

# Diversity, Equity, and Inclusion:

What's an Employer to Do After  
*Students for Fair Admissions, Inc. v. President & Fellows  
of Harvard College/University of North Carolina?*



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## *Presenters*



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**History Leading to**  
***Students for Fair Admissions, Inc. v.***  
***Harvard/University of North Carolina***

## History of Higher Education Racial Discrimination Cases

- ***Bakke v. Regents of University of California***, 438 U.S. 265 (1978)
  - White male medical school applicant with admissions score above average admittee's score rejected because of school's racial quota system where white applicants could only compete for 84 out of 100 spots, and the remaining 16 were reserved for racial minorities
  - Admission criteria violated Equal Protection Clause and Civil Rights Act of 1964; quota system excluding candidates because of race alone is racial discrimination
- ***Grutter v. Bollinger***, 539 U.S. 306 (2003) ; ***Gratz v. Bollinger***, 539 U.S. 244 (2003)
  - Point system that assigns fixed number of points for underrepresented minority group members is constitutionally suspect; can consider race among factors for each individual
- ***Fisher v. University of Texas***, 579 U.S. 365 (2016)
  - White female applicant who did not qualify for Top Ten Percent Plan (guarantees admission to top 10% of every in-state graduating high school class) argued consideration of race as a factor in admissions process violated Fourteenth Amendment's Equal Protection Clause
  - Did not violate EPC because race a factor in a holistic review to fill remaining spots and not a quota of minorities or vague idea of diversity

*Students for Fair Admissions, Inc.*

*v.*

*Harvard/University of North Carolina*

## *Issue*

- SFFA is a nonprofit legal group that believes “racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional”
- Sued Harvard and the University of North Carolina (UNC) alleging that the school admission processes violated Title VI of the Civil Rights Act of 1964 by discriminating against Asian American applicants in favor of white applicants
- Questions:
  - Many institutions of higher education consider race as a factor in admissions?
  - If so, do Harvard and UNC’s race-conscious admissions processes violate Title VI?

## *Holding*

- Race-conscious affirmative action held unconstitutional
  1. Policies lack coherent, focused objectives to legally warrant consideration of race
  2. Universities used an applicant's race in a "negative manner"
  3. The absence of "meaningful endpoints" for the policies
- Ruling based on the Fourteenth Amendment's Equal Protection Clause, but the Court also interpreted Title VI of the Civil Rights Act
  - Creates questions about whether claims can be brought under similar statutes like Title VII

## *Reasoning*

- Court explained racial categories utilized by institutions were imprecise, arbitrary, undefined, and/or underinclusive
  - Concerns that if these categories were too precise, they would operate as a numerical quota
- Universities could not demonstrate compelling interests in a measurable way, failed to avoid racial stereotypes, and did not offer a logical endpoint for when race-based admissions would cease
- Court did say nothing prohibits universities from considering an applicant's discussion of how race affected an applicant's life if that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university



## *Considerations and Questions*

- Decision does NOT directly impact Title VII of the Civil Rights Act of 1964
  - Questions about SFFA's applicability to employment litigation
- Decision itself does not govern DEIA programs outside the college admissions process
- Anticipating increased litigation against race-related programs
- Backlash against perceived race-conscious programs increasing (in higher education and elsewhere)
- Despite decision and backlash, employers often consider experiences working with diverse teams to be valuable skills

The background is a dark green color with several abstract, light green shapes that resemble stylized waves or organic forms. These shapes are positioned on the right and bottom-left sides of the frame, creating a modern and professional aesthetic.

# **Support for DEI Efforts in the Workplace**

## Case Law

***United Steelworkers v. Weber***, 443 U.S. 193, 197 (1979)

***Johnson v. Transp. Agency***, 480 U.S. 616 (1987)

- Private sector employers can voluntarily adopt race-conscious affirmative action programs under Title VII “designed to eliminate conspicuous racial imbalance in traditionally segregated job categories”
  - Any program an employer implements must be designed to be:
    - Temporary in measure
    - Eliminate a manifest racial imbalance”
    - Not “unnecessarily trammel the interests of [non-minority] employees”
- However, criteria could possibly be challenged and then reexamined by the Court, with reasoning from *SFFA* impacting the outcome

## ***Statement from EEOC Chair Charlotte A. Burrows***

“Today’s Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies. That’s a problem for our economy because businesses often rely on colleges and universities to provide a diverse pipeline of talent for recruitment and hiring. Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers”.

However, the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.

<https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action#:~:text=lt%20remains%20lawful%20for%20employers,equal%20opportunity%20in%20the%20workplace.>



**Why Are Employers Curious About  
the *SFFA v. Harvard/UNC*'s Impact?**

# *Business Is Caught in a Diversity Trap*

Democratic AGs defend 'aspirational' hiring goals. Republican AGs suggest they're illegal.

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<https://www.wsj.com/articles/democratic-state-attorneys-general-letter-fortune-100-companies-dei-hiring-sffa-v-harvard-5564719c>



## ***July 13, 2023: Warning Letter to Fortune 100 Companies***

### **Republican Attorneys General Warn Top U.S. Businesses Over 'Discrimination'**

Citing affirmative action ruling, top state law officials put Fortune 100 on notice for racial quotas, preferences

### ***A Warning to the C-Suite on Racial Preferences***

State Attorneys General warn Fortune 100 companies about their hiring practices.



## *Warning Letter, Continued*

- Republican State Attorneys General from 13 states sent a letter to Fortune 100 companies explaining their interpretation of the SFFA decision and how it applies to private employers
- Alleges that “[i]n an inversion of the odious race-based initiatives of the distant past, today’s major companies adopt explicitly race-based initiatives which are similarly illegal”
  - Calls into question DEI programs operated by private employers



*July 19, 2023: Letter Supporting DEI Programs at Fortune 100*

## **Democratic AGs blast Republicans trying to 'intimidate' corporations on diversity efforts**

In a letter to major corporations, the Democrats contradicted a warning against the practice sent by GOP state attorneys general.

**ICYMI: DEMOCRATIC AGS RESPOND TO GOP AGS' LETTER TO FORTUNE 100 COMPANIES**



## *Support Letter, Continued*

- Democratic attorneys general from 20 states and the District of Columbia contradicted the Republican attorney's general letter and supported hiring efforts that consider diversity
- Contended that “The letter you received from the 13 state attorneys general is intended to intimidate you into rolling back the progress many of you have made”
- Agreed that companies should face legal consequences for “unlawful” discrimination, but argued that Republican attorneys general were making a “baseless assertion that any attempts to address racial disparity are by their very nature unlawful” in their July 13, 2023, letter

# Diversity Goals Are Disappearing From Companies' Annual Reports

Dozens of firms change what and how they report diversity initiatives; deleting the word 'diverse' or cutting whole sections

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<https://www.wsj.com/business/diversity-goals-are-disappearing-from-companies-annual-reports-459d1ef3>



## *SFFA September 2024 Letters*

- Students for Fair Admissions sent letters to presidents and general counsels of Yale, Princeton, and Duke because “gravely concerned schools are not complying with” *Students for Fair Admissions v. Harvard* decision
- Letter provides these schools were part of a brief “in which they stated to the Supreme Court that it would be impossible to ‘obtain a diverse student body’ without the racial preferences the justices subsequently found to be unconstitutional”
  - SFFA argues schools could not have obtained racial outcomes for the class of 2028 that they reported “under race neutrality”
- SFFA President Edward Blum said, “SFFA hopes these colleges will provide us and the public with specific, granular details about their new admissions policies”

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**Additional Guidance from the  
Equal Employment Opportunity Commission**

## ***EEOC Vice Chair Samuels: The Supreme Court “Didn’t Kill DEIA at Work”***

- **“DEIA initiatives in employment are legally distinguishable from the race-based admissions decisions at issue” in *SFFA***
  - Cases did not arise under/relate to Title VII or other employment discrimination law
  - Harvard and UNC both “were urging the Supreme Court to recognize diversity itself as a compelling rationale for race-based decisions,” but **“workplace DEIA initiatives [have] been based instead on efforts to remedy barriers in the workplace** that have limited opportunities for underrepresented groups”
- Decisions in *SFFA* were “race-based,” but DEIA initiatives are “typically implemented in race-neutral ways or in ways that don’t result in race-based selections”
- Title VII bars disparate impact discrimination, so EEOC regulations require employers to **“evaluate the impact of their selection procedures on protected groups** at the front end and take steps to respond if those procedures have exclusionary effect”

## ***EEOC Commissioner Lucas: “Take a Hard Look” at Corporate Diversity Programs***

- “. . . in the employment context, affirmative action appears to be more prevalent than ever. Most companies don’t use the label ‘affirmative action’ in their diversity programs. Nevertheless . . . **companies remain under heavy pressure to take race-conscious employment actions**”
- The “very limited circumstances” in which the Supreme Court “has authorized employers to consider race (and sex)” include being “part of **voluntary, remedial affirmative action plans**” that “**must be temporary, narrowly tailored to the company or industry at issue, and justified by a ‘strong basis in evidence’ that remedial action is necessary**”

~EEOC Commissioner Andrea R. Lucas



**Recommendations for DEIA Efforts**  
***Post-Students for Fair Admissions, Inc.***



## *Promoting DEI is **NOT** race-based decision making*

- The business case for DEI
- What does DEI look like?
- How employers can effectively and efficiently promote DEI

## *The Business Case for DEI*

- Inclusive workplaces with equitable policies foster diversity
- Diverse teams are more innovative, leading to greater productivity and profitability
- Diverse workplaces are more competitive in the market
  - Consumers and potential employees are insisting on DEIA

## *What is DEI?*



# Inclusion is the foundation

## UNDERSTANDING INCLUSION



**EQUALITY** is that everyone gets the same book.



**DIVERSITY** is that everyone gets different types of books.



**EQUITY** is that everyone gets the book that is right for them.



**ACCEPTANCE** is understanding that everyone reads different types of books.

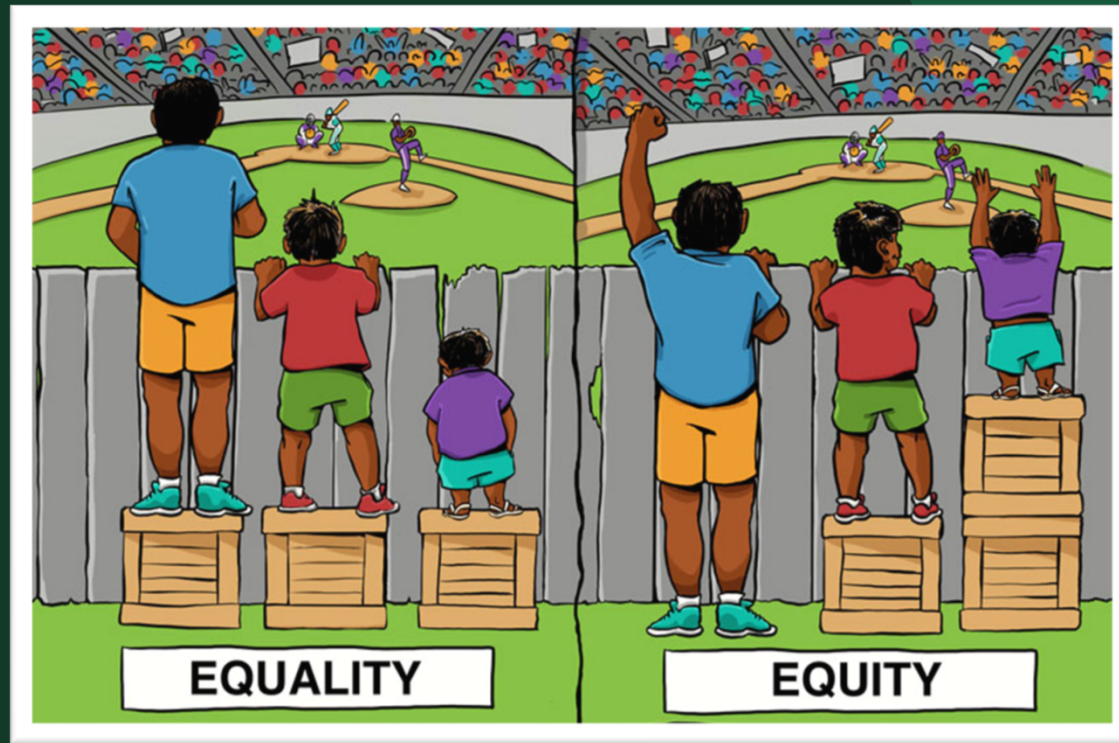


**BELONGING** is reading any book you want without fear of being judged.



**JUSTICE** is fighting to make sure everyone has access to books.

## *Equality vs. Equity*



## *Five Tips for Promoting DEI in the Workplace*

- Know your allies
- Get leadership buy-in
- Assess your culture
- Educate
- Celebrate

## *Know Your Allies*

- Allies within your organization
- Allies outside of your organization and *use their influence* (i.e., consumers, clients, recruits)
- BUT don't expect buy-in from all your stakeholders

## *Get Leadership Buy-in*

- Leaders who champion DEI initiatives encourage employees to embrace DEI as part of the organization's culture
- Leaders can model inclusive and equitable attitudes
- Leaders can garner resources for DEI programming



## *Assess Your Culture*

- Talk to your people
- Conduct a culture survey to assess climate of inclusion
- Evaluate diversity in leadership
- Audit your marketing efforts
- Conduct stay interviews

## *Educate*

- Train recruiters on the organization's DEI program
- Make DEI part of new employee orientation
- Conduct annual training for all stakeholders
- Address negative stigmas
- Establish a diversity resource site

## *Celebrate*

- Celebrate diversity events (i.e. Black History Month, Women's History Month, Equal Pay Day, etc.)
- Focus on integration
  - Create opportunities for diverse teams to work together
  - Create opportunities to discuss something **other than work**
  - Mix up the time and place for events and meetings
- Support internal employee resource groups
- Support stakeholder engagement in external DEI-related programs

## *Reminders and Recommendations*

- Under Title VII, employers have never been able to make employment decisions based on any protected characteristic, including race, or use quotas
- Keep robust documentation of reasoning for promotions
- Define diversity broadly!
  - Diversity does not just include race or other characteristics mentioned in law
  - Diversity can also include characteristics like parental status, education, career experience, knowledge of languages
- Review hiring procedures and ensure all applicants are asked the same questions, regardless of gender, ethnicity, race, etc.
- Continue to provide anti-discrimination and anti-harassment trainings
- Always take discrimination complaints seriously

*Questions?*

## *Presenters*



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