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Written Statement of
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Distinguished Commissioners, thank you for the opportunity to provide my testimony on “The Federal Response to Anti-Asian Racism in the United States.”

My name is Devon Westhill and I am the president and general counsel of the Center for Equal Opportunity (CEO). CEO is a non-partisan, non-profit research and educational organization that for over a quarter century has conducted studies and produced reports, monitored and advised on government action, and educated the public with the goal of promoting colorblind equal opportunity and nondiscrimination in America.

That mission is of both professional and personal importance to me. I have written and spoken widely on this topic including before both houses of Congress last year.¹ More fundamentally, I am a black man from the American South with a Vietnamese wife with whom I share two beautifully multiracial and multiethnic babies.

My primary concern today is how the federal government regards the civil rights of Asian Americans, and that of other Americans, who, as a result of their racial or ethnic identity, are treated differently, contrary to the American guarantee of equal protection under the law. In particular, I am worried about efforts to promote the concept of equity in many spheres of American life, but I will focus my remarks primarily on the federal government’s activities.

First, I describe and comment on examples of the Biden administration equity agenda, then I describe what the concept entails, and then explain why I think it is problematic for the protection of civil rights, especially for Asian Americans. I close by suggesting a better way forward and what this distinguished body can do to address the issues I identify.

I. BIDEN ADMINISTRATION EQUITY AGENDA

On January 20, 2021, as one of his first official acts, in the first hours of his presidency, President Joseph Biden signed Executive Order 13985.² As stated in EO 13985, the primary goal was to establish an “ambitious whole-of-government equity agenda.” In doing so, President Biden empowered his Domestic Policy Council to “coordinate efforts to embed equity principles, policies, and approaches across the Federal Government” and required every federal agency conduct an “equity assessment” and report findings to the Assistant to the President for Domestic Policy.

Six days later, the president issued a “Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States.” The letter was laudable in its admission that the “Federal Government played a

¹*Discrimination and the Civil Rights of the Muslim, Arab, and South Asian American Communities: Hearing Before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties*, 117th Cong. 2 (2022) (written testimony of Devon Westhill, Pres. Center for Equal Opportunity), <https://www.congress.gov/117/meeting/house/114438/witnesses/HMTG-117-JU10-Wstate-WesthillD-20220301.pdf>; *Fairness in Financial Services: Racism and Discrimination in Banking: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 117th Cong. 2 (2022) (written testimony of Devon Westhill, Pres. Center for Equal Opportunity), <https://www.banking.senate.gov/imo/media/doc/Westhill%20Testimony%2012-1-22.pdf>.

² Exec. Order No. 13,985, 3 C.F.R. 7009 (2021).

Approximately one week later, on February 3, 2021, the Department of Justice, having apparently not gotten the memo that specifically instructed the Attorney General “to prevent discrimination...against AAPI (Asian American and Pacific Islanders) individuals,” dropped its lawsuit against Yale University alleging exactly that.³

During the previous administration, the Civil Rights Division filed suit against Yale University. In a letter to the school, the Civil Rights Division explained it had determined “that Yale University violated, and is continuing to violate, [Title VI], by discriminating on the basis of race and national origin in its undergraduate admissions,” that “Yale’s discrimination is long-standing and ongoing,” and “significantly disfavors...Asian American[s].”⁴ Despite what the Justice Department only a few months prior called “Yale’s race discrimination in undergraduate admissions” against Asian American applicants based, in part, on “voluminous admissions data,” the Biden administration dismissed the case with essentially no comment.⁵ This was an early sign that the Biden equity agenda and the goal of preventing Asian American discrimination might, at times, be incompatible with each other and when so, the former was a priority for the Biden administration.

On June 25, 2021, President Biden signed Executive Order 14035 entitled “Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.”⁶ The directive demands, among other things, that the “head of each agency shall make advancing diversity, equity, inclusion, and accessibility a priority component of the agency’s management agenda and agency strategic planning...to determine whether and to what extent agency practices result in inequitable employment outcomes” rather than unequal employment opportunities.

On December 8, 2021, the Biden Justice Department provided, once again, its view on the issue of Asian American discrimination in a case pending certiorari review at the Supreme Court challenging undergraduate admissions procedures at Harvard College. Despite the government’s own extensive investigation revealing Asian American discrimination at Yale University, and its acknowledgement of Harvard’s own admission that it uses race in evaluating applicants for admission, the Biden administration nonetheless urged, unsuccessfully, the Court to decline taking the case.⁷

On April 14, 2022, more than 90 federal agencies, including all Cabinet-level agencies and this Commission,⁸ released “Equity Action Plans” pursuant to EO13985 announcing what amounted to hundreds of strategies and commitments to advance equity across the federal government.⁹

³ Devon Westhill, *New Study on Costs of Racial Preferences as DOJ Drops Yale Suit*, National Review (Feb. 5, 2021, 5:53 PM), <https://www.nationalreview.com/corner/new-study-on-costs-of-racial-preferences-as-doj-drops-yale-suit/>.

⁴ Dep’t of Justice, Civ. Rights Div., Notice of Violation of Title VI of the Civil Rights Act of 1964 (Aug. 13, 2020) https://www.justice.gov/opa/press-release/file/1304591/download?utm_medium=email&utm_source=govdelivery.

⁵ *United States v. Yale University*, Court Listener, Feb. 3, 2021, (D. Conn. Feb. 3, 2021), https://storage.courtlistener.com/recap/gov.uscourts.ctd.141516/gov.uscourts.ctd.141516.50.0_1.pdf.

⁶ Exec. Order 14,035, 3 C.F.R. 34593 (2021).

⁷ *Students for Fair Admissions v. President and Fellows of Harvard College*, Oyez, <https://www.oyez.org/cases/2022/20-1199> (last visited Mar 19, 2023).

⁸ U.S. Comm’n on Civil Rights, E.O 13985 Equity Action Plan, (Jan. 20, 2022), <https://www.usccr.gov/files/2022-04/usccr-eo13985-action-plan.pdf>.

In a report⁹ analyzing the “Equity Action Plans,” civil rights experts at the Heritage Foundation listed the following takeaways, among others:

1. President Biden’s new “Equity Action Plans” not only make federal bureaucracy more ineffective and wasteful, but they also violate federal civil rights laws.
2. These 25 plans [selected for review] push the false notion of “equity,” which, instead of providing equal treatment under the law, would treat people differently based on their race.

On August 1, 2022, and on October 31, 2022, the Biden administration urged via merits brief and oral argument, respectively, the Supreme Court to rule against the group of Asian American petitioners challenging race discrimination in Harvard University admissions.

Fast forward to just last month, President Biden signed yet another Executive Order entitled “Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government.”¹⁰ Concurrent with announcing this newest EO on government-wide equity, Vice President Kamala Harris expressed on her official Twitter account her thoughts behind the motivation for the directive:

America is the promise of equity and justice for all. Today, [President Biden] signed an executive order that puts our nation one step closer to achieving that promise.¹¹

It was a telling admission that the current administration has perhaps less commitment to our Pledge of Allegiance’s promise of “*liberty* and justice for all.” Indeed, Vice President Harris’ change in terminology comports with the Biden administration equity fixation. In fact, in the most recent EO, for example, equity is mentioned 63 times, but liberty gets no mention at all.

It is not just executive actions, memoranda, and court cases that make up the Biden equity agenda. The administration has pushed equity legislative priorities, federal programs, corporate board representation, and more aggressive reporting on and gathering of “equitable data.”¹²

The collection of equitable data in particular is peculiar, indeed. If the federal government’s goal is to combat discrimination, xenophobia, bias, racism, and intolerance one would think that the

⁹ David Ditch, *et al.*, *President Biden’s “Equity Action Plans” Reveal Radical, Divisive Agenda*, Heritage Foundation, (May 25, 2022) <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 Exec. Order 14,091, 3 C.F.R. 10825 (2023).

¹¹ Kamala Harris (@KamalaHarris), Twitter (Feb. 26, 2023, 3:15 PM), <https://twitter.com/VP/status/1626314226946957312?lang=en>.

¹² See e.g. Wynn v. Vilsack, Pacific Legal, Jun. 23, 2021 (M.D. Fl., Jacksonville Div. Jun. 23, 2021) <https://pacificlegal.org/case/farm-loan-forgiveness/> (American Rescue Plan Act of 2021 providing financial set-aside for farmers based on race); Hierholzer v. Guzman, Pacific Legal, Jan. 18, 2023, (E.D. Va., Norfolk Div. Jan. 18, 2023) <https://pacificlegal.org/case/veteran-sba-racial-preferences/> (SBA 8(a) program racial set-aside); <https://nclalegal.org/2022/10/secs-comply-or-report-rules-pushing-diversity-quotas-on-nasdaq-corporate-boards-face-ncla-challenge/> (equity in corporate board representation); *Watch: SEC’s “Comply or Report” Rules Pushing Diversity Quotas on Nasdaq Corporate Boards Face NCLA Challenge*, New Civil Liberties Alliance, Oct. 5, 2022, https://tax.thomsonreuters.com/news/law-professor-irs-should-embrace-race-data-to-promote-equity/?utm_source=substack&utm_medium=email (noting increase in equitable data collection and urging more).

administration would favor eliminating any practice that identifies the race or ethnicity of people and instead, advance race-neutral practices. If nothing else, this tips the administration's hand to its true intentions.

The federal government's equity agenda appears to consist of identifying disparities in outcomes and attempting to close them by preferential treatment based on race or other immutable characteristics such as ancestral lineage. That's immoral, it's illegal,¹³ and it's undeniable that the federal government has put forward massive efforts at "Embedding Equity into Government-wide Processes," making implanting "a focus on equity into the fabric of Federal policymaking and service delivery," "to deploy artificial intelligence programs in a manner that advances equity," and to deploy "Equity Teams" that ensure agencies are "delivering equitable outcomes."¹⁴

II. EQUITY IS NOT EQUALITY

The currently fashionable term "equity," is not contained in any of the following major federal civil rights laws, among others:

- Civil Rights Act of 1957
- Civil Rights Act of 1964
- Voting Rights Act of 1965
- Civil Rights Act of 1968
- Title IX of the Education Amendments of 1972

That fact alone should raise every eyebrow on this Commission. Not only does equity not appear to be an effort to advance civil rights protections enacted by Congress, but one might question and seek to investigate—given that equity initiatives target federally protected classes—whether equity initiatives might frustrate or impede civil rights protection and enforcement.

Of course, one could reasonably believe that the term equity is synonymous with equality. However, as we learn from the administration's most recent EO, equity demands disparate treatment of individuals and groups such that agencies can "deliver better outcomes for the American people." Contrary to the focus on outcomes, equality is the impartial, nondiscriminatory treatment of all individuals in order to provide equal opportunity. Indeed, that is what our federal civil rights laws mandate.

Moreover, we learn from leading federal government officials that equity and equality are distinct terms. On November 1, 2020, for example, Vice President Kamala Harris tweeted a video from her official government Twitter page where she acknowledged:

¹³ See e.g. 42 U.S.C. § 2000e-2 (Title VII prohibits, inter alia, discrimination on the basis of race, color, and national origin in employment matters); 42 U.S.C. § 2000d (Title VI prohibits, inter alia, discrimination on the ground of race in federally assisted programs); *Adarand Constructors v. Peña*, 515 U.S. 200, 217 (1995) (Race discrimination violates the indistinguishable equal protection obligations imposed on the government by the Fifth and the Fourteenth Amendments).

¹⁴ Nate Hochman, *Biden's Equity Mandate for AI*, National Review, (Feb. 22, 2023, 6:24 PM) <https://www.nationalreview.com/corner/bidens-equity-mandate-for-ai/>.

So there’s a big difference between equality and equity. Equality suggests, “oh everyone should get the same amount.” The problem with that, not everybody’s starting out from the same place. So if we’re all getting the same amount, but you started out back there and I started out over here, we could get the same amount, but you’re still going to be that far back behind me. It’s about giving people the resources and the support they need, so that everyone can be on equal footing, and then compete on equal footing. **Equitable treatment means we all end up in the same place.** (Emphasis added)¹⁵

Equality of opportunity efforts seek to remove barriers that otherwise close doors to opportunity. I have first-hand experience as the leader of the civil rights program at the United States Department of Agriculture. There, for example, we redesigned and implemented a better department-wide reasonable accommodation policy for Americans with disabilities. Thereby, opening the door of opportunity to more people putting their talents to work for the public interest.

During my time at USDA, we were laser-focused on collecting, investigating, and adjudicating complaints of civil rights violations, attempting to prevent those violations in first place with preventative measures such as education, and promoting an inclusive environment for everyone. Not only does the outcome-focused nature of equity measures detract from the obligations to protect civil rights and promote equal opportunity—resources are always limited—equity does positive injury.

The insistence that we must produce equal outcomes among groups defined by skin color, national origin, or gender perverts the American understanding of justice based on individual rights. It is achievable only by substituting totalitarian methods that trample those rights. And there is no good reason to believe that people or groups of people should or even can “all end up in the same place.” As I stated in a hearing of the Senate Banking Committee recently:

Imbalances [of outcome] often have a multitude of contributing factors and do not always disfavor minorities. The sentiment is well summed up, as so often is the case, by economist Thomas Sowell in his book *Discrimination and Disparities*:

“If there is not equality of outcomes among people born to the same parents and raised under the same roof, why should equality of outcomes be expected—or assumed—when conditions are not nearly so comparable?”¹⁶

The rampant conflation of equity and equality mollifies those who would otherwise be aghast at the true difference. A difference that is clearly explained by Commissioner Peter Kirsanow in his recent letter to House Judiciary Committee Chairman Jim Jordan raising the alarm to the Biden administration’s recent equity-focused EO—an action Commissioner Kirsanow calls a “Trojan Horse [that]...is a major step toward socialism.”¹⁷ Commissioner Kirsanow plainly writes:

¹⁵ Kamala Harris (@KamalaHarris), Twitter (Nov. 1, 2020, 1:06 PM), <https://twitter.com/KamalaHarris/status/1322963321994289154?s=20>.

¹⁶ *Fairness in Financial Services: Racism and Discrimination in Banking: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 117th Cong. 2 (2022) (written testimony of Devon Westhill, Pres. Center for Equal Opportunity) (quoting Thomas Sowell, *DISCRIMINATION AND DISPARITIES* (2018))

“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.”¹⁷

That plain-speak, and the track record of the Biden administration and others, brings me to my not-so-well-hidden main point: Asian Americans are a disfavored group under the equity regime.

III. EQUITY ENDANGERS CIVIL RIGHTS AND “CREEPS”

Asian Americans are equity targets because of their success.

Equity initiatives, as discussed, seek to reach proportional outcomes for groups. That is especially problematic for Asian Americans in certain areas of American life within which they succeed in disproportionate numbers.

Many Asian Americans are culturally dedicated to academic achievement and family cohesion. That devotion has led to representation in fields that outstrip their proportion to the general population.

The Biden administration’s equity directives may well force agencies, contractors, and others to discriminate against otherwise perfectly qualified employees or federal contractors if the predetermined racial balance cannot be struck. Rather than preventing discrimination based on race, “equity” orders can instead encourage discrimination. Put more directly, agencies and covered entities will be perversely incentivized to judge prospective employees and contractors in part by the color of their skin rather than, as should be the case, their qualifications to do the job in order to achieve proportional race representation. This, of course, turns our civil rights laws on their head and Asian Americans are currently on the losing end of it all.

In a system where outcomes must reflect proportionality, Asian Americans cannot occupy half of the incoming class at Harvard College as alleged they would if academic qualifications were the sole criterion for consideration.¹⁸ Neither can Asian males participate in the federal Senior Executive Service at rates higher than their governmentwide participation rates as they did in 2018.¹⁹ Achieving equitable outcomes means both providing preferences to artificially inflate the proportion of and lowering standards for certain groups and also, *bringing down* other “overrepresented” races to their proportion of the population—approximately 7% for Asian Americans.

These are the two sides of the same equity coin. Neither side can be satisfied without violating federal civil rights laws or the constitutional principle of equal protection under the law since

¹⁷ Id. at 3.

¹⁸ Caroline S. Engelmayer, Kristine E. Guillaume, *Court Filings Reveal Academic Strength of Asian-American Applicants to Harvard*, Harvard Crimson, (Jun. 19, 2018) <https://www.thecrimson.com/article/2018/6/19/asian-american-academics/>.

¹⁹ U.S. EEOC, Annual Report on the Federal Workforce, (2018) <https://www.eeoc.gov/sites/default/files/2021-06/2018%20Federal%20Sector%20Report.pdf>.

both require divvying-up individuals by race.

The federal civil rights apparatus is designed to combat this sort of race essentialism and discrimination. However, what we have seen instead is acquiescence and, worse still, “equity creep” in American society targeting Asian Americans.

Equity Creep in Education

- Administrators at the top ranked high school in the country, Thomas Jefferson High School for Science and Technology, has sought to redesign its admissions process with the express intention of achieving a more racially proportionate outcome in the student population—read: less Asian. Principal Ann Bonitatibus, for example, explained to students and parents in an email that the school “do[es] not reflect the racial composition in [Fairfax County Public Schools]. Our 32 black students and 47 Hispanic students fill three classrooms. If our demographics actually represented FCPS, we would enroll 180 black and 460 Hispanic students.”²⁰ Principal Bonitatibus was expressing the concern—shared by others regarding elite and specialized schools across the country—that the school enrolls too many Asians.
- Honors and gifted programs have been equity targets because of the disproportionate racial makeup of the classes—again, a perception of too many Asians. Culver City High School English teachers, for example, presented data at a board meeting last year showing Latino and black students underrepresented in advance placement courses while Asian students were overrepresented based on their share of the student population.²¹ The equitable answer developed by the Los Angeles-area school for the perceived problem of too many Asian honors students was to eliminate the honors courses entirely.
- Among many institutions of higher education that are removing race-neutral admissions criteria such as standardized testing to further equity, Columbia University has formally announced that it will no longer require SAT or ACT scores for its applicants.²² Asian Americans are simply performing too well on the tests compared to others frustrating schools’ efforts to achieve equity of outcome.

Equity Creep in Public Safety

- I testified before Congress last year about Christina Yuna Lee, Michelle Alyssa Go, and Yao Pan Ma. They are all Asian American murder victims. Sadly, I could testify here about many others. There has been much reporting on a spike in crimes against Asian Americans—particularly, violent crime—in the last few years. I do not believe it is a

²⁰ Coalition for TJ v. Fairfax County School Board, Pacific Legal Foundation, (E.D. Va. Alexandria Div. Mar. 10, 2021), <https://pacificlegal.org/wp-content/uploads/2021/03/Coalition-for-TJ-v.-Fairfax-County-School-Board.pdf>

²¹ Sandra Randazzo, *To Increase Equity, School Districts Eliminate Honors Classes*, Wall Street Journal, (Feb. 17, 2023, 5:30 AM) https://www.wsj.com/articles/to-increase-equity-school-districts-eliminate-honors-classes-d5985dee?mod=article_inline.

²² *Keep the SAT*, National Review, (Mar. 8, 2023, 6:30 AM), <https://www.nationalreview.com/2023/03/keep-the-sat/>.

Equity Creep in Healthcare

- In early 2021, the Center for Equal Opportunity discovered, exposed, and wrote letters to health officials in numerous states who were restricting the COVID-19 vaccine based on racial equity concerns.²³ These lifesaving vaccines were prioritized for BIPOC (Black, Indigenous, and People of Color) individuals—which does not include Asian—and all other races and ethnicities were instructed to find a place in the back of the line.
- The Center for Equal Opportunity just a few days ago, filed an amicus brief in the Supreme Court urging certiorari review of a New York equity regime that provides COVID antiviral treatments based on race.²⁴

We should remember that a favored race today may fall out of favor tomorrow. We have seen this movie before. If we do not address this now because the authoritarians are not yet coming for us, the old Niemoller adage [with updating] may ring true sooner than later:

First they came for the [Jews], and I did not speak out—because I was not a [Jew].
Then they came for the [whites], and I did not speak out—because I was not [white].
Then they came for the [Asians], and I did not speak out—because I was not [Asian].
Then they came for me—and there was no one left to speak for me.

If the equity of outcome agenda is not resisted, our civil rights laws mean little, and this era will be yet another blot on America’s race history.

IV. CONCLUSION AND WAY FORWARD

My invitation to participate in this briefing requested I address the “The Federal Response to Anti-Asian Racism in the United States.” Sadly, as I lay out, the federal government is one of the great purveyors of discrimination against Asian Americans and other accomplished ethnic groups in this country via its equity agenda. The question is what this body will do about it.

The progenitors of civil rights understood and accepted the undeniable fact that unequal outcomes exist, they always have, and always will when human beings are free to order their lives as they choose. Disparate outcomes are the rule in the real world, where flawed human

beings have agency to make countless decisions about all manner of issues and within various environments, families, and cultures. Rather than being by design, different outcomes are the product of countless factors.

²³ Devon Westhill, *Restricting COVID-19 vaccine based on race or ethnicity*, Wash. Times (Mar. 3, 2021), <https://www.washingtontimes.com/news/2021/mar/3/restricting-covid-19-vaccine-based-on-race-or-ethn/>.

²⁴ *Roberts v. McDonald*, No. 22-757 (2023) (cert. pet.) https://www.supremecourt.gov/DocketPDF/22/22-757/256892/20230313144959848_Roberts%20Amicus%20Brief.pdf.

In conclusion to this statement, I list a number of actions the Commission can and should take to address the discriminatory equity agenda. However, I would be remiss if I did not first comment on another major problem that is created when efforts are undertaken to artificially close achievement gaps.

The problem is that these efforts mask fundamental reasons, and stifle efforts to address, why there are a disproportionate number of certain groups underperforming in certain ways. An undue focus on an outcome-driven approach can paper over structural issues within certain demographic populations that contribute to a failure to meet standards in hiring, contracting, college acceptance, promotions, etc. Such obfuscation can in turn lead to these issues being neglected with minorities perhaps the most acutely affected. We have seen this problem exacerbated in the decades of unsuccessful racial preference experiments in higher education.

To be clear, I believe that most people who support equity measures do so because they want to support minorities in America. This is laudable and, if done right, can be positive. I work every day to support ideas and efforts that do that. Equity of outcome however is counterproductive, wrong, and subject to fierce backlash. It offends morality and violates civil rights laws. I believe in and continue to support those laws because they recognize, as a wise person once said: “The smallest minority on earth is the individual. Those who deny individual rights, cannot claim to be defenders of minorities.”

Recommendations:

- Investigate federal equity initiatives, their connection to federal civil rights, and report findings to Congress.
- Urge congress to investigate and expose any discrimination brought by these equity measures.
- Recommend Congress defund any activity associated with discriminatory equity initiatives.
- Encourage individuals and businesses that face equity-focused discrimination to seek appropriate relief including challenges in court.