Skadden

The Supreme Court's Affirmative Action Opinion Continues To Spawn Challenges to DEI Programs

Contributing Partners

Lara A. Flath / New York

David E. Schwartz / New York

Amy Van Gelder / Chicago

Key Points

- In the wake of the Supreme Court's decision in *Students for Fair Admissions*, challenges to DEI initiatives have focused on programs that facially appear to provide a zero-sum advantage based on protected characteristics, including race or gender, or that are open only to applicants with certain protected characteristics.
- DEI initiatives undoubtedly will continue to face similar and potentially expanded challenges in 2024 as litigants opposed to such initiatives continue their efforts to extend the reach of *SFFA*.
- Programs that focus on eliminating bias, cultivating a broad view of diversity and promoting equal opportunity among employees generally remain lawful.

Following the U.S. Supreme Court's June 29, 2023, decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* (together, *SFFA*) prohibiting the consideration of race in university admissions, legal challenges to diversity, equity and inclusion (DEI) programs and initiatives of various forms have continued, including in contexts outside higher education.[1]

New Challenges to Admission Policies in Higher Education

Several recent suits against higher education institutions are noteworthy, as they may allow courts to weigh in on the application and impact of *SFFA*.

Suits against military academies. Although *SFFA* applies to both private and public institutions of higher education, the Supreme Court expressly noted that its holding did not apply to the U.S. military academies, which were not parties to the litigation and might present "potentially distinct interests" that could warrant the consideration of race in admissions.

Students for Fair Admissions filed suits in September and October 2023 against the U.S. Military Academy and the U.S. Naval Academy, respectively, seeking to close that exception. The plaintiff alleges that both academies' use of racial classifications in their admissions programs is unconstitutional.

> Several recent suits against higher education institutions may allow courts to weigh in on the application and impact of *SFFA*.

According to the complaints, the compelling interests proffered by the academies are reduced to two propositions:

- That racial preferences enhance the military's internal functioning.
- That racial preferences enhance the military's functional capacity by fostering internal confidence within the ranks and by bolstering its external legitimacy. This, in turn, increases societal trust and recruitment efforts.

SFFA disputes that these interests are sufficiently compelling.

Suit against NYU. America First Legal, a national nonprofit, filed a putative class action lawsuit in October 2023 against New York University on behalf of prospective *New York University Law Review* applicants. It alleges that the *Law Review*'s consideration of race and

1 Lara Flath and Amy Van Gelder represented the University of North Carolina at Chapel Hill in the *SFFA* litigation.

This article is from Skadden's *2024 Insights*.

One Manhattan West
New York, NY 10001
212.735.3000

sex in its member and editor selection process violates Title VI of the Civil Rights Act and Title IX of the Education Amendments. The suit alleges that the *Law Review* sets aside positions for women, non-Asian racial minorities and LGBTQ+ students at the expense of white and Asian men.

These suits eventually may provide an additional opportunity for the Supreme Court to weigh in on the limits and/or breadth of its reasoning in *SFFA*.

Recent Court Rulings on Challenges to DEI Initiatives

Since our update on this topic in September 2023, several federal courts have ruled on suits brought by public interest litigation groups relating to corporate DEI policies and programs.

- A September 27, 2023, ruling in the U.S. District Court for the Northern District of Georgia denied a request to enjoin a private company from operating its small business grant program open only to Black women. The court held that applying 42 U.S.C. Section 1981 likely would be an unconstitutional restriction on the defendants' expressive conduct under the First Amendment. Three days later, however, the U.S. Court of Appeals for the Eleventh Circuit reversed the district court and granted an injunction pending appeal, stating that the defendants were not engaging in constitutionally protected expression and holding that the plaintiff was substantially likely to succeed on the merits.
- On October 18, 2023, the U.S. Court of Appeals for the Fifth Circuit denied an equal protection and administrative law challenge to the approval by the Securities and Exchange Commission (SEC) of a Nasdaq rule that requires Nasdaq-listed companies to disclose statistics about the demographics of their board members and to include at least one woman and one underrepresented minority or LGBTQ+ member (or explain why they do not). The Fifth Circuit did not reach the underlying merits of the initiative and dismissed the suit on the grounds that, because Nasdaq is not a state actor, the constitutional challenges failed. The Fifth Circuit further held that the SEC had not exceeded its authority under the Securities Exchange Act or the Administrative Procedure Act. The plaintiff has petitioned for *en banc* review of this decision.

Continued Challenges to DEI Programs, Including Those Open to Diverse Applicants Generally

Shortly after *SFFA*, the American Alliance for Equal Rights (AAER), on behalf of prospective law student applicants, filed lawsuits against two prominent law firms, Perkins Coie and Morrison Foerster. Those complaints alleged that the firms' diversity fellowships violated Section 1981 because they were open exclusively to racial minorities, members of the LGBTQ+ community and, for one of the fellowships, students with disabilities. After both law firms expanded the application criteria for their fellowships, AAER voluntarily dismissed both suits.

AAER continued to send letters to additional law firms with similar diversity fellowships, inquiring about applicant criteria and threatening litigation after these dismissals. On October 30, 2023, AAER filed another suit against one such firm, Winston & Strawn, in which it alleged that the firm limits the applicant pool for its fellowship to candidates who are "diverse," "disadvantaged" or "historically underrepresented." Even though the applicant criteria is not exclusive to certain groups, the complaint alleges that this language is shorthand for "not a straight white male."

On December 7, 2023, AAER dismissed this suit as well and has indicated that it has no current plans to sue additional law firms.

Corporations may not be so fortunate. Indeed, America First Legal recently filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) asserting that NASCAR discriminates against white men through its "Drive for Diversity" program. This program previously specified that it was intended for women and ethnic minorities but was updated on September 1, 2023, to seek applicants of "diverse backgrounds and experiences."

Despite the language change, America First Legal alleged in its November 2, 2023, complaint that NASCAR continues to carry out unlawful hiring practices "under the cloak of a 'diverse backgrounds and experiences' rebranding."

These recent developments may signal a coming wave of challenges to programs based not only on their facial description but how they are applied in practice.

Heightened Scrutiny of DEI Initiatives To Undoubtedly Continue

Individuals and nonprofits seeking to challenge race-conscious policies are energized because they see *SFFA* as a decisive, favorable change in doctrine, and they seek to apply its reasoning to contexts beyond higher education.

As we discussed in our September 2023 article on this topic, DEI initiatives and programs that are not open to all applicants or those that apply an explicit race- or gender-based focus will likely face continued and heightened scrutiny. We also expect to see ongoing scrutiny of perceived hiring quotas and set-asides, particularly those that may appear to be incentivized by bonuses for management or company leadership.

DEI programs — especially those that are focused on eliminating bias, cultivating a broad view of diversity and promoting equal opportunity among employees — remain lawful. But companies should closely examine their public statements regarding these programs and consider whether they are closely connected to specific business goals, are non-exclusionary and avoid providing an advantage due to race in a zero-sum outcome.