

## “Colorblindness for All” is a Tale That’s Tall

### I. Introduction

In June 2023, the Supreme Court ruled in Students For Fair Admissions, Inc. v. President and Fellows of Harvard College v. University of North Carolina<sup>1</sup> (hereinafter, “*SFFA*”) that higher education institutions can no longer consider race as a factor in admissions, finding that such a practice violated the Equal Protection Clause of the 14<sup>th</sup> Amendment. While the majority opinion specifically addressed the admission practices of colleges and universities, opponents of affirmative action almost immediately united to threaten legal action against companies with active diversity, equity, and inclusion (“DEI”) programs. Such threats included the Attorney Generals of 13 states who sent letters to CEOs of Fortune 500 companies cautioning them against their use of DEI-centered hiring and promotion practices in July 2023.<sup>2</sup> Another came from Senator Tom Cotton of Arkansas who, also in July 2023, sent letters to 51 major law firms in the country with a blanket advisory that participation in any DEI hiring programs violated federal law prohibiting racial discrimination in the private sector.<sup>3</sup>

While *SFFA* only addressed affirmative action as applied to college admissions, it resulted in intensified scrutiny and criticism of DEI efforts in the employment sector to ensure compliance with the authority “next door,”<sup>4</sup> Title VII. Therefore, companies are having to reinspect their DEI practices to ensure compliance with anti-discrimination laws. Post-*SFFA*, diversity initiatives are in danger because some companies are abandoning them altogether, either out of an abundance of caution or a lack of sincere dedication in the first place. The most concerning result of *SFFA* will

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<sup>1</sup> 600 U.S. 181 (2023).

<sup>2</sup> Barbara E. Hoey, *Did the Supreme Court Put All Programs At Risk?*, KELLEY DRYE (July 27, 2023), <https://www.kelleydrye.com/viewpoints/blogs/labor-days/did-the-supreme-court-put-all-dei-programs-at-risk>.

<sup>3</sup> Press Release, Tom Cotton Senator for Arkansas, Cotton Warns Top Law Firms about Race-Based Hiring Practices (July 17, 2023), <https://www.cotton.senate.gov/news/press-releases/cotton-warns-top-law-firms-about-race-based-hiring-practices>.

<sup>4</sup> 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring).

be the significant decrease in diversity of the future workforce, making DEI efforts more important than ever, but easy to opt out of.

## II. *SFFA* Should Not Impact Employment Opportunities... But it Will

After the murder of George Floyd in 2020, public outcry demanded that the country take active steps to rectify discrimination, racism, and inequity against Black people.<sup>5</sup> This pressure resulted in many companies reaffirming (or establishing for the first time) their commitment to workplace diversity. Nearly four years later, some of these pledges of allyship were evidently empty or weak at best. Before *SFFA* was even decided, companies such as Nike, Amazon, Walmart, American Airlines, and other large companies eliminated DEI-related departments as the flames of the post-George Floyd outrage began to dim.<sup>6</sup>

This is the first detrimental impact of the *SFFA* decision—DEI professionals are being laid off at alarming rates as companies eliminate these positions. Staff, leaders, and even former c-suite executives whose jobs were centered around diversity are increasingly being laid off due to companies pulling back on these commitments. The widespread elimination of these jobs is devastating, not only because employees with this expertise are being laid-off, but because it is now increasingly difficult to find another job in the same field. “By mid-2023, DEI-related job postings had declined 44% from the same time a year prior, according to data provided by job site Indeed... That’s a sharp contrast with the period from 2020 to 2021, when those postings expanded nearly 30%.”<sup>7</sup>

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<sup>5</sup> Dexter Tilo, *Did the Aftermath of George Floyd’s Murder Lead to Positive Change in the Workplace?*, HUMAN RESOURCES DIRECTOR (June 20, 2023), <https://www.hcamag.com/us/specialization/diversity-inclusion/did-the-aftermath-of-george-floyds-murder-lead-to-positive-change-in-the-workplace/449927>.

<sup>6</sup> Philip Mandelbaum, *Exposed: Big Brands like Nike and Amazon Abandoning DEI*, CUSTOMER ENGAGEMENT INSIDER (May 25, 2023), <https://www.customerengagementinsider.com/employee-experience/articles/exposed-big-brands-like-nike-amazon-abandoning-dei>.

<sup>7</sup> Jennifer Elias, *Tech Companies like Google and Meta Made Cuts to DEI Programs in 2023 After Big Promises in Prior Years*, CNBC (Dec. 22, 2023 9:00 AM), <https://www.cnbc.com/2023/12/22/google-meta-other-tech-giants-cut-dei-programs-in-2023.html>.

As if these company-specific actions were not upsetting enough, conservative state governors are using legislation to ensure suppression of DEI-related initiatives and jobs. For example, Texas Governor Greg Abbott signed a bill in 2023 that outright banned diversity offices in higher education institutions funded by the state.<sup>8</sup> Barriers such as these create added hurdles to an already-criticized field in conservative states.

The Equal Employment Opportunity Commission published a statement clarifying that the *SFFA* decision did not impact employers' implementation of DEI initiatives, and that continuing to foster diversity within the workplace was lawful.<sup>9</sup> While it would seem that confirmation from *the* employment law enforcement agency would quell concerns regarding DEI efforts, many employers still opted to abandon consideration of race—or even gender—in their hiring practices out of the fear of potential litigation. This fear developed because there had already been an uptick in reverse discrimination claims over the past few years, and employers found themselves bracing for a surge in such cases post-*SFFA*.<sup>10</sup> Hypothetically, a larger company legally attacked for its commitment to DEI could likely afford to defend against reverse discrimination claims, and may choose to fully litigate such claims to validate and defend its decision to support DEI programs. Smaller companies, however, may not consider DEI efforts worth the risk of a lawsuit, as defending a discrimination lawsuit could cost anywhere from \$75,00-\$250,000.<sup>11</sup> Such employers are likely to play it “safe,” inevitably resulting in less diverse workplaces.

Diversity initiatives were born from a concern that White men were dominating certain industries. It took intentional efforts, initiatives, planning and programs to attempt to subvert this

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<sup>8</sup> Kiara Alfonseca & Max Zahn, *How Corporate America is Slashing DEI Workers Amid Backlash to Diversity Programs*, ABC NEWS (July 7, 2023 6:26 AM), <https://abcnews.go.com/US/corporate-america-slashing-dei-workers-amid-backlash-diversity/story?id=100477952>.

<sup>9</sup> Hoey, *supra* note 2.

<sup>10</sup> *Id.*

<sup>11</sup> *How Much Does it Cost to Defend an Employment Lawsuit?*, WORKFORCE.COM (May 14, 2013), <https://workforce.com/news/how-much-does-it-cost-to-defend-an-employment-lawsuit>.

reality. The more companies that abandon these efforts entirely, the more likely the workplace could return to the status quo, and diverse candidates could find it increasingly difficult to find employment, especially in traditionally White male-dominated industries.

### III. Impact of *SFFA* on Diversity of Future Workforce

Critics of affirmative action have historically reasoned that, if minorities truly wanted to be considered equal, they should not be given special opportunities and should instead demonstrate their merit like everyone else. The crux of this argument is the proverbial “bootstrap” theory that, with affirmative action, “[i]t is often not possible to tell whether a given student genuinely *deserved* admission to Stanford, or whether he is there by virtue of fitting into some sort of diversity matrix.”<sup>12</sup> This philosophy is flawed because it ignores reality: women and minorities have faced systemic challenges that still impact the likelihood of admission into higher education institutions when compared to affluent and non-diverse students. For example, a study conducted by a Harvard-based research organization made a major finding in 2023 that, when compared to students with similar academic profiles who were *not* admitted, 9% of students admitted to ivy league universities 1) had parents in the top 1% of wealth distribution and 2) had an alumni parent.<sup>13</sup>

This data is per se harmful to all non-affluent students despite their race or gender; however, the history of ivy league admissions paints a picture of persistent discrimination of women and minorities. For example, Harvard’s first Black undergraduate student graduated in 1870, but the

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<sup>12</sup> David Sacks & Peter Thiel, *The Case Against Affirmative Action*, STAN. MAG. Sept./Oct. 1996, <https://stanfordmag.org/contents/the-case-against-affirmative-action> (emphasis added).

<sup>13</sup> Michael Barbaro & Sabrina Tavernise, *Affirmative Action for the 1 Percent*, THE DAILY: N.Y. TIMES (July 27, 2023), <https://podcasts.apple.com/us/podcast/the-daily/id1200361736?i=1000622502681>; Raj Chetty, et al, *Diversifying Society’s Leaders? The Determinants and Causal Effects of Admission to Highly Selective Private Colleges*, OPPORTUNITY INSIGHTS (July 2023), <https://opportunityinsights.org/paper/collegeadmissions/>.

university admitted less than 12 Black students each year until the 1970s.<sup>14</sup> In the 1940s, women could finally take classes at Harvard, but until 1963, women could not earn degrees from Harvard.<sup>15</sup> Other ivy leagues have a similar history of resistant admissions for women and minorities, leading to a smaller population of diverse alumni. Further, the demographics of the top 1% population includes only 4% Black and 2% Latino individuals.<sup>16</sup>

It is widely understood that Black and Latino households experience higher rates of poverty in the US. This means that these students are more likely to attend lower performing schools with less access to extracurricular activities or advanced placement (“AP”) courses. Even if these students performed at the top percentile of their high schools, it would be difficult for their resumes to compete with affluent students who attended schools laden with sports, speech and debate, community service partnerships, a variety of AP courses, and other resume-boosting opportunities. Without affirmative action, such students will likely get less consideration in college admissions just by virtue of their circumstances.

Due to these realities, one college has predicted that a race-neutral admissions process will cut their Black and Latino population in half.<sup>17</sup> In careful consideration of Chief Justice Roberts’ warning in *SFFA*’s majority opinion that, “[w]hat cannot be done directly cannot be done indirectly[,]”<sup>18</sup> some higher education institutions are boosting consideration for low-income students. Others are increasing recruitment in diverse areas or increasing admission rates for

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<sup>14</sup> Talia Lakritz, *Here’s When All 8 Ivy Leagues Began Admitting Minorities—and How They’re Responding to the Supreme Court’s Affirmative Action Ruling*, BUS. INSIDER (June 30, 2023 3:40 PM), <https://www.businessinsider.com/affirmative-action-ivy-league-colleges-history-2023-6#harvards-first-black-student-graduated-in-1870-and-it-combined-admissions-with-its-womens-college-radcliffe-in-1975-3>.

<sup>15</sup> *Women at Harvard University*, HARV. LIBR., <https://guides.library.harvard.edu/c.php?g=1108872&p=8085578>.

<sup>16</sup> <https://contexts.org/articles/gender-in-the-one-percent/#:~:text=Similarly%2C%2088%25%20of%20those%20in.%2C%20and%20%25%20are%20Latino.>

<sup>17</sup> *Supreme Court’s Affirmative Action Ruling Leaves Colleges Looking for New Ways to Promote Diversity*, ASSOC’D PRESS (June 30, 2023 8:24 AM), <https://ny1.com/nyc/all-boroughs/education/2023/06/30/supreme-court-s-affirmative-action-ruling-leaves-colleges-looking-for-new-ways-to-promote-diversity>.

<sup>18</sup> *Students For Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 230 (2023).

transfer students from community colleges.<sup>19</sup> These steps are likely to be at least somewhat successful in adjusting to post-*SFFA* requirements—but only for institutions that are willing to go this extra mile. Despite the long-understood benefits of diversity in higher education, there is no requirement that colleges and universities admit, or attempt to admit, diverse students.

It remains to be seen what impact the *SFFA* decision will have on college admissions, though it is not impossible to predict a substantial decrease in the diversity of student bodies. While *SFFA* may not directly impact the availability of employment opportunities to qualified diverse candidates, with a decreased diverse workforce, the population of such candidates may suffer significantly.

#### **IV. Conclusion**

The United States has a long, unfortunate history plagued by discrimination of women and minorities. Such history precipitated a need for programs that attempt to balance the scales that have been imbalanced for entirely too long. While the current Supreme Court's majority is potentially concerning for supporters of diversity initiatives, there is evidence that some companies and higher education institutions are doing the work and doubling-down on their dedication to diversity. "Colorblindness" is a myth; luckily, there are individuals in power who remember our history and are working hard to never forget it.

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<sup>19</sup> ASSOC'D PRESS, *supra* note 17.