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DEI PROTECTION TASK FORCE

SFFA v. UNC and *SFFA v. Harvard*: Navigating the Impact Across All Industries

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On October 31, the Supreme Court will hear oral argument in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, in which the Court will reconsider the legality of race-conscious admissions programs. Opponents of these programs have asked the Court to overrule its landmark decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and hold that consideration of race or ethnicity in admissions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. The Court's decisions are expected by the end of June.

While the outcome is not yet certain, numerous commentators have suggested that the Court will rule against the universities. That result would have immediate and far-reaching consequences for educational institutions, which may need to redesign their recruitment and admissions programs to meet a new legal standard. But the impact of the Court's decision would not stop there: the Court's ruling could lay the groundwork for a broader assault on the use of race, ethnicity, and other protected characteristics in many programs across numerous industries. Amici supporting SFFA in the Harvard and North Carolina cases explicitly extended their arguments to attack private businesses' "corporate diversity efforts" in general. With many well-funded groups devoted to this movement, any organization that seeks to promote diversity, equity, and inclusion (DEI) could find itself in the crosshairs.

This coordinated effort to outlaw DEI efforts already extends well beyond challenges to university admissions programs to, for example, lawsuits challenging hiring policies intended to diversify the workforce,[1] efforts to support minority-owned businesses through promotional credits,[2] online storefronts that allow customers to sort and filter sellers based on whether they self-identify as minority-owned,[3] and even the use of facially race-neutral proxies to determine student placements in public high schools.[4]

Threats to DEI programs will only increase under a Republican administration or Republican-controlled Congress. In that event, businesses will need to prepare for litigation and investigations brought by the federal government as well. Indeed, dozens of Republican US Senators and House members filed an amicus brief supporting SFFA's challenge. Expressing alarm that "race-conscious policies … appear to be proliferating" beyond the university context, the Republican lawmakers argued that "[r]etiring *Grutter* is urgent to discourage race-conscious policies in other settings" that are "far afield from higher education." In other words, victory in *SFFA* will provide ammunition in a larger effort to dismantle race-conscious policies in all sectors of the economy.

Facing this rapidly evolving legal landscape, educational institutions and businesses alike should consider taking proactive steps to develop new strategies for achieving their DEI objectives. Jenner & Block has a deep commitment to diversity, equity, and inclusion and extensive experience supporting our clients' DEI efforts though litigation, investigations, and strategic counseling. In light of this

commitment and experience, the firm has launched a task force—composed of leading attorneys serving a wide variety of industries—to help clients prepare for and respond to the SFFA decision and the legal developments that inevitably will follow. The DEI Protection Task Force is developing creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. The Task Force will also keep clients informed of relevant developments in this space though a client alert series and CLE opportunities.

If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), and Kathryn Wynbrandt (kwynbrandt@jenner.com).

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[1] A class-action lawsuit filed last month challenges the hiring program at Texas A&M University, which was updated to help achieve compositional "parity with that of the State of Texas." The complaint asserts that the program discriminates on the basis of race and sex in violation of Title VI, Title IX, Section 1981, and the Equal Protection Clause.

[2] Food delivery companies DoorDash and Uber Eats were sued last year after they offered promotions waiving delivery fees for purchases from Black-owned restaurants in the wake of George Floyd's murder. An array of lawsuits in several states alleged that the promotions violated state civil rights laws.

[3] In *Correll v. Amazon.com Inc.*, Amazon faces a class-action lawsuit in California alleging that the company unlawfully discriminates on the basis of race and sex by allowing sellers on the Amazon Marketplace to certify themselves as minority-owned businesses and allowing customers to filter search results based on those certifications. The district court recently dismissed the complaint on standing grounds, but the plaintiffs have until the end of this month to file an amended complaint.

[4] In *Coalition for TJ v. Fairfax County School Board*, an advocacy group challenged the Fairfax County School Board's admissions policy for a prestigious public magnet school in Northern Virginia. Even though admissions officers are not made aware of applicants' race or ethnicity, the advocacy

group argued that the policy discriminates against Asian American applicants by considering a "facially neutral proxy" for race. The district court held that the policy violates the Fourteenth Amendment's Equal Protection Clause. Its ruling is stayed pending appeal before the Fourth Circuit.