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**Re: Executive Order 13,950 (Docket No. OFCCP-2020-0002)**

The following information is respectfully submitted by the Transgender Legal Defense and Education Fund (“TLDEF”) in response to the Request for Information as relevant to Executive Order 13950, titled “Executive Order in Combating Race and Sex Stereotyping” (the “Executive Order”).

## **1. INTRODUCTION**

TLDEF is a civil rights organization that works to end discrimination against the transgender and non-binary community and to protect and defend the rights of transgender and non-binary people through test case litigation, advocacy, and public education. The Executive Order is of particular interest to TLDEF due to TLDEF’s experience and expertise in three areas: first, providing training to organizations and businesses—especially law firms, corporate legal departments, law schools, and community organizations—many of whom are federal contractors and sub-contractors, for the purpose of aiding them in providing culturally-competent services (primarily

legal services) to low-income transgender clients, who are primarily people of color; second, helping these same partners to develop diversity and inclusion materials for use in-house with their own employees; and third, assisting partner organizations, such as LGBT community centers, around the country who provide employee trainings to businesses and organizations in their communities with the development of training materials. TLDEF is thus positioned to see first-hand the need for and the benefits of employee diversity and inclusion programming, as well as to observe Executive Order's damaging effects on employers' abilities to provide such programming. As a civil rights organization, TLDEF is also familiar with and accustomed to employing the nation's civil rights laws and our Constitution.

With these experiences in mind, TLDEF respectfully submits that the Executive Order is inconsistent with its stated purpose, fosters rather than combats workplace discrimination, and is unconstitutional and unlawful. It cannot be repaired or improved. The only course of action consistent with the Constitution, with civil rights laws, and with eliminating discrimination and harassment in American workplaces and public accommodations, is for the Executive Order to be immediately and entirely withdrawn.

While the Executive Order's title and its stated goal of fostering an inclusive workplace evince a laudable purpose, a review of the restrictions in the Executive Order's broad language demonstrates that it subverts genuine attempts to create equality in the workplace; and it also violates the Constitution's guarantee of freedom of speech. In brief, the broadly worded Executive Order threatens to prohibit discussion of subjects, such as unconscious biases and systemic prejudices, which are vitally important in a society that is diverse and unfortunately still marked by inequalities based on race and sex, for a business or organization to successfully maintain a workforce or to serve a client base or a community. Contrary to the Executive Order's assertion that such subjects espouse "the pernicious and false belief that America is an irredeemably racist and sexist country," they are actually tailored towards addressing inequality, through educating employees as to their implicit biases, and providing tools to end automatic patterns of thinking which may be unintentionally discriminatory. Implicit or unconscious bias training means nothing more than recognizing and eradicating unconscious favoritism toward, or prejudice against, people of a particular race, sex, or other social classification, which arises from our society's historical legacy of

race and sex inequities. All of us have implicit biases, regardless of our sex or race. Far from viewing America as “irredeemably” racist and sexist, this training understands that racism and sexism are eradicable, and endeavors to improve the American experiment, for all of its people.

Through the Executive Order, the Administration is signaling – shouting, really – that notions of implicit and unconscious bias are both false and harmful, and in themselves are a form of discrimination. This could not be further from the truth, as experts in the area of diversity and inclusion can attest. In particular, by falsely equating implicit bias trainings with “scapegoating,” the Executive Order discourages and demeans vital aspects of diversity trainings which experts in the arena agree are important and effective towards both acknowledging and ending discrimination. The key to fostering inclusive workplaces is not through restricting speech and prohibiting training on topics which may incidentally make some individuals uncomfortable, but rather by encouraging more training and a better understanding of ourselves and our society, creating a more inclusive and equal national community.

Contrary to their stated goals, the prohibitions enumerated in the Executive Order are having a far-reaching detrimental impact on the progress this country has made towards eradicating discrimination in workplaces and public accommodations. This impact is not limited to the contractors who risk the loss of valuable governmental contracts, nor even just their employees, but extends to society in general, and especially those in our society who have been historically discriminated against and marginalized, including the transgender and non-binary community, primarily comprised of people of color, on whose behalf TLDEF works.

Additionally, the Executive Order is an unconstitutional restraint on free speech. It conditions the receipt of Government contracts on adherence to a Government ideology—specifically, on opposing a viewpoint the Government believes “malign.” The Constitution prohibits tests of political orthodoxy, and the Supreme Court has long held that these kinds of ideological quid pro quo violate the First Amendment’s guarantee of freedom of speech.

As detailed below, the only remedy for these defects is to rescind the Executive Order in its entirety. It is therefore respectfully submitted that the Executive Order should be immediately withdrawn.

## 2. THE EDICTS SET FORTH IN THE EXECUTIVE ORDER ARE UNCONSTITUTIONAL AND CONTRARY TO LAW

### 2.1 *The Executive Order Unduly Restricts the Constitutional Right to Free Speech*

It is a basic First Amendment principle that “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*<sup>1</sup> To this end, the Supreme Court has made clear that “[t]he government may not prohibit the dissemination of ideas it disfavors, nor compel the endorsement of ideas that it approves.” *Knox v. SEIU, Local 1000*.<sup>2</sup> Indeed, viewpoint-based restrictions on policy preference and on freedom of speech as a prerequisite for Government funding have been soundly declared unconstitutional by the Supreme Court, which held most recently in *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, that a Government mandate that organizations adopt a policy explicitly opposing prostitution as a prerequisite to obtain funding violated the First Amendment.<sup>3</sup> As the Court reiterated, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>4</sup>

Yet, through the Executive Order, the Administration blatantly seeks to limit speech through chilling discussion of, among other things, systemic racism, prejudice and unconscious biases, under the pretext that they amount to a “malign ideology.” But Government notions as to which “ideologies” are worth vilification, and which are acceptable, should bear no relation to the issuance, or termination, of government contracts.

Moreover, the suggestion that it is somehow evil for employers and employees to be educated about biases based on a history of discrimination and marginalization, which are irrefutably and objectively a part of our society, but which need no longer be if we work to end them, is simply unfounded and nonsensical. In reality, there are numerous examples of the United States righting wrongs that have result from both explicit and implicit biases based on race

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<sup>1</sup> 547 U.S. 47, 61 (2006).

<sup>2</sup> 567 U.S. 298, 299 (2012).

<sup>3</sup> 570 U.S. 205 (2013).

<sup>4</sup> *Id.*

and sex, from the enactment of the Fourteenth Amendment the century before last to the Supreme Court's decision just this year in *Bostock vs. Clayton County, Georgia*,<sup>5</sup> affirming definitively that anti-LGBT discrimination violates Title VII.

Irrespective of the lack of merit of the Executive Order's assertions, however, is its clear violation of the fundamental right to free speech. There is no way to remedy this through revising the Executive Order or its enforcement scheme. Rather, the Executive Order should be withdrawn accordingly.

## **2.2 *The Executive Order Sets up a Legal Conflict Between Certain States and Contractors***

Beyond running afoul of established First Amendment rights, the Executive Order threatens conflict with certain state laws. The end result of these conflicts is to discourage organizations or businesses in those states, or which otherwise need to comply with the states' anti-discrimination laws, from seeking government contracts.

No discussion of personal, interpersonal, institutional, structural, and cultural barriers to achieving the most effective workforce or the best client or community relations can be complete without a discussion of implicit bias. Indeed, as has been noted, "the study of the role of automatic processes in the manifestation of discrimination and maintenance of disparities in contemporary society has been quite fruitful and a necessary corrective to the idea that discrimination is typically, if not necessarily, born of individual intent...."<sup>6</sup>

Accordingly, to cite one example, in California, healthcare providers must include discussions of implicit bias to fully comply with California law. In 2019, the California legislature passed a series of bills that will require implicit bias training to be included in continuing education programs for physicians, nurses, and physician assistants by 2023, and require that all health care providers involved in the perinatal care of patients within hospitals, alternative birth centers or primary care clinics receive implicit bias training. For those involved in perinatal care, their training must

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<sup>5</sup> 140 S. Ct. 1731 (2020).

<sup>6</sup> Natalie M. Daumeyer, Julian M. Rucker & Jennifer A. Richeson (2017) Thinking Structurally About Implicit Bias: Some Peril, Lots of Promise, *Psychological Inquiry*, 28:4, 258-261, DOI: 10.1080/1047840X.2017.1373556 (emphasis added).

include the identification of “personal, interpersonal, institutional, structural, and cultural barriers to inclusion.”<sup>7</sup>

In complying with California’s law, any federal contractors or subcontractors involved in health care will quite reasonably be concerned with running afoul of the Executive Order, given the ambiguity of its language. The Executive Order defines “scapegoating” as “any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race . . . are inherently inclined to oppress others, or that members of a sex are inherently . . . inclined to oppress others;” it also prohibits training “inculcates . . . the concept[] that . . . any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.”

Implicit bias training does neither of these things, but coming to understand unconscious tendencies to treat people differently because of race or sex is a purpose of such trainings, and employees’ recognition of such tendencies may result in their feeling discomfort. “Research has found that learning that one does indeed harbor implicit bias, especially biases that are deemed socially unacceptable in their explicit form... is threatening to the self-concept of many Americans, at least initially.”<sup>8</sup> Because the Executive Order’s only references to implicit or unconscious biases, or to discomfort in discussing them, is in reference to prohibited conduct, it suggests that implicit bias training itself is prohibited. The order certainly does not provide clarity as to what is permitted. Thus, the Executive Order forces contractors and sub-contractors involved in training healthcare professionals in California to choose between risking their federal contract or grant<sup>9</sup> and complying with state law.

These problems extend nationwide. Along with California, other states, including Connecticut, Delaware, Illinois, Maine, and New York require sexual harassment training for employees in all industries (depending upon the size of the employer). In California, employers with five or more employees must provide “effective interactive training and education” by a “qualified trainer,” who is

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<sup>7</sup> Cal. Health & Safety Code § 123630.3.

<sup>8</sup> *Id.*

<sup>9</sup> Office of Federal Contract Compliance Programs, “Executive Order 13950 – Combating Race and Sex Stereotyping”, <https://www.dol.gov/agencies/ofccp/faqs/executive-order-13950> (date accessed November 23, 2020).

someone that, among other things, has the ability to train employees about “[h]ow to identify behavior that may constitute unlawful harassment, discrimination, or retaliation...”<sup>10</sup> Similarly, Connecticut, Delaware, Illinois, Maine, and New York also require training that includes an explanation of sexual harassment, examples of conduct that may constitute unlawful sexual harassment, and information about the employer’s responsibilities in the prevention, investigation, and corrective measures for sexual harassment. Other states, like Florida, Iowa, Nevada, New Jersey, North Carolina, Oklahoma, Pennsylvania, Texas, Utah, and Washington require that certain state employees receive training on different diversity-related topics, including affirmative action, equal opportunity, and sexual harassment.

To be effective, any training on how to identify unlawful harassment and discrimination, and how to address or prevent such harassment or discrimination, must necessarily address the implicit biases employees unwittingly hold. Without confronting their biases, employees cannot eliminate them. It is only by confronting unconscious biases and understanding that they exist that harassment and discrimination can be finally eliminated from the workplace. Indeed, in the context of workplace harassment and discrimination litigation, it is rare that the intent to discriminate or harass is shown by explicitly racist or sexist conduct. As often as not, a plaintiff in Title VII litigation may demonstrate unlawful intent through a pattern of statements and actions that a defendant had not even realized were discriminatory at the time they were undertaken.

Through chilling the subjects and methods employed in diversity and inclusion trainings, which are required by numerous states, the Executive Order sets up a conflict between federal contractors’ and sub-contractors’ need to comply with those states law and their ability to retain their federal contracts and funding.

### **3. ENFORCEMENT OF THE EXECUTIVE ORDER WILL HAVE FAR-REACHING NEGATIVE IMPACT**

#### ***3.1 The Elements of Diversity Training Which the Executive Order Chills Are Vital to Anti-Discrimination Initiatives***

As the Executive Order itself acknowledges, “[t]raining employees to create an inclusive workplace is appropriate and beneficial.”

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<sup>10</sup> Cal. Gov’t. Code § 12950.1.

However, the Executive Order inhibits elements of diversity training that are vital to anti-discrimination initiatives. As discussed above, most egregious is its prohibition of training that “inculcates...the concepts that...an individual, by virtue of his or her race or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously” or “any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.” This threaten to chill common and necessary forms of diversity and inclusion training, especially implicit bias training.

Employers are typically legal entities other than natural persons and, therefore, their efforts to combat discrimination are only as effective as the words and conduct of the employees of which the legal entity is comprised. To truly prevent discrimination in the workplace, it is insufficient to merely prohibit overt acts of racism, sexism, and other unlawful behavior based upon categories protected by state and federal law. Rather, employees must understand the historical context of racism and sexism in the workplace, as well as the systemic societal and cultural influences that permeate the work environment. And, as discussed above, to educate employees on these issues in any meaningful and effective manner, qualified trainers must address both conscious and unconscious biases.

The discussion of these biases will likely, and quite appropriately, cause employees to question themselves, to look inward to become aware of their own biases. Indeed, research indicates that “awareness raising is the most likely aim of [unconscious bias training] and the aim most often achieved.”<sup>11</sup> In this manner, to view their speech and actions in light of these newly-discovered biases, employees can help to safeguard their work environment from both overt discrimination and speech, conduct, or policies that may have a discriminatory impact. Indeed, it has been found that “unconscious bias is like a habit that can be reduced through a combination of awareness of unconscious bias, concern about its effects, and the use of tools to reduce bias.”<sup>12</sup>

Yet, in becoming aware of unconscious bias, there is the potential that some employees will feel some level of discomfort upon

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<sup>11</sup> Doyin Atewologun, Tinu Cornish, and Fatima Tresh (2018), *Unconscious Bias Training: An Assessment of the Evidence for Effectiveness, Equality and Human Rights* Commission Research Report 113.

<sup>12</sup> *Id.*

becoming aware of their unconscious bias; or even misunderstand such training to imply that an employee is racist or sexist because of their own race or sex, rather than because of unconscious bias. Thus, if the Executive Order is not withdrawn, employers will be left with training options that, steering wide of the threat of losing government contracts, are significantly less effective in preventing acts of discrimination or harassment in the workplace.

### **3.2 *The Executive Order Promotes Disenfranchisement of Historically Marginalized People, Including Transgender Individuals***

As noted above, the Executive Order provides vague direction for how diversity and inclusion training should occur in the workplace. It chills discussion of implicit bias, unconscious bias, and systemic racism and sexism in workplace trainings. This in turn promotes the disenfranchisement of transgender people, especially people of color, among many others.

As discussed above, while described as prohibiting “sex scapegoating” in trainings, the Executive Order is chilling discussion of or inquiry into concepts of implicit bias, unconscious bias, and systemic racism and sexism from being introduced in the trainings. Since it comes right up to the line of arguing that implicit bias trainings are in themselves a form of bias, the Executive Order leaves federal contractors and sub-contractors in a gray area that inhibits carrying out such trainings and self-evaluations. This effect has been multiplied by the establishment of a hotline to which employees may report any trainings that, in their subjective impression, cross the blurry lines established under the Executive Order; in other words, threatening punishment by investigation, including possible temporary withholding of payments, even if employee reports turn out to be baseless, or concern speech that is protected by the First Amendment.

Including the concepts of systemic sexism and implicit or unconscious bias within diversity and inclusion training has never been for the purpose of teaching one social group is superior or inferior to another. Research shows that implicit bias is not fictional.<sup>13</sup> Nor is the purpose of recognizing this type of bias to cast judgment, as the Executive Order indicates. Rather, it is to help

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<sup>13</sup> See e.g., Charlesworth TES, Banaji MR. Patterns of Implicit and Explicit Attitudes: I. Long-Term Change and Stability From 2007 to 2016. *Psychological Science*. 2019;30(2):174-192. doi:10.1177/0956797618813087.

individuals mitigate its very real effects, regardless of personal intentions.

Recognition of implicit bias is vital to addressing and correcting the everyday discrimination experienced by transgender people, and retaining them as employees and as clients or customers. In the most recent U.S. Transgender Survey (a comprehensive national survey of conditions of transgender people in this country, with nearly 28,000 respondents), 23% of transgender employees reported experiencing workplace discrimination reflective of implicit bias, such as supervisors removing them from direct contact with clients, or sharing private information.<sup>14</sup> And as customers, 31% reported discrimination in places of public accommodation.<sup>15</sup> These forms of discrimination impact employee happiness and retention, and consumer retention, respectively. Yet the chill caused by the Executive Order inhibits businesses' and organizations' ability to remedy these problems—to the detriment of everyone. By issuing guidance that effectively diminishes the quality of the training that may be available, the Executive Order is effectively forcing contractors to work against their own interest in combating discrimination in the workplace,<sup>16</sup> and transgender individuals are left with fewer remedies available to them to combat the discrimination that they all-too-routinely face.

### **3.3 The Practical Impact of the Harms Caused by the Executive Order If It Is Not Rescinded Will Be Significant and Far Reaching**

In just the few weeks since the Executive Order was issued, diversity trainings have been canceled, postponed, and reduced in scope for fear of running afoul of the broad and vague prohibitions of the Executive Order. Because the Executive Order suggests that this is unlawful and will jeopardize government payments, the immediate practical impact of the Executive Order is that employees of contractors which either hold or strive for government contracts are left without the training they need,

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<sup>14</sup> James, S.E. et al., *The Report of the 2015 U.S. Transgender Survey*, 153, Nat'l Ctr. For Transgender Eq., (Wash., D.C. 2016),

<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>15</sup> *Id.* at 213.

<sup>16</sup> EEOC, "LGBT-Based Sex Discrimination Charges",

<https://www.eeoc.gov/statistics/lgbt-based-sex-discrimination-charges> (date accessed November 23, 2020) (Over the past 5 years the number of LGBTQIA+ based sex bias suits filed with the EEOC and the amounts recovered have only increased, with \$7M being paid in 2019 for sex discrimination charges.)

undoing decades of organizations' efforts to combat employment and public accommodations discrimination, including anti-transgender bias. It also impacts employers' ability to foster inclusive workplaces, help with talent recruitment, remain competitive, and serve their clients and customers.

For example, if a healthcare provider undergoes competency trainings to provide transgender-affirming health care, and the government considers that they make employees uncomfortable or address unconscious bias in a way the government thinks is divisive, they risk losing the ability to participate in federally-funded research or even certain emergency programs to combat the COVID-19 pandemic. These healthcare providers therefore will likely choose to avoid providing any type of training that may threaten their government funding, which in turn eliminates trainings that permit them to serve the transgender community effectively. The LGBT community centers and LGBT-focused healthcare organizations with which TLDEF partners have seen a reduced demand for their training services as a consequence.

If not withdrawn, the Executive Order will also result in government contractors incurring the administrative and oversight burdens of determining compliance. Failure to comply with the requirements of the EO may result in the contract being canceled, terminated, or suspended in whole or in part. Further, the contractor may be declared ineligible for future government contracts. Rather than undertake such risks, governmental contractors (or prospective governmental contractors) will continue to minimize or discontinue critical aspects of diversity training.

In addition to limiting the content of the training, government contractors are required to send a notice of their obligations under the Executive Order to their labor unions, and include certain language in all subcontracts and purchase orders, to ensure that these obligations are also binding on their vendors and subcontractors. This will significantly impact government contractors' working relations with their employees, subcontractors, and suppliers.

Further, Section 8 of the Executive Order specifically instructs the Attorney General to "continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the

Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.” The effects of this provision will divert the Attorney General’s limited resources from combatting actual discrimination in violation of Title VII, such as that described above, and into baseless investigations into speech that is in aid of compliance with Title VII and is protected by the First Amendment.

Perhaps most importantly, the Executive Order puts the American people at risk by standing in the way of access to lifesaving health care, culturally competent social services, and equitable treatment in the justice system. This transmits to limitation on access to health care, housing, HIV prevention education, and screenings. Identifying disparities and acknowledging their underlying causes is essential to informing testing and prevention efforts, and to improving health outcomes. By dictating the content of the trainings, the Executive Order chills speech that enables service providers to deliver life-saving care and social services to marginalized communities. This is of particular importance during the time of a global pandemic, when there are stark racial disparities in rates of COVID-19 cases and deaths.<sup>17</sup>

#### **4. CONCLUSION**

It is therefore respectfully suggested that nothing can be done to improve upon or repair Executive Order 13950; rather, the Executive Order should be withdrawn promptly in its entirety.

Sincerely,



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<sup>17</sup> Merlin Chowkwanyun, Ph.D., M.P.H. & Adolph L. Reed, Jr., Ph.D., Racial Health Disparities and Covid-19—Caution and Context, 383 NEW ENG. J. MED. 201, 202 (2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMp2012910>.