

STATE OF TENNESSEE

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**SUBMITTED ELECTRONICALLY
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Michelle Paczynski
Administrator, Office of Policy Development and Research
U.S. Department of Labor, Employment and Training Administration
200 Constitution Avenue NW, Room N-5641
Washington, DC 20210

RE: U.S. Department of Labor Notice Entitled National Apprenticeship System Enhancements,
89 Fed. Reg. 3,118 (Jan. 17, 2024), Docket No. ETA–2023–0004

Dear Ms. Paczynski:

The People and State of Tennessee, joined by twenty-three co-signing States, welcome the chance to comment on the U.S. Department of Labor’s proposed rule revising the regulations for registered apprenticeships. *See National Apprenticeship System Enhancements*, 89 Fed. Reg. 3,118 (Jan. 17, 2024) (“Proposal” or “Proposed Rule”). “Racial discrimination [is] invidious in all contexts.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023) (“*SFFA*”) (citation omitted). “[G]overnment actors” and private employers “may [not therefore] ‘intentionally allocate preference to those ‘who may have little in common with one another but the color of their skin.’” *Id.* at 220 (citation omitted). Yet, the Department’s proposal to “[e]mbed[e]quity at the [c]enter of [r]egistered [a]pprenticeship” appears to do exactly that. 89 Fed. Reg. at 3,126. It should reverse course.

Congress authorized the Department of Labor to “formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices.” 29 U.S.C. § 50. Pursuant to that authority, the Department created the National Apprenticeship System, which allocates federal

funds to help state sponsors, employers, and other entities recruit, train, and retain workers in skilled occupations, while jobseekers obtain work experience, training, and a nationally recognized credential. 89 Fed. Reg. at 3,120. The program enables Americans to take advantage of hundreds of thousands of apprenticeship opportunities around the country, improving their career earnings while strengthening the American economy.

The Proposed Rule deviates from the statutory purpose of safeguarding the welfare of apprentices and builds on existing regulations to further entrench an apprenticeship regime dedicated to picking winners and losers based on the color of apprentices' skin. Through the Proposed Rule, the Department purports to promote "greater equity in the National Apprenticeship System." *Id.* at 3,139. The Proposed Rule furthers this equity goal by "requiring sponsors" and other stakeholders to develop "an intentional strategy to recruit from and retain" people who fall within a newly defined class that appears nowhere in the authorizing statute—"underserved communities." *Id.* (citing proposed § 29.2). "Underserved communities," which is "used throughout the proposed rule," includes "persons of color," *id.* at 3,139, 3,276, so every time the Proposed Rule uses that term, it directs consideration of race. For example, the Proposed Rule codifies the role of the Employment and Training Administration's Office of Apprenticeship ("OA") in "[p]romoting diversity, equity, inclusion, and accessibility in apprenticeship, including for those from underserved communities," i.e., treating people differently solely because of their race. *Id.* (quoting proposed § 29.3(f)).

The Proposed Rule would also impose new race-based strategic, oversight, and data collection requirements on program sponsors, State Apprenticeship Agencies, and participating employers, including:

- "requir[ing]" prospective sponsors "to articulate an equitable, intentional, and achievable strategy for advancing the program's recruitment, hiring, and retention of individuals from underserved communities," *id.* at 3,127, 3,280 (citing proposed § 29.10(a)(4));
- requiring each State Apprenticeship Agency ("SAA") to obtain or maintain its recognition by submitting a "detailed, actionable plan for advancing DEIA" to OA, *id.* at 3,268, 3,294, 3,238, 3,215 (citing proposed § 29.27);
- requiring SAAs to collect and report individual racial and other "demographic" data on apprentices and programs to enable the Department of Labor to "develop and track indices relating to equity," *id.* at 3,215, 3,223 (citing proposed §§ 29.25, 29.26(a)(5), 29.28);
- requiring program sponsors and participating employers to maintain extensive records demonstrating compliance with the new regulations, including "[i]nformation related to the qualification, recruitment, employment, and training of apprentices," *id.* at 3,184, 3,284 (citing proposed § 29.18(a)(2)(i));
- requiring sponsors of group programs to "screen and actively monitor participating employers" and SSAs to monitor apprenticeship programs "to ensure their compliance with" the new equity regulations, *id.* at 3,127, 3,162, 3,279 (citing proposed § 29.8(b)); *id.* at 3,186, 3,237–38 (citing proposed § 29.19).

On top of all that, the Proposed Rule recodifies the definition of "race" as used in the Department's non-discrimination regulations for "purposes of recordkeeping" across "all aspects of the National

Apprenticeship System.” *Id.* at 3,129, 3,274–75 (proposed § 29.2). And the Proposed Rule states that collecting this “individual . . . demographic information” would promote “crucial goals like DEIA.” *Id.* at 3,212. In other words, the Department proposes to require sponsors and SAAs to develop plans for recruiting, hiring, and measuring compliance using racial data and targets.

We endorse the value of promoting meaningful diversity of experience and viewpoint in the workplace. Further, we support finding meaningful interventions to promote the success of disadvantaged apprentices regardless of the color of their skin. But as we have previously admonished private employers and the Department of Commerce (*see* attached Exhibits A and B), neither public nor private employers can lawfully pursue that goal by engaging in racial discrimination, regardless of whether their efforts go under the labels of “equity,” “DEIA,” or other similar euphemisms. Additionally, no federal agency can wield legislative authority beyond that lawfully granted by Congress. We therefore write to identify four legal barriers to the type of race-based system the Proposed Rule appears to require.

First, the Department’s imposition of new oversight and data collection requirements on SAAs exceeds the scope of the agency’s Spending-Clause authority. Congress funds SAAs using its power to tax and spend in pursuit of the “general Welfare.” U.S. Const. art. I, § 8, cl. 1. When Congress exercises that power to impose conditions on funding recipients, however, it must do so via “clear[] statement[s]” in the legislation itself. *Haight v. Thompson*, 763 F.3d 554, 568 (6th Cir. 2014). Only then can States “voluntarily and knowingly accept[]” or decline any obligations attached to federal funds. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Here, the Department’s sole statutory authority for its regulatory overhaul is Congress’s broad direction of the Secretary of Labor to “formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices,” “encourage[e] the inclusion” of those standards in apprenticeship contracts, “bring together employers and labor” to develop apprenticeship programs, and “cooperate with State agencies” engaged in developing such programs. 29 U.S.C. § 50. That language lacks the clarity necessary to enable Congress—via the Department—to impose new race-based oversight and data collection obligations on state agencies’ existing apprenticeship programs. The Department of Labor’s novel mandates thus cannot lawfully serve as prerequisites for States’ continued receipt of millions in federal funding.

Second, the Department’s proposed race-based requirements for apprenticeship program design and administration violate the U.S. Constitution’s Equal Protection Clause. Despite asserting the Proposed Rule’s consistency with its own regulations prohibiting discrimination by program sponsors and requiring “affirmative steps to provide equal opportunity,” 89 Fed. Reg. at 3,127; 29 C.F.R. § 30.3, the Department fails to acknowledge its obligation to comply with another body of federal law—that elucidated by the U.S. Supreme Court most recently in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181. There, the U.S. Supreme Court invalidated the use of race in educational affirmative-action programs as a violation of equal protection standards and thus Title VI of the Civil Rights Act of 1964, holding that “amorphous” justifications for race-based action, such as promoting student-body diversity, are not sufficiently compelling to survive strict scrutiny. *Id.* at 198 n.2, 214, 224, 230–31 (quoting *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007)). The Equal Protection Clause was designed to “do away with all governmentally imposed discrimination based on race,” the Court emphasized, and “[e]liminating racial discrimination means eliminating

all of it.” *Id.* at 206 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). This interpretation of the Equal Protection Clause reaches beyond higher education to “other areas of life,” including employment. *Id.* at 204.

Against this landmark decision, the Department offers two illegitimate justifications for its proposed race-based action. First, the Department cites the undefined “benefits” of using apprenticeship as a “DEIA strategy.” 89 Fed. Reg. at 3,119. This “inescapably imponderable” interest cannot justify race-based action after *SFFA*. 600 U.S. at 215. Second, the Department states that the Proposed Rule’s “emphasis on . . . equity” is “founded on the recognition that some populations, such as women and people of color, have historically faced systemic barriers to successfully access, participate in, and complete a registered apprenticeship program.” 89 Fed. Reg. at 3,119. But the *SFFA* Court made clear that “past societal discrimination” does not justify “race-based state action.” 600 U.S. at 226 (citation omitted) (emphasis added). The historical discrimination justification can be invoked only when three criteria are satisfied: (1) the policy “target[s] a specific episode” of past discrimination, not “generalized . . . past discrimination in an entire industry”; (2) there is “evidence of intentional discrimination in the past,” not just “statistical disparities”; and (3) the government “actively or passively participated” in the past discrimination. *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (plurality opinion)). The Department doesn’t even try to satisfy that standard. Its Proposal simply can’t be reconciled with governing Equal Protection law.

Third, race-based employment decision-making violates Title VII and related civil-rights laws. The Court made clear in *SFFA* that a violation of the Equal Protection Clause also violates Title VI, 600 U.S. at 198 n.2, and Supreme Court precedent “discussing constitutional principles can provide helpful guidance in [the Title VII] context.” *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009). In other words, employers, no more than educational institutions, may not rely on diversity and similar justifications to justify race-based discrimination. And lest our concerns appear overblown that “DEIA”- and “equity”-driven employment strategies are code for race-based decisionmaking, the evidence shows that employers too often make race-based employment decisions in the name of “diversity” and “equity.” Google, for example, justifies treating applicants to its BOLD internship program differently because of the color of their skin by pointing to the goal of exposing “historically underrepresented students” to tech field opportunities.¹ It also publishes a “Diversity Annual Report” that measures the percentage racial composition of the Google workforce, bragging recently that it met its 2023 “Racial Equity Commitment” of increasing “leadership representation of Black+, Latinx+, and Native American+ Googlers by 30%.”² And Google is far from alone in pursuing race-based hiring and promotion,³ although no other company has so effectively demonstrated the folly of prioritizing racial diversity over all other concerns.⁴

¹ *Who should apply to the BOLD internship program?*, *Bold Internship Program*, Google, <https://perma.cc/U7QS-M3UL> (last visited Mar. 4, 2024).

² *2023 Google Diversity Annual Report* 60, 65, Google (2023), <https://perma.cc/Y7KZ-3WBZ>.

³ Caroline Colvin, *Once neglected, DEI initiatives now present at all Fortune 100 companies*, HR Dive (July 20, 2022), <https://perma.cc/F8TE-E7SM>.

⁴ Adi Robertson, *Google apologizes for ‘missing the mark’ after Gemini generated racially diverse Nazis*, The Verge (Feb. 21, 2024), <https://perma.cc/TE63-FHH5>.

SFFA drove home that “racial classifications designed to include rather than exclude” are, like the latter, “inherently suspect.” *Parents Involved*, 551 U.S. at 742 (quoting *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)). And there is no affirmative “DEIA” or “equity” defense to a Title VII or 42 U.S.C. § 1981 claim of race-based decision-making or contracting. Indeed, the U.S. Solicitor General’s Office recently confirmed that Title VII’s “bona fide occupational qualification” defense excludes race-based employment decisions. Transcript of Oral Argument at 44, *Muldrow v. St. Louis*, No. 22-193 (U.S. Dec. 6, 2023) (discussing 42 U.S.C. § 2000e-2(e)). So such a decision, regardless of any diversity- or equity-related motivation, would violate Title VII’s “clear text.” *Id.* at 44–45. Confronted with this reality, even some of the nation’s leading law firms have recently eliminated or altered race-based fellowships and other diversity-driven employment programs, rather than defend their legality.⁵

Unfazed, the Department proposes to proceed with just the sort of race-based program that violates constitutional and statutory protections against discrimination. The Proposed Rule would require that program sponsors develop plans to promote the recruitment and hiring of “persons of color.” 89 Fed. Reg. at 3,127, 3,276. Similarly, it would condition recognition of SAAs on their submission of a plan “for advancing DEIA.” *Id.* at 3,238, 3,268, 3,215. It would also require SSAs to monitor programs and sponsors of group programs to “monitor employers” for their compliance with equity regulations. *Id.* at 3,127, 3,162, 3,186, 3,237–38. And if the Department’s direction to employers to engage in race-based hiring weren’t clear enough from these new mandates, the Department proposes to require SAAs, program sponsors, and participating employers to collect and maintain detailed “demographic” data on apprentices to enable the Department of Labor to track “equity.” *Id.* at 3,215, 3,223, 3,284. In short, the Department proposes to require participants in the National Apprenticeship System to do what neither the Department nor state actors nor individual employers could lawfully do on their own.

But, fourth, “what cannot be done directly” under governing law “cannot be done indirectly.” *SFFA*, 600 U.S. at 230 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)). Strict scrutiny also applies to classifications that appear neutral but are actually a pretext for racial discrimination. See *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Hunt v. Cromartie*, 526 U.S. 541, 456 (1999). Thus, even if the Department’s Proposal were facially neutral, it would be unlawful to adopt for an unspoken “racial purpose or object.” *Hunt*, 526 U.S. at 546 (quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995)).

Of course, no such investigation into the Department’s motives is necessary here. The Proposed Rule tells us that the Department hopes to “[e]mbed[e]quity at the [c]enter of [r]egistered [a]pprenticeship” in order to remedy “historic[] . . . barriers” to “people of color.” 89 Fed. Reg. at 3,119, 3126. But the Department’s desire to achieve broader diversity ends cannot be effectuated through race-based means. We hope this comment will redirect the Department toward *lawful* diversity efforts—and away from measures, like the Proposed Rule,

⁵ See, e.g., Tatyana Monnay, *Blum’s Group Drops DEI Lawsuit Against Morrison Foerster*, Bloomberg Law (Oct. 6, 2023), <https://perma.cc/9VRQ-YKZ8> (lawsuit dropped after Morrison Foerster “changed the eligibility criteria for its diversity, equity and inclusion fellowship” to be “race and gender neutral”); Tatyana Monnay, *Blum Says He’s Done Suing Law Firms as Winston Yields on DEI*, Bloomberg Law (Dec. 6, 2023), <https://perma.cc/XQL3-6DYK> (same, for Perkins Coie and Winston & Strawn).

that exceed congressional authority and that are “contrary to both the letter and spirit of a constitutional provision whose central command is equality.” *SFFA*, 600 U.S. at 227 (citation omitted).

Sincerely,



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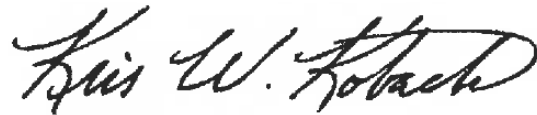
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