The Fallout of *SFFA v. Harvard*: Implications for Diversity, Equity, and Inclusion in Law Firms and Corporations

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FOR almost fifty years, plaintiffs have initiated litigation challenging the use of race in higher education admissions.[1] Historically, these lawsuits were often initiated by white plaintiffs claiming reverse discrimination and arguing that certain universities favored under-represented minority applicants at their expense.[2] In *Students for Fair Admissions, Inc. v. Harvard* and *UNC,* however, the plaintiff brought a case to the courts under a new legal theory,[3] enabling the United States Supreme Court to adopt a different legal approach.[4] Plaintiff, Students for Fair Admissions, Inc. ("SFFA"), contended that Harvard engaged in intentional discrimination against Asian American applicants despite their classification as people of color.[5] Specifically, SFFA argued that Harvard penalized these applicants by undervaluing standardized test scores and other objective criteria where Asian American students typically excel.[6]

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[1] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269-270 (1978) (holding that a medical school admissions plan with a quota for students admitted from minority groups violates the Equal Protection Clause of the Fourteenth Amendment); Grutter v. Bollinger, 539 U.S. 306, 311 (2003) (holding that the use of race as a factor in law school admissions did not violate the Equal Protection Clause of the Fourteen Amendment or Title VI of the Civil Rights Act of 1964); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 301-303 (2013) (finding that use of race in the admissions process must be evaluated under strict scrutiny); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 369 (2016) (finding that use of race as a factor in holistic review of undergraduate applications survived strict scrutiny review as it was narrowly tailored to serve a compelling state interest).

[2] *Reverse Discrimination*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("A type of discrimination in which majority groups are purportedly discriminated against in favor of minority groups ....").

[3] In addition to Harvard, SFFA separately sued the University of North Carolina at Chapel Hill (UNC). *See* Students for Fair Admissions v. Univ. of N.C., 319 F.R.D. 490 (M.D. N.C. 2017). The cases were consolidated at the cert stage before the appellate ruling in the UNC case.

[4] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.) ("SFFA v. Harvard"), 397 F. Supp.3d 126 (D. Mass. 2019), *aff'd sub nom*.; SFFA v. Harvard, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

[5] SFFA – a nonprofit organization with a stated purpose to defend human and civil rights, including the right of individuals to equal protection under the law – filed suit challenging the admissions programs of UNC and Harvard, both of which considered applicants' race in the process.

[6] Many in the Asian American community contend that Asian Americans were mere pawns in SFFA's strategy, largely leaving their major concerns going unaddressed by the Supreme Court related to the stereotyping of the group. *See* Vinay Harpalani, *Asian Americans and the Bait-and-Switch Attack on Affirmative Action*, AM.

On June 29, 2023, the Supreme Court held that it is unconstitutional[7] and a violation of Title VI of the Civil Rights Act of 1964[8] for colleges and universities to consider race as a factor in the admissions process.[9] In the majority opinion authored by Justice Roberts, the Court emphasized that race cannot be a deciding factor in admissions decisions, though it allowed for the consideration of an applicant's racial experiences if they relate to unique character traits or abilities.[10] This ruling overturned two decades of precedent and has prompted businesses and corporations to reassess the potential impact on their diversity, equity, and inclusion (DEI) programs.[11]

As a result, the *SFFA* decision represents a significant shift in the legal landscape surrounding affirmative action and race-conscious policies. Organizations are now tasked with reevaluating their DEI strategies to ensure they remain compliant while still fostering an inclusive environment. This ruling not only challenges institutions to find new pathways to promote diversity but also raises critical questions about how to effectively support under-represented groups in the face of evolving legal standards. The future of DEI initiatives will likely depend on innovative approaches that prioritize inclusivity without relying on race as a determining factor.

This article will explore the implications of the *SFFA* decision on DEI initiatives within law firms and corporations. Following this landmark ruling, organizations face new challenges in navigating their DEI programs and ensuring compliance while striving to promote a diverse and inclusive workplace. The article will also examine how the *SFFA* decision reshapes the landscape for DEI efforts and the potential repercussions for legal practices and corporate policies moving forward.

CONST. SOC'Y (May 13, 2023), https://www.acslaw.org/expertforum/asian-americans-and-the-bait-and-switch-attack-on-affirmative-action/ [https://perma.cc/4FMD-WHUD].

[7] Under the Constitution's Equal Protection Clause, as to public institutions.

[8] Applicable to private institutions accepting federal financial assistance.

[9] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

[10] *See* Rahem D. Hamid and Neil H. Shah, Crimson Staff Writers, "Inside the Decision: Here's What the Supreme Court Said About Affirmative Action," THE HARVARD CRIMSON (June 30, 2023), https://www.thecrimson.com/article/2023/6/30/scotus-affirmative-action-analysis/.

[11] *See* David Hinojosa and Chavis Jones, *Overturning* SFFA v. Harvard, 26 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 256, 267 (2024).

I. The Journey from Affirmative Action to Diversity Initiatives

The introduction of equal employment laws and affirmative action initiated the first wave of "corporate" diversity training, aimed at helping employees adapt to increasingly integrated workplaces. Many organizations still had long-standing cultures that favored certain demographics over others, which created barriers for marginalized groups seeking employment or advancement. The origins of DEI in the workplace can be traced back to the mid-1960s. However, DEI has significantly evolved since the initial reshaping of corporate culture began.

The term "affirmative action" came into the American lexicon in 1961, when President John F. Kennedy issued Executive Order 10925 requiring federal employers to take "affirmative action" in combating racial discrimination.[12] The Section 301 of the order required every federal contract to include the pledge that:

> The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.[13]

Following this order, subsequent administrations issued several executive orders that further shaped our understanding of affirmative action. By 1965, the EEOC mandated that employers submit reports detailing their workforce demographics by sex and race.[14] Within three years, states could receive block grants to help identify disparities in employment patterns, with employers facing various potential sanctions.[15]

The Supreme Court also played a significant role in establishing the legal framework for affirmative

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[12] Am. Ass'n for Access, Equity, and Diversity, *Affirmative Action Policies Throughout History*, https://www.aaaed.org/aaaed/History_of_Affirmative_Action.asp (last visited Jan. 28, 2025).

[13] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

[14] *See* DENNIS DESLIPPE, PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION 22-23 (2012).

[15] *Id.* at 25-26.

action through a series of rulings clarifying the scope and purpose of affirmative action.[16] These new laws prompted companies to start diversity training programs that would help employees adjust to working in more integrated offices. The early training programs aimed to raise awareness about implicit biases and systemic inequalities, encouraging employees to cultivate a more respectful and supportive atmosphere for their colleagues.[17] Workshops and seminars were developed to promote understanding of different cultural backgrounds and experiences, helping to dismantle stereotypes and foster a sense of belonging among all employees.[18]

These initiatives were not only about compliance, but also about leveraging the diverse perspectives that a more inclusive workforce could bring.[19] Companies began to recognize that diversity could drive innovation, enhance problem-solving, and improve overall performance, financial and otherwise. As a result, there was a significant shift in the DEI landscape in the 1980s and 1990s. As societal awareness expanded, DEI training programs began to adopt a more comprehensive approach to diversity, acknowledging the complex and multifaceted identities that existed within the workforce, including gender, ethnicity, religion, and LGBTQ+ communities.[20] Most courts found affirmative action programs to be legal, even though such programs were alleged to discriminate by giving benefits to

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[16] *See* Griggs v. Duke Power, 401 U.S. 424, 429 (1971). The Court stated, "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id*. at 429-430. The purpose of Title VII was to eliminate race oriented systems and promote hiring on the basis of job qualifications. *Id*. at 434 (citing 110 Cong. Rec. 7247); *cf*. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17, 31 (1973) (limiting the ability of courts to challenge state funding systems for public education based on equal protection claims); *Bakke*, 438 U.S. at 265-266 (while affirmative action programs were constitutional, quotas (in this case, a specific number of spots reserved for minority students) were not).

[17] *See* Clay Banks/Unsplash, *What the history of diversity training reveals about its future*, (Sept. 7, 2020), available at https://theconversation.com/what-the-history-of-diversity-training-reveals-about-its-future-143984 (last visited Jan. 28, 2024).

[18] *Id.*

[19] *Id.* ("Over the course of the 1960s to 1980s, corporate training broadened in scope to target employee personality traits.").

[20] *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2161-2164 (2013) (describing the evolution of affirmative action).

individuals based upon race or sex.[21]

In the 2000s, DEI strategies became essential in shaping corporate culture, largely driven by the increasingly diverse demographics of the workforce extending beyond race and gender to include sexual orientation and disability. At this point, diversity training became a foundational element in many organizations' strategies to create a more equitable workplace, ultimately leading to a shift in corporate culture and policies that embraced diversity as a core value.[22] As a result, businesses started to understand the need to reflect this societal diversity to remain competitive, attract top talent, foster innovation, and connect with a broader customer base.[23]

The 2010s marked a pivotal shift in DEI training, driven by social movements like #MeToo, #BlackLivesMatter, and #StopAAPIHate.[24] These movements heightened awareness around social justice issues, leading to a transformation in DEI training methods. Organizations began to adopt more effective and engaging approaches, ensuring that training not only addressed systemic inequities but also fostered a more inclusive workplace culture.

The social and political upheavals of 2020 acted as a catalyst for DEI, and there was an increase in workplace discussions about racial justice and equity. This led to more in-depth and honest conversations within organizations.[25] While the evolution of DEI initiatives over the decades

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[21] *See, for example,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (affirmative action which is imposed to remedy specific past discriminatory practices will probably be upheld as constitutional).

[22] *See* Neil Lee, *Migrant and Ethnic Diversity, Cities and Innovation: Firm Effects or City Effects?*, 15 J. ECON. GEOG. 769, 770 (2015) (finding higher innovation where there is a larger diverse population).

[23] *See The Evolution of DEI: From Setbacks to Data-Driven Strategies DEI in Action, Principles in Practice, HR Management*, ELLEQUATE, https://www.ellequate.com/blog/the-evolution-of-dei-from-setbacks-to-data-driven-strategies (last visited Jan. 28, 2025).

[24] Todd J. Clark, *Reversing DEI: The Consequence - "IED" Indoctrination and Elimination of Diversity*, 55 U. TOL. L. REV. 169, 175 (20204) ("Social justice movements including #MeToo, #BlackLivesMatter, #SayHerName, and #StopAsianHate harmonized to precipitate a recognition that more communities needed a place at the table.").

[25] *See* Tanya Katerí Hernández, *Can CRT Save DEI?: Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action*, 71 UCLA L. REV. DISCOURSE 282, 284 (2024) ("Just four years after the nation's summer of 2020 protests--sparked by the murder of George Floyd--culminated in a racial reckoning in which many organizations across the country instituted racial equity measures and policies, legislators across the nation are now enacting anti-Critical Race Theory (CRT) bans in a seeming backlash to this recent wave of advocacy for racial justice.").

reflects a growing recognition of the importance of diversity and inclusion in the workplace, there are growing challenges to DEI that have intensified since the murder of George Floyd.

II. Challenges to Change: The Social Justice Backlash

In 2020, following the murder of George Floyd, many companies committed to improving DEI practices. At the time, "corporate" DEI roles increased by 55%, and many companies set aside billions of dollars to support racial justice organizations, Black-owned businesses, and internal diversity initiatives.[26]

Although DEI programs have been in place corporations and law firms for decades without much criticism, following the increased attention to social justice during the COVID pandemic, DEI programs are now facing increased scrutiny. Many of the same companies that made significant commitments during 2020 have cut DEI programs.[27] The *SFFA* decision banning affirmative action in the college admissions process has led to the recent backlash. History, however, shows that these types of attacks are not new and have always come at times in history when there has been progress toward building a more inclusive society in the United States.

The first "white" backlash came after the Civil War when African Americans made significant gains politically and economically. After Abraham Lincoln signed the Emancipation Proclamation, which marked the end of enslavement, the Ku Klux Klan, to intimidate black voters, began a reign of terror and lynching.[28] In the early 1900s, Black residents in Tulsa, Oklahoma, were experiencing great success and prosperity. But "a little more than 100 years ago, between May 31st and June 1st of 1921, the prosperous community of Greenwood was destroyed," and hundreds of residents were killed by an angry white mob.[29] There were similar incidents across the

[26] Michael Z. Green, *(a)woke Workplaces*, 2023 WIS. L. REV. 811, 813 (2023) ("With heightened expectations for a reckoning in response to the broad support for the Black Lives Matter movement after the senseless murder of George Floyd in 2020, employers explored many options to improve racial understanding through discussions with workers.").

[27] Dave Poston and John Brown, "Turning Down the Rancor Around DEI: Re-embracing the Value of—and Values Behind—Workplace Diversity Programs," LAW.COM (October 15, 2024) (last visited Jan. 28, 2025).

[28] *See, for example*, Burson v. Freeman, 504 U.S. 191, 200-207 (1992) (examining the evolution of election reform and the necessity of restricted areas in or around polling places).

[29] Robert J. Cottrol and Raymond T. Diamond, *Helpless by Law: Enduring Lessons from A Century-Old Tragedy*, 54 CONN. L. REV. CONNTEMPLATIONS 1, 5 (2022).

United States during this timeframe.[30]

Shortly thereafter, many Southern states and local legislatures passed Jim Crow laws that segregated transportation and public facilities[31] and limited the activities of daily life for African Americans.

A second, significant backlash manifested itself after the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. After passage of the Acts, many Southern Democrats left the party and became Republicans.[32] In 1968, Richard Nixon's famous "southern strategy" was focused on obtaining the votes of the Southern white majority by appealing to their racist views and concerns about the continued implementation of the *Brown* decision.[33]

The third backlash emerged after Barack Obama's election in 2008. While many anticipated that the election of America's first Black president would usher in a post-racial era, fostering collaboration to eliminate racial prejudice, the reality was starkly different: there was a significant rise in hate crimes following his election.[34]

Finally, following the summer of protests in 2020 and the renewed focus on DEI initiatives from 2020 to 2023, resistance to these efforts has intensified and

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[30] *See, for example,* R. Thomas Dye, *Rosewood, Florida: The Destruction of an African American Community,* 58 THE HISTORIAN 605, 605-607 (1996) (describing racist violence that took place not only in various cities in Florida, but also East St. Louis (Illinois), Omaha (Nebraska), and Chicago (Illinois)); Charles Crowe, *Racial Massacre in Atlanta September 22, 1906*, 54 THE JOURNAL OF NEGRO HISTORY 150 (1969).

[31] *See* Sharon L. Browne and Elizabeth A. Yi, *The Spirit of* Brown *in* Parents Involved *and Beyond*, 63 U. MIAMI L. REV. 657, 661 (2009), *citing* Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 98 (1992) ("The Civil War amendments [13th, 14th, and 15th Amendments]--on slavery, citizenship, voting, equal protection, due process, and privileges and immunities--were designed to decrease the scope of state power to confer ordinary common law liberties selectively on some while denying them to others."); *see also id*. at 94 ("Under Jim Crow, big government fell into the hands of the wrong people, who were able to perpetuate their stranglehold over local communities and businesses by means of a pervasive combination of public and private force.").

[32] Ron Elving, "Dixie's Long Journey From Democratic Stronghold To Republican Redoubt," NPR (June 15, 2015), available at https://www.npr.org/sections/itsallpolitics/2015/06/25/417154906/dixies-long-journey-from-democratic-stronghold-to-republican-redoubt (last visited Jan. 28, 2025).

[33] *See* Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1527 (2019) ("What is apparent is that Nixon came to see racial pandering as his best path to victory. Drawing lessons from the success of the outwardly racist presidential contender George Wallace, Nixon embraced the Republican Party's sharp rightward shift on the issue of race.").

[34] Neubia Williams, *A Post Racial Era?: How the Election of President Obama and Recent Supreme Court Jurisprudence Illustrate That the United States Is Not Beyond the Centrality of Race*, 4 S. REGIONAL BLACK L. STUDENTS ASS'N L.J. 1 (2010).

become politicized.[35] Many ongoing, concerted attempts aim to reverse the progress made by racially marginalized groups, and the *SFFA* decision seems to be just the beginning of this new backlash.

III. The Backlash Against Racial Progress: Harvard's Admissions Practices Declared Unconstitutional

In *SFFA*, the Court ruled 6-3 in a 40-page opinion that Harvard's admissions practices were unconstitutional, finding that Harvard (and UNC) violated the Equal Protection Clause of the Fourteenth Amendment.[36] Originally filed as two separate lawsuits by SFFA – one against Harvard and one against UNC – the Court found that Harvard's use of race as a factor in admissions constituted discrimination against Asian American applicants.[37]

While the Court stopped short of granting SFFA's request to overrule *Grutter v. Bollinger*,[38] the landmark opinion that protected race-based admissions considerations with narrow restrictions, the Court in *SFFA* nonetheless determined the admissions programs of UNC and Harvard failed to satisfy the strict scrutiny test required for exceptions to the Equal Protection Clause.[39] In its ruling, the Court highlighted several key findings regarding the discrimination against Asian American applicants.

A. Admissions Practices

The Court examined Harvard's holistic admissions process, which considered multiple factors, including race, to achieve diversity.[40] The Court determined that Asian American applicants faced higher standards and were

[35] Leah M. Watson, *The Anti-"Critical Race Theory" Campaign - Classroom Censorship and Racial Backlash by Another Name*, 58 HARV. C.R.-C.L. L. REV. 487, 489 (2023) ("By January 2022, 35 percent of all primary and secondary (K-12) students, or 17.7 million students, attended districts that experienced some form of a local campaign to end 'critical race theory' in classrooms.").

[36] Justices Sotomayor and Kagan dissented from the majority, and Justice Jackson, who recused herself from the Harvard case, authored a dissent in the UNC case.

[37] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 213 (2023) (holding that neither program fell "within the confines of narrow restrictions" and thus failed the strict scrutiny analysis).

[38] 539 U.S. 306, 326 (2003).

[39] In 2003, the Court in *Grutter* found race-based college admissions policies permissible so long as they complied with strict scrutiny and never used race as a stereotype or a negative and come to an end. However, *Grutter* Court stated it expected that twenty-five years from now, the use of racial preferences would no longer be necessary. Yet as the Court in *SSFA v. Harvard* emphasized: "[t]wenty years later, no end is in sight." *SFFA*, 600 U.S.. at 213.

[40] *Id.* at 192. The admissions process of Harvard is comprised of the following:

1) Each application for admission is initially screened by a "first reader,"

often rated lower on personal characteristics compared to applicants from other racial groups.[41]

B. Statistical Evidence

Evidence presented showed that Asian Americans, despite having strong academic credentials, were admitted at lower rates than their white, Black, and Hispanic counterparts.[42] This discrepancy raised concerns about potential

who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race.

2) Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee and, in doing so, they take an applicant's race into account.
3) The next step involves the 40-member full admissions committee beginning its deliberations and discussing the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of the full committee's votes is tentatively accepted for admission.
4) At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee.
5) The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. The full committee decides as a group which students to lop.
6) Once the lop process is complete, Harvard's admitted class is set.

UNC's similar admissions process is comprised of the following (*Id.* at 192):

1) Every application is reviewed first by an admissions office reader, who assigns a numerical rating to each of several categories. Readers are required to consider the applicant's race as a factor in their review. Readers then make a written recommendation on each assigned application, and they may provide an applicant a substantial "plus" depending on the applicant's race. At this stage, most recommendations are provisionally final.
2) A committee of experienced staff members then conducts a "school group review" of every initial decision made by a reader and either approves or rejects the recommendation. In making those decisions, the committee may consider the applicant's race.

[41] *Id.* at 196.
[42] *Id*. at 221-223.

bias in how race was factored into admissions decisions.[43]

C. Racial Balancing

The ruling discussed how Harvard's approach to racial balancing may have inadvertently led to discrimination.[44] By aiming to meet specific racial quotas, the admissions committee might have disadvantaged Asian American applicants who did not fit the desired demographic profile, reinforcing the perception of bias.[45]

D. Intent vs. Impact

The Court emphasized that the impact of admissions policies—specifically, the disproportionate negative effects on Asian American applicants—was a significant factor in determining discrimination, even if there was no overt intent to discriminate stating:

> For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.[46]

Ultimately, the Court ruled that both UNC's and Harvard's admissions programs could not be reconciled with the guarantees found in the Equal Protection Clause because both programs "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[47]

IV. Challenges to DEI Programs Post-*SFFA*

Immediately following the release of the *SFFA* decision, there was a sharp uptick in both the number and the scope of legal attacks and challenges against corporate DEI programs.[48] Indeed,

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[43] *Id*. at 225.
[44] *Id*. at 223-226.
[45] *Id*. at 222.
[46] *Id*. at 230.
[47] *Id.*
[48] *See* Daniel Wiessner, "Gannett Moves to Toss White Workers' Challenge to Diversity Goals," REUTERS (Nov. 27, 2023) (noting the growing backlash to corporate diversity policies).

because of the Supreme Court's findings, educational institutions have been forced to re-assess and quickly adjust. The decision also stoked the fire, giving challengers of corporate DEI programs and policies ammunition to similarly attack such programs. In fact, since the *SFFA* decision, activists have attacked law firm diversity fellowships and high school admissions programs, and reverse discrimination litigation and legislative efforts to ban DEI have increased significantly.[49]

Immediately following the issuance of the *SFFA* decision, the American Alliance for Equal Rights (AAER) filed lawsuits against Perkins Coie LLP and Morrison & Foerster LLP alleging that the diversity fellowship programs at those firms constituted reverse racism and excluded applicants based on race.[50] In response to the suit, both firms modified their diversity fellowships by removing language specifying that the fellowship programs were only open to Black, Hispanic, Native American or LGBT applicants and expanding the applicant pool to all law students regardless of background.[51]

In a case similar to *SFFA*, *Coalition for TJ v. Fairfax County,*[52] the Coalition for TJ alleged that the high school's admission policy violated the Fourteenth Amendment by intentionally discriminating against the admission of Asian-American students in favor of admitting Black and Hispanic students. The

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[49] Marissa C. Meredith, *The Domino Effect: Discussing the Future Implications of* Students for Fair Admissions, Inc. v. Harvard, 62 DUQ. L. REV. 312, 324 (2024) ("Individuals and non-profits similar to the Students for Fair Admissions, Inc. have filed lawsuits to contest diversity initiatives in corporate America on several fronts.").

[50] Shakira D. Pleasant, *Data's Demise and the Rhetoric of* SFFA, 77 SMU L. REV. 161, 186 (2024), citing "American Alliance for Equal Rights Files Lawsuit Against Perkins Coie LLP and Morrison & Foerster LLP Alleging Discriminatory Diversity Fellowships," AM. ALL. FOR EQUAL RTS. (Sept. 14, 2023), https://americanallianceforequalrights.org/american-alliance-for-equal-rights-files-lawsuit-against-perkins-coie-llp-and-morrison-foerster-llp-alleging-discriminatory-diversity-fellowships [https://perma.cc/PJ4Y-4WL6]; Nate Raymond, "Conservative Activist Uses Civil War-Era Law to Challenge US Corporate Diversity," REUTERS (Sept. 25, 2023), https://www.reuters.com/sustainability/society-equity/conservative-activist-uses-civil-war-era-law-challenge-us-corporate-diversity-2023-09-25; *see also* Christopher Brown, "Eleventh Circuit Blocks Venture Fund's Grants for Black Women," BLOOMBERG LAW (Oct. 2, 2023), https://news.bloomberglaw.com/litigation/eleventh-circuit-blocks-venture-funds-grants-for-black-women [https://perma.cc/M6U4-X4UD] (the plaintiffs in the case were White and Asian women).

[51] Julian Mark, "Edward Blum group drops suit after Perkins Coie expands diversity program," WASH. POST (October 11, 2023) https://www.washingtonpost.com/business/2023/10/11/perkins-coie-dei-fellowship/ (last visited Jan. 29, 2025).

[52] 68 F.4th 864, 871 (4th Cir. 2023), cert petition filed Aug. 21, 2023.

Complaint alleged a new admissions policy designed to automatically admit the top 1.5% of students from each middle school in the district would act as an unnatural cap and disproportionately impact Asian-American students. The Coalition of TJ filed a motion for summary judgment, which the district court granted. On appeal, the Fourth Circuit reversed. The Coalition of TJ filed a petition for a writ of certiorari on the question of whether a competitive school can consider race-neutral factors to promote diversity without violating the Equal Protection Clause. The Court denied certiorari and the Fourth Circuit's ruling stands.[53]

While challenges to DEI initiatives are not new, these challenges have increased significantly following the *SFFA* decision, and they have incorporated many new legal theories to bring lawsuits.[54]

V. Emerging Legal Theories on DEI Programs: Reverse Discrimination Claims

The *SFFA* decision has also provided plaintiffs with new theories to challenge employer DEI programs. There have been several challenges to DEI initiatives related to hiring and termination in the employment context, resulting in the filing of "reverse" discrimination claims. The "two biggest categories of cases being tracked through the project right now involve 'targeted programs,' which are at 37 cases, and 'workplace discrimination,' at 23 cases."[55]

In *Duvall v. Novant Health Inc.*,[56] David Duvall, a white male was fired from his position as Senior Vice President of Marketing and Communications at Novant Health, Inc. Duvall claimed he was fired so the company could replace him with women to further its diversity goals in violation of Title VII of the Civil Rights Act of 1964. In 2022, a

[53] The First Circuit recently decided Boston Parent Coalition for Academic Excellence Corp. v. School Committee for Boston, 89 F.4th 46 (1st Cir. 2023), a case litigated by the same law firm representing the challenges in Coalition for TJ and ruled in favor of the school district. The court explained that the Supreme Court made clear that using socio-economic factors to increase diversity is different from giving explicit advantages to students of specific races.

[54] NYU School of Law Meltzer Center for Diversity, Inclusion, and Belonging, *DEI Litigation Tracker*, available at https://advancingdei.meltzercenter.org.

[55] Sarah Lynch, "Here Are The Most Common Anti-Dei Legal Cases Right Now — And What You Need To Know About Them," INC. (August 15, 2024), available at https://www.inc.com/sarah-lynch/here-are-most-common-anti-dei-legal-cases-right-now-what-you-need-know-about-them.html (last visited Jan. 29, 2025).

[56] No. 3:19-CV-00624, 2022 U.S. Dist. LEXIS 143209 (W.D. N.C. Aug. 11, 2022).

federal judge in North Carolina awarded Duvall more than $3.4 million plus interest for lost pay, and $300,000 in punitive damages (the cap under Title VII).[57] The jury found that Duvall proved that his race and gender were motivating factors in Novant's decision to terminate him and that Novant failed to prove it would have dismissed him regardless of his race. On appeal, the court affirmed, noting that the number of women and minorities in senior leadership roles at Novant rose sharply after it adopted a diversity and inclusion plan in 2017, while Duvall and several other white executives lost their jobs.[58]

In *DiBenedetto v. AT&T Services Inc.*,[59] a 58-year-old white male filed a lawsuit alleging he lost his job at AT&T because the company was "doubling down" on its DEI efforts. Specifically, DiBenedetto asserts that AT&T's DEI plan effectively biases hiring and retention decisions in favor of female and non-white candidates, who were disproportionately hired in the finance department where he worked. AT&T filed a motion to dismiss, which was denied, allowing the case to move forward to determine whether AT&T's Diversity & Inclusion Plan, "however laudable in theory," "was unlawfully applied." The case was ultimately settled in 2024.

In *Langan v. Starbucks Corporation*,[60] a white, female, former Starbucks employee sued Starbucks claiming she was wrongfully accused of racism and terminated when Starbucks unsuccessfully attempted to deliver T-shirts supporting the "Black Lives Matter" movement to her store. Starbucks accused Langan of rejecting the delivery out of her alleged political opposition to the movement. Langan alleged that she was discriminated and retaliated against based on her race and disability as part of a programmatic favoring of non-white employees, in violation of Title VII, Section 1981, New Jersey antidiscrimination law, the ADA, and the ADEA. She also alleged state tort claims for emotional distress and negligent hiring.

In response to the complaint, Starbucks filed a motion to dismiss, and the court granted Starbucks' motion dismissing Langan's claims of race bias, discrimination and retaliation under the New Jersey

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[57] *Id*. (affirming jury verdict, with modified damages, for reverse racism claim where the employer's diversity, inclusion and health equity efforts were cited as evidence of discriminatory animus).

[58] *Id. See also* 45 No. 6 Quinlan, Employee Terminations Law Bulletin NL 5 (June 2024).

[59] 1:21-cv-04527, 2022 WL 18777367 (N.D. Ga. June 6, 2022) (denying motion to dismiss in reverse racism promotions claim challenging AT&T's corporate-wide Diversity & Inclusion Plan).

[60] No. 3:23-cv-05056 (D. N.J. 2023).

Law Against Discrimination because the allegations were filed months after the statute's two-year statute of limitations period expired. The court, however, allowed Langan's race bias and retaliation claims under Title VII, and her discrimination claims under the Americans with Disabilities Act and the Age Discrimination in Employment Act to proceed. The court granted the plaintiff leave to amend her dismissed claims, and the plaintiff filed an amended complaint on August 11, 2024. The matter remains pending.

In *National Center for Public Policy Research v. Schultz*,[61] a shareholder of Starbucks brought a shareholder derivative suit challenging Starbucks's corporate DEI initiative. According to the court, the plaintiff is "an advocacy group committed to conservative causes in government and the private sector" and "engaged in a nationwide campaign to litigate against so-called 'woke' corporate practices concerning" DEI.[62] Among other things, the plaintiff alleged that Starbucks' directors and employees breached their fiduciary duties by adopting these initiatives and sought a declaratory judgment that Starbucks's DEI initiatives violated federal and state laws.[63] The court dismissed the complaint because the plaintiff's views were not a fair and adequate representation of Starbucks, and the plaintiff failed to overcome the business judgment rule, noting that the plaintiff did not file the action to enforce the interests of Starbucks but to advance its own political and public policy agenda.

Specifically, the court noted:

- the plaintiff had a clear goal of dismantling what it sees as destructive DEI and ESG initiatives in corporate America; and
- the plaintiff's dislike of DEI and ESG initiatives had little support from Starbucks's other shareholders and no support from Starbucks's board.

The court concluded that if a shareholder "remains so concerned with Starbucks's DEI and ESG initiatives and programs, the American version of capitalism allows them to freely reallocate their capital elsewhere."[64]

As *SFFA* continues to shape the landscape of DEI initiatives in the workplace, the emergence of "reverse" discrimination claims underscores the complex interplay between promoting diversity and ensuring fair employment practices. The ongoing legal challenges to

[61] No. 2:22-CV-00267-SAB, 2023 WL 5945958, at *2 (E.D. Wash. Sept. 11, 2023).
[62] *Id.*
[63] *Id.* at *1-2.
[64] *Id.* at *3-5.

targeted programs highlight the need for employers to navigate these waters carefully, balancing their commitment to inclusivity with compliance to avoid potential litigation. As these issues evolve, organizations must remain vigilant in assessing the effectiveness and fairness of their DEI strategies, ensuring they foster a truly equitable environment for all employees.

VI. Legislative Trends Impacting DEI Programs: State-Level Restrictions and Employer Considerations

Besides the attack on DEI programs by litigation, at least eleven states—Alabama, Florida, Idaho, Kansas, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah, and West Virginia—have passed laws restricting DEI programs and banning DEI offices on college campuses.[65] These anti-DEI laws significantly impact colleges and universities, affecting faculty hiring practices, curriculum design, and on-campus student organizations. Colleges have taken steps to eliminate DEI offices or remove DEI-related statements from their websites, and programs that emphasize race, color, sex, national origin, gender identity, or sexual orientation are being eliminated, stifling efforts to create inclusive campus environments and limiting the diversity of perspectives in classroom.

While these legislative efforts are targeting colleges and universities, employers also need to be aware of and navigate this trend of state lawmakers passing and considering various legislation and measures aimed at limiting certain DEI policies, trainings, and practices as there are likely to be efforts to expand into the workplace.

As the landscape of higher education continues to evolve, advocates of DEI must find new avenues to foster inclusive environments that reflect the complexities of our society and prepare students for an increasingly diverse world. As legislative efforts increasingly target colleges and universities, employers must remain vigilant and proactive in addressing similar trends that may extend to workplace DEI policies. The potential for state lawmakers to impose restrictions on diversity initiatives underscores the need for corporations to carefully assess and adapt their DEI strategies. By staying informed and responsive to

[65] Jessica Bryant and Chloe Appleby, "These States' Anti-DEI Legislation May Impact Higher Education," BEST COLLEGES (updated Jan. 22, 2025), available at https://www.bestcolleges.com/news/anti-dei-legislation-tracker/ (last visited Jan. 29, 2025).

these developments, employers can not only safeguard their commitment to inclusivity but also ensure compliance with evolving regulations. Ultimately, navigating this landscape effectively will be crucial for fostering a diverse and equitable workplace that benefits both employees and the organization.

VII. Resilience in Diversity: Upholding DEI Initiatives in The Workplace

Despite the heightened challenges to DEI initiatives following the *SFFA* decision, implementing meaningful and lawful DEI programs remains important, offering significant value to both employers and employees. Even after the *SFFA* ruling, courts continue to uphold race-neutral programs and initiatives, indicating a commitment to maintaining diversity efforts within the legal boundaries.[66]

Even in the current environment, law firms and corporations remain steadfast in their commitment to provide inclusive communities for all employees. As noted above, in response to the *SFFA* decision, EEOC Chair Charlotte A. Burrows stated:

> [T]he decision . . . 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.[67]

Despite the EEOC's guidance, there is an air of uncertainty on what law firms and corporations can and cannot do in furtherance of their DEI efforts.

As a starting point, employers should immediately review their current DEI programs and initiatives to ensure that all your

[66] *See supra* note 55.

[67] *See* Equal Employment Opportunity Commision, "Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs," (June 29, 2023), available at https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action (last visited Jan. 29, 2025).

programs are non-discriminatory. Once this audit is completed, the next step is to continue the path to creating an inclusive workplace by operating a risk-free DEI program. Some experts opine that law firms and corporations should perform a self-audit of current their DEI initiatives using a traffic-light system to categorize programs based on risk:

- **Red** (high risk): Programs with formal quotas or policies that use race or sex as tiebreakers in hiring/promotion.
- **Yellow** (medium risk): Initiatives with ambitious demographic targets linked to manager evaluations and compensation.
- **Green** (low risk): Programs that comply with legal standards and pose minimal risk.[68]

After auditing their programs, employers should engage with legal counsel to address and mitigate the risks linked to red and yellow programs. This strategy will empower employers to confidently advocate for green programs when faced with internal challenges to their DEI program.[69]

Law firms and corporations can continue to legally implement diversity, equity, and inclusion initiatives provided they do not engage in discriminatory practices. Despite the *SFFA* decision, establishing and pursuing DEI goals while fostering awareness within the workforce is not only permissible, but encouraged to promote a more inclusive and equitable work environment.

VIII. Debunking the Myth: Understanding the True Objectives of DEI Practices

An enduring myth about DEI practices is that it relies heavily on affirmative action in practice.[70] This misconception reflects a fundamental misunderstanding of

[68] "Does the US Supreme Court Decision on Affirmative Action Affect Your Company's Diversity Initiatives?", CATALYST (June 29, 2023), available at https://www.catalyst.org/2023/06/29/legal-experts-supremecourt-affirmative-action/ (last visited Jan. 29, 2025).

[69] Stacy Hawkins, *How Diversity Can Redeem the* McDonnell Douglas *Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 FORDHAM L. REV. 2457, 2460 (2015) ("Regardless of how the commitment to diversity is justified, there is significant uncertainty and confusion about the legality of workplace diversity efforts as they have been articulated and/or adopted by the legal profession.").

[70] Federal law, however, already prohibits private employers from considering race and other protected characteristics in

DEI's true objectives. At its core, DEI encompasses three distinct values that law firms aim to embody to support their employees, regardless of background:

- **Diversity** refers to the presence of a wide range of identities and perspectives, recognizing the unique contributions of individuals from different backgrounds, races, ethnicities, genders, and experiences.

- **Equity** involves creating fair opportunities and access for all employees, ensuring that everyone has the resources and support they need to succeed, while actively addressing systemic barriers that may hinder certain groups.

- **Inclusion** fosters an environment where all employees feel valued, respected, and empowered to voice their opinions and ideas.

Together, these values promote a supportive workplace that not only enhances employee satisfaction and retention but also drives innovation and success for the law firm.[71]

The future of successful and lawful DEI initiatives must prioritize the institutionalization of practices that effectively reduce bias and discrimination. This involves implementing comprehensive training programs that raise awareness about unconscious biases and promote inclusive behaviors among all employees. By fostering a culture of accountability and transparency, law firms can create an environment where diverse perspectives are not only welcomed but actively sought out. Ultimately, these proactive measures will help cultivate a fair and equitable workplace, enhancing both employee morale and organizational performance.[72]

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employment decisions under Title VII, which prohibits practices like reserving hiring or promotion slots for people of color.

[71] Rebecca K. Lee, *Implementing* Grutter's *Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL'Y 133, 141 (2011) ("Workplace diversity is important because it contributes to a work environment that is less discriminatory and more effective as well as 'inclusive, comfortable, and reflective of the multicultural communities in which [businesses do] business.'").

[72] *Id.*

IX. Ten Steps to Implement DEI Efforts Post-*SFFA*: Strategies for Safeguarding DEI in Law Firms

Here are ten steps to implement DEI efforts following the *SFFA* decision:

1. **Inclusive Policies and Practices**: Review hiring, promotion, and retention policies to ensure they promote diversity and equity at all levels of the organization and to ensure compliance with anti-discrimination laws. This may involve revising recruitment strategies, performance evaluation criteria, and opportunities for advancement.
2. **Training and Education**: Implement mandatory training programs for all employees to raise awareness about unconscious bias, diversity issues, and inclusive practices. Providing training to enhance understanding and appreciation of diverse cultures, backgrounds, and identities. These programs can help create a more inclusive work environment and reduce discriminatory behaviors.
3. **Diverse Recruitment Strategies**: Actively recruit and hire lawyers from diverse backgrounds, including underrepresented racial and ethnic groups, LGBTQ+ individuals, and people with disabilities. Partner with organizations that specialize in recruiting diverse talent and attending career fairs targeted at underrepresented populations such as Hispanic Serving Institutions and HBCUs.
4. **Mentorship and Sponsorship Programs**: Establish robust mentorship and sponsorship programs that pair junior lawyers from underrepresented groups with senior lawyers who can provide guidance, support, and advocacy for their career advancement. This also helps increase the retention of diverse employees.
5. **Employee Resource Groups (ERGs)**: Establish groups and networks that provide support and advocacy for underrepresented communities. Actively support and promote ERGs within the firm that cater to specific affinity groups, such as women, racial and ethnic minorities, LGBTQ+ individuals, and individuals with disabilities. ERGs can provide a sense of community, networking opportunities, a support system, and a platform for advocating for change within the organization.

6. **Supplier Diversity**: Encourage supplier diversity by sourcing goods and services from minority-owned businesses and diverse suppliers.
7. **Community Engagement and Pro Bono Work**: Engage with community organizations and participate in pro bono legal work that addresses issues of social justice, civil rights, and equality. This demonstrates the firm's commitment to advancing DEI both inside and outside the legal profession.
8. **Transparency and Accountability**: Regularly measure and report on diversity metrics and progress toward DEI goals to hold the firm accountable for its efforts. Transparency can help identify areas for improvement and foster a culture of continuous learning and growth. Collect and analyze data on demographics, experiences, and outcomes to identify disparities and identify targeted interventions and strategies.
9. **Partnerships and Advocacy**: Collaborate with other law firms, legal organizations, and advocacy groups on best practices to implement and to advocate for policies and practices that promote diversity, equity, and inclusion in the legal profession and society at large.
10. **Ongoing Evaluation and Adaptation**: Utilize data to apprise DEI initiatives to ensure that your law firm remains objective and evidence-based in its approach. Continuously evaluate and adapt DEI initiatives based on feedback from employees, clients, and internal stakeholders. DEI efforts should be dynamic and responsive to evolving challenges and opportunities.

While the impact of the *SFFA* decision may not directly alter DEI efforts in the workplace, law firms can—and should—persist in their commitment to creating a more diverse, equitable, and inclusive legal profession and society for all, ultimately benefiting their clients and the communities they serve through lawful actions.