

## **What the SCOTUS Affirmative Action Cases Could Mean For Your DEI Work (and How to Protect It Going Forward)**

May 2023 (v1)

*Affirmative action is under attack. This June, the US Supreme Court likely will issue decisions in two cases backed by conservative activist groups challenging race-based affirmative action in higher education as unlawful discrimination. The Court has signaled that its decision is likely to end affirmative action. As well, conservative activist groups are closely watching these decisions to further their use of the courts to challenge diversity, equity, and inclusion (“DEI”) programs in workplaces. Organizations should act now to proactively modify their DEI programs and policies – to protect and even deepen them – while mitigating the risk of successful “reverse discrimination” and other lawsuits.*

On Halloween 2022, the US Supreme Court (the “Court”) heard oral arguments in two cases challenging the use of race as a factor in college admissions. The anti-affirmative action group Students for Fair Admissions (“SFFA”) brought one case against Harvard College and another against the University of North Carolina (together, the “SFFA Cases”). While the Court, in the past, has permitted limited affirmative action in college admissions, the Court’s conservative majority is eager to overturn this precedent. Most experts agree that the Court will rule that race-based affirmative action programs in higher education are unconstitutional and violate federal law, which, in turn, likely threatens diversity, equity, and inclusion (“DEI”) programs, practices, and policies far beyond higher education.

### **Some Big Picture Questions First**

*Why does a case about higher education admissions matter for other organizations?*

It is important for employers – including not for profits and foundations – to recognize that, historically, decisions in higher education cases have guided courts in deciding employment discrimination cases.<sup>1</sup> Courts have already applied the Supreme Court’s guidance from affirmative action cases to evaluate whether workplace policies are discriminatory.<sup>2</sup> If the Court issues new guidance restricting the use of race in college admissions, it is very likely that trial courts will also apply this new, restrictive guidance when evaluating a private employer’s policies relating to diversity efforts in “reverse discrimination” cases. As detailed below, various activist groups have already brought a torrent of reverse discrimination lawsuits. A decision in favor of SFFA could result in a spate of favorable rulings by trial courts finding that diversity programs and practices many employers have implemented are unconstitutional and illegal. The risk is more pronounced than merely an increased willingness by an aggrieved applicant or

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<sup>1</sup> Wilkinson, C. and Wright, J. (November 7, 2022). Affirmative Action: Six Employer Questions After the Supreme Court Arguments. Perkins Coie. <https://www.perkinscoie.com/en/news-insights/affirmative-action-six-employer-questions-after-the-supreme-courts-arguments.html>

<sup>2</sup> *Id.*

employee to bring a “reverse discrimination” claim; it is the risk that “reverse discrimination” claims will be more successful against employers.

*How exactly will the Court’s ruling in the SFFA Cases impact our DEI programs?*

It is unknown how broadly the Court will reject *all use of race as a factor* in college and university admissions.<sup>3</sup> During oral arguments, some justices implied possible support for barring even minimal consideration of race or, at least, requiring an expiration date in the near-term. Justice Barrett, for example, stated that “racial classifications are so potentially dangerous, however, compelling their goals, they can be employed no more broadly. . . *Grutter* doesn’t say this is great, we embrace this. *Grutter* says this is dangerous and it has to have an end point.”<sup>4</sup> Justice Thomas stated that he did not “have a clue what [diversity] means,” and requested that the University provide a definition and enumerate diversity’s educational benefits.<sup>5</sup> He then dismissed the University’s rationale and stated “Well, I guess I don’t put much stock in that [argument] because I’ve heard similar arguments in favor of segregation too.”<sup>6</sup> Meanwhile, Justice Alito already has written his view that affirmative action is unlawful, describing it as “systematic racial discrimination,”<sup>7</sup> though he expressed in the oral arguments for the *SFFA* Cases that he might support *minimal* consideration of race on a *highly individualized* basis – such as in a college admission essay.<sup>8</sup> The breadth of the Court’s ruling should better inform the legal viability of some aspects of workplace DEI programs.

*Can we still have DEI programs?*

ABSOLUTELY! Organizations should continue helping employees, boards, and constituents better understand the deep, socioeconomic roots of injustice and inequality (in its myriad forms), and redouble their efforts to create diverse, inclusive, and equitable workplaces and communities. But: to protect such efforts -- and perhaps even deepen them -- it’s important to understand the shifting legal terrain and be prepared. Employers can mitigate some risk now by reviewing and making appropriate changes to race and sex (including gender, which the Supreme Court has held includes “merely being” gay or transgender) conscious DEI policies, practices, trainings, and communications, both for current legal compliance and in anticipation that such programs will face more scrutiny.

*So, what do we do now?*

Employers should engage appropriate expert support to:

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<sup>3</sup> Yager, D.V. (2022, October 25). Five Things CHROs [Chief Human Resource Officers] Should Know About the Supreme Court’s Harvard and UNC Cases. *HR Policy Association*. <https://www.hrpolicy.org/insight-and-research/resources/2022/hr-workforce/public/10/five-things-chros-should-know-about-the-supreme-co/>

<sup>4</sup> Transcript of Oral Argument at 80:6-22, *SFFA v. University of North Carolina et. al.*, No. 21-567 (S. Ct. argued Oct. 31, 2022) (“Transcript”).

<sup>5</sup> *Id.* at 71:12-24.

<sup>6</sup> *Id.* at 74:13-15.

<sup>7</sup> *Fisher v. University of Texas*, 579 U.S. 365, 437 (2016) (Alito, J. dissenting)

<sup>8</sup> Transcript at 22:6-25.

- **Conduct appraisals of DEI initiatives.** This includes, for example, employee affinity and resource groups (which should be open to anyone who wishes to join them), fellowship programs, leadership development and other programs, as well as other anti-discrimination, workplace inclusion, and diversity related trainings to ensure that they do not stereotype or otherwise set apart any employees on the basis of protected classes, e.g., race, color, national origin, or sex. (Many HR and employment law professionals can design and/or provide trainings consistent with the above.) Consider using this as an “opportunity” to explore new initiatives and practices that may even be more effective to achieve greater diversity in the workplace without explicit use of race, national origin and other federally protected classes.
- **Review Internal and External Language.** Employers should engage in a careful review of internal communication and external language used in DEI programming, practices, and policies to ensure equitable treatment across protected categories and compliance with the laws above (one e.g.: external or internal communications suggesting a preference for staff or leaders of a particular racial background). This review should not be limited to finalized documents or public-facing language; it also should encompass internal documents, notes, emails, and even language used in meetings. Likewise, organizations should ensure that the language used in DEI programs and trainings does not single out any groups in a manner that might convey a hostile work environment towards those classes.
- **Assess Data Collection Goals and Use.** Data is an important tool in DEI programs and practices. However, data must be framed and used with care. Examine data use and framing to ensure that it is not tracking results that could suggest your organization is engaging in racial balancing, quotas, or impermissible discrimination. A legal expert can assess data collection practices for compliance with applicable laws including federal, state, local and even international laws where applicable.
- **Examine Compliance With Current Laws.** Review not just federal employment laws and regulations (e.g. hiring, promotion, workplace discrimination, etc.), but also state and local law, as well as changes in those laws. Some jurisdictions at the state and local level have expanded their protections beyond the federal classes to include protections from discrimination based on political party affiliation, weight, and other considerations; it is important for organizations to know what characteristics are protected and to comply.

## The History of Affirmative Action in the Supreme Court

In 1978, the Court first addressed affirmative action in higher education. In *Regents of the University of California v. Bakke* (“*Bakke*”), the Court struck down an admissions system reserving a specific number of seats for minority applicants as an unconstitutional quota, but upheld, for the first time, the constitutionality of using race *as one of many factors* in college admissions under the Equal Protection Clause. Thus, while most programs using race-based quotas have long been unlawful, the Court’s ruling mapped future DEI programs.

Since *Bakke*, the Court has heard challenges to affirmative action in higher education in 2003 (*Gratz v. Bollinger* and *Grutter v. Bollinger*), 2016 (*Fisher v. University of Texas*), and, now, in 2023 (the *SFFA* Cases – opinions pending). While narrow Court majorities and pluralities in 2003 and 2016 upheld some use of affirmative action, the Court posited that there may be a sunset on the necessity of affirmative action and narrowed its use with each challenge. For instance: The Court rejected the argument that affirmative action could be used to redress past racial discrimination, rejected points-based admissions systems that over-weighted race, and mandated consideration of race-neutral alternatives before the use of race-conscious practices which then could be used only if “narrowly tailored” and individualized to each candidate. Despite imposing these limitations, the Court continued to allow some affirmative action practices.

Legal experts agree that this is likely to change with the 2023 *SFFA* Cases.<sup>9</sup> The *SFFA* Cases are unique from prior ones in two key ways. First, *SFFA* has alleged discrimination not against a singular White applicant, but against a class of White and Asian American applicants. Second, and more significantly, the *SFFA* Cases will be decided by a Court with six conservative justices, most of whom have signaled their desire to overturn the Court’s precedent and find programs that use race as a factor at all in admissions to be unconstitutional and illegal.

The decisions in the *SFFA* Cases will be a watershed moment for anti-bias protections. Historically when affirmative action is curtailed, minority applicants experience a “steep decline in ... enrollment.”<sup>10</sup> In addition, the Court’s decision may deeply impair the number of diverse candidates entering the workforce by drastically reducing the number of diverse students admitted to colleges and universities.<sup>11</sup>

## **Effects on Employers**

The Court’s decisions in the *SFFA* Cases are, by nature, definitive precedent only as to the use of affirmative action in higher education. However, the decisions likely will impact current DEI practices broadly, including in employment, and have highlighted anew that existing race-conscious DEI programs must be reviewed to ensure compliance with current law.<sup>12</sup> Just the oral arguments alone have already had some “chilling effect” on private workplace DEI programs; a ruling that deems affirmative action unconstitutional may deter companies from implementing or

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<sup>9</sup> Tanick, M. (2023, April 12). First universities, next workplaces: Supreme Court ruling could doom diversity initiatives. *Minnesota Reformer*. <https://minnesotareformer.com/2023/04/12/first-universities-next-workplaces-supreme-court-ruling-could-doom-diversity-initiatives/>

<sup>10</sup> Ullman, L. (2023, April 9). Supreme Court ruling will decide fate of affirmative action. *WCAX*. <https://www.wcax.com/2023/04/09/supreme-court-ruling-that-will-decide-fate-affirmative-action/>

<sup>11</sup> Yager (2022)

<sup>12</sup> See Chang, E and Levine, B. (2022, July-August). To Drive Diversity Efforts, Don’t Tiptoe Around Your Legal Risk. *Harvard Business Review*. <https://hbr.org/2022/07/to-drive-diversity-efforts-dont-tiptoe-around-your-legal-risk?registration=success> (discussing legal issues surrounding optics of data collection in “reverse discrimination” lawsuits, impermissible preferential treatment of race and gender, and impermissible quotas in DEI practices)

continuing programs that overtly discuss or use race (or certain other protected classifications) as even a factor in allocating employment benefits.<sup>13</sup> As reported in the *Minnesota Reformer*:

“The anticipated decision dooming the legality of taking race or other traditionally protected class characteristics into account in academia could also deal a mortal blow to many [workplace DEI] practices . . . Employers would be deterred from participating in DEI programs that provide race-conscious preferences in recruitment, hiring, retention, and promotion of minority personnel for fear of becoming embroiled in costly, divisive and probably losing ‘reverse discrimination’ litigation brought by aspiring or current employees alleging that they were given second-class treatment in the workplace.”<sup>14</sup>

Such fears are not unfounded. Opponents of affirmative action are looking to the Court to signal its willingness to end considerations of race in other facets of American life, with employment law as a natural focus.<sup>15</sup> The federal laws that govern workplace discrimination are markedly similar to the federal laws the Court is reviewing in the *SFFA* Cases. Experts have noted: “[a] decision under Title VI [which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal funds] impacting affirmative action would likely prompt a new wave of litigation under Title VII [which prohibits discrimination in employment on the same bases plus religion and sex] challenging racial preferences in the workplace . . . [t]here has always been spillover between the [C]ourt’s affirmative action cases in the higher education context and the use of race in hiring and employment.”<sup>16</sup>

In fact, there are currently pending “reverse discrimination” lawsuits challenging corporate DEI employment programs that may set the stage for another Supreme Court battle.<sup>17</sup> Employers should not just be concerned about the future. “While it could be several years until a Title VII reverse discrimination case[] reaches the Supreme Court, the decision in *Harvard/UNC* could foment [another] wave of litigation” with an immediate impact on employers.<sup>18</sup> The law firm representing *SFFA* filed a “reverse discrimination” lawsuit against Pfizer, which receives federal funding, for offering a Fellowship Program to racial minorities.<sup>19</sup> Last year, America First Legal (“AFL”), helmed by former Trump administration staffers including Stephen Miller and Mark Meadows, launched the AFL Center for Legal Equality to challenge DEI programs and practices. AFL since has brought dozens of lawsuits and complaints primarily targeting corporations with allegations of discriminatory employment practices based on DEI goals, policies, and programs.

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<sup>13</sup> Fritze, J. (2022, September 21). Supreme Court’s affirmative action cases could affect hiring, employment. *USA Today*. <https://www.usatoday.com/story/news/politics/2022/09/21/supreme-court-affirmative-action-workplace-diversity/8060921001/>; Friess, S. (2022, November 16). Ending Affirmative Action Will Be an ‘Earthquake’ for Colleges, Companies. *Newsweek Magazine*. <https://www.newsweek.com/2022/11/25/ending-affirmative-action-will-earthquake-colleges-companies-1759783.html>

<sup>14</sup> Tanick (2023)

<sup>15</sup> Friess (2022)

<sup>16</sup> Fritze (2022). *Internal quotation marks omitted*.

<sup>17</sup> O’Melveny & Myers LLP. (2023, March 6). Will the Supreme Court’s Harvard/UNC Affirmative Action Decision Imperil Corporate Diversity Programs? <https://www.omm.com/resources/alerts-and-publications/alerts/supreme-court-affirmative-action-decisions-corporate-diversity-programs/>

<sup>18</sup> Yager (2022)

<sup>19</sup> O’Melveny & Myers LLP (2023)

Neither corporate size nor ability to fund a defense is a deterrent, as AFL’s current targets include Lyft, Amazon, Texas A&M, Starbucks, and Microsoft.<sup>20</sup> While the *SFFA* Cases are limited to race, employment “reverse discrimination” cases challenge programs based on all Title VII protected classes, which also include “sex” and “religion”.

*Duvall v. Novant Health* (“*Duvall*”), a 2022 lawsuit in North Carolina federal court, illustrates the risk that “reverse discrimination” claims pose. The plaintiff alleged discriminatory termination based on his race (White) and gender (male). A jury found for Mr. Duvall and awarded him \$3 million dollars in lost pay and \$10 million in punitive damages.<sup>21</sup> Among other factors, the court pointed to Novant’s DEI program as evidence of race and gender discrimination, including the program’s “review of metrics,” “bonuses paid to executives based on diversity and inclusion goals,” “targets to remake the workforce until it mirrored the community,” and the CEO’s “brag[ging] . . . about the increased diversity on the executive team.”<sup>22</sup> Equally concerning, the court concluded that these DEI initiatives *could not be considered* “good-faith efforts to comply with” federal anti-discrimination laws.<sup>23</sup>

Employers also can expect increased constraints on DEI programs at the state level. In lockstep with news predicting a Court ruling in favor of *SFFA*, at least 20 states have introduced bills to restrict or prohibit DEI programs at public colleges and universities and public institutions and some have introduced bills to prohibit DEI measures more broadly.<sup>24</sup> Most well-known, in Florida, Governor DeSantis has stated that “DEI is better viewed as standing for discrimination, exclusion and indoctrination.”<sup>25</sup> Consistent with this view, Florida has enacted one law that prohibits private employers from conducting diversity training (currently enjoined pending further review)<sup>26</sup> and another that prohibits public colleges and universities from spending money on diversity, equity, and inclusion programs<sup>27</sup>.

## **Additional Questions to Consider**

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<sup>20</sup> AFL is not the only conservative organization mounting such challenges. See, for example, Stempel, J. (2022, August 31). Starbucks executives, directors are sued over diversity policies. *Reuters*. <https://www.reuters.com/business/retail-consumer/starbucks-executives-directors-are-sued-over-diversity-policies-2022-08-31/> (detailing the National Center for Public Policy Research, a conservative think tank, lawsuit against Starbucks for “setting hiring goals for Blacks and other people of color, awarding contracts to ‘diverse’ suppliers and advertisers, and tying executive pay to diversity.”)

<sup>21</sup> The court reduced the punitive damages to \$300,000, which is the federal statute’s limit on punitive damages.

<sup>22</sup> *David L. Duvall v. Novant Health Inc.*, Post-Trial Opinion (Dkt. 164) at 11-12, 11 August 2022, Case No. 3:19-CV-00624-DSC.

<sup>23</sup> *Id.* at 12 (emphasis added)

<sup>24</sup> Montana, for example, introduced a bill to prohibit the “unlawful discriminatory practice” of diversity training as a condition of employment by the state. Bryant, J. and Appleby, C. (2023, May 19). These States’ Anti-DEI Legislation May Impact Higher Education. *Best Colleges*. <https://www.bestcolleges.com/news/anti-dei-legislation-tracker/>

<sup>25</sup> Diaz, J. (2023, May 15). Florida Gov. Ron DeSantis signs a bill banning DEI initiatives in public colleges. *NPR*. <https://www.npr.org/2023/05/15/1176210007/florida-ron-desantis-dei-ban-diversity>.

<sup>26</sup> Craig, T. (2022, August 18). Judge blocks Florida’s ‘Stop Woke Act’ restrictions for private companies. *Washington Post*. <https://www.washingtonpost.com/nation/2022/08/18/florida-stop-woke-act/>

<sup>27</sup> Diaz (2023).

*Is there really a risk to continuing our current DEI programs as they are?*

Until the Court rules, employers will not know how broad a reach the *SFFA* Cases may have. Still, long existing laws prohibit anything that looks or sounds like a race-based quota, and anti-DEI activists are advertising their focused targeting of the employment arena. The *Duvall* case, described above, is the starkest example of the current risks that existing language of many standard DEI programs present. The *Duvall* case also demonstrates that for-profit employers are not the only targets of these lawsuits – Novant Health, the defendant in the *Duvall* case, is a non-profit healthcare provider. The increased scrutiny also creates risk of an increase in harassment claims that DEI programs or trainings cause a hostile workplace environment for employees on the basis of their race or identity.<sup>28</sup>

*If I am in a deep blue state like California or New York, does any of this apply to me?*

First and foremost, Supreme Court rulings apply to everyone, everywhere in the United States. No matter what jurisdiction you are located in, the Court’s decision will apply to your workplace policies under the federal Constitution and federal law.

Second, while state legislatures in more liberal jurisdictions may attempt to pass state laws to protect DEI efforts, and courts in those jurisdictions may attempt to interpret federal laws more favorably to historically marginalized groups, all state legislatures and state courts remain bound by the Supreme Court’s rulings. Even if a state has protective anti-bias laws, the “scope and strength [of such laws] in combatting invidious discrimination could be shredded if the justices in the nation’s capital . . . dismantle affirmative action.”<sup>29</sup>

Third, just as the current “reverse discrimination” cases are being brought under the federal constitution and anti-bias laws, such lawsuits can be brought under state constitutions and anti-bias laws as well. In the *Pfizer* lawsuit described above, the plaintiffs brought their claims under not only federal law, but also the New York City Human Rights Law and the New York State Human Rights law, which prohibit discriminatory treatment on the basis of race. As another example, in California, two legislative attempts to require public companies to include at least one woman on corporate boards and to include at least one member of a member from an underrepresented community on corporate boards were both struck down and found to have violated the state constitution’s equal protection clause.<sup>30</sup>

*If I’d like to learn more about what is happening, what are good sources for me to consult?*

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<sup>28</sup> For example, last year, a White, male Seattle governmental worker filed claims alleging harassment and other claims based on Seattle’s Race and Social Justice Initiative and related training programs. Wilson, L. (2022, November 30). Seattle sued by former employee for anti-white discrimination. *The Center Square*. [https://www.thecentersquare.com/washington/article\\_750ccc32-70ed-11ed-a903-b7b846f3c87c.html](https://www.thecentersquare.com/washington/article_750ccc32-70ed-11ed-a903-b7b846f3c87c.html)

<sup>29</sup> Tanick (2023)

<sup>30</sup> Sahadi, J. (2022, May 17). California court strikes down another law seeking to diversify corporate boards. *CNN*. <https://www.cnn.com/2022/05/16/success/board-diversity-california-efforts-blocked/index.html>

- **To learn more history about affirmative action, the context surrounding the *Students for Fair Admissions* cases and the oral arguments for the cases, and to learn what experts in higher education and employment law have predicted,** read the Newsweek article “Ending Affirmative Action Will Be an ‘Earthquake’ for Colleges, Companies.” <https://www.newsweek.com/2022/11/25/ending-affirmative-action-will-earthquake-colleges-companies-1759783.html>
- **To learn more about the effect of the Supreme Court cases on diversity pipelines, predictions regarding challenges to the use of race and gender as factors in employment decisions, and current law governing employment discrimination,** read the HR Policy Association article “Five Things CHROs Should Know About the Supreme Court’s Harvard and UNC cases.” <https://www.hrpolicy.org/insight-and-research/resources/2022/hr-workforce/public/10/five-things-chros-should-know-about-the-supreme-co/>
- **To learn more about general best practices companies can follow to create compliant DEI programs, practices, and policies,** read the Harvard Business Review article “To Drive Diversity Efforts, Don’t Tiptoe Around Your Legal Risk.” <https://hbr.org/2022/07/to-drive-diversity-efforts-dont-tiptoe-around-your-legal-risk?registration=success>

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Note: This brief does not constitute legal advice; rather, it outlines possible ramifications of pending SCOTUS decisions.