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Dear Associate Deputy Director Turner:

I am writing in light of recent public reports that raise questions about whether the FBI's recruitment and hiring policies are consistent with federal non-discrimination law—specifically, the Fifth Amendment's equal protection guarantee and Title VII's non-discrimination requirements. The FBI has long said that “diversity, equity, and inclusion” is more than a buzzword at the FBI—that it's “interwoven” into everything the FBI does and is a priority at the “highest levels.” It appears those platitudes may be metastasizing into illegal behavior.

Although quotas are forbidden in hiring and recruitment, the Bureau has publicly expressed that there is still “progress to be made” in upping female and racial minority representation in its ranks—strongly implying a yet-unreached numerical target (that is, a quota). And certain FBI graphs and public statements show that the quota/target is to meet or exceed the percentage of females and racial minorities in the general population. Relatedly, the FBI's chief diversity officer has admitted that the Bureau is on a mission to change what it “look[s] like.” At the same time, the FBI is also promoting minority exclusive events that are explicitly meant to disfavor some groups and prefer others. A whistleblower recently said that “straight white males may not attend” these events. The FBI has further committed to a hard numeric recruitment target based on sex—30% female applicants by 2030. And it is punishing recruiters who don't hit various diversity targets; according to another whistleblower, these punishments even include terminating those recruiters who don't side with this diversity-first approach. Other whistleblowers say the FBI is pushing minority candidates through the hiring process (even though they fail to meet key hiring standards) and keeping other minority agents (even though they are underperforming) because the FBI “need[s] minority female agents.”

Quotas and similarly pernicious practices like these are unlawful. As you also know, both the United States Constitution and the Civil Rights Act of 1964 prohibit the FBI from discriminating in employment based on protected categories like race or sex. The Fifth Amendment’s Due Process Clause includes “equal protection claims” identical “to equal protection claims under the Fourteenth Amendment.” *Sessions v. Morales-Santana*, 582 U.S. 47, 52 n.1 (2017). And Title VII says “that all personnel actions affecting employees of the federal government ‘shall be made free from any discrimination based on race, color, religion, sex, or national origin.’” *Youssef v. FBI*, 687 F.3d 397, 401 (D.C. Cir. 2012) (quoting 42 U.S.C. § 2000e–16(a)).<sup>1</sup>

Given the statements from FBI officials, public outreach like LinkedIn posts, data highlighted on the FBI website, and whistleblower accounts, I write so that I can make an independent determination as to whether you are violating any civil rights laws. As you know, the FBI houses its largest division (the Criminal Justice Information Services division) in Clarksburg. Olivia Miller, *Inside the FBI*, W. VA. EXECUTIVE, <http://tinyurl.com/4usu9a7w> (Nov. 16, 2022). Over three thousand FBI employees and contractors work at that facility. Charles Young, *FBI CJIS Divison in Clarksburg, WV continues to provide employment, innovation*, WVNEWS, <http://tinyurl.com/msuv2s97> (April 20, 2019). Thus, thousands of West Virginians would be directly affected by discriminatory behavior and policies at the FBI. And civil rights and non-discrimination protections are “the highest priority” for my office. *Allen v. State, Hum. Rts. Comm’n*, 324 S.E.2d 99, 122 (W. Va. 1984).

I write in the hope that you can provide answers to real questions that the Bureau’s actions have generated. West Virginians—and the American people—deserve to know whether their government is following the laws it purports to enforce.

## **I. The FBI’s Obligations**

Before turning to what the FBI says it is doing, it’s helpful to review the bedrock legal principles undergirding our discrimination protections.

Provisions like the Equal Protection Clause and Civil Rights Act are meant to ensure “the absolute equality of all citizens of the United States politically and civilly before their own laws.” *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 201 (2023). And that equality means “doing away with all governmentally imposed discrimination based on race.” *Id.* at 206 (cleaned up). Indeed, the “clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination.” *Loving*

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<sup>1</sup> Of course, these are not the FBI’s only legal responsibilities in the employment space. For example, 5 U.S.C. § 2301(b)(1) says that employment decisions “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.” And the next subsection requires that all federal “employees and applicants for employment ... 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.” *Id.* § 2301(b)(2). This letter focuses on just a few of the FBI’s many legal requirements—those arising under the Fifth Amendment and Civil Rights Act.

*v. Virginia*, 388 U.S. 1, 10 (1967). The Supreme Court has gone so far as to say that “the peace of the country and the liberties of all—would be imperiled, if [courts] ... permitted any departure from those principles based upon discrimination against a particular class because of their race.” *Gibson v. Mississippi*, 162 U.S. 565, 592 (1896).

For years, persons in academia, government, and elsewhere had supported what they saw as benign discrimination—that is, discrimination justified in their minds by some laudable end goal. But the Court in *SFFA* squashed that notion: “Eliminating racial discrimination means eliminating all of it.” 600 U.S. at 206. Our laws detest “distinctions drawn according to race” or “solely because of their ancestry.” *Loving*, 388 U.S. at 11. Such distinctions are “odious to a free people whose institutions are founded upon the doctrine of equality.” *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). They “are contrary to our traditions and hence constitutionally suspect.” *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Some illegal discrimination is easier to detect than other illegal discrimination—“outright racial balancing,” for example, is “patently unconstitutional.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007); accord *Grutter* 539 U.S. at 330. And “[r]acial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’” *Parents Involved*, 551 U.S. at 732. “Racial balance is not to be achieved for its own sake.” *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). After all, discrimination protections “cannot mean one thing when applied to one individual and something else when applied to a person of another color.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978).

Further, any “permanent justification for racial preferences” offends “fundamental equal protection principle[s].” *SFFA*, 600 U.S. at 212. “[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.” *Grutter*, 539 U.S. at 327. And “every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.” *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 316 (2013) (Thomas, J., concurring). “It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life.” *SFFA*, 600 U.S. at 212 (cleaned up).

## **II. Concerning Evidence and Signs**

Based on the FBI’s own public statements, it seems doubtful that the FBI’s hiring and recruitment policies comply with its constitutional and statutory obligations.

### **A. Hiring and promotion practices**

For several years now, the FBI has been ramping up its Diversity, Equity, and Inclusion efforts. Courtney Bublé, *FBI Has Failed to Move the Needle on Diversity Over the Past Decade, Despite Efforts of Recent Directors*, GOVERNMENT EXECUTIVE, <http://tinyurl.com/3uezenv2> (Feb.

14, 2020). Under the leadership of its first diversity executive, Tonya Odhom, the FBI made diversity “an FBI core value,” “significantly increase[d] representation of women and historically excluded or underrepresented communities at every level,” and created minority-exclusive “Diversity Agent Recruitment [] events” at field offices. FBI, LinkedIn post, <http://tinyurl.com/4rxkfvd3> (Dec. 2023); *but see Taxman v. Bd. of Educ. of Tp. of Piscataway*, 91 F.3d 1547, 1557-58, (3d Cir. 1996) (finding a Title VII violation because promoting diversity, standing alone, is not a valid justification for race-conscious employment action).

Shortly after President Biden took office in 2021, he issued Executive Order 14035, which aimed at promoting Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce. That order required federal agencies, including the FBI, to be a “model” for DEI efforts. The President ordered the implementation of a government-wide strategic DEI plan. He ordered the FBI to make DEI “a priority component of the agency’s management agenda.” This plan included, among other things, “enhanc[ing]” DEI efforts within the FBI, establishing a chief diversity officer with a set level of seniority, and “strongly consider[ing] for employment” candidates who advance “diversity, equity, inclusion, and accessibility in the workplace.”

A few months after EO 14035, the FBI hired an aggressive chief diversity officer, Scott McMillion, who appears to have further advocated for all aggressive DEI policies. Courtney Bubl , *FBI’s Scott McMillion on Advancing Diversity, Equity, Inclusion and Accessibility*, <http://tinyurl.com/mr2hektp> (Dec. 6, 2021). In McMillion’s own words, the FBI brought him on board to “make sure that diversity, equity, and inclusion is interwoven into everything the FBI does.” Jessica Schneider, *FBI faces its own racial reckoning while leading probes into police shooting deaths*, CNN, <http://tinyurl.com/2u2nsvd9> (June 10, 2021) (quotation from embedded video). “[D]iversity and inclusion are more than just on-trend buzzwords at the Bureau,” the FBI now says; “[e]quity, and how to get there, is a priority at the highest levels at the FBI.” FBI, LinkedIn post, <http://tinyurl.com/2p98wy4a> (May 2023). And when the FBI says “diversity,” it appears to mean only statistically smaller protected categories—such as women or racial minorities. *See, e.g., FBI, Recruiting Road Trip Brings Promising Returns*, <http://tinyurl.com/48c7purf> (Nov. 14, 2022) (defining historically black colleges as “diverse communities”); *compare with Duvall v. Novant Health Inc.*, No. 3:19-CV-00624, 2022 WL 3331263, at \*4 (W.D.N.C. Aug. 11, 2022) (noting how a “‘D&I’ initiative with an expressed timeline to remake the workforce to reflect the community and ‘embed’ a culture of ‘D&I’ at Defendant” was evidence from which reasonable jurors could conclude that the plaintiff was discriminated against based on race or gender), *and Ritchie v. Napolitano*, 196 F. Supp. 3d 54, 65 (D.D.C. 2016) (finding that a decisionmaker’s statement that he “saw value in diversity and considered it as one of several factors in selecting the best candidate” was direct evidence of discrimination by the Secret Service).

The FBI’s most recent Diversity Report shows similar thinking. It includes three categories titled “Overall Representation,” “Representation by Leadership Level,” and “Representation by Career Path.” FBI, *Diversity Report*, <http://tinyurl.com/5n79xmyr> (Dec. 2023). The Overall Representation category shows that 27.3% of the bureau is classified as “Racial/Ethnic Minority,” 45.4% is “Female,” 1.6% is “LGBTQIA+,” and 4.6% is “People with Disabilities.” In the

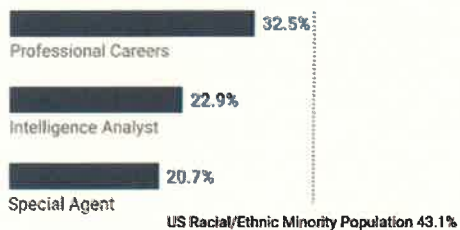
“Representation by Leadership Level” category, the FBI boasts that it “has increased racial/ethnic diversity by 5.4% and increased ... the proportion of female employees by 4.1%,” and it includes percentages of executives, supervisors, and non-supervisors who are “Female” or a “Racial/Ethnic Minority.” In the Career Path section, the FBI says it has increased “special agents female representation” “by 17.5% and minority representation by 16.2%.” And it then provides numbers showing how many special agents, intelligence analysts, and those in professional careers are female or a member of various “Racial/Ethnic Minorit[ies].”

This inordinate focus on employment numbers for racial minorities and women is a pattern. The FBI’s promotional material on its website and LinkedIn are covered in statistics showing how many racial minorities and females work in various positions—especially compared to former years. See Schneider, *supra* (after interviewing McMillion, summarizing the FBI’s employment numbers as “show[ing] signs of improvement”—that is, “[t]he number of minority special agent applications” increased to “47% of applicants,” and “the percentage of new Black agents training at its academy ... doubled” in the last six years). And it doesn’t just discuss these numbers in a vacuum. The FBI’s language and presentation of these statistics appears to consistently assume that the FBI is still striving for some yet-unreached numerical target. In a spring 2023 LinkedIn post, for example, it noted that “[s]ince 2018, FBI women executives increased 4.4%, from 21.1% to 25.5%, and women supervisors increased 1.8%.” FBI, LinkedIn post, <http://tinyurl.com/938d7ax6> (Spring 2023).

The Bureau repeatedly focuses on numeric targets for preferred demographics. Take the FBI’s website “Our Demographics” tab. The first line of that section proclaims that “[t]he FBI prioritizes meeting diversity goals.” And to illustrate how the FBI is doing with those goals, it includes these two charts:

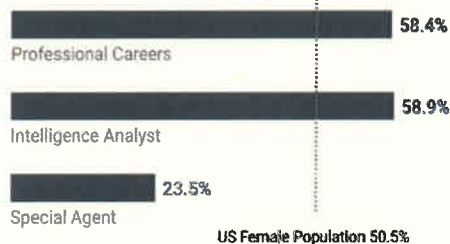
**Racial/Ethnic Minority Representation Across the FBI**

Year-to-date FY23



**Female Representation Across the FBI**

Year-to-date FY23



Note the dotted lines labeled, respectively, “US Racial/Ethnic Minority Population 43.1%” and “US Female Population 50.5%.” The most natural interpretation of these charts is that the FBI’s “goal” is to match the percentage of racial minorities and females in various FBI positions to the percentage of racial minorities and females in the general population. The dotted lines are comparators. They serve both visually and mathematically as yardsticks—measuring devices

telling the FBI how close it is to its goal of population/employment number parity. *Compare with Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 693 (8th Cir. 2009) (reversing grant of summary judgment for employer where, among other things, hiring committee was “trained to abide by the District’s ‘racial equality’ policies” that included specific minority “hiring goals” and an express promise of “special efforts” for minority candidates).

Other FBI behavior comports with this reading of the evidence. In March 2023, for example, McMillion asked readers on LinkedIn to help the FBI’s “intentional efforts to recruit more women into the special agent and the FBI police position.” Scott McMillion, LinkedIn post, <http://tinyurl.com/yvf5bcdf> (March 2023). But he didn’t ask for help hiring women for professional careers or intelligence-analyst positions. One explanation for this omission is that the FBI had already reached its population-parity goal for those positions (58.4% and 58.9% compared to 50.5%), while it was still behind for special-agent positions (only 23.5% compared to 50.5%). It also seems likely that recent promotions were intended at least, in part, to remedy perceived statistical diversity failings. *See Schneider, supra; see also, e.g., Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 636 (1987) (noting how even an approved affirmative-action plan can “fairly ... be called into question” where it “simply calculate[s] imbalances in all categories according to the proportion of women in the area labor pool” rather than undertaking “analysis of a more specialized labor pool”).

Some related comments by McMillion regarding the FBI’s hiring practices raise similar concerns, too. In March 2023, McMillion went on the “Workday Podcast” to discuss the case for hiring “diverse” candidates. Workday Podcast, *The ROI of Doing the Right Thing With Belonging and Diversity*, <http://tinyurl.com/3ph9w2t4> (March 7, 2023). At least in McMillion’s view, FBI diversity hiring focuses closely on skin color. He admitted that hiring racially diverse candidates is important to the FBI “because [FBI employees] want to see others that look like them.” *Id.* McMillion said he’d heard “stories” about how some “employees have felt isolated over their careers because we didn’t have enough [other minority employees], or they were the only one.” *Id.* McMillion said the FBI focuses on “diversity” in hiring “particularly” with a view to “what [the FBI] look[s] like.” *Id.* When “people can see themselves or see others” who look like them—“particular[ly] when it comes to promotion and those on the upper mobility track”—they say to themselves, “I can do that as well.” *Id.* These sorts of comments—that the workplace should “reflect the diversity of the [population]”—are exactly what led the court in *Herrera v. New York City Dep’t of Educ.*, No. 1:21-cv-7555, 2024 WL 245960, at \*8 (S.D.N.Y. Jan. 23, 2024), to recently hold that there was “a reasonable inference” that New York’s DOE was racially discriminating. It appears the FBI is making the same mistake.

Indeed, all of this seems at points at odds with *SFFA*’s holdings and reasoning. To start, the FBI continues to proudly use all the “imprecise” racial categories—like “African-American” or “Hispanic”—that *SFFA* decried as, respectively, “plainly overbroad,” “arbitrary or undefined,” or “underinclusive.” 600 U.S. at 216. And as in *SFFA*, it’s “far from evident” here how assigning individuals “to these racial categories and making [hiring] decisions based on them furthers” the operational effectiveness of the FBI. *Id.* *SFFA* “stressed that an individual’s race may never be used against him in the admissions process,” but “Harvard’s consideration of race ... led to an

11.1% decrease in the number of Asian-Americans.” *Id.* at 218. And because “admissions are zero-sum,” a “benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.” *Id.* at 218-19.

The FBI’s employment numbers fit a pattern like Harvard’s. The FBI routinely emphasizes that it intentionally seeks out and hires “diverse” employees—like females or racial minorities. And its media interviews and official reports (like the Diversity Report) often give hard statistics showing its “success” doing just that. The Diversity Report, for example, says FBI policies have increased “special agents female representation” “by 17.5% and minority representation by 16.2%.” The zero-sum nature of employment means that the FBI is likely advantaging diverse candidates at the expense of candidates that the Bureau views as non-diverse. And the FBI strongly implies, if not outright says, that its intentional hiring efforts are crucial to achieving its demographic goals. But “[h]ow else but ‘negative’ can race be described if, in its absence, members of some racial groups would be [employed] in greater numbers than they otherwise would have been?” *SFFA*, 600 U.S. at 219.

The FBI also uses language consistent with stereotyping people based on skin color or sex. For example, it introduced its text and video profile of special agent Nicole Sinegar with the language: “A Black perspective. A woman’s perspective.” FBI, LinkedIn post, <http://tinyurl.com/2s467vyh> (Feb. 2023). Unfortunately, it appears that stereotyping an entire group of people based on a protected characteristic isn’t an isolated incident. *See, e.g.*, FBI, LinkedIn post, <http://tinyurl.com/4add93t6> (Jan. 2024) (saying women have “diverse perspectives”). But the Supreme Court has “long” forbidden operating with “the belief that minority [individuals] always (or even consistently) express some characteristic minority viewpoint on any issue.” *SFFA*, 600 U.S. at 219. Put differently, the Supreme Court “has rejected the assumption that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike.” *Id.* at 220 (quotations omitted). Yet that seems to be precisely the FBI’s assumption when it offers Nicole Sinegar’s perspective as the “Black perspective.” McMillion’s comments about needing an FBI that “looks” a certain way imply the same ill that the Supreme Court “foreswore: stereotyping.” *Id.*

The charts and statistics, the public statements about achieving greater diversity, and the diversity events (discussed more below) all seem to assume “that there is an inherent benefit in race qua race—in race for race’s sake.” *SFFA*, 600 U.S. at 220. Indeed, the FBI’s repeated justification for racially based hiring is some combination of “People want fellow employees with the same skin color,” “We need diverse perspectives,” and “We need to look like America.” But the assumption “that a black [employee] can usually bring something that a white person cannot offer” is a “pernicious stereotype—as is the idea that “race in itself says something about who you are.” *Id.* (cleaned up). And any stereotype “that treats individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution, would be inappropriate.” *Id.* at 221.

Thus, there appear to be serious questions about whether the FBI’s hiring and promotional practices are consistent with the “colorblindness” that is the “proud announcement of cases like

*Loving and Yick Wo*, like *Shelley and Bolling*.” *SFFA*, 600 U.S. at 227; *see also, e.g., DiBenedetto v. AT&T Servs., Inc.*, No. 1:21-cv-452, 2022 WL 1682420, at \*7 (N.D. Ga. May 19, 2022) (denying motion to dismiss where the plaintiff alleged that the defendant had “implemented a company-wide employment policy that programmatically favored non-white persons and women for hiring and retention based solely or at least principally on internal company demographics”).

## **B. Recruitment practices**

Another area of concern is how the FBI is recruiting. Courts have long said that discrimination prohibitions apply to recruiting practices. *See, e.g., United States v. Brennan*, 650 F.3d 65, 125 (2d Cir. 2011); *United States v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998); *Thomas v. Wash. Crty. Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990); *Parham v. Sw. Bell Tel. Co.*, 433 F.2d 421, 427 (8th Cir. 1970). And the EEOC says it is “illegal for an employer to recruit new employees in a way that discriminates against them because of their race.” EEOC, *Prohibited Employment Policies/Practices*, <http://tinyurl.com/52fye2yt> (last accessed Mar. 15, 2024).

Yet based on several LinkedIn posts, it appears the FBI is recruiting in racially discriminatory ways. The FBI “continue[s] to hold Diversity Agent Recruitment events across the nation.” FBI, LinkedIn post, <http://tinyurl.com/5rf24z5c> (Summer 2023); *see also* FBI, LinkedIn post, <http://tinyurl.com/you2s7x9j> (Summer 2023); FBI, LinkedIn post, <http://tinyurl.com/5hch6nph> (Fall 2023). These exclusive, invite-only, “minority”-focused events seem fraught. The FBI’s announcement of its Detroit DAR event was headlined, “FBI Detroit Seeking Diverse Special Agent Candidates.” *See* FBI Press Release, <http://tinyurl.com/3t7jjzav> (August 22, 2023). These events are expressly designed to exclude disfavored groups and prefer others. One reporter, after interviewing a special agent in charge, described these diversity recruitment events by saying, “The FBI is changing the way it looks from the inside out. ... The FBI says it has room to grow, and [its] goal is to improve those [minority] numbers.” Melissa Steininger, *FBI holds recruitment event, focuses on diversity*, SPECTRUM NEWS 1, <http://tinyurl.com/wkuup528> (Oct. 30, 2022). Recruiting to change the way the FBI “looks” and with the “goal” of increasing “numbers” sounds like a racial quota.

And there are concerning parallels between the FBI’s touted focus on “minority-serving institutions,” FBI, LinkedIn post, <http://tinyurl.com/457x4jja> (Fall 2023), and older cases where businesses interviewed “for recruitment only at particular,” whites-only “scholastic institutions,” *United States v. Ga. Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973). One FBI whistleblower has alleged that “[f]or internships and hiring, HBCU students are moved to the front of the line.” Report, *infra*, p. 41. McMillion admitted on the Workday Podcast that his recruiting was focused on “minority-serving institutions, particularly to ensure that underrepresented groups become more aware of us and get to know us better. ... We are really trying to make the case to ... in particular to underrepresented communities.” Workday Podcast, *supra*. Such “practices” targeting institutions affiliated with a particular racial identity may be “neutral on their face,” but they can also “operate[] as a ‘built-in-headwind’” to a particular race. *Ga. Power Co.*, 474 F.2d at 925. As Judge Ho recently noted, quoting Justice Department lawyers from oral argument, “if ‘a law firm is having a lunch to do CLEs and you have a policy that says we’re only going to invite women



but not men to this CLE lunch, that's of course actionable, and that's of course a term, condition, or privilege of employment' under Title VII." *Hamilton v. Dallas Cnty.*, 79 F.4th 494, 509 (5th Cir. 2023) (Ho, J., concurring). And unlawful discrimination includes "selecting interviewees partially due to diverse candidate slate policies" and "tying" employment consequences to employees "achieving certain demographic targets" and "accelerated interview processes." *Id.* FBI recruitment of women and racial minorities to the exclusion of others seems to be doing just that.

The FBI has elsewhere explicitly committed to numerical diversity targets in recruiting. In March 2023, the FBI announced that it was joining the 30x30 Initiative. *See* FBI, *FBI Takes 30x30 Pledge to Recruit More Women Agents, Police*, <http://tinyurl.com/3zahvnay> (March 27, 2023). This agreement wasn't just a generic "promise to make its incoming special agent and police officer recruiting classes more female." *Id.* It included a concrete numerical target of "[i]ncreas[ing] representation of women in recruiting classes to at least 30% by 2030." *Id.* This target "reflects [the FBI's] continued dedication to bringing more women into our special agent cadre, FBI police, and the FBI's leadership ranks," it said. *Id.* McMillion was "[v]ery proud to highlight" this "intentional action to bring more women into the Special Agent and FBI Police role." Scott McMillion, LinkedIn post, <http://tinyurl.com/2tasfujf> (March 2023) (hashtagging this post #FBIDiversity).

This race-and sex-focused recruitment may have been going on for some time. Peter Sursi, the senior executive of recruitment and hiring at the FBI, sat down with LinkedIn Talent Connect 2019 to discuss "flaws the FBI uncovered in its hiring process ... and the steps it took to modernize recruitment [and] improve diversity." Samantha McLaren, *How the FBI Overhauled Its Hiring Process to Improve Diversity and Create a Better Candidate Experience*, <http://tinyurl.com/ycyr73bw> (Nov. 4, 2019). Even then, the FBI began setting "clear diversity targets and factor[ing] progress into recruiters' performance reviews." *Id.* It went so far as to mandate "hiring goals for women and people of color" for the field offices. *Id.* Initially, FBI "recruiters were given diversity targets, but" failing to meet the requirements didn't affect performance reviews. *Id.* But by 2019, "progress toward the[] diversity targets would be factored into their division's performance plan," and recruiters were told that they "need[] to make a substantial improvement." *Id.*

Sursi's quantifiable diversity recruitment goals and McMillion's 30x30 initiative come worryingly close to quotas. *Grutter*, 539 U.S. at 335 (defining a quota as "a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups" or "impose a fixed number or percentage which must be attained" (cleaned up)). "The problem with these approaches is well established. Outright racial balancing is patently unconstitutional." *SFFA*, 600 U.S. at 223 (cleaned up). The moment that the FBI mandates a "rough percentage of various racial groups" or a particular sex, they "turn [Equal Protection principles] on [their] head." *Id.* at 223-24. So long as the FBI uses such statistical measures, "race will always be relevant ... and [] the ultimate goal of eliminating race as a criterion will never be achieved." *Id.* at 224 (quotations omitted). And to be clear, the FBI cannot use racially charged recruitment efforts to circumvent the Constitution and Civil Rights Act: "What cannot be done

directly cannot be done indirectly. The Constitution deals with substance, not shadows, and the prohibition against racial discrimination is levelled at the thing, not the name.” *SFFA*, 600 U.S. at 230 (cleaned up).

### III. Corroborating FBI Whistleblower Report

A couple months ago, many anonymous FBI whistleblowers filed a report with the House Judiciary Committee titled “Report on Alarming Trends in FBI Special Agent Recruitment and Selection.” The Report shares many accounts from anonymous FBI personnel at various levels and positions in the agency that, if true, likely confirm some of the concerns above. The report’s summary concludes that the FBI is rejecting qualified candidates in favor of unqualified candidates who “satisfy the FBI’s priority to meet Diversity, Equity and Inclusion (DEI) mandates.” Report p. 5. Various employees are selected for “diversity and inclusion over the qualification of the applicants.” *Id.* Current trends, these FBI whistleblowers say, are on a “trajectory” to use “DEI as the primary and sole measure” for hiring. *Id.* at 7.

Many of the whistleblowers report that the FBI is quietly lowering standards for various applicants—chiefly to “increase the pool of candidates” to get more diverse (i.e., non-white male) applicants. *Id.* at 14. One longtime Special Agent Recruitment Coordinator echoed Peter Sursi’s comments that recruiters are rated, in part, based on how many “Diversity Applicant Recruitment” events they host. *Id.* at 18. Invitations to these exclusive events are “only given to those in minority groups based on race, sexual orientation, etc. ... [S]traight white males may not attend.” *Id.* at 18. These events appear to have replaced events recruiting military veterans. *Id.* at 71.

FBI leadership has also culled assessors who are not “diverse,” *id.* at 19, and who refuse to “prioritize diversity and inclusion over qualifications,” *id.* at 54. A 15-year Supervisory Special Agent said that the FBI’s hiring policies prioritize “people of different colors, races, and sex” rather than the most qualified candidate. *Id.* at 18. For example, this SSA said, the FBI forced the SSA to continue an African-American female’s application over the SSA’s objection although she was physically underqualified and had no intention to change. *Id.* at 22. And most of the SSA’s meetings with FBIHQ about hiring “focus on hiring diverse candidates of different races and sexes.” *Id.* at 43. The SSA claims to be familiar with many “instances where applicants with a mix of racial, gender, and age demographics seem to get priority in the bureau’s recruitment efforts over individuals who score at the top of the application assessment.” *Id.* at 44. Other whistleblowers echo this obsession with diversity hiring. *Id.* at 52, 63. This includes hiring and advancing certain unqualified special agents “because they identify as LGBTQ and/or are a minority.” *Id.* at 65-66.

Further, a 20-year Supervisory Special Agent said the FBI “pressure[s]” supervisors to elevate minorities as class leaders; so long as any “diverse” candidate passes the physical fitness test, they are installed as the leader of their new agent cohort. Report, p. 20. One FBI veteran “whose career spanned four decades” said that DEI policies now “full[y] guide the FBI’s hiring and firing policies. *Id.* at 21. Another special agent with service spanning four decades told a story about an underperforming special agent’s supervisor asking to terminate the special agent

during the probationary period. *Id.* at 27. But the assistant special agent in charge told the supervisor that the FBI “need[s] minority female agents” like the special agent in question. *Id.* Indeed, it sounds like FBIHQ often forces applicant coordinators, backgrounds investigators, and assessors to pass through unqualified candidates and underperforming employees. *See, e.g., id.* at 73, 91-92, 95.

Although the report’s anecdotes are anonymous, they have been publicly confirmed by at least one named former FBI official. Chris Swecker, a retired FBI Assistant Director of the Criminal Investigative Division, said that his sources inside the FBI “are consistent with the report.” John Nantz, *The FBI’s Training Division Doubles Down on Biden’s DEI Policy*, TOWNHALL, <http://tinyurl.com/55xssn6u> (Feb. 14, 2024); *see also* Scott Erickson, *To Impact Culture, the FBI Needs to Value Integrity First and Foremost in the Hiring Process*, AMERICA FIRST POLICY INSTITUTE (Nov. 2, 2023), <https://bit.ly/3TiQ8lz> (quoting former FBI special agent Nicole Parker, who described how “the FBI has dropped their hiring standards” and “[m]any believe it was in order to check diversity boxes”).

Stories like these—and the public statements listed above—“reflect the growing concern that diversity has increasingly become a code word for discrimination.” *Price v. Valvoline, L.L.C.*, 88 F.4th 1062, 1068 (5th Cir. 2023) (Ho, J., concurring). “Courts have long worried that diversity efforts” like the ones the FBI talks about lead directly “to discrimination in the workplace.” *Id.* The FBI cannot transform “racial balancing” “from ‘patently unconstitutional to a compelling state interest simply by relabeling it ‘racial diversity.’” *Id.* (quoting *Parents Involved*, 551 U.S. at 732).

According to the whistleblowers, McMillion, and others, the FBI’s “defense” is that its diversity policy is “well intended—and that it’s designed, not to disfavor any particular group, but to favor other groups.” *Price*, 88 F.4th at 1068. But of course, favoring one sex or “race necessarily means disfavoring those of another race” or sex. *Id.* Every person helped by their race is another person hurt by theirs. *Id.* Nor can the FBI escape by claiming that sex or race “is just being used as a crude proxy for intellectual diversity.” *Id.* Evaluating anyone based on “ancestry instead of by his or her own merit” “demeans” their “dignity and worth.” *Id.* And if the FBI “isn’t actually interested in intellectual diversity,” that approach is hypocritical to boot. *Id.* So neither of the FBI’s normally publicly deployed excuses works. Indeed, even friendly academics are beginning to admit that under *SFFA* the FBI’s “business case for diversity as such seems unlikely to survive.” Michael J. Yelnosky, *Racial Preferences in Employment After Students for Fair Admissions v. Harvard*, 112 GEO. L.J. ONLINE 74, 87 (2023).

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All of this is, to say the least, concerning—especially to West Virginians. Obviously a genuinely diverse workforce is desirable and valuable for many reasons. But the Bureau can’t build a diverse organization by targeting protected traits like race or sex. Thousands of FBI employees and contractors live and work in West Virginia, and the policies the FBI uses to hire them directly affect this State and its residents. Answers to the following questions, drawn from the evidence outlined above, would help State and officials and the public assess whether the FBI is living up to its legal and moral obligations:

- Does the FBI agree that making employment decisions about a person based in any part on that person's race or sex is pernicious discrimination?
- Is the FBI making decisions on the basis of race or sex in its (a) recruiting, (b) hiring, or (c) promotion? In other words, is the FBI's recruiting, hiring, and promotion colorblind? If it isn't colorblind, what is the reason for this discrimination?
- Does the FBI believe it is legal to hire to create a workplace with a certain racial "look"?
- Are the FBI's DEI policies intended to increase the number of minorities employed by the FBI?
- How has *SFFA* changed the FBI's approach to recruiting, hiring, and promotion? For example, is the FBI still conducting its DEI work with the racial categories discussed in *SFFA*?
- Does the FBI believe there is such a thing as a "female" or "white" or "black" perspective on the world?
- Is any FBI employment-related policy responsible for any of the increase in the percentage of minority and female agents over the past several years?
- Does the FBI have specific hiring goals based on sex and race? If so, what are those goals?
- Who counts as "diverse"? Are some people more "diverse" than others?
- Are Diversity Agent Recruitments trying to attract at a particular sex or particular race(s)?
- What are your recruiter's diversity targets—that is, their hiring goals for females and racial minorities? And are recruiters docked for failing to hit those targets?
- What does it mean practically for DEI to be a core value of the FBI?
- When is it permissible for the FBI to consider a person's race during the hiring process?
- Is committing to hit a specific percentage of female special agents a quota? If not, why not?
- Can you please provide us with the FBI's most recent EEOC compliance reports?

We would appreciate an answer to these questions no later than April 18, 2024. Thank you for the work the Bureau does in service of our country and for considering our request.

Sincerely,



Patrick Morrissey  
Attorney General