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DEI IN THE WORKPLACE: KEY DEVELOPMENTS AND TRENDS

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Navigating Legal Risk in Corporate DEI

Recent executive orders from the new administration significantly impact private-sector companies, threatening investigations into those deemed to have ""illegal" DEI programs. This article suggests broad ways that chief human resources officers (CHROs) and diversity leaders can prepare. However, The Conference Board suggests that companies consult with qualified legal counsel before making changes due to the complex nature of the issues and fast pace of developments in this area. This article has been prepared for informational purposes only and should not be taken as legal advice.

Key Insight

The impact of recent presidential directives extends beyond federal employees and contractors, as the administration seeks to influence broader corporate diversity practices. Government agencies have been asked to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities" and may investigate companies they deem to be in violation. This creates uncertainty for businesses regarding legal compliance and risks associated with existing policies, particularly those involving racial and gender preferences.

Actions

- **As a CHRO or diversity executive, engage with executive leadership and the board to develop your businesses' strategic initiatives and risk profile.** Identify all DEI-related programs, policies, and practices for deeper review. Evaluate each policy individually, including its intent, language, and impact in practice.
- **With counsel, review your diversity programs, ensuring they are open to all and not restricted by race or gender**. Confirm their compliance with applicable federal and other antidiscrimination laws and eliminate explicit set-asides, or

public parity targets. Review programs that may appear open in theory but are, in practice, restricted, and evaluate potential enhancements and changes to all programs to ensure they provide opportunities without regard to a person's protected status.

• **Engage in meaningful dialogue with stakeholders**, including employees, customers, investors, senior executives, and board members to reinforce the importance of your organization's core values, including the business imperative of an **inclusive** work environment that rewards all employees equally based on merit and skills. Explain precisely how effective diversity programs mitigate risk.

• **Consider adjusting the nomenclature of "DEI" programs**, as the term itself may be seen as a red flag. Sticking with the acronym on principle may send a strong message, but given its polarizing effect, it might distract from the vital work of building a fair and **inclusive** workplace that effectively attracts and retains talent.

Executive Actions Extend Beyond Government Employees and Contractors to the Private and Nonprofit Sectors

Multiple executive orders and other presidential memoranda have been issued since January 20, 2025, related to workplace **DEI** initiatives. These actions have a direct and immediate impact on three groups: federal employees, federal contractors and subcontractors, and federal grantees. The impacts vary depending on the group at issue. For example, federal contractors and subcontractors are no longer required to comply with the affirmative action requirements with respect to race and sex that have shaped employment practices for nearly 60 years. Federal contractors, subcontractors, and grantees must certify that they do not operate any programs promoting **DEI** that violate any applicable federal antidiscrimination laws.

Equally important, EO 14173 will directly impact private employers' diversity practices by bringing a **new** focus to the **legality** of the practices and developing investigation and enforcement practices to end diversity initiatives that are not compliant with federal law. Section 4 of EO 14173, entitled "Encouraging the Private Sector to End Illegal **DEI** Discrimination and Preferences," requires all government agencies to report private-sector initiatives that promote **DEI** through preferential practices, mandates, policies, programs, and activities. It also directs the US attorney general, along with the heads of over 400 federal agencies, to provide recommendations for enforcing federal civil rights laws and taking other appropriate measures to encourage the private sector to end what the administration deems to be illegal discrimination and preferences, including "illegal" **DEI**. Specifically, within 120 days the attorney general must create a "strategic enforcement plan" that identifies: sectors of concern, potential large employer investigation targets, and potential litigation strategies and regulatory actions.

In short, within the next few months the federal government will identify large businesses and nonprofits it believes may be operating diversity programs in a manner inconsistent with applicable federal antidiscrimination laws, engage in steps to deter private businesses from engaging in diversity programs deemed discriminatory, and take other measures to encourage the private sector to end certain diversity programs and preferences (including developing strategies to investigate businesses). These actions will heighten existing risks for businesses regarding whether their existing **DEI** programs are **legally** compliant, particularly those involving racial and gender preferences and targeted goals.

Collaboration and Communication Are Critical

The recent executive orders challenge leaders to identify, evaluate, and innovate their programs and strategies, ensuring that they align with both federal **legal frameworks** and the core values that drive business success and employee engagement. Organizations that focus on the intrinsic benefits of a fair, skills- and experience-based, **inclusive** workforce as a fundamental aspect of their culture will expand their opportunities to attract and retain top talent, appeal to a broader customer base, and enhance their competitive edge.

This is an opportune moment for business organizations to engage in meaningful dialogue with stakeholders, including employees, customers, and investors, to reinforce the importance of their core values. Transparent communication and a demonstrated commitment to fostering an **inclusive** environment with equal opportunities for all can strengthen brand reputation and build trust.

While the regulatory environment may be shifting, the business case for **inclusive** practices and programs that provide equal employment opportunities for all remains robust. CHROs and diversity leaders should build collaborative relationships with other executives, the board, attorneys, and risk management leaders not only to review the risk in diversity programs but to

assess them against their business impact, as this will foster continuous improvement and build support for diversity initiatives that promote, fairness, opportunity, access, and inclusion.

Organizations that proactively adapt and reaffirm their dedication to their core principles in an **inclusive** environment are likely to thrive, ensuring a broad talent pool, driving innovation, and achieving sustainable success in the years to come.

Before Acting, Leaders Should Engage Qualified Counsel

This article provides a **framework** within which CHROs and diversity leaders can understand the recent actions by the Trump administration with respect to **DEI** programs and can be used to identify, evaluate, and **evolve** existing programs and initiatives to ensure they are **legally** compliant as well as effective and **inclusive**.

Leaders should recognize that while executive orders impact federal agencies and contractors, and do not ban diversity initiatives in the private sector directly, the government can still exert influence and may investigate private companies for anything it perceives to be an "illegal" diversity-related practice. Understand your litigation and regulatory risk profile and the nuances of your policies both in fact and in practice to ensure that they do not run afoul of federal equal employment opportunity laws. Also, stay abreast of emerging **legal** actions *against* the administration's **DEI** related directives. Whatever the **legal** climate, now is the time to develop your strategic response to ongoing developments.

While the information above is provided to assist you in developing strategies to understand the applicable **legal** principles regarding your existing practices, The Conference Board strongly suggests that companies consult with qualified **legal** counsel regarding the specifics of their programs to ensure **legal** compliance and before making any decisions on retaining, modifying, or **evolving** their practices.

In assessing the risk and **legality** of your diversity initiatives, adapt a **framework** like the one below, seek qualified **legal** advice, and vet the credibility of firms sharing **DEI** insights in general.

***Potential* risk spectrum for DEI programs (a detailed analysis by program is required to properly assess compliance and risks)**

Image 1 within document in PDF format.

Source: The Conference Board, 2025

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Understanding and Managing Legal Risk in Corporate DEI

Rapid **legal** developments in the US related to diversity, equity & inclusion (**DEI**) practices, programs, and policies require continuous monitoring to ensure companies have accurate, up-to-date information regarding compliance and **evolving** regulatory standards. As the **legal landscape** develops in this area, companies are identifying and evaluating the specifics of their existing programs to determine compliance with state and federal law, as well as overall program effectiveness. While "illegal **DEI**" remains undefined by the **new** administration, recent developments have provided some direction useful to the private sector.

This report compliments our February 2025 essay ***Navigating Legal*** *Risk In Corporate* ***DEI***.[1]

Key Insights

• Companies should harmonize regulatory and **legal** compliance with their broader **inclusive** workplace culture objectives. The ability to swiftly adapt to **legal** changes, proactively manage risk, and engage in transparent communication will be critical to sustaining lawful workplace programs while reaffirming a commitment to equal opportunity, merit, and access.

• Conduct scenario planning to ensure your leadership team is aware of developments and your communications strategy considers alternative outcomes. Engage with **legal** counsel and other resources to gain a broader perspective on applicable **legal** principles and **evolving** interpretations. Regular attorney--client privileged audits can strengthen organizational resilience against **legal** scrutiny.

• Ensure that employees and other key stakeholders understand the organization's commitment to creating and maintaining a culture of fairness and inclusion. Provide employees with timely updates on any changes to existing workplace policies.

Executive Orders

Since the implementation of three Executive Orders (EOs) related to **DEI**, there have been a number of **legal** challenges to some provisions of the orders. [1] It is important to note that EO 14173 *("Ending Illegal Discrimination and Restoring Merit-Based Opportunity")* is the only **DEI**-related EO to directly impact federal contractors, grantees, and private employers.

The DEI-related EOs that have come into force since January 20, 2025:

EO 14148 *("Initial Rescissions of Harmful Executive Orders and Actions")*

EO 14151 *"Ending Radical and Wasteful Government **DEI** Programs and Preferencing")*0551977476;00007;2082798580;CT;;0001043;

EO 14173 *("Ending Illegal Discrimination and Restoring Merit-Based Opportunity")*0551977476;00009;2082816152;CT;;0001043;

On February 21, 2025, a Maryland District Court preliminarily enjoined (prohibited) two key provisions of EO 14173: the Certification Provision of Section 3 and Enforcement Threat Provision of Section 4. [2] The court found that it is likely that the terms "illegal **DEI**" and "equity related" will be found unconstitutionally vague without further definition by the administration.

For the time being, there continues to be no affirmative action obligations under the now-rescinded EO 11246, the "Equal Employment Opportunity" order, which required federal contractors to ensure equal employment opportunities. As a result of the Maryland preliminary injunction, federal contractors and grantees are not required to include certifications in their grants and contracts and will not face immediate enforcement actions. Attorney General Pam Bondi is still proceeding with the preparation of a strategic enforcement plan. The administration has filed an appeal of the nationwide preliminary injunction in the Fourth Circuit of Appeals. It is unlikely there will be a decision on the appeal before June 2025.

Despite the absence of clear definitions on what the administration considers to be "illegal **DEI**," certain actions by federal agencies and state attorneys general have provided insights regarding various employment policies and practices that fall under that category. [3] For example, Attorney General Pam Bondi's memoranda regarding **DEI** emphasizes that programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex violate federal antidiscrimination laws and will be investigated, signaling heightened enforcement risks. The Office of Personnel Management's memo providing further guidance regarding ending **DEI** offices, programs, and initiatives includes guidance that lawful employee resource groups and special emphasis programs should be open to all employees. Acting Chair of the Equal Employment Opportunity Commission Andrea Lucas warned of the **legal** risks of screening employees for a "commitment to diversity," "diverse backgrounds," or ""diverse perspectives," especially if applicants are encouraged to disclose their race.

Based on the federal agency memoranda, guidance, and public statements, as well as litigation developments cited in endnote three, equal treatment under the law means:

1 Avoiding identity-based considerations in employment decisions (recruitment, hiring, promotion, retention, and separation), procurement, and contracting;

2 Closely reviewing statistical disparities, as the disparities alone do not automatically constitute unlawful discrimination;

3 Equal dignity and respect for all;

4 Rewarding individual excellence;

5 Creating workplaces focused on merit-based equal employment opportunity; and

6 Fulfilling obligations related to disability accessibility, accommodations, and other programs that are not contrary to the Rehabilitation Act of 1973 or the Civil Rights Act of 1964.

Public attention remains focused on the issue of members of majority groups challenging employment decisions and practices as a result of the recent oral argument before the Supreme Court in the workplace discrimination case *Ames v. Ohio Department of Youth Services*. In that case, a straight white woman claimed she was discriminated against when a job she applied for went to a gay man instead. The decision will resolve a split in the circuit courts of appeal on the standard of proof (currently higher) required by a member of a majority group (e.g. white, male, heterosexual, etc.) to prove a violation of Title VII.

Monitor Government Actions and Guidance, and Court Developments to Keep Your Workplace Policies and Programs Compliant

The Department of Labor (DOL) and Department of Justice (DOJ) have received requests to investigate corporate **DEI** practices, alleging that certain initiatives violate antidiscrimination laws. In February, the group America First **Legal** wrote to the DOL urging the department to investigate federal contractors for prohibited discrimination, emphasizing that all race- and sex-based employment practices are unlawful. The organization's alleged instances of prohibited discrimination were present in at least eight federal contractors named in its letter.

The public interest law firm Wisconsin Institute for Law & Liberty (WILL) sent two investigation request letters to Attorney General Bondi in February alleging race discrimination in government contracting programs at the Wisconsin Department of Administration (DOA) and the **New** York Department of Economic Development (DED). WILL alleges that the Wisconsin DOA's Supplier Diversity Program and the **New** York DED's Minority and Women-Owned Business Enterprise Program constitute discrimination on the basis of race. The letters request that the DOJ open formal investigations into these programs, alleging that they violate Title VI.

This summer, the Supreme Court is expected to rule on the *Ames* case. Should the court rule in the plantiff's favor, the higher bar set by some courts that adversely impacts a member of a majority group who makes workplace discrimination claims will end. This could potentially lead to greater scrutiny of, and more lawsuits challenging, employer hiring and promotion decisions.

As businesses **navigate** the **evolving landscape**, they should align compliance with broader **inclusive** workplace culture objectives. By maintaining robust compliance protocols, proactively adapting to **legal** developments, and consulting with **legal** professionals, businesses can effectively **navigate** this **evolving landscape** and sustain lawful, **inclusive** workplace programs while reaffirming their commitment to equal opportunity, merit, and access. Figure 1 provides a consolidated look into 16 state attorneys generals' statements on what constitutes **legal** diversity-related initiatives.

Figure 1

Attorneys general provide guidance on lawful inclusivity practices


Image 2 within document in PDF format.

Source: The Conference Board, 2025

Regular audits and third-party reviews can strengthen organizational resilience against **legal** scrutiny. Workplace programs should be developed and implemented in accordance with well-established antidiscrimination **legal frameworks**.

By proactively identifying areas of **legal** vulnerability and ensuring equal opportunity for all, businesses can safeguard their values and commitments to **inclusive** workplaces while minimizing **legal** exposure. Examples of such actions include:

- Prioritizing equal opportunity rather than implementing race- or gender-based preferences.
- Clearly documenting the business case for initiatives to demonstrate lawful and objective justifications.
- Ensuring state and local **legal** requirements are also considered, as some jurisdictions may impose additional compliance obligations.
- Defining otherwise undefined and ambiguous terms that the administration identified as potentially suspect, including "diversity," "equity," " "inclusion," and "**DEI**." Providing meaning to these terms will decrease the risk that third parties attach unintended meanings to them.
- Reviewing relevant training materials to ensure they do not ask employees to accept specific viewpoints or contain personal attacks.

• Reviewing recruitment, sourcing, hiring, promotion, retention, and separation practices to ensure employment decisions are not made based on any protected characteristic.

• Closely examining public-facing equal opportunity commitments to ensure **legal** compliance.

• Conducting a **legal** review to confirm that an employee's race or sex does not impact the company's decision-making with respect to various benefits of employment, such as attendance at outside seminars and events, travel allowances, and client and customer assignments.

• Eliminating quota-based initiatives that could be construed as discriminatory under federal law.

• Ensuring that all educational, cultural, and historical observances; affinity group meetings; and events that celebrate diversity and promote awareness do not restrict attendance (explicitly or functionally) and do not separate participants during events based on protected characteristics.

Structuring initiatives to enhance fair opportunity and access around sound **legal** principles will foster **inclusive** workplaces while ensuring **legal** compliance. Businesses should also consider **evolving** internal policies and employee handbooks in concert with rapidly changing **legal** developments in this area.

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Executive Order on HR Meritocracy

Implications for Business

30 APRIL 2025

Executive Order 14281, signed April 23, 2025, states that the administration's policy and enforcement position is to eliminate the use of disparate (or adverse) impact to prove employment discrimination under Title VII of the Civil Rights Act of 1964. The order encourages a return to evaluating candidates on individual merit, skill, and qualifications rather than group-based statistical outcomes and directs all federal agencies, including the Equal Employment Opportunity Commission (EEOC) and the Department of Justice, to focus less on enforcing and litigating disparate impact claims. It also asks them to review and possibly change or repeal existing regulations, guidance, and consent decrees that impose disparate impact liability on businesses.

A Notable Shift in the Federal Enforcement Landscape

The administration's policy on disparate impact has particular relevance for employers that use certain selection procedures, tests, or other tools (e.g., AI) in their hiring, promotions, and related processes. The current **legal** risk associated with disparate impact has led some businesses to avoid merit-based decisions that could appear biased in practice. By removing this enforcement risk, the executive order seeks to ease perceived constraints on making employment decisions based solely on skills, qualifications, and business needs.

Background: Courts have long approved two ways to prove employment discrimination under Title VII

Under the disparate treatment **framework**, a plaintiff may allege discrimination through direct or indirect evidence of discrimination (such as when there is evidence that a protected status was a factor in the decision-making or evidence that others who are not within the protected status group are treated better under the same circumstances).

Under the second **framework**--disparate impact--an employer policy that is applied equally to all employees may still violate Title VII if it disproportionately harms members of a protected group. To defend such a policy, the employer must show it is essential to business operations and that no alternative, less discriminatory option exists. Unlike the theory of disparate

treatment, which includes either direct or indirect proof of a discriminatory motive in the employment action, disparate impact looks at the *effects* of a policy or practice rather than the *motivation* for it.

Key Insight

The order states that it encourages a return to evaluating candidates on individual merit, skill, and qualifications rather than group-based statistical outcomes.

However, the **legal landscape** is complex, as today private litigants still retain the right to bring disparate impact claims under Title VII. In addition, some states and local governments have enacted nondiscrimination laws that recognize disparate impact liability. The administration is examining potential preemption of these local laws and rules.

Given the uncertainty regarding the viability of disparate impact liability, employers should evaluate the content validity and impact of the potential use of selection procedures early--before the procedures are implemented. Internal evaluations should include:

1 An analysis of what part of the procedure may cause an adverse impact on a protected group;

2 Confirmation that the procedure accurately measures the specific knowledge, skills, or abilities required for the job; and

3 Determination of whether an equally valid procedure is available that has less adverse impact on a protected group.

Example: A company implements a physical fitness test requiring applicants for a position to perform certain lifting activities as part of its hiring process. If, in practice, the physical ability test significantly reduces the number of female applicants who qualify for the position, under disparate impact theory, the company is required to show that the test is job related, its use is a business necessity, and an alternative test that accurately measures the required skill for the position without an adverse impact on the pass rate for women is unavailable. If the company is not able to do so, the test could be successfully challenged--even if the company never intended to exclude hiring women. Going forward, if disparate impact theory is no longer viable, it will be more difficult to sue an employer for discrimination. An applicant would be required to show that the use of the test was discriminatory under a disparate treatment theory of discrimination--through direct or indirect evidence of intent to discriminate against women through adoption or operation of the test, as opposed to through the results of the test.

Employers can expect additional updated federal guidance (from the US attorney general and the acting chair of the EEOC) to help **navigate** and operationalize these federal enforcement changes, as well as future **legal** developments impacting employers on the federal as well as potentially the state and local levels. We encourage employers to stay current on federal and local developments and proactively anticipate any existing practices that may be the subject of either litigation or enforcement activity by government authorities and private plaintiffs.

*Note: This essay is intended as information and guidance only. It is not a substitute for **legal** advice. Leaders are encouraged to seek advice from qualified attorneys.*

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Advancing Opportunity and Access

Linking **DEI** to Business Outcomes

12 JUNE 2025

Most leaders remain committed to diversity, equity & inclusion (**DEI**) principles that provide equal opportunities for success to all workers--but **legal** challenges, political polarization, and public criticism have prompted many to reevaluate their strategies. This report, based on the results of recent surveys and a series of roundtables with more than 110 human capital (HC) leaders,

explores how organizations are mitigating **legal** and reputational risk by adjusting language; redefining objectives; and scaling back, expanding, or eliminating initiatives. [1]

Trusted Insights for What's Ahead®

- Most leaders intend to retain their commitment to creating diverse and **inclusive** workplaces by aligning **DEI** efforts with business goals and ensuring fair opportunity and access to all workers.
- Organizations should review their **DEI** structures, outcomes, and communications with attorneys, diversity leaders, and risk management experts to minimize **legal** and reputational risk, removing language that appears to support preferential treatment for any group and perhaps revising the terms used to describe **DEI** initiatives.
- A commitment to equal opportunity and access can have a positive impact on workforce culture and contribute to long-term organizational success, but it requires clearly defined, business-aligned initiatives featuring rigorous measurement, transparent reporting, and continuous improvement.

Workers and Leaders Remain Committed to Opportunity and Access

For most organizations, remaining committed to their values while mitigating the **legal** and reputational risks of doing so does not mean retreating from an **inclusive**, diverse workforce--it means **evolving**. Support for diversity is evident in the perspectives of US workers, whose responses to recent surveys from The Conference Board reveal ongoing support for **DEI** despite increasing backlash against such efforts.

In late 2024, 79% of nearly 1,350 US workers surveyed by The Conference Board indicated that their organization's level of **DEI** effort/resources was either about the right amount or too little. In January 2025, 85% of almost 390 US workers indicated the same (Figure 1).

Figure 1

Most workers continue to support their organization's DEI efforts

Q: Regarding the level of effort/resources your organization dedicates to diversity, equity & inclusion (**DEI**), would you say it devotes ...

Image 3 within document in PDF format.

Note: 1,345 US workers responded in 2024, and 386 US workers responded in 2025.

Source: *Beyond Backlash: The Continued Benefits of **DEI** at Work*, The Conference Board, October 2024; **DEI** Worker survey, The Conference Board, January 2025

In that same 2024 survey of 1,345 US workers, 38% of workers said they would not work for an organization that does not take **DEI** seriously, with another 30% saying they would do so but only reluctantly. This sends an important message to CEOs and chief human resources officers (CHROs) that **DEI** efforts are important enough to impact where workers choose to work and--by extension--how engaged they might be.

While support for **DEI** efforts remains strong, confidence in its future is more tempered. In the 2025 survey of 386 US workers, only 11% said they were very confident that **DEI** would remain a priority at their organization. The remainder expressed lower levels of assurance: 27% were confident, 31% were slightly confident, 17% were not confident at all, and 13% reported that their organization did not have **DEI** programs or initiatives to continue. This distribution was mirrored in the responses of the 170 HC leaders who participated in our Reimagined Workplace 2025 study. Just 18% were very confident in **DEI's** staying power, while 32% were confident, 26% were slightly confident, 15% were not confident at all, and 8% did not have **DEI** initiatives or programs to continue (Figure 2). Notably, workers expressed less confidence than HC leaders only in the highest confidence tiers, underscoring the broader sense of caution among employees about **DEI's** staying power.

Figure 2

48% of workers and 41% of HC leaders are either slightly confident or not confident that their organization's DEI initiatives will remain a priority

Q (for workers): How confident are you that your organization's diversity-related initiatives will remain a priority?

Q (for leaders): How confident are you that diversity-related initiatives will be a priority in your organization moving forward?

Image 4 within document in PDF format.

Note: 386 US workers and 170 HC leaders responded in 2025.

Source: **DEI** Worker survey, The Conference Board, January 2025; *The Reimagined Workplace 2025: Managing Uncertainty*, The Conference Board, May 2025

These findings suggest that both employees and HC leaders recognize the precariousness of **DEI's** position in 2025 even as they continue to support its underlying principles of universal inclusion and opportunity. HC leaders recognize that confidence does not equate to complacency and are already taking action to protect the staying power of their efforts in an **evolving landscape**.

In our Reimagined Workplace 2025 study, 69% of HC leaders report maintaining (61%) or expanding (8%) their current diversity efforts--even as many revise specific initiatives--while only 19% report scaling them back (Figure 3). This measured approach suggests that while **DEI** is under pressure, most leaders recognize that the right approach to establishing balance is making targeted adjustments rather than abandoning previous commitments outright.

Figure 3

Most HC leaders say their organizations are not scaling back DEI in 2025

Q: Which of the following best describes your organization's stance toward diversity-related efforts under the **new** presidential administration? (Select all that apply)

Image 5 within document in PDF format.

Note: 170 HC leaders responded.

Source: *The Reimagined Workplace 2025: Managing Uncertainty*, The Conference Board, May 2025

Crucially, when leaders manage to get opportunity and access right, they are rewarded with results that matter. In our 2024 *Beyond Backlash: The Continued Benefits of **DEI** at Work* report, nearly 75% of workers said **DEI** improved their sense of **belonging**; 60% or more reported positive impacts on well-being, engagement, retention, and job satisfaction; and 43% of respondents even reported improved productivity.

To realize these business benefits, senior leaders should move beyond broad statements of inclusion to focus on measurable objectives--closing gaps in advancement, increasing transparency in hiring and pay, widening access to mentorship, and integrating **DEI** into leadership accountability **frameworks**.

Ultimately, the future of **DEI** strategies will hinge not on whether organizations can weather political cycles, but on whether they can connect diversity efforts to business outcomes, integrate it within all HC operations, and make opportunity and access part of the foundational fabric of doing business.

Mounting Pressure Is Forcing Leaders to Reevaluate Their DEI Strategies

DEI traces back to President John F. Kennedy's 1961 Executive Order 10925, promoting the concept of "affirmative action" to combat workplace discrimination. Initially focused on race and ethnicity, the order expanded through later legislation to include gender and other protected groups. In many organizations, **DEI** has **evolved** from a sole focus on compliance to initiatives aimed at improving the work experience for all.

Over time, however, some organizations have veered from lawful strategies, instead prioritizing optics over impact or giving preferences to specific groups of workers. Wasted resources, limited progress, and resentment have sometimes been the result. Mounting evidence suggests that traditional **DEI** strategies often fail to reduce bias, may inadvertently harm marginalized groups, and trigger backlash. Edelman's 2025 Trust survey, for example, found that worry about experiencing discrimination has risen among all US demographic groups since 2024, with an all-time high of nearly half of White US respondents indicating this concern.

The current sociopolitical climate offers an opportunity to reset efforts and rebuild trust by abandoning unlawful or misguided practices and adopting effective equal opportunity and business-focused approaches.

The Legal Landscape: Applicable Laws

The US Constitution prohibits federal government and state actions that deny any person equal protection under the law.

• Section 1981 of the Civil Rights Act of 1866 grants all people the same right to make and enforce contracts, including employment and business contracts, without regard to their race, color, or ethnicity.

• Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin. It permits employers to adopt mechanisms to support diversity by advancing equal opportunity for all employees, without the use of illegal preferences with respect to employees based on their protected status.

• Other federal and/or state and local laws prohibit discrimination on other grounds, including disability, pregnancy, gender identity, marital status, and myriad other bases.

Pushback and response

At public companies, anti-**DEI** shareholder proposals have sharply risen, from 6% of all proposals in 2022 to 23% in 2024, driven by increased **legal** scrutiny and political polarization following key **legal** rulings (such as the US Supreme Court's 2023 decision prohibiting race-based college admissions). **DEI** proposals, for or against, receive support from less than 2% of shareholders on average, yet the growing divide between pro- and anti-**DEI** proponents has complicated corporate decision-making, negotiations, and regulatory compliance.

Though most organizations maintain their commitment to **DEI**, doing so has become more challenging of late. Government agencies have been ordered to "combat illegal private-sector **DEI** preferences, mandates, policies, programs, and activities," which may spur investigation of companies they view as suspect based on, for example, public statements regarding representational goals or targets. Agencies have been directed to identify up to nine major entities-- publicly traded corporations, nonprofit organizations, etc.--for compliance investigations based on their diversity practices, and the administration is scrutinizing previously submitted civil-rights compliance plans from federal contractors to identify and penalize potential discriminatory practices.

These shifts create uncertainty for businesses; for example, practices previously considered **legal**, such as leadership development programs designed specifically for women, may now be deemed unlawful or suspect. While it remains uncertain what constitutes "illegal **DEI**," much of what organizations have done and continue to do may raise concerns regarding whether the programs segregate employees or provide a preference based on a protected status, and thus could be considered illegal by the **new** administration. To complicate matters further, **legal** risks are also generated by scaling back **DEI** initiatives.

The risks are also reputational

CEO and CHRO concerns go beyond strict **legality** to include two forms of reputational risk: 1) the risk of attracting unwanted attention from anti-**DEI** activists and facing coordinated social media and/or **legal** attacks, and 2) the risk of compromising core organizational values by too aggressively curtailing **DEI** efforts, thus alienating employees, customers, or other stakeholders.

Those Calling for DEI Reform Include Many of Its Champions

Advocates for strategic **DEI** reframing include experienced **DEI** practitioners and experts who recognize the need for introspection and evolution. For example, a prominent **DEI** champion argues in a 2025 *Harvard Business Review* article for an outcomes-based alternative to traditional **DEI**, emphasizing measurable improvements in systems like hiring, promotions, and organizational culture rather than isolated awareness campaigns. The article's author advises leaders to collaborate closely with internal experts to reimagine strategies, ensuring a nuanced, **inclusive**, and genuinely transformative approach aligned with organizational realities.

Leaders should consider their values, circumstances, risk tolerance, and business objectives as they work with qualified attorneys, diversity leaders, and risk management professionals to scrutinize their **DEI** strategy, initiatives, and language for **legal** and reputational risk. Figure 4 offers a **framework** for evaluating the **legal** and reputational risks associated with corporate diversity programs affecting US-based workers.

Figure 4

A detailed, program-by-program analysis is required to properly assess legal compliance and risks

Potential risk spectrum for programs and practices

ZONE 1 Low Risk	ZONE 2 Moderate Risk	ZONE 3 Higher Risk	ZONE 4 High Risk	ILLEGAL
Workforce analysis	ERGs (employee resource groups)	Aspirational workforce diversity goals	Selective training or development programs limited to diverse talent	Quotas, set-asides
Pay audits	Cultural competency programs	Diverse hiring slates	Tying compensation to DEI outcomes	Tie-breaker decision-making
Job description, job ad, and interview question audits	Widening job applicant pools	Development programs limited to diverse talent		Exclusive affinity groups and ERGs that provide employees with training benefits
Implicit bias & inclusivity training	DEI metrics	Supplier diversity goals		Compulsory DEI training with discriminatory content
Inclusive mentorship & fellowship opportunities		Leveraging ERGs for referral programs		Employment decisions based on protected status

Source: *Advancing Opportunity and Access: Linking DEI to Business Outcomes*, The Conference Board, June 2025

In a 2024 article, two legal experts advise leaders to make changes to their DEI program if they can answer yes to all three of the following questions: [2]

- Does the program confer a preference, meaning that some individuals are treated more favorably than others?
- Does the preference relate to an employment action motivated (in whole or in part) by race, color, religion, national origin, sex, or another protected characteristic?
- Does the preference involve a concrete benefit (or exclusion from a benefit), such as a job, a promotion, a pay raise, a work assignment, or access to training and development opportunities?

While actions and statements from the new administration continue to shift the spotlight on which practices, organizations, and industry sectors are most at risk, *any* organization may invite legal risk if it pursues initiatives in any of the zones in Figure 3. In June 2025, for example, the Supreme Court unanimously ruled that all workers, regardless of race, gender, or sexual orientation, must meet the same standard to prove workplace bias, striking down a higher burden long applied to majority-group plaintiffs and potentially leading to more challenges around hiring, promotion, and even leadership development decisions.

Despite some legal risks, companies may be able to deliver diversity initiatives by structuring them appropriately, even among those listed in zones 3 and 4 (see Figure 3). With respect to reputational risk, however, these strategies might draw attention from disgruntled employees, customers, and/or anti-DEI activist groups. Yet by backing off initiatives--especially those in zones 1 to 3--leaders might compromise stated values, damage the culture, and threaten relationships with some employees, customers, and other stakeholders.

Accordingly, every organization must assess its own risk tolerance, balancing the reputational risks of too deeply curtailing DEI initiatives to avoid censure with those of making too few adjustments and attracting scrutiny. For example, a firm that publicly announces workforce diversity "goals" might be accused of using "goals" as a masquerade for "quotas" and find itself in the crosshairs of a social media campaign or even a federal or state investigation for illegal DEI--especially if it has not defined lawful methods to accomplish those goals and referenced relevant labor market availability data by job to establish the goals. Another might cancel employee resource groups (ERGs), attracting the ire of workers and leaders who benefit from them.

>> "Criteria (whether for promotion or hiring) that screen candidates based on 'diverse backgrounds,' 'diverse perspectives,' or 'commitment to diversity' can be legally suspect, if the employer is using these criteria as pretext or a proxy for racial

preferences...The EEOC has long taken the position that soliciting any pre-employment information that tends to disclose an applicant's race creates a presumption that the employer unlawfully will use race as a basis for making selection decisions." --Acting chair of the EEOC, February 11, 2025, post on X

These challenges underscore a need for more collaborative, empowering, evidence-based, and business-aligned strategies. Leaders should apply data-driven, systemic change management to engage broad coalitions, positioning **DEI** as a shared benefit rather than as an advantage for specific groups. Amid growing dissatisfaction with performative **DEI** efforts, organizations should **evolve** toward approaches that tangibly improve outcomes, create universal benefits, and effectively communicate the value of opportunity and access work, regardless of terminology.

Removing Barriers, Enhancing Fairness, and Expanding Talent Pools Without Applying Preferential Treatment

>> *"**DEI** as it has classically been known is gone. There is a reframe now."*--Roundtable participant

Most of the 110+ HC leaders who participated in our Member discussions and roundtables said they find **DEI** programs more challenging now than before 2024. A minority have scaled back their **DEI** investments and initiatives; more commonly, and consistent with our earlier surveys of workers and leaders, respondents report that they are maintaining or even expanding their overall focus on and investments in **DEI** in 2025. For many, this means curtailing some initiatives while maintaining, introducing, or expanding others (Figure 5).

Figure 5

Shifting from DEI practices that carry risk to ones focused on universal opportunity and access

Scaling back or ending programs	Evolving current programs	Affirming existing commitments
• Sunsetting diversity targets and goals	• Renaming committees and commitments to emphasize opportunity, inclusion, and merit	• Continuing to support ERGs, networking opportunities, and efforts toward equal pay for all employees
• Ceasing participation in external diversity surveys	• Updating and expanding Employee Resource Groups (ERGs)	
• Closing **DEI** offices and/or teams, reassigning staff	• Shifting training sessions to focus on business objectives	• Emphasizing the business case for inclusion programs that create a culture of **belonging** as well as value for customers and stakeholders
• Removing the term '**DEI**' or 'diversity' from company documents, websites, and annual reports	• Redirecting former **DEI** staff to HR department to focus on talent acquisition and employee experience	• Reaffirming organizations' historical commitments to respect and inclusion
• Dropping board diversity requirements		
• Removing pronouns from email signatures		• Continuing to internally track employee demographic data
• Abandoning supplier diversity quotas		

Source: *Advancing Opportunity and Access: Linking **DEI** to Business Outcomes*, The Conference Board, June 2025

Changing the focus and language of **DEI**

Many organizations that participated in our roundtables and discussion sessions are holding firm on their **DEI** commitments, including keeping the acronym. Like other high-profile organizations, several within this group say they have no intention of

making changes, while others are adopting a wait-and-see approach in the expectation that the current negative focus on **DEI** will dissipate as the administration turns to other policy priorities.

However, even before the current administration took office, some organizations were already beginning to change their **DEI** language. According to an April 2024 survey of 70 executives by The Conference Board, roughly half of organizations have moved away from the words "diversity" and "equity" toward ""inclusion" and "**belonging**," with another 20% considering similar adjustments. Moreover, our analysis of US Securities and Exchange Commission filings from public companies between 2020 and 2025 reveals a broad retreat from references to "**DEI**" and related terms (Figure 6). Often, this shift in focus has led to expanding protected-status initiatives to include individuals who have experienced certain obstacles or hardships, as opposed to groups of individuals *defined* by their protected status.

Figure 6

Use of DEI and related terms in SEC filings has waned in 2025

References to **DEI** terms in S&P 500 major filings


Image 6 within document in PDF format.

Source: *Advancing Opportunity and Access: Linking **DEI** to Business Outcomes*, The Conference Board, June 2025

Organizations that intend to continue **DEI** initiatives but reduce their risks most often explain this change in terminology as a repositioning and realignment of their commitments. Firms are using words including "inclusion," ""**belonging**," "culture," "people" "opportunity," and "fairness," as well as combinations of these terms, to refocus their efforts. Many are shying away from the terms "equity" and "diversity," which potentially imply discriminatory practices.

CHROs should consider reframing workplace diversity as a core pillar of business performance by using a more encompassing term, such as "opportunity and access," thereby shifting the conversation toward business strategy, innovation, and competitiveness, and positioning **inclusive** hiring, retention, and development practices as markers of resilience, productivity, and long-term growth.

Decoupling executive compensation from **DEI** outcomes

Between 2021 and 2023, the percentage of companies listed in the S&P 500 that reported tying executive pay to **DEI** outcomes increased by 23 percentage points. In 2024 and in 2025 to date, executive pay linked to **DEI** declined by 41 percentage points (Figure 7).

Figure 7

The practice of linking executive pay to DEI dropped by 55% between 2023 and 2025.

Share of companies disclosing human capital management (HCM) metrics in executive compensation, by type of HCM metric, 2021-2025


Image 7 within document in PDF format.

Note: 332 filings in 2021; 363 filings in 2022; 386 filings in 2023; 388 filings in 2024; 328 filings January 1-May 30, 2025
Source: The Conference Board/ESGAUGE, 2025

Linking executive compensation to **DEI** carries significant risks. A multinational retailer of specialty coffee, for example, was sued in early 2025 by the state of Missouri for alleged race and gender bias stemming from executive pay linked to what the litigants call "quotas." Given the current **legal** uncertainties and political opposition, leaders should consider alternatives, such as linking executive pay to human capital management measures more closely linked to business outcomes; for example, retention and upskilling. Incentivizing these outcomes--and rewarding executives for employee survey results that reveal gains in workplace **belonging**, inclusion, and dignity--can serve to strengthen the organizational culture while promoting universal opportunity and access.

Adopting a more nuanced but defined approach

Mirroring media reports about organizations rolling back **DEI** programs, remarks from our roundtable participants suggest that for some, opportunity and access might be better promoted through subtle, persistent efforts than highly visible or confrontational ones. Companies can take measures to evade negative press or public scrutiny while continuing their commitment to the work, choosing discretion over public declarations.

>> "Talking about it externally is now viewed as a riskier proposition... Companies often tend to follow the crowd... Some have found ways to hedge or otherwise tweak the language they use to make it more vague." -- Roundtable participant

Companies see public discussion of **DEI** as riskier today than in the recent past, leading them to soften or generalize the language they use in official documents and communications and thereby reduce their external "**DEI** footprint." A refined strategy could include refocusing, reducing visibility, adapting interventions, and/or adjusting initiatives or communications to comply with **evolving** laws (Figure 8).

Figure 8

Consider shifting from risky DEI practices to inclusive strategies that align with legal standards and foster belonging for all employees

Practices to avoid	Practices to embrace
Employment, procurement, & contracting decisions based on protected status preferences	Rewarding individual excellence & prioritizing merit-based decision-making
Rigid, inflexible quotas, set-asides, & goals; workforce 'balancing'	Aspirational goals achieved through equal opportunity and merit-based decision-making
Diverse slates in selection processes requiring a minimum representation of candidates from specific groups	Casting a wide recruitment net to broaden talent acquisition strategies and expand sourcing channels
Employee events, affinity groups or employee resource groups (ERGs) exclusive to specific groups	Heritage months, celebrations, and ERGs open to all employees
Relying solely on federal law	Ensuring state and local **legal** requirements that impose additional obligations are also considered
Non-privileged workforce analyses that identify under-utilization of groups and trigger altered selection methods	Privileged monitoring of workplace demographics, reviewing statistical disparities, and corrective action
Trainings that are discriminatory in content, application, or context	Training to promote inclusion, **belonging**, and equal opportunity and prevent discriminatory decision-making

Source: *Advancing Opportunity and Access: Linking **DEI** to Business Outcomes*, The Conference Board, June 2025

When leaders remain faithful to their organization's commitments to **DEI** but choose to refocus their efforts or scale back certain initiatives, clear and strategic communication is essential. Without it, these changes risk being perceived as a retreat rather than a thoughtful effort to safeguard the organization's core values and **evolve** its strategies. By proactively explaining the rationale, emphasizing continued commitment to fairness and opportunity, and clarifying what is changing--and what is not--leaders can reinforce trust, minimize misunderstanding, and demonstrate that the organization's values are not being abandoned, but preserved through smarter, more sustainable approaches.

Scaling Back Open Support for Pride Month

A multinational food company visibly supported Pride Month events for many years, with sponsorships that included branded banners, hats, T-shirts, web advertisements, and posters. In 2025, it decided to temporarily suspend its active participation in these events but will continue to support them financially. The organization now gives money to local nonprofits that support the events through sponsorship and volunteerism.

Maintaining and adapting internal employee support structures

Many organizations are strategically reducing the external visibility of their **DEI** efforts, while continuing to maintain or even increase initiatives internally. ERGs, for example, remain a central component of this internal strategy so long as they are not demographically restricted and are open to every employee.

Some companies are aligning ERG agendas with broader business priorities, such as supplier diversity and employee well-being, thereby integrating **DEI** efforts into the core business strategy. This alignment not only reinforces the value of ERGs but also ensures their sustainability amid external pressures. One major US airline consults its business resource groups to inform various aspects of its operations--from product offerings to workplace accessibility-- leveraging the role of ERGs in driving **inclusivity** and business outcomes.

Several roundtable participants also described formal mentorship and sponsorship programs as high risk if made exclusive to certain groups. Others seek to provide resources related to concerns like immigration or LGBTQ+ rights, prioritizing employee safety and protection in a challenging climate. In these cases, as with ERGs, ensuring that the programs are accessible to everyone eliminates the risk. This open approach recognizes the need to include and support all employees--including majority groups--and address the diversity issues they perceive, as well as reaching traditionally underserved groups like blue-collar or "unwired" workers.

These examples suggest that some companies are making conscious decisions to pull back or modify specific diversity initiatives that they deem especially vulnerable to **legal** challenge or backlash, while maintaining or expanding others, viewing these adjustments as strategic moves to protect the bottom-line business benefits of **DEI**.

Embedding fair opportunity and access into core systems and processes

Beyond ERGs, organizations are **evolving** their diversity initiatives to focus on changes that mitigate bias. For instance, companies are implementing structured hiring rubrics and anonymized application processes to reduce unconscious bias in recruitment. These systemic approaches are designed to produce measurable outcomes linked to business success, such as greater diversity of perspective, improved employee retention, and enhanced innovation. By embedding diversity principles into organizational systems and processes, companies aim to foster **inclusive** cultures that support diverse talent and drive performance, while **navigating** the complexities of the current **landscape**.

Rather than relying heavily on stand-alone programs, companies are increasingly focusing on designing their fundamental organizational processes and systems to be inherently fair, accessible, and **inclusive**. This includes reviewing and revising systems for hiring, promotion, and performance management to mitigate bias in design.

The acting chair of the EEOC advises that organizations should: [3]

- Audit all job descriptions to remove unnecessary job requirements;
- Audit job descriptions, job ads, and interview questions for race and gender references;
- Widen the pool of job applicants by expanding the colleges, trade schools, and geographic areas that are sources, including advertising jobs in a wider variety of formats and locations;
- Standardize interview questions for similar positions and remove " "cultural fit" or other subjective interview questions;
- Standardize promotion and internal hiring policies. Consider posting all internal job openings and requiring opt-out rather than opt-in methods for in-line promotions;
- Ensure mentorship and fellowship program opportunities are open to all;
- Institute equal opportunity programs;
- Standardize leadership development trainings and offer them to all qualified employees;
- Consider focusing mentorship, fellowship, and other **DEI** programs on first-generation employees in a given field (versus restricting to minority group members);
- Offer individualized training based on skills, performance, and qualifications;
- Conduct audits under the attorney-client privilege to identify areas with existing discrimination or harassment issues/complaints.

Strategies include implementing standard practices in design and development to ensure opportunity and access is addressed systemically rather than case by case, and cultivating a culture where **inclusive** behaviors are expected, reinforced, and rewarded--part of the fabric of the organization as opposed to a stand-alone "program."

Frontline managers and leaders have an outsized influence on organizational culture. By cultivating a mindset of respect, humility, curiosity, courage, and interdependence, all connected through accountability, organizations can encourage leaders to understand their role in shaping culture, reflect on what their actions and the composition of their ranks symbolize, and equip themselves with the skills to **navigate** difficult conversations and build trust.

Adopting rigorous measurement to demonstrate business impact

To create workplaces where everyone feels valued and respected and has fair opportunity--and to justify ongoing investments--many organizations represented in our roundtables are prioritizing rigorous measurement of the business impact of their **DEI** efforts. This involves grounding the work in key performance indicators that connect **DEI** to HC measures such as employee well-being, engagement scores, leadership development, and unwanted attrition. These and other measures should then be linked to measurable outcomes related to business success, such as profit, innovation, customer retention, safety, and talent acquisition/retention.

The practice of assessing **DEI** investments against their returns demands time and determination, but doing so allows CHROs and diversity leaders to build a stronger internal case with data and examples to counter challenges. As in any other part of the business, this rigor promotes continuous improvement.

Conclusion

The path forward for **DEI** lies in clearly articulated goals linked to business success, organization-wide process improvements, and transparent communications that highlight fairness, broaden opportunity, and drive performance for all employees--regardless of how those efforts are labeled. With rigor, nuance, and alignment to organizational values, leaders can safeguard the enduring value of **inclusive** workplaces while managing **legal** and reputational risk.

Additional Resources from The Conference Board

- *Executive Order on HR Meritocracy: Implications for Business*
- *Understanding and Managing **Legal** Risk in Corporate **DEI***
- ***Navigating** **Legal** Risk in Corporate **DEI***
- *Remain Faithful to the Core Mission of Inclusion but Monitor Requirements*
- *For Many Workers, **DEI** Is Essential*
- *Beyond Backlash: The Continued Benefits of **DEI** at Work*
- *Repositioning **DEI**: Words Matter but It Is the Focus of the Work That Counts*
- *How CEOs and CHROs Can **Navigate** **DEI** Backlash*

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1. Note: Neither this nor the present article constitute **legal** advice.

1. *See National Association of Diversity Officers in Higher Education et al. v. Trump et al.*, D. Md., Case No. 25-cv-00333; *Shapiro et al. v. U.S. Department of the Interior et al.*, E.D. Pa., Case No. 25-cv-763; *Does v. Office of the Director of National Intelligence et al.*, E.D. Va., Case No. 25-cv-00300; *National Urban League et al. v. Trump et al.,* D.D.C., Case No. 25-cv-00471;

San Francisco AIDS Foundation et al. v. Trump et al., D.D.C., Case No. 25-cv-1824; *Chicago Women in Trades v. Trump et al.*, N.D. Ill., Case No. 25-cv-02005; *and American Association of Colleges for Teacher Education v. Carter*, D. Md., Case No. 25-cv-00702. This list is current as of March 11, 2025.

2. The Section 3 Certification Provision mandates that federal agencies include certifications in all contracts and grants confirming compliance with federal antidiscrimination laws and affirming that they do not operate **DEI** programs that violate these laws. The Section 4 Enforcement Threat Provision directs the attorney general to take measures to deter illegal discrimination and preferences, including **DEI** programs, through potential civil compliance investigations.

3. *See* Attorney General Pam Bondi's February 5, 2025 memoranda, *Ending Illegal **DEI** and DEIA Discrimination and Preferences* and *Eliminating Internal Discriminatory Practices*; Acting Head of the Office of Personnel Management Chuck Ezell's February 5, 2025 memorandum, *Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives*; Acting Chair of the Equal Employment Opportunity Commission Andrea Lucas' February 11, 2025 post on X regarding **legal** risks of screening employees for a "commitment to diversity;" Federal Campaign Commission Chairman Brendan Carr's February 11, 2025 letter to Comcast Corporation, *Comcast and NBCUniversal's Promotion of **DEI***; 16 state attorneys general February 13, 2025 guidance, *Multi-State Guidance Concerning **DEI** and Accessibility Employment Initiatives*; the Department of Education's March 1, 2025 FAQ, *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act*; Attorney General Bondi's March 4, 2025 move to intervene in a lawsuit against Illinois for requiring nonprofits to publicly post-race-based data; and President Donald Trump's March 6, 2025 Executive Order 14230: *Addressing Risks from Perkins Coie LLP*.

1. Information contained in this report is provided for informational purposes only and is not a substitute for **legal** advice regarding any specific factual situations, programs, or initiatives.

2. Kenji Yoshino and David Glasgow, ***DEI** is Under Attack. Here's How Companies Can Mitigate the **Legal** Risks*, Harvard Business Review, January 5, 2024. The link is provided for informational purposes only and is not a substitute for individual **legal** advice.

3. March 1, 2024 "Employment Law Now" Podcast Episode, "**DEI** Perspectives from EEOC Commissioner Andrea Lucas" and May 22, 2024 Bloomberg Law Coverage of **New** York University School of Law Conference

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IN SEARCH OF SOLID GROUND: CONSTITUTIONAL STANDING IN CHALLENGES TO CORPORATE DIVERSITY, EQUITY, AND INCLUSION ("DEI") PROGRAMS

ABSTRACT

This term, in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the Supreme Court invalidated Harvard and the University of North Carolina's ("UNC") race-conscious admissions programs as unconstitutional under the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. In a significant departure from past precedent, the Court concluded that Harvard and UNC's programs "cannot be reconciled with the guarantees of the Equal Protection Clause." In anticipation of and in the wake of this decision, individuals and organizations who oppose similar workplace diversity programs brought lawsuits challenging the* ***legality*** *of various corporate diversity, equity, and inclusion ("****DEI****") programs under a range of federal civil rights statutes. Lower courts considering these claims have thus far largely declined to adjudicate them on the merits, instead dismissing them for lack of Article III standing. While much attention has been placed on the implications of the Court's substantive reasoning in* Students for Fair Admissions *for corporate* ***DEI*** *programs, this Article argues that the Court's standing analysis this term, both in the affirmative action case and in other key decisions, is equally important to the outcome of pending challenges to such initiatives. The Article highlights the Court's historic willingness to relax standing requirements in discrimination cases brought by dominant group plaintiffs, while considering similar claims brought by historically marginalized plaintiffs to be non-cognizable. The Article argues that the Court's continuation of that approach this term has significant implications for challenges to corporate* ***DEI*** *programs, and that its failure to apply consistent standing requirements to race discrimination claims* ***186** *threatens the continued effectuation of the Fourteenth Amendment's guarantee of equal protection under the law.*

INTRODUCTION

On June 29, 2023 the United States Supreme Court departed from decades of its own affirmative action precedent and struck down Harvard and the University of North Carolina's ("UNC's") admissions programs in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[1] Writing for the majority, Chief Justice Roberts reiterated his longstanding view that "eliminating racial discrimination means ***187** eliminating all of it,"[2] and held that "the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause."[3] While the Court made clear that its decision should not "be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise," it nonetheless held that Harvard and UNC's race-conscious admissions programs were unconstitutional because they "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."[4] The Court made clear that admissions programs designed to promote diversity must treat applicants "based on his or her experiences as an individual--not on the basis of race."[5]

Although *Students for Fair Admissions* (*SFFA*) does not have direct precedential effect on diversity programs in the private sector--which is not generally subject to either the Fourteenth Amendment's Equal Protection Clause or Title VI of the Civil Rights Act--it nonetheless has substantive probative value on workplace discrimination claims given the applicability of Title VII of the Civil Rights Act to such programs. The Fourteenth Amendment, pursuant to which the Court in *SFFA* struck down Harvard and UNC's affirmative action programs, was ratified in the wake of the Civil War in a race-conscious effort to guarantee equal rights to Black Americans.[6] The Amendment intentionally shifted the balance between the federal government and the states through Section 5, which vests Congress with the power to enforce the Amendment's provisions through legislation. Almost fifty years ago, in *Fitzpatrick v. Bitzer*,[7] the Court made clear that Title VII, which prohibits ***188** employment discrimination on the basis of race and other protected statuses, was enacted pursuant to Section 5 of the Fourteenth Amendment.

Opponents of corporate diversity, equity, and inclusion ("**DEI**") efforts were quick to recognize the relevance of the Court's Fourteenth Amendment holding in *SFFA* to the continuing **legality** of corporate **DEI** programs under Title VII. America First **Legal** ("AFL"), a politically conservative organization led by Stephen Miller, Donald Trump's former senior policy advisor, issued a statement on the same day as the Court's decision in *SFFA* "putting woke corporations ... on notice that all **DEI** programs, and all 'balancing' in employment, training, scholarships, and promotions, based on race, national origin, or sex are illegal."[8] In the months since, AFL has urged the Equal Employment Opportunity Commission ("EEOC") to investigate Nascar, Activision Blizzard, Kellog, and more than a dozen other companies over their alleged use of gender and racial preferences,[9] and has brought direct litigation against companies like Target and Amazon challenging their **DEI** programs.[10] As is particularly relevant to readers of this article, in October 2023 the group sued **New** York University ("NYU") alleging that its Law Review selection process gives "unlawful and discriminatory preferences to women, non-Asian racial minorities, and homosexual and transgender individuals" in violation of Title VI and Title IX of the Civil Rights Act.[11]

The American Alliance for Equal Rights ("AAER"), a nonprofit founded by conservative activist Edward Blum, who led the affirmative action challenge in *SFFA*, also filed litigation challenging diversity fellowships at law firms such as Perkins Coie, Morrison & Foerster, and Winston & Strawn,[12] successfully persuading the law firms to voluntarily ***189** change the eligibility criteria for their **DEI** fellowships to minimize litigation risk.[13] AAER has also been successful thus far in its lawsuit against Fearless Fund, an Atlanta-based venture capital firm that aims to "bridge the gap in venture capital funding for women of color founders,"[14] obtaining a preliminary injunction from the Eleventh Circuit prohibiting the fund from running a grant program that awards funding to businesses that are at least 51% owned by Black women.[15] Additional litigation appears likely from at least some of the thirteen Republican state attorneys general who sent a letter to chief executives of the 100 largest U.S. companies in the days after the *SFFA* decision reminding them of their "obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of 'diversity, equity, and inclusion' or otherwise."[16]

Despite the potential applicability of the Court's substantive *SFFA* analysis to corporate diversity programs, the success of these challenges will depend first upon their ability to convince federal courts that their claims are justiciable under Article III of the U.S. Constitution--a hurdle which pre-*SFFA* challenges to corporate **DEI** programs largely failed to clear. In October 2022,

just a few weeks before the Supreme Court heard oral arguments in *SFFA*, the U.S. District Court for the Southern District of California considered a lawsuit brought by Jonathan Correll, a white, heterosexual, cisgender man who alleged that Amazon had discriminated against him by implementing programs aimed at highlighting underrepresented sellers on its online retail platform.[17] A few months ***190** later, the U.S. District Court for the Southern District of New York considered a similar challenge from an organizational plaintiff, Do No Harm, which sued Pfizer over a fellowship program the company implemented to promote diversity in hiring.[18] Both courts declined to hear the merits of these claims, instead dismissing them for failing to satisfy the standing requirements of Article III of the U.S. Constitution. A third case, brought against American Express by several individual plaintiffs alleging reverse discrimination claims under Title VII of the Civil Rights Act, is unlikely to result in a substantive ruling because the employees who filed suit had signed contractual agreements requiring them to resolve any employment-related disputes exclusively in arbitration.[19]

Given these outcomes, just as relevant as the Court's substantive decision in *SFFA* are opinions it rendered this term on issues of Article III standing. In three separate cases, *United States v. Texas*,[20] *Biden v. Nebraska*,[21] and *Haaland v. Brackeen*,[22] the Court considered questions about state standing to bring claims against federal government actors. In *Brackeen*, the Court also considered the standing of individual plaintiffs bringing race discrimination claims challenging the constitutionality of the Indian Child Welfare Act ("ICWA") under the Fourteenth Amendment's Equal Protection Clause. In *SFFA* itself, the Court preceded its substantive ruling with an important decision granting the organizational plaintiffs Article III standing. Finally, in *303 Creative LLC v. Elenis*, the Court allowed an individual plaintiff to proceed with her challenge to a Colorado civil rights statute before any enforcement action was taken against her.[23]

In the discrimination cases, the Court continued its historic tendency to relax standing requirements in challenges brought by dominant individuals and groups seeking to challenge laws that uplift historically marginalized individuals and groups. As discussed in the following Part, this liberalizing approach tends to apply only in cases involving dominant ***191** group plaintiffs, while the Court has repeatedly deemed similar claims brought by historically marginalized plaintiffs as non-cognizable. The Court's decision to double down this term on this trend set precedent that could empower challenges to corporate DEI programs, producing substantive outcomes that contravene the Fourteenth Amendment's purpose of guaranteeing equal rights to those historically deprived of such protections.

I. HISTORIC RECOGNITION OF RACE DISCRIMINATION AS AN INJURY

Article III of the U.S. Constitution vests the federal judiciary with the power to decide certain types of "cases" or "controversies."[24] In addition to being courts of limited subject matter jurisdiction, federal courts are also constitutionally required to hear only cases that are justiciable-- that is, matters that can satisfy the cases and controversies requirement of Article III. The modern doctrine of "standing" is the key threshold component of this justiciability requirement and determines who can bring claims before the federal courts. While standing doctrine has evolved over the years, it generally imposes three requirements on a plaintiff seeking to bring a claim in federal court: (1) the plaintiff must have suffered an injury-in-fact, (2) there must be a causal connection between that injury and the named defendant, and (3) the plaintiff must demonstrate that the alleged injury would be redressed by a favorable decision from the court.[25] The Court has made clear that to demonstrate an injury-in-fact, the plaintiff must have sustained a direct injury or be "immediately in danger of sustaining some direct injury" that is "both 'real and immediate,' not 'conjectural' or 'hypothetical.'"[26] The Court has considered the question of whether race discrimination is a cognizable injury under Article III over the past several decades in several contexts, with varying outcomes.

A. Recognition of the Injury in Affirmative Action Cases

In its first major affirmative action decision in 1978, the Court in *Regents of the University of California v. Bakke* granted standing to Allen Bakke, a white plaintiff who challenged U.C. Davis Medical School's admissions program after twice being rejected for admission.[27] Like the plaintiffs in *SFFA*, Bakke challenged the school's admissions ***192** programs as violating the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act in their efforts to increase the representation of disadvantaged students in each class.[28] Several amici in the case argued that Bakke lacked standing because he had not shown that his alleged injury--exclusion from the medical school--would be redressed by a favorable decision from the Court as there was no evidence that Bakke would have been admitted absent any preference for minority candidates.[29] Rejecting this characterization of the injury, the Court granted standing on the grounds that Bakke was deprived of "the chance to

compete with applicants from the preferred groups" for every place in the entering class, and therefore had suffered a cognizable harm. [30]

The Court applied a similar rationale fifteen years later in *Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville* ("*AGC*"), [31] a case considering a challenge to a city ordinance which required that 10% of Jacksonville's contracts be set aside for "Minority Business Enterprises" ("MBEs"). The plaintiff in that case, the Associated General Contractors of America ("AGC"), alleged that its non-minority members "regularly bid on and perform construction work for the City of Jacksonville" and would have bid for the set-aside MBE contracts "but for the restrictions" imposed by the ordinance, which made them ineligible. [32] The Eleventh[th] Circuit Court of Appeals had rejected the claim on standing grounds because the AGC could not show that "one or more of its members would have been awarded a contract but for the challenged ordinance." [33] Analogizing to its decision in *Bakke*, the Supreme Court reversed, concluding instead that when "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the plaintiff need not allege "that he would have obtained the benefit but for the barrier in order to establish standing." [34] In an apparent relaxation of the typical causation requirement of standing, the Court held that the AGC's non-minority contractors had a cognizable ***193** race discrimination claim because they had alleged a "denial of equal treatment resulting from the imposition of the barrier." [35]

Twenty-five years after *Bakke* and ten years after *AGC*, the Court again considered the constitutionality of affirmative action programs in *Grutter v. Bollinger* and echoed the standing approach outlined in *Bakke*. [36] The plaintiff in that case, Barbara Grutter, was a white Michigan resident who applied to the University of Michigan's law school but was waitlisted and subsequently rejected. She alleged that her application was rejected because of the school's use of "race as a predominant factor" in admissions, "giving applicants who **belong** to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups." [37] Without further discussion, the Court concluded that Grutter "clearly has standing to bring this lawsuit," citing to its decision in *AGC*. [38] The Court in *Grutter* narrowly upheld the University of Michigan's affirmative action program, but signaled its willingness to revisit the question in dicta explaining that it "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." [39]

Seeking to capitalize on this opportunity, Students for Fair Admissions ("SFFA") brought actions against Harvard and UNC on behalf of students who had been denied admission to their desired schools because of the school's interest in favoring less-dominant individuals, including, for example, "at least one Asian-American student member who applied for and was denied admission to Harvard's 2014 entering class." [40] Apart from the organizational plaintiff standing considerations ***194** discussed in Part IV, there was little concern at any stage of the litigation that SFFA's individual members satisfied the Article III injury requirement under the Court's now-settled affirmative action standing precedents in *Bakke*, *AGC*, and *Grutter*. [41]

B. Recognition of the Injury in Other Race Discrimination Cases

The Court has occasionally, though less consistently, recognized race discrimination as an "injury in fact" in claims brought by Black and other underrepresented plaintiffs in other contexts. In *Havens Realty Corp. v. Coleman*, for example, the Court considered Article III standing questions in the context of a challenge to racially discriminatory housing practices. [42] The suit was brought by several plaintiffs: a Black man who alleged that Havens Realty Corp. engaged in "racial steering" in violation of § 804 of the Fair Housing Act of 1968 ("FHA") by falsely telling him that it had no apartments available for rent; Housing Opportunities Made Equal ("HOME"), an organizational plaintiff whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area"; and two individuals--one Black and one white--who were employed by HOME as "testers" to determine whether Havens engaged in racial steering in violation of the FHA. [43] Because the suits were brought under § 812 of the FHA, under which "Congress intended standing ... to extend to the full limits of Art. III," the Court's inquiry focused on "the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.'" [44]

The Court concluded that, in addition to the Black individual alleging discrimination, the organizational plaintiff HOME and the testers had pled injuries satisfying the requirements of Article III. [45] Considering the claims brought by the testers, the Court allowed their claims as individuals to proceed because the challenged racial steering practices may have, in the words of the

plaintiffs, "deprived them of the right to important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." [46] With ***195** respect to the Black tester, the Court concluded that she had suffered an injury in the "denial of [her] statutory right to truthful housing information" guaranteed by the FHA, but denied standing to the white tester because he was told that apartments *were* available, which simply served to prove discrimination against the Black tester and other similarly situated housing seekers. [47] With respect to HOME's direct claim, [48] the Court concluded that "there can be no question that the organization has suffered an injury in fact," as the discriminatory practices at issue "have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers." [49]

Two years later, in *Allen v. Wright*, [50] however, the Court seemed to undermine its recognition of injuries akin to those sustained by the Black individual plaintiffs in *Havens*. In *Allen*, parents of Black children in public schools sued the Internal Revenue Service ("IRS") alleging that the agency discriminated against them and their children by failing to deny tax-exempt status to racially discriminatory private schools, [51] which proliferated in the wake of the Supreme Court's decision to desegregate public schools in *Brown v. Board of Education*. [52] Despite the IRS's formal policy of denying tax-exempt status to such racially discriminatory private schools--including by issuing guidelines and procedures on the topic--the plaintiffs in *Allen* alleged that the IRS had nonetheless granted such status to at least seventeen schools or school systems identified in the complaint. [53] In doing so, they argued, the IRS ***196** had thereby "harm[ed] them directly and interfere[d] with the ability of their children to receive an education in desegregated public schools." [54]

With respect to the claim that the parents were directly harmed by the IRS's failings, the Court recognized that while they may have suffered a "stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race," such an injury is non-cognizable under Article III. [55] Despite appearing to recognize in *Havens* a broad, non-economic "right to the important social, professional, business and economic, political and aesthetic benefits" arising from "living in integrated communities free from discriminatory ... practices," [56] the Court in *Allen* concluded that such an injury may serve as a basis for standing only to "those persons who are personally denied equal treatment by the challenged discriminatory conduct." [57] Thus, while the Court recognized that the alleged "noneconomic injury [of race discrimination] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing," it concluded that the parents did not have standing to bring such a claim because, unlike the plaintiffs in *Havens*, they were not directly discriminated against by the IRS. [58] In contrast, however, the Court recognized that the injury alleged by the parents on behalf of their children--specifically, their children's "diminished ability to receive an education in a racially integrated school"--was, "beyond any doubt, not only judicially cognizable but ... one of the most serious injuries recognized in our **legal** system." [59] As discussed in the following Part, however, the Court nonetheless denied them standing, holding the *Allen* plaintiffs to a more stringent but-for causation test than it would apply to the non-minority AGC contractors just a few years later in *AGC*. [60]

***197** *C. Race Discrimination Injuries and Causation*

Despite recognizing the children's injuries as cognizable in *Allen*, the Court nonetheless denied their claims under the second prong of standing analysis, concluding that their injuries were not "fairly traceable to the Government conduct respondents challenge as unlawful." [61] According to the majority opinion authored by Justice O'Connor, the causal connection between the IRS's grant of tax exemptions to racially discriminatory schools and the students' cognizable injury--their "diminished ability to receive an education in a racially integrated school"--was "attenuated at best." [62] According to the majority opinion, the children's injury "would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration." [63] Because the plaintiffs had not made such a showing, the Court concluded that the "links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing." [64]

In complementary dissenting opinions, Justices Brennan and Stevens sharply disagreed with the Court's dismissal of the plaintiffs' claims for failing to satisfy the causation requirements of the Article III standing inquiry. In Justice Brennan's view, "the respondents have alleged a direct causal relationship between the Government action they challenge and the injury they

suffer" because "common sense alone would recognize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools." [65] According to Justice Stevens, the "causation analysis is nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased," and thus the IRS's unlawful conduct altered "the incentive structure facing white parents who seek [racially segregated] schools for their children." [66]

While the *Allen* Court attempted to make clear that it recognized the student plaintiffs' "injury in fact," and instead deliberately dismissed their claims under the causation requirement of Article III, **legal** scholars have questioned the coherence of this distinction. As Harvard Law ***198** School professor and constitutional law expert Cass R. Sunstein explains, in race discrimination cases like *Allen*, the "central problem ... is how to characterize the relevant injury." [67] While the *Allen* Court professed to recognize the student plaintiffs' injury as the "diminished ability to receive an education in a racially integrated school," [68] Sunstein points out that the *Allen* "plaintiffs themselves argued that their injury should be characterized as the deprivation of an opportunity to undergo desegregation in school systems unaffected by unlawful tax deductions," and "thus recharacterized, the injuries are not speculative at all." [69] Rather, when the *Allen* plaintiffs "challenge a grant or tax deductions to segregated schools, they believe that the grant is an injury in fact, not that it is purely ideological." [70] Thus, when the Court denies these claims it is inherently "making a judgment based not on any fact, but instead on an inquiry into what should count as a judicially cognizable injury." [71]

Sunstein's argument that the outcome of the Court's standing analysis tends to turn on normative factors like the identity of the plaintiffs is bolstered by the apparent dissonance between the Court's causation analysis in *Allen* and its holding a few years later in *AGC*. [72] Applied to the facts in *Allen*, the Court's *AGC* analysis indicates that the children need not prove that, but for the IRS's discriminatory behavior, they would have received access to equal educational opportunity. Yet this is precisely the requirement the Court imposed on the Black plaintiffs challenging a discriminatory barrier in *Allen*.

D. Race Discrimination Injuries and Redressability

The third and final prong of Article III's standing requirement, redressability, requires the plaintiff to demonstrate that their injury can be redressed by a favorable ruling from the Court. Yet just as the causation ***199** and injury requirements are often blurred, as they appear to have been in *Allen* and *AGC*, so too can questions of injury and redressability. This phenomenon can best be demonstrated by the Court's decision in *Los Angeles v. Lyons*, a case challenging the Los Angeles Police Department's ("LAPD's") use of chokeholds. [73] The plaintiff in that case, a Black man named Adolph Lyons, was pulled over for a broken taillight, and, despite offering "no resistance or threat whatsoever," was placed in a chokehold by the police officers, "rendering him unconscious and causing damage to his larynx." [74] Lyons sought damages and injunctive relief to bar the City of Los Angeles from using chokeholds in the future in situations like his where the police face no immediate threat of deadly force. [75]

While the Court recognized that Lyons's damages claims could clearly be redressed by judicial relief, it dismissed his request for injunctive relief for failing to satisfy the requirements of Article III standing. In a deeply problematic majority opinion for the Court, Justice White concluded that the fact that Lyons had been choked in one specific instance "does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part" in the future. [76] The Court likewise dismissed his "additional allegation ... that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force" for "fall[ing] far short of the allegations that would be necessary to establish a case or controversy between these parties." [77] According to the Court's tenuous reasoning, Lyons's claim for injunctive relief therefore could not be addressed by a favorable decision by the Court because the threat that he would again be placed in a chokehold by the LAPD was not sufficiently "real and immediate." [78] This notion--that injuries, even if otherwise potentially cognizable, can be too speculative to satisfy the redressability prong of Article III--is one that likewise felled pre-*SFFA* challenges to corporate **DEI** efforts. For the reasons discussed in the next Part, however, those claims may require reconsideration in light of the Supreme Court's recognition of similarly speculative injuries this term.

*200 II. INJURY ANALYSIS IN CORPORATE DIVERSITY, EQUITY, AND INCLUSION ("DEI") AND 2023 SUPREME COURT CASESS

A. Race Discrimination Injuries in Pre-Students for Fair Admissions ("SFFA") Corporate DEI Challenges

In August 2022, four employees of American Express ("AmEx") filed a complaint challenging the company's anti-racism and **DEI** initiatives in the District of Arizona. [79] The employees alleged that the company's Board of Directors and CEO "decided that they wanted the percentage of black employees in the company to match that of the U.S. population" and accordingly "implemented policies to achieve that numerical goal without any regard for employees in unfavored racial categories." [80] Referring to this diversity goal as a form of "racial engineering," the plaintiffs accused AmEx of "ruthlessly implement[ing] a racial caste and quota system in the company" by using a "carrot-and-stick approach for enforcing its racial quotas." [81]

The four individual employee-plaintiffs alleged that an array of the company's **DEI** initiatives--ranging from conducting pay equity audits, to mandating unconscious bias trainings, to the creation of BLM stickers--fostered a "racially toxic" work environment for white employees that "resulted in hundreds of white employees being terminated or forced to leave the company." [82] One of the plaintiffs, Brian Netzel, alleged that after he spoke to his manager about what he characterized as "an uncomfortable and racially hostile environment for ... white employees," he faced retaliation and ultimately was "terminated because of his race and because he spoke out against AmEx's racially discriminatory policies." [83]

Netzel subsequently filed discrimination and retaliation charges with the EEOC and received a Notice of a Right to Sue, prompting him to file a complaint alleging violations of Title VII of the Civil Rights Act and § 1981 of the Civil Rights Act of 1866. [84] In response, AmEx filed a motion to dismiss and compel arbitration. Because it appears that ***201** Netzel and his co-plaintiffs are likely subject to the company's mandatory arbitration policies, it is unlikely that additional jurisdictional questions--including the justiciability of claims under Article III--will come before the court any time soon. But a similar lawsuit filed by another individual plaintiff, Brian Correll, hinges on this very question.

Correll likewise filed a race discrimination claim against Amazon, challenging the company's programs to promote, encourage, and incentivize minority certified sellers on its retail platform. Amazon states that it purposefully implemented such policies "to increase the diversity of its seller population so that customers have the greatest possible choice." [85] Correll sees it differently: He alleges that by implementing such programs, Amazon "discriminates against, boycotts, blacklists, and refuses to contract or trade with" heterosexual white men and nonbinary, non-Black, or non-Hispanic people thereby denying them "full and equal accommodations, advantages, facilities, privileges, or services" in violation of California law. [86]

Correll alleges that he visited Amazon's website "with the intent to use Amazon's internet-based sales services to sell products" but declined to do so because the challenged programs "marginalized heterosexual White males" and thereby discriminated against him under California law. [87] While Correll has yet to attempt to sell any items through Amazon's platform, he nonetheless alleges these policies injure him and others similarly situated by causing "discontent, divisiveness, animosity, harm, resentment, and envy" among Amazon sellers. [88] In the words of the district court, Correll "contends that because he viewed identity-based incentive programs on the Amazon Seller site that he could not qualify for, he was subject to discrimination, and accordingly suffered an injury in fact." [89]

The district court disagreed and dismissed the case for lack of standing, noting that "[g]eneralized grievances have long been considered insufficient to confer standing under Article III." [90] Quoting *Allen*, the court explained that in past race discrimination cases, the "asserted ***202** right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." [91] Because Correll pled "no facts to show he was 'able and ready' to sell" items on Amazon's retail platform, the court concluded that he failed to "plead a particularized injury sufficient to support an inference of injury-in-fact." [92] In his subsequent amended complaint, Correll has alleged that he "had and continues to have the direct and specific intent to establish an Amazon Professional Seller account and sell his products on Amazon.com" but has not done so because Amazon's programs make clear that "his business would be at a competitive disadvantage" because of his race, gender, and sexual orientation. [93]

As in the affirmative action cases and *Allen*, recognition of Correll's injury ultimately turns on the characterization of the alleged harm. Correll can claim on appeal that, like the rejected students in *Bakke*, *Grutter*, and *SFFA*, and the non-MBE contractors in *AGC*, his injury is the denial of the *opportunity* to compete for sales on Amazon's platform, not any actual impact to his current or future sales because of Amazon's Seller Certification Program. As discussed in the next Part, his appeal on standing grounds is likely to be further bolstered by the Supreme Court's recognition of similar race discrimination injuries in *Haaland v. Brackeen*, and its willingness to allow a speculative injury to proceed in challenging Colorado's civil rights statute in *303 Creative v. Elenis*.

B. Recognition of Race Discrimination Injury in Haaland v. Brackeen

Alongside *SFFA* this term, the Court considered Fourteenth Amendment Equal Protection race discrimination claims in *Haaland v. Brackeen*, challenging ICWA.[94] Like the affirmative action programs at issue in *SFFA*, the child placement procedures outlined in ICWA were enacted to remedy a historic pattern of racial discrimination against Indian families, "an alarmingly high percentage of [whom were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies."[95] Among other requirements, ICWA therefore contains preferences for placing Indian children with ***203** Indian families or institutions over other non-Indian individuals or institutions seeking child custody.[96]

Various plaintiffs--including a birth mother and several aspiring and actual foster and adoptive parents (none of whom are "Indian" under the statutory definition),[97] as well as the States of Texas, Louisiana, and Indiana--filed suit against the United States and other federal parties claiming that ICWA illegally discriminates on the basis of race by employing racial classifications that "hinder non-Indian families from fostering or adopting Indian children."[98] In doing so, the *Brackeen* plaintiffs alleged race discrimination injuries similar to those in *Allen*, *Havens*, *AGC*, and *SFFA*: namely, that ICWA's racial preferences "make[] it more difficult for members of one group to obtain a benefit than it is for members of another group."[99] Under ICWA's hierarchy of preferences, non-Indian parents are generally last in line for potential adoption or foster care placements. Accordingly, the individual plaintiffs in *Brackeen* alleged that it was more difficult for them to obtain a benefit--a foster or adoption placement--than members of another racial group because of ICWA's placement preferences. This comparative difficulty, they argued, caused them a cognizable injury-in-fact.

The defendants in *Brackeen*--tribal entities and federal parties--argued that the plaintiffs' alleged injuries were too speculative to confer Article III standing, because, like Lyons, they could not demonstrate that any future harm was likely, let alone "real and immediate."[100] The named plaintiffs, the Brackeens, had successfully finalized adoption of an Indian child despite ICWA's placement preferences and initial resistance from the Navajo Nation.[101] The Brackeens nonetheless maintained that they had standing to bring their challenge to ICWA because they sought to adopt another child and "hope to foster and adopt other Indian children in the future, [but] their fraught experience" with the first adoption "makes them hesitant to do so."[102] Another couple challenging ICWA, the Librettis (joined by Altagracia Hernandez, the birth ***204** mother of the child the Librettis adopted),[103] likewise underwent an adoption proceeding under ICWA that resulted in a finalized successful adoption but nonetheless "stayed in the litigation because they planned to foster and possibly adopt Indian children in the future."[104] A final couple involved in the lawsuit, the Cliffords, were denied adoption of an Indian child pursuant to ICWA and "intend to foster or adopt Indian children in the future."[105]

While the Brackeens and Cliffords could allege that, like Lyons, they were harmed by past actions, none of the individual plaintiffs were in the midst of an ongoing adoption or foster care placement proceeding governed by ICWA. Thus, under the *Lyons* rationale, they did not face a "real and immediate" threat of being harmed by ICWA's placement preferences again in the future. Some of the individual plaintiffs alleged that ICWA's race-conscious provisions harmed them during state court child custody cases, which had ended by the time they initiated the federal litigation.[106] Others, like the Brackeens, had successfully adopted Indian children, despite ICWA's placement preferences.[107] While all the individual plaintiffs who had already **pursued** adoption or foster care placements under ICWA claimed that they intended to do so again for additional children in the future, the tribal defendants argued that such prospective injuries were "especially inadequate" in the child adoption context, as "parents cannot by fiat conjure children" and a "child might not come forward needing care," let alone one who would be subject to ICWA's placement preferences.[108]

Writing for the Court, Justice Amy Coney Barrett, an adoptive parent herself, [109] recognized the individual plaintiffs' alleged injuries as ***205** cognizable, writing without further explanation that the "racial discrimination they allege counts as an Article III injury." [110] Given the lack of clarity around when racial discrimination claims are cognizable under *Allen*, which remains binding precedent, the Court's lack of analysis or explanation on this front is striking. In a footnote, the Court recognized the tribal defendants' "objections to the individual petitioners' standing, including that the alleged injury is speculative because it depends on future proceedings to foster or adopt Indian children," [111] but declined to address it.

Despite recognizing an injury based in racial discrimination, the Court nonetheless rejected "the standing of all individual petitioners on the ground of redressability." [112] The denial of standing in this case rested more on federalism principles than on any race-related considerations, a fact bolstered by the Court's clear recognition of the individual plaintiffs' race discrimination injuries as cognizable. Instead, the Court explained that it could not hear the individual plaintiffs' claims because their requested remedy, "enjoining the federal parties" from enforcing ICWA, "would not remedy the alleged injury, because state courts apply the placement preferences, and state agencies carry out the court-ordered placements." [113] As a result, the requested injunctive relief "would not give petitioners **legally** enforceable protection from the allegedly imminent harm." [114]

Despite its ultimate rejection of the individual *Brackeen* plaintiffs' race discrimination claims, its recognition of their alleged harms as cognizable injuries, together with its unwillingness to address the speculative nature of their claims, could serve to bolster anti-corporate **DEI** claims like Correll's. The basis for the court's dismissal of Correll's claim was his inability to prove that he was "ready and able" to sell on Amazon's platform, relying on a belief that, as in *Allen* and *Lyons*, the plaintiff's claims were too speculative to satisfy the requirements of Article III standing. But, as Sunstein points out, the causation and redressability prongs of the Article III standing inquiry often turn, in the end, on how the initial injury-in-fact is characterized. On appeal, Correll can point to the Court's recognition of the Brackeen individual plaintiffs' race discrimination injury as clearly cognizable under Article III, bolstering his claims. And while *Brackeen* failed to squarely address the ***206** question of how speculative such claims can be, another discrimination-related case decided this term, *303 Creative v. Elenis*, indicates the Court's willingness to relax the immediacy requirement of standing, particularly in cases involving challenges brought by dominant group plaintiffs.

C. Recognition of Speculative Injury in 303 Creative v. Elenis

While not a straightforward race discrimination case, the Court's opinion in *303 Creative v. Elenis* [115] this term contains important standing analysis that is relevant to plaintiffs seeking to challenge corporate **DEI** programs. The case involved a challenge to the Colorado Anti-Discrimination Act ("CADA"), which prohibits all "place[s] of public accommodation" from denying "the full and equal enjoyment" of its goods and services to any customer based on race, disability, sexual orientation, and other statutorily enumerated traits. [116] The plaintiff, Lorie Smith, challenged the law as unconstitutionally violating her First Amendment free speech rights by requiring her to design wedding websites for same-sex couples in violation of her religious belief that marriage is a union between one man and one woman. [117] Accordingly, Smith sought an injunction in federal court to prevent the state from requiring her to create wedding websites for same-sex couples. [118]

In its own words, the Court explained that Smith brought her lawsuit to "clarify her rights" under Colorado law before even entering the wedding business. [119] Such a request for relief typically contravenes the requirements of Article III standing. In *Fairchild v. Hughes*, for example, the Court rejected a constitutional challenge to the enactment of the Nineteenth Amendment on the grounds that the plaintiff was seeking to challenge "the enforcement ... of the penalties to be imposed by a contemplated act of Congress which plaintiff asserts would be unconstitutional" before any adverse action had been taken against the plaintiff. [120] The Court's *Fairchild* opinion is difficult to square with its holding in *303 Creative*: In both cases, the plaintiff sought a declaration by the Court that an act violates the constitution before its actual enforcement and associated adverse effects on the plaintiff. Such pre-enforcement claims are not generally cognizable under Article III because, as the Court explained in *Fairchild*, "the right, possessed by every citizen, to ***207** require that the government be administered according to law ... does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute ... will be valid." [121]

Smith alleged that, although she had not yet entered the wedding website business, she nonetheless faced a "credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse." [122] As evidence, she pointed to CADA's past civil rights investigations and enforcement actions against other businesses that had denied services to individuals on the basis of sexual orientation. [123] Because no party challenged Smith's standing, the Court declined to address the issue, leaving in place the Tenth Circuit's conclusion that Smith satisfied the requirements of Article III by showing that "Colorado has a history of past enforcement against nearly identical conduct" and that anyone in the state may file a complaint against Smith which would "initiate 'a potentially burdensome administrative hearing' process." [124] Accordingly, the Court granted standing to Smith's claim and struck down CADA's protections for LGBTQIA+ individuals as inconsistent with Smith's right to free speech and expression under the First Amendment.

Objectively, the Court's unwillingness to inquire further into the standing issue in Smith's claim of a potential future injury in the event of a hypothetical enforcement action is difficult to square with the Court's denial of Lyons's claim for a preliminary injunction on the grounds that his similarly future prospective injury was not sufficiently "real and immediate." [125] This is particularly true given that, unlike Smith, who had experienced *no* adverse action from the government under CADA, Lyons had in fact been put in a chokehold that rendered him unconscious by virtue of the LAPD policy he sought to challenge in court. Perhaps the Court in *303 Creative* and *Brackeen* is now recognizing, albeit in a very different context, Justice Marshall's dissenting argument about the problematic **framework** endorsed by the majority in *Lyons*. By holding that Lyons had no standing to sue, the Court endorsed a system in which "a federal court is without power to enjoin the enforcement of [a state or city] policy, no matter how flagrantly unconstitutional it may be," because, given the Court's characterization of Lyons' injury as too speculative, "no one can show that he will be choked ***208** in the future, no one--not even a person who, like Lyons, has almost been choked to death." [126] It seems more likely that the Court's standing analysis in *303 Creative* proves Sunstein's argument that such decisions ultimately turn on the Court's subjective preferences and implicit biases, thereby tending to favor plaintiffs from dominant groups over historically marginalized individuals. Regardless of the Court's intention, its opinions in *303 Creative* and other cases this term are likely to bolster challenges to corporate **DEI** programs like Correll's that have thus far failed to proceed to the merits stage of litigation due to their speculative nature.

III. STATE STANDING TO BRING RACE DISCRIMINATION CLAIMS

A. Parens Patriae Standing in 2023 Supreme Court Cases

In certain circumstances states can bring suit in their own capacity under the doctrine of "parens patriae," which translates to "parent of the country." [127] Although there have been some instances in which states have been permitted to sue the federal government under a parens patriae theory of standing, [128] for the most part it is established law that a state may not invoke the doctrine to challenge a federal statute as unconstitutional. [129] The theory of parens patriae standing rests on the idea that the state is acting in the best interests of (literally, as the "parent") of the country, not the state itself. [130] Thus, as the Court in *Massachusetts v. Mellon* explained, the doctrine recognizes that a state can, in some circumstances, appropriately sue in a parens patriae capacity "for the protection of its citizens," but that same logic does not apply when the state is suing to enforce its citizens' rights "in respect of their relations with the federal government." [131] That is because, in cases involving the federal government, "it is the United States, and not the state," which is acting as the parent of the country. [132]

The State of Texas nonetheless joined the individual plaintiffs in *Brackeen* in suing the federal parties responsible for enacting and enforcing ***209** ICWA "on multiple constitutional grounds," arguing that the statute "exceeds federal authority, infringes state sovereignty, and discriminates on the basis of race." [133] Recognizing the unlikelihood that it would succeed on a parens patriae theory against the federal government, Texas instead alleged that having to comply with ICWA in a "racially biased manner" created a distinct "sovereign injury." [134] Texas argued that, because it is racially biased, "ICWA forces Texas to violate its own constitutional obligations," thereby "requiring it to break its promise to its citizens that it will be colorblind in child-custody proceedings." [135]

The Court in *Brackeen* dismissed Texas's claims for lack of standing under both parens patriae and its alleged sovereign injury theory. [136] In her majority opinion, Justice Barrett noted that because Texas "does not have standing as parens patriae to bring an action against the Federal Government," this "should make the issue open and shut." [137] With respect to the sovereign injury

claim, she concluded it was a "thinly veiled attempt to circumvent the limits on parens patriae standing," which prevents states from invoking the theory to file "a suit against the Federal Government." [138] The Court rejected Texas's "creative arguments for why it has standing despite these settled rules," including its "'unclean hands' injury" alleging that ICWA forces Texas to violate its own constitutional obligations. [139] Such an injury, Justice Barrett wrote, "is not the kind of 'concrete' and 'particularized' 'invasion of a **legally** protected interest' necessary to demonstrate an 'injury in fact,'" [140] and recognizing it as such would mean that "a State would always have standing to bring constitutional challenges when it is complicit in enforcing federal law." [141]

However, the case Justice Barrett relied upon to foreclose Texas's parens patriae standing as an "open and shut" issue *does* permit a state to assert a "quasi-sovereign" interest on behalf of its citizens in similar circumstances, as long as the suit is against a private party, not the federal ***210** government. In *Snapp & Son, Inc. v. Puerto Rico*, [142] the Court considered a claim by Puerto Rico alleging that individuals and companies in Virginia's apple industry had violated two federal laws--the Wagner-Peyser Act [143] and the Immigration and Nationality Act of 1952 [144] --which prohibited discrimination against United States workers in favor of foreign workers. In doing so, Puerto Rico alleged that the defendants in the case had discriminated against Puerto Rican farmworkers in violation of federal law. [145]

The Court concluded in *Snapp & Son* that Puerto Rico had parens patriae standing to assert a "quasi-sovereign interest" on behalf of its citizens to ensure their federally protected **legal** right to participate in the labor market free from discrimination. [146] Because the lawsuit alleged that defendants "discriminated against Puerto Ricans in favor of foreign laborers," thereby "den[ying] the benefits of access to domestic work opportunities that the Wagner-Peyser Act and the Immigration and Nationality Act of 1952 were designed to secure for United States workers," the Court concluded that Puerto Rico had parens patriae standing. [147] In the corporate **DEI** context, the concern of the state attorneys general that corporate **DEI** programs violate existing federal laws intended to protect workers from discrimination clearly parallels Puerto Rico's allegation that discriminatory federal labor laws injured its citizens in *Snapp & Son*. As a result, Justice Barrett's reliance on *Snapp & Son* as definitive in resolving questions of state standing could serve to bolster any future claims by state attorneys general against corporations that administer **DEI** programs.

Moreover, while the Court rejected Texas's parens patriae standing in *Brackeen*, it granted standing to Missouri in another challenge to the federal government's actions in *Biden v. Nebraska*, [148] one of two cases challenging the Biden Administration's student loan relief program this term. While the Court did so under the theory that Missouri had suffered a direct injury, and therefore not under a parens patriae theory, the dissent characterized the challenge as similar in nature to Texas's ICWA challenge in *Brackeen*. As Justice Kagan wrote in her dissenting opinion, the harm Missouri alleged to its citizens in *Biden v. Nebraska* cannot escape the "canonical limit on a State's ability to ride on third parties: A State may never sue the Federal Government based on its ***211** citizens' rights and interests." [149] Citing *Snapp & Son* and quoting *Brackeen*, Kagan argued that Missouri should have been denied standing under a theory of harm to its own citizens. [150] The divergent views of the Court in *Brackeen* and *Biden v. Nebraska* demonstrate what University of Chicago Law School professor and established constitutional law expert Aziz Huq has recognized as "a puzzling and nonstandard patterning" of decisions by the Supreme Court, resulting in "divergent, seemingly inconsistent, positions" that produce a standing doctrine that is "inconstant and unstable." [151] Such a lack of clarity could serve to bolster the claims of the state attorneys general threatening anti-corporate **DEI** litigation, particularly in a **landscape** where such claims have been recognized as substantively meritorious by the Court in *SFFA*. [152]

B. Threatened State Corporate DEI Litigation

Although no state attorney general has commenced litigation against a private corporation in the wake of *SFFA* at the time of this Article's publication, such a challenge seems inevitable in light of the July 13, 2023 letter sent on behalf of thirteen states to Fortune 100 CEOs. [153] The letter quotes the Court's opinion in *SFFA* and highlights that, in the context of Harvard's affirmative action program, the Court "recognized that federal civil-rights statutes prohibiting *private* entities from engaging in race discrimination apply at least as broadly as the prohibition against race discrimination found in the Equal Protection Clause." [154] Echoing sentiments in the *Netzel* and *Correll* complaints discussed in Part II.A., the letter characterizes corporate **DEI** programs as problematic initiatives that draw "crude lines based on skin color" in violation of both federal and state anti-discrimination laws. [155]

***212** The letter takes specific aim at a Microsoft program that sets "a quota for the number of Black-owned approved suppliers over three years and demand[s] annual diversity disclosures from its top 100 suppliers." [156] According to the letter, Microsoft also publicly announced that, over a three-year period, "it would set quotas for transaction volumes through Black-owned banks and external managers as well as for the number of Black-owned U.S. partners." [157] Quoting Justice Clarence Thomas's concurrence in *SFFA*, the attorneys general argue that programs like Microsoft's create racial preferences which "'stamp' the preferred races 'with a badge of inferiority' and 'taint the accomplishments of all those who are admitted as a result of racial discrimination.'" [158] In addition to harming those whom such programs purport to benefit, the states allege that "every racial preference necessarily imposes an equivalent harm on individuals outside of the preferred racial groups, solely on the basis of their skin color." [159] Invoking their parens patriae role, they explain that as "Attorneys General, it is incumbent upon us to remind *all* entities operating within our respective jurisdictions of the binding nature of American anti-discrimination laws," that "race-based employment and contracting violates both state and federal law, and as the chief law enforcement officers of our respective states we intend to enforce the law vigorously." [160]

The attorneys general seem to be anticipating filing litigation under Title VII, as they quote the statute explicitly and make the point that the same principles that governed the Court's decision in *SFFA* "apply equally to Title VII." [161] Because such a lawsuit would be intended to ensure their citizens enjoy the benefits of federal anti-discrimination laws, the Court's reliance on *Snapp & Son* in *Brackeen* this term is instructive. While the Court rejected Texas's assertion of parens patriae standing in *Brackeen*, it did so primarily because Texas had filed suit against the federal government. But where states file suit against private parties asserting rights created by the federal government--as in *Snapp & Son*, which involved Puerto Ricans' right to be free from employment-related discrimination--the Court is more likely to allow states to invoke a "quasi-sovereign" interest theory.

***213 IV. ORGANIZATIONAL STANDING TO BRING RACE DISCRIMINATION CLAIMS**

Although the foregoing discussion has focused on claims brought by individual plaintiffs and state plaintiffs, the successful challenges to affirmative action programs in *SFFA* were not brought by either. Instead, *SFFA* was brought by an organizational plaintiff, Students for Fair Admissions (SFFA), a nonprofit membership group of more than 20,000 students, parents, and "others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional." [162] In cases where the plaintiff is an organization, rather than an individual, the organization must either allege a direct injury or assert standing on behalf of its members. [163]

To assert standing on behalf of its members, an organization must prove that its members would have standing to sue in their own right--in other words, that they meet the three-part test of injury, causation, and redressability. [164] In addition, an organizational plaintiff must also establish that: (1) "the interests it seeks to protect are germane to the organization's purpose" and (2) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." [165] Various challenges to corporate **DEI** programs--both before the *SFFA* decision and in the wake of it--have been brought by organizational plaintiffs. While one key pre-*SFFA* case, *Do No Harm v. Pfizer*, [166] had been unsuccessful in surmounting these standing hurdles, the Court's standing analysis in *SFFA* makes it more likely that the organizational plaintiff in that case, and in future cases to come, will have more success.

A. Organizational Plaintiff Challenges to Corporate DEI Programs

A key pre-*SFFA* case in the corporate **DEI** space involves a lawsuit filed by an organization called Do No Harm. Like SFFA, Do No Harm was launched just five months before it filed its first lawsuit, [167] with a mission to "protect healthcare from radical, divisive, and discriminatory ideologies, including the recent rise in explicit racial discrimination in ***214** graduate and postgraduate medical programs." [168] In one of its first acts as an organization, it assisted doctors in suing the Biden administration for introducing equity criteria into its Medicare program [169] and subsequently initiated a lawsuit against the pharmaceutical company Pfizer, challenging its corporate **DEI** programs. [170]

Do No Harm challenged Pfizer's Breakthrough Fellowship Program, which Pfizer implemented to "address its challenges with recruiting, retaining, and promoting diverse talent, and to increase underrepresented groups in leadership positions at the company." [171] Applicants to the fellowship must meet certain requirements, including maintaining status as an undergraduate student and a qualifying GPA. [172] Originally, and at the time Do No Harm initiated its lawsuit, applicants also were required to meet "the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans" at the company. [173] According to Do No Harm, this program "categorically excludes white and Asian American applicants" in violation of § 1981 and, because Pfizer receives federal funding, Title VI of the Civil Rights Act of 1964--the same statute SFFA used to challenge Harvard's race-conscious admissions policies. [174]

Like SFFA, Do No Harm is a voluntary membership organization comprised of "physicians, healthcare professionals, medical students, patients, and policymakers" [175] who are aligned with its mission. Members are not required to contribute financially to join the organization but are encouraged to fill out a form on its website "and if possible, chip in a couple bucks" to help Do No Harm advance its mission. [176] Do No Harm invoked associational standing, bringing an action on behalf of two of its purported members--Member A and Member B--submitting ***215** anonymous declarations from them alleging they both suffered harm as a result of Pfizer's Fellowship Program. [177] Like Correll, the members allege that they are "able and ready" to apply to Pfizer's 2023 fellowship class if it stops discriminating by race. [178] Unlike Correll, the members invoked pseudonyms "because they fear reprisal if their participation" if the litigation were to become public. [179]

The district court dismissed Do No Harm's claims for lack of standing on both Article III and statutory grounds. [180] With respect to Article III, the court concluded that Do No Harm failed to establish the first requirement of associational standing: that one or more of its members has standing to sue in their own right. [181] At a minimum, the Court explained, "associational standing requires that a plaintiff identify by name at least one member with standing," and anonymized declarations are insufficient. [182] Moreover, even if the members were identified by name, "the perfunctory two-page anonymous declarations from Members A and B simply track the Fellowship requirements and provide very little facts showing that the members ... were ready and able to apply to the Fellowship." [183] Thus, like Correll, who had not yet sold products on Amazon's platform, the Do No Harm members failed to "show a 'committed interest and intent' to **pursue**" the benefits of the Fellowship program. [184] In March 2024, the Second Circuit affirmed this holding and dismissed Do No Harm's lawsuit on the grounds that organizational plaintiffs must identify at least one injured member by name in order to satisfy the standing requirements of Article III. [185]

The court also found persuasive that the alleged members only joined Do No Harm's "**newly** created organization" because they shared ***216** a "generalized grievance" against Pfizer's **DEI** programs, "not an actual desire by the members to apply to the Fellowship and work at Pfizer." [186] This line of reasoning implies skepticism from the district court as to whether Do No Harm is a legitimate membership organization. However, the district court will now be precluded from exploring this inquiry further due to the Court's decision in *SFFA*, which, as discussed in the next Part, concluded that where "an organization has identified members and represents them in good faith, our cases do not require further scrutiny." [187] Thus, it seems likely that once Do No Harm is able to identify named members who are ready and able to apply to Pfizer's fellowship, their claims, or others like them, will be able to advance to the merits stage of litigation in the wake of the Court's organizational standing analysis in *SFFA*.

B. Organizational Standing Analysis in SFFA

Just as states can assert third-party standing on behalf of their citizens, so too can organizations assert standing on behalf of their members. As in the case of parens patriae standing, even "in the absence of injury to itself, an association may have standing solely as the representative of its members." [188] In *Hunt v. Washington State Apple Advertising Commission*, the Court held that such standing exists if: (1) the organization has members who would themselves have standing to sue, (2) the lawsuit is "germane to the organization's purpose," and (3) the relief sought does not require the participation of the organization's members. [189]

Because *Hunt* involved a lawsuit brought by a state agency, the Washington Apple Commission, rather than a traditional member-based association, the Court also considered whether associational standing is appropriate in circumstances where the organization seeking standing is not a "voluntary membership organization." [190] The *Hunt* Court concluded that "while the apple growers and dealers" alleging injury were not members in the "traditional trade association sense," they nonetheless

possessed "all of the indicia of membership in an organization." [191] Determinative to this conclusion was that the Commission's members alone elected other members, served on the Commission, and financed ***217** its activities. [192] Courts have since invoked this indicia of membership test to determine if organizations that are not traditional voluntary membership organizations should nonetheless be permitted to invoke organizational standing. [193]

Students for Fair Admissions, the organizational plaintiff in the affirmative action cases, was incorporated on July 30, 2014 as a 501(c)(3) non-profit organization in order to "defend human and civil rights secured by law, including the right of individuals to equal protection under the law, through litigation and any other lawful means." [194] Less than six months later, in November 2014, it filed suit against Harvard. When founded, the organization consisted of three self-appointed members and, by the time it initiated the lawsuit, forty-seven "affiliate members" who did not pay dues and could not vote for any officers or directors. [195] SFFA updated its bylaws in June 2015 to remove "affiliate members" and substitute them with "general members" who could vote for a member-elected director and were required to pay dues. [196] By 2017, the organization had approximately 20,000 general members. [197]

From the outset, Harvard conceded that SFFA met the basic three requirements to assert organizational standing: (1) at least one of its members possessed standing to sue in their own right, (2) the interests of the lawsuit were germane to SFFA's purpose, and (3) neither the claim asserted nor the relief demanded required the personal participation of the affected individuals. [198] On appeal, UNC urged the Supreme Court to apply *Hunt*'s "indicia of membership" test to the organization to ascertain whether it is a "genuine" membership organization. [199] Because SFFA's members did not pay dues or have electoral rights at the time it ***218** filed suit, UNC argued that it did not satisfy the "indicia of membership test" set forth in *Hunt*. [200]

The First Circuit rejected the notion that the "indicia of membership" test should apply to SFFA, concluding instead that because SFFA "is, on its face, a traditional voluntary membership organization, the indicia of membership test is inapplicable." [201] Chief Justice Roberts agreed that "SFFA *is* indisputably a voluntary membership organization with identifiable members--it is not, as in *Hunt*, a state agency that concededly has no members." [202] Therefore, the "indicia of membership analysis employed in *Hunt* has no applicability" to SFFA. [203] By refusing to apply the "indicia of membership" test, the Court avoided the question of whether SFFA's non-dues-paying "affiliate" members sufficiently created a legitimate membership organization. Instead, and significantly for future associational standing claims, it concluded that where "an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates." [204] Thus, in the wake of *SFFA*, so long as an organization alleges in good faith that it is a voluntary membership organization, courts are not to inquire further into the legitimacy of their membership structure. This decision has clear implications for **new** organizations, such as Do No Harm, AFL, and AAER, that are seeking to bring challenges to corporate **DEI** programs in the wake of *SFFA*: As long as they can satisfy basic standing requirements, courts will likely not conduct a detailed inquiry into the legitimacy of the organization as the district court did in *Do No Harm v. Pfizer*.

CONCLUSION

A clear correlation exists between the Court's determination in *SFFA* that ending "racial discrimination means eliminating all of it" [205] and the continued **legality** of workplace programs that employ racial preferences. Indeed, the decision is already having a concrete impact on such programs, as defendants like Pfizer and Morrison & Foerster have voluntarily changed the criteria for their fellowship programs in response to initiated litigation, and diversity-focused initiatives like Fearless Fund's grant-making program have been halted by preliminary injunctions. ***219** [206] The Court's **legal** analysis in *SFFA* rested largely on the Fourteenth Amendment's Equal Protection Clause and relied heavily on past Supreme Court decisions, such as *Parents Involved in Community Schools* and *Grutter*, which had already begun to chip away at the use of racial preferences in the education context.

No similar line of Supreme Court cases yet exists regarding diversity initiatives in the workplace. Whether one emerges in the wake of *SFFA* will depend largely on whether the nascent lawsuits discussed in this Article proceed to the merits stage of litigation. The Court's continued willingness to relax standing requirements in discrimination cases involving dominant group plaintiffs, together with other decisions liberalizing standing requirements this term, increases the odds that they will,

with potentially dire implications for workplace **DEI** programs and the continued effectuation of the purpose and intent of the Fourteenth Amendment.

Footnotes

d1 Visiting Professor at CUNY School of Law. The author would like to thank Shea Holman and Courtney Ryan for excellent research assistance, Laura Lane-Steele and Ryan Park for invaluable insights, and the editors of the CUNY L. REV for their feedback and edits in preparing the Article for publication.

1 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

2 *Id.* at 206; *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J.) ("[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

3 Students for Fair Admissions, Inc., 600 U.S. at 230. While Harvard is not a state actor and therefore not subject to the Fourteenth Amendment's Equal Protection clause, it is subject to Title VI of the Civil Rights Act of 1964, which prohibits "discrimination under any program or activity receiving Federal financial assistance" on the ground of race, color or national origin. See 42 U.S.C. § 2000d; The Civil Rights Cases, 109 U.S. 3, 11 (1883). As Chief Justice Roberts explained in his opinion, "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." Students for Fair Admissions, Inc., 600 U.S. at 198 n.2 (quoting Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003)).

4 *Id.* at 230.

5 *Id.* at 231.

6 *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 754 (1985).

7 427 U.S. 445 (1976).

8 *America First **Legal** Puts Woke Corporations, Law Firms, and Hospitals on Notice: All **DEI** Programs and Workplace "Balancing" Based on Race, National Origin, and Sex Violate the Law*, AM. FIRST **LEGAL** (June 29, 2023), https://perma.cc/3HAE-78U8.

9 Riddhi Setty, *Nascar Accused of Bias Against White Men in Diversity Efforts*, BLOOMBERG (Nov. 2, 2023), https://www.bloomberg.com/news/articles/2023-11-02/nascar-accused-of-bias-against-white-men-in-diversity-efforts (on file with CUNY Law Review); Daniel Wiessner, *Ex-Trump Administration Officials Target Corporate Diversity Efforts*, REUTERS, (Aug. 18, 2023, 6:41 AM), https://www.reuters.com/sustainability/ex-trump-administration-officials-target-corporate-diversity-efforts-2023-08-18/ (on file with CUNY Law Review).

10 Wiessner, *supra* note 9; *AFL Files Groundbreaking Class-Action Lawsuit Against Amazon for Illegal Racial Discrimination, Egregious Violations of Civil Rights*, AM. FIRST **LEGAL** (July 30, 2022), https://perma.cc/SZ85-H6FR.

11 John Doe v. N.Y. Univ., No. 23-cv-9187 (S.D.N.Y 2024) (motion to dismiss granted).

12 David Thomas, *Winston & Strawn Is Latest US Law Firm Sued Over Diversity Programs*, REUTERS (Oct. 30, 2023, 1:33 PM), https://www.reuters.com/**legal**/legalindustry/winston-strawn-is-latest-us-law-firm-sued-over-diversity-programs-2023-10-30/ (on file with CUNY Law Review).

13 Tatyana Monnay, *Perkins Coie **DEI** Suit Ended by Anti-Affirmative Action Group*, BLOOMBERG L. (Oct. 11, 2023, 1:53 PM), https://news.bloomberglaw.com/business-and-practice/perkins-coie-**dei**-suit-dropped-by-anti-affirmative-action-group (on file with CUNY Law Review); Tatyana Monnay, *Blum's Group Drops **DEI** Lawsuit Against Morrison Foerster*, BLOOMBERG L. (Oct. 6, 2023, 5:23 PM), https://news.bloomberglaw.com/business-and-practice/blums-group-drops-**dei**-lawsuit-against-morrison-foerster (on file with CUNY Law Review); Nate Raymond, *Affirmative Action Opponent Drops Case over Winston & Strawn's Diversity Fellowship,* REUTERS (Dec. 6 2023, 5:53 PM), https://www.reuters.com/**legal**/legalindustry/affirmative-action-opponent-drops-case-over-winston-strawns-diversity-fellowship-2023-12-06/ (on file with CUNY Law Review).

14 *About*, FEARLESS FUND, https://perma.cc/85JK-4DJP (last visited May 2, 2024).

15 Am. Alliance for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 23-13138, 2024 WL 2812981, at *5, *29 (11th Cir. June 3, 2024).

16 Letter from Kris W. Kobach, Kansas Attorney General, et al. to Fortune 100 CEOs 1 (July 13, 2023), https://perma.cc/B934-6LLB [hereinafter State Attorneys General Letter]; *State Attorney Generals' Warning to CEOs May Chill **DEI** Initiatives*, FORBES (July 18, 2023), https://perma.cc/TC84-2EDV.

17 Correll v. Amazon.com, Inc., No. 21-cv-1833, 2022 WL 5264496 (S.D. Cal. Oct. 6, 2022).

18 Do No Harm v. Pfizer Inc., 646 F. Supp. 3d 490 (S.D.N.Y. 2022).

19 *See* Netzel v. Am. Express Co., No. 22-cv-1423, 2023 WL 4959587 (D. Ariz. Aug. 3, 2023) (finding that "[p]laintiffs' claims are subject to arbitration under the plain language of their agreements" and granting AmEx's Motion to Compel Arbitration dismissing the complaint).

20 599 U.S. 670 (2023).

21 143 S. Ct. 2355 (2023).

22 599 U.S. 255 (2023). Whether this case involved straightforward race discrimination claims is debatable, as the tribal defendants argued that ICWA's placement preferences are based on tribal citizenship, not race. However, because the Court itself agreed with the plaintiffs' characterization of the relevant claims as race discrimination allegations, this Article uses that classification because of its potential implication for race-based challenges to corporate **DEI** programs.

23 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

24 U.S. CONST. art. III, § 2.

25 *See generally* Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016).

26 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (first quoting Massachusetts v. Mellon, 262 U.S. 447, 488-89 (1923); and then quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

27 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

28 *Id.* at 269-70.

29 *Id.* at 280 n.14.

30 *See id.* at 280 n.14, 319 (emphasis added).

31 Ne. Fla. Chapter of the Associated Gen. Contractors v. Jacksonville, 508 U.S. 656 (1993).

32 *Id.* at 659.

33 *Id.* at 664.

34 *Id.* at 666, 669.

35 *Compare id.* at 666, with Allen v. Wright, 468 U.S. 737, 757-59 (1984) (finding an insufficient causal connection between IRS-granted tax exemptions for segregated schools and Black students' "diminished ability" to attend integrated schools).

36 *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

37 *Id.* at 316-17 (internal quotation marks and citations omitted).

38 *Id.* at 317.

39 *Id.* at 343-44.

40 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 261 F. Supp. 3d 99 (D. Mass. 2017). *See also* DP1: Profile of General Population and Housing Characteristics, U.S. Census Bureau, https://perma.cc/W6N9-F4KU (last visited May 19, 2023) (reporting that Asian-Americans make up only approximately 7% of the country's total adult population); *see, e.g.,* Robert S. Chang, *Toward an Asian American **Legal** Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1251-58, 1289-1303 (1993) (outlining the history of anti-Asian oppression and exclusion in the United States). Nevertheless, SFFA's lawsuit on behalf of this Asian-American plaintiff is akin to the lawsuits brought by white plaintiffs in *Bakke* and *Grutter* because it challenged the schools' practices of denying admission to members of racial groups that would otherwise likely *receive* admission. This type of suit stands in contrast to traditional discrimination suits brought by members of under-represented racial groups who might be denied admission but for the existence of a challenged affirmative action or **DEI** program.

41 *See* *Students for Fair Admission, Inc.* 600 U.S. at 198-201 ("[r]espondents do not contest that SFFA satisfies [the basic standing requirements], and like the courts below, we find no basis in the record to conclude otherwise.").

42 Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

43 *Id.* at 366-68.

44 *Id.* at 372 (first quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979); and then quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

45 *Id.* at 374, 379.

46 *Id.* at 369.

47 *Id.* at 374-75. Because the white tester was informed that apartments *were* available, the Court concluded that he had suffered no similar disinformation injury and denied him standing to **pursue** his claims.

48 *Id.* at 369. HOME initially alleged both that it had suffered a direct injury and injury on behalf of its members, whom it argued Havens had "deprived of the benefits of interracial association arising from living in an integrated community free of housing discrimination." However, during settlement negotiations, HOME agreed to abandon the organizational standing claim on behalf of its members and, in a subsequent brief, suggested that the Supreme Court "need not decide whether the organization has standing in its representative capacity." *Id.* at 378. Given "HOME's apparent willingness to abandon this claim," the Court declined to "use its resources to resolve an issue for which 'such small embers of controversy ... remain.'" *Id.* (quoting Taggart v. Weinacker's, Inc., 397 U.S. 223, 225 (1970) (per curiam)).

49 *Id.* at 379.

50 Allen v. Wright, 468 U.S. 737 (1984).

51 *Id.* at 739-40.

52 349 U.S. 294 (1955); *see* *Allen*, 468 U.S. at 743-44 (describing the plaintiffs' allegations of growing numbers of racially segregated private schools amidst school desegregation efforts); A History of Private Schools and Race in the American South, S. Educ. Found., https://perma.cc/6BSV-FKLG (last visited May 19, 2024) (describing the unprecedented growth of "segregation academies," designed to "preserve the Southern tradition of racial segregation," in the years following *Brown*).

53 *Allen*, 468 U.S. at 744-45.

54 *Id.* at 739-40.

55 *Id.* at 752-54.

56 Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 (1982).

57 *Allen*, 468 U.S. at 755 (quoting Heckler v. Mathews, 465 U.S. 728, 740 (1984)) (internal quotation marks omitted).

58 *Id.* The Court invoked a "floodgates" argument, noting that if such an "abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating .... A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." *Id.* at 755-56 (internal citation and quotation marks omitted).

59 *Id.* at 756.

60 *Compare* *Allen*, 468 U.S. at 757-59, with Ne. Fla. Chapter of the Associated Gen. Contractors v. Jacksonville, 508 U.S. 656, 666 (1993) (explaining that but-for causation is not required "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group").

61 *Allen*, 468 U.S. at 756-57.

62 *Id.*

63 *Id.* at 758.

64 *Id.* at 759.

65 *Id.* at 774 (Brennan, J., dissenting).

66 *Id.* at 788 (Stevens, J., dissenting).

67 Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1464 (1998).

68 *Allen*, 468 U.S. at 756.

69 Sunstein, *supra* note 67, at 1465.

70 Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 189 (1992).

71 *Id.*

72 *See id.* at 188-89 (asserting that "courts must inevitably rely on some standard that is normatively laden and independent of facts" when classifying harms as either injuries in fact or ideological). As discussed in Part I.A., the Court in *AGC* held that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," a member of the group impacted by the barrier "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Ne. Fla. Chapter of the Associated Gen. Contractors v. Jacksonville, 508 U.S. 656, 666 (1993).

73 Los Angeles v. Lyons, 461 U.S. 95 (1983).

74 *Id.* at 97-98.

75 *Id.* at 98.

76 *Id.* at 105.

77 *Id.*

78 *Id.*

79 Complaint, Netzel v. Am. Express Co., No. 22-cv-1423 (D. Ariz. 2023).

80 *Id.* at ¶ 2.

81 *Id.* at ¶¶ 3, 5.

82 *Id.* at ¶¶ 8, 35-38, 43, 51.

83 *Id.* at ¶¶ 92-93, 97.

84 Pursuant to Title VII, employees seeking to file a lawsuit alleging discrimination under the statute must first file a formal charge with the EEOC, which conducts an investigation and issues a Notice of a Right to Sue once it concludes that

the employee properly exhausted all available administrative remedies (a prerequisite for bringing a federal lawsuit under Title VII) and that the EEOC does not wish to **pursue** further action on the matter as an agency. 42 U.S.C. § 2000e-5(b), (f)(1).

85 Order Granting Motion to Dismiss Plaintiffs' Complaint Under Fed. R. Civ. P. 12(b)(1) With Leave to Amend at 10, Correll v. Amazon.com, Inc., No. 21-1833 (S.D. Cal. 2023) (quoting Memorandum of Points and Authorities in Support of Motion to Dismiss at 12, *Correll*, No. 21-1833).

86 First Amended Class Action Complaint at ¶¶ 23-24, 26-27, 29-30, 32-33, 35-36, 38-39, *Correll*, No. 21-1833 (S.D.N.Y. 2022).

87 *Id.* at ¶ 50.

88 *Id.* at ¶ 44.

89 Order Granting Motion to Dismiss Plaintiffs' Complaint Under Fed. R. Civ. P. 12(b)(1) With Leave to Amend, *supra* note 85, at 5.

90 *Id.* at 5-6.

91 *Id.* at 5 (quoting Allen v. Wright, 468 U.S. 737, 754 (1984)).

92 *Id.*

93 First Amended Class Action Complaint, *supra* note 86, at ¶ 51.

94 Haaland v. Brackeen, 599 U.S. 255 (2023).

95 25 U.S.C. § 1901(4); *see also* *Brackeen*, 599 U.S. at 297 (Gorsuch, J., concurring) (explaining that ICWA "did not emerge from a vacuum" but rather "as a direct response to the mass removal of Indian children from their families during the 1950s, 1960s, and 1970s by state officials and private parties" and prior removal policies "initially spearheaded by federal officials with the aid of their state counterparts nearly 150 years ago.").

96 *See, e.g.*, 25 U.S.C. § 1915(a).

97 *See* 25 U.S.C. § 1903(3) (defining "Indian" in the statute as "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation").

98 *Brackeen*, 599 U.S. at 271. Although the states of Louisiana and Indiana initially joined challenges to ICWA, only Texas litigated the issue all the way to the Supreme Court.

99 *Id.* at 292.

100 *Id.* at 292 n.9; see *Lyons* 461 U.S. at 105 (holding that the plaintiff did not have standing because he failed to "establish a real and immediate threat" that officers would again place him in an illegal chokehold).

101 *Brackeen*, 599 U.S. at 268-69.

102 *Id.* at 269.

103 Hernandez chose the Librettis as adoptive parents for her newborn daughter, and the child's adoptive father, who is descended from the Ysleta del Sur Pueblo Tribe, also supported the adoption. *Id.* at 269-70. Because the child was enrolled as a member of the Tribe, the Tribe exercised its right to intervene under ICWA, and argued for the child to be moved from the Librettis' home to its reservation, over Hernandez's objections. *Id.* at 270. However, once the Librettis and Hernandez joined the lawsuit challenging ICWA, the Tribe dropped its challenge to the adoption and the Librettis finalized their adoption of the child. *Id.*

104 *Id.*

105 *Id.*

106 Petition for Writ of Certiorari at 6-8, *Brackeen*, 599 U.S. 255 (Nos. 21-376, 21-377, 21-378, 21-380).

107 *Id.* at 5-6, 8.

108 Brief for Tribal Defendants at 47, *Brackeen*, 599 U.S. 255 (Nos. 21-376, 21-377, 21-378, 21-380).

109 Matt Keeley, *Who Is Amy Coney Barrett's Family? Supreme Court Nominee Is a Mother of Seven and Has Six Siblings*, NEWSWEEK (Sept. 29, 2020, 8:53 PM), https://perma.cc/9AKQ-CGME. Justice Barrett's experience as an adoptive parent is relevant to Sunstein's argument that the Justices may be more likely to recognize an injury when it is one they can personally relate to.

110 *Brackeen*, 599 U.S. at 292.

111 *Id.* at 292 n.9.

112 *Id.*

113 *Id.* at 292.

114 *Id.* at 293.

115 600 U.S. 570 (2023).

116 COLO. REV. STAT. § 24-34-601(2)(a) (2021).

117 303 Creative LLC v. Elenis, 600 U.S. 570, 579-80 (2023).

118 *Id.* at 580.

119 *Id.*

120 258 U.S. 126, 129-30 (1922).

121 *Id.*

122 *303 Creative*, 600 U.S. at 581.

123 *Id.* at 581-82 (citing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 627-28 (2018)).

124 *Id.* at 583.

125 *Lyons* 461 U.S. at 105.

126 *Id.* at 113 (Marshall, J., dissenting).

127 RICHARD H. FALLON JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 279 (7th ed. 2015).

128 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007); Aziz Huq, *State Standing's Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2141 (2019) ("[i]n *Massachusetts v. EPA* ... the Court seemed to lean on a parens patriae theory of standing to enable a state challenge to a federal agency's failure to regulate ....").

129 *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 485 (1923).

130 FALLON ET AL., *supra* note 127, at 279.

131 *Mellon*, 262 U.S. at 485-86.

132 *Id.* at 486.

133 Haaland v. Brackeen, 599 U.S. 255, 264 (2023).

134 Reply Brief for Petitioner at 13, Haaland v. Brackeen, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, 21-380).

135 *Id.* at 14-5. Texas also alleged direct economic injuries, which the Court likewise rejected. *Brackeen*, 599 U.S. at 296.

136 *Id.* at 294-95.

137 *Id.* (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610 n.16 (1982)).

138 *Id.* at 295 n.11.

139 *Id.* at 295.

140 Reply Brief for Petitioner, *supra* note 134, at 13 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

141 *Id.*

142 *Snapp & Son,* 458 U.S. 592 (1982).

143 29 U.S.C. § 49.

144 8 U.S.C. §§ 1101-1537.

145 *Snapp & Son*, 458 U.S. at 597-98.

146 *Id.* at 608-09.

147 *Id.* at 608.

148 Biden v. Nebraska, 600 U.S. 482 (2023).

149 *Id.* at 2390 (Kagan, J., dissenting)

150 *Id.*

151 Huq, *supra* note 128, at 2127-28.

152 The Court also denied standing to Texas in a third case brought against the federal government in *United States v. Texas*, 599 U.S. 670 (2023), challenging the Biden administration's immigration policy. The Court dismissed this claim on the redressability prong because the remedy Texas sought was for the executive branch to prosecute more individuals than under its current program. 599 U.S. 670, 677-81 (2023). The separation of powers concerns underlying the Court's dismissal of Texas's claims in this case are less likely to be applicable to state attorneys general claims challenging corporate **DEI** programs, though they would preclude claims seeking more aggressive enforcement action from the executive branch with respect to federal anti-discrimination laws.

153 *See* State Attorneys General Letter, *supra* note 16. Authors include the attorneys general from Kansas, Tennessee, Alabama, Arkansas, Indiana, Nebraska, Iowa, South Carolina, Kentucky, Mississippi, Missouri, Montana, and West Virginia.

154 *Id.* at 1.

155 *Id.* at 6.

156 *Id.* at 2.

157 *Id.*

158 *Id.* at 4 (quoting Students for Fair Admissions, Inc. v. Harvard Coll., 600 U.S. 181, 270 (2023) (Thomas, J., concurring) (citations omitted)).

159 *See* State Attorneys General Letter, *supra* note 16.

160 *Id.* at 3, 6.

161 *Id.* at 3, 5.

162 *About*, STUDENTS FOR FAIR ADMISSIONS, https://perma.cc/E2BT-X47U (last visited May 2, 2024).

163 Warth v. Seldin, 422 U.S. 490, 511 (1975).

164 Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

165 *See id.*

166 646 F. Supp. 3d 490 (S.D.N.Y. 2022).

167 *About Us*, DO NO HARM, https://perma.cc/F657-NBFY (last visited Apr. 27, 2024) (noting that the organization launched in April 2022).

168 Complaint at 3, Do No Harm v. Pfizer Inc., 646 F. Supp. 3d 490, (S.D.N.Y. 2022) (No. 22-07908) [hereinafter *Do No Harm* Complaint].

169 Press Release, Do No Harm, Do No Harm Helps Doctors with Lawsuit Against CMS, HHS over Medicare "Anti-Racism" Plans (May 5, 2022), https://perma.cc/M7Y8-X3VH. *But see Do No Harm* Complaint, *supra* note 168, at 10 (implying that the organization itself filed the suit). *See generally* Colville v. Becerra, (S.D. Miss. Aug. 24, 2022) (No. 22-113), 2023 WL 2668513.

170 *See generally Do No Harm* Complaint, *supra* note 168.

171 *Do No Harm*, 646 F. Supp. 3d at 496.

172 *Id.*

173 *Id.* Pfizer has since abandoned this requirement, presumably to address the allegations in Do No Harm's complaint. *See Breakthrough Fellowship Program*, PFIZER, https://www.pfizer.com/about/careers/breakthrough-fellowship-program (last visited Apr. 12, 2024) (on file with CUNY Law Review).

174 *Id.* at 496, 498-99.

175 *Supra* note 168.

176 *See generally Become a Member*, DO NO HARM, https://perma.cc/2KJU-SNZS (last visited Apr. 27, 2024).

177 *Do No Harm*, 646 F. Supp. 3d at 497-98, 500.

178 *Compare id.* at 498, *with* First Amended Class Action Complaint, *supra* note 86, at 21 (alleging that Correll "was and continues to be able and ready to sell his collectibles on Amazon.com").

179 *Compare Do No Harm*, 646 F. Supp. 3d at 498, *with* First Amended Class Action Complaint, *supra* note 86, at 20 (introducing the plaintiff by his actual name).

180 Do No Harm, 646 F. Supp. 3d at 517. As is relevant to this Article, the Court found that plaintiffs lacked statutory standing to file suit against Pfizer under Title VI of the Civil Rights Act because the statute bars employment-related claims except when the employer is a recipient of federal funds "aimed primarily at providing employment." *Id.* at 510-12. This requirement would bar challenges to corporate **DEI** efforts under Title VI and encourage plaintiffs to instead bring claims under Title VII, like Netzel did against American Express. *See generally* Complaint, *supra* note 79 (alleging unlawful race discrimination, a racially hostile work environment, and retaliation in violation of Title VII of the Civil Rights Act).

181 *Do No Harm*, 646 F. Supp. 3d at 504.

182 *Id.* at 501.

183 *Id.* at 506.

184 *Id.* at 507.

185 Do No Harm v. Pfizer Inc., 96 F.4th 106, 121 (2d Cir. 2024).

186 *See* *Do No Harm*, 646 F. Supp. 3d at 507.

187 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 201 (2023).

188 Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 342 (1977) (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975)).

189 *Id.* at 343.

190 *Id.* at 344.

191 *Id.*

192 *Id.* at 343-44.

193 *See, e.g.*, Sorenson Commc'ns, LLC v. Fed. Commc'ns Comm'n, 897 F. 3d 214, 225 (D.C. Cir. 2018); Heap v. Carter, 112 F. Supp. 3d 402, 418 (E.D. Va. 2015); Package Shop, Inc. v. Anheuser-Busch, Inc., Civ. A. No. 83-513, 1984 WL 6618, at *40 (D.N.J. Sept. 25, 1984).

194 App. A to Petition for Writ of Certiorari at App. 10, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 20-1199, 21-707).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* at App. 52. Harvard mostly abandoned its standing challenges when the case reached the Supreme Court, but UNC continued to press the point. *Compare id.* (arguing that SFFA does not have standing), *with* Brief for Respondent at 20 n.3, *Students for Fair Admission, Inc.*, 600 U.S. 181 (No. 20-1199) (mentioning standing only in one footnote in the brief's summary section).

199 Brief for Respondents at 24, Students for Fair Admission, Inc., 600 U.S. 181 (2023) (No. 21-707).

200 *Id.* at 24-25.

201 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F. 3d 157, 183-84 (2020).

202 *Students for Fair Admissions, Inc.*, 600 U.S. at 201.

203 *Id.*

204 *Id.*

205 *Id.* at 206.

206 *See, e.g.*, Taylor Telford, *Law Firm Opens Diversity Fellowship to All Students After Lawsuit*, WASH. POST (Sept. 6, 2023, 2:20 PM), https://perma.cc/LW3U-69PV.

27 CUNYLR 185

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January 31, 2024

Community

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*1 INSIGHTS FROM THE 3RD ANNUAL DIVERSITY SUMMIT AT THE WEITZMAN NATIONAL MUSEUM

WESTLAW LAWPRAC INDEX

INH--In-House Counsel & Corporate Law Departments

***2** Banner artwork by bob boz */ Shutterstock.com*

On December 6, 2023, the Weitzman National Museum of American Jewish History in the heart of Philadelphia played host to the third annual Diversity Summit, a beacon of knowledge and collaboration in the ever-**evolving landscape** of Diversity, Equity, and Inclusion (**DEI**). This year's summit, titled "**DEI** Under Siege: **Legally** Compliant Strategies to Combat the Attack on **DEI** Initiatives," brought together thought leaders, **legal** experts, and advocates to dissect the challenges facing **DEI** initiatives and explore **legally** compliant strategies to **navigate** these complex waters.

***4** Organized by the ACC Greater Philadelphia's Diversity Inclusion Equity & **Belonging** committee, the summit proved to be a powerhouse of insights and solutions. The summit aimed to provide a roadmap for organizations to foster **inclusivity** while remaining **legally** resilient--no small task as corporations grapple with increasing scrutiny over **DEI** efforts in the workplace. The summit featured five compelling panels, each hosted by prominent law firms dedicated to advancing **DEI**. Anderson Kill P.C., Armstrong Teasdale LLP, Blank Rome LLP, Cozen O'Connor, and Dechert LLP took the stage, offering a comprehensive exploration of pressing issues within the **DEI** space.

***6** Throughout the summit, participants engaged in lively discussions, exchanging ideas and best practices. The event provided a platform for professionals across industries to connect, fostering a community dedicated to driving positive change in the **DEI landscape**. Louis Abrams and Dave Dambreville, the co-chairs of the ACC Greater Philadelphia's Diversity Inclusion Equity & **Belonging's** Summit Sub-committee, expressed their satisfaction with the event's outcomes. "The third annual Diversity Summit exceeded our expectations. It was a testament to the collective commitment of organizations and **legal** experts to proactively address the challenges facing **DEI** initiatives. By combining **legal** expertise with practical strategies, we hope to empower organizations to champion diversity while safeguarding their **legal** standing."

Measure your organization's **DEI** success by using the ACC Foundation's **DEI** Maturity Model and Assessment!

***8** As organizations continue to grapple with the complexities of **DEI**, the insights shared at this summit serve as a guiding light, ensuring that diversity remains at the forefront of the corporate agenda.

*Disclaimer: the information in any resource collected in this virtual library should not be construed as **legal** advice or **legal** opinion on specific facts and should not be considered representative of the views of its authors, its sponsors, and/or ACC.*

These resources are not intended as a definitive statement on the subject addressed. Rather, they are intended to serve as a tool providing practical advice and references for the busy in-house practitioner and other readers.

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ACC Docket
October 11, 2023

Diversity and Inclusion

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*1 DESPITE ATTACKS, DEI'S FOUNDATION IS SOUND

WESTLAW LAWPRAC INDEX

INH--In-House Counsel & Corporate Law Departments

***2** Original banner artwork by Daren Lin

Cheat Sheet

- **Embracing DEI.** Diversity, equity, and inclusion can drive innovation and profitability in **legal** practice.

- **Cognitive diversity.** An environment fostering different thought processes improves decision-making and financial performance.

- **Reputation and retention.** Diverse workspaces enhance recruitment, retention, talent development, and can capture **new** market shares.

- **Legal considerations. Navigating DEI** initiatives requires **legal** guidance to remain within federal and state anti-discrimination laws.

A contentious climate

Is **DEI** up for debate? It certainly seems that way with controversial lawsuits, US states cleaving into different camps, and the potential for a US Supreme Court ruling that could do for **DEI** in the workplace what it did for race in the college admissions process.

Recent lawsuits reveal a complex **landscape** for companies. Companies are walking a tightrope between fostering diversity and ensuring they don't inadvertently marginalize any group.

***3** Indeed, after the Court's decision that Harvard and the University of North Carolina's race-conscious admissions practices are unconstitutional, it is imperative that leaders in the **legal** field strike a careful balance between encouraging **inclusive** work environments and avoiding unlawful preferences based on protected characteristics.

In this article, we dive into the ever-**evolving** **landscape** of **DEI** and why many companies view it as a strength. General counsel and law firm leadership have emerged as crucial actors making meaningful efforts to maximize profits and improve **DEI**, all while thoughtfully remaining within the bounds of federal and state anti-discrimination laws. By striking this balance, **legal** professionals can pave a path that is ethically commendable, financially advantageous, and **legally** robust.

Diversity strengths: Innovation

Through careful planning and partnership with employment counsel, the **legal** industry can benefit from **DEI** because it fosters renewed perspectives, inspires creative litigation strategies, and drives innovation in case management.

DEI helps to anticipate shifts in consumer needs

The power of **DEI** is evidenced by McKinsey's May 2020 Report, Diversity wins: How inclusion matters. McKinsey, a management consulting firm, found--based on a data set covering 15 countries and over 1,000 large companies--that "the most diverse companies are more likely than ever to outperform non-diverse companies on profitability."

For example, companies with more than 30 percent women on their executive teams were significantly more likely to outperform those with between 10-30 percent women, and companies in the top quartile for ethnic and cultural diversity outperformed those in the fourth by 36 percent in terms of profitability in 2019, slightly up from 33 percent in 2017 and 35 percent in 2014. One reason for this, according to McKinsey, is that companies that value **DEI** are likely to "radically innovate and anticipate shifts in consumer needs and consumption patterns." In other words, where businesses embrace **DEI**, innovation and creativity abound.

Applying these findings to the **legal** industry, McKinsey's report tends to show that **legal** teams with diversity in characteristics (e.g., age, physical and cognitive ability, gender, race and ethnicity, or geographic culture), can more closely reflect and better assist the ever-broadening client base that large companies and law firms serve.

In comparison with non-diverse companies, diverse **legal** teams are more innovative and can better assist the needs of all clients. RysaVector / *Shutterstock.com*

Diversity strengths: Decision-making and financial performance

One critical aspect of **DEI** is openness to cognitive diversity. As highlighted in Boston Consulting ***4** Group's 2017 Report, The Mix That Matters: Innovation Through Diversity, an environment where employees feel free to speak their minds and are encouraged to consider opposing ideas and engage in "constructive conflict" is a fundamental element of effective decision-making. To foster such an environment in a **legal** setting, both in-house **legal** departments and law firms need to exemplify what the report calls "participative leadership behavior." When leaders genuinely listen to employees' suggestions and make use of them, diversity's benefits multiply and decision-making improves exponentially.

Revenue from new products increases with diversity

Based on a survey of 171 companies across Germany, Switzerland, and Austria, BCG also found that diversity has a statistically significant positive correlation with innovation revenue, defined as the percentage of revenue derived from **new** products and services over a three-year period. Companies with higher diversity scores demonstrated an impressive 38 percent increase in revenue generated from innovative products and services compared to companies with lower diversity scores.

In complex organizations, the relationship between diversity and innovation revenue was statistically significant, accounting for up to 18 percent of the variation in innovation revenue. Notably, the study also emphasizes the role of favorable work environment conditions in amplifying the positive impact of diversity on innovation revenue. Companies that fostered a supportive and **inclusive** workplace environment generated 33 percent of their revenue from innovative products and services, compared to 24 percent for those that failed to create such conditions.

Having more women in senior roles shows a greater return in innovation revenue. 27SaturnO / *Shutterstock.com*

Finally, like McKinsey, BCG's report highlights the influence of gender diversity on innovation revenue. Companies with the highest gender diversity, having 8 out of 20 managers as female, generated around 34 percent of their revenue from innovative products and services. In contrast, companies with the lowest gender diversity (only 1 in 20 managers being female) generated only 25 percent of their revenue from innovation.

***5** While there is no doubt that law firms and **legal** departments employ problem-solvers and quick-thinkers, the **legal** industry tends to lag in modernization and innovation-- particularly compared to tech giants and other similar companies. After all, the **legal** industry is one that relies heavily upon history and precedent.

Thus, McKinsey and BCG's findings are pertinent, especially in a world in which artificial intelligence is beginning to transform **legal** services delivery and impact the relationship between firms and in-house counsel. Embracing **DEI** can inspire adaptability and creativity, essential qualities for improving financial performance in an **evolving legal landscape**.

Diversity strengths: Reputation and retention

DEI brings an advantage in recruiting

Legal departments and law firms with a history and reputation for meaningfully providing an **inclusive** and diverse work environment--where all employees can bring their authentic selves to the workplace and feel a true sense of **belonging** because their opinions are valued, considered, and included in the decision-making process--can also benefit in recruitment, retention, development, and advancement of talent and clients.

A diverse workforce is a key factor job seekers and employers value during the recruitment process. ProStockStudio / *Shutterstock.com*

Employers with high diversity in leadership were 45 percent likelier to report that their company market share increased over the past year and 70 percent likelier to report that their company captured **new** market share during the same period. Also, in the current market (one still reeling from the "Great Resignation"), **inclusive** and diverse workforces provide a company with an advantage in recruiting. For example, Glassdoor's 2020 Diversity & Inclusion Workplace Survey found that "more than [three quarters] of job seekers and employees (76 percent) report that a diverse workforce is an important factor when evaluating companies and job offers."

DEI drives up retention

Employee retention and advancement are also critical to the financial success of **legal** departments and law firms. Indeed, the National Association-Law Placement reports that turnover costs can range from US$200,000 to US$500,000 for an associate, and over US$1 million for a partner. The costs associated with turnover include that of recruiting, hiring, on-boarding, training, loss of institutional ***6** knowledge, decrease in employee morale, and much more. And while the number of attorneys in underrepresented groups continues to increase at law schools and entry level of the **legal** professions, it nonetheless significantly declines at higher levels of the **legal** profession (i.e., attorneys leave the profession). Thus, prioritizing an **inclusive**, equitable and diverse work environment can improve the likelihood that these employees stay, advance, and in return mentor/help others.

Upholding a positive **DEI** work environment will help ensure employee retention. Nadya_Art / *Shutterstock.com*

Ask your colleagues how DEI has impacted them

***7** Edward Chyun, Shareholder, Littler Mendelson, P.C.

Finally, speaking from personal experience, one of the authors (Chyun) can personally attest that his firm's ongoing commitment to **DEI** (demonstrating to him that he could succeed at the firm) contributed to him deciding to join the firm, staying (16 years and counting), advancing at the firm, and developing and expanding current and **new** clients.

***8** Lysette M. Roman, Associate, Littler Mendelson, P.C.

Likewise, another author (Roman) can echo that she was drawn to her current law firm as a junior associate because of its investment in her talent, recognition of her unique perspectives, and appreciation for her self-expression.

Markus Hartmann, General Counsel, Mister Car Wash

***9** In the same vein, another author (Hartmann) was attracted to his current public company, not only because of its rapid growth, but also due to its impressive commitment to IE&D at the highest executive levels, where four of the five of the named executive officers are diverse.

Current legal considerations

As demonstrated by the referenced reports and studies, the **legal** industry can benefit both culturally and financially by embracing **DEI** in the workplace. But developing and instituting *lawful* **DEI** initiatives requires careful planning, and employers should consider partnering with experienced employment counsel for **legal** support and guidance.

Careful planning is exceedingly important considering the Court's decision in *SFFA*. While the opinion addressed race-conscious admissions practices in the higher education context only, various state actors have interpreted the *SFFA* decision as extending evenly to the employment context. Title VII of the Civil Rights Act, which governs employers, has always prohibited the use of race and other protected characteristics in employment decision-making.

For instance, on July 13, 2023, the Attorneys General of 13 different states

Kansas, Tennessee, Alabama, Arkansas, Indiana, Nebraska, Iowa, South Carolina, Kentucky, West Virginia, Mississippi, Missouri, and Montana

issued a letter to Fortune 100 CEOs, cautioning them against using racial preferences in employment decisions given the *SFFA* decision. Likewise, on July 17, 2023, Senator Tom Cotton sent a letter to 51 law firm leaders, stating that the firms' clients' (and the law firms') IE&D programs may be violating federal law following the *SFFA* decision. Both letters threatened scrutiny and **legal** action by the state or federal actors.

But on the other hand, on June 19, 2023, Attorneys General from 20 states

Nevada, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington

and the District of Columbia sent their own letter to Fortune 100 CEOs, arguing that *SFFA* does not directly address or govern the behavior or the initiatives of private sector businesses. While these AGs agreed that race-based employment discrimination is unlawful, they also believe that corporate efforts to recruit diverse workforces and create **inclusive** work environments "comply with the spirit and the letter of state and federal law." Indeed, these AGs emphasize that corporate **DEI** efforts-- when thoughtfully carried out--"are ethically responsible, good for business, and good for building ***10** America's workforce."

Keep these guardrails in mind

Amidst this back-and-forth, **legal** departments and law firms should be mindful that organizational **DEI** initiatives, even those supported by the best intentions, may be subject to heightened scrutiny and **legal** challenges by individuals, groups, and federal and state legislative and regulatory agencies. How can employers lean into **DEI** trend without running afoul of anti-discrimination laws? To start, employers should keep the following guardrails in mind:

• Employers should make all employment decisions based on *objective, business-related criteria*-- not protected characteristics.

• Employers should not interview or hire individuals from historically marginalized communities *simply to meet a quota or quantitative goal.*

• Decision-makers (such as hiring managers, supervisors, human resource professionals, and even recruiters) should be *trained* on federal and state equal employment and anti-discrimination laws so they understand the **legal framework** governing their employment decisions.

• Employers may consider incorporating *unconscious bias training* to further prevent unlawful (albeit inadvertent) employment decisions based on protected characteristics but should consult with counsel to ensure that such training does not run afoul of "anti-Woke" laws in certain jurisdictions.

• Remember that in successful **DEI** programs, *one size does not fit all*.

Balancing act: Nurturing DEI in a contentious legal climate

Legal professionals can significantly benefit from embracing **DEI** in the workplace on many levels, including recruitment, innovation, productivity, decision-making, employee engagement, and financial goals. Considering recent events, it's evident that while the path to creating an **inclusive** environment is filled with challenges, it's also ripe with opportunities.

Legal departments and law firms can--and should--be torchbearers in promoting and advancing **inclusive** and equitable workplaces where *all* employees can flourish, while simultaneously adhering to all applicable anti-discrimination laws. As such, leaders in the **legal** field should stay abreast of legislative and regulatory developments across the country and seek employment counsel for guidance in the ever-**evolving legal landscape** of **DEI**.

2 minutes with an ACC *Docket* Author

Check out this clip from *Docket* author Markus Hartmann as he comments on his most recent article, "Despite Attacks, **DEI's** Foundation is Sound."

***11** Join ACC

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guidance and references for the busy in-house practitioner and other readers. Information/opinions shared are personal and do not represent author's current or previous employer.

Footnotes

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Comment
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*239 DIVERSITY ON TRIAL: NAVIGATING EMPLOYER DIVERSITY PROGRAMS AMIDST SHIFTING LEGAL LANDSCAPES

ABSTRACT

In the Summer of 2023, in a pivotal move, the Supreme Court nullified the application of affirmative action policies in both private and public universities nationwide. The Supreme Court's holding stripped the use of any race-conscious guidelines for admission aimed at enhancing diversity on college campuses. Although the Supreme Court's holding is grounded in Title VI and does not directly implicate employers and businesses, its aftereffects are poised to reshape how organizations approach their diversity, equity, and inclusion (**DEI**) initiatives. The **legal landscape** in this area is quickly **evolving** and employers need to be prepared to evaluate and potentially revise their **DEI** policies to mitigate **legal** exposure. This article extends its focus to the implications of the Supreme Court's decision within the employer context and delineates strategies and actions that employers can implement to limit their risk. In the face of **legal** uncertainties, this article serves as a guidepost, encouraging employers and businesses to not only adapt but to persevere in their **pursuit** of diversity, equity, and inclusion.

*240 I. INTRODUCTION

Universities historically have been able to use a student's race as a factor in admission since the 1960s and 70s. [1] A school's ability to consider race as a factor comes from race-conscious admissions policies, otherwise known as affirmative action. [2] In a historic decision, the Supreme Court in 2023, struck down and effectively ended the use of affirmative action in college admissions. [3] The Court's decision deviated from decades of precedent that has previously held up race-conscious admission programs. [4] While the Supreme Court's decision does not directly impact employers and businesses, the ruling has the potential to shift how private employers approach diversity, equity, and inclusion ("**DEI**") policies, initiatives, and voluntary affirmative action programs. [5] The Supreme Court's affirmative action decision will have significant indirect consequences for private employers, as they will face greater scrutiny and **legal** challenges in their use of **DEI** programs. [6] Thus, employers, businesses, and companies are going to have to adapt to the rapidly **evolving legal landscape** in the wake of the Court's decision. [7]

Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating based on race. [8] Historically, employers who seek to combat racial discrimination have implemented voluntary affirmative action and **DEI** initiatives. [9] In order to understand *241 affirmative action and its impact on **DEI** programs and initiatives, it is important to break down the history of affirmative action and the Court's most recent decision. It is also necessary to break down the meanings of diversity, equity, and inclusion, and explore the impacts these programs and initiatives can have on the workplace. This comment will discuss the Supreme Court's affirmative action ruling and its potential impact on different types of **DEI** initiatives and programs that employers utilize. The comment will also look at what private employers can do to avoid potential **legal** challenges because of their **DEI** efforts, while still aiming to keep **DEI** policies.

II. HISTORY AND BACKGROUND OF AFFIRMATIVE ACTION

Affirmative action refers to policies that are used to increase workplace and educational opportunities for underrepresented groups.[10] These policies are meant to focus on demographics with "historically low representation in leadership and professional roles."[11] The polices aim at countering discrimination and reversing historical trends of discrimination against various segments of society.[12] Early implementation of affirmative action policies were mainly put in place to help aid the social segregation of minorities from institutions and opportunities.[13]

President John F. Kennedy signed Executive Order 10925 in 1961 where he used affirmative action for the first time to ensure that federal contractors treated applicants equally without regard to race.[14] After this executive order, future administrations promulgated several other executive orders that helped develop what we currently understand as affirmative action. It was not just presidents that built a **legal** standard for affirmative action, but in a long line of cases, the Supreme Court did as well. There are two previous Supreme Court cases that have looked at affirmative action within the Title VII context, and ***242** these are *United Steelworkers of America v. Weber*[15] and *Johnson v. Transportation Agency, Santa Clara County, California*.[16]

In *Weber*, the Court held that Title VII cannot prohibit or condemn all private, voluntary race-conscious affirmative action plans.[17] The petitioner in *Weber* challenged the **legality** of an affirmative action plan that was collectively bargained by an employer and a union.[18] The plan was designed to eliminate "conspicuous racial imbalances" in the Kaiser Aluminum and Chemical Corp. by reserving 50% of its openings in its training program until the percentage of black workers matched a proportionate percentage in the local labor force.[19] The Court in *Weber* set the standard that employers wishing to justify their adoption of an affirmative action plan need to only point to a "conspicuous imbalance in traditionally segregated job categories."[20]

In *Johnson*, the Supreme Court, relying heavily on *Weber*, sustained an affirmative action plan for the Transportation Agency that aimed to counter the underrepresentation of women and racial minorities.[21] The Court held that the plan did not specifically set aside a position for women, so it did not set up a gender-based quota, but it authorized affirmative action measures when evaluating applicants in the hiring process.[22] The court emphasized that the Agency's plan mainly "intended to *attain* a balanced work force, not to maintain one," (emphasis added).[23] The Agency used numbers and percentages as benchmarks to measure its progress in fixing the underrepresentation of women.[24] The Court called the Agency's plan a "moderate, gradual approach" that "visit[ed] minimal intrusion on the legitimate expectations of other employees."[25]

*243 III. STUDENTS FOR FAIR ADMISSIONS, INC. V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE & STUDENTS FOR FAIR ADMISSION, INC. V. UNIVERSITY OF NORTH CAROLINA

The Supreme Court addressed the same issues in its most recent opinion, *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*[26] and *Students for Fair Admission, Inc. v. University of North Carolina*. The Court granted certiorari to both of these cases, combined the two, and issued an opinion addressing both under *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*.

Students for Fair Admissions ("SFFA"), is a nonprofit membership group, who believe that racial classifications in college admissions are "unfair, unnecessary, and unconstitutional."[27] The purpose of the group is meant to support, create, and participate in ligation that challenges affirmative action policies in higher education with a goal of eliminating race and ethnicity as factors for admissions.[28] The most recent and successful attempt to overturn affirmative action was led by Edward Blum, the founder of SFFA.[29] The group sued both Harvard and the University of North Carolina seeking an end to affirmative action plans used by the universities.[30] SFFA brought these actions arguing that the admissions process for Harvard and the University of North Carolina violated Title VI of the Civil Rights Act of 1964[31] and the Equal Protection Clause of the Fourteenth Amendment.[32] Title VI applies to private universities because they elect to receive federal assistance annually, while constitutional authority is applicable to public universities.[33] The Supreme Court ultimately held that the race-based admissions programs violated the Equal ***244** Protection Clause of the Fourteenth Amendment as well as Title VI.[34] The Court further held that Harvard and University of North Carolina did not assert compelling interests to satisfy the Court's

application of strict scrutiny in violation of both the Equal Protection Clause and Title VI. which created not only an equal protection violation but also a Title VI violation. [35]

The Supreme Court began its opinion with a lengthy discussion on the Equal Protection Clause's main purpose. [36] The Court surmised that the Equal Protection clause is meant to limit and remove governmentally imposed race discrimination. [37] The Court here specifically applied the two-part "strict scrutiny" test: whether there was a valid and judicially coherent compelling interest and whether the conduct was necessary and proper to achieve the universities' compelling interests. [38] These interests included but were not limited to, "training future leaders in public and private sectors, better educating its students through diversity, fostering innovation and problem-solving, enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." [39]

Writing for the majority, Chief Justice Roberts expressed that even though the universities' goals were commendable, they were illusive, not coherent, and not measurable enough for the purposes of strict scrutiny. [40] The Court used examples like school segregation or workplace discrimination cases to show that these cases allow courts to ask concrete questions that produced concrete answers. [41] For example, in workplace discrimination cases, courts can ask whether a race-based benefit make those in the discriminated class whole for the injury they have suffered. [42] The Court held that the compelling interests identified by the universities were not valid nor judicially coherent.

The majority also ruled that the universities' admissions programs failed to justify the means they used to advance the goals they had set ***245** in order to create diversity on their campuses. [43] Harvard and University of North Carolina worked to avoid underrepresentation of minority groups as their main goal, [44] and, in order to accomplish this goal, the universities use specific race classes to measure the racial composition of their incoming class. [45] These categories include Asian, Native Hawaiian or Pacific Islander, Hispanic, White, African-American and Native American. [46] The Court concluded that there was no evidence that established how using and assigning racial categories when making admissions decisions furthered the educational benefits and goals that Harvard and the University of North Carolina aimed to achieve. [47] The Court found the categories imprecise, overbroad, underinclusive and "undermine[d], instead of promote[d]" the universities' goals. The Court held that the means did not justify the goals in affirmative action.

Harvard and University of North Carolina argued that an applicant's race is never considered a negative factor in admission. [48] Here, the Court does not give any credit to the universities' argument as they see college admissions as a zero-sum game. [49] The Court found that it is essentially impossible for race to be a 'plus factor' for some applicants without, at the same time, functioning as a negative for others. [50] The Majority also found that "using race as a plus factor inevitably involves impermissible racial stereotyping." [51] Using precedent from *Grutter,* [52] the court expressed that universities cannot run their admissions programs using a belief that minority students have some sort of minority viewpoint on any issue. [53] When universities use race-based admission standards where some applicants might ***246** have a step-up solely on the basis of race, the programs endure stereotyping, which is the exact practice G*rutter* renounced. [54]

Ultimately, the Court ruled that Harvard's and University of North Carolina's admission programs lacked measurable objectives for justifying the use of race in a negative matter and in racial stereotyping, as such the programs could not survive strict scrutiny, thus violating Equal Protection and Title VI. Chief Justice Roberts stressed that the decision did not completely bar universities from always considering race, instead, universities can consider an applicant's discussion of how race has impacted their life. [55]

It is important to discuss Justice Gorsuch's concurrence as he wrote more in depth about the Title VII implications than the majority opinion. [56] Gorsuch cites the plain meaning of Title VI, stating that it "prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin." [57] He re-emphasizes the fact that when admission programs use race as a factor, they are treating some applicants worse than others and this conduct is prohibited by Title VI. [58]

What is critical for this comment from Justice Gorsuch's opinion is that he links the Court's interpretation of Title VI to the language of Title VII. [59] He identifies Title VII's similar language that makes it unlawful for an employer to discriminate against an individual because of their race, color, religion, sex or national origin and because of the language similarity, a court needs to assume they have the same meaning. [60] He goes even further to say that both Title VI and Title VII "codify a categorical rule of 'individual equality, without regard to race.'" [61] Gorsuch's concurrence, while not the majority opinion, opens the door to potential issues with employer's diversity, equity, ***247** and inclusion programs that might use the same rationale as Harvard and University of North Carolina.

Justice Sotomayor wrote a dissenting opinion where she emphasized that when Congress passed the Fourteenth Amendment, they also passed several race-conscious laws to fulfill the Fourteenth Amendment's goal and promote equality. [62] Justice Sotomayor argues that the passage of these laws leaves no room to assume that the Equal Protection Clause does not permit race conscious practices to achieve its goal. [63] She also attacks the majority opinion for its conclusion that "indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions." [64] Justice Sotomayor also emphasizes the fact that the majority's holding "is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today." [65] The dissenters heavily emphasized that the majority turns a blind eye to the racial inequality in today's society and overrules decades of precedent that have upheld means to achieve racial equality which is central to the Fourteenth Amendment and the Equal Protection Clause. [66]

IV. BACKGROUND ON DIVERSITY, EQUITY, AND INCLUSION

Essential to the discussion on the impact of the Supreme Court's affirmative action decision is an explanation of the background and meaning of diversity, equity, and inclusion. **DEI** programs in the workplace are actions taken by corporations and businesses to raise and establish awareness of diverse backgrounds in the workplace and to create changing mindsets, behaviors and practices to create a more diverse, equitable, and **inclusive** work environment. [67] While each **DEI** aspect goes hand in hand with the others, diversity, equity, and inclusion alone have important differences that are critical in understanding the programs. Diversity is seen as all the ways in which people differ. [68] Diversity should be defined as "an embodiment of a group's ***248** composition." [69] Common types of diversity often do not include just race, age, and gender, [70] but can also include socioeconomic status, education, culture, spiritual and religious beliefs, and job title and professional experience. [71] While diversity can be looked at as how people differentiate themselves and are from different backgrounds and categories, equity is the aspect of **DEI** where concrete steps are taken to create fair opportunities and access to those who might align with being a part of a diverse background. When implementing equity, it is crucial to create a fair and even playing field. [72] Companies often integrate equity in their talent screening, hiring, and workplace standards. [73]

While a company or organization may promote its diversity and equity standards, it is important to make sure that those who might be in a diverse group also feel included in the company. [74] The best example of inclusion is where women might be represented in higher level management but because a company has a history of gender discrimination, these women might not feel as part of the company or treated as part of the company. [75]

Companies that employ **DEI** initiatives often see tangible benefits. Recent studies show that companies who prioritize **DEI** initiatives often see an increase in innovation and better financial outcomes. [76] It has also been reported that "companies with a good diversity strategy experienced a 56% increase in job performance." [77] A large number of people consider **DEI** programs in the workplace when deciding between job offers or when looking for **new** career opportunities. [78] This can lead to more effective employee recruitment. Overall, **DEI** programs can benefit employees, managers, and leaders within an organization and lead to fundamental change within a company. [79]

*249 IV. TYPES OF DEI INITIATIVES AND PROGRAMS

In their simplest format, **DEI** programs are meant to increase diversity in the workplace. [80] The main goals for **DEI** initiatives include "fostering diversity throughout the company, ensuring equity in opportunity, contribution, and advancement, and

promoting **inclusive** teams and leadership."[81] Many **DEI** "programs today are focused on the selection process" of diverse candidates.[82] This means that many companies in the United States aim their diversity policies toward eligible applicants during their recruitment, hiring, and selection process for **new** employees.[83] There are also **DEI** programs that are implemented to continue **DEI** efforts within the company after the hiring process. The first of these initiatives is referred to as a promotion-based diversity program.[84] This program is considered an internal promotion initiative, where employers consider diversity when promoting internal employees.[85] Employers utilizing promotion-based **DEI** programs can analyze a candidate's diversity through different lenses, such as through their race, gender, socioeconomic status, and/or sexual orientation alongside other qualifications.[86] The second **DEI** program that goes past the selection process is a program in which employers take measures to make sure that existing diverse employees feel a sense of **belonging**.[87] These programs focus on a company's workplace culture to ensure employees are comfortable and feel included.[88]

There has been a modern corporate move to embrace diversity, equity, and inclusion programs in the wake of the Black Lives Matter Movements and it has since grown tremendously in the business ***250** **landscape**.[89] These **new** **DEI** initiatives have ranged from symbolic to systematic.[90] For example, 22Squared, a marking agency out of Atlanta, collaborated with the NAACP to seek out remaining Confederate monuments across the United States in order to let visitors know the history of the statutes, but then allow them to call local officials to call for the statues removal.[91] McDonald's on the other hand has started to offer low-interest loans to **new** franchisees in order to help increase the diversity of its ownership.[92] These are examples of large corporations employing their own **DEI** initiatives and programs. While these programs are on the extreme line of **DEI** initiatives (the programs above were considered to be strong efforts from companies in implementing **DEI** programs), most companies have implemented **DEI** plans that fall somewhere in the middle of those described above.[93] These range from evaluating the makeup of a company's workforce and how it can improve on its diversity to allowing employees from within to speak out about their **DEI** concerns in a **DEI**-focused-town hall program.[94] One of the largest freight transporter companies, XPO Logistics, became the first in its field to establish a separate **DEI** office to develop resources and launch programs that aid those in particular demographics and minorities.[95]

There are other programs and initiatives that face a higher risk of being found to be unlawful because these programs are going to specifically look at race as a determining factor or use race as an individual characteristic to implement the program. These initiatives include companies that require diverse interview slates, those that limit opportunities to specific underrepresented groups (these programs include internships or scholarships for specific race/ethnicity or gender groups, businesses' that implement leadership development programs that aim at increasing diversity in leadership, and mentorship initiatives), company programs that set goals and timelines for representation with specific roles, programs that incentivize those making ***251** decisions in the company to base decisions on **DEI** results, or companies that have rules that require diversity on boards of directors.[96] All of these programs focus on race-conscious considerations, which in the wake of *SFFA*, will likely need to be re-evaluated in order to comply with the current law.

V. AFFIRMATIVE ACTION IMPLICATION ON DEI PROGRAMS

Soon after the Supreme Court's decision in *SFFA*, Attorneys General (AG) in thirteen states sent a letter to Fortune 100 companies discussing their thoughts on the decisions and the application of the decision to private employers.[97] The letter threatened major consequences for companies that implemented **DEI** policies the AGs believed to be in violation of the **framework** set out in *SFFA*, specifically programs that lack measurable objectives for justifying the use of race, programs that use race in a negative matter or use forms of racial stereotyping.[98] The letter explicitly questioned **DEI** programs operated by private employers and went on to rationalize that, under the recent decision, racial quotas and preferences in hiring and recruiting are unconstitutional.[99]

In response, the Equal Employment Opportunity Commission Chair released a statement regarding the *SFFA* decision:

> [This 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. [100]

***252** Legislators have even sent letters to private employers citing civil rights violations because they maintain **DEI** programs. [101] Senator Tom Cotton sent letters to 51 law firms alleging that the firms and some of their clients are in violation of the recent Supreme Court decision in *SFFA* for maintaining **DEI** policies. [102] While the Attorney General's letter, the EEOC chairwoman's statement, and Tom Cotton's letter do not have the force of law, [103] they consist of differing opinions. In the wake of the AG's letter and EEOC's response, it is important to note that most often companies do not implement racial quotas and hiring preferences as practices in their **DEI** programs and typically do not consider race as the *only* factor in making employment decisions. [104] This illustrates what has led to the confusion of an employer's **legal** obligation because of the Court's affirmative action decision.

Following the Supreme Court's recent decision and the opinions coming from several Attorneys General across the United States and the EEOC, businesses and companies should be prepared for increased scrutiny of their **DEI** initiatives and a potential for litigation to rule **DEI** programs unlawful. [105]

Litigation will likely form through employees, potential employees or applicants, or through groups like *SFFA* where they can file claims for "reverse discrimination." [106] Reverse discrimination happens when "historically advantaged groups consider themselves discriminated against because of certain protected characteristics." [107] This often includes a discrimination claim made by a Caucasian, heterosexual male. [108] Essentially, the decision from *SFFA* may influence those who are in the majority to bring claims against their employer for their **DEI** programs. [109] These employers must have programs or initiatives that allegedly discriminate against those in majority races. Unfortunately, defending these claims, even when they ***253** might be unsupported, can cost a company a substantial amount of time, money, and resources. [110]

While *SSFA* does not directly apply or impact private employers since the Supreme Court used Title VI for private universities receiving federal funding, [111] Title VII applies to private and public employers with fifteen or more employees. [112] "Justice Gorsuch's concurring opinion puts employer's **DEI** programs on notice." [113] If an employer's **DEI** programs use race, gender, gender preferences, sexual orientation, or disabilities in not only hiring but also in deciding promotions, they will come under attack. [114] The Court's affirmative action decision has already impacted large law firms like Perkins Cole, Gibson Dunn, and Morrison & Foerster, and more continue to be brought into litigation. [115] Edward Blum, who led the charge in *SFFA* filed lawsuits against these firms over their fellowship programs that aim at hiring diverse candidates. [116] Blum has created a group called Alliance for Equal Rights which believes that these fellowship programs are "racially exclusive." [117] Employers are already seeing the impact of *SSFA* and its implications on their **DEI** programs and initiatives.

***254 VI. RECOMMENDATIONS FOR EMPLOYERS TO AVOID DEI SUITS WHILE STILL PROMOTING DIVERSITY, EQUITY, AND INCLUSION**

In order for companies or businesses to apply **DEI** programs and initiatives properly, they must comply with Title VII. [118] Title VII has always kept employers from making hiring and employment decisions based on race, gender, and other protected classes. [119] This has not changed when it comes to employers looking to achieve their **DEI** efforts and goals. [120] While employers and businesses do no not fall under Title VI, they have the potential to face scrutiny over their **DEI** commitments and programs in the wake of the Supreme Court's holding and reasoning that emerged in *SFFA*. Employers seeking to maintain diverse and equitable workplaces will want to consider **DEI** strategies and programs that focus beyond just race, like socioeconomic background, education, and life experiences. [121]

Going forward, employers should think about focusing and shining a light on their inclusion efforts, rather than diversity, as it draws away issues of race and reverse discrimination that can create potential **legal** problems because of *SFFA*. [122] Focusing on

inclusion can still advance employers **DEI** efforts as it is meant to create workplace environments where diverse employees feel "welcomed, respected, valued, and supported." [123] The focus on inclusion means that employers can create specific programs within their company to ensure a more collaborative environment and a workplace where employees feel not only supported but also have a strong sense of **belonging**. Workplace trainings focusing on inclusion and diversity are programs that employers can continue to provide and should continue to provide as it is the one area that does not create racial segregation or race conscious policies. These trainings should include topics like anti-discrimination, anti-harassment, **DEI** related topics like cultural competency and implicit bias training.

Companies have been fostering their inclusion and workplace **DEI** efforts by implementing cultural programs. For example, Unified for Pride Month put together celebratory initiatives that included an informational session hosted by community members centered ***255** around supporting LGBTQ+ homeless youth and brought in treats and foods from businesses that were LGBTQ+ owned. [124] Businesses and companies can continue to foster these programs within the walls of their company without fear of facing reverse discrimination claims. These inclusion programs can be as simple as having lunch catered where the food revolves around different cultures every month. This is a simple and easy way to encourage diversity and inclusion *in* the workplace. Since these are not programs that look to hiring or separating individuals in any way because of their race, employers can expect to not face much **legal** repercussion, while still maintaining some **DEI** programs within their companies.

Companies and businesses should review all **DEI** initiatives and programs that they currently have in place in order to mitigate the risk of being targeted for reverse discrimination. First, companies need to ensure that they are not using racial quotas or set asides when making hiring and advancement goals. [125] This means that companies should highly consider (for the time being in the current **legal landscape**) not setting race centered goals for advancement and hiring opportunities. For example, if a company has a policy that says their next three management team hires need to come from a diverse or ethnic background, employers are putting themselves at a higher risk of being sued for reverse discrimination under the reasoning provided by *SFFA*.

Next, companies need to confirm that they are defining diversity in terms of more than just race and ethnicity. [126] Diversity includes more than just these characteristics, as it can also include education, languages spoken, and experiences had. At the end of the majority's opinion in *SFFA*, the Court stressed that they were not limiting the universities from considering how race has impacted an applicant's life. This means that employers can look beyond just race when considering diversity. Down to its simplest form, diversity entails an individual's characteristics on what makes them unique. [127]

As such, employers should look for applicants that might bring a unique perspective along with the requisite experience or background necessary for the job. The employer will need to ensure that if they ***256** are drawing on an individual's distinction that they are doing it in order to fulfill a legitimate business need. [128] Employers may need to conduct a thorough job analysis to identify the essential functions and requirements of the job they are needing to fill. This will allow employers to really know the specific qualifications and characteristics they need to aim for to fulfill a legitimate business need. For example, perhaps the job that a candidate is applying for requires a global perspective because they will be traveling to various other countries. This means that when a company is hiring for this job position, they should determine characteristics that are going to be needed to fulfill the business need of being able to do business with people from different cultures and countries.

When reviewing a company's hiring process, employers will need to maintain equitable and fair standards across the board for every applicant they interview. [129] This means asking every applicant the same questions. [130] This also means that employers might need to review their job descriptions and perhaps alter them to ensure that they do not leave themselves open for reverse discrimination suits. [131] Several law firms who had diversity fellowships were forced to change their job descriptions to reflect a more racially neutral position by opening up their fellowships to everyone and no longer limiting the applicant pool to racial minorities and ethnicities. [132] Hiring and applicant pools might need to be expanded or employers will have to draw a clear link between its hiring protocol and its efforts to diversity so it can prove on a challenge that its means were measurable and not broad in order to satisfy present **legal** standards. [133]

***257** Companies and businesses cannot have policies that are seen as disadvantageous to a specific category of individuals. Companies will also have to be prepared to articulate compelling interests that can survive under *SFFA*. This means business should conduct **DEI** audits. **DEI** audits are a formal analysis and review of "a company's policies, practices, and initiatives as they relate to defined diverse and/or nonwhite ... employees." [134] These **DEI** audits may be critical right now for companies to ensure that its initiatives are non-discriminatory and equitable, to make sure companies can measure the effectiveness of its **DEI**

policies and programs and help to identify changes that a company might need to make in order to produce more **inclusivity** and equitable outcomes. [135]

The majority in *SFFA* also articulated that in order for affirmative action to be appropriate it requires a logical end point because affirmative action sought to balance the scales in diversity on college campuses. [136] This means that employers should consider **DEI** programs that are short-term or potentially limited in order to stay in compliance with future developments to show that these programs were used as a way to balance the racial gap in their company. Short-term programs can include a one-year mentorship program for underrepresented groups that has a clear-cut ending date. In order to stay even more compliant under the *SFFA* decision, it would create short term mentorship programs that are open to all employees, but the mentorship emphasizes building **DEI** culture within the company. Companies could also create a diverse speaker series within their company, where they bring in diverse speakers to share their experiences and insights. This program would need to be short term as well. Short term programs can make a positive impact on **DEI** efforts into creating a welcoming work environment while still implementing **DEI** centered initiatives without fear of being sued. The implementation of short-term **DEI** programs can have a positive impact in creating a welcoming work environment while allowing employers to continue implementing **DEI** programs without the fear of being sued.

***258** In order for employers to mitigate their risk of a lawsuit being brought against them for their **DEI** programs and policies, they will primarily need to ensure that they are in no way using race as a "plus factor." This means that employers cannot treat similarly situated individuals differently because of their race when they are considering hiring or promoting the individual. Employers will need to review their hiring practices to ensure that racial quotas are not being implemented. They will also need to make sure that race-centered goals for advancement in their management are not set. Employers and companies should also highly consider conducting **DEI** audits on their policies and programs, in order to really know where they currently stand in terms of the *SFFA* decision. If employers choose to implement **DEI** programs, they will need to ensure that the programs have a logical end point and are used to fulfill a legitimate business need.

Employers do not have to drop every **DEI** initiative all together out of fear of being sued. Diversity efforts can have significant impacts on a company and their work culture. As such, employers should consider focusing their **DEI** efforts on inclusion programs within their company. This includes implementing workplace trainings and hosting cultural programs and events for employees to attend. Employers should also use the SFFA notion that they do not have to eliminate race from consideration completely, as they can consider it in how it has impacted an applicant's life. This means that employers should broaden their definition of diversity and look toward what makes an individual applicant unique. Employers can clearly take steps to mitigate their risk of a lawsuit, but this does not mean that all **DEI** efforts should be thrown away as a lost cause as **DEI** is critical for a company's innovation, market and customer understanding, global competitiveness, and increased employee engagement and **belonging**.

VII. CONCLUSION

In the summer of 2023, the Supreme Court of the United States handed down a decision that changed the **landscape** of affirmative action to colleges and universities. While this decision does not directly impact employers and businesses, it will shift how employers approach their diversity, equity, and inclusion programs because they may no longer use race-conscious policies to advance their **DEI** efforts, as they may face potential and costly litigation for reverse discrimination. This includes programs like diversity fellowships, hiring ***259** quotas that center around diversity, and leadership trainings and policies that promote racial or ethnic minorities. In order for businesses and companies to continue to advance their **DEI** programs they will need to make adjustments in accordance with the ruling from *SFFA*. This entails reviewing and modifying job descriptions, adjusting any policies that treat similarly situated individuals differently because of their race, and focusing on inclusion.

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Legal practice during the Trump administration: strategies for lawyers of color

(January 15, 2025) - Kim Mallett of Major, Lindsey & Africa discusses what may be in store for certain practice areas with shifting government priorities under the new administration and the opportunities and challenges facing lawyers of color.

As we enter the new year, it's time to gaze into our crystal balls and predict what's ahead under the new administration. Am Law 100 firms, known for their sophisticated practices in regulatory, transactional, and litigation areas, are likely to see increased opportunities as demand grows in response to shifting governmental priorities.

While forecasting is not an exact science, unlike weather predictions using Doppler radar — we can make informed guesses based on statements and signals from members of the incoming administration and corresponding conversations with firm management.

Reflections on white-collar practices under the Biden administration

At the beginning of the Biden administration, many believed white-collar practices would thrive due to the expected heightened focus on corporate accountability and enforcement. However, four years later, a mix of factors prevented this anticipated boom from materializing.

One significant reason was the Department of Justice's diverted attention to urgent matters arising from the global pandemic. Cybersecurity and pandemic-related fraud consumed substantial resources, drawing focus away from the resource-intensive investigations typical of white-collar cases. Additionally, the expectation of heightened scrutiny led many corporations to self-regulate by strengthening compliance programs and proactively avoiding potential violations. This trend reduced the number of prosecutable cases as businesses focused on adhering to regulations.

What's ahead for white-collar practices and beyond?

With the incoming administration, a shift in priorities is expected. Like the previous Trump administration, there may be reduced emphasis on enforcing certain regulatory actions, particularly in corporate fraud, environmental violations, and financial misconduct.

If this policy materializes, it could lead to fewer investigations and prosecutions, lessening the need for white-collar defense. However, white-collar practices are highly sensitive to policy shifts, and unexpected events — such as high-profile corporate scandals or regulatory overhauls — could reignite demand.

Here is a completely unscientific list of practice areas that appear to be on the rise.

Private credit

The financial sector was highly promoted in the previous Trump administration. If the anticipated reduction in regulatory burdens on lenders and investors materializes, the activity of companies seeking to take advantage of fewer regulations in deal structuring could spur on private credit activity; thus, the demand for private credit lawyers would continue to grow.

PE/M&A

With an expected increase in M&A activity through deregulation, tax reforms, and continued low interest rates, PE firms may increase leveraged buyouts — which in turn will rely on more private credit. A favorable environment for business growth, financing, and transactions could lead to an increase in deal work, which would lead to more work for PE/M&A lawyers.

Energy

Lawyers specializing in energy will possibly see changes from the current **landscape** as the incoming administration seeks to dismantle regulations and increase exploration for oil and gas, particularly on federal and previously restricted lands.

ESG

If the incoming administration scales back or dismantles financial and environmental regulations that are currently in place this could lead to a reduction in the burden for compliance on companies, thus limiting the areas of ESG enforcement. Such steps would thereby create **new** opportunities for lawyers to help their clients **navigate** the emerging challenges in an **evolving** regulatory **landscape**.

Scaling back disclosure requirements will weaken the SECs rules pertaining to climate related financial risks especially for public companies. On its face this may create less work for ESG lawyers in terms of helping their clients comply with currently mandatory rules of disclosure. However, there could be a path for ESG lawyers to find work with clients whose companies are interested in voluntarily maintaining or improving their environmental footprint to meet investor and consumer expectations. This would assist businesses in aligning their social strategies with shareholder interest, particularly in a market that increasingly values social responsibility.

With fewer regulatory requirements there will still be strong investor demand for good governance practices. ESG lawyers may focus more on advising clients on adopting best governance practices to attract capital and prevent shareholder activism.

Finance and banking

The incoming administration is telegraphing rollbacks of financial regulations, corporate tax reforms, and loosened lending restrictions; consequently, economic growth will be stimulated, which could in turn lead to increased borrowing and an even more active financial market. Subsequently, increased opportunities for financial institutions to increase lending, investment, and M&A would lead to more work, particularly for finance and banking lawyers.

Tax

Significant changes to corporate tax laws are apparent. Changes to the corporate tax rates, deductions or rules governing international tax corporations will require highly skilled experts to help **navigate** the **new** rules to ensure compliance and optimize companies' tax strategies.

International arbitration/trade

With signaling of trade wars with China or a more confrontational trade style, international arbitration lawyers will likely be in demand. Increased trade disputes over tariffs, trade barriers, intellectual property, and market access could be fertile ground for IA lawyers looking to sustain or grow their practice.

Lawyers with experience appearing before the World Trade Organization who are adept at **navigating** trade disputes, international trade agreement enforcement, and IP and tech in this **new** environment will be especially sought after.

Strategies for lawyers of color

The Trump administration's proposed changes will be felt across various practice areas; however, they offer both opportunities and challenges for law firm partners who are members of underrepresented minorities.

While there may be increased work in certain sectors (especially energy, M&A, and tax), minority partners may still encounter barriers to accessing high-profile work due to systemic biases, closed networks, and their lack of support of senior leadership. Additionally, the shift in focus away from issues like diversity and social justice could make it harder for minority partners to leverage the full potential of these changes, despite the increase in business opportunities.

First-generation law firm partners and those who are members of underrepresented minorities will require some creative thinking as the **new** **landscape** unfolds and they consider how best to **navigate** it while growing their practices. Here are several approaches they can take to adapt and thrive by leveraging transferable skills and exploring **new** opportunities.

Expand into related practice areas

For litigators — consider specializing in corporate compliance, advising companies on regulatory matters, risk mitigation, and ethics policies, which could become steady revenue streams.

A strategic pivot to focus on data privacy and cybersecurity, addressing growing concerns about AI misuse, cybercrime, and data breaches could also help to strengthen your practice and broaden your expertise.

Find a sponsor at your firm

If you have not already connected with a senior partner or someone of similar seniority who has the ear of firm management, I recommend doing so now. Building a relationship with a sponsor will provide you with support in case things slow down and will also give you the flexibility to pivot if that becomes necessary. See "How a sponsor can help you move up the ranks at a law firm," Reuters **Legal** News, Oct. 2, 2024 (https://bit.ly/3E2NNam).

Pursue pro bono or public interest work

Depending on your firm's policy on pro-bono work, this might be the perfect time to engage in impactful cases such as criminal justice reform or civil rights advocacy, which also broaden experience and professional networks.

Enhance client and business development skills

As a recruiter, it is always my advice to partners that they find ways to build relationships through networking, thought leadership, and active participation in industry associations.

Leverage diversity initiatives

Many firms still have programs aimed at fostering relationships with lawyers from diverse backgrounds. This may be the time to explore these programs at your firm if you have not already done so.

Focus on cross-border work

Foster pre-existing relationships with colleagues in offices outside of the US. If applicable, explore opportunities in international arbitration or fraud investigations, leveraging the interconnected global market.

Develop a niche expertise

Whether you are a litigator or a corporate lawyer you can stand out by specializing in emerging areas like ESG, health care, or cryptocurrency regulations. Additionally, understanding how to integrate niche areas into your practice, when applicable, could help you establish your expertise in an emerging field.

Engage in professional development

Stay current with certifications and training in relevant fields such as fraud examination or privacy law.

Join professional networks

Collaborate with organizations like the National Bar Association, the National Asian Pacific American Bar Association, the Hispanic National Bar Associate, the National LGBTQ+ Bar Association, the National Association of Women Lawyers, and the Minority Corporate Counsel Association for networking and mentorship opportunities.

Conclusion

The **evolving** **legal** market, while challenging, offers many opportunities for those who adapt proactively. Embracing diversity and inclusion initiatives, fostering relationships with clients who prioritize these values, and developing strong business acumen, will ensure that first generation partners can not only survive but thrive during these changes. By diversifying skills and staying attuned to industry shifts, lawyers of color can position themselves for success in this dynamic environment.

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