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15 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
16 **SAN JOSE DIVISION**

17 SANTA CRUZ LESBIAN AND GAY
COMMUNITY CENTER d/b/a THE
18 DIVERSITY CENTER OF SANTA CRUZ;
LOS ANGELES LGBT CENTER; AIDS
19 FOUNDATION OF CHICAGO; B. BROWN
CONSULTING, LLC; BRADBURY-
20 SULLIVAN LGBT COMMUNITY CENTER;
NO/AIDS TASK FORCE d/b/a
21 CRESCENTCARE; SERVICES AND
22 ADVOCACY FOR GLBT ELDERS; DR.
WARD CARPENTER,

23 *Plaintiffs,*

24
25 v.

26 DONALD J. TRUMP, in his official capacity
as President of the United States; U.S.
27

Civil Action No. 5:20-CV-07741-BLF

**BRIEF OF 8 INSTITUTIONS OF HIGHER
EDUCATION AS AMICI CURIAE IN
SUPPORT OF PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION**

Hearing Date: December 10, 2020

Hearing Time: 9:00 A.M.

Trial Date: None Set

1 DEPARTMENT OF LABOR; EUGENE
2 SCALIA, in his official capacity as Secretary
3 of Labor; CRAIG E. LEEN, in his official
4 capacity as Director of the Office of Federal
5 Contract Compliance Programs; OFFICE OF
6 MANAGEMENT AND BUDGET; RUSSELL
7 VOUGHT, in his official capacity as Director
8 of the Office of Management and Budget; U.S.
9 DEPARTMENT OF HEALTH AND HUMAN
10 SERVICES; ALEX M. AZAR II, in his official
11 capacity as Secretary of Health and Human
12 Services; U.S. DEPARTMENT OF JUSTICE;
13 WILLIAM PELHAM BARR, in his official
14 capacity as United States Attorney General;
15 U.S. DEPARTMENT OF HOUSING AND
16 URBAN DEVELOPMENT; BENJAMIN
17 SOLOMON CARSON, SR., in his official
18 capacity as Secretary of Housing and Urban
19 Development; U.S. DEPARTMENT OF
20 VETERANS AFFAIRS; ROBERT WILKIE,
21 in his official capacity as Secretary of Veterans
22 Affairs; NATIONAL ENDOWMENT FOR
23 THE HUMANITIES; JON PARRISH PEEDE,
24 in his official capacity as Chairman of the
25 National Endowment for the Humanities;
26 NATIONAL ENDOWMENT FOR THE
27 ARTS; MARY ANNE CARTER, in her
28 official capacity as Chairman of the National
Endowment for the Arts,

Defendants.

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 28 [sol3/papers.cfm?abstract_id=2208240](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208240).....7

IDENTIFICATION OF AMICI¹

- 1 Boston University
- 2 Brandeis University
- 3 Brown University
- 4 Dartmouth College
- 5 Harvard University
- 6 Stanford University
- 7 Tufts University
- 8 University of Michigan

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¹ This brief has not been authored, in whole or in part, by counsel to any party in this case. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amici*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief.

STATEMENT OF INTEREST

1
2 For decades, and under both Republican and Democratic presidential administrations, *amici*
3 *curiae* institutions of higher education have been the recipients of major federal grants and contracts.
4 As in the past, these federal funds fuel research critical to our nation and the world in fields ranging
5 from medicine and vaccines to the exploration of distant universes to artificial intelligence. Federally
6 funded research gives rise to innovations vital to the success of the nation’s armed forces and the
7 health of the nation’s economy as well. The knowledge and practical applications resulting from this
8 federally funded research reach far beyond the classroom walls and change the world for the
9 betterment of humanity. Executive Order No. 13950, *Combating Race and Sex Stereotyping*, 85 Fed.
10 Reg. 60,683 (Sept. 22, 2020) (“Executive Order” or “Order”), which Plaintiffs seek in this action to
11 preliminary enjoin nationwide, imposes vague and intrusive requirements on contractors and grant
12 recipients. It unfairly—and unlawfully—forces *amici* to choose between preserving critical trainings
13 and safeguarding their academic freedoms on the one hand, and forgoing needed federal funding for
14 cutting-edge research on the other.

15 The Order’s vague prohibitions provide that a “contractor shall not use any workplace training
16 that inculcates in its employees any form of race or sex stereotyping or any form of race or sex
17 scapegoating.” *Id.* § 4(a)(1). The Order also directs agency heads to “review their respective grant
18 programs and identify programs for which the agency may, as a condition of receiving such a grant,
19 require the recipient to certify that it will not use Federal funds to promote the [prohibited] concepts.”
20 *Id.* § 5. These proscriptions threaten substantial, and yet equally vague, sanctions. In the event a
21 recipient is found out of compliance, grant funding may be revoked, *see id.*, and a “contract may be
22 canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible
23 for further Government contracts,” in addition to indeterminate “other sanctions” established by the
24 Secretary of Labor, *id.* § 4(a)(3). *Amici*—for whom federal grants and contracts fund critical
25 research—thus have a substantial interest in this case as the challenged Order directly implicates their
26 rights and operations.

27 American institutions of higher education are world-renowned precisely because the
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1 government has not historically made incursions into the way institutions train their staff, teach their
2 students, or carry out their research. The Executive Order, however, inserts the government’s political
3 views, on important and highly contested topics, into the center of *amici*’s operations. The Order
4 purports to dictate the content of diversity and inclusion trainings that *amici*, as federal contractors,
5 provide on campus. In so doing, the Order violates universities’ First Amendment rights by chilling
6 them from exercising protected speech. *Amici* do not concede that their current activities violate the
7 Order. Nevertheless, the Order creates an unreasonable and unlawful choice for institutions of higher
8 education seeking to pursue vital research, with detrimental consequences for the country as a whole.

9 A government-mandated orthodoxy of this kind is inimical to the First Amendment. And the
10 Order ultimately makes no secret of its assault on academic freedom. In a provision laden with
11 ambiguity, the Executive Order permits the discussion of what it deems “divisive concepts” as part of
12 a course of academic instruction only when the subjects are discussed “in an objective manner and
13 without endorsement.” *Id.* § 10(b). With that dictate, the Order risks chilling the activity that is the
14 very lifeblood of American higher education: the free and unfettered right of institutions to bring
15 professors and students holding myriad viewpoints around a table to debate the hardest questions of
16 our times. A government mandate that any certain topic—let alone critical ones of gender and race—
17 can only be trained or taught if certain views are expressed effects an extraordinary and illegal
18 intrusion into *amici*’s core freedoms.

19 ARGUMENT

20 *Amici* strongly support Plaintiffs’ motion for a nationwide preliminary injunction.
21 Foundational principles of First Amendment law prohibit the government from regulating speech
22 based on viewpoint. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29
23 (1995). Yet, the Executive Order does this explicitly—prohibiting workplace training on diversity
24 and inclusion issues that present one perspective on what the Order deems “divisive concepts” while
25 permitting trainings that present the opposing viewpoint. As Plaintiffs explain, for that reason alone
26 the Executive Order is unconstitutional and must be enjoined. Moreover, equally well-established
27 First Amendment and due process principles provide that an enactment is void if its prohibitions are
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1 so ill-defined as to leave regulated entities unsure of what they can or cannot say. Such enactments
2 are invalid because of the chill to protected expression they cause. On this ground, too, the Order fails.
3 *See Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (“[V]agueness
4 concerns are more acute when a law implicates First Amendment rights and, therefore, vagueness
5 scrutiny is more stringent” because such laws “operate to inhibit the exercise of those freedoms.”).

6 The Order prohibits federal contractors like *amici* from using workplace trainings that
7 “inculcate” “divisive concepts;” prohibits grant recipients from “promoting” these concepts; and, in a
8 provision putatively establishing a safe harbor for schools, authorizes these concepts to be discussed
9 as part of an academic course of study only if professors teach them “in an objective manner and
10 without endorsement.” *See* Order §§ 4(a)(1), 5, 10(b). Institutions such as *amici* of course educate
11 their students and employees about complex issues regarding race and gender. And while *amici* do
12 not believe they are violating any of the Executive Order’s requirements, they will be chilled from
13 engaging in protected expression, or else may be forced to forgo certain federal contracts and grants,
14 out of concern for how the Order may be implemented. Forcing institutions to this choice is
15 unconstitutional and could have substantial and lasting consequences for American higher education.

16 *First*, federal contracts and grants fund some of the nation’s most important research in areas
17 spanning science, medicine, engineering, artificial intelligence, psychology, social sciences, and
18 myriad other disciplines. The federal government relies on academic institutions to conduct this
19 research not only to further human knowledge, but also because of the life-saving and life-altering
20 applications of that research. By appending vague and viewpoint-discriminatory requirements
21 regarding diversity and inclusion trainings onto grants and contracts, the Executive Order forces
22 universities to decide whether to steer well clear of engaging in protected speech, or else risk needed
23 contracts and critical research funding. The Order threatens research that uses federal funds to study
24 the prohibited “concepts,” such as timely work on implicit bias, artificial intelligence, and policing.

25 *Second*, the Executive Order’s vague prohibitions threaten to interrupt the essential functioning
26 and independence of American institutions of higher education. The “divisive concepts” identified in
27 the Order relate to contemporary issues of race and gender—subjects that are addressed in *amici*’s
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1 various trainings for staff, faculty, and students, and that are discussed and debated in *amici*'s
2 classrooms. The Order mandates that for *amici* contractors only certain perspectives on these concepts
3 may be included in workplace trainings or programs. For example, the Order prohibits training
4 programs from teaching that “an individual, by virtue of his or her race or sex, bears responsibility for
5 actions committed in the past by other members of the same race or sex,” but it fully permits teaching
6 that “an individual, by virtue of his or her race or sex, bears [*no*] responsibility for actions committed
7 in the past by other members of the same race or sex.” Order § 4(a)(1).

8 *Third*, in another vague dictate, the Order purports to safeguard *amici*'s discussion of “divisive
9 concepts”—but only if such concepts are discussed “in an objective manner and without
10 endorsement.” *Id.* § 10(b). Such an Orwellian rule (even if its application is limited to academic
11 courses funded in part by federal grants) would be dangerous in any era and on any topic. It is all the
12 more concerning here when the so-called “divisive concepts” are some of the most complex and hotly
13 contested social, cultural, and political issues the country faces. These are *precisely* the “concepts”
14 that must be permitted to be freely explored and debated on campuses.

15 **I. Institutions of Higher Education Conduct Critical Research Funded By Federal Grants**
16 **and Contracts.**

17 For decades, institutions of higher education—whether as grant recipients or federal
18 contractors—have been among the most important sources of cutting-edge research on the nation's
19 most pressing challenges. Federal funding is crucial to these efforts, providing over 60 percent of
20 these institutions' research budgets. *See R&D at Colleges and Universities*, Am. Ass'n for
21 Advancement of Sci., [https://www.aaas.org/programs/r-d-budget-and-policy/rd-colleges-and-](https://www.aaas.org/programs/r-d-budget-and-policy/rd-colleges-and-universities)
22 [universities](https://www.aaas.org/programs/r-d-budget-and-policy/rd-colleges-and-universities) (last visited Nov. 23, 2020). The Order jeopardizes this federally-supported work by
23 putting universities to an untenable choice between refraining from protected and important speech on
24 the one hand, and, on the other, risking loss of grant funds, debarment from future federal contracts,
25 and unspecified, ominous “other sanctions.” *See* Order §§ 4(a)(3), 5.

26 The federal partnerships that the Order threatens to disrupt have been a consistent and critical
27 part of universities' research endeavors. *Amicus* Stanford University, for example, has approximately
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1 \$3.5 billion in direct, active federal government grants and contracts. And this federal funding has
2 long transcended partisan politics. Research and development funding to institutions of higher
3 education totaled \$27 to \$36 billion per year during the Obama Administration, and \$26 to \$31 billion
4 per year during the Bush Administration. *Id.* (Excel sheet listed at “Federal Support for Universities
5 by Agency, 1990-2016”). Federal funding in support of research initiatives has been consistent during
6 the current Administration, too. *See* Christopher Pece, *Federal R&D Obligations Increase 8.8% in*
7 *FY 2018; Preliminary FY 2019 R&D Obligations Increase 9.3% Over FY 2018*, Nat’l Sci. Found.
8 (Jan. 30, 2020), <https://www.nsf.gov/statistics/2020/nsf20308> (estimating \$33 billion in FY 2019
9 R&D funding to colleges and universities). This federal funding has remained so consistent—and so
10 substantial—because of the significant benefits it delivers to the nation. It has yielded groundbreaking
11 work on healthcare, supercomputing, psychology, artificial intelligence, and products used by the
12 United States military. This work has been vital to the health, economy, and security of the United
13 States, and the world. Continued research and innovation on this scale require not only that the federal
14 government continues to fund research conducted by institutions of higher education through grants
15 and contracts, but also that those institutions remain willing to partner with the federal government.

16 Examples of federally funded projects *amici* are currently pursuing demonstrate the diversity
17 and importance of the research they undertake—all with federal government support.

18 **COVID-19:** During the ongoing coronavirus pandemic, *amici* have received funding for
19 critical public health efforts. *Amicus* University of Michigan has received funding from the
20 Department of Health and Human Services for research on the “next generation of protective masks,”
21 *Personal Cold Plasma ‘Air Curtain’ Design for COVID-19 Protection Moves Forward*, Univ. of
22 Mich. (Oct. 27, 2020), [https://news.umich.edu/personal-cold-plasma-air-curtain-design-for-covid-19-](https://news.umich.edu/personal-cold-plasma-air-curtain-design-for-covid-19-protection-moves-forward)
23 [protection-moves-forward](https://news.umich.edu/personal-cold-plasma-air-curtain-design-for-covid-19-protection-moves-forward), and contract funding for research “to provide a path to recovery from
24 COVID-19,” *New Immunology Study of U-M Employees Seeks Answers on Coronavirus Reinfections*,
25 Univ. of Mich. (Sept. 29, 2020), [https://news.umich.edu/new-immunology-study-of-u-m-employees-](https://news.umich.edu/new-immunology-study-of-u-m-employees-seeks-answers-on-coronavirus-reinfections)
26 [seeks-answers-on-coronavirus-reinfections](https://news.umich.edu/new-immunology-study-of-u-m-employees-seeks-answers-on-coronavirus-reinfections). Federally funded research at *amicus* Boston University
27 has helped scientists understand “how COVID-19 infections trigger deadly levels of lung
28

1 inflammation.” Kat J. McAlpine, *In Deadly COVID-19 Lung Inflammation, BU Researchers Discover*
 2 *a Culprit in NFkB Pathway*, The Verge (Sept. 24, 2020), [http://www.bu.edu/articles/2020/in-deadly-](http://www.bu.edu/articles/2020/in-deadly-covid-19-lung-inflammation-bu-researchers-discover-a-culprit-in-nfkb-pathway)
 3 [covid-19-lung-inflammation-bu-researchers-discover-a-culprit-in-nfkb-pathway](http://www.bu.edu/articles/2020/in-deadly-covid-19-lung-inflammation-bu-researchers-discover-a-culprit-in-nfkb-pathway).

4 **Healthcare:** Beyond COVID-19, institutions of higher education receive federal funding for
 5 other important healthcare research. *Amici* Harvard University, Boston University, and University of
 6 Michigan, among others, have formed the CELL-MET laboratory, which receives funding from the
 7 National Science Foundation, “to advance nano-bio-manufacturing methods that could lead to large-
 8 scale fabrication of functional heart tissue which could replace diseased or damaged muscle after a
 9 heart attack.” CELL-MET, <https://www.bu.edu/cell-met> (last visited Nov. 23, 2020). The National
 10 Institutes of Health (“NIH”) fund research at *amicus* Brown University on how drugs of abuse affect
 11 memory and why they cause cravings. *The Secrets of Cravings*, Impact 5 (2020),
 12 [https://www.brown.edu/sites/g/files/dprerj316/files/2020-03/PDFIMPACT2020.FullIssueREV3.](https://www.brown.edu/sites/g/files/dprerj316/files/2020-03/PDFIMPACT2020.FullIssueREV3.27.20a.pdf)
 13 [27.20a.pdf](https://www.brown.edu/sites/g/files/dprerj316/files/2020-03/PDFIMPACT2020.FullIssueREV3.27.20a.pdf). Federally funded work also fights bias in the delivery of medicine; *amicus* Boston
 14 University’s Department of Medicine, for instance, offers training as part of the NIH-funded Bias
 15 Reduction in Internal Medicine initiative. *See Bias Reduction in Internal Medicine*, Boston Univ. (last
 16 visited Nov. 23, 2020), [https://www.bumc.bu.edu/facdev-medicine/dom-opportunities/diversity-in-](https://www.bumc.bu.edu/facdev-medicine/dom-opportunities/diversity-in-dom/deib-trainings/bias-reduction-in-internal-medicine-brim/#:~:text=The%20Department%20of%20Medicine%20is,in%20unwanted%20and%20unintended%20ways)
 17 [dom/deib-trainings/bias-reduction-in-internal-medicine-brim/#:~:text=The%20Department%20of%20Medicine%20is,in%20unwanted%20and%20unintended%20ways](https://www.bumc.bu.edu/facdev-medicine/dom-opportunities/diversity-in-dom/deib-trainings/bias-reduction-in-internal-medicine-brim/#:~:text=The%20Department%20of%20Medicine%20is,in%20unwanted%20and%20unintended%20ways).
 18 [20Medicine%20is,in%20unwanted%20and%20unintended%20ways](https://www.bumc.bu.edu/facdev-medicine/dom-opportunities/diversity-in-dom/deib-trainings/bias-reduction-in-internal-medicine-brim/#:~:text=The%20Department%20of%20Medicine%20is,in%20unwanted%20and%20unintended%20ways).

19 **Technological and Economic Innovation:** *Amici* foster innovation crucial to government
 20 infrastructure through federally funded projects. *Amicus* Stanford used federal grant money to conduct
 21 research that “enable[d] the Federal Communications Commission to auction off the nation’s
 22 telecommunications spectrum, a highly complex technical challenge.” Clifton B. Parker, *Stanford*
 23 *Economists Among Golden Goose Winners*, Stanford News (July 18, 2014),
 24 <https://news.stanford.edu/news/2014/july/golden-goose-economists-071814.html>. And the
 25 Department of Defense annually invests tens of millions of dollars in university research. Press
 26 Release, DOD, *DOD Awards \$48.9 Million to Universities for Major Research Equipment* (Nov. 20,
 27 2019), <https://www.defense.gov/Newsroom/Releases/Release/Article/2021937/dod-awards-489->
 28 <https://www.defense.gov/Newsroom/Releases/Release/Article/2021937/dod-awards-489->

1 [million-to-universities-for-major-research-equipment.](#)

2 ***Implicit Bias:*** Among the work that the Executive Order targets is the federally funded
 3 research at *amicus* Harvard University that identified and developed theories of implicit bias; this
 4 research has resulted in data used “in business, by police departments, in class rooms, and throughout
 5 research centers.” *Fellow Mahzarin Banaji Wins Golden Goose Award*, AAPSS (Oct. 12, 2018),
 6 <https://www.aapss.org/news/fellow-banaji-wins-golden-goose-award>. In other words, the Order
 7 threatens to end funding for discussion of and training on a phenomenon that federal funds helped
 8 identify in the first place. That work continues—and continues to be funded by the federal
 9 government. Federally funded research at Harvard has examined discrimination in online advertising
 10 delivery. Latanya Sweeney, *Discrimination in Online Ad Delivery* (2013).
 11 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208240. A Department of Justice grant
 12 supported research at Yale University into improving policing practices, including reducing racial
 13 bias. Justice Collaboratory, *Principles of Procedurally Just Policing*, Yale Law School (2018),
 14 [https://law.yale.edu/sites/default/files/area/center/justice/principles_of_procedurally_just_policing](https://law.yale.edu/sites/default/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf)
 15 [report.pdf](#).

16 As these and myriad other examples illustrate, *amici* provide valuable research across subject
 17 areas—most having nothing to do with race or gender—and they do so by working in partnership with
 18 the federal government via grants and contracts.

19 **II. Intellectual Freedom Is Integral To The Academic Endeavor.**

20 American colleges and universities are able to conduct this type of innovative and cutting-edge
 21 research because they operate within an unregulated “marketplace of ideas.” *Keyishian v. Bd. of*
 22 *Regents*, 385 U.S. 589, 603 (1967). As the Supreme Court has repeatedly stated: “The essentiality of
 23 freedom in the community of American universities is almost self-evident.... To impose any strait
 24 jacket upon the intellectual leaders in our colleges and universities would imperil the future of our
 25 Nation.” *Id.* (quoting *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 250 (1957)). *Amici’s*
 26 freedom—and their ability to provide contributions to society at large—are imperiled by the Order’s
 27 vague terms, which chill constitutionally protected speech and force a choice between that protected
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1 speech and accepting federal contracts and grants.

2 The Order prohibits constitutionally protected speech by barring *amici* university contractors
3 from conducting diversity, equity, and inclusion (“DEI”) trainings that are critical to creating and
4 maintaining a campus workplace and community that is welcoming to all. *Amicus* University of
5 Michigan conducts trainings open to employees addressing, for example, how a history of genocide
6 and systemic racism continue to impact Native Americans and indigenous people today; how racial
7 trauma impacts the mental health and wellbeing of patients; and how the university library can work
8 to become an anti-racist organization. *Amicus* Harvard University has developed a number of
9 workshops and fora for employees and managers, through its Center for Workplace Development, that
10 provide techniques for workplace leaders to foster more inclusive working environments. *Amicus*
11 Brown University has developed the Facilitated Dialogue program, which trains students to facilitate
12 dialogues with other students; the trainings include a “grounding in a multipartial framework and
13 understanding of identity, dominant narratives and dynamics of power and privilege.” *Facilitated*
14 *Dialogue*, Cmty. Dialogue Proj., Brown Univ., <https://cdp.brown.edu/programs/facilitated-dialogue>
15 (last visited Nov. 23, 2020). *Amicus* Brandeis University offers trainings on racial equity and dialogue,
16 which feature topics including Whiteness, White Supremacy, and White Fragility.

17 Each *amicus* designs its DEI trainings differently, depending on its own needs and priorities.
18 And many trainings are open to both employees *and* students. Thus, the Order, with its broad, unclear
19 language and drastic penalties, chills speech beyond its putative application to “workplace training”
20 alone. The Order’s prohibition on “workplace training,” in fact, risks causing *amici* to alter or curtail
21 student-oriented programming that universities need to ensure that opportunities for learning and
22 engagement are open to all community members. And the Order purports to establish restrictions
23 university-wide at the moment any department, laboratory, or center at an *amicus* institution enters
24 into a contract that includes the Order’s required language.

25 *Amici* are deeply committed to their DEI trainings and, more broadly, to maintaining the
26 sanctity of intellectual freedom in research, in programming, and on campus. Academic freedom is
27 necessary for the rigorous debate that sharpens ideas at the forefront of cultural discourse. “In a word,
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1 the University’s fundamental commitment is to the principle that debate or deliberation may not be
2 suppressed because the ideas put forth are thought by some or even by most members of the University
3 community to be offensive, unwise, immoral, or wrong-headed.” *Report of the Committee on*
4 *Freedom of Expression*, Univ. of Chi. at 3 [https://provost.uchicago.edu/sites/default/files/documents/](https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf)
5 [reports/FOECommitteeReport.pdf](https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf).

6 The Order pays lip service to this freedom by purporting to protect “objective” discussion of
7 the “divisive concepts” as part of “a larger course of academic instruction”—provided the concepts
8 are not “endorse[d].” Order § 10(b). But this provision is no safe harbor at all; instead, it exposes the
9 extent to which the Order’s vague prohibitions take direct aim at core academic freedoms and threaten
10 to chill debate on campus and in classrooms. The Order contemplates that the federal government
11 should decide what presentation of “divisive concepts” conforms to its preferred “objective” viewpoint
12 and what does not—an untenable encroachment on *amici*’s constitutional rights.

13 *Amicus* and federal contractor Harvard University, for example, offers psychology courses
14 entitled “The Nature of Prejudice” and “The Development of Social Cognition,” which like the grants
15 discussed above, directly address the “divisive concepts” that the Order targets. And Harvard offers
16 an undergraduate English course “Race and Jurisprudence,” which examines whether “the design of
17 the American legal system [has] made it easier or harder to remedy cases of racial inequality and
18 injustice.” *Faculty of Arts and Sciences Course Catalog Preview*, Harvard Univ. 1063,
19 https://courses.my.harvard.edu/dw_course/fas_crse_cat.pdf (last visited Nov. 23, 2020). Harvard Law
20 School courses discuss everything from critical race theory to implicit bias to “sympathy for the loss
21 of whiteness in traditional national identity.” *Harvard Law School Course Catalog*, Harvard Law Sch.
22 (Nov. 22, 2020), <https://helios.law.harvard.edu/CourseCatalogs/hls-course-catalog-2020-2021.pdf>.
23 And all Masters in Public Policy students at the Harvard Kennedy School are required to take “Race
24 and Racism in the Making of the United States as a Global Power,” a course that “examin[es] the
25 nature of race at the heart of the American project” by “draw[ing] from African American, Latinx,
26 Indigenous and Asian American history, critical race theory, and whiteness studies to offer students
27 historical knowledge about the role that race and racism have played in wealth creation, labor force
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1 participation, political culture, social institutions, immigration, LGBTQ+ rights, and civic life.” *DPI-*
 2 *385: Race and Racism in the Making of the United States as a Global Power*, Harvard Kennedy Sch.,
 3 <https://www.hks.harvard.edu/courses/race-and-racism-making-united-states-global-power> (last
 4 visited Nov. 23, 2020).

5 *Amici* universities cultivate fora for rigorous debate on these and other important topics.
 6 *Amicus* Stanford University is home to the Hoover Institution, which has hosted talks about reparations
 7 for Black Americans. *See, e.g., The Libertarian: The Reparations Debate*, Hoover Inst. (Apr. 10,
 8 2019), <https://www.hoover.org/research/libertarian-reparations-debate>. *Amicus* Dartmouth College is
 9 home to the Dartmouth Centers Forum, which seeks to “create an enabling environment for
 10 constructive thinking and open dialogue campus-wide about current issues of the day.” *Dartmouth*
 11 *Centers Forum*, Dartmouth College, <https://www.dartmouth.edu/centersforum/> (last updated Nov. 7,
 12 2019). Also at Dartmouth, the Shared Academic Experience Program aims to enable students to
 13 practice disagreeing about racial justice, drawing on two prominent methodologies of racial justice.
 14 *See Shared Academic Experience: Class of 2024 and Transfer Students*, Dartmouth College,
 15 <https://www.dartmouth.edu/orientation/experience> (last updated Sept. 11, 2020). *Amici* Tufts
 16 University and Boston University are home to centers founded with the express goal of tackling issues
 17 of race and racism. *See, e.g., Center for Antiracist Research*, Bos. Univ.,
 18 <https://www.bu.edu/antiracism-center/> (last visited Nov. 23, 2020); *Center for the Study of Race and*
 19 *Democracy*, Tufts Univ., <https://as.tufts.edu/csrd/Default.htm> (last visited Nov. 23, 2020).

20 The Trump Administration itself has recognized the importance of promoting academic
 21 freedom on college campuses. Only last year, it issued an executive order requiring agencies “to
 22 ensure institutions that receive Federal research or education grants promote free inquiry.” Exec.
 23 Order No. 13,864, § 3(a), *Improving Free Inquiry, Transparency, and Accountability at Colleges and*
 24 *Universities*, 84 Fed. Reg. 11,401, 11,402 (Mar. 26, 2019). *Amici* do not support that order’s heavy-
 25 handed approach and believe it should be repealed; but that order, by its own terms, was designed to
 26 “encourage institutions to foster environments that promote open, intellectually engaging, and diverse
 27 debate.” *Id.* § 2(a), 84 Fed. Reg. at 11,401. As the American Council on Education has noted, the
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1 Order at issue here appears to directly contradict the earlier 2019 order. *See* Letter from Am. Council
2 on Educ. to Pres. Donald J. Trump 2 (Oct. 8, 2020), [https://www.acenet.edu/Documents/Letter-White-
4 House-Race-and-Sex-Stereotyping-Executive-Order-100820.pdf](https://www.acenet.edu/Documents/Letter-White-
3 House-Race-and-Sex-Stereotyping-Executive-Order-100820.pdf). After all, the Order prohibits
5 training or use of funds that promotes ideas the Order deems divisive. It thereby “exercises executive
6 power to limit speech on campuses in ways that undercut the administration’s prior order seeking to
7 increase it.” *Id.* The Order likewise contradicts directives of other federal agencies that instruct *amici*
8 institutions to promote and prioritize diversity in science and technology research, in recognition that
9 “America’s continued S[cience] & T[echhnology] leadership depends not only on balancing security
10 and openness but also creating research environments that are safe and inclusive.” Prepared
11 Testimony of Dr. Kelvin Droegemeier, Director of Office of Science and Tech. Policy, Before House
12 Comm. on Science, Space and Tech. at 6 (Feb. 27, 2020),
13 <https://science.house.gov/imo/media/doc/Droegemeier%20Testimony1.pdf>; *see also, e.g., Request for*
14 *Information on the American Research Environment*, 84 Fed. Reg. 65,194 (Office of Science & Tech.
15 Policy Nov. 26, 2019).

16 Only by maintaining a robust commitment to academic freedom can *amici* sustain a dynamic
17 marketplace of ideas. The Executive Order threatens to chill speech, privileges certain views over
18 others, and risks a monopoly of thought the Constitution prohibits.

19 **III. The Order Is Unconstitutional And Jeopardizes *Amici*’s Federally Funded Research.**

20 If the Order were to take effect, it would have a substantial chilling effect on speech and
21 intellectual advancement at higher education institutions and, by forcing an impossible choice, may
22 discourage some institutions from even seeking certain federal grants or contracts. To be clear, *amici*
23 do not believe they are violating any aspect of the Order. However, the Order’s prohibitions are
24 unclear. And the Order threatens serious, but equally vague, penalties: Violating the Order could
25 jeopardize a university’s eligibility for *all* future contracts and subject it to unspecified “other
26 sanctions.” Order § 4(a)(3). The Order could also expose institutions of higher education to lawsuits
27 under Title VII for including the “divisive concepts” in their trainings. *Id.* § 8. While no authoritative
28

1 interpretation of the Order’s reach yet exists, attorneys both inside and outside the higher education
 2 community have suggested that the Order could be interpreted to apply to *all* of a school’s employees
 3 and programs, not only those receiving federal funding. *See* Hailey Fuchs, *Trump Attack on Diversity*
 4 *Training Has a Quick and Chilling Effect*, N.Y. Times (Oct. 13, 2020), [https://www.nytimes.com/](https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html)
 5 [2020/10/13/us/politics/trump-diversity-training-race.html](https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html); *see also id.* (noting one college canceled a
 6 professor’s talk on Hispanic identity due to the Order). That makes the risk of penalties all the greater.

7 The Order’s threatened sanctions confirm that it is unconstitutional. Under the First
 8 Amendment, the government may not pick winners or losers based on the content or viewpoint of their
 9 speech. *See Rosenberger*, 515 U.S. at 828-29 (“The government must abstain from regulating speech
 10 when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for
 11 the restriction.”). But, of course, that is exactly what this Order threatens. It restricts how *amici* can
 12 approach their discussions of DEI issues with their own employees and students, limiting them to one
 13 side of certain debates and cutting off others entirely. And the Order does so on questions of racial
 14 equality and justice that are at the forefront of the current cultural and political debate.² The Order
 15 “requires [recipients of federal funding] to pledge allegiance to the Government’s policy” of
 16 discrediting certain theories of race and gender bias. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l,*
 17 *Inc.*, 570 U.S. 205, 220 (2013). It thus does what the Supreme Court has long held that “no official,
 18 high or petty, can” do: “prescrib[ing] what shall be orthodox in politics ... [and] other matters of
 19 opinion.” *Id.* at 220-21 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

20 The Order makes these proscriptions even though most federal grants to, and contracts with,
 21 institutions of higher education have little or nothing to do with the “divisive concepts” the Order
 22 targets. As noted above, most federally funded research encompasses the sciences, medicine, the
 23 environment and numerous other topics that do not focus on race or gender. The Order “thus
 24 effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the
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26 ² *E.g.*, Scott McFetridge, *Iowa Senate Candidates Debate, Differ on Racism, Privilege*, Associated Press (Oct. 15, 2020),
 27 [https://apnews.com/article/race-and-ethnicity-senate-elections-des-moines-elections-joni-ernst-ea6f94a18c4ed805fb4403](https://apnews.com/article/race-and-ethnicity-senate-elections-des-moines-elections-joni-ernst-ea6f94a18c4ed805fb4403dff43c26e8)
 28 [dff43c26e8](https://apnews.com/article/race-and-ethnicity-senate-elections-des-moines-elections-joni-ernst-ea6f94a18c4ed805fb4403dff43c26e8); Gerald F. Seib, *The Debate Over Systemic Racism: Why It Divides and Why It Provides Hope*, Wall St. J.
 (July 27, 2020), [https://www.wsj.com/articles/the-debate-over-systemic-racism-why-it-divides-and-why-it-provides-](https://www.wsj.com/articles/the-debate-over-systemic-racism-why-it-divides-and-why-it-provides-hope-11595852987)
[hope-11595852987](https://www.wsj.com/articles/the-debate-over-systemic-racism-why-it-divides-and-why-it-provides-hope-11595852987).

1 federally funded program.” *Rust v. Sullivan*, 500 U.S. 173, 197 (1991). After all, “[a] recipient cannot
2 avow the belief dictated by the [Order] when spending [federal] funds, and then turn around and assert
3 a contrary belief, or claim neutrality, when participating in activities on its own time and dime.”
4 *Agency for Int’l Dev.*, 570 U.S. at 218. A contract recipient may not “inculcate[] in its employees”
5 any “divisive concepts” during *self-funded* trainings, including trainings for university employees who
6 do not work on federal contracts. Order § 4(a)(1). In this way, the Order “goes beyond defining the
7 limits of the federally funded program to defining the recipient.” *Agency for Int’l Dev.*, 570 U.S. at
8 218. That is a quintessential First Amendment violation.

9 Central to the First Amendment’s design is that an entity should not have to self-censor
10 protected expression in order to avoid being sanctioned under a government mandate. *See, e.g.*,
11 *Lamont v. Postmaster General of the U.S.*, 381 U.S. 301, 305 (1965); *see also Steffel v. Thompson*,
12 415 U.S. 452, 459 (1974) (plaintiff need not “first expose himself to actual arrest or prosecution to be
13 entitled to challenge a statute that he claims deters the exercise of his constitutional rights”). To avoid
14 the risk of muzzling vital debate, “[t]he Constitution gives significant protection from overbroad laws
15 that chill speech within the First Amendment’s vast and privileged sphere.” *Ashcroft v. Free Speech*
16 *Coal.*, 535 U.S. 234, 244 (2002). But, because of its vague and capacious reach, the Order forces
17 *amici* to choose between engaging in protected speech or risking their federal contracts, grants, and
18 undefined additional penalties. Should institutions be put to this choice, not only they, but also all
19 who benefit from the critical research they conduct, will be meaningfully harmed.

20 Indeed, the Order’s unclear commands have already sewed confusion and prompted change
21 among schools’ programming even beyond traditional “workplace training.” The University of
22 Memphis, for example, has encouraged suspension of *all* diversity trainings for the fall semester as a
23 result of the Order. FOX13Memphis.com News Staff, *Diversity Training in Jeopardy at U of M Due*
24 *to President Trump’s Executive Order*, Fox13 (Oct. 28, 2020),
25 [https://www.fox13memphis.com/news/local/diversity-training-jeopardy-u-m-due-president-trumps-](https://www.fox13memphis.com/news/local/diversity-training-jeopardy-u-m-due-president-trumps-executive-order/IC6HJ5AHS5DU7IUHXZA5TKAWRI)
26 [executive-order/IC6HJ5AHS5DU7IUHXZA5TKAWRI](https://www.fox13memphis.com/news/local/diversity-training-jeopardy-u-m-due-president-trumps-executive-order/IC6HJ5AHS5DU7IUHXZA5TKAWRI). The University of Iowa paused all diversity
27 trainings for two weeks. *Regarding Executive Order 13950*, Univ. of Iowa,
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1 <https://diversity.uiowa.edu/regarding-executive-order-13950> (last visited Nov. 23, 2020). Other
2 schools are curtailing the scope of their diversity trainings out of concern for the Order’s sweep. *See*,
3 *e.g.*, *Campus Guidelines – Compliance with EO 13950*, University of Arkansas,
4 <https://oeoc.uark.edu/policies/untitled.php> (last visited Nov. 23, 2020); Letter, Am. Council on Educ.,
5 *supra*, at 1-2; *see also* Fuchs, *supra* (the Order’s “impact has rippled through corporate America,
6 academia and the government with remarkable speed”). Some of *amici*’s researchers who work on
7 DEI training have heard concerns about the Order from organizations to which they provide training—
8 such as the New England Public Health Training Center, which works with *amicus* Boston University.

9 These institutions’ reactions are no surprise given that the Order is so vague and its threatened
10 penalties so potentially severe. The Supreme Court has “recognized that the university is a traditional
11 sphere of free expression so fundamental to the functioning of our society that the Government’s
12 ability to control speech within that sphere by means of conditions attached to the expenditure of
13 Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”
14 *Rust*, 500 U.S. at 200. But the Order “contains many ambiguities and gray areas, which means
15 potentially substantial penalties for federal contractors and grantees will be based upon the subjective
16 determinations of federal officials.” Am. Council on Educ., *supra*, at 2. The Order thus leaves
17 colleges and universities guessing as to what it covers. Can DEI trainings discuss critical race theory?
18 How about the concept of white privilege? Can they discuss the results of implicit bias research, if it
19 turns out that members of some races are more inclined toward unconscious bias than others? The
20 Order’s imprecise and broad language makes it possible that some of these subjects are off-limits
21 entirely, or must be presented in a specific, and yet undefined, manner.

22 It should not need to be said: No President should dictate to institutions of higher education
23 the subjects that can be discussed and what may or may not be said about them. These institutions’
24 “role in our society will not survive if certain points of view may be declared beyond the pale.
25 ‘Teachers and students must always remain free to inquire, to study and to evaluate, to gain new
26 maturity and understanding; otherwise our civilization will stagnate and die.’” *Rodriguez v. Maricopa*
27 *Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (quoting *Keyishian*, 385 U.S. at 603).

1 Yet the Order’s broad terms have potential to reach past trainings for employees and students
 2 and to restrict even what professors may say in their classrooms. *See supra* Part II. The Order’s
 3 purported safeguard for the “objective” discussion of the “divisive concepts” in “a larger course of
 4 academic instruction” provided there is no “endorsement” of those concepts, Order § 10(b), only
 5 exacerbates its chilling effects. Scholars need to be able to give voice to, and indeed “endorse,”
 6 *opposing* views in order for intellectual progress to occur. The Order inhibits this advancement—
 7 which is a core component of *amici*’s missions, *supra* Part II—because its definition of “objective”
 8 discussion leaves room for speech in support of only *one* view on the issues it addresses. Posit that
 9 the notion of “meritocracy” is racist or sexist, for example, and one could risk losing federal funding
 10 for one’s entire university, due to the “endorsement” of a “divisive concept.” *Id.* Posit that it is not,
 11 and one risks nothing. Discussion is impossible under these unconstitutional constraints.

12 The Order’s vague definitions and capacious reach may prompt institutions to avoid bidding
 13 on government contracts, or to disclaim government grants for critical research initiatives. Everyone
 14 would lose in that scenario. Colleges and universities will be deprived of needed support for their
 15 missions; the government will lose the talents and energy of scholars and students working on the
 16 hardest issues; and the nation will lose the critical benefits and practical applications of that research.

17 CONCLUSION

18 Plaintiffs’ motion for a preliminary injunction with nationwide effect should be granted.

19 Dated: November 23, 2020

Respectfully submitted,

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