



The Honorable Jim Jordan
House Judiciary Committee
2138 Rayburn House Building
Washington, DC 2-515

March 2, 2023

Dear Chairman Jordan:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, to alert you to the Trojan Horse that is the “Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”¹ It is not an exaggeration to say that this executive order is a major step toward socialism.

The key promise of civil rights statutes is equal *opportunity*.² They do not promise equal *outcomes*. People are born with different abilities and interests. Since we are all different, the only way to achieve equal *outcomes* is by putting a thumb on the scale, i.e., through some form of discrimination.

Discrimination on the basis of skill, hard work, and proficiency is necessary and lawful. Discrimination on the basis of immutable characteristics unrelated to performance is idiotic and unlawful.

The latter form of discrimination is precisely what is required by this executive order.

A plain reading of Section 10 abundantly demonstrates that fact:

Sec. 10. Definitions. For purposes of this order:

- (a) The term “equity” means the consistent and systematic treatment of all individuals in a fair, just, and impartial manner, including individuals who belong to communities that often have been denied such treatment, such as Black, Latino, Indigenous and Native American, Asian American, Native Hawaiian, and Pacific Islander persons and other persons of color; members of religious minorities; women and girls; LGBTQI+ persons; persons with disabilities; persons who live in rural areas; persons who live in United

¹ “Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” President Joseph R. Biden, February 16, 2023, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

² See, e.g., 42 U.S.C. § 2000d, 42 U.S.C.; 42 U.S.C. § 2000e-2.



States territories; persons otherwise adversely affected by persistent poverty or inequality; and individuals who belong to multiple such communities.³

There are multiple problems with, and questions raised by, this definition. First, why the use of the term “equity” instead of “equality?” Clearly, because “equality” means *treating* everyone the same, and “equity” means ensuring that *outcomes* are the same. If the executive order were merely intended to ensure everyone has equal opportunity, the definition would simply restate the *existing* language of Title VII:

It shall be an unlawful employment practice for an employer –

- (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.⁴

The fact that the executive order does not simply adopt the language of Title VII emphatically demonstrates that the order is *not* about equality or nondiscrimination. It is about something wholly different and pernicious.

Second, entire segments of the American population are effectively excluded from the executive order’s definition of “equity”? Among them are whites, seniors, men and boys, members of majority religions, and the able-bodied.

Yet even by the Order’s own terms, the groups *included* are arbitrary and/or the premises for their inclusion are based on stereotypes and suppositions that have long been overtaken by facts. For example:

- Women are more likely to graduate from college than are men, and have been for years.⁵
- Many minority religions have higher average incomes than majority religions. For example, Jewish Americans have the highest average income, with 44% of Jews having a

³ “Executive Order on Further Advancing Racial Equity,” *supra* note 1.

⁴ 42 U.S.C. § 2000e-2.

⁵ Kim Parker, “What’s behind the growing gap between men and women in college completion?,” Pew Research Center, Nov. 8, 2021 (39% of women aged 25 and older have a bachelor’s degree versus 37% of men, and among those 25-34, 46% of women have a bachelor’s degree versus 36% of men), <https://www.pewresearch.org/fact-tank/2021/11/08/whats-behind-the-growing-gap-between-men-and-women-in-college-completion/>.



household income of \$100,000 or more and only 16% having a household income of \$16,000 or less. 36% of Hindu Americans have an average income of \$100,000 or more, and only 17% have a household income of \$16,000 or less. On the other hand, 19% of Catholic Americans have a household income of \$100,000 or more, and 36% have an income of \$16,000 or less. Only 16% of Southern Baptists have an income of \$100,000 or more, and 32% have an income of \$16,000 or less.⁶

- Similarly, Asian Americans have the highest average income of any racial or ethnic group in the United States. In 2020, the average household income for Asian Americans was \$94,903. The average household income for non-Hispanic whites was \$74,912. For Hispanics, the average household income was \$55,321, and for blacks, \$45,870.⁷

As Justice Powell wrote in *Regents of the University of California v. Bakke*:

[T]he difficulties entailed in varying the level of judicial review according to a perceived “preferred” status of a particular racial or ethnic minority are intractable. The concepts of “majority” and “minority” *necessarily reflect temporary arrangements and political judgments*. As observed above, the white “majority” itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only “majority” left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit “heightened judicial solicitude” and which would not.⁸ (Emphasis added).

Practically speaking, we know that the drafters of this executive order are unconcerned with which groups are doing comparatively well or poorly. This is simply an excuse to redistribute jobs, salaries, and prestige away from disfavored groups and toward favored (politically useful) groups.

Consider definitions (e) and (f):

- (e) The term “equitable data” refers to data that allow for rigorous assessment of the extent to which Government programs and policies yield consistently fair, just, and impartial treatment of all individuals.

⁶ David Masci, “How income varies among U.S. religious groups,” Pew Research Center, Oct. 11, 2016, <https://www.pewresearch.org/fact-tank/2016/10/11/how-income-varies-among-u-s-religious-groups/>.

⁷ “Real Median Income by Race and Hispanic Origin: 1967 to 2020,” U.S. Census Bureau, <https://www.census.gov/content/dam/Census/library/visualizations/2021/demo/p60-273/figure2.pdf>.

⁸ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 297 (1978).



(f) The term “algorithmic discrimination” refers to instances when automated systems contribute to unjustified different treatment or impacts based on their actual or perceived race, color, ethnicity, sex (including based on pregnancy, childbirth, and related conditions; gender identity; intersex status; and sexual orientation), religion, age, national origin, limited English proficiency, disability, veteran status, genetic information, or any other classification protected by law.⁹

These definitions can be translated quite simply: “equitable data” means that federal agencies will have to “get their numbers right.” Sorry, we ran the numbers and the Occupational Safety and Health Administration has too many white supervisors. OSHA, you better promote some “people of color,” even if they aren’t the most qualified for the job. Federal Aviation Administration: too many of your air traffic controllers are white. You’d better get your numbers right.¹⁰

Translating the actual meaning of “algorithmic discrimination” is also simple. Contrary to what one might believe, this *doesn’t* mean prohibiting algorithms from taking race, sex, etc., into account. (The whole point of using algorithms is to *avoid* using that information.) Instead, “algorithmic discrimination” means prohibiting the use of algorithms when inputting race-neutral data yields results that disparately impact favored classes.¹¹ I have seen this phenomenon at the U.S. Commission on Civil Rights. For example, a number of states use risk assessment tools to evaluate an arrestee’s dangerousness and likelihood of absconding to decide whether the person should be released pending trial.¹² Race is not a factor that goes into the algorithm. Nonetheless, because black criminals are more likely to have a longer criminal history than criminals of other races, the algorithm recommends that more black criminals than white criminals be detained. According to the Left, this is discrimination, even though the algorithm does not consider the race of any arrestee (they could be a one-eyed, one-horned, flying purple people-eater for all the algorithm knows) and the arrestee is literally being judged on his behavior, not his race.¹³

⁹ “Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” President Joseph R. Biden, February 16, 2023, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

¹⁰ Those with long memories may remember that during the Obama Administration, the FAA diluted its selection procedures to try to obtain more “diverse” air traffic controllers. See Letter from Peter Kirsanow, U.S. Commission on Civil Rights, to Michael Huerta, U.S. Department of Transportation, June 4, 2015, <http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/FAA-letter-re-hiring-practices-June-2015.pdf>.

¹¹ I use “favored classes” rather than “protected classes” because all people are protected by the civil rights laws of the United States. Every class is a protected class. The Left, however, uses “protected class” to mean, “not white, male, straight, Christian, or able-bodied.”

¹² See U.S. Commission on Civil Rights, CIVIL RIGHTS IMPLICATIONS OF CASH BAIL, Jan. 2022, at 59-69, <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf>.

¹³ *Id.* at 64-65.



Thus, combatting “algorithmic discrimination” necessarily entails one of two things: 1) making algorithms less accurate; 2) intentional discrimination. For example, imagine that a federal agency uses an algorithm to determine the winning bids for contracts. There is no information put in the algorithm regarding the race, ethnicity, sex, sexual orientation, gender identity, etc., of the bidding contractors. Nevertheless, when the algorithm produces the best options based on the numbers, the algorithm concludes the contracts should be awarded to two white male contractors and one Hispanic male contractor. Such outcome does not advance “equity.” In the world of this executive order, this constitutes “algorithmic discrimination.” To advance “equity” the agency must do two things: 1) It can include the bidders’ race and ethnicity in the data for the algorithm and direct the algorithm to give positive weight to certain immutable characteristics; 2) It can override the algorithm and award the contract to someone else. Either way, the agency is engaging in discrimination in the name of “equity.”

The executive order states that this is an “ambitious, whole-of-government” approach. Every major agency is directed to establish an “Agency Equity Team” within thirty days.¹⁴ Each agency’s equity team is directed to coordinate with the agency’s “environmental justice officer designated pursuant to Executive Order 14008 of January 27, 2021 (Tackling the Climate Crisis at Home and Abroad), and with the senior agency official designated to coordinate with the Gender Policy Council pursuant to Executive Order 14020 of March 8, 2021 (Establishment of the White House Gender Policy Council).¹⁵ Nearly the entirety of the federal government is devoted to propagating ideological imperatives enforced by innumerable teams of DEI officers.

Agency designees will be held responsible for delivering equitable outcomes and agency equity teams will be required to coordinate equity training across the entire agency workforce. Agencies are required to incorporate equity into their strategic and performance plans and to make equity an element of senior officials’ performance reviews.¹⁶ In other words, agencies must subject their workforces to racially hostile trainings of the sort exposed by Christopher Rufo at Sandia Labs and elsewhere.¹⁷ Senior officials *must engage in racial discrimination* to achieve “equitable” outcomes or face poor performance reviews. The agency designees fulfill the same role as Soviet political officers – ensuring that if anyone has a thought or impulse that contradicts the party line, he will be quickly reminded that his career can be ruined.

Again, make no mistake: racial discrimination will be *required*. The federal government has bent over backward to hire and promote minorities during my entire 40+-year career as a labor and employment lawyer and federal official. The only remaining solution to the “problem” of

¹⁴ “Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” President Joseph R. Biden, February 16, 2023, Section 2, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

¹⁵ *Id.*

¹⁶ *Id.* at Sec. 2-3.

¹⁷ Christopher F. Rufo, “The Truth About Critical Race Theory,” WALL ST. J., Oct. 4, 2020, <https://www.wsj.com/articles/the-truth-about-critical-race-theory-11601841968>.



insufficient numbers of minorities in preferred positions is to prevent members of disfavored groups from fulfilling their potential. Kurt Vonnegut's Handicapper General was supposed to be a warning, not a pattern to follow.¹⁸

The massive discrimination imperative in the Order is not limited to the federal government. Its tentacles reach into nearly every facet of America.

- First, the federal government is the largest single employer in the country. Federal employees include Border Patrol agents, slaughterhouse inspectors, air traffic controllers, and accident investigators. Promoting a manager in the Des Moines Social Security office based on the person's race instead of qualifications may not seem like a big deal to anyone besides the person who is passed over. Promoting food safety inspectors and air traffic controllers based on race is necessarily a big deal for millions of people potentially affected. Furthermore, if qualified people realize they are unlikely to be promoted because of their race, they may leave the federal workforce. Even so, the federal workforce won't simply shrink. The individuals who leave will be replaced by someone who is chosen not because they are the most qualified, but because they tick the right boxes.
- Second, the influence of federal hiring and promotion practices is not limited to federal employees. Many people who work with, in, or for federal agencies are contractors, not federal employees. Federal contractors are already subject to the requirements of Executive Order 11246, which is used to ensure they "get their numbers right." Federal contractors will come under pressure to adopt "equity" in their hiring processes as well. "Equity," i.e., "benign" discrimination, i.e., equal outcomes already is pervasive in the private sector, but it will spread more rapidly and completely from the federal government and federal contractors through the entire private sector.
- Third, the executive order is not limited to hiring and promotion. It also directs agencies to embrace "equity" in planning and distribution of goods and funds. For example, Section 6(b) provides:

Agencies shall undertake efforts, to the extent consistent with applicable law, to strengthen urban equitable development policies and practices, such as advancing

¹⁸ Kurt Vonnegut, Jr., "Harrison Bergeron," Welcome to the Monkey House, 1961, available at <https://www.tnellen.com/cybereng/harrison.html>.

It was tragic, all right, but George and Hazel couldn't think about it very hard. Hazel had a perfectly average intelligence, which meant she couldn't think about anything except in short bursts. And George, while his intelligence was way above normal, had a little mental handicap radio in his ear. He was required by law to wear it at all times. It was tuned to a government transmitter. Every twenty seconds or so, the transmitter would send out some sharp noise to keep people like George from taking unfair advantage of their brains.



community wealth building projects; preventing physical and economic displacement as the result of Federal investments; facilitating equitable flows of private capital, including to underserved communities; and incorporating outcome-based metrics focused on urban equitable development in the design and deployment of Federal programs and policies. To support these efforts, the Assistant to the President for Domestic Policy shall issue a policy memorandum on actions agencies can take to advance urban equitable development.¹⁹

Centralized planning can take many forms. For example, a federal agency may need to open a new field office. Perhaps the least expensive and most conveniently situated land is in an exurb. Too bad. We have to advance equity, so we have to place this office in a more expensive urban area. Or HUD could easily incorporate this into “fair housing” regulations. If a builder wants to build townhomes in a suburb, the regional planning commission had better require them to also build an apartment complex in the urban core – or the entire region may lose HUD funds. The mischief and meddling is limited only by the imagination of people whose jobs are on the line.

There are at least two reasons why Congress should be alarmed about this executive order. First, the executive order essentially upends the civil rights statutes. It is the province of Congress, not the executive branch, to pass legislation. This executive order, on its own terms, completely rewrites the civil rights statutes, laws and regulations regarding contracting and funding, and the civil service system. It is respectfully submitted that Congress should not allow its legislative prerogatives to be usurped by another branch of government.

Second, the substance of the executive order is unconstitutional. The executive order directs federal agencies to deliberately discriminate on the basis of race. This violates the Fifth and Fourteenth Amendments’ guarantees of equal protection.²⁰ The guarantee of equal protection is a guarantee to *individuals*, not to groups. As the Supreme Court has stated, “The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”²¹ Ostensibly benign or remedial racial discrimination is still racial discrimination.

[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests.²²

¹⁹ “Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” President Joseph R. Biden, February 16, 2023, Section 2, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

²⁰ *Adarand Constructors v. Peña*, 515 U.S. 200, 217 (1995) (“Cases decided after *McLaughlin* continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable”).

²¹ *Washington v. Davis*, 426 U.S. 229, 238 (1976).

²² *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).



The executive order makes no effort to show a compelling government interest, much less to narrowly tailor a race-conscious remedy. The Supreme Court has repeatedly stated that “societal discrimination” cannot be used as the basis for a racially discriminatory remedy.²³ Nor is achieving racial proportionality – the very goal of “equity” – a compelling state interest.²⁴

It is perhaps superfluous to note that a “whole of government” approach is the *opposite* of narrow tailoring.

In this respect, not only is the executive order discriminatory on its face, but it is possible that members of *every* racial group may find themselves discriminated against in one form or another. Such discrimination is rampant in higher education admissions, where Asian-Americans are discriminated against in favor of blacks and Hispanics. In *Ricci v. DeStefano*, Hispanic firefighters lost the opportunity for promotion when the city decided that not enough black firefighters had scored highly on the promotion exam.²⁵

It is not an exaggeration to say that the goal of this executive order is to remake the federal government and, as a consequence, the entire country. I urge Congress to take immediate action to defend the Constitution’s guarantee of equal protection to individuals and Congress’s own constitutional prerogatives as the legislative branch of government. At a minimum, Congress should do two things: 1) Hold hearings about this executive order, its purpose, and its implementation; 2) In the next appropriations bill, forbid any appropriations from being expended on any agency equity teams, agency equity plans, incorporation of equity into any performance plans, or anything else mentioned in this executive order.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Kirsanow".

Peter Kirsanow
Commissioner

²³ *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 310 (1978); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276 (1986) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

²⁴ *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007).

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not simply as components of a racial, religious, sexual or national class.” *Miller v. Johnson*, 515 U.S. 900, 911 (1995)(cleaned up).

²⁵ *Ricci v. DeStefano*, 557 U.S. 557, 565 (2009).