
An Introduction to Critical Race Theory

***Part of the Diversity and Inclusion
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Chapter One

Articles

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Critical Race Theory and the Legal Profession

By Barbara E. Ransom, Esq. and Katherine Kennedy, Esq.

Adding its voice to 120 civil rights organizations and allies and a federal lawsuit that condemned former President Donald Trump's Sept. 9, 2020 Executive Order 13950,¹ the American Bar Association published "A Lesson on Critical Race Theory" in its *Human Rights Magazine*. Trump's order had eliminated training and education against conscious and unconscious bias rooted in critical race theory, even though its stated intent was to enforce the codified principles of 5 U.S.C. § 2301(b)

(2). In response, Professor Janel George provides a succinct summary of critical race theory that heightens our understanding of how the delivery of law and education intersect. She defines critical race theory as the practice of reviewing the racial caste system that relegates people of color to the bottom tiers, while also recognizing that "race intersects with other identities, including sexuality, gender identity, and others."²

Another voice within the American Bar Association also spoke out; Paulette Brown, Esq., past president of the American Bar Association and chief diversity and inclusion officer at Locke Lord, is quoted in a recent NAACP Legal Defense Fund statement advising employers to continue their racial sensitivity training programs, "rather than abandon them over concerns that they sow division."³ The false narrative propagated in Executive Order 13950 has proven too unconscionable to ignore. And, fortunately, the executive order has started a national conversation about critical race theory and the need to address racism in the American legal system.

Critical race theory has been used credibly to address bias and is popular with private and public employers as an effective deterrent against discrimination in the workplace. However, critical race theory is more than a training to reinforce diversity and inclusion. According to Chandra Ford and Collins Airhihenbuwa, critical race theory is "... the set of anti-racist tenets, modes of knowledge production, and strategies a group of legal scholars of color in the 1980s organized into a framework

targeting the subtle and systemic ways racism currently operates above and beyond any overly racist expressions."⁴ Professor Derrick Bell, father of critical race theory, described his people as the faces at the bottom of the well and cautioned the poorest whites who live their lives only a few levels above "that their deliverance depends on letting down their ropes. Only by working together is escape possible." Unfortunately, most simply watch because they are "mesmerized into maintaining their unspoken

commitment to keeping us where we are, at whatever cost to them or to us."⁵

To understand critical race theory, it is important to acknowledge that whiteness is property in American law and culture. From its establishment, our nation has used its laws to maintain an underclass and create privileges and rights that have been exclusive to white, male, property-owning American citizens. In her seminal article, "Whiteness as Property,"⁶ Cheryl Harris "provides an extensive framework of whiteness as a traditional

and modern form of property, which includes the conception of reputation as property."⁷ Harris explains the racialization of identity in property law, as slavery subordinated Black and indigenous people to the point of being the property of those who fit the code of whiteness. American law, then, has been built on a foundation of protecting an actual property interest in whiteness itself.

Sadly, American law is rife with cases that demonstrate how U.S. courts have used junk science, such as eugenics and craniology, to adjudicate race. "Owning white identity as property affirmed the self-identity and liberty of whites and, conversely, denied the self-identity and liberty of Blacks." Harris warned that white privilege is expected and afforded legal protection in American case law. Harris also warned that whiteness as property will continue to morph and change unless and until it is directly confronted, which is exactly what Executive Order 13950 sought to avoid.



Continued on page 4

Critical Race Theory and the Legal Profession

Continued from page 3

President Joseph R. Biden revoked Executive Order 13950 on his first day in office.⁸ Executive Order 13985 acknowledges the existence of “[e]ntrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities.” Biden compels federal agencies to consult and engage with communities that historically have been underserved and underrepresented by the government. Executive Order 13985 also orders that all who have been deemed “othered” and placed lower in the racialized and gendered caste system than white males be treated equitably by the federal government. Executive Order 13985 reassuringly demonstrates the current administration’s commitment to combat

The PBA Diversity and Inclusion Committee will offer a seminar entitled "Critical Race Theory-101" to help Pennsylvanian lawyers who want to learn more about critical race theory.

the existing culture of otherness built on illusions of superiority that believes that using critical race theory to dismantle colonial frameworks and overturn the racial caste system is “divisive, anti-American propaganda.”⁹ However, our nation has a long way to go to overcome the continued divide and racist legacy.

The PBA Diversity and Inclusion Committee will offer a seminar entitled "Critical Race Theory-101" to help Pennsylvanian lawyers who want to learn more about critical race theory. Be on the lookout for this seminar which will take place at the end of June.



Barbara E. Ransom, Esq. specializes in rights secured pursuant to the 14th Amendment and federal and state laws that guarantee equal protection and due process to all. She has worked for the Public Interest Law Center in Philadelphia, the Pennsylvania Human Relations Commission and Disability Rights California. She currently serves as an adjunct professor in Lesley's Graduate School of Education and takes on cases where her acquired skills can be useful to help those whose voices would otherwise not be heard.



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Endnotes

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Critical Race Theory as Intellectual Property Methodology

Anjali Vats and Deidré A. Keller*

I. Introduction

As Margaret Chon's piece in this collection so eloquently articulates, Critical Legal Studies emerged in the 1970s as a project of redefining how scholars think about law, its neutrality, and its indeterminacy. The principles of Critical Legal Studies, when applied to intellectual property (IP), produced what John Tehranian and Laura Foster call Critical Intellectual Property.¹ Invested in the workings of power, Critical Intellectual Property draws from the scholarship that Chon outlines to imagine new, often more socially just, forms of knowledge production. We follow Chon in this chapter by tracing the emergence of Critical Race Theory (CRT) and subsequently Critical Race Intellectual Property (Critical Race IP). We also articulate the central aims, evolutions, and methodologies of both. CRT advanced frameworks for understanding how and why attempts at ending race discrimination had failed.² It evolved in later years, into a theory that had the breadth and depth to help explain race in international contexts as well as domestic ones.³ In the 1990s, scholars like Keith Aoki⁴ and Rosemary Coombe⁵ started conceptualizing intellectual property through the lenses of race and coloniality. They offered a foundation upon which to build Critical Race IP.

Critical Race IP 'refers to the interdisciplinary movement of scholars connected by their focus on the racial and colonial non-neutrality of the laws of copyright,

* Thanks are due to Maria Ukattah and Akendita Amoro who provided research assistance. All errors and omissions are the sole responsibility of the authors.

¹ John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration & Control*, 2012 BYU L. REV. 1233 (2012); Laura A. Foster, *Situating Feminism, Patent Law, and the Public Domain*, 20 COLUM. J. GENDER & L. 262 (2011).

² Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

³ FRANCISCO VALDEZ ET AL., *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002).

⁴ Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996).

⁵ Rosemary Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, in *LAW IN THE DOMAINS OF CULTURE* 21 (Austin Sarat & Thomas R. Kearns eds., 1998).

patent, trademark, right of publicity, trade secret, and unfair competition using principles informed by CRT.⁶ Intellectual property law, as Critical Legal Studies argued of all law, is a tool of concealing, managing, and relocating power. That power may take different forms, such as white supremacy, misogyny, ableism, or classism. Critical Race IP zeros in on one axis of power, race, often using intersectional methods. Drawing on the foundational premises of CRT as a starting point for thinking domestically and internationally about the racial impacts of intellectual property law, Critical Race IP is centred on investigating and interrogating how law protects what Cheryl Harris defines as ‘white supremacy’.⁷ In a system of political economy in which intellectual property is increasingly valuable, bringing the principles of CRT to bear on copyright, patent, trademark, and unfair competition analyses are particularly important. Issues from pharmaceutical patenting to reproduction of educational materials for students implicate questions of racial and distributive justice in the Global South. In this brief chapter, we lay out the origins of CRT and its central methods, articulate a Critical Race IP, and contemplate how CRT’s interdisciplinary and transnational methods might apply to intellectual property. In accomplishing the latter, we use India’s commitments to access to knowledge in the recent Delhi University copyshop case and controversy over Novartis’s drug Gleevec to show how CRT’s central insights can open possibilities for reading intellectual property law with attunement to structures of racial power.

II. Critical Race Theory’s Origins and Methods

A. Origins and Tenets

CRT began as a uniquely American legal theory, borne out of the rollback of the civil rights gains produced by cases such as *Brown v. Board of Education* (1954) and statutes such as the Voting Rights Act of 1965.⁸ As Black thinkers considered questions around the basis and consequences of the decision in *Brown*, i.e. a social scientific study that enabled a white saviour mentality,⁹ Derrick Bell, the first Black law professor tenured at Harvard Law School,¹⁰ began developing a metatheory to describe race relations in the United States (US). ‘Racial realism’, as he called it,

⁶ Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 736 (2018).

⁷ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Voting Rights Act of 1965, 89 Pub. L. 110, 79 Stat. 437 (1965).

⁹ Jelani Cobb, *The Ambivalent Legacy of Brown v. Board*, NEW YORKER (15 May 2014), <https://www.newyorker.com/news/daily-comment/the-ambivalent-legacy-of-brown-v-board> (rehearsing the mixed aftermath of *Brown*, in particular, the consequences that have flown from the Court’s reliance upon the social science ‘of African-Americans who were psychologically “damaged” by the legacy of slavery and the ongoing travesty of segregation’).

¹⁰ KIMBERLÉ CRENSHAW ET AL., *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1996).

contended that racism is a permanent part of American society.¹¹ Bell characterized this painful idea, written in the 1992 bestseller *Faces at the Bottom of the Well*, as a path to freedom.¹² CRT flourished in the 1980s and the 1990s, with scholars of colour taking it up across the nation. Charles Lawrence III, Richard Delgado, Jean Stefancic, Ian Haney López, Kimberlé Crenshaw, Neil Gotanda, Mari Matsuda, Sumi Cho, and Angela Harris were among the first Race Critics in the US. As it grew, CRT began to take up issues beyond civil rights, by contemplating how laws that purported to advance race equality actually served to reinforce, in Alan Freeman's language, the 'perpetrator perspective'.¹³ For instance, legal standards such as strict scrutiny, used to evaluate Equal Protection challenges to legislation, required that even ameliorative anti-racist protections, including busing and affirmative action, meet high levels of constitutional muster.¹⁴

In the early 2000s, CRT reached a crossroads: many in the legal academy claimed, based on Clinton era prosperity and rising diversity, that the original purpose of CRT had been fulfilled and there was nothing more to say about the law's racial investments.¹⁵ CRT was dead, they asserted. However, as the election of President Barack Obama and, subsequently, President Donald Trump, demonstrated CRT still had much work to do. The revitalization of CRT was due, in part, to the growth of critical race studies more generally across disciplines, including sociology, communication, and ethnic studies.¹⁶ Returns to theories of whitelash,¹⁷ racial capitalism,¹⁸ and social death,¹⁹ among others, enriched the study of race while invoking the deep women of colour feminist roots of anti-racist theory and praxis.²⁰ The subsequent growth of CRT was also fuelled by the uptake of terms

¹¹ Derrick Bell, *Introduction*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

¹² *Id.*

¹³ Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

¹⁴ CRENSHAW ET AL., *supra* note 10.

¹⁵ VALDEZ ET AL., *supra* note 3.

¹⁶ *Id.*

¹⁷ For an early articulation of white resistance to racial progress, see, e.g., MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY* (1967), excerpted at *Read Martin Luther King, Jr. on White America's Delusions*, ATLANTIC (1 March 2018). For more recent treatment engaging the topic in the wake of Donald Trump's election, see, e.g., Sweta Rajan-Rankin, *Brexit Logics: Myth and Fact: A Black Feminist Analysis*, 7 FEMINISTS@LAW 1 (2017); and JARED YATES SEXTON, *THE PEOPLE ARE GOING TO RISE LIKE THE WATERS UPON THE SHORE: A STORY OF AMERICAN RAGE* (2017).

¹⁸ For the original articulation of this concept, see CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983). For a more recent treatment of Robinson's theory, see Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism*, BOSTON REVIEW (12 January 2017). We are aware of Nancy Leong's article, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); however, we believe that Robinson's conceptualization of racial capitalism is foundational and provides a deeper and broader basis for contemporary considerations that are of particular relevance to Critical Race IP.

¹⁹ For an early articulation of 'social death', see ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* (1982). For more recent discussions of social death relative, in particular, to black subjects, see Frank B. Wilderson III, *Afro-Pessimism and the End of Redemption*, HUMAN FUTURES (30 March 2016).

²⁰ See, e.g., *HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE* (Keeanga-Yamahtta Taylor ed., 2017).

such as intersectionality in popular culture.²¹ As publics broadly embraced the language of CRT as a tool to fight against racism and sexism, the need for renewed emphasis on the study of race became evident. Since, the rise of the ‘post-racial’ in the US, followed by the rise of racist, misogynist, sexist, and ableist demagogues globally has driven a great deal of the second generation of critical race scholarship.²² In 2011, Francisco Valdez, Angela Harris, and Jerome Culp published an edited collection, *Crossroads, Directions, and a New Critical Race Theory*, that articulated the pressing need for CRT, including attention to international developments in race and law.²³ The same year, Devon Carbado confirmed this sentiment in his law review article ‘Critical What What?’ which posited that CRT is a living, breathing theory that must evolve.²⁴

CRT is loosely defined by a set of governing tenets which assert that: 1) law creates an appearance of racial equality while actually protecting the structural power of whiteness and 2) those invested in anti-racism must reveal and contest the racial non-neutrality of law. Two terms frequently come to the fore in discussions of CRT: narratives and interest convergence. The former, articulated by scholars such as Delgado, Stefancic, and Bell, describes the need to produce stories that counter the hegemonic power of law. Narratives, because of their style and content, render whiteness visible through their centring of histories of racial oppression. Richard Delgado’s *The Rodrigo Chronicles: Conversations About America and Race* and Derrick Bell’s *Faces at the Bottom of the Well: The Permanence of Racism* demonstrate the power of narrative through their retelling of the experiences of being a person of colour in America, particularly in legal contexts.²⁵ The latter, as articulated by Lani Guinier, explains why the social justice pendulum swings back after moments of intense racial progress.²⁶ Mary Dudziak offers an explanation of how interest convergence and its corollary, interest divergence, work in practice by

²¹ See, e.g., Christine Emba, *Intersectionality*, WASH. POST (21 September 2015) (‘Over the past several years “intersectionality” has become a feminist buzzword, deployed in discussions of pop culture, political action and academic debate. Considering its recent prominence, it’s surprising to realize that the term has been around only since 1989—it was coined by legal scholar and critical theorist Kimberlé Crenshaw, in a paper illustrating how black women were often marginalized by both feminist and anti-racist movements because their concerns did not fit comfortably within either group.’). See also Clare Foran, *Hillary Clinton’s Intersectional Politics*, ATLANTIC (9 March 2016) (‘Clinton’s invocation of intersectionality may also broaden popular understanding of the concept. In popular culture, it has been variously deployed. Intersectionality has been denounced by conservatives as a form of identity politics. Progressives, meanwhile, have used the term both to conceptualize identity and as a framework to broadly explain how different structural barriers operate simultaneously. Clinton is using the concept to denote an integrated approach to dealing with deeply intertwined environmental, economic, and social problems.’).

²² See, e.g., Kimberlé Williams Crenshaw, *Race to the Bottom: How the Post-racial Revolution Became a Whitewash*, BAFFLER (June 2017).

²³ VALDEZ ET AL., *supra* note 3.

²⁴ Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011).

²⁵ RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995); BELL, *supra* note 11.

²⁶ Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004).

demonstrating, through meticulous historical evidence, how desegregationist impulses emerged from national desires to prevent the global spread of Communism not ensure the well being of African Americans.²⁷ As with Abraham Lincoln's decision to free enslaved persons,²⁸ the equality produced by the civil rights movement was grounded in white interests in the nation.²⁹ That is to say, emancipation and desegregation decisions were about preserving the integrity and power of the US in the face of internal and external opposition more than embracing socially just racial politics. Guinier demonstrates that, while prompted by moments of interest convergence, both emancipation and civil rights reforms were followed by interest divergence and the reassertion of white supremacy.³⁰

Inherent in CRT's tenets is an understanding of race as a constantly evolving, socially constructed category that ascribes meaning to otherwise biologically and physically meaningless phenotypic differences.³¹ As Michael Omi and Howard Winant show in their groundbreaking book *Racial Formation in the United States: From the 1960s to the 1990s*, race is a culturally and historically contingent concept that evolves over time.³² CRT resists essentialized understandings of race and takes as a presupposition the notion that racism also evolves over time and certainly did not end with the advent of rights-based remedies. Rather, race and racism are understood as evolving along with law. By way of example, Race Critics argued that white Americans embraced formal remedies to racism that maintained their social power without addressing the structural inequalities that produce exclusion and inequity.³³

Scholars have applied these CRT insights to international contexts arguing that 'if race is an idea, it is a global one. It is no coincidence that the idea of race emerged at the same time as the age of empire and nation-building'.³⁴ In a 2019 article, Michelle Christian asserted that 'all of modernity's "governing technologies"—Western imperial expansion, transnational capitalist political economy, chattel slavery, state formation building, knowledge production, categorization, citizenship, and human value—are hierarchically racialized'.³⁵ Recognizing this, we turn

²⁷ Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

²⁸ Abraham Lincoln, President of the United States, *Emancipation Proclamation* (1 January 1863) (transcript available at <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html>).

²⁹ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 514 (1976).

³⁰ Guinier, *supra* note 26.

³¹ See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 9–11 (3d ed. 2017) (discussing, as basic tenets of CRT, race as social construction, differential racialization dependent upon time, place, and anti-essentialism).

³² MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994).

³³ See, e.g., CRENSHAW ET AL., *supra* note 10.

³⁴ Deborah Thompson, *Through, Against and Beyond the Racial State: The Transnational Stratum of Race*, 26 CAMBRIDGE REV. INT'L AFF. 133, 139 (2013).

³⁵ Michelle Christian, *A Global Critical Race and Racism Framework: Racial Entanglements and Deep and Malleable Whiteness*, 5 SOC. RACE & ETHNICITY 169, 171 (2019).

next to the eclectic, interdisciplinary methods developed within CRT to reveal and contest white racial power.

B. Methods

Method is always, we posit, a thorny question in the context of legal scholarship. While legal scholars emphasize the need to understand common law histories and cite dispositive authorities, critical race scholars situate epistemology itself differently, understanding it as not a question of institutional authority but of cultural, political, and economic structure and embodied positionality.³⁶ Race and law scholars, including legal historians and critical legal scholars, frequently adopt methods from outside the legal academy in an attempt to enrich the practical aspects of law.³⁷ CRT did so by drawing upon emergent theories and practices in ethnic studies, as well as people of colour feminist methodologies centred on performance and bodies. Imani Perry argues specifically for ‘a more central role for [the interdisciplinary methods of] cultural studies work within the [CRT] movement’.³⁸ While we do not trace all of these methods, we aim to provide guiding meta-methodological principles for developing theories and practices that decentre whiteness. We want to emphasize that CRT’s methodologies are primarily structured through the organizing *objectives* of the field. That is to say that Critical Race Theorists draw upon a range of interdisciplinary methodological practices in order to achieve the *ends* of making racial power visible and contesting the oppressive forces of white supremacy.³⁹ Critical Race Theorists use a range of qualitative, quantitative, and humanistic methods to ask these questions about racial power. Those methods can be traced to the same genealogies, namely the articulation of ethnic studies as a field in the US and its subsequent burgeoning in disciplines across the academy.

Perhaps most importantly, CRT decentres whiteness through focus on the embodied experiences of people of colour. Embodiment here refers to the methodological practice of understanding and narrating the lived experience of people of colour as a lens for identifying and undoing structural inequalities. In *This Bridge*

³⁶ See, e.g., Maria C. Malagon et al., *Our Experiences, Our Methods: Using Grounded Theory to Inform a Critical Race Theory Methodology*, 8 SEATTLE J. SOC. JUST. 253 (2009).

³⁷ See, e.g., Menah Pratt-Clarke, *A Black Woman’s Search for the Transdisciplinary Applied Social Justice Model: Encounters with Critical Race Feminism, Black Feminism, and Africana Studies*, 5 J. PAN AFR. STUD. 83 (2012).

³⁸ Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflections on Methods*, 50 VILL. L. REV. 915, 915 (2005).

³⁹ Arild Buanes & Svein Jentoft, *Building Bridges: Institutional Perspectives on Interdisciplinarity*, 41 FUTURES 446 (2009); *Id.* On transdisciplinary methods generally, see Marilyn Stember, *Advancing the Social Sciences through the Interdisciplinary Enterprise*, 28 SOC. SCI. J. 1 (1991).

Called My Back: Writings by Radical Women of Color, Cherríe Moraga describes in detail the physical and psychological effects of racism, sexism, and classism.⁴⁰ ‘How can we—this time—not use our bodies to be thrown over a river of tormented history to bridge the gap?’⁴¹ In this line, Moraga points us to the lived experiences of racism, the toll that such lived experiences take on the body, and the role of narratives in building coalitional politics. ‘How could it be that the more I feel with other women of colour, the more I feel myself Chicana, the more susceptible I am to racist attack!’⁴²

The methodological task that Moraga performs in these sentences anchors not only CRT but ethnic studies. Ethnic studies, a project that emerged across the country in the post-civil rights moment, ‘started to emphasize ethnic consciousness, ethnic identity, and ethnic pride.’⁴³ In the years after ‘Black is beautiful’ became a rallying cry, the failures of the civil rights movement and continuing whiteness of law faculty became lightning rods for critique. Early Critical Race Theorists, such as Derrick Bell and Richard Delgado, used narrative, sometimes in the form of short stories, alongside traditional legal theory and doctrinal analysis, as methodological tools for revealing the structural dangers of white liberalism.⁴⁴ Bell’s doctrinal critiques of *Brown II* and Delgado’s imaginings of law revealed how white supremacy continued to function despite the apparent gains of the civil rights movement.⁴⁵

‘Narrative’ is perhaps the method most distinctively associated with CRT. In distinguishing CRT’s narrative method from those of other disciplines, for instance English or communication studies, Robert A. Williams, Jr. writes in a Foreword to the *Rodrigo Chronicles*:

Delgado’s stories are many things, but mostly they are outsider stories. They help us imagine the outside in America, a place where some of us have never been and some of us have always been, and where a few of us, like Rodrigo, shape-shift, like the trickster, asking the hard questions, the bedevilling questions, without answers, questions about what it means to be outside, what it means to be inside, and what it means to be in-between in America.⁴⁶

⁴⁰ THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 1981).

⁴¹ *Id.*

⁴² *Id.*

⁴³ PHILIP Q. YANG, ETHNIC STUDIES: ISSUES AND APPROACHES 4 (2000).

⁴⁴ BELL, *supra* note 11; RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2d ed. 2012).

⁴⁵ Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995).

⁴⁶ Robert A. Williams, Jr., *Foreword*, in Richard Delgado, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE xi, xii (1995).

This narrative methodology does not mean that CRT is not doctrinally oriented, however. Bell's *Faces at the Bottom of the Well* is a carefully footnoted set of short stories that demonstrates how narrative can critique law from an outsider perspective.⁴⁷ Moreover, canonical works in CRT such as 'Whiteness as Property',⁴⁸ 'A Critique of "Our Constitution is Color-Blind"',⁴⁹ and 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color'⁵⁰ show how uncovering the influences of whiteness is a project of doctrine and policy that centres new and distinct identities. Layered atop these methodological commitments are interdisciplinary ways of thinking. Critical race scholars across the academy have made their cases by drawing on a diverse range of approaches, including archival research, oral histories, ethnographies, interviews, content analyses, discourse analyses, and more. By drawing on a range of approaches, Critical Race Theorists can speak across disciplines, in different languages of expertise. Methodological diversity, which maintains a fidelity to intersectional and emancipatory theorizing by people of colour, provides a flexible approach to addressing problems of race in law.

Daniel Sorlorzano and Tara Yosso, in speaking about critical race methodologies, offer a set of guiding principles that condenses the anchoring tenets of CRT.⁵¹ The pair counsels: (1) centring race and racism in all aspects of the research and praxis; (2) conducting intersectional analyses that attend to class, gender, and other axes of oppression; (3) challenging traditional ideologies around research, such as power-laden myths of expertise and objectivity; (4) refusing to theorize for theory's sake, in favour of focusing on solutions to the real-world problems faced by people of colour; (5) centring the racialized, classed, and gendered experiences of marginalized individuals in order to articulate research problems and myriad solutions; and (6) embracing interdisciplinary frameworks for thinking through these issues.⁵² Sorlorzano and Yosso provide a foundational basis from which to articulate research questions and navigate practical solutions around race. The meta-methodological insights that CRT brings to the table, using multiple and varied quantitative, qualitative, and humanistic approaches, are ethical commitments to attending to race via theories of the flesh as well as theories of materiality, culture, political economy, representation, embodiment, and feeling.⁵³ In the next section, we demonstrate how

⁴⁷ BELL, *supra* note 11.

⁴⁸ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

⁴⁹ Neil Gotanda, *A Critique of 'Our Constitution Is Color-Blind'*, 44 STAN. L. REV. 1 (1991).

⁵⁰ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

⁵¹ Daniel G. Sorlorzano & Tara J. Yosso, *Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research*, 8 QUALITATIVE INQUIRY 23 (2002).

⁵² *Id.*

⁵³ See, e.g., Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006).

these condensed principles can be applied to Critical Race IP, using the examples identified in the Introduction.

III. Critical Race Intellectual Property's Origins and Methods

A. Origins and Tenets

We have written an extensive history of the intersections between race and intellectual property previously, in a law review article entitled 'Critical Race IP'.⁵⁴ That article maps, in detail, the antecedents of Critical Race IP and how they form a coherent body of race scholarship that not only suggests the need to continue to study the intersections of race and intellectual property but also consider how CRT, as a coherent movement originating in the legal academy, can inform studies of race and knowledge production. We suggest several themes around which intellectual property and race scholarship has formed in that article. They include: protection of traditional knowledge in globalizing intellectual property regimes, definition and management of the public domain, framing and reframing of infringement and counterfeiting, access to knowledge, and alternatives to intellectual property.⁵⁵ These categories offer a global *racial* and *colonial* framework for understanding how and why race, national identity, and intellectual property came to be intertwined and continue to be so. Understanding the histories of the globalization of intellectual property is vital to tracing the emergence of contemporary intellectual property law as well as its intersections with race and colonialism. In short, the international harmonization of intellectual property laws is a process that has been 'always already' raced.⁵⁶ Exploring how and why is an important precursor to racial and colonial justice.

The term Critical Race IP is a recent one, that we adopt in response to Critical Intellectual Property's articulation of an analogue to Critical Legal Studies. Critical Race IP marks the longstanding and intentional engagement with race and coloniality by intellectual property scholars, in a way that echoes the tenets of CRT and posits new ones specific to Critical Race IP. The term is intended to help situate the wealth of scholarship in intellectual property that addresses the racial and colonial inequalities that stem from the propertization and privatization of knowledge in a larger legal and racial landscape. Critical Race IP as a concept is less about labelling the work of individual scholars and more about engaging colonialism and racism explicitly, in order to make them visible and transformable. Scholars including Keith Aoki, Kevin J. Greene, Lateef Mtima, Olufunmilayo Arewa, Ruth Okediji, Boatema Boateng, Sonia Katyal, and Madhavi Sunder, who

⁵⁴ Vats & Keller, *supra* note 6.

⁵⁵ *Id.*

⁵⁶ See LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* (2001).

centre their analyses on race and colonialism, transformed the law and economics conversations that dominated intellectual property law. They created conceptual space for social justice based frameworks for copyright, patents, trademarks, unfair competition, and rights of publicity.⁵⁷ Critical Race IP is a commitment to leverage this radical space to engage in intersectional and transnational analyses that illuminate the perspectives of racially marginalized communities, including those in the Global South. Locating whiteness in intellectual property is one step in accomplishing this goal.

Though this section could go into much greater depth about the landscape of Critical Race IP, we have intentionally kept it brief, in recognition of the evolving nature of the project. As two conferences on the topic have demonstrated, what constitutes Critical Race IP is a question-in-progress, shaped by scholarship to come as well as scholarship past and present. The challenges of defining the public domain, rhetorically framing infringement, ensuring access to knowledge, and respecting traditional knowledge remain issues of ongoing negotiation in critical race studies. In the next section, in order to show how Critical Race IP might develop, we engage the tools CRT provides to unearth the racial commitments embedded in an example of the racial and colonial power dynamics at play in attempts at harmonization.

B. Methods

The meta-methodological principles that guide CRT also guide Critical Race Intellectual Property. In this section, we apply the work of Critical Race theorists, including Sorlorzano and Yosso to lay out an intellectual property specific critical race methodology. We centre the traditional tenets of CRT, i.e. the need to articulate how formal rights-based solutions fail to achieve equity and imagine paths for combatting racial injustice, via the examples. Through examination of India's resistance to international intellectual property regimes, we make a case for utilizing each of the principles of critical race methodology that Sorlorzano and Yosso identify in the context of Critical Race IP. We emphasize that Critical Race IP is a meta-methodological ethical project that guides the development of research questions, which evolve from and point to particular methodologies. Those methodologies are culled from a vast array of options in the humanities, hard sciences, and social sciences. While there is much to be said about the current state of critical race studies and its methodologies, in this brief chapter, our goal is to lay out a

⁵⁷ See MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 23 (2012) ('[L]aw must facilitate the ability of all citizens, rich or poor, brown or white, man or woman, straight or gay, to participate in making knowledge of our world and to benefit materially from their cultural production.').

framework for CRT's macro-methods, while leaving the micro choices for another piece. That framework is also a mechanism for remaining accountable to people of colour and intersectionality in making methodological choices. Critical Race IP teaches us to maintain a steadfast focus on race and a commitment to racialized subjects, even as we engage in different approaches that zero in on racism and its effects.

1. Case Study: India against Globalized Intellectual Properties

India, a country that is frequently labelled an infringer,⁵⁸ exemplifies the intersectional racial and colonial complexities of globalized intellectual property law. As the World Trade Organization (WTO) was overseeing the globalization of intellectual property, India became an important voice for the developing world.⁵⁹ A vast array of research discusses India's responses to the harmonization of various types of intellectual property law.⁶⁰ In this last part of the chapter, we explore some of this research as a way of showcasing how CRT can function as a lens for thinking with and expanding upon existing intellectual property scholarship, through a variety of methodologies.

Two books anchor our analysis: *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* by Prashant Reddy and Sumathi Chandrashekar,⁶¹ and *Pharmocracy: Value, Politics, and Knowledge in Global Biomedicine* by Kaushik Sunder Rajan.⁶² These books represent different possibilities and methodologies for approaching the study of inequity and intellectual property, while also pointing to some of the ways Critical Race IP can be further developed and cultivated. This is the crux of Critical Race IP, exploring the race and colonialism-based implications of intellectual property law in as of yet unexplored ways while advocating for social justice.

Neither of these books explicitly engages with questions of race. Rather, they tell legal and cultural histories of intellectual property law via analyses of nation, power, governance, globalization, capitalism, and science. Nonetheless, like the Critical Legal Studies scholars before them, they attend to important questions of marginalization and oppression. They also showcase ways to reveal what Rosemary Coombe calls 'the cultural life of intellectual properties.'⁶³ We chose these books in part because they show us the space that exists within intellectual property law for

⁵⁸ See, e.g., *The Roots of Innovation*, US Chamber International IP Index (February 2017), http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC_IP_Index_2017_Report.pdf.

⁵⁹ SUMATHI CHANDRASHEKARAN & PRASHANT REDDY, *CREATE, COPY, DISRUPT: INDIA'S INTELLECTUAL PROPERTY DILEMMAS* 38 (2017).

⁶⁰ See, e.g., Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 74 (2004).

⁶¹ CHANDRASHEKARAN & REDDY, *supra* note 59.

⁶² KAUSHIK SUNDER RAJAN, *PHARMOCRACY: VALUE, POLITICS, AND KNOWLEDGE IN GLOBAL BIOMEDICINE* (2017).

⁶³ ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998).

making race visible and centring racialized subjects, while also working through issues of structural inequality and political economy.

Critical Race IP makes meta-methodological moves that are analogous to those that CRT made. The books we chose embrace Critical Intellectual Property's animating themes to reveal bits and pieces of the racial substructures that anchor intellectual property, while primarily attending to structural inequality and political economy. 'Where is race in law and political economy?' Angela Harris asks.⁶⁴ Answering that question requires that we 'trace the work of legal institutions, principles, and structures in simultaneously establishing and securing the "treadmill" of industrial capitalism' and the "racial contract" on which the treadmill depends'.⁶⁵ Critical Race IP must fill in the interstitial gaps that scholarship such as *Create, Copy, Disrupt* and *Pharmocracy* make visible by asking questions and telling stories about the intersections of *race* and *coloniality* with existing power structures. Built into the histories and institutions that shape inequity under capitalism are more racial and colonial stories that need telling.

As colleagues of the late Shamnad Basheer,⁶⁶ Reddy, and Chandrashekar, the authors of *Create, Copy, Disrupt*, carry out *Spicy IP*-style legal analysis of the evolution of India's intellectual property systems⁶⁷ through the post-colonial period, the rise of harmonized intellectual property, and contemporary access to knowledge struggles. The book primarily employs doctrinal analysis and legal history as methodologies. Yet it also unavoidably tells a cultural history about the development and economic progress of a post-colonial nation through its historical evolution, which includes articulating a position for the Global South with respect to intellectual property, e.g. embracing harmonization with caveats, and asserting global leadership in imagining alternatives to the Global North's restrictive knowledge ownership practices. At the forefront of the argument that Reddy and Chandrashekar make are India's resistance to the Berne Convention, the anti-evergreening ethic of Indian patent law in *Novartis v. Union of India and Ors* (2013), and the recent Delhi University copyshop case. Through familiar legal doctrinal methods laced with histories of the Indian nation, Reddy and Chandrashekar suggest consideration of India in a new light.

One of the great strengths of the book that Reddy and Chandrashekar have written is that it epistemologically grounds India in an ethics other than that of the US or the WTO. By telling a story in which India is heroic, albeit sometimes imperfectly, *Create, Copy, Disrupt* pushes the reader to embrace a subjectivity grounded in Asianess. This reversal of power acts in the same way that Bell's attentiveness to

⁶⁴ Angela Harris, *Where Is Race in Law and Political Economy*, LAW & POL. ECON. (30 November 2017).

⁶⁵ *Id.*

⁶⁶ Seemantani Sharma, *Book Review of Create, Copy, Disrupt: India's Intellectual Property Dilemmas*, J. INTELL. PROP. L. & PRAC. 2, n. 4 (2017) (accompanying text, noting that the *Spicy IP* blog was founded by Basheer and the authors of *Create, Copy, Disrupt* were regular contributors).

⁶⁷ *Id.*

the ‘faces at the bottom of the well’ does.⁶⁸ The Global South is no longer cast as a vast, ahistoric, chaotic, and Orientalized space ‘out there’ but a reasoned and principled actor, with a past and future grounded in advocacy for its people. Even without focusing specifically on race, Reddy and Chandrashekarun unavoidably centre racial and national identity. However, the contours and stories of race and coloniality do not take centre stage. The audience is not, for instance, privy to the ways that each of the case studies implicate racial formation or interface with racial projects. Nor is the reader explicitly introduced to the implications of India’s political positions for other places in the Global South, in Asia, Africa, and the Middle East. Here, Critical Race IP, by bringing race and coloniality centric analysis into the picture, can help to deepen knowledge of the racial and colonial implications of the moments that Reddy and Chandrashekarun study. The authors’ methodological choices accomplish many of the goals that Sorlorzano and Yosso lay out, including attending to questions of class, interrogating issues of power embedded in Western law, centring histories of India in tangible and accessible ways, and drawing upon interdisciplinary thought, here culturally informed. But they also create critical space for inquiries that centre outside experiences of race and gender, drawing upon standpoint epistemologies.

Sunder Rajan’s *Pharmocracy* is an impressively detailed ethnographic study of the pharmaceutical industry in India, crafted over years of fieldwork in Indian legal and cultural spaces. “Pharmocracy” is the term he uses to describe ‘the global regime of hegemony of the multinational pharmaceutical industry’,⁶⁹ and understand how capitalism has monetized and colonized values around human health. Pharmaceutical patents are one battleground for control over who decides which humans should be deemed valuable and in what ways.⁷⁰ *Pharmocracy* covers two case studies in detail: a disastrous Gardasil study that devalued the lives of poor women of colour and the battle over the validity of Novartis’ Gleevec patent. Through these two case studies and the interviews and institutional archival research that anchor them, the reader learns that the definitions of public health and intellectual property are not fixed but contested, through ethical commitments, political economy, and institutional choices.

Sunder Rajan’s *Pharmocracy* does not centre race or coloniality as explicit analytics. Instead, in the terms Sorlorzano and Yosso lay out, it conducts intersectional analyses of power, specifically national identity, class, and gender. Sunder Rajan implicitly interrogates the racialization of global citizenship by speaking about hierarchies within public health and neoliberal capitalism. Just under the surface of his analysis are deeper questions about how Indianness came to be racialized

⁶⁸ BELL, *supra* note 11.

⁶⁹ KAUSHIK SUNDER RAJAN, *PHARMOCRACY: VALUE, POLITICS, AND KNOWLEDGE IN GLOBAL BIOMEDICINE* (2017).

⁷⁰ *Id.*

and how such racialization functions.⁷¹ Indeed, India is, perhaps, the quintessential example of the colonial subject that Homi Bhabha would argue almost but not quite proves their humanity.⁷² But Sunder Rajan challenges central characteristics of power, including the right to define terms in patent law, and engages in a grounded and policy-centred analysis, including India's pushback against intellectual property harmonization in ways that call for deeper attention to the commodification and instrumentalization of race. He also turns to interdisciplinary frameworks, such as those offered by law, sociology, science and technology studies, critical theory, and cultural studies, in order to understand how 'value' is defined and co-opted in public health contexts, often through assumptions about disposability. Sunder Rajan engages a critical project that focuses on the devaluation of marginalized identities in the Global South and the politics of recognition through which nation-states resist being rendered valueless under capitalism. Yet there good reasons to further investigate how race and coloniality implicate these values as well. For instance, intersectional feminist methodologies might centre the experiences of those women in the Gardasil study while racial capitalist methodologies might reveal how *Novartis* implicates racial and colonial power. Sunder Rajan's book aids in creating intellectual space for such studies. Together, these two books illustrate that while existing scholarship attends to important issues of inequity under capitalism, there are questions of race and coloniality that remain to be explored, in explicit ways that draw on Critical Race IP.

IV. Conclusion

In this chapter, we outline an expansive, globally oriented Critical Race IP methodology. We utilize the example of recent treatment of India's intellectual property positions to demonstrate the rich potential offered by CRT methodologies. *Create, Copy, Disrupt* and *Pharmocracy* demonstrate how a transnational Critical Race IP can evolve, through layers of analysis of power, political economy, race, and coloniality. The methodological project of Critical Race IP is to locate the racial and colonial pressure points in intellectual property law and interrogate them, in order to reimagine them. CRT approaches have the potential to contribute to intellectual property scholarship by aiding in resisting the dominant framework of law and economics and supporting the evolving work on the relationship of marginalized persons vis-à-vis intellectual property regimes currently structured primarily by Western understandings of knowledge production.

⁷¹ Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000).

⁷² Homi Bhabha, *Of Mimicry and Man: The Ambivalence of Colonial Discourse*, in TENSIONS OF EMPIRE: COLONIAL CULTURE IN A BOURGEOIS WORLD (Frederick Cooper & Ann Laura Stoler eds., 1997).



POLITICS

The War on Critical Race Theory

Turning a blind eye to the realities of racial injustice, the highly orchestrated right-wing attacks cast a body of scholarship about race in the law as a great threat to American society.

MAY 7, 2021

DAVID THEO GOLDBERG

Clockwise from top left: Charles Ogletree, Derrick Bell, Patricia Williams, Kimberlé Crenshaw.

According to the right, a specter is haunting the United States: the specter of critical race theory (CRT).

On the eve of losing the presidency, Donald Trump issued an **executive order** in September banning “diversity and race sensitivity training” in government agencies, including all government “spending related to any training on critical race theory.” He was prompted, apparently, by hearing an interview with conservative activist Christopher Rufo on Fox News characterizing “critical race theory programs in government” as “the cult of indoctrination.” (President Biden ended the ban as soon as he took office.) In March Senator Tom Cotton, Republican of Arkansas, introduced a bill seeking to ban the teaching of CRT in the military because—he charges without argument or evidence—it is “racist.” Florida Governor Ron DeSantis banned CRT from being covered in Florida’s public schools for “teaching kids to hate their country and to hate each other.” Republican majority lawmakers

in the state of Idaho prohibited the use of state funding for student “social justice” activities of any kind at public universities and threatened to withhold funding earmarked for “social justice programming and critical race theory.” Lawmakers in Arkansas, Oklahoma, and Utah are following suit.

The exact targets of critical race theory’s critics vary wildly, but it is obvious that most critics simply do not know what they are talking about.

Similar attacks are afoot abroad. In Britain a government minister declared in October that the government was “unequivocally against” the concept, even though records show that the phrase “critical race theory” had never once been uttered in the House of Commons before that time. And a British government “Race Report,” commissioned by Boris Johnson in the wake of last year’s Black Lives Matter protests, was just released amidst considerable controversy for its reductive definition of racial discrimination as nothing but the explicit invocation of skin color. For the French, criticism of a “decolonial” turn in the academy is being invoked to do the sort of political silencing that CRT has been advanced to do by conservatives in the United States and Britain. (Never mind that decolonialization—as a term, a politics, and a field of study—was around well before CRT.) President Emmanuel Macron and his ministers have castigated the importation of “certain social science theories” from “American universities” for leading to “the ethnicization of the social question,” and prominent intellectuals have denounced discussions of race. Philosopher Pierre-André Taguieff, whose earlier work tracked the history of anti-Semitism, indicts contemporary anti-racist critics of the French state as guilty of “anti-white racism.” An assistant attorney general in Australia insisted an anti-racism program should not be funded because “taxpayer funds” were being used “to promote critical race theory.”

The attacks have also made their way to my office doorstep, probably due to my small contribution to the body of scholarship to which “critical race theory” actually refers—scholarship that first emerged several decades ago, not in the last few years, as a critical response to what was then known as “critical legal studies.” When I picked up my mail a few weeks ago, I found a thick hand-addressed envelope with no return address; the contents included an eight-page-long screed denouncing CRT as “hateful fraud.” The documents are copies of resources prepared by the Chinese American Citizens Alliance Greater New York (CACAGNY), which filed an amicus brief in the failed Supreme Court case challenging what the group characterized as discrimination by Harvard University against Asian

American applicants. The materials echo essays sponsored by the Heritage Foundation, which **calls** CRT “the new intolerance” and “the rejection of the underpinnings of Western civilization.” The materials suggest a more coordinated campaign than many seem to have realized; I am surely not the only one who received this package.

What do all these attacks add up to? The exact targets of CRT’s critics vary wildly, but it is obvious that most critics simply do not know what they are talking about. Instead, CRT functions for the right today primarily as an empty signifier for any talk of race and racism at all, a catch-all specter lumping together “multiculturalism,” “wokeism,” “anti-racism,” and “identity politics”—or indeed any suggestion that racial inequities in the United States are anything but fair outcomes, the result of choices made by equally positioned individuals in a free society. They are simply against any talk, discussion, mention, analysis, or intimation of race—except to say we shouldn’t talk about it.



Among CRT’s critics little distinction is drawn, in particular, between the academic disciplines of critical race theory and critical race studies. Critical race *theory* refers to a body of legal scholarship developed in the 1970s and ’80s, largely out of Harvard Law School, by the likes of Derrick Bell, Kimberlé Crenshaw, Patricia Williams, Mari Matsuda, and Charles Lawrence, III, among others. Though varied in their views, what unites the work of these scholars is a shared sense of the importance of attending explicitly to race in legal argument, given the perpetuation of racial and other hierarchies through the structure of colorblind law instituted after the Civil Rights Act of 1965. The framework has since been taken up, expanded, and applied more generally to social discourse and practice. As a jurisprudential and social theory it is open to **critique and revision**, even rejection with compelling counterargument—all notably absent from the current attacks.

CRT functions for the right today primarily as a catch-all specter lumping together “multiculturalism,” “wokeism,” “anti-racism,” and “identity politics”—or indeed any suggestion that racial inequities in the United States are anything but fair outcomes.

Critical race *studies*, by contrast, encompass a broader, more loosely affiliated array of academic work. Some far more compelling than others, these accounts have been taken up,

debated, and indeed sometimes dismissed in the expansive analysis of race and racism in and beyond the academy today. Very little holds all of these accounts together beyond taking race and racism as objects of analysis. Two radically **divergent books**, for example—Isabel Wilkerson’s latest bestseller, *Caste*, and Oliver Cromwell Cox’s classic, *Caste, Class, and Race* (1948)—share little in common, though both would be recognized as works in critical race studies.

In conservative accounts, the two authors most commonly cited as CRT’s principal exemplars are Ibram X. Kendi, who trained not in law but in African American Studies (he is CRT’s “New Age guru,” according to the Heritage Foundation), and Robin DiAngelo, a professor of education. Neither is a critical race theorist in the traditional legal sense, and Kendi’s popularizing of some work on race shares little with DiAngelo’s reductive account of what she calls “white fragility.” Other screeds also dismiss philosophers Angela Davis and Achille Mbembe as “scholar-activists” (as if there is something damning about the title). Of course, there is no evidence anywhere of either ever claiming anything resembling that “everyone and everything White is complicit” in racial oppression, or that “all unequal outcomes by race . . . is the result of racial oppression,” as the CACAGNY documents put it.

According to the CACAGNY screed, CRT claims that “you are only your *race*” and that “*by your race alone you will be judged.*” The theory of intersectionality—first elaborated by Crenshaw—belies the point, of course, arguing that race operates *along with* other key determinants of social positioning such as class, gender, disability, and so on. Nor do I know of any serious CRT scholar who would endorse the CACAGNY qualification that, in intersection “with other victimization categories” like gender, “race is *always* primary.” The point of intersectional analysis is that conditions and context dictate what the primary and exacerbating determinants of inequality and victimization are in specific circumstances. Indeed, one of Crenshaw’s **seminal contributions** to CRT scholarship specifically criticized the limitations of a “single-axis framework,” including those that focus on race to the exclusion of a supplementary “analysis of sexism.”

Another measure of the ideological dishonesty can be found in the cheapness of these screeds’ intellectual genealogies. According to CACAGNY, CRT simply substitutes “race struggle” for “class struggle” in the work of “such hate promoters as Marx, Lenin, Gramsci, Schmitt, Marcuse, Foucault, and Freire.” Apparently critics cannot be bothered to imagine sources other than white men. For them there was no Frederick Douglass, no W. E. B. Du Bois, no Zora Neale Hurston, Fannie Lou Hamer, or Frantz Fanon, no Aimé Césaire, Alain

Locke, or Charles Hamilton Houston, no Stokely Carmichael, Charles Hamilton, or Audre Lorde—and on and on. Their list of progenitors is instead plainly meant to conjure “**neo-Marxist**” bogeymen, the association with Marxism or socialism the surefire means to parodic conservative dismissal. Needless to say, I have not seen any mention, let alone analysis, of the substantive body of literature on racial capitalism and racial neoliberalism.

The conservative attacks weaponize colorblindness in an effort to neoliberalize racism—to reduce it to a matter of personal beliefs, rather than structural injustice.

A small circle of conservative outlets appears to be responsible for the bulk of the messaging. One of them is ***City Journal***, a voice of the Manhattan Institute long committed to defending and defining the conservative and anti-anti-racist values of the day. The Heritage Foundation, decades-long coordinator of attacks on progressive critical thought, provides the cement, **insisting** that CRT “seeks to undermine the foundations of American society”—implicitly admitting the racism at the country’s basis. The groups Campus Reform and Turning Point USA weaponize these criticisms to spy on faculty and students across the country they take to be too liberal for the national good. Freedom of expression is cancelled for all but those shouting their agreement with them. *National Review* gets in on the act by publishing a dismissive **review** of what they take to be the founding texts of whiteness studies—three decades after those texts were published. These are contemporary extensions of the practices conducted by David Horowitz’s Freedom Center over the last couple of decades; all that is new are the terms of indictment. The critics, NGOs and politicians alike, are mobilizing the very tactics for which they excoriate CRT.

City Journal has published a **growing number** of articles attacking CRT, many by Rufo—a visiting fellow at the Heritage Foundation and former director of the Center on Wealth and Poverty at the Discovery Institute, best known for its unstinting advocacy of intelligent design. Rufo pits a self-styled disenfranchised right against a supposedly out-of-control government set to impose dogma on the unsuspecting:

critical race theory . . . is an almost entirely government-created and government-sponsored ideology, developed in public and publicly-subsidized universities, formulated into policy by public bureaucracies, and transmitted to children in the public school system. The critical race theorists and their enablers at the *New York Times* and elsewhere want the right to enshrine their personal ideology as official state

dogma. They prioritize the “freedom of the state” over the “freedom of the individual”—the prelude, whether deliberate or accidental, to any totalitarian system.

The ideological dishonesty is almost too obvious. Bell, Crenshaw, and others would be surprised to hear it was the government that created CRT. And the irony of the accusation of individual freedoms being sacrificed to the state will not be lost on those noting the current undertaking by these vigorous conservative efforts to impose *its* ideology on the state. The truth is that the only high-level coordinated campaign attempting to “enshrine” a view of CRT “as state dogma” is a dismissive one. It is the French president who has echoed Heritage Foundation publications and webinars. It is the British prime minister who has authorized a Race Report committed to downplaying racism in society along with the history and legacy of slavery. And it is conservative state governors and politicians in the United States who are acting to legislate bans.

The attacks on CRT and CRS often center examples of egregious “anti-racist” practices, attributed usually to K–12 school classrooms or student groups on university campuses. As with Rufo, decontextualized quotes and positions are often lifted from academic publications; Dinesh D’Souza honed such practices to an art in the 1990s. While many, if not all, of the targeted claims are peripheral to much of CRS and all but missing from CRT, critics attribute their occurrence to the impact, influence, or implication of CRS commitments.

It is true that anti-racism today has been turned into something of an industry. But an honest critique of CRT would take issue with its actual assumptions, logic, and conclusions.

It is true that anti-racism today has been turned into something of an industry. But “diversity training,” “racial equity,” “systemic” and “institutional” racism, and indeed “anti-racism” itself are not the inventions of CRT; all but diversity training predate it. Like “diversity” over the past decade and “multiculturalism” before that, critical race theory is being made the bag now carrying the load long critical of racism. The foolishness sometimes said and done in its name—including some genuinely wince-worthy—is being used as a sledgehammer to bash any effort to discuss and remedy racial injustice. Attempts to turn these into a manual, largely by those looking to advance personal, professional, or pecuniary standing, are doomed to ridicule, which in turn unleashes the conservative caricatures.

Critics such as Thomas Sowell, taking CRT reductively to claim that racism alone disadvantages Black people, counter that education is a major enabling factor in Black advancement. On the face of it nothing objectionable there. But in blaming Black people for lesser educational attainment, they pay no attention to deep, structurally produced inequities in public school funding. They ignore historical lack of access translating into cross-generational disadvantage. They sideline racially disproportionate class differences enabling a greater proportion of wealthier white students to receive after school tutoring and not have to work to put themselves through college. The conceptual narrowing of “racism” in the British Race Report—limiting it to the beliefs of individuals—engages in the same sleight of hand.

An honest critique of CRT would take issue with its actual assumptions, logic, and conclusions, not blame it for policies, programs, and practices—or for that matter, attributed premises and principles—it had no hand in formulating or implementing. “CRT,” a Heritage webinar asserts, collapsing the good and the bad of CRS with CRT, is “leading to cancel culture.” Not only politicians but political fundraising campaigns are using these explicit terms to advance their cause. Controlling the narrative, rather than honest critical debate about the sources and remedies of racial injustice, is defining the agenda.



What conclusions can we draw from these developments?

First, the coordinated conservative attack on CRT is largely meant to distract from the right’s own paucity of ideas. The strategy is to create a straw house to set aflame in order to draw attention away from not just its incapacity but its outright refusal to address issues of cumulative, especially racial, injustice. In a perverse misuse of Martin Luther King, Jr., colorblindness remains the touchstone of clearly uninformed conservative talking points on race. As critics such as Eduardo Bonilla-Silva, Patricia Williams, and myself, among many others, have long pointed out, colorblindness—the individualizing response to structural and systemic racial injustice par excellence—hides the underlying structural differences historical inequalities reproduce.

The strategy is to create a straw house to set aflame in order to draw attention away from the right’s outright refusal to address cumulative, especially racial, injustice.

Second, the conservative attack on CRT tries to rewrite history in its effort to neoliberalize racism: to reduce it to a matter of personal beliefs and interpersonal prejudice. (Even in this case, you will search in vain at *The Federalist*, *National Review*, Fox News, the *Daily Caller*, and *Breitbart News* for coverage of a recent story in which a group of white high school students “auctioned” their Black peers on Snapchat.) On this view, the structures of society bear no responsibility, only individuals. Racial inequities today are at worst the unfortunate side effect of a robust commitment to individual freedom, not the living legacy of centuries of racialized systems. The British Race Report shares with the 1776 Project this project of historical erasure. The problem is not the actual histories of slavery, racial subjugation, segregation, and inequity but, as historian **David Olusoga** observes, how those histories are represented, taught, and mobilized for contemporary ideological purposes. Hence the attack on work spelling out the historically produced social conditions establishing ongoing racist systems—especially the *New York Times*’s 1619 Project, which is explicitly dismissed as the product of CRT thinking.

Third, race has always been an attractive issue for conservatives to mobilize around. They know all too well how to use it to stoke white resentment while distracting from the depredations of conservative policies for all but the wealthy. Conservatives see their worldview **under threat** of being eroded; Tucker Carlson now openly **alludes** to the white nationalist “replacement” conspiracy theory, the fear of white people being diminished and displaced by Blacks, Latinos, and immigrants. “Whiteness,” James Baldwin wrote, is “a metaphor for power.” At a time when the power, privileges, and indeed numbers of the GOP base are under pressure, the conservative assault on CRT is only the latest effort to maintain white domination—economically, politically, and legally.



There is no simple toolkit for the critical analysis of racism. Pointers and rules of thumb may help, but they are not and never will be a substitute for mass popular organizing to create a more just world.

CRT and more nuanced work in CRS offer an invaluable resource for this work. They take seriously what the conservative attack too readily looks away from. They try to account for what it is in our culture, in the social infrastructure and institutional shaping and the order to which they give rise, that reproduces the undeniable inequality, the lived violence and trauma, that people of color experience in the United States and Europe, however variously.

At a time when the power, privileges, and indeed numbers of the GOP base are under pressure, the conservative assault on CRT is only the latest effort to maintain white domination.

Conservative critics of CRT not only have no serious response to these tragic injustices; instead they belittle the very suggestion that they ought to have one. Willed away are the lives of those they would rather not admit are fellow citizens. Heritage calls instead for a narrative of upliftment and **hope**. Wiping the slate of history clean, they insist that formal equality under the law—never mind how recently or imperfectly realized—vitiates any claim of enduring injustice. Whatever the unfairness of the past, this thinking goes, individuals are now free to make of their lives what they will.

If we are to learn one thing from this highly orchestrated assault on CRT, it is that this alternative narrative is not a sincere expression of hope: it is a cynical ploy to keep power and privilege in the hands of those who have always held it. Meanwhile, the outcome remains what Marvin Gaye sang—to brothers and sisters, mothers and fathers—a half century ago: “there are far too many of you dying.”

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CRT Under Attack

Opposition to CRT is now in the media more than ever, mirroring the 1925 Scopes Trial. Fox's Sam Dorman recently reported that a "Virginia teacher says critical race theory has damaged [her] community as frustrated parents demand changes."

<https://www.foxnews.com/us/loudoun-county-critical-race-theory-divided>. More alarmingly, on April 29, 2021, former Vice President Mike Pence tweeted, in part, "We will reject Critical Race Theory in our schools and public institutions, and we will CANCEL Cancel Culture wherever it arises!" https://twitter.com/Mike_Pence/status/1387945224723439619. However, this rhetoric does not just exist on social media. Rather, angry white legislators, supported by fragile, white parents who misunderstand CRT, seek to ban CRT in the education system. In his recent article, Raymund Ankrum makes the case for CRT and its principles in education, arguing that the movement against CRT is, in itself, racism dressed in a different form and hypocritical. Glaring disparities in the American education system evidence this hypocrisy. Continuing to whitewash history only further oppresses the Black community, especially if it is done just to keep White people comfortable. <https://educationpost.org/since-critical-race-theory-is-being-called-indoctrination-lets-go-there/>. Sadly, though, the backlash is also based on misinformation and a misunderstanding of what CRT means.

Various jurisdictions are seeing a rise in cases alleging that the use of CRT in school and government is inappropriate. https://www.thecentersquare.com/national/op-ed-critical-race-theory-is-about-to-face-its-day-s-in-court/article_9dcefa10-a76c-11eb-bf9f-27e0e238e56d.html. Christopher Rufo is a fixture for those opposed to CRT. Credited as the inspiration for EO 13950 after appearing on Tucker Carlson's program, Rufo created a legal coalition with the sole purpose of fighting CRT in the courts.

<https://twitter.com/realchrisrufo/status/1352033792458776578/photo/1>. Carlson has called CRT "anti-American" and "anti-the-gospel-of-Jesus-Christ," while threatening to "white shame" those who do not oppose CRT. https://news.yahoo.com/fox-news-tries-convince-viewers-113000996.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guc_e_referrer_sig=AQAAADi5Pj2eM_YA5Hi_D4S4yG-tFYhWtlwXaa26IfNqebKLaPCitmAh0yvLCGHnTDSODM5af5e2jvcPBx_GZnUw6PsIcseTIZ

[kIpBUa1O2YeurNt7Jpa2BDtFDfyUNkHJxm_y7O13gpxCRFM-n4627Ar7tdtiP9M7-Lj01xbTEaigK](https://static1.squarespace.com/static/5ac03e14ec4eb74c10016931/t/5fa02b0c4ddb7db99555e7/1604332300428/CNRA+class+action+complaint.pdf).

Currently being litigated in California, plaintiffs filed a class action lawsuit alleging that their work-related emails were rooted in CRT and violate federal civil rights laws, including, 42 U.S.C. §§ 1981, 1983, 1985 and the California Constitution, Article I, § 31, “which prohibits discrimination, or the endowment of preferential treatment based on race by state government.” (<https://static1.squarespace.com/static/5ac03e14ec4eb74c10016931/t/5fa02b0c4ddb7db99555e7/1604332300428/CNRA+class+action+complaint.pdf>). Complainants also allege that use of CRT violates the California Taxpayer statute, California Code of Civil Procedure § 526a, “which allows lawsuits to stop the government from wasting tax resources on policies and laws that are unlawful.” On April 16, 2021, Defendants filed a Motion to Strike the complaint for attacking protected speech and having a chilling effect on speech. The Motion also asserts that the plaintiffs have not identified a discriminatory employment action, such as termination or discipline, in relation to the series. This case is still pending before the Superior Court of Los Angeles County.

Another case in the Supreme Court of New York against the Department of Education and its Chancellor alleges that mandatory implicit bias training focuses on Black children over White children. <https://nypost.com/2019/05/25/teachers-allegedly-told-to-treat-black-students-as-victims-punish-whites/>. Plaintiffs also allege that they were unjustly demoted so their positions could be filled by “non-Caucasian” appointees and that this was both a race-based and gender-based decision. This case is also pending.

An Introduction to Critical Race Theory

Recommended Reading

George, Janel. "A Lesson on Critical Race Theory." ABA Human Rights Magazine, Vol. 46, No. 2: Civil Rights Reimagining Policing. January 12, 2021. Available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

Harris, Cheryl I. "Whiteness as Property." Harvard Law Review. June 10, 1993. Available at <https://harvardlawreview.org/1993/06/whiteness-as-property/>.

Chapter Two

Federal Directives

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Combating Race and Sex Stereotyping

A Presidential Document by the [Executive Office of the President](#) on 09/28/2020

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Executive Order 13950 (/executive-order/13950) of September 22, 2020

Combating Race and Sex Stereotyping

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101

(<https://www.govinfo.gov/link/uscode/40/101?type=usc&year=mostrecent&link-type=html>) *et seq.*, and in order to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating, it is hereby ordered as follows:

Section 1. Purpose. From the battlefield of Gettysburg to the bus boycott in Montgomery and the Selma-to-Montgomery marches, heroic Americans have valiantly risked their lives to ensure that their children would grow up in a Nation living out its creed, expressed in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal.” It was this belief in the inherent equality of every individual that inspired the Founding generation to risk their lives, their fortunes, and their sacred honor to establish a new Nation, unique among the countries of the world. President Abraham Lincoln understood that this belief is “the electric cord” that “links the hearts of patriotic and liberty-loving” people, no matter their race or country of origin. It is the belief that inspired the heroic black soldiers of the 54th Massachusetts Infantry Regiment to defend that same Union at great cost in the Civil War. And it is what inspired Dr. Martin Luther King, Jr., to dream that his children would one day “not be judged by the color of their skin but by the content of their character.”

Thanks to the courage and sacrifice of our forebears, America has made significant progress toward realization of our national creed, particularly in the 57 years since Dr. King shared his dream with the country.

Today, however, many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.

This destructive ideology is grounded in misrepresentations of our country's history and its role in the world. Although presented as new and revolutionary, they resurrect the discredited notions of the nineteenth century's apologists for slavery who, like President Lincoln's rival Stephen A. Douglas, maintained that our government “was made on the white basis” “by white men, for the benefit of white men.” Our Founding documents rejected these racialized views of America, which were soundly defeated on the blood-stained battlefields of the Civil War. Yet they are now being repackaged and sold as cutting-edge insights. They are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country.

Unfortunately, this malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country. Instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country, even in □ components of the Federal Government and among Federal contractors. For example, the Department of the Treasury recently held a seminar that promoted arguments that “virtually all White people, regardless of how ‘woke’ they are, contribute to racism,” and that instructed small group leaders to encourage employees to avoid “narratives” that Americans should “be more color-blind” or “let people’s skills and personalities be what differentiates them.”

Training materials from Argonne National Laboratories, a Federal entity, stated that racism “is interwoven into every fabric of America” and described statements like “color blindness” and the “meritocracy” as “actions of bias.”

Materials from Sandia National Laboratories, also a Federal entity, for non-minority males stated that an emphasis on “rationality over emotionality” was a characteristic of “white male[s],” and asked those present to “acknowledge” their “privilege” to each other.

A Smithsonian Institution museum graphic recently claimed that concepts like “[o]bjective, rational linear thinking,” “[h]ard work” being “the key to success,” the “nuclear family,” and belief in a single god are not values that unite Americans of all races but are instead “aspects and assumptions of whiteness.” The museum also stated that “[f]acing your whiteness is hard and can result in feelings of guilt, sadness, confusion, defensiveness, or fear.”

All of this is contrary to the fundamental premises underpinning our Republic: that all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit.

Executive departments and agencies (agencies), our Uniformed Services, Federal contractors, and Federal grant recipients should, of course, continue to foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics. Training employees to create an inclusive workplace is appropriate and beneficial. The Federal Government is, and must always be, committed to the fair and equal treatment of all individuals before the law.

But training like that discussed above perpetuates racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint. Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars. Research also suggests that blame-focused diversity training reinforces biases and decreases opportunities for minorities.

Our Federal civil service system is based on merit principles. These principles, codified at 5 U.S.C. 2301 (<https://www.govinfo.gov/link/uscode/5/2301?type=usc&year=mostrecent&link-type=html>), call for all employees to “receive fair and equitable treatment in all aspects of personnel management without regard to” race or sex “and with proper regard for their . . . constitutional rights.” Instructing Federal employees that treating individuals on the basis of individual merit is racist or sexist directly undermines our Merit System Principles and impairs the efficiency of the Federal service. Similarly, our Uniformed Services should not teach our heroic men and women in uniform the lie that the country for which they are willing to die is fundamentally racist. Such teachings could directly threaten the cohesion and effectiveness of our Uniformed Services.

Such activities also promote division and inefficiency when carried out by Federal contractors. The Federal Government has long prohibited Federal contractors from engaging in race or sex discrimination and required contractors to take affirmative action to ensure that such discrimination does not occur. The participation of contractors' employees in training that promotes race or sex stereotyping or scapegoating similarly undermines efficiency in Federal contracting. Such requirements promote divisiveness in the workplace and distract from the pursuit of excellence and collaborative achievements in public administration. □

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Therefore, it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees.

Sec. 2. Definitions. For the purposes of this order, the phrase:

(a) “Divisive concepts” means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

(b) “Race or sex stereotyping” means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

(c) “Race or sex scapegoating” means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

(d) “Senior political appointee” means an individual appointed by the President, or a non-career member of the Senior Executive Service (or agency-equivalent system).

Sec. 3. Requirements for the United States Uniformed Services. The United States Uniformed Services, including the United States Armed Forces, shall not teach, instruct, or train any member of the United States Uniformed Services, whether serving on active duty, serving on reserve duty, attending a military service academy, or attending courses conducted by a military department pursuant to a Reserve Officer Corps Training program, to believe any of the divisive concepts set forth in section 2(a) of this order. No member of the United States Uniformed Services shall face any penalty or discrimination on account of his or her refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to these concepts.

Sec. 4. Requirements for Government Contractors. (a) Except in contracts exempted in the manner provided by section 204 of Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), as amended, all Government contracting agencies shall include in every Government contract hereafter

entered into the following provisions:

“During the performance of this contract, the contractor agrees as follows:

1. The contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term “race or sex stereotyping” means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex, and the term “race or sex scapegoating” means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex.

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2. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under the Executive Order of September 22, 2020, entitled Combating Race and Sex Stereotyping, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

3. In the event of the contractor's noncompliance with the requirements of paragraphs (1), (2), and (4), or with any rules, regulations, or orders that may be promulgated in accordance with the Executive Order of September 22, 2020, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided by any rules, regulations, or orders the Secretary of Labor has issued or adopted pursuant to Executive Order 11246, including subpart D of that order.

4. The contractor will include the provisions of paragraphs (1) through (4) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.”

(b) The Department of Labor is directed, through the Office of Federal Contract Compliance Programs (OFCCP), to establish a hotline and investigate complaints received under both this order as well as Executive Order 11246 alleging that a Federal contractor is utilizing such training programs in violation of the contractor's obligations under those orders. The Department shall take appropriate enforcement action and provide remedial relief, as appropriate.

(c) Within 30 days of the date of this order, the Director of OFCCP shall publish in the *Federal Register* a request for information seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. The request for information should request copies of any training, workshop, or similar programming having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.

Sec. 5. Requirements for Federal Grants. The heads of all agencies shall review their respective grant programs and identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote the concepts that (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. Within 60 days of the date of this order, the heads of agencies shall each submit a report to the Director of the Office of Management and Budget (OMB) that lists all grant programs so identified.

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Sec. 6. Requirements for Agencies. (a) The fair and equal treatment of individuals is an inviolable principle that must be maintained in the Federal workplace. Agencies should continue all training that will foster a workplace that is respectful of all employees. Accordingly:

(i) The head of each agency shall use his or her authority under 5 U.S.C. 301 (<https://www.govinfo.gov/link/uscode/5/301?type=usc&year=mostrecent&link-type=html>), 302, and 4103 to ensure that the agency, agency employees while on duty status, and any contractors hired by the agency to provide training, workshops, forums, or similar programming (for purposes of this section, "training") to agency employees do not teach, advocate, act upon, or promote in any training to agency employees any of the divisive concepts listed in section 2(a) of this order. Agencies may consult with the Office of Personnel Management (OPM), pursuant to 5 U.S.C. 4116 (<https://www.govinfo.gov/link/uscode/5/4116?type=usc&year=mostrecent&link-type=html>), in carrying out this provision; and

(ii) Agency diversity and inclusion efforts shall, first and foremost, encourage agency employees not to judge each other by their color, race, ethnicity, sex, or any other characteristic protected by Federal law.

(b) The Director of OPM shall propose regulations providing that agency officials with supervisory authority over a supervisor or an employee with responsibility for promoting diversity and inclusion, if such supervisor or employee either authorizes or approves training that promotes the divisive concepts set forth in section 2(a) of this order, shall take appropriate steps to pursue a performance-based adverse action proceeding against such supervisor or employee under chapter 43 or 75 of title 5, United States Code.

(c) Each agency head shall:

- (i) issue an order incorporating the requirements of this order into agency operations, including by making compliance with this order a provision in all agency contracts for diversity training;
- (ii) request that the agency inspector general thoroughly review and assess by the end of the calendar year, and not less than annually thereafter, agency compliance with the requirements of this order in the form of a report submitted to OMB; and
- (iii) assign at least one senior political appointee responsibility for ensuring compliance with the requirements of this order.

Sec. 7. OMB and OPM Review of Agency Training. (a) Consistent with OPM's authority under 5 U.S.C. 4115 (<https://www.govinfo.gov/link/uscode/5/4115?type=usc&year=mostrecent&link-type=html>)-4118, all training programs for agency employees relating to diversity or inclusion shall, before being used, be reviewed by OPM for compliance with the requirements of section 6 of this order.

(b) If a contractor provides a training for agency employees relating to diversity or inclusion that teaches, advocates, or promotes the divisive concepts set forth in section 2(a) of this order, and such action is in violation of the applicable contract, the agency that contracted for such training shall evaluate whether to pursue debarment of that contractor, consistent with applicable law and regulations, and in consultation with the Interagency Suspension and Debarment Committee.

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(c) Within 90 days of the date of this order, each agency shall report to OMB all spending in Fiscal Year 2020 on Federal employee training programs relating to diversity or inclusion, whether conducted internally or by contractors. Such report shall, in addition to providing aggregate totals, delineate awards to each individual contractor.

(d) The Directors of OMB and OPM may jointly issue guidance and directives pertaining to agency obligations under, and ensuring compliance with, this order.

Sec. 8. Title VII Guidance. The Attorney General should continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 (<https://www.govinfo.gov/link/uscode/42/2000?type=usc&year=mostrecent&link-type=html>) *et seq.* If appropriate, the Attorney General and the Equal Employment Opportunity Commission shall issue publicly available guidance to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII.

Sec. 9. Effective Date. This order is effective immediately, except that the requirements of section 4 of this order shall apply to contracts entered into 60 days after the date of this order.

Sec. 10. General Provisions. (a) This order does not prevent agencies, the United States Uniformed Services, or contractors from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent with the requirements of this order.

(b) Nothing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts listed in section 2(a) of this order in an objective manner and without endorsement.

(c) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

(d) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

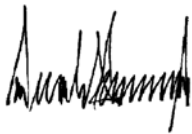
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(e) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

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(f) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



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THE WHITE HOUSE, September 22, 2020. Filed 9-25-20; 8:45 am]
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BRIEFING ROOM

Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Policy. Equal opportunity is the bedrock of American democracy, and our diversity is one of our country's greatest strengths. But for too many, the American Dream remains out of reach. Entrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities. Our country faces converging economic, health, and climate crises that have exposed and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism. Our Nation deserves an ambitious whole-of-government equity agenda that matches the scale of the opportunities and challenges that we face.

It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.

By advancing equity across the Federal Government, we can create opportunities for the improvement of communities that have been historically underserved, which benefits everyone. For example, an analysis shows that closing racial gaps in wages, housing credit, lending opportunities, and access to higher education would amount to an additional \$5 trillion in gross domestic product in the American economy over the next 5 years. The Federal Government's goal in advancing equity is to provide everyone with the opportunity to reach their full potential. Consistent with these aims, each agency must assess whether, and to what

extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups. Such assessments will better equip agencies to develop policies and programs that deliver resources and benefits equitably to all.

Sec. 2. Definitions. For purposes of this order: (a) The term “equity” means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

(b) The term “underserved communities” refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, as exemplified by the list in the preceding definition of “equity.”

Sec. 3. Role of the Domestic Policy Council. The role of the White House Domestic Policy Council (DPC) is to coordinate the formulation and implementation of my Administration’s domestic policy objectives. Consistent with this role, the DPC will coordinate efforts to embed equity principles, policies, and approaches across the Federal Government. This will include efforts to remove systemic barriers to and provide equal access to opportunities and benefits, identify communities the Federal Government has underserved, and develop policies designed to advance equity for those communities. The DPC-led interagency process will ensure that these efforts are made in coordination with the directors of the National Security Council and the National Economic Council.

Sec. 4. Identifying Methods to Assess Equity. (a) The Director of the Office of Management and Budget (OMB) shall, in partnership with the heads of agencies, study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals. The study should aim to identify the best methods, consistent with applicable law, to assist agencies in assessing equity with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability.

(b) As part of this study, the Director of OMB shall consider whether to recommend that agencies employ pilot programs to test model assessment tools and assist agencies in doing so.

(c) Within 6 months of the date of this order, the Director of OMB shall deliver a report to the President describing the best practices identified by the study and, as appropriate, recommending approaches to expand use of those methods across the Federal Government.

Sec. 5. Conducting an Equity Assessment in Federal Agencies. The head of each agency, or designee, shall, in consultation with the Director of OMB, select certain of the agency's programs and policies for a review that will assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs. The head of each agency, or designee, shall conduct such review and within 200 days of the date of this order provide a report to the Assistant to the President for Domestic Policy (APDP) reflecting findings on the following:

- (a) Potential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs;
- (b) Potential barriers that underserved communities and individuals may face in taking advantage of agency procurement and contracting opportunities;
- (c) Whether new policies, regulations, or guidance documents may be necessary to advance equity in agency actions and programs; and
- (d) The operational status and level of institutional resources available to offices or divisions within the agency that are responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities.

Sec. 6. Allocating Federal Resources to Advance Fairness and Opportunity. The Federal Government should, consistent with applicable law, allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities, as well as individuals from those communities. To this end:

- (a) The Director of OMB shall identify opportunities to promote equity in the budget that the President submits to the Congress.
- (b) The Director of OMB shall, in coordination with the heads of agencies, study strategies, consistent with applicable law, for allocating Federal resources in a manner that increases investment in underserved communities, as well as individuals from those communities. The Director of OMB shall report the findings of this study to the President.

Sec. 7. Promoting Equitable Delivery of Government Benefits and Equitable Opportunities. Government programs are designed to serve all eligible individuals. And Government contracting and procurement opportunities should be available on an equal basis to all eligible providers of goods and services. To meet these objectives and to enhance compliance with existing civil rights laws:

(a) Within 1 year of the date of this order, the head of each agency shall consult with the APDP and the Director of OMB to produce a plan for addressing:

(i) any barriers to full and equal participation in programs identified pursuant to section 5(a) of this order; and

(ii) any barriers to full and equal participation in agency procurement and contracting opportunities identified pursuant to section 5(b) of this order.

(b) The Administrator of the U.S. Digital Service, the United States Chief Technology Officer, the Chief Information Officer of the United States, and the heads of other agencies, or their designees, shall take necessary actions, consistent with applicable law, to support agencies in developing such plans.

Sec. 8. Engagement with Members of Underserved Communities. In carrying out this order, agencies shall consult with members of communities that have been historically underrepresented in the Federal Government and underserved by, or subject to discrimination in, Federal policies and programs. The head of each agency shall evaluate opportunities, consistent with applicable law, to increase coordination, communication, and engagement with community-based organizations and civil rights organizations.

Sec. 9. Establishing an Equitable Data Working Group. Many Federal datasets are not disaggregated by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables. This lack of data has cascading effects and impedes efforts to measure and advance equity. A first step to promoting equity in Government action is to gather the data necessary to inform that effort.

(a) Establishment. There is hereby established an Interagency Working Group on Equitable Data (Data Working Group).

(b) Membership.

(i) The Chief Statistician of the United States and the United States Chief Technology Officer shall serve as Co-Chairs of the Data Working Group and coordinate its work. The Data Working Group shall include representatives of agencies as determined by the Co-Chairs to be necessary to complete the work of the Data Working Group, but at a minimum shall include the following officials, or their designees:

(A) the Director of OMB;

(B) the Secretary of Commerce, through the Director of the U.S. Census Bureau;

(C) the Chair of the Council of Economic Advisers;

(D) the Chief Information Officer of the United States;

(E) the Secretary of the Treasury, through the Assistant Secretary of the Treasury for Tax Policy;

(F) the Chief Data Scientist of the United States; and

(G) the Administrator of the U.S. Digital Service.

(ii) The DPC shall work closely with the Co-Chairs of the Data Working Group and assist in the Data Working Group's interagency coordination functions.

(iii) The Data Working Group shall consult with agencies to facilitate the sharing of information and best practices, consistent with applicable law.

(c) Functions. The Data Working Group shall:

(i) through consultation with agencies, study and provide recommendations to the APDP identifying inadequacies in existing Federal data collection programs, policies, and infrastructure across agencies, and strategies for addressing any deficiencies identified; and

(ii) support agencies in implementing actions, consistent with applicable law and privacy interests, that expand and refine the data available to the Federal Government to measure equity and capture the diversity of the American people.

(d) OMB shall provide administrative support for the Data Working Group, consistent with applicable law.

Sec. 10. Revocation. (a) Executive Order 13950 of September 22, 2020 (Combating Race and Sex Stereotyping), is hereby revoked.

(b) The heads of agencies covered by Executive Order 13950 shall review and identify proposed and existing agency actions related to or arising from Executive Order 13950. The head of each agency shall, within 60 days of the date of this order, consider suspending, revising, or rescinding any such actions, including all agency actions to terminate or restrict contracts or grants pursuant to Executive Order 13950, as appropriate and consistent with applicable law.

(c) Executive Order 13958 of November 2, 2020 (Establishing the President's Advisory 1776 Commission), is hereby revoked.

Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
 - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) Independent agencies are strongly encouraged to comply with the provisions of this order.
- (d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,
January 20, 2021.

5 U.S.C. § 2301 - U.S. Code - Unannotated Title 5. Government Organization and Employees § 2301. Merit system principles

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(a) This section shall apply to--

- (1) an Executive agency; and
- (2) the Government Publishing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

- (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.
- (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
- (3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.
- (4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
- (5) The Federal work force should be used efficiently and effectively.
- (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
- (7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.
- (8) Employees should be--
 - (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

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(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter--

(1) with respect to any agency (as defined in [section 2302\(a\)\(2\)\(C\)](#).

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of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

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Chapter Three

Case Law

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LOIS HERRERA, JAYE MURRAY AND LAURA FEIJOO,

Index No.

Plaintiff(s),

Summons

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION and
RICHARD CARRANZA, Chancellor of New York City
Department of Education, Individually,

Date Index No. Purchased:

Defendant(s).

To the above named Defendant(s)

Tweed Courthouse
52 Chambers Street
New York, New York 10007

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is Defendant's place of business & location of occurrence
which is Tweed Courthouse 52 Chambers Street New York, New York 10007

Dated: New York, New York

May 28, 2019

Schwartz Perry & Heller, LLP

by

DAVIDA S. PERRY

Attorneys for Plaintiff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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LOIS HERRERA, JAYE MURRAY and
LAURA FEJOO,

Index No.:

Plaintiffs,

VERIFIED COMPLAINT

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION
and RICHARD CARRANZA, Chancellor of New York
City Department of Education, Individually,

Defendants.

-----X
Plaintiffs Lois Herrera, Jaye Murray and Laura Feijoo, as and for their Verified Complaint,
respectfully allege, all upon information and belief, as follows:

IDENTITY OF PARTIES

1. At all relevant times mentioned herein, Plaintiff Lois Herrera ("Herrera"), who is a Caucasian woman, has been employed by Defendant New York City Department of Education ("DOE") since 1986 and, until her recent demotion, served as the Chief Executive Officer of the Office of Safety and Youth Development ("OSYD").

2. At all relevant times mentioned herein, Plaintiff Jaye Murray ("Murray"), who is a Caucasian woman, has been employed by Defendant DOE since 2006 and, until her recent demotion, served as Executive Director to the Office of Counseling Support Programs ("OCSP").

3. At all relevant times mentioned herein, Plaintiff Laura Feijoo ("Feijoo"), who is a Caucasian woman, has been employed by Defendant DOE since 1989 and, until her recent demotion, served as Senior Supervising Superintendent.

4. At all relevant times mentioned herein, Defendant New York City Department of Education (the "DOE") was and is a New York City governmental agency responsible for the administration of New York City's public school system, which is located in the City and State of New York.

5. Since April 2018, Defendant Richard Carranza ("Carranza") has been the Chancellor of DOE and in that role oversees the DOE, including the employment relationship between the DOE and Herrera, Murray and Feijoo, respectively.

6. Plaintiffs bring this action against DOE and Carranza for unlawful race and gender discrimination and retaliation under the New York City Human Rights Law because Carranza has improperly conflated the daunting task of addressing tough socioeconomic challenges facing many of the students in the New York City public school system with a discriminatory belief that Caucasians in the DOE workplace, particularly more senior Caucasian women, are causing or exacerbating those challenges, even though Plaintiffs and other similarly situated DOE employees have led meaningful change for students attending all of New York City's public school districts for decades, and their achievements have been and are being celebrated by DOE and the New York City government to this day.

7. In acting to address his misguided belief, Carranza has completely disregarded the Human Rights Law by targeting and stripping Caucasian employees, particularly women, from the ranks of DOE senior management on the basis of their race and gender.

8. The DOE and Carranza replaced Plaintiffs with non-Caucasians because of their race, even though many if not all of these newly appointed leaders did not apply for their positions through the standard managerial processes that require the public posting of vacancies, transparent application submission process, as well as minimum educational and New York State certification requirements.

9. As a result, the newly appointed leaders of DOE are woefully less prepared and qualified than their predecessors, demonstrating that there was no legitimate reason for these personnel changes other than discrimination.

10. DOE, under Carranza's leadership permits, condones and supports newly appointed supervisors to systematically target their Caucasian colleagues on the basis of their race.

11. Furthermore, under Carranza's leadership, DOE has swiftly and irrevocably silenced, sidelined and punished Plaintiffs and other Caucasian female DOE employees on the basis of their race, gender and their unwillingness to accept their other colleagues' hurtful stereotypes about them.

12. Carranza's DOE has permitted newly appointed leaders to adopt Plaintiffs' successes as their own victories and required Plaintiffs to accept degrading roles that do nothing more than permit them to consult with their replacements on issues they once supervised and managed.

BACKGROUND RELEVANT TO HERRERA CAUSES OF ACTION

13. Over the course of her professional career, Herrera has earned a Masters Degree from Harvard University Graduate School of Education, where she studied counseling and consulting psychology, has studied at Columbia Teacher's College, received an undergraduate degree from Mount Holyoke College and has earned professional certifications from the City and State of New York related to School District Administration, School Building Leadership, Education Administration, Supportive Services Instruction, Supervision of Guidance and Bilingual Guidance Counselorship.

14. Herrera commenced her employment with DOE in or around 1986 as a Guidance Counselor and was promoted numerous times, first to District Assistant Director of Pupil Personnel, then a School Administrator, Central Director, Senior Executive Director, Deputy Chief Executive Officer, and finally, Chief Executive Officer of DOE Office of Safety and Youth Development ("OSYD"), which position she held until she was unlawfully demoted in September 2018 because of her race.

15. At all relevant times, Herrera was fully qualified for her position with DOE, as confirmed by, among other things, her educational background, certifications, positive performance

evaluations, the feedback, promotions and increases in compensation she received, and her remarkable longevity with DOE.

16. Further demonstrating her qualification and recent positive performance, while Herrera was the CEO of OSYD, New York City Hall widely publicized that the 2017 school year was the “safest year on record” in the New York City public schools.

17. At all relevant times, Herrera worked predominantly out of DOE Headquarters, located at the Tweed Courthouse, 52 Chambers Street, in Manhattan (“Headquarters” or “Tweed”).

18. In her role as Chief Executive Officer, Herrera reported to a Deputy Chancellor, who in turn reported to the Chancellor.

19. In or around April 2018, New York City Mayor William DeBlasio appointed Carranza to the position of Chancellor of DOE.

20. Soon after he became Chancellor, in or around June 2018, Carranza appointed LaShawn Robinson (“Robinson”), who is African American, as Deputy Chancellor of School Climate and Wellness, and in that role Robinson supervised Herrera in her position as Chief Executive Officer of OSYD.

21. Herrera learned from another Senior Administrator that Robinson expressed a discriminatory bias against her Caucasian colleagues on a number of occasions leading up to her promotion to Deputy Chancellor, including on or about May 4, 2018, while presenting at the “Border Crossers” Training in her former role as the Executive Director of the Office of Equity and Access, telling Caucasian colleagues that they “had to take a step back and yield to colleagues of Color” and “recognize that values of White culture are supremacist,” as well as saying that “We have all taken on Whiteness,” while referring to being exposed to a society that has become toxic with Whiteness.

22. Robinson also regularly advised her subordinates that she would “disrupt and dismantle” the work of Caucasian employees, and the phrase “disrupt and dismantle” became a mantra often used by Carranza’s administration as justification to marginalize the roles and responsibilities of Caucasian employees, especially Caucasian women in leadership positions.

23. On June 27, 2018, Carranza addressed the restructuring of his administration, including Robinson’s promotion, from the rotunda of Tweed, announcing to all DOE employees at Tweed that “If you draw a paycheck from DOE,” you will either “Get on board with [his] equity platform or leave,” a totalitarian threat to his employees’ salaries and financial future that Carranza used to silence the Caucasian DOE employees impacted by his discriminatory actions for no reason other than their race.

24. On June 29, 2018, soon after Carranza was appointed Chancellor and Robinson was appointed Deputy Chancellor, Carranza and Robinson further confirmed to Herrera that they held

discriminatory animus against Caucasians when, during a DOE event for graduating and college-bound high school seniors who currently lived in temporary housing, they gave Superintendent Donald Conyers (“Conyers”) a standing ovation after he welcomed the audience by saying, “I’m so glad to see a sea of Black and Brown children” and then gave another standing ovation when another invited presenter read an original poem that warned racial minority students against Caucasians.

25. DOE condoned Conyers’ message at its event, as confirmed by Carranza and Robinson’s standing ovation of Conyers, which distressed and marginalized Herrera, who was in the audience.

26. In or around June 2018, Chris Groll (“Groll”), the new Chief Operating Officer for the Division where Herrera now worked, asked Herrera when she intended to retire.

27. On August 8, 2018, at another scheduled event called the “First Divisional Professional Learning Session,” Robinson asked other attendants at the event, including Herrera, how long each of them had been working for DOE, and after each had responded, Robinson stated, “If you’ve been with the DOE for more than 20 years, you are responsible for the problem,” which Robinson indicated was a problem regarding perceived racial inequities in the administration of DOE.

28. Robinson’s statement made clear to Herrera that Robinson would stop at nothing to rid her ranks of Caucasians, including Herrera, despite Herrera’s body of anti-bias work including

her leading role in the DOE's "Respect For All" initiative.

29. From the moment Robinson had managerial authority over Herrera, she treated Herrera less well than the non-Caucasian on her staff, including berating her in front of subordinate members of her staff and removing critical functions of her role.

30. Soon thereafter, in or around August 2018, Groll again asked Herrera when she intended to retire.

31. On September 7, 2018, DOE and Carranza stripped Herrera of her position as CEO of OSYD and replaced her with her subordinate Mark Rampersant ("Rampersant"), an African American man who was promoted without conducting a formal search or interview process and was demonstrably less qualified than Herrera and other similarly situated employees who underwent a formal interview process with DOE before being appointed to their respective positions.

32. DOE relegated Herrera to essentially the bottom of the reporting structure of the group she formerly led, as she was demoted three (3) administrative steps below her previous title, from Chief Executive Officer to "Senior Administrator" and was told that she would "consult" with the new reporting structure on issues that she used to supervise and manage, which was an outrageous and humiliating demotion.

33. When Herrera asked Robinson during the meeting in which she was informed of her demotion whether the decision was performance based, Robinson indicated that it was not and that the DOE had decided to go “in a different direction,” which confirmed to Herrera that her race and gender played a role in the decision to demote her.

34. Upon information and belief, Carranza, Robinson and DOE did not open Herrera’s position to other candidates (especially Caucasian women candidates), and did not conduct any meaningful search for a replacement for Herrera, and instead focused its decision to demote Herrera and promote Rampersant based on their respective racial identities.

35. Cruelly, DOE required Herrera to attend the celebration for Rampersant’s promotion into her former role and made no effort to move Herrera out of the shared office with the rest of the team that she used to lead, even though Herrera immediately requested a new desk at Tweed, which served to constantly remind Herrera of how far she had fallen.

36. Herrera was humiliated by this clear demotion, after 30 years of positive performance in her many roles with the DOE.

37. Herrera’s successor, Rampersant, even made a point to schedule a meeting with Herrera on the same day that DOE demoted Herrera, to explain that he did not have anything to do with the decision to demote Herrera and be promoted to her role, which confirmed that the top of the DOE organizational structure was changing the reporting structure unilaterally.

38. During the meeting with Herrera, Rampersant even confirmed to Herrera that “they have a ton of people coming in, from what I understand, nine, including one that will be in charge of counseling support programs,” which was Co-Plaintiff Murray’s role.

39. When Herrera asked whether there was a formal application process underway for replacing DOE leaders like Murray, he became flustered and could not explain how these promotions were possible without a formal interview process or consideration of the people who were currently appointed, which alarmed Herrera that these decisions were being made on the basis of race and in the shadows, without transparency expected and required for DOE promotions.

40. Even though Robinson demoted Herrera, she took credit for Herrera’s work, as she did at a hearing before the New York City Council on September 20, 2018 regarding DOE’s report on School Safety and Emergency Preparedness.

41. Before the aforementioned meeting at the New York City Council, Robinson required Herrera to prepare the presentation, which highlighted the accomplishments that OSYD achieved under Herrera’s leadership, but otherwise completely excluded Herrera from any aspect of the presentation, other than permitting Herrera to pass notes with answers to the questions the New York City Council posed to the all-African-American presenters from DOE, effectively adopting Herrera and her team’s successes as their own.

42. Despite suffering weeks of humiliation as a result of not having her workstation reassigned from the room where she would have had to sit in close quarters with the individuals that she supervised for many years, and having to work from other employees' stations, conference tables and cafeteria tables, Herrera's follow up requests for a new work station were ignored, even though there were open workstations.

43. Before finding Herrera a new workstation, DOE used the opportunity of Herrera avoiding her current desk to unilaterally move her belongings into boxes and put the boxes under the stairwell for everyone in the office to see, which signaled to Herrera that she was not going to be accommodated at Headquarters, and would instead either be forced to retire or be assigned somewhere else.

44. Eventually, in or around October 2018, DOE reassigned Herrera to its Fordham Plaza office in the Bronx, her clear second choice to her initial request to be moved within Headquarters at Tweed.

45. In or around the beginning of October 2018, Herrera learned that OSYD staff members attended a retreat with upper management, where DOE advised that new changes would be made in the reporting structure of OSYD, with the three highest ranking Caucasian women in OSYD being replaced by African Americans, who were each objectively less qualified for the roles even by the metrics DOE adopted to promote individuals within its ranks.

46. During this same retreat, DOE used a video for professional development that blamed the proliferation of predominantly Caucasian suburbs for creating poverty, lack of education, and poor job attainment for African Americans, without any substantive purpose for the development of the professionals in the audience, which exacerbated the open hostility against Caucasian employees within the ranks of DOE.

47. Over the subsequent months, OSYD engaged in a rapid hiring process, where little to no Caucasian women were even considered for the vacant positions.

48. Many of the incoming candidates that were ultimately selected were less qualified than their predecessors in education, work experience and New York State certifications, which are metrics and requirements used by DOE to promote individuals.

49. Tellingly, many if not all of the positions were filled before they were posted internally, meaning DOE, and specifically Carranza and Robinson, had selected candidates outside of the process required for promotions in DOE and without regard for the standards set for promotions.

50. During this same period of time, DOE senior leadership forced out older Caucasian women from their roles and have rarely considered those same employees for promotion to new roles, if at all.

51. On or about October 24, 2018, Herrera complained in writing to DOE about the discrimination she had been forced to endure on the basis of her race and gender since Carranza and Robinson have led DOE.

52. Herrera specifically complained that even while she was being demoted, Robinson told her, "I don't know where you stand but I will just have to accept you where you are," which in context could only mean that Robinson was unsure whether, given Herrera's racial identity, she could be trusted to work for the benefit of other racial identities, which was deeply hurtful and upsetting to Herrera.

53. DOE did not take any steps to address Herrera's complaint, and instead left her on the sidelines, with very little job responsibility or oversight, eviscerating her chances for promotions within DOE.

54. Tellingly, in a professional development workshop within the DOE administration subsequent to her complaint, entitled the "Election Day" training, which was organized by and condoned by Carranza and Robinson, Herrera learned that an African American presenter stated that there were a set of "White middle class values" that were plaguing society, sharing her message in terms of "Us" vs. "Them" when referring to Caucasians, and another presenter crassly compared the suspension of African American male students to the Holocaust.

55. On or about November 16, 2018 the OSYD Twitter feed, now being administered or condoned by Carranza, Robinson and other high ranking officials at DOE, tweeted that OSYD is "Engaging in some courageous conversations about the systematic structures rooted in white cultural norms that be must addressed from the top within our own organization," which signaled to Herrera that DOE believed that Caucasian people were a problem and that there was no place for Caucasian employees to be leaders in a conversation about racial inequality, which was extremely hurtful and degrading to Herrera, who had worked tirelessly for decades to make the DOE a better opportunity for education and advancement for children of all backgrounds and identities.

56. As a result of Defendants' discriminatory conduct, Herrera has suffered the adverse effects of discrimination, the quality of her life has been irreparably damaged and her self esteem, self respect and well-being has been irreversibly harmed because she was subjected to the humiliating and demeaning type of conduct described herein, all of which will continue and remain a source of humiliation, distress and financial loss to Herrera into the future.

BACKGROUND RELEVANT TO MURRAY CAUSES OF ACTION

57. Murray repeats, re-alleges and incorporates in full paragraphs 1 through 56 of this Complaint as though fully set forth at length herein.

58. Before beginning her career with DOE, Murray earned a Masters of Social Work degree from Fordham University, a Masters of Arts in Writing degree from Manhattanville College and her undergraduate degree from Concordia College.

59. Murray also came to DOE as a licensed clinical social worker who has taught graduate level courses in social work and educational leadership and published novelist of an award winning young adult novel geared towards managing addiction at that age.

60. Murray commenced her employment with DOE in or around 2006 as a School Social Worker and has been promoted numerous times, first to Social Worker/Dean of Discipline, then to Director of Student Services/Youth Development, then Senior Administrator of Guidance and School Counseling, and then, most recently in August 2015, to Executive Director of the DOE Office of Counseling Support Programs ("OCSP"), a position that she held until she was unlawfully demoted in September 2018 because of her race.

61. At all relevant times, Murray was fully qualified for her position with DOE, as confirmed by, among other things, being awarded New York State School Social Worker of the Year in role as Executive Director, her education, certifications, positive performance evaluations, the feedback, promotions and increases in compensation she received, as well as her remarkable longevity with DOE.

62. At all relevant times, Murray worked predominantly out of DOE Headquarters, located at the Tweed Courthouse, 52 Chambers Street, in Manhattan.

63. In her role as Executive Director, Murray reported into a Deputy Chancellor, who in turn reported into the Chancellor.

64. In or around June 2018, after New York City Mayor William DeBlasio appointed Carranza as Chancellor of DOE, Carranza expressed an ongoing agenda targeted specifically at placing individuals in positions of authority based on race, including but not limited to the ranks of subordinates in positions of managerial authority at DOE.

65. Soon after Carranza became Chancellor, he appointed LaShawn Robinson (“Robinson”), who is African American, as the Deputy Chancellor that would supervise Murray in her position as Executive Director.

66. Murray very quickly feared that she would be targeted by Carranza because of her race when, on June 27, 2018, Carranza addressed the restructuring of his administration, including Robinson’s promotion, from the rotunda of Tweed, announcing to all DOE employees at Tweed that “If you draw a paycheck from DOE,” you will either “Get on board with [his] equity platform or leave.”

67. Murray was dismayed two days later when, on June 29, 2018, soon after Carranza was appointed Chancellor and Robinson was appointed Deputy Chancellor, Murray endured Carranza and Robinson giving Superintendent Donald Conyers (“Conyers”) a standing ovation after he welcomed the audience by saying, “I’m so glad to see a sea of Black and Brown children,” and then gave another standing ovation when another invited presenter read an original poem that warned racial minority students against Caucasians.

68. Additionally, in Robinson's first and only one-to-one meeting with Murray, which lasted 15 minutes, Robinson asked Murray "Where are you from?" and when Murray responded that she was raised in a suburb town in Westchester County, New York, Robinson asked little else, including anything related to her ongoing projects and work streams, which signaled to Murray that Robinson was not interested in getting to know Murray or her work.

69. From the moment Robinson had managerial authority over Murray, she treated Murray less well than the non-Caucasian women on her staff, including excluding Murray from important work meetings, including meetings related to union negotiations regarding the social workers and guidance counselors whose positions fell under the auspices of Murray's office.

70. Robinson's actions made clear to Murray that she would stop at nothing to rid her ranks of Caucasians, including Murray and despite Murray's body of anti-bias work, which included her leading role in developing the DOE's "Unpacking Racism" workshops, hiring the DOE's first citywide LGBT Community Liaison and first Gender Equity Coordinator and designing and leading the Mayor's Equity and Excellence initiative with Single Shepherd.

71. In an effort to convince Robinson of her value, Murray sent Robinson an Executive Summary Report of the accomplishments of her office during the previous school year, including a video recording of a racial equity presentation Murray gave at Medgar Evers College.

72. Robinson completely ignored Murray, confirming that Robinson only saw Murray as a Caucasian woman, not as a dedicated, contributing leader of the DOE.

73. Soon thereafter, Murray was notified that OCSP would no longer operate as a stand alone office, and would instead report into OSYD.

74. Murray also learned that she would be reporting to Rampersant, an African American man, who had been named CEO of OSYD in place of co-Plaintiff Herrera, who had already been demoted from her leadership position with OSYD despite her more relevant experience and training.

75. By reporting into a CEO instead of a Deputy Chancellor, the DOE had already demoted Murray one administrative step.

76. Robinson confirmed to Murray that her demotion was simply that DOE had decided to go "in a different direction," as opposed to her performance, which confirmed to Murray that her race and gender played a role in her demotion.

77. In or around September 2018, DOE further demoted Murray when Robinson told Murray's subordinates that they would now report to Kenyatte Reid ("Reid"), who has no work experience as a counselor or social worker and who also reports into Rampersant, before even telling Murray.

78. Upon information and belief, Reid, who is an African American man, was promoted without conducting a formal search or interview process, which was required of other similarly situated employees who underwent a formal interview process with DOE for their respective positions.

79. Another video used for professional development during the same training blamed the proliferation of predominantly Caucasian suburbs for creating poverty, lack of education, and poor job attainment for African Americans, which video did not provide any substantive purpose for the development of the professionals in the audience other than to indoctrinate them into believing that focusing on the race of DOE employees will improve its performance, which instead exacerbated the open hostility against Caucasian employees within the ranks of DOE, including Murray.

80. In October 2018, DOE removed Murray as Executive Director of OCSP and replaced her with Gillian Smith ("Smith"), who immediately began a campaign to degrade Murray, including requiring Murray to report her work in 30 minute intervals, which upon information and belief is not a practice adopted by DOE, even as the DOE was receiving commendations for the programs that OCSP developed under Murray's leadership.

81. As a result of this demotion, Murray is no longer an Executive Director, but rather is now a lower designated Director, and reports three levels down from the Deputy Chancellor position that she reported into before Robinson and Carranza took office.

82. Upon information and belief, Smith was hired without a formal posting outside of the DOE's managerial hiring process, is not a trained counselor or social worker and has no demonstrable work experience with developing counseling programs, and is otherwise less qualified than Murray to lead OCSP.

83. Further demonstrating the haphazard manner in which Caucasian employees were being relegated and demoted at DOE, Rampersant notified Murray of her demotion no more than five minutes before he announced her replacement at an OSYD retreat titled, "The Power of Us."

84. Murray has not received a title or clear job description since her demotion and instead reports to Smith in a consultancy role, with very little work flow responsibility.

85. In or around October 2018, Murray complained to DOE's internal Office of Equal Opportunity ("OEO") about the discrimination she has been forced to endure under Carranza's leadership of DOE, which complaint has been ignored

86. Later that same month, Murray complained to her supervisors and DOE about the discrimination that she has been forced to endure, on the basis of her race and gender, since Carranza and Robinson have lead DOE.

87. DOE has not taken any steps to address Murray's complaints and instead has left her on the sidelines, with very little job responsibility or oversight, eviscerating her chances for stability

and promotions within DOE.

88. In early 2019, Smith began to regularly meet with Murray's last two subordinate employees individually and gave them direction without Murray's input or knowledge, which has impacted what little job assignment that the DOE has given to Murray, and fully relegated Murray to the sidelines.

89. Alarming, Murray's supervisors have recently began using Murray's known disability and need for a reasonable accommodation as a means to further harass and bully Murray, by using the interactive process to scrutinize Murray and otherwise treat Murray less well than other DOE employees who require reasonable accommodations.

90. As a result of Defendants' discriminatory conduct, Murray has suffered the adverse effects of discrimination, the quality of her life has been irreparably damaged and their self esteem, self respect and well-being has been irreversibly harmed because she was subjected to the humiliating and demeaning type of conduct described herein, all of which will continue and remain a source of humiliation, distress and financial loss to Murray into the future.

BACKGROUND RELEVANT TO FEIJOO CAUSES OF ACTION

91. Feijoo repeats, re-alleges and incorporates in full paragraphs 1 through 90 of this Complaint as though fully set forth at length herein.

92. Feijoo earned a Doctorate degree in School Leadership from New York University and a Professional Diploma in School Administration, a Masters Degree in Special Education, and a Bachelor's Degree in Education, all from Queens College.

93. Feijoo commenced her employment with DOE during the 1989 academic year as a Teacher and quickly ascended the ranks of the DOE, first to Assistant Principal, then Principal, then Superintendent, then Executive Officer for Instruction, then Deputy Senior Supervising Superintendent, then Senior Superintendent, and finally in or around the 2014 academic school year, to the position of Senior Supervising Superintendent, which she held until she was unlawfully demoted in or around June 2018 because of her race and gender.

94. At all relevant times, Feijoo was fully qualified for her position with DOE, as confirmed by, among other things, her education, positive performance evaluations and the feedback, promotions and increases in compensation she received.

95. At all relevant times, Feijoo reported to DOE Headquarters, located at the Tweed Courthouse, 52 Chambers Street, in Manhattan.

96. In her role as Senior Supervising Superintendent, Feijoo supervised all 46 other Superintendents in the New York City public school system and reported into the Senior Deputy Chancellor, who reported into the Chancellor, although Feijoo was also a designated member of Chancellor Farina's cabinet, where she had regular opportunity to meet directly with the Chancellor

to discuss and advise about expectations for the direction of DOE.

97. In or around April 2018, when New York City Mayor William DeBlasio appointed Richard Carranza as Chancellor of DOE, Carranza skipped over Feijoo without even interviewing her to appoint African American Cheryl Watson-Harris ("Watson-Harris") to the position of First Deputy Chancellor.

98. At the time of her promotion to First Deputy Chancellor, Watson-Harris was a member of Feijoo's Senior Deputy Chancellor team overseeing Field Support Centers.

99. Watson-Harris was not qualified to fulfill the role of First Deputy Chancellor when she was appointed, as tellingly, she did not possess a necessary license for the role, so rather than appoint the qualified Feijoo, Carranza and the DOE created a "transition period" between Feijoo and Watson-Harris to permit Watson-Harris time to obtain a license that was a prerequisite for all candidates to be considered for the role in the past.

100. Starting in or around May 8, 2018, Watson-Harris held meetings with only African American Superintendents and began choosing her immediate subordinates from that group.

101. Soon thereafter, on June 5, 2018, Carranza met with Feijoo, and, while reading from a pre-written script, he advised Feijoo that her role at DOE would "change" but did not offer specifics.

102. Watson-Harris obtained her license on June 26, 2018, and one month later, on July 27, 2018, Feijoo was told that the “transition period” between Feijoo and Watson-Harris was over.

103. Soon thereafter, Feijoo learned that her new role following the “transition period” would constitute a demotion, as Watson-Harris rid her ranks of Caucasian women, including Feijoo, and appointed African American Donald Conyers to the role of Senior Superintendent and promoted nine (9) employees, some of whom had no prior superintendent experience, into a newly created role of “Executive Superintendent.”

104. None of the nine (9) appointed Executive Superintendents were Caucasian women.

105. Although the role of Senior Superintendent and Executive Superintendent combined to perform some of the functions of Feijoo’s old role, she was not appointed to any of those newly created positions, despite her relevant experience and qualifications.

106. Given that Feijoo’s former role was Senior Supervising Superintendent and she was not appointed to the role of Senior Superintendent or Executive Superintendent, her new role constitutes a demotion of at least three (3) administrative steps in the reporting structure.

107. On June 25, 2018, Feijoo again met with Carranza, who this time advised Feijoo that her new role would be in labor relations and that she would be reporting into the Chief Operating Officer’s (“COO”) line, but not into the COO directly, and that all of Feijoo’s former functions

would be absorbed by Watson-Harris and the new non-Caucasian female ranks that she had assembled.

108. In designating Feijoo for this role in labor relations, Carranza also attempted to remove Feijoo's designation as a Superintendent from her title, a title she had held for decades, which was extremely demoralizing to Feijoo.

109. At least in part because she is a Caucasian woman, Carranza first relegated Feijoo to the position of "Senior Advisor of Labor & Policy," a designation which all but assured Feijoo would be sidelined from continuing the work she spent her career achieving because of her race.

110. Carranza made it clear to the employees of DOE, including Feijoo, that race had motivated his employment decisions when, two days later, on June 27, 2018, he advised the Field Support Center Executive Directors and Superintendents that they should "Get on board with his equity platform or leave" and that "It was *their* time," which made it clear to Feijoo that Carranza viewed his employees as an "Us vs. Them" situation based entirely upon racial identity.

111. Feijoo pleaded with Edie Sharpe, Carranza's Chief of Staff, to at least retain her designation as a Superintendent, which reluctantly was permitted, changing her title to Senior Superintendent of Labor and Policy, a title that carried no significant change in responsibility from Senior Advisor, only title, confirming that despite her title Feijoo remained demoted in responsibility.

112. Carranza and Watson-Harris announced Feijoo's demotion to her team at Headquarters without Feijoo even being present.

113. Since being demoted, DOE and Carranza have permitted Watson-Harris and others to sideline Feijoo and only permit her to consult with the decision makers who now control the work flow she once supervised and managed as Senior Supervising Superintendent, which has had devastating effect on Feijoo and her career.

114. As a result of Defendants' discriminatory conduct, Feijoo has suffered the adverse effects of discrimination, the quality of her life has been irreparably damaged and their self esteem, self respect and well-being has been irreversibly harmed because she was subjected to the humiliating and demeaning type of conduct described herein, all of which will continue and remain a source of humiliation, distress and financial loss to Feijoo into the future.

**AS FOR A FIRST CAUSE OF ACTION ON BEHALF OF
HERRERA AGAINST DOE AND CARRANZA FOR RACE
DISCRIMINATION IN VIOLATION OF CHAPTER 1, TITLE 8,
§8-107(1)(a) OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK**

115. Herrera repeats, re-alleges and incorporates in full paragraphs 1 through 114 of this Complaint as though fully set forth at length herein.

116. At the time Herrera was subjected to the discriminatory conduct described herein, she was in a protected class under the New York City Human Rights Law because of her race.

117. Throughout the time of her employment with Defendants, Herrera was fully qualified for her position and was in a position to continue working in that capacity for the remainder of her career.

118. Defendants treated Herrera less well because of her race and took adverse employment action against her by demeaning her because of her race, demoting her and denying her employment opportunities, all of which was permitted and condoned by Defendants.

119. The circumstances surrounding Defendants' conduct towards Herrera, including the condonation of racist professional development trainings and other presentations, gives rise to a very real inference that the actual basis for Defendants' actions towards Herrera was race discrimination.

120. The aforementioned acts of Defendants constitute unlawful discrimination against Herrera in violation of Chapter I, Title 8 of the Administrative Code of the City of New York, §8-107(1)(a) (referred to herein as "The New York City Human Rights Law"), which provides, *inter alia* that:

It shall be unlawful discriminatory practice . . . [f]or an employer or an employee or agent thereof, because of the actual or perceived ... race . . . of any person . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

121. As a result of Defendants' violations of the New York City Human Rights Law §8-107(1)(a), Defendants are liable to Herrera pursuant §8-502(a) of said statute for "damages,

including punitive damages,” and pursuant to §8-502(f) of the statute for “costs and reasonable attorney’s fees,” as provided for under the law.

122. Herrera has been caused to suffer injuries resulting in emotional anguish and suffering, and has been humiliated, demeaned and otherwise degraded because of Defendants’ outrageous conduct in violation of Herrera’s human rights, all of which has impacted her well-being and the quality of her life.

123. As a direct and proximate result of Defendants’ discriminatory conduct complained of herein, Herrera has suffered damages, injuries and losses, both actual and prospective, which include damage to her career and the emotional pain and suffering she has been caused to suffer and continues to suffer, all of which Herrera alleges to be in the amount of Ten Million Dollars (\$10,000,000).

124. Herrera, therefore, seeks judgment against Defendants on this cause of action, including, among other things, for compensatory damages in the sum of Ten Million Dollars (\$10,000,000).

**AS FOR A SECOND CAUSE OF ACTION
ON BEHALF OF HERRERA AGAINST DOE AND CARRANZA
FOR GENDER DISCRIMINATION IN VIOLATION OF CHAPTER 1, TITLE 8,
§8-107(1)(a) OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK**

125. Herrera repeats, re-alleges and incorporates in full paragraphs 1 through 124 of this Complaint as though fully set forth at length herein.

126. At the time Herrera was subjected to the discriminatory conduct described herein, she was in a protected class under the New York City Human Rights Law because of her gender.

127. Throughout the time of her employment with Defendants, Herrera was fully qualified for her position and was in a position to continue working in that capacity for the remainder of her career.

128. Defendants treated Herrera less well because of her gender and took adverse employment action against her by demeaning her because of her gender, demoting her and denying her employment opportunities, all of which was permitted and condoned by Defendants.

129. The circumstances surrounding Defendants' conduct towards Herrera gives rise to a very real inference that the actual basis for Defendants' actions towards Herrera was gender discrimination.

130. The aforementioned acts of Defendants constitute unlawful discrimination against Herrera in violation of Chapter I, Title 8 of the Administrative Code of the City of New York, §8-107(1)(a) (referred to herein as “The New York City Human Rights Law”), which provides, *inter alia* that:

It shall be unlawful discriminatory practice . . . [f]or an employer or an employee or agent thereof, because of the actual or perceived . . . gender . . . of any person . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

131. As a result of Defendants’ violations of the New York City Human Rights Law §8-107(1)(a), Defendants are liable to Herrera pursuant §8-502(a) of said statute for “damages, including punitive damages,” and pursuant to §8-502(f) of the statute for “costs and reasonable attorney’s fees,” as provided for under the law.

132. Herrera has been caused to suffer injuries resulting in emotional anguish and suffering, and has been humiliated, demeaned and otherwise degraded because of Defendants’ outrageous conduct in violation of Herrera’s human rights, all of which has impacted her well-being and the quality of her life.

133. As a direct and proximate result of Defendants’ discriminatory conduct complained of herein, Herrera has suffered damages, injuries and losses, both actual and prospective, which include damage to her career and the emotional pain and suffering she has been caused to suffer and continues to suffer, all of which Herrera alleges to be in the amount of Ten Million Dollars (\$10,000,000).

134. Herrera, therefore, seeks judgment against Defendants on this cause of action, including, among other things, for compensatory damages in the sum of Ten Million Dollars (\$10,000,000).

**AS FOR A THIRD CAUSE OF ACTION ON BEHALF OF MURRAY
AGAINST DOE AND CARRANZA FOR RACE DISCRIMINATION
IN VIOLATION OF CHAPTER 1, TITLE 8, §8-107(1)(a) OF
THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK**

135. Murray repeats, re-alleges and incorporates in full paragraphs 1 through 134 of this Complaint as though fully set forth at length herein.

136. At the time Murray was subjected to the discriminatory conduct described herein, she was in a protected class under the New York City Human Rights Law because of her race.

137. Throughout the time of her employment with Defendants, Murray was fully qualified for her position and was in a position to continue working in that capacity for the remainder of her career.

138. Defendants treated Murray less well because of her race and took adverse employment action against her by demeaning her because of her race, demoting her and denying her employment opportunities, all of which was permitted and condoned by Defendants.

143. As a direct and proximate result of Defendants' discriminatory conduct complained of herein, Murray has suffered damages, injuries and losses, both actual and prospective, which include damage to her career and the emotional pain and suffering she has been caused to suffer and continues to suffer, all of which Murray alleges to be in the amount of Ten Million Dollars (\$10,000,000).

144. Murray, therefore, seeks judgment against Defendants on this cause of action, including, among other things, for compensatory damages in the sum of Ten Million Dollars (\$10,000,000).

**AS FOR A FOURTH CAUSE OF ACTION ON BEHALF OF MURRAY
AGAINST DOE AND CARRANZA FOR GENDER DISCRIMINATION
IN VIOLATION OF CHAPTER 1, TITLE 8, §8-107(1)(a) OF
THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK**

145. Murray repeats, re-alleges and incorporates in full paragraphs 1 through 144 of this Complaint as though fully set forth at length herein.

146. At the time Murray was subjected to the discriminatory conduct described herein, she was in a protected class under the New York City Human Rights Law because of her gender.

147. Throughout the time of her employment with Defendants, Murray was fully qualified for her position and was in a position to continue working in that capacity for the remainder of her career.

148. Defendants treated Murray less well because of her gender and took adverse employment action against her by demeaning her because of her gender, demoting her and denying her employment opportunities, all of which was permitted and condoned by Defendants.

149. The circumstances surrounding Defendants' conduct towards Murray gives rise to a very real inference that the actual basis for Defendants' actions towards Murray was gender discrimination.

150. The aforementioned acts of Defendants constitute unlawful discrimination against Murray in violation of Chapter I, Title 8 of the Administrative Code of the City of New York, §8-107(1)(a) (referred to herein as "The New York City Human Rights Law"), which provides, *inter alia* that:

It shall be unlawful discriminatory practice . . . [f]or an employer or an employee or agent thereof, because of the actual or perceived ... gender . . . of any person . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

151. As a result of Defendants' violations of the New York City Human Rights Law §8-107(1)(a), Defendants are liable to Murray pursuant §8-502(a) of said statute for "damages, including punitive damages," and pursuant to §8-502(f) of the statute for "costs and reasonable attorney's fees," as provided for under the law.

152. Murray has been caused to suffer injuries resulting in emotional anguish and suffering, and has been humiliated, demeaned and otherwise degraded because of Defendants'

outrageous conduct in violation of Murray's human rights, all of which has impacted her well-being and the quality of her life.

153. As a direct and proximate result of Defendants' discriminatory conduct complained of herein, Murray has suffered damages, injuries and losses, both actual and prospective, which include damage to her career and the emotional pain and suffering she has been caused to suffer and continues to suffer, all of which Murray alleges to be in the amount of Ten Million Dollars (\$10,000,000).

154. Murray, therefore, seeks judgment against Defendants on this cause of action, including, among other things, for compensatory damages in the sum of Ten Million Dollars (\$10,000,000), together with costs, pre-judgment interest and reasonable attorney's fees.

**AS FOR A FIFTH CAUSE OF ACTION ON BEHALF OF FEIJOO
AGAINST DOE AND CARRANZA FOR RACE DISCRIMINATION
IN VIOLATION OF CHAPTER 1, TITLE 8, §8-107(1)(a) OF
THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK**

155. Feijoo repeats, re-alleges and incorporates in full paragraphs 1 through 154 of this Complaint as though fully set forth at length herein.

156. At the time Feijoo was subjected to the discriminatory conduct described herein, she was in a protected class under the New York City Human Rights Law because of her race.

157. Throughout the time of her employment with Defendants, Feijoo was fully qualified for her position and was in a position to continue working in that capacity for the remainder of her career.

158. Defendants treated Feijoo less well because of her race and took adverse employment action against her by demeaning her because of her race, demoting her and denying her employment opportunities, all of which was permitted and condoned by Defendants.

159. The circumstances surrounding Defendants' conduct towards Feijoo, including ignoring Feijoo's candidacy for newly restructured positions, despite her track record and experience leading the team that handled the operations later assigned to at least eleven (11) newly formed roles, as well as the condonation of racist professional development trainings and other presentations, gives rise to a very real inference that the actual basis for Defendants' actions towards Feijoo was race discrimination.

160. The aforementioned acts of Defendants constitute unlawful discrimination against Feijoo in violation of Chapter I, Title 8 of the Administrative Code of the City of New York, §8-107(1)(a) (referred to herein as "The New York City Human Rights Law"), which provides, *inter alia* that:

It shall be unlawful discriminatory practice . . . [f]or an employer or an employee or agent thereof, because of the actual or perceived ... race . . . of any person . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

161. As a result of Defendants' violations of the New York City Human Rights Law §8-107(1)(a), Defendants are liable to Feijoo pursuant §8-502(a) of said statute for "damages, including punitive damages," and pursuant to §8-502(f) of the statute for "costs and reasonable attorney's fees," as provided for under the law.

162. Feijoo has been caused to suffer injuries resulting in emotional anguish and suffering, and has been humiliated, demeaned and otherwise degraded because of Defendants' outrageous conduct in violation of Feijoo's human rights, all of which has impacted her well-being and the quality of her life.

163. As a direct and proximate result of Defendants' discriminatory conduct complained of herein, Feijoo has suffered damages, injuries and losses, both actual and prospective, which include damage to her career and the emotional pain and suffering she has been caused to suffer and continues to suffer, all of which Feijoo alleges to be in the amount of Ten Million Dollars (\$10,000,000).

164. Feijoo, therefore, seeks judgment against Defendants on this cause of action, including, among other things, for compensatory damages in the sum of Ten Million Dollars (\$10,000,000).

**AS FOR A SIXTH CAUSE OF ACTION ON BEHALF OF FEIJOO
AGAINST DOE AND CARRANZA FOR GENDER DISCRIMINATION
IN VIOLATION OF CHAPTER 1, TITLE 8, §8-107(1)(a) OF
THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK**

165. Feijoo repeats, re-alleges and incorporates in full paragraphs 1 through 164 of this Complaint as though fully set forth at length herein.

166. At the time Feijoo was subjected to the discriminatory conduct described herein, she was in a protected class under the New York City Human Rights Law because of her gender.

167. Throughout the time of her employment with Defendants, Feijoo was fully qualified for her position and was in a position to continue working in that capacity for the remainder of her career.

168. Defendants treated Feijoo less well because of her gender and took adverse employment action against her by demeaning her because of her gender, demoting her and denying her employment opportunities, all of which was permitted and condoned by Defendants.

169. The circumstances surrounding Defendants' conduct towards Feijoo gives rise to a very real inference that the actual basis for Defendants' actions towards Feijoo was gender discrimination.

170. The aforementioned acts of Defendants constitute unlawful discrimination against Feijoo in violation of Chapter I, Title 8 of the Administrative Code of the City of New York, §8-107(1)(a) (referred to herein as “The New York City Human Rights Law”), which provides, *inter alia* that:

It shall be unlawful discriminatory practice . . . [f]or an employer or an employee or agent thereof, because of the actual or perceived . . . gender . . . of any person . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

171. As a result of Defendants’ violations of the New York City Human Rights Law §8-107(1)(a), Defendants are liable to Feijoo pursuant §8-502(a) of said statute for “damages, including punitive damages,” and pursuant to §8-502(f) of the statute for “costs and reasonable attorney’s fees,” as provided for under the law.

172. Feijoo has been caused to suffer injuries resulting in emotional anguish and suffering, and has been humiliated, demeaned and otherwise degraded because of Defendants’ outrageous conduct in violation of Feijoo’s human rights, all of which has impacted her well-being and the quality of her life.

173. As a direct and proximate result of Defendants’ discriminatory conduct complained of herein, Feijoo has suffered damages, injuries and losses, both actual and prospective, which include damage to her career and the emotional pain and suffering she has been caused to suffer and continues to suffer, all of which Feijoo alleges to be in the amount of Ten Million Dollars (\$10,000,000).

174. Feijoo, therefore, seeks judgment against Defendants on this cause of action, including, among other things, for compensatory damages in the sum of Ten Million Dollars (\$10,000,000), together with costs, pre-judgment interest and reasonable attorney's fees.

**AS AND FOR A SEVENTH CAUSE OF ACTION, IN THE ALTERNATIVE,
AGAINST CARRANZA, INDIVIDUALLY, FOR AIDING AND ABETTING
DISCRIMINATION IN VIOLATION OF CHAPTER I, TITLE 8, §8-107(6)
OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK**

175. Plaintiffs repeat, re-alleges and incorporate in full paragraphs 1 through 174 of this Complaint, as though fully set forth at length herein.

176. As more specifically detailed in prior paragraphs of this Complaint, all of which are deemed a part hereof, Carranza aided, abetted and compelled the discrimination against Plaintiffs, so that Carranza should be held personally liable.

177. The aforementioned acts of Carranza constitute unlawful aiding and abetting against Plaintiffs in violation of §8-107(6) of the New York City Human Rights Law, which states, *inter alia*:

It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so.

178. Carranza aided and abetted the City of New York to engage in the conduct complained of and, as a direct result, Plaintiffs each has and will continue to suffer, among other things, a significant loss of income and benefits, emotional injuries, as well as other losses associated with the effects of Carranza's conduct upon Plaintiffs' respective employment, career and life's

normal pursuits.

179. As a direct and proximate result of Carranza's violation of the New York City Human Rights Law, Carranza is individually liable to each Plaintiff pursuant to §8-502(a) of said statute for damages and pursuant to §8-502(f) of said statute for "costs and reasonable attorney's fees," as has been judicially established.

180. Plaintiffs, therefore, seek compensatory damages in this cause of action including, among other things, for loss of earning capacity and for the emotional pain and suffering each have been caused to suffer, which they each allege to be in the amount of Ten Million Dollars (\$10,000,000).

181. Plaintiffs each therefore, seek compensatory damages in this Fifth Cause of Action in the sum of Ten Million Dollars (\$10,000,000) in damages, for a total of Thirty Million Dollars (\$30,000,000) plus attorney's fees, pre-judgment interest and the costs of this action.

WHEREFORE, Plaintiff Lois Herrera demands judgment against Defendants on the first cause of action in the sum of Ten Million (\$10,000,000) Dollars in compensatory damages; Plaintiff Lois Herrera demands judgment against Defendants on the second cause of Action in the sum of Ten Million (\$10,000,000) Dollars in compensatory damages; Plaintiff Jaye Murray demands judgment against Defendants on the third cause of action in the sum of Ten Million (\$10,000,000) Dollars in compensatory damages; and on the fourth cause of action in the sum of Ten Million (\$10,000,000) Dollars in compensatory damages; Plaintiff Laura Feijoo demands judgment against Defendants on the fifth cause of action in the sum of Ten Million (\$10,000,000) Dollars in compensatory damages; and on the sixth cause of action in the sum of Ten Million (\$10,000,000) Dollars in compensatory damages; and, in the alternative, Plaintiffs demand judgment against Defendant Richard Carranza, individually, on the fifth cause of action in the sum of Thirty Million Dollars (\$30,000,000) in compensatory damages so that, for all causes of action, Plaintiffs seek a total of Ninety Million

(\$90,000,000) Dollars, plus costs, pre-judgment interest and attorney's fees as permitted under the law, and for such other relief as this Court deems just and proper.

SCHWARTZ PERRY & HELLER, LLP

Attorneys for Plaintiffs

By: 

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New York, New York 10016

(212) 889-6565

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
LOIS HERRERA, JAYE MURRAY and
LAURA FEIJOO,

Index No.:

Plaintiffs,

VERIFICATION

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION
and RICHARD CARRANZA, Chancellor of New York
City Department of Education, Individually,

Defendants.

-----X
STATE OF NEW YORK)
)ss.
COUNTY OF NEW YORK)
 WESTCHESTER

JAYE MURRAY, being duly sworn, says:

I am the Plaintiff in the within action; I have read the foregoing Complaint and know the contents thereof; the same is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.

JAYE MURRAY

Sworn to me this 5th
day of May 2019

NOTARY PUBLIC

JOONG J. LEE
Notary Public, State of New York
No. 01LE6220280
Qualified in Rockland County
Commission Expires April 12, 2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
LOIS HERRERA, JAYE MURRAY and
LAURA FEJOO,

Index No.:

Plaintiffs,

VERIFICATION

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION
and RICHARD CARRANZA, Chancellor of New York
City Department of Education, Individually,

Defendants.

-----X
STATE OF NEW YORK)
)ss.

COUNTY OF NEW YORK)
 WESTCHESTER

LOIS HERRERA, being duly sworn, says:

I am the Plaintiff in the within action; I have read the foregoing Complaint and know the contents thereof; the same is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.


LOIS HERRERA

Sworn to me this 25th
day of May 2019


NOTARY PUBLIC

JOONG J. LEE
Notary Public, State of New York
No. 01LE6220280
Qualified in Rockland County
Commission Expires April 12, 2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
LOIS HERRERA, JAYE MURRAY and
LAURA FEIJOO,

Index No.:

Plaintiffs,

VERIFICATION

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION
and RICHARD CARRANZA, Chancellor of New York
City Department of Education, Individually,

Defendants.

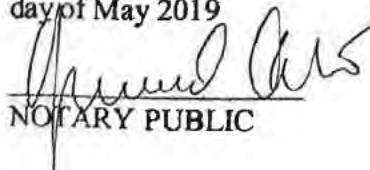
-----X
STATE OF NEW YORK)
)ss.
COUNTY OF NEW YORK)

LAURA FEIJOO, being duly sworn, says:

I am the Plaintiff in the within action; I have read the foregoing Complaint and know the contents thereof; the same is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.


LAURA FEIJOO

Sworn to me this 25th
day of May 2019


NOTARY PUBLIC

RAYMOND ARDITO
NOTARY PUBLIC-STATE OF NEW YORK
No. 02AR5038975
Qualified in Nassau County
My Commission Expires February 13, 2019 23

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and Wade Crowfoot, individually and in his official
capacity as Secretary of the California Natural
Resources Agency*

FILED
Superior Court of California
County of Los Angeles

April 16 2021
FEB 16 2021

Sherri B. Carter, Executive Officer/Clerk of Court
By Brigitte De La Rosa Deputy
Brigitte De La Rosa

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

**GEIR AASEN, INDIVIDUALLY, AND ON
BEHALF OF OTHERS SIMILARLY
SITUATED; GEIR AASEN AND DANIEL
PISCINA, AS TAXPAYERS,**

Plaintiffs,

v.

**CHARLTON H. BONHAM,
INDIVIDUALLY, AND IN HIS OFFICIAL
CAPACITY AS DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF FISH
AND WILDLIFE; WADE CROWFOOT,
INDIVIDUALLY, AND IN HIS OFFICIAL
CAPACITY AS SECRETARY OF THE
CALIFORNIA NATURAL RESOURCES
AGENCY; AND DOES 1-100, INCLUSIVE,**

Defendants.

Case No. 20STCV38981

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SPECIAL MOTION TO STRIKE**

Date: May 13
Time: 10:00 am
Dept: 9
Judge: Hon. Yvette Palazuelos

Trial Date: TBD
Action Filed: October 13, 2020

BY FAX

04/20/2021

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Code Civ. Proc. § 47(a).....	19
Code Civ. Proc. § 425.16	7, 8
Code Civ. Proc. 425.16(b)	8
Code Civ. Proc. § 425.16(a).....	8
Code Civ. Proc. § 425.16(b).....	7
Code Civ. Proc § 425.16(c).....	20
Code Civ. Proc. § 425.16(e)(2), (3), (4).....	13
Code Civ. Proc. § 425.16(e)(3), (4).....	8
Code Civ. Proc., § 425.16, subd. (b).....	12
Gov't Code § 7400	14
Gov't Code § 12940, et seq.....	14
Gov't Code § 18930.....	11
Gov't Code § 19704(a)	12
Gov't Code §§ 19704(b), 19705, 19792	12
Gov't Code § 18500 et seq.....	11
CONSTITUTIONAL PROVISIONS	
Cal. Const. Article VII, § 1	11

INTRODUCTION

Defendants Charlton Bonham and Wade Crowfoot¹ (collectively “Defendants”) submit this anti-SLAPP special motion to strike under Code of Civil Procedure section 425.16 (“anti-SLAPP statute”). This motion challenges each cause of action in Plaintiffs’ complaint because each claim arises from protected speech and is meritless. Plaintiffs improperly attempt to hold Defendants, who are high-level administrators, liable for expressing views in public seminars, official blogs, and department-wide notices concerning the importance of eliminating systemic discrimination and fostering diversity. Plaintiffs seek to chill important public discussions about racial inequity because they oppose the views expressed, not because they have been harmed. The complaint, at its core, is no more than an attempt to restrain speech with which Plaintiffs disagree, a classic Strategic Lawsuit Against Public Participation (SLAPP), which Code of Civil Procedure section 425.16 (Section 425.16) was specifically enacted to eliminate and deter. (Code Civ. Proc. § 425.16(a).)

All of Plaintiffs’ allegations arise from Defendants’ exercise of First Amendment speech rights. The complaint identifies Defendants’ “messaging” and “communications” as the source of Plaintiffs’ alleged harm. (Complaint at p. 1, ¶3:10-15.) The complaint takes issue with specific statements attributed to Defendants and other speakers at voluntary lunch-time series and in materials designed to improve outreach and retention. (Id at p. 6, ¶28- p. 13, ¶55.) Plaintiffs challenge the speakers’ use of terms such as “racial equity,” “systemic racism,” “equity and inclusion,” and “unconscious bias” in public communications. (*Ibid.*) For example, Plaintiffs allege that: “Defendant Bonham *published an email* to all CDFW employees” (Complaint, p. 6, ¶28:17-18); “Crowfoot *published a blog post*” (Complaint, p. 7, ¶34:21-22); “Subsequently, Bonham sent *an official email* to class members inviting them to participate in Crowfoot’s “Secretary Speaker Series”/ ... The *seminar*, which was *broadcast* on YouTube, was described

¹ Defendant Bonham is Director of the California Department of Fish and Wildlife (“CDFW”), and Defendant Crowfoot is the Secretary of the California Natural Resources Agency (“CNRA”). They have been sued in both their personal and official capacities.

1 by Crowfoot as an ‘an *important conversation*’...” (Complaint, p. 8, ¶38:21-24) (*emphasis*
2 *added.*)

3 Defendants discussed racial bias and systemic inequity this past summer in the wake of the
4 George Floyd, Ahmaud Arbery, and Breonna Taylor tragedies. Nowhere does the complaint
5 describe an unlawful practice, policy, or decision that harmed the Plaintiffs or an employee of
6 CDFW or CNRA. Nor can it. There are no facts showing that any person was ever terminated,
7 disciplined, denied employment/promotion, or otherwise subjected to an adverse employment
8 action based on race.²

9 Section 425.16 provides that, if a claim arises from any act in furtherance of a person's right
10 of free speech in connection with a public issue, the claim shall be subject to a special motion to
11 strike, unless Plaintiffs establish a probability of prevailing on the merits.³ (Code Civ. Proc.
12 425.16(b).) Statements concerning a matter under consideration by heads of executive branch
13 agencies fall within the protection of the anti-SLAPP statute, and cannot be the basis for liability
14 against those officials. (*Maranatha Corrections, LLC v. Dept. of Corr. & Rehab.* (2008) 158
15 Cal.App.4th 1075, 1085.) The communications are further protected because they were made in
16 public forums concerning an issue of significant public interest. (*Id.* at p. 1086, Code Civ. Proc. §
17 425.16(e)(3), (4).)

18 Ultimately, Plaintiffs cannot establish a probability of prevailing on the merits because they
19 cannot identify a discriminatory employment action, and therefore, Plaintiffs cannot establish
20 harm. (See *Miller v. Barry* (1983 D.C.) 698 F.2d 1259 [Section 1983 claim dismissed because
21 plaintiff could not show constitutional harm.]) Because there is no unlawful *decision* or harm
22 connected to the speech at issue, Plaintiffs’ allegations lack merit. (See *Okorie v. Los Angeles*
23 *Unified School District* (2017) 14 Cal.App.5th 574, 593.) Plaintiffs’ claims fail for numerous
24 additional reasons, including that Defendants’ conduct as high-level public officials is protected

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26 ² Although Plaintiffs vaguely reference “policies and customs” that allegedly created an
atmosphere of “racial intimidation,” the complaint fails to identify a single practice or policy
much less any actual harm allegedly caused by the plaintiffs.

27 ³ These anti-SLAPP protections extend to federal claims brought in California state courts,
28 such as the 42 U.S.C. § 1983 claim in the present action. (*Patel v. Chavez* (2020) 48 Cal.App.5th
484, 487-490.)

1 by privileges as well as immunities under both state and federal law. Accordingly, Plaintiffs do
2 not have a reasonable probability of prevailing and their claims must be dismissed with prejudice.

3 STATEMENT OF FACTS

4 On May 25, 2020, George Floyd, an African American male, died after a white police
5 officer callously kneeled on his neck for eight minutes and 46 seconds. His death, along with the
6 tragic deaths of other African-Americans, Ahmaud Arbery and Breonna Taylor, led to months-
7 long civil unrest across the United States. Also, on May 25, 2020, an African American who was
8 simply birdwatching was falsely reported to the police as engaging in criminal conduct because
9 he had asked the white complainant to leash her dog. These incidents resulted in a significant,
10 national discourse on race discrimination, which government leaders encouraged. On June 2,
11 2020, Governor Newsom challenged the public to rise to the moment, start listening, and invite
12 change. (See <https://twitter.com/GavinNewsom/status/1268020426292092928>.) For their part,
13 Secretary Crowfoot and Director Bonham began dialogues on racial equity within their respective
14 agencies at lunch seminars and through voluntary speaker series, offering employees who were
15 interested an opportunity to learn about these issues. (Berwith Decl, ¶¶3-4, Ex. 1, Ex. 2; Cash
16 Decl, ¶¶4-5, Ex. A.)

17 On June 4, 2020, Director Bonham issued a department-wide email to CDFW employees to
18 initiate a discussion of racial justice. (Berwith Decl., ¶3, Ex. 1.) He wrote: "If we who have the
19 mission of saving nature can't have an open mind to build a culture of dialogue in our own
20 institution when we see a birdwatcher targeted as a person of color and see racism in the
21 outdoors, then we are just perpetuating the violence of the system. Let alone seeing injustice that
22 results in death." (*Ibid.*) He further discussed a plan for promoting racial equity in the agency:
23 "[w]e had already begun a formal process working with Capitol Collaborative on Race and
24 Equity to learn from their experts, plan for, and then create long-term changes embedding racial
25 equity actions into department culture, policies, and practices. We have new staff whose job
26 description includes looking at ways to change our approaches to hiring and increasing the
27 diversity of our candidate pools." (*Ibid.*) Hence, Bonham initiated agency-wide discussions about
28 the need for racial equity and diversity, a significant issue of national interest and dialogue.

1 On the same date, Defendant Crowfoot published a blog on CNRA's public website
2 regarding the need to eradicate racism. (Cash Decl, ¶4, Ex. A.) Crowfoot's blog included
3 Governor Newsom's statement and highlighted the need to "listen, commit, and act." (*Ibid.*) He
4 proposed to: "[d]evelop a clear agenda to confront racism, inequity and unconscious bias within
5 our agency and hold ourselves accountable for implementing this agenda." (*Ibid.*) His post noted
6 that "[a]cting on these priorities also means recruiting, empowering and promoting diverse
7 leaders that reflect California." (*Ibid.*)

8 On July 15, 2020, Secretary Crowfoot hosted a panel discussion titled "What We Can Learn
9 from Our Past to Move Toward an Equitable Future" as part of CNRA's Secretary Speaker
10 Series. (Cash Decl., ¶5.) The panelists included Susan Anderson, Head of Public Programming
11 for the California Historical Society; Virgil Roberts, Chairman of the African American Board
12 Leadership Institute and Director, Great Public Schools Now; and Corey Matthews, Chief
13 Operating Officer of Community Coalition. (*Ibid.*) The speakers spoke on topics related to their
14 positions and discussed their views on systemic racism in California's past and present. (*Ibid.*;
15 Powe Decl., ¶¶ 2-3, Ex. A.) After each panelist spoke on their area of expertise, the moderator
16 posed questions from Crowfoot and department employees who viewed the program live. (*Ibid.*)
17 Crowfoot ended the seminar by summarizing the discussion and opining that the agency needed
18 to increase diversity in the agency and to promote equal access to the park system. (*Ibid.*)

19 On July 29, 2020, Bonham held a voluntary townhall forum where he spoke with Rue
20 Mapp, the director of Outdoor Afro.⁴ (Berwith Decl., Ex. 2.) Defendant Bonham introduced the
21 program as a discussion on race issues in the outdoors. (*Ibid.*) This program was broadcast to
22 1,084 CDFW employees. (*Ibid.*) The first part of the program focused on the development and
23 function of Outdoor Afro. (*Ibid.*; Powe Decl., ¶4, Ex. B.) Ms. Mapp expressed her views and
24 focused on collaboration efforts, having authentic conversations, and the fact that change happens
25 at the speed of relationships. (*Ibid.*) The town hall included a question-and-answer session with
26 participation from viewers of the program. (*Ibid.*) At no point did Ms. Mapp or Bonham state

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28 ⁴ Outdoor Afro is a non-profit organization that inspires Black leadership in nature.
(<https://outdoorafro.com/about/>)

1 “that they would implement quotas in state agencies to assure racial equity in who chooses to use
2 California’s outdoor spaces.” (*Ibid.*; Complaint, p. 12, ¶47.) Neither speaker stated “that
3 California’s outdoor agencies must engage in race-based hiring and promotion practices.” (Powe
4 Decl., ¶4, Ex. B; cf. Complaint, p. 13, ¶53).

5 Defendants in their official capacities thus engaged in conversations with employees and
6 the public at large about racial justice, inclusivity, and equity as those issues pertain to the
7 mission of their various entities. There is no dispute that these conversations were connected to
8 national events, and that Defendants were initiating deliberations of racial equity and how to
9 promote equity goals. In fact, Plaintiffs’ complaint admits that the communications at issue arose
10 “after the national upheaval stemming from the death of George Floyd.” (Complaint, p. 1, ¶3:10-
11 11.) Plaintiffs, however, fail to connect Defendants’ communications about racial equity with
12 any unlawful employment decisions at CDFW or CNRA or injury to themselves. Indeed,
13 Defendants have *not* implemented any policies or practices that discriminate against individuals
14 based on race, ethnicity, gender, or any other protected trait. (Robbins Decl, ¶¶ 3-5; Cash Decl,
15 ¶¶ 6-7.)

16 Defendants’ expressed goal of eliminating racial bias in the workplace is consistent with
17 California’s civil-service system and state law generally. As state agencies, employment at both
18 CDFW and CNRA is subject to civil-service laws. (See Cal. Const. Art. VII, § 1.) Under the
19 California Constitution, the hiring and promotion of state employees is strictly based “on merit
20 ascertained by competitive examination.” (*Ibid.*) This constitutional mandate, known as the
21 “merit principle,” is the cornerstone of California’s civil service. (*California State Personnel Bd.*
22 *v. California State Employees Ass’n* (2005) 36 Cal.4th 758, 763, 765; Govt. Code § 18500 et seq.)
23 Applicants for employment must undergo a competitive selection process, which is designed to
24 result in the hiring of top candidates based on merit. (*California State Personnel Bd, supra*, at p.
25 765; Gov’t Code § 18930.) Discussions about racial equity and obtaining a diverse applicant pool
26 from which to draw the most qualified candidates are entirely compatible with the merit principle.

27 California statutes also ensure that unlawful discrimination plays no part in civil-service
28 employment by prohibiting state applications and other examination materials from referencing

1 race, religious creed, sex, physical disability, and other protected characteristics. (Gov't Code
2 §§ 19704(a); 12940(a).) Ethnic, marital status, and gender data may be obtained for research and
3 statistical purposes, *but may not be used* for examination, appointment, or promotion. (Gov't
4 Code §§ 19704(b), 19705, 19792.) The statutes require safeguards so that racial data is not
5 available to a state employer. (Gov't Cde § 19705.) The purpose of this prohibition is to avoid
6 consideration of an applicant's race or gender in the hiring process. Both CDFW and CNRA
7 follow these civil-service laws in making employment decisions. (Robbins Decl., ¶3, Ex. 1; Cash
8 Decl., ¶¶ 6-7.) These agencies have implemented and enforced policies against the use of race,
9 ethnicity, or gender in employment decisions. (Robbins Decl., ¶¶ 4-5; Cash Decl., ¶¶6-7.)

10 Significantly, the complaint fails to identify any practice or policy implemented by the
11 Defendants that discriminates against individuals based on race. Likewise, the complaint does
12 not identify any unlawful employment decision or action taken by the Defendants. Instead, the
13 complaint is entirely based on Plaintiff's speculation that Defendants' speech endorses "critical
14 race theory," an academic perspective that Plaintiffs vehemently oppose. (Compliant, pp. 1-4.)

15 APPLICABLE LEGAL STANDARD

16 To prevail on an anti-SLAPP motion, Defendants must show that the plaintiffs' claims
17 (1) arise from Defendants' protected activities and (2) lack minimal merit. (*Navellier v. Sletten*
18 (2002) 29 Cal.4th 82, 88-89.) Plaintiffs' evidence will be accepted as true and Defendants'
19 evidence evaluated to determine if it defeats the Plaintiffs' showing as a matter of law. (*City of*
20 *Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420.)

21 A claim arises from protected activity when that activity underlies or forms the basis for the
22 claim. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Once a defendant shows that the
23 allegations arise from protected activity, the burden shifts to the plaintiff to establish a
24 "probability" of prevailing on these claims. (Code Civ. Proc., § 425.16, subd. (b); *Baral v.*
25 *Schnitt* (2016) 1 Cal.5th 376, 384.) Uncorroborated and self-serving declarations are insufficient
26 at this stage. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.) Moreover, a
27 plaintiff may not rely on allegations in the complaint that are unsubstantiated during the anti-
28 SLAPP motion proceeding. (See *Murray v. Tran* (2020) 55 Cal.App.5th 10, 36-37.)

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ARGUMENT

I. PLAINTIFFS' CLAIMS ARISE FROM PROTECTED SPEECH UNDER SECTION 425.16(E)

Under the first step of the anti-SLAPP analysis, the moving party must show the relief sought is based on allegations arising from protected activity. (*Murray, supra*, 55 Cal.App.5th at p. 25.) The California Supreme Court has explained that, in analyzing whether this first prong has been met, courts should consider “supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Hence, Plaintiffs cannot simply rely on bare allegations in the complaint to defeat an anti-SLAPP motion on the first prong, if admissible evidence otherwise establishes that Plaintiffs’ claims arise primarily from protected speech activity.

The allegations in the complaint and supporting declarations demonstrate that Plaintiffs are suing the heads of CNRA and CDFW for their communications on issues of racial equity in connection with the environmental goals of their agencies. Defendants have been targeted because they exercised their right to speak about racial justice in public blogs, employee town halls, and voluntary panel discussions. (Complaint, pp. 6-13, ¶¶28-54.) For example, Bonham is being sued because he sent an agency-wide email to describe his goals to promote racial equity at CDFW, and expressed views about the role of racial justice and nature-based recreational experiences. (Complaint, pp. 6-7, ¶¶28-33.) Crowfoot is similarly being sued for posting his views on racial equity in his agency’s blog and broadcasting a panel discussion on racial equity within his agency and the park system. (Complaint, pp. 7-11, ¶¶34-44.)

The anti-SLAPP law protects written or oral statements: (1) made in connection with an issue under consideration or review by an executive body, or any other official proceeding authorized by law; (2) made in a place open to the public or a public forum in connection with an issue of public interest; (3) or speech and petitioning activity “in connection with a public issue or an issue of public interest.” (Code Civ. Proc. § 425.16(e)(2), (3), (4).) These anti-SLAPP protections extend to government entities and public officials. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17; *See Maranatha Corrections, LLC v. Dept. of Corr. & Rehab.*, *supra*, 158 Cal.App.4th 1075, 1085; *Tubor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 610.) It is

1 California public policy to protect “continued participation in matters of public significance” and
2 the anti-SLAPP law is construed broadly towards this end. (*Id.* at p. 18.)

3 Defendants’ challenged communications plainly qualify as protected activity. First,
4 Defendants’ statements were made in connection with an issue under consideration or review by
5 an executive agency – increasing diversity. A matter is under consideration if it “is one kept
6 ‘before the mind,’ ‘given attentive thought, reflection, meditation.’” (*Maranatha Corrections,*
7 *LLC v. Dept. of Corr. & Rehab.*, supra, 158 Cal.App.4th 1075, 1085.) A matter is under review if
8 it is subject to inspection or examination. (*Ibid.*) Based on Plaintiffs’ allegations, Defendants
9 Bonham and Crowfoot made their statements in an email, blog posts, and as panelists in
10 discussions about racism in connection with environmental goals, and implementation of implicit-
11 bias training⁵ and increasing diversity and inclusion at DFW and CNRA. Defendants’ speech
12 thus concerned the implementation of racial justice considerations in their respective agencies’
13 operations, a matter under consideration by those agencies. (See Gov’t Code § 7400.)

14 Second, the challenged speech is also protected because it concerned efforts to eliminate
15 discrimination, which is an issue of significant public interest. (See e.g. Gov’t Code § 12940, et
16 seq.) As stated above, the anti-SLAPP statute protects “any other conduct in furtherance of the
17 exercise of the constitutional right of petition or the constitutional right of free speech in
18 connection with a public issue or an issue of public interest.” A statement is made “in connection
19 with a public issue” when it furthers a public conversation, taking the context into account,
20 including the audience, speaker, and purpose. (*Sandlin v. McLaughlin* (2020) 50 Cal.App.5th
21 805, 825.) The issue of race discrimination was front and center this past summer. The deaths of
22 Floyd, Arbery and Taylor ignited nationwide protests and sparked debates about racial justice.
23 The issue of racial equity even touched the environmental sphere after the birdwatcher incident in
24 Central Park and the Sierra Club’s public discussion about the racist leanings of their founder,
25 John Muir. As the heads of the largest environmental agencies in California, Defendants’

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27 ⁵ Without support, the Complaint alleges that implicit bias training “which has been
28 empirically proven to be a pseudo-science...” (Complaint ¶33). However, the legal profession has
officially recognized implicit-bias training as valid. (See Stats. 2019, Chap. 418, A.B. 242 § 1;
Bus. & Prof. Code §§ 6070.5, 68088 [implicit bias training for lawyers and judges].)

1 communications directly addressed the question of racial justice and its role in the agencies'
2 environmental missions, furthering the public debate. The anti-SLAPP statute was intended to
3 protect individuals like Bonham and Crowfoot from lawsuits filed to chill their speech on matters
4 of public interest.

5 Finally, although Plaintiffs' complaint vaguely alleges that Defendants implemented
6 "racially discriminatory policies and practices" in the workplace, Plaintiffs fail to identify
7 employment policies and practices that are discriminatory, nor do they identify any
8 discriminatory employment actions that caused harm. Plaintiffs cannot identify conduct by
9 Defendants that can be the basis of liability, and is not protected speech, because *there is no*
10 *discriminatory policy or employment action*. (Robbins Decl, ¶ 5; Cash Decl., ¶¶ 6-7.) Both the
11 complaint and the evidence establish that Defendants' protected speech is the gravamen of
12 Plaintiffs' suit and not merely tangential to the claims. (See *Okorie v. Los Angeles Unified School*
13 *District* (2017) 14 Cal.App.5th 574, 593 [anti-SLAPP motion properly granted because claims
14 based on a "wide-array of injury causing statements" and not adverse action].)

15 **II. PLAINTIFFS' CLAIMS LACK ANY MERIT**

16 Once a defendant demonstrates that the contested allegations arose from protective activity,
17 the burden shifts to the plaintiff to establish a "probability" that the plaintiff will prevail on those
18 claims. (Code Civ. Proc. §425.16(b); *Baral v. Schnitt*, supra, 1 Cal. 5th 376, 384.) Plaintiffs must
19 do more than simply allege facts sufficient to defeat a demurrer. (*Dupont Merck Pharmaceutical*
20 *Co. v. Superior Court* (2000) 78 Cal. Ap.4th 562, 568.) Plaintiffs must produce *admissible*
21 evidence supporting a judgment in their favor, and overcome any privilege or defense asserted to
22 the claim. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087; *Bergstein v. Stroock &*
23 *Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 815.) Courts are required to grant a motion
24 to strike if the defendants' supporting evidence defeats the plaintiffs' claim as a matter of law.
25 (*Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219,
26 1235.) Here, Plaintiffs fail to establish a *prima facie* case for each cause of action alleged.

1 **A. Plaintiffs Cannot Sue State Officials under 42 U.S.C. § 1981**

2 42 U.S.C. § 1981 is a federal statute that prohibits race discrimination in government
3 employment. (*Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279; *Flores*
4 *v. City of Westminster, et al.*, (9th Cir. 2017) 873 F.3d 739.) Virtually all the federal circuits hold
5 that there is no private right of action against state actors under section 1981. (See *Buntin v. City*
6 *of Boston* (1st Cir. 2017) 857 F.3d 69, 72-73 [explaining majority agree there is no private cause
7 of action against state actors for money damages].) Money-damages claims against state actors
8 based on 42 U.S.C. § 1981 are exclusively enforced under 42 U.S.C. §1983. (*Jett v. Dallas*
9 *Independent School Dist.* (1989) 491 U.S. 701, 735.) Hence, Plaintiffs' section 1981 claim
10 should be dismissed entirely.

11 **B. Plaintiffs' 42 U.S.C. § 1981 and § 1983 Claims Fail Because There Is No**
12 **Adverse Employment Action Based on Race**

13 Courts generally apply the legal framework of Title VII to employment discrimination
14 claims alleging race discrimination under both 42 U.S.C. §§ 1981 and 1983. (*Metoyer v.*
15 *Chassman* (9th Cir. 2007) 504 F.3d 919, 930-931.) Therefore, to establish a *prima facie* case,
16 Plaintiffs must prove: (1) that they are members of a protected class; (2) that they were qualified
17 for their positions and performing their jobs satisfactorily; (3) that they experienced adverse
18 employment actions; and (4) that similarly situated individuals outside their protected class were
19 treated more favorably, or other circumstances surrounding the adverse employment action give
20 rise to an inference of discrimination. (*Hawn v. Exec. Jet Mgmt.* (9th Cir. 2010) 615 F.3d 1151,
21 1156.) Ultimately, Plaintiffs must show that, but-for their race, they would not have been
22 subjected to constitutional harm. (*Comcast Corp. v. Nat'l Assn of African American-Owned*
23 *Media* (2020) 140 S.Ct. 1009, 1019.) Here, Plaintiffs fail to show any adverse employment
24 decision that violated their constitutional rights and caused an alleged harm. This is fatal to their
25 claim⁶. (See *Andrews v. CBOCS West, Inc.* (7th Cir. 2014) 743 F.3d 230, 237-238 [42 U.S.C. §

26 ⁶ A trial court cannot allow an amendment after a defendant has met its burden with
27 respect to the first prong (see *Mobile Medical Services etc. v. Rajaram* (2015) 241 Cal.App.4th
28 164, 171) or before the hearing on the motion (see *Salma v. Capon* (2008) 161 Cal.App.4th 1275,
1280), because it would defeat the purpose of an anti-SLAPP motion.

1 1981 claim failed because plaintiff did not suffer adverse action]; *Harman, supra*, 136
2 Cal.App.4th at p. 1289 [section 1983 plaintiff must show injury].)

3 Further, Plaintiffs' federal claims are barred to the extent Defendants are sued in their
4 official capacities for money damages under Sections 1981 or 1983.⁷ (*Mackey v. Board of*
5 *Trustees* (2019) 31 Cal.App.5th 640, 653-655; *Will v. Dept. of State Police* (1989) 491 U.S. 58,
6 71; *McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1207.) A claim
7 for money damages against a state official acting in his or her official capacity is barred because it
8 is considered a suit against the state itself. (*Pierce v. San Mateo County Sheriff's Dept.* (2014)
9 232 Cal.App.4th 995, 1018.)

10 Finally, Plaintiffs cannot maintain a claim for injunctive relief against Defendants Bonham
11 and Crowfoot in their official capacities because they cannot identify a state policy that violates
12 the federal constitution as required under sections 1981 and 1983. A suit against a state officer in
13 his official capacity for injunctive relief must show a "policy or custom that played a part in the
14 violation of federal law." (*Kentucky v. Graham* (1985) 473 U.S. 159, 167.) Here, Plaintiffs only
15 point to discussions concerning racial equity and inclusiveness that do not violate federal law.

16 **C. Plaintiff's First Amendment Speech Claim Is Meritless.**

17 Plaintiffs allege that Defendants violated their First Amendment speech rights in addition to
18 their right to be free from race discrimination. (Complaint, p. 15:17-19.) To establish this claim,
19 Plaintiffs must show (1) a violation of rights protected by the Constitution or created by federal
20 statute (2) proximately caused (3) by conduct of a "person" (4) acting under color of state law.
21 (*Crumpton v. Gates* (9th Cir. 1991) 947 F.2d 1418, 1420.) Plaintiffs fail to satisfy the first
22 element of this *prima facie* case because their complaint does not identify any exercise of their
23 speech rights; on the contrary, the only speech identified is *Defendants'* speech.⁸ Plaintiffs do not
24 allege that their speech has been targeted, restricted, or chilled in their attempt to restrict the First

25 ⁷ State officials sued in their official capacity are however subject to suit for injunctive
26 relief. (*Will v. Dept. of State Police* (1989) 491 U.S. 58, 71, fn 10.) Those claims fail on the
merits as explained herein.

27 ⁸ In the first count for damages, Plaintiffs contend that implicit-bias training is tantamount
28 to compelled speech and conclude, without basis, that there is a "loyalty oath" to CRT ideology in
the workplace. (Complaint ¶66.) This is purely speculative, as there is no such "loyalty oath" to
CRT ideology compelled by Defendants. (Robbins Decl., ¶6; Cash Decl, ¶8.)

1 Amendment rights of Defendants. The lack of any cognizable action defeats Plaintiffs' speech
2 claim. (See *Berard v. Town of Millville* (Mass. 2000) 113 F.Supp.2d 197, 203.)

3 **D. The 42 U.S.C. § 1985 Claim Fails to Allege a Cause of Action**

4 Plaintiffs plead a violation of 42 U.S.C. § 1985 but fail to identify the specific subdivision
5 violated. Plaintiffs appear to be attempting to assert a conspiracy theory under section 1985(3).
6 To establish this claim, Plaintiffs must show a conspiracy motivated by racial animus aimed at
7 interfering with protected rights. (*Maymi v. P.R. Ports Auth.*, (1st Cir. 2008) 515 F.3d 20, 30-31.
8 A mere allegation of conspiracy is insufficient to state a claim. (*Holgate v. Baldwin* (9th Cir.
9 2005) 425 F.3d 671, 676.) There must be "invidiously discriminatory motivation ... behind the
10 conspirators' action." (*Usher v. Los Angeles* (9th Cir. 828 F.2d 556, 561.) Plaintiffs must plead
11 "in a specific and nonconclusory way, that the alleged acts deprived plaintiffs of rights,
12 privileges, or immunities secured by the federal Constitution and laws." (*Duffy v. City of Long*
13 *Beach* (1988) 201 Cal.App.3d 1352, 1360 [emphasis added].) The complaint in this case is
14 fatally defective because it fails to allege specific facts establishing a conspiracy or deprivation of
15 rights and cannot show invidious intent by the Defendants. For example, Plaintiffs fail to identify
16 who participated in a conspiracy, what acts occurred in furtherance of such a conspiracy, and how
17 their civil rights were deprived based on racial animus. As such, Plaintiffs' over-generalized
18 claims are meritless and must be dismissed.

19 **E. Privileges and Immunities Bar Plaintiffs' Claims**

20 Defendants' communications and participation as panelists are protected by qualified
21 immunity because Defendants were acting as government officials and performing discretionary
22 functions. (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 817-820.) Qualified immunity shields
23 government officials from "liability for civil damages insofar as their conduct does not violate
24 clearly established statutory or constitutional rights of which a reasonable person would have
25 known." (*Bradley v. Medical Board* (1997) 56 Cal.App.4th 445, 456.) Plaintiffs' disagreement
26 with Defendants' official communications and desire to avoid ideas they do not tolerate cannot
27 defeat qualified immunity. (*Ibid.*)

Additionally, Defendants' statements are protected by the official-duty privilege under both federal and state law. Statements made by public officials while discharging official duties are absolutely privileged. (*Maranatha Corrections, LLC v. Dept. of Corr. & Rehab.*, *supra* 158 Cal.App.4th at p. 1087; see also *Barr v. Matteo* (1959) 360 U.S. 564, 573-575; *Kilgore v. Younger* (1959) 30 Cal.3d 770, 782.) To the extent Plaintiffs' claims are based on California law, Code of Civil Procedure § 47(a) bars Plaintiffs' claims. (*Tutor-Saliba Corp. v. Herrera*, *supra*, 136 Cal.App.4th 604, 613-616.) Defendants wrote emails from their official email accounts to their employees and published blog posts and seminars in their agencies' official websites. Defendants' actions were within their official capacities as Secretary and Director of their respective agencies and within their official duties. (See also *Royer v. Steinberg* (1979) 90 Cal. App. 3d 490, 501[extending the official duty privilege to all state and local officials].)

Finally, the federal *Noerr-Pennington* doctrine immunizes speech and petitioning activity by government officials acting in their official capacity. In one case, the Ninth Circuit affirmed the dismissal of section 1983 and 1985 claims under *Noerr-Pennington* where city officials made statements opposing plans to lease space to specific lessors. (*Manistee Town Center v. City of Glendale* (9th Cir. 2000) 227 F.3d 1090, 1091-1092.) The Ninth Circuit noted that public officials often engage in speech-related activities such as interceding, lobbying, and generating publicity to advance public goals, and that they should be immune from section 1983 liability for engaging in such quintessential political activity. (*Id.* at p. 1093.) Defendants' advocacy to promote racial justice in their respective government agencies should similarly be protected from civil liability.

CONCLUSION

Plaintiffs' lawsuit is a classic SLAPP case intended to discourage Defendants from exercising their First Amendment rights as heads of environmental agencies to discuss racial justice in the workplace and in the agencies' public mission. Plaintiffs' claims are based on Defendants' protected speech and fail to identify any unlawful action attributable to Bonham and Crowfoot. Plaintiffs, therefore, cannot establish a reasonable probability of succeeding on the merits and their lawsuit must be dismissed. For these reasons, Defendants' special motion to

1 strike should be granted, and Defendants awarded fees and costs pursuant to Code of Civil
2 Procedure section 425.16(c).

3
4 Dated: April 15, 2021

Respectfully Submitted,

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Bonham, individually and in his official
capacity as Director of the California
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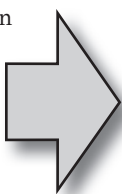
	PRORATED SCHEDULE	DUES	GOV'T ATTY.*
On or before 9/19/16	Nov.–March \$335.00	\$335.00	\$268.00
	April–June 252.00	252.00	201.00
	July–Sept. 168.00	168.00	134.00
	Oct.–Dec. 84.00	84.00	67.00
9/20/16 thru 9/19/17	Nov.–March \$268.00	\$268.00	\$215.00
	April–June 201.00	201.00	162.00
	July–Sept. 134.00	134.00	108.00
	Oct.–Dec. 67.00	67.00	54.00
9/20/17 thru 9/19/18	Nov.–March \$201.00	\$201.00	\$161.00
	April–June 151.00	151.00	121.00
	July–Sept. 101.00	101.00	81.00
	Oct.–Dec. 51.00	51.00	41.00
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Civility is a virtue, not a shortcoming. Willingness to temper zeal with respect for society's interest in preserving responsible judicial process will help to preserve it.

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4 Be punctual in appointments, communications and in honoring scheduled appearances. Neglect and tardiness are demeaning to others and the judicial system.

5 Procedural rules are necessary to judicial order and decorum. Be mindful that pleadings, discovery processes and motions cost time and money. They should not be heedlessly used. If an adversary is entitled to something, provide it without unnecessary formalities.

6 Grant extensions of time when they are reasonable and when they will not have a material, adverse effect on your client's interest.

7 Resolve differences through negotiation, expeditiously and without needless expense.

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