be established at the beginning of the search or promotion policy—or, even better, as an umbrella policy that applies and can be accessed if opportunities arise in the course of any faculty search or promotion process.

Race- or Sex- Conscious Layoffs Pose Greater Burden Than In Hiring

Taking race or sex into account in layoffs has been determined by the Supreme Court to unduly burden the vested interests of individuals being laid off.[70] In *Wygant,*[71] White employees with seniority could not be terminated in order to protect minority teachers from the "last hired, first fired" phenomenon. The *Wygant* Court recognized the vested interest of White teachers with more seniority, who would lose if a minority teacher retention plan trumped traditional protections of the collective bargaining agreement, and distinguished the burdens in race-conscious hiring and layoff scenarios. In cases involving general hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden "innocent" individuals,[72] they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity (arguably including promotion) is not as intrusive as loss of an existing job.[73] In the circumstances in which race and sex conscious employment practices may be justified, the more diffuse the effect of the practice–so that everyone may compete for opportunities and not all opportunities are foreclosed on the basis of race or sex–the easier the practice is to justify.

IV. The Educational Diversity Rationale as a Supplementary Justification

The logically strong argument exists that faculty are as critical as students to the achievement of diversity-associated educational benefits at colleges and universities. Faculty are undeniably an integral and essential part of the educational and research endeavor, leading and shaping pedagogical perspectives and the educational dialog and process, while actively interacting with and supervising students. Thus, a diverse faculty is necessary to provide educational benefits—excellent educational experiences—for all students and to produce associated excellent scholarship and research for a global society.[74] However, the U.S. Court of Appeals for the Third Circuit has rejected this "diversity rationale" (similar to the educational benefits of broadly diverse student body) as the sole justification for race and sex focused affirmative action in the employment. And the U.S. Supreme Court has not yet addressed the question. An April 2006 EEOC compliance manual,[75] while not definitive in establishing appropriate boundaries, raises the possibility that educational diversity interests could justify affirmative action in employment at IHEs:

> Some federal courts have held that public law enforcement agencies may satisfy the Equal Protection Clause if an "operational need" justifies voluntary affirmative action efforts. In the higher education context, the Supreme Court decided in *Grutter v. Bollinger* that attaining a diverse student body can justify consideration race as a factor in specific admissions decisions…. The Supreme Court has not yet ruled on whether an "operational need" or diversity rationale could justify voluntary affirmative action efforts under Title VII, but a number of legal scholars and practitioners have debated the issue.
>
> The Commission encourages voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII [and] believes that "persons subject to Title VII must be allowed flexibility in modifying employment systems and

practices to comport with the purposes" of the statute. However, employers are cautioned that very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law.[76]

In employment at IHEs, there are intersections of Title VII with Title VI, Title IX and the Equal Protection Clause, which may provide a foundation for this argument, as well as creating complexity in the analysis. That interplay has not been fully decided by the Supreme Court or EEOC. While strong logical arguments building on—but not addressed by—existing U.S. Supreme Court decisions, exist that the purposes of Title VII are served in a higher education context by extending the educational diversity rationale alone to employment of faculty, it is prudent to consider the current legal environment and the uncertainty of relevant law. Recent changes in the composition of the Supreme Court, which result in dominance of the so-called "conservative" wing, and particularly strict view of diversity-related law adopted by current administrative agencies, should be considered in assessing the likelihood of success in advancing educational diversity rationales as a sole justification for faculty affirmative action at this time.[77]

While colleges and universities are well-advised to articulate their compelling, mission-driven educational interest in having a broadly diverse faculty as one basis for faculty diversity efforts, it is prudent to also have a corresponding and aligned Title VII and OFCCP remedial basis for race- or sex-conscious actions regarding faculty employment and related benefits. Thus, prudence would call for the justification to include a showing that the employment action is remedying the IHE-employer's own discrimination or a manifest imbalance or underutilization in its workforce in particular disciplines and categories of positions, as described above. Neutral barrier removal, criteria, and outreach should be justified by the diversity rationale when an IHE determines diversity is important to achieving its educational mission and role in society, and may also be justified by equal opportunity objectives of Title VII.

Conclusion

Advancing a diverse and inclusive faculty is critical to fulfilling many IHEs' educational missions, benefiting all students and society-at-large in an increasingly diverse world and considering U.S. population demographics and economic trends. There is a range of actions that committed IHEs may take to effectively enhance diversity and inclusion of the faculty, many of which do not require consideration of race, ethnicity or sex of individuals; but such actions may not be adequate alone.

Under the Supreme Court's precedents (in contexts other than higher education), race-conscious hiring strategies for faculty are valid under Title VII when they: (1) share Title VII's statutory goals of breaking down patterns of discrimination or opening employment opportunities to members of racial groups, ethnicities or a sex that were once closed to them; (2) are grounded in a remedial justification—i.e., an IHE's own discrimination or a manifest imbalance in its workforce, considering available and qualified (or trainable) people of certain races or sex in traditionally segregated job categories; and (3) avoid unnecessarily trammeling the interests of those not targeted for the remedial action. Under the third condition, the Supreme Court has favored temporary affirmative action plans that seek to attain, rather than maintain, a "permanent racial and sexual balance,"[78] and plans that do not foreclose the ability for others to compete for opportunities.[79]

When conditions (1) and (2) are met, to satisfy condition (3), it is best, when considering race and sex in employment actions, to take a stepped approach. Remove barriers, use neutral criteria (e.g., seeking faculty of any race or sex who demonstrate inclusionary records and (or) equity commitment), and conduct targeted outreach in an inclusive manner within robust general outreach. If these approaches are inadequate alone, consider race and sex as a "plus factor" (not an exclusive participation criterion, which would heavily burden those who are not targeted for the remedy) in capacity building and training programs.

Only if justified, based on inadequacy of the other steps alone, should race, ethnicity or sex be considered in hiring decisions or promotions, as a flexible and individualized "plus factor," among many criteria, not a dominant or uniformly weighed or determinative criterion.[80] However, all such programs must satisfy the three requirements established by the Supreme Court in its *Weber* and *Johnson* decisions. Affirmative action plans involving "preferential hiring" (or promotions, training and capacity-expanding opportunities), may be justified with sufficient evidence of need; but considering race, ethnicity or sex in layoffs is too burdensome on vested rights of current employees.[81] "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial or sex equality on particular individuals."[82] Further, in light of the Supreme Court's *Ricci* decision, it is important to identify the relevant hiring or promotion criteria up front, and to not change them on the basis of race, ethnicity or sex after identifiable candidates rely on them; that is unless there is a strong basis in the evidence to believe that, absent such a race- or sex-conscious change, the IHE would be subject to disparate impact liability.

Articulating the educational diversity rationales, as well as the remedial justifications sanctioned by Title VII, OFCCP and Supreme Court opinions, for pursuing faculty diversity efforts is logical and a good practice. However, current Supreme Court precedent and administrative agency regulations and guidance have not definitively determined whether educational diversity rationales can alone justify consideration of race, ethnicity or sex in faculty employment terms and conditions; and it is not prudent to rely only on such rationales at this time.

Opportunities may exist for higher education to frame research-based rationales for upholding race-based affirmative action in employment (and education), based on the persistence and effect of deeply entrenched societal inequities, as the research on racial equity has developed over the years and has not been directly addressed by the Supreme Court. (This may be possible respecting other inequities as well.) While that may require traveling a longer road, there is much that IHEs can do now to advance equity—as well as diversity—without running afoul of the law:

- articulate the importance of furthering education, research and societal contributions to both equity and diversity in the institution's mission, and explain the criticality of that endeavor to the health and strength of our economy and democracy and the interests of society-at-large;
- break down barriers to inclusion of all talent by building communities actively intolerant of exclusionary conduct;
- authentically embrace the neutral criterion of inclusionary record and (or) equity commitment (among some other potential neutral criteria) in employment and education decision-making; and
- do what IHEs do best—elevate learning about issues of, and inequities targeting, race, ethnicity and sex, including in curricular and co-curricular initiatives, and invest in the faculty, pedagogy and research to support that effort.

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[1] United States Census Bureau. (March 2018). *Demographic Turning Points for the United States: Population Projection for 2020 to 2016* (Report No. P25-1144). Retrieved from https://www.census.gov/content/dam/Census/library/publications/2018/demo/P25_1144.pdf . Among the findings are: "The population of people who are Two or More Races is projected to be the fastest-growing racial or ethnic group over the next several decades, followed by Asians and Hispanics." and "As the population ages and grows more slowly in coming decades, the United States is projected to continue becoming a more racially and ethnically pluralistic society…."

[2] *Id.*

[3] *Id.*

[4] Carnevale, Anthony P., Smith, Nicole, & Strohl, Jeff. (2013). Recovery: Job Growth and Education Requirements through 2020. *Georgetown University Center of Education and the Workforce*. Retrieved from https://1gyhoq479ufd3yna29x7ubjn-

wpengine.netdna-ssl.com/wp-content/uploads/2014/11/Recovery2020.ES_.Web_.pdf; *See* also Carnevale, Anthony P., Jayasundera, Tamara, and Hanson, Andrew R. (2012). Five Ways that Pay Along the Way to the B.A. *Georgetown University Center of Education and the Workforce*. Retrieved from https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/2014/11/CTE.FiveWays.FullReport.pdf.

[5] *Id.*

[6] Marlin, Daniel. (January 16, 2018). Millennials, This is How Artificial Intelligence Will Impact Your Job for Better and Worse. *Forbes*. Retrieved from https://www.forbes.com/sites/danielmarlin/2018/01/16/millennials-this-is-how-artificial-intelligence-will-impact-your-job-for-better-and-worse/#5b1bf2e34533. *See* also, Gartner. (December 13, 2017). *Gartner Says by 2020, Artificial Intelligence Will Create More Jobs Than it Eliminates* [Press release]. Retrieved from https://www.gartner.com/newsroom/id/3837763; Manyika, James, Chui, Michael, Miremadi, Mehdi, Bughin, Jacques, George, Katy, Willmott, Paul, & Dewhurst, Martin. (January 2017). Harnessing Automation for a Future that Works. *McKinsey Global Institute*. Retrieved from https://www.mckinsey.com/featured-insights/digital-disruption/harnessing-automation-for-a-future-that-works; and Dugan, Andrew & Nelson, Bailey. (June 8, 2017) 3 Trends That Will Disrupt Your Workplace Forever. *Gallup Business Journal*. Retrieved from https://news.gallup.com/businessjournal/211799/trends-disrupt-workplace-forever.aspx.

[7] See, National Science Board, *Science and Engineering Indicators 2018 (SEI 2018)*, chapter 3, 3-6, available at https://www.nsf.gov/statistics/2018/nsb20181/assets/901/science-and-engineering-labor-force.pdf (There are "over 6 million to more than 23 million [people in the science and engineering] workforce, depending on the definition used." About 6.4 million college-educated people are employed in science and engineering occupations; 23.2 million hold a bachelor's or higher degree in these fields; and 19.4 million college graduates "require at least a bachelor's degree level of technical expertise in [science and engineering]" in their jobs in any field. Data indicate that "the application of [science and engineering] knowledge and skills is widespread across the technologically sophisticated U.S. economy and not limited to jobs classified as [science and engineering].")

[8]See *SEI 2018*, chapter 3, 3-6-3-7. (The average annual growth rate for workers in science and engineering occupations from 1960 to 2015 was three percent, as compared with two percent in the workforce overall, and these workers experienced greater job stability than those in other fields whose jobs declined during the economic downturn from 2007 to 2009. Those who have a science or engineering college degree or are college graduates employed in science and engineering occupations "have higher earnings than other comparable workers." And "[u]nemployment rates for college-educated individuals in [science and engineering] occupations tend to be lower than those for all college graduates and much lower than those for the overall labor force.")

[9] See, *SEI 2018*, chapter 3, 3-12.

[10] Carnevale, Anthony P., Fasules, Megan L., Porter, Andrea, & Landis-Santos, Jennifer. (2016). African Americans: College Majors and Earnings. *Georgetown Center on Education and the Workforce*. Retrieved from https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/AfricanAmericanMajors_2016_web.pdf. *Id*. ("African Americans account for only eight percent of general engineering majors, seven percent of mathematics majors, five percent of computer engineering majors, and 10 percent of health majors. In health, they are clustered in the lowest-earning detailed major: 21 percent in health and medical administrative services, six percent in higher-earning pharmacy, pharmaceutical sciences, and administration."); see SEI 2018, chapter 3, 3-8 (Non-Hispanic Whites constitute 66 percent of the U.S. population 21 years old or older and 67 percent of those employed in science and engineering occupations. Hispanics, Blacks, American Indians and Alaskan Natives collectively constitute 27 percent of the U.S. population 21 years old or older, but hold only 15 percent of the highest science and engineering degrees and are only 11 percent of those employed in science and engineering occupations. Asians constitute 6 percent of the U.S. population 21 years old or older but constitute 21 percent of those employed in science and engineering occupations. While women are 50 percent of the college educated workforce, they constitute only 40 percent of those with their highest degree in science or engineering fields and 28 percent of those employed in science and engineering occupations. Within such occupations, women are only 15 percent of engineers, 28 percent of physical scientists, and 26 percent of mathematicians, while representing 60 percentages of those

in social sciences and 48 percent of those in life sciences.); Catherine Riegle-Crumb, Barbara King, Yasmiyn Irizarry, *Does STEM Stand Out? Examining Racial/Ethnic Gaps in Persistence Across Postsecondary Fields,* Educational Researcher, Vol. 48 No. 3, pp. 133-144, April 2019.

[11] It may be helpful to the reader to review the Key Definitions section in ROBERT BURGOYNE, RALPH C. DAWSON, ARTHUR L. COLEMAN, SCOTT R. PALMER, THEODORE M. SHAW, WITH JAMIE LEWIS KEITH, AM. ASS'N FOR THE ADVANCEMENT OF SCI. WITH AM. ASS'N OF UNIVS., HANDBOOK ON DIVERSITY AND THE LAW: NAVIGATING A COMPLEX LANDSCAPE TO FOSTER GREATER FACULTY AND STUDENT DIVERSITY IN HIGHER EDUCATION, 16-17 and accompanying notes (ed. Jamie Lewis Keith 2010) [hereinafter Handbook], *available at* https://www.aaas.org/sites/default/files/LawDiversityBook.pdf , located in Chapter IV, pp. 23-29.

[12] 42 U.S.C. § 2000d *et seq.*

[13] 20 U.S.C. A§ 1681 *et seq*.

[14] 42 U.S. Code § 2000e *et seq.*

[15] JAMIE LEWIS KEITH AND DARYL E. CHUBIN, AM. ASS'N FOR THE ADVANCEMENT OF SCI., ASS'N OF AM. UNIVS., HANDBOOK ON DIVERSITY AND THE LAW SUMMARY AND HIGHLIGHTS 6-9 and accompanying notes, 45-51 (Chapter VII), 77-104 (Chapter VIII), and Appendix 1 (ed. Arthur L. Coleman, 2011) [hereinafter *Handbook Summary*], *available at* http://php.aaas.org/programs/centers/capacity/documents/LawDiversity_SUMMARY.pdf; *See also* Handbook *supra* note 11, at 45-51, 77-104 (Chapter VII) and 137-155 (Appendix 1).

[16] *See Id.,* at 6-9; Handbook, *supra* note 11, at 45-51, 77-104 (Chapter VII) and 137-155 (Appendix 1).

[17] *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Hill v. Ross*, 183 F.3d 586 (7th Cir. 1999); *United States v. Virginia,* 518 U.S. 515, (1996); *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718 (1982).

[18] *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger,* 539 U.S. 306 (2003); *Fisher v. University of Texas at Austin,* 570 U.S. 297, 312 (2013) (*Fisher I*); *Fisher v. University of Texas at Austin,* 136 S. Ct. 2198 (2016) (*Fisher II*).

[19] *Virginia,* 518 U.S. at 531.

[20] *See* Handbook*, supra* note 11, at 89-91, 93-94 (Chapter VII) and 173-76 (Appendix III), *addressing Johnson v. Transp. Agency*, 480 U.S. 616, 632-34, 642 (1987) (Supreme Court upheld the consideration of race and sex as one among many factors in promotion decisions to achieve affirmative action goals where there was a manifest imbalance of women and minorities in a skilled role in the employer's workforce, using the trainable cohort of women and minorities in the general labor pool in the area to determine the manifest imbalance); *Steelworkers v. Weber*, 443 U.S. 193, 209 (1979) (Supreme Court upheld reserving 50% of places in a skilled craft training program for trainable Black workers at the plant to build capacity in a traditionally segregated field where representation was not in line with the relevant labor pool, the local trainable labor market).

[21] See, e.g., *Bakke*, 438 U.S. at 305-09 (also recognizing the possibility of a remedial justification if there were judicial, legislative or administrative agency findings of constitutional or statutory violations with current effects and continuing oversight, to ensure that the remedy benefiting some races over others "will work the least harm possible to innocent persons competing for the benefit," not found to be present); *Grutter,* 539 U.S. at 330; *Fisher I,* 570 U.S. at 311. Remedying the present effects of an institution's own discrimination, which is a distinct (remedial) aim from achieving the educational benefits of diversity, is a permissible justification for considering race and has been used in DOJ desegregation consent agreements with state university systems. However, this "own institution remedial aim" has not been raised to justify race conscious admission policies in cases that have reached the Supreme Court. When University of Maryland attempted to use this remedial rationale to justify a program providing a limited number of race-exclusive scholarships for African American

students, the U.S. Court of Appeals for the 4th Circuit found evidence of the university's discriminatory practices lacking and struck down the program. *Podberesky v. Kirwan,* 38 F.3d 147 (4th Cir. 1994), *cert. denied,* 514 S. Ct. 1128 (1995). In the employment context, an employer's own discrimination, demonstrated by direct evidence or satisfaction of the Supreme Court's burden-shifting framework in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) justify race-conscious action, as does remedying a "manifest imbalance" in an employer's own workforce in historically segregated job categories. *Johnson v. Transp. Agency*, 480 U.S. at 632-34, 642; *Shea v. Kerry,* 796 F.3d 42, 57-60 (D.C. Cir. 2015) (Department of State's race conscious hiring plan was adequately based on a "manifest imbalance" in its workforce and supported by evidence of discrimination, including a 1989 GAO Report finding that 631 of the 655 Senior Foreign Service Officers were white and further evidence of "pervasive historical discrimination in the Foreign Service tracing as far back as the 1960s." Thus, the plan served to remedy the "lingering effects of State's past discrimination").

[22] *Fisher I,* 570 U.S. at 313-314; *Fisher II,* 136 S. Ct. at 2208 (in the education context)*; See also Adarand Constructors, Inc.,* 515 U.S. at 227 (employment context); *Wygant v. Jackson Board of Education,* 476 U.S. 267, 283-284 (1986) (employment context).

[23] See, e.g., *Fisher I,* 570 U.S. at 313-314; *Fisher II,* 136 S. Ct. at 2208 (applying strict scrutiny in the education context to prohibit consideration of race in admission decisions to remedy societal inequity); *Wygant,* 476 U.S. at 274-278 (1986) (applying strict scrutiny to consideration of race in employment terms and conditions, the Court held that remedying societal inequity, promoting role models, and tying teacher employment goals to the racial composition of the student body are not justifications for considering race in employment actions).

[24] The Supreme Court has found that Section 5 of the 14th Amendment to the U.S. Constitution provides a limited exception for Congressional action righting broad and systemic societal inequities, when backed by robust evidence-based legislative fact-finding. *Fullilove v. Klutznick*, 448 U.S. 448, 458-67, 488 (1980) (involving set-asides to correct systemic discrimination against minority contractors), provided that strict scrutiny (evidence of need) is satisfied, *Adarand Constructors, Inc.,*515 U.S. at 227; compare, *Richmond v. J.A. Croson,* 488 U.S. 469, 492 (1989) (striking down a local ordinance, which was not adequately backed by findings).

[25] *Regents of the Univ. of CA. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Community Schools,* 551 US. at 720; Fisher *I,* 570 U.S. at 307-08; Fisher *II,* 136 S. Ct. at 2208.

[26] The most recent Supreme Court cases on race in employment are *Ricci v. DeStefano,* 557 U.S. 557 (2009) and *Lewis v. City of Chicago, Illinois*, 560 U.S. 205 (2010). These cases relate to different issues in disparate impact claims associated with use of employment tests. *Ricci* concerns the limited circumstances in which disparate treatment may be justified to avoid a disparate impact claim. *Lewis* concerns the distinct acts of disparate impact—i.e., the act of setting a standard which has a disparate impact being one, and each time the standard is applied being others—from which the 300-day period to file a claim with EEOC runs. Concerning sex in college admission see *United States v. Virginia,* 518 U.S. 515, 532 (1996) (invalidating a male only admission policy at a public military academy); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (invalidating a women only admission program for nursing at a public university, perpetuating sex-based stereotypes). *See* Handbook Summary, *supra* note 15, at 6-9; *see also* Handbook, *supra* note 11, at 45-51, 77-104 (Chapter VIII), and 137-153 (Appendix 1).

Note also that where a remedial justification is required for race or sex conscious action in employment, such justification may be viewed to include both situations in which the need for remediation is evidenced by discrimination or a manifest imbalance or underutilization of women or minorities by an employer—as well as actions that further the equal opportunity objectives of Title VII, such as capacity building programs when there is an artificially limited labor pool of women or minorities. In fields such as STEM disciplines, where there is a "pipeline problem" because there are very few minorities or women in the available and qualified labor pool, there may be a "trainable cohort" of women or minority graduate students, fellows, or junior faculty who could be prepared to expand the available and qualified labor pool and compete successfully for tenure and tenure-track positions. Limited, targeted, appropriately designed, and implemented capacity-building programs for this cohort (e.g., certain time-limited assistantships, internships, fellowships, visiting and junior appointments) may be justified.

[27] See *Handbook, supra* note 11, at 77- 126 (Chapter VIII, on faculty diversity) and 137- 154 (Appendix I (Constitutional, Statutory and Regulatory Authority)), and 165- 195 (Appendix III (case law summaries and analyses)). A number of laws apply in the employment context: the Equal Protection Clause of the U.S. Constitution (according to the Supreme Court, an individual right protecting all races and sexes equally and to which strict judicial scrutiny applies to race and ethnicity conscious action and heightened scrutiny applies to sex-conscious action by public institutions); Title VII (race, ethnicity, sex, religion discrimination is prohibited for private employers with more than 15 employees and public employers, and reasonable affirmative action is permitted where an institution-specific remedial justification exists); OFCCP regulations and executive orders (race, ethnicity, sex, and religion discrimination is prohibited for federal contractors, and reasonable affirmative action plans are required to attempt to address underutilization of minorities and women, but the hiring decision is expected to be made on a non-discriminatory basis); Title VI (race and ethnicity discrimination is prohibited for the whole operation of a public or private federal funding recipient, including in employment but only if the purpose of the funding is employment or if the employment confers an educational benefit, and extends Equal Protection principles to private institutions); and Title IX (sex discrimination is prohibited for the whole operation—academics, athletics, employment, etc.—with some exceptions allowing some single sex programs, for private and public federal funding recipients and extends Equal Protection principles to private institutions). While Title VI (in some circumstances) and Title IX apply to employment, in this area they overlap with Title VII which also applies. The interplay of these federal laws has not been decided, but Title VII applies in some fashion as it is the principal federal employment statute. State constitutions, law and executive orders also may apply.

[28] *See* Handbook, supra note 11, 93-105 (Chapter VIII), 137-154 (Appendix I, (Relevant Constitutional, Statutory and Regulatory Authority)) and 165-195 (Appendix III (case law summaries and analyses).

[29] *See* Licht, Stuart "*Analyzing Racial Classifications in Employment Discrimination Litigation*," 52 U.S. Attorneys' Bulletin 10, 11 (May 2004); *Johnson v. Transp. Agency*, 480 U.S. 616, 632-34, 642 (1987) (distinctions between "manifest imbalance" justification for voluntary affirmative action under Title VII and actual discrimination justification for consideration of race and sex under the Equal Protection Clause); *Ricci v. DeStefano,* 557 U.S. at 594-96 (Scalia concurring, raised the issue of differences in Equal Protection Clause and Title VII standards: "Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" However, the Court did not address the question.)

[30] *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (utilizing a standard deviation analysis to analyze statistical disparities and suggesting that a standard deviation that exceeds two is sufficient to create an inference of discrimination); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (*prima facie* case made out by showing that the percentage of minorities in the employer's work force is significantly lower than the percentage of minorities in the general population); *Wygant v. Jackson Board of Education,* 476 U.S. 267, 274-275 (1986).

[31] *Steelworkers v. Weber,* 443 U.S. 193 (1979) (upholding under Title VII a collective bargaining agreement of a private employer reserving 50 percent of spots in an internal training program for skilled labor positions at an aluminum plant for its employed Black general laborers, where the union had historically barred Black laborers from membership, depriving them of the opportunity to train for the skilled positions and the employer hadn't employed them in those roles, but they were trainable and represented a high percentage of the available labor market); *Johnson,* 480 U.S. 632-34, 642 (upholding under Title VII a county agency's affirmative action plan that did not set any quotas or fixed numerical goals but, on a temporary basis, considered race and sex in employee promotion decisions, with long and short term goals to address "manifest imbalance" of women and racial minorities in the county's work force as compared to their representation in the relevant general qualified labor force, where there had been job segregation; others could still compete for promotion; reserving the question of whether the Equal Protection Clause would apply greater limitations on such a plan).

[32] *See* 41 CFR Part 60-20; *See also* OFCCP's Federal Contract Compliance Manual (Oct. 2014) Retrieved from https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf. (A contractor may use a variety of methods to determine what constitutes "underutilization", including: (1) any numerical difference between incumbency and availability, (2) a numerical difference of one person or more, (3) minority or female incumbency that is less than 80% of availability (i.e., less than 80% of their representation in the available and qualified labor pool), (4) a disparity between the actual

representation and expected representation for minorities and women that is statistically significant – namely -2.00 standard deviations or more); *See also* U.S. Dep't of Labor, OFCCP, "Technical Assistance Guide for Federal Supply and Service Contractors," at 21-22 (Aug. 2009). Applied broadly and in good faith, any of these approaches to underutilization should arguably afford educational institutions opportunities to engage in affirmative action that is as least as extensive as the affirmative action that is authorized under OFCCP regulations. The extent to which a court would uphold some of them, and the extent to which they differ from the court-articulated concept of "manifest imbalance" is undecided.

[33] Government Contractors, Affirmative Action Requirements, 165 Fed. Reg. 68,022, 68,033 (Nov. 13, 2000) (to be codified at 41 C.F.R. pts. 60-1, 60-2); *Technical Assistance Guide for Federal Supply And Service Contractors,* at 21-22 (Aug. 2009); 41 CFR 60-2.10-2.17.

[34] *See Adarand Constructors, Inc.,* 515 U.S. at 227 (strict scrutiny applies whenever "racial classifications" are used); *Fisher I,* 570 U.S. at 307-08 (2013); Fisher *II,* 136 S.Ct. at 2207-08.

[35] *See Id.*

[36] The Supreme Court has cited *Adarand Constructors, Inc.,* 515 U.S. at 227 in educational diversity and employment cases for the proposition that strict scrutiny applies whenever "racial classifications" are used. Regarding the application of this standard in the employment context, *See,* e.g., *supra note* 31; *Wygant,* 476 U.S. at 274-278 (inadequate evidence of the employer's own discrimination to justify protecting minorities from layoffs; remedying societal discrimination is not a justification); *Croson,* 488 U.S. at 492 (1989) (affirmative action is justified to remedy the effects of a public employer's own discrimination or to dismantle a system of discrimination in which the public entity has been a "passive participant, " neither of which was found); *See also Ricci v. DeStefano,* 557 U.S. 557 (2009). In the student education context, see *Regents of the Univ. of CA. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 US. 701 (2007); *Fisher I,* 570 U.S. at 307-08 (2013); Fisher *II,* 136 S.Ct. at 2207-08. The *Fisher I* and *Fisher II* Court emphasized that strict scrutiny applies whenever race is considered in decision-making on individual benefits. While the holdings of these cases apply only to race in college admissions, they strongly indicate that the same Equal Protection principles would apply when race or ethnicity of individuals is considered in decision-making to confer or withhold benefits in other enrollment and educational programs. In the student diversity context, the ultimate analysis required under applicable strict scrutiny standards (including weight of evidence required to justify consideration of race and sex) may arguably differ when the effect of program participation or other benefit conferring decisions does not equate to the "in or out" nature of admissions decisions. That is the position taken by the U.S. Department of Education (USED) in its 1994 policy on race-conscious financial aid. However, the current legal landscape, with changes in the composition of the U.S. Supreme Court and the positions being taken by USED and the Department of Justice (DOJ), may portend equally strict treatment of consideration of race and ethnicity in all programs conferring benefits on individuals and should be considered in program design.

[37] *See* e.g., *United States v. Virginia*, 518 U.S. 515, 532-34 (1996) (striking down a male-only admissions policy at a state military institute, finding it perpetuated sex-stereotyping and lacked "an exceedingly persuasive justification"); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (women's nursing program discriminates against and stereotypes men). Unlike statutory provisions prohibiting racial discrimination, there are limited exceptions to sex-based decision-making for bona fide qualification requirements that do not perpetuate sex-based stereotypes under Title IX (prohibiting sex discrimination in education programs by institutions that receive federal funding) and Title VII (the federal non-discrimination in employment statute). As a subset of discrimination, the Court has long been clear that harassment based on male and female sex, even if not sexual (referred to by some as gender harassment), and sex-based stereotyping, can serve as the basis for a discrimination claim. *See Davis v. Monroe County Bd. of Ed*., 526 U.S. 629, 650 (1999) (describing actionable harassment under Title IX to include male students threatening their female peers to prevent the female students use of a school resource); *Oncale v. Sundowner Offshore Services, Inc*. 523 U.S. 75, 80 (1998) (holding that same sex harassment can be actionable, noting that harassing conduct need not be motivated by sexual desire, and can be motivated by a "general hostility to the presence of women in the workplace"); *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 19 (1993) (allegations sufficient under Title VII included sex-based (and sometimes referred to as gender-based) insults such as "you're a woman, what do you know," and "we need a man as a rental manager"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989)

(allegations actionable under Title VII were that consideration for holding off female plaintiff's partnership included that plaintiff should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," and that she was "macho," and "overcompensated for being a woman," and that objections to her use of profanity were only "because it's a lady using foul language.").
On April 22, 2019, the Supreme Court granted certiorari in a series of cases in which it will ultimately decide whether Title VII bans discrimination based on sexual orientation or transgender status. These cases are as follows: *Bostock v. Clayton County, Georgia,* 723 Fed.Appx. 964 (11th Cir. 2018) (sexual orientation), *Altitude Express Inc. v. Zarda,* 883 F.3d 100 (2nd Cir. 2018) (sexual orientation) and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission,* 884 F.3d 560 (6th Cir. 2018) (transgender status).
The United States Department of Education has also long stated that sex-based harassment, which may include acts of verbal, or physical aggression, intimidation, or hostility based on sex or sex stereotyping, but not involving conduct of a sexual nature, can be a form of sexual discrimination under Title IX. *See USED OCR's Revised Sexual Harassment Guidance* (January 2001).

[38] *See*, *Johnson v. Transp. Agency*, 480 U.S. 616, 632-34, 642 (1987).

[39] *See supra notes* 36, 37.

[40] The Supreme Court has not ruled on outreach in college enrollment. Federal appeals and trial courts have made distinctions between inclusive and exclusive outreach in employment and enrollment. *See*, e.g., *Weser v. Glen,* 190 F. Supp. 2d 384, 399 (E.D. N.Y. 2002)(upholding targeted outreach to build a diverse applicant pool for law school, citing *Honadle* for the proposition that race and sex targeted outreach to "'broaden a pool of qualified applicants and to encourage equal opportunity,' but [that] do not confer a benefit or impose a burden do not implicate the Equal Protection Clause" and are "inclusive," a distinction recognized by *Adarand*); *c.f.*, *Honadle v. University of Vermont and State Agricultural College*, 56 F. Supp. 2d 419, 427-28 (D.Vt. 1999) (upholding targeted outreach in employment); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1553-56 (M.D. Ala. 1995) (upholding "inclusionary" targeted outreach to African Americans and women to expand the pool of qualified applicants for employment as part of an affirmative action plan; stating that "traditional" equal protection analysis should not apply, where race and sex are not considered in hiring decisions and the outreach does not have the effect of excluding qualified candidates from the pool on the basis of race or sex; but demonstrating strict scrutiny would be satisfied if it were to apply); Compare, e.g., *MD/DCI/DE Broadcasters Ass'n v. Federal Communications Commission*, 236 F.3d 13, 20 (D.C. Cir. 2001) (applying strict scrutiny to an FCC rule requiring race-targeted outreach and tracking in licensee employment programs, which had the effect of requiring limited recruitment resources to be targeted to recruiting minorities, depriving others of information to compete for positions).

[41] *See* the STEM Equity Achievement Change initiative at https://seachange.aaas.org/ .

[42] *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 US. 701, 786-91 (2007); *Fisher II,* 136 S. Ct. at 2211-15. For examples of neutral strategies, informed by relevant legal precedents *see* Handbook Summary, supra note 15, 48-65, Keith, Jamie Lewis, A Step-by-Step Guide to Law-Attentive Design of Campus Diversity and Access Strategies (AAAS, 2011 & 2015); Coleman, Arthur L., Teresa E. Taylor and Katherine E. Lipper, The Playbook: A Guide to Assist Institutions of Higher Education in Evaluating Race- and Ethnicity-Neutral Policies in Support of Mission-Related Diversity Goals (October, 2014) Retrieved from https://professionals.collegeboard.org/pdf/adc-playbook-october-2014.pdf; Coleman, Arthur L., Scott R. Palmer and Steven Y. Winnick, Race-Neutral Policies in Higher Education: From Theory to Action (College Board and EducationCounsel, June 2008), Retrieved from https://professionals.collegeboard.org/pdf/race-neutralpoliciesinhighereducation.pdf.

[43] *42 U.S.C. § 2000e,* In the rest of this article, we will reference Title VII's application to race- and sex- based employment actions.

[44] *See* Handbook, *supra* note 11, at 84; 42 U.S.C. § 2000e-2(a).

[45] *See* Handbook, *supra* note 11, at 84; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

[46] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see Handbook, *supra* note 11, at 84, citing *McConnell Douglas Corp.,* 411 U.S. at, 802-05.

[47] *See* Handbook, *supra* note 11, at 86, citing 42 U.S.C. § 2000e-2(d), (l), (m).

[48] *Id.* at 84, citing 42 U.S.C. § 2000e-2(1).

[49] *Id.* at 85, citing 42 U.S.C. § 2000e-2(k)(1)(A); *See also Lewis v. City of Chicago, Illinois,* 560 U.S. 205, 212 (2010).

[50] *Id.,* citing 42 U.S.C. § 2000e-2(k)(2).

[51] *Ricci v. DeStefano,* 557 U.S. 557, 587-93 (2009); 42 U.S.C. § 2000e-2(k)(1)(A); 42 U.S.C. § 2000e-2(k)(2).

[52] *Ricci,* 557 U.S. at 580-582, 585. (New Haven, Connecticut abandoned the results of a standardized test that it had administered for promotions within the fire department because it feared liability for the disparate impact the results would have had on Black and Latino firefighters. The test results would have resulted in promotion of many more White firefighters. The Court rejected the arguments that "under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination" under all circumstances and that "an employer in fact must be in violation of the disparate impact provision before it can use compliance as a defense in a disparate treatment suit." The Court made clear that the decision was not overruling its 1971 interpretation of Title VII's disparate impact provisions in *Griggs v. Duke Power Co.* or undercutting Congress's intent that employers should voluntarily comply with Title VII disparate impact standards.)

[53] *Steelworkers v. Weber*, 443 U.S. 193, 204 (1979); *Johnson v. Transp. Agency*, 480 U.S. at 628-29, 630 & n.8, 640, 642 (1987); *see* Handbook, *supra* note 11, at 85, citing 42 U.S.C. § 2000e-2(j).

[54] 29 C.F.R., Section 1608.1

[55] 29 C.F.R., Section 1608.3

[56] The eight states imposing bans on considering race or sex in education, employment and contracting are Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and (until recently) Washington state; and their prohibitions extend to public institutions. Arizona Const. Art. II, Sec. 36 (state shall not grant preferential treatment to or discriminate against any individual on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting); Ca. Const. Art. I, Sec. 31 (same); Florida Executive Order No. 99-281 issued by then Governor, Jeb Bush (prohibiting use of race, gender, creed, color or national origin, in Government Employment and State Contracting, and asking the then Florida Board of Regents to implement a similar policy in state university admissions); *See also* Executive Order 19-10 issued by Florida Governor Ron Desantis reaffirming Exec. Order No. 99-281 and 11-04; Mich. Const. Art. 1, Sec. 26 (prohibiting consideration of race, sex, color, ethnicity, or national origin by the State University and by the State in the operation of public employment, public education, or public contracting); Neb. Const. Art. 1, Sec. 30; N.H. HB623 (2011) (prohibiting preferences/preferential treatment or discrimination in recruiting, hiring, promotion or admission by state agencies, the university system, the community college system and the postsecondary education commission); Oklahoma Const. Art. 2, Section 36A (state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting); Wash. RCW 49.60.400 (banning preferential treatment in public employment, public education or public contracting – recently repealed in large part by "Initiative 1000"). *See* Coleman, Arthur L., Katherine E. Lipper and Jamie Lewis Keith, Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions (2012), Retrieved from https://professionals.collegeboard.org/pdf/09-beyond-federal-law-state-voter-initiatives-consequences-tool.pdf. "Initiative 1000" in Washington state recently caused the repeal of many of the restrictions of the state's statutory ban, allowing "affirmative action" in public education and employment but retaining prohibitions against use of quotas for race, sex and some other attributes, as well as use of those attributes as the sole or deciding factor in decision-making. Another petition is underway seeking to restore the ban. Michigan's ban passed constitutional challenge. *Schuette v. Coal. to Defend Affirmative*

Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291 (2014) (holding that a voter-approved amendment to the Michigan State constitution prohibiting race-based and sex-based decisions in public education, employment and contracting was valid, and thereby reversing the Sixth Circuit's holding that the amendment violated the doctrine against discrimination in the political process under the 14th Amendment to the U.S. Constitution).
In California, which bans racial and sex "preferences" in higher education employment, and any other state that has a similar law and is influenced by California's judicial interpretations, documentation that barrier removal and neutral criteria are being used and are inadequate may justify race- or sex- targeted outreach, such as invitations to apply or personal contact to encourage applications. Considering race, ethnicity or sex in a hiring or promotion decision does not generally fall under the exceptions to the prohibitions in such laws; their exceptions are tied to federally *required* affirmative action. Consideration of race, ethnicity and sex is not included in federally *required* affirmative action under OFCCP regulations and executive orders, and Title VII provides for *voluntary* affirmative action.

[57] S. Lich, supra note 29, at 11.

[58] *See* Handbook, supra note 11, at 43, 77-126, 137-154, 165-195 (Chapters VIII for faculty and VI for state restrictions, Appendix I for Relevant Constitutional, Statutory and Regulatory Authority, and Appendix III for case summaries on employment).

[59] *See supra* note 40.

[60] *See* Handbook, *supra* note 11, at 95, citing EEOC, Directives Transmittal No. 915.003, Compliance Manual, "Race and Color Discrimination," at 15-31 - 15-34 (April 19, 2006) (citations omitted) (available at www.eeoc.gov/policy/docs/race-color.html).

[61] In a dissenting opinion in *Ricci v. DeStefano,* 557 U.S. 557, 628 n. 6 (2009) (Ginsburg, J., dissenting) (citing, *Johnson v. Transportation Agency),* Justices Ginsburg, Stevens, Souter and Breyer noted that "in Title VII cases involving race-conscious (or sex-conscious) affirmative-action plans, the Court has never proposed a strong-basis-in-evidence standard," and instead "simply examined the [government] employer's action for reasonableness…." But that was not the opinion of the Court.

[62] *See* Handbook, *supra* note 11, at 90, citing *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (reserving some training spots for Blacks with strong evidence of exclusion and ability for others to also participate, to remove longstanding barriers to preparation of Blacks); *Shea v. Kerry,* 795 F.3d 42, 57-60 (D.C. Cir. 2015) (removal of a barrier to people of color at the entry point to a hiring process in the State Department upheld where the rigor of substantive hiring criteria is the same for all applicants and there is a manifest imbalance with robust evidence of longstanding, persistent exclusion of people of color, which had not been successfully remedied by neutral efforts over a period of years); *Johnson Transp. Agency,* 480 U.S. 616 (1987) (consideration of race and sex as one of many factors in promotion decisions to address a manifest imbalance); *c.f., Ricci,* 557 US. at 585 (generally applied criteria should not be changed mid-process). While not tested in the Supreme Court in recent years, capacity building and barrier removal programs to address documented, persistent and widespread exclusion on the basis of race and sex, with evidence of inadequacy of neutral efforts, may have some leeway respecting uniformity of all aspects of process, provided that opportunities to participate are provided for all in need and that the same substantive criteria are applied to all applicants.

[63] *See Id.* at 90, citing William Kaplan & Barbara A. Lee, THE LAW OF HIGHER EDUCATION § 6.5 (4th Ed. 2006).

[64] 29 C.F.R. Part 1608, 1608(3)(c) (2008).

[65] 42 U.S.C. § 2000e-12(b); S*ee also Ricci,* 557 U.S. at 631 n. *9.* (Ginsburg, J., dissenting)(referencing this Title VII provision and the EEOC's affirmative action guidelines).

[66] *Steelworkers v. Weber,* 443 U.S. 193 (1979)

[67] *See* Handbook, *supra* note 11, at 93-94 (Chapter VIII); *See* Handbook Summary, *supra* note 15, Appendix B, part II.

[68] See *Ricci, 557 U.S. at 585.*

[69] *Id.*

[70] *Wygant v. Jackson Board of Education,* 476 U.S. 267, 286 (1986) (race conscious layoff policy is not narrowly tailored under applicable strict scrutiny standards because it is overly intrusive on and over-burdens already-employed individuals of other races—as distinguished from considering race when necessary in hiring decisions about individuals who are not yet employed).

[71] *See* Handbook, *supra* note 11 at 88, citing *Wygant,* 476 U.S. 267 (1986).

[72] See *Regents of the University of California v. Bakke*, 438 U.S. 265, 305-09 (1978) (a remedy benefiting some races over others should "work the least harm possible to innocent persons competing for the benefit"). In a society with deeply embedded, longstanding inequities in education, housing, criminal justice and other areas based on race, even those who were not involved in creating the inequities may benefit from them, raising the question of whether "innocence" is relevant. The Court has not addressed the significant research that has developed on this issue of race in American society since *Bakke* was decided, although Justice Marshall's opinion, concurring and dissenting in part, cited to the horrendous inequities targeting African-Americans that he opined justify consideration of race in admissions. *Id.* at 387-396.

[73] *See* Handbook, *supra* note 11 at 88, citing *Wygant,* 476 U.S. 267 at 282-83.

[74] The Supreme Court has recognized a First Amendment-protected interest of institutions of higher education to exercise their academic discretion. It is this interest upon which Justice O'Connor relies to find a context in which the Court will recognize the compelling educational interest in a broadly diverse student body that can survive strict judicial scrutiny on Equal Protection grounds and justify the appropriate consideration of race in student admissions. See, *Grutter v. Bollinger,* 539 U.S. 306, 329, 331-32 (2003). This rationale was rejected by the U.S. Court of Appeals for the Third Circuit, however, as the sole basis for race-based affirmative action under Title VII, when reviewing a school system's affirmative action plan layoff provision, where there was no remedial justification for considering race. The U.S. Solicitor General, citing to general reasoning in a U.S. Department of Justice memorandum issued after the *Adarand* decision, opined that non-remedial affirmative action may be justification for diversifying faculty in the school context if strict scrutiny were satisfied. That would require a compelling educational interest and evidence of need to consider race to achieve it for reasons other than mere operational convenience. *Taxman v. Board of Education of the Township of Piscataway,* 91 F.3d 1547 (3d Cir. 1996), *cert granted,* 521 U.S. 1117, *cert. dismissed,* 522 U.S. 1010 (1997); Brief for the United States as Amicus Curiae, Piscataway Twp. Bd. Ed. v. Taxman, 519 U.S. 1089 (1997)(No. 96-679), 1997 WL 33561365, at *9 (citations omitted). The Third Circuit also rejected an educational rationale—outside of the higher education context—under the Equal Protection Clause as a justification for firefighter transfers in the absence of a showing that the fire department had intentionally discriminated against certain racial groups. *Lomack v. City of Newark*, 463 F.3d 303 (3d Cir. 2006).

[75] EEOC, Directives Transmittal No. 915.003, Compliance Manual, "Race and Color Discrimination," at 15-31 – 15-34 (April 19, 2006)(citations omitted), available at www.eeoc.gov/policy/docs/race-color.html; *See also* Handbook, *supra* note 11, at 182-85 (addressing Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. Ed. v. Taxman*, 519 U.S. 1089 (1997)(No. 96-679), 1997 WL 33561365, at *9 (citations omitted) in which the Solicitor General opined that non-remedial affirmative action to achieve a diverse faculty does not violate Title VII where there are specific facts, not just broad assertions, that support the government's compelling need for a diverse workforce to achieve the government's mission—other than diversity as an end in itself—and where narrowly tailored consideration of race furthers that compelling mission); *See* Handbook *supra* note 11, at 173-74 addressing *Steelworkers v. Weber*, 443 U.S. 193, 202, 208 (1979) in which the Supreme Court upheld an employer's training program that reserved 50% of the craft training spots for trainable black employees until the percentage of black craft workers was in line with their representation in the relevant labor pool—the local labor market--as appropriate, time-limited, voluntary affirmative action that implemented Title VII's purpose to break down racial hierarchy in occupations that have been traditionally segregated without barring advancement by non-minorities.

[76] EEOC, Directives Transmittal No. 915.003, Compliance Manual, "Race and Color Discrimination," at 15-31 - 15-34 (April 19, 2006) (citations omitted) (available at www.eeoc.gov/policy/docs/race-color.html).

[77] *See* Handbook*, supra* note 11, at 182-85 (Appendix III, Section 3.a) (U.S. Solicitor General's arguments to the U.S. Supreme Court at its invitation while considering whether to grant certiorari in *Taxman v. Bd. of Ed. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted,* 521 U.S. 1117, *cert. dismissed,* 522 U.S. 1010 (1997)).

[78] *See* Handbook*, supra* note 11 at 93, citing *Weber*, 443 U.S. at 193, 208, *Johnson v. Transp. Agency*, 480 U.S. 616, 640 (1987).

[79] *Id.* at 92, citing *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 628-31; *See also Humphries v. Pulaski Cty. Special School Dist.*, 580 F.3d 688, 695-96 (8th Cir. 2009); *Smith v. Virginia Commonwealth Univ*., 84 F.3d 672, 676 (4th Cir. 1996).

[80] *See Johnson*, 480 U.S. at 657.

[81] *See* Handbook*, supra* note 11 at 93; *Weber,* 443 U.S. at 208; *Johnson*, 480 U.S. at 638 (approving the affirmative action plans in part because neither plan required discharging nonminority employees).

[82] *Id.* at 93, citing *Taxman,* 91 F.3d at 1564 (citing *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267, 283 (1986)).