



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

June 20, 2024

Dear American Bar Association, Fortune 100 CEOs, and Other Organizations Unfairly Targeted for their Commitment to Diversity, Equity, and Inclusion:

In July 2023, 20 of my fellow Attorneys General and I wrote a letter to condemn attempts to correlate diversity measures with racial discrimination, and to remind companies of their obligations to ensure equitable and inclusive environments for their employees and clients. Racial discrimination continues to plague the American workforce. Diversity, equity, and inclusion programs are important tools to root out, correct and prevent on going discrimination. As stated in our July 2023 letter, “the diversity efforts of private sector employers remain vital to a healthy economy and productive workforce.”¹

Today, the undersigned 19 Attorneys General write to reaffirm our commitment to ensuring that diversity, equity, and inclusion programs continue to effectively address discrimination throughout the private and philanthropic sector. We also write to respond to coordinated attempts to contort the law and invalidate programs aimed at eliminating and preventing racial inequities, including the recent letter to the American Bar Association by several of our Attorneys General colleagues.²

Our letter starts with a discussion of the narrow reach of the Supreme Court’s ruling on affirmative action and responds to the letter to the ABA. It then summarizes recent litigation, and concludes with a discussion on the importance of diversity, equity, and inclusion programs in the corporate and philanthropic sector.

¹ July 19, 2023 Letter to Fortune 100 Companies from 21 AGs, available at <https://illinoisattorneygeneral.gov/News-Room/Current-News/Fortune%20100%20Letter%20-%20FINAL.pdf>

² June 3, 2024 Letter to the ABA by 21 Other AGs, available at <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2024/pr24-47-letter.pdf>.

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SFFA Did Not Ban Higher Education Diversity Efforts Outside of The Narrow Practices Prohibited in Admissions

Groups interested in reversing racial progress have become unduly emboldened by *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) (“*SFFA*”). Among other tactics, they are willfully misinterpreting the law in attacking various DEI efforts that are not impacted by the holding of *SFFA*. These groups have specifically targeted programs focused on providing Black people, communities, and businesses with access to markets that have historically shut them out or discriminated against them in other ways. Their challenges are intended to contort and weaponize antidiscrimination statutes to undo decades of progress. We cannot allow these attacks to chill efforts to remove barriers to full participation in schools, business, and nonprofit endeavors.

On June 3, 2024, several Attorneys General sent a letter to the American Bar Association falsely equating the ABA’s proposed revised standards for law school accreditation with the type of racial considerations held to be unlawful in *SFFA*. That letter attempts to expand the reach of *SFFA*, stretching its holding far beyond its own reasoning, and it should be ignored.

The ABA is responsible for law school and paralegal program accreditation across the United States.³ As the nation’s largest professional organization, it serves as the voice of the legal community and is the premier advocate for improvements in the profession.⁴ As a part of its wide-reaching responsibilities, the ABA has identified significant disparities between the legal industry and the rest of the country. For example, according to the ABA, Black and Latino people “are just over a third of the population but are only approximately 10% of attorneys.”⁵ This discrepancy is troubling, particular to an organization like the ABA with a stated mission to “eliminate bias and enhance inclusion in the Association, the legal profession, and the justice system.”⁶

As the accrediting body for legal education, the ABA is uniquely positioned to influence the legal industry and encourage the correction of troubling trends as they occur. As one tool, the ABA issues a set of standards and rules for law schools to abide by in order to gain and retain accreditation. In Standard 206(a) – the standard at issue in the June 3 letter – the ABA requires that law schools wishing to become and remain accredited by the organization “demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities to the study of law and entry into the profession by members of underrepresented groups, particularly

³ See American Bar Association, <https://www.americanbar.org/topics/legaled/>.

⁴ *Id.*, <https://www.americanbar.org/membership/>

⁵ American Bar Association Model Diversity Survey, <https://www.americanbar.org/groups/diversity/DiversityCommission/model-diversity-survey/>

⁶ American Bar Association, About Us, https://www.americanbar.org/about_the_aba/

racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.”⁷

Standard 206(a) does not require that law schools make admissions decisions based on race or ethnicity. In fact, Standard 206(a) does not mention admissions at all. It does not dictate how a law school may demonstrate its commitment to diversity and inclusion other than by providing full opportunities to underrepresented groups – which law schools were already duty-bound to provide by the Constitution and antidiscrimination statutes. The plain language of the Standard is clear, and to argue against it suggests a belief that underrepresented groups should *not* have equal access to legal education – which is plainly discriminatory.

Interpretation 206-2 provides more clarity on the Standard, making it clear that law schools may use race and ethnicity in its admissions process only to the extent *consistent with applicable law*, and noting that the organization is not prescribing which actions a law school may take to satisfy the Standard:

The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. If consistent with applicable law, a law school may use race and ethnicity in its admissions process to promote diversity and inclusion. The determination of a law school’s satisfaction of such obligations is based on the totality of the law school’s actions and the results achieved.⁸

To be clear, *SFFA* does not require that higher education institutions are barred from undertaking recruitment efforts to encourage a diverse applicant pool, or from creating non-hostile educational environments for underrepresented groups. The majority opinion confirms the limited reach of *SFFA*’s holding: “College *admissions* are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.” *SFFA*, at *27. Recruitment efforts and other aspects of the admissions process that do not ultimately determine who is admitted are not “zero-sum” in the way that matters for the majority in *SFFA*, and are therefore not implicated by the holding.⁹ Further, on-campus affinity organizations and other efforts to ensure students have a sense of belonging do not exist in a closed universe in the same way that school class sizes do. In other words, law schools are free to ensure that their applicant

⁷ Standard 206, 2023-2024 Revised Edition of the Standards and Rules Since August 2023, American Bar Association, at 15 (*available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/23-24-revised-standards-and-rules-since-aug-2023.pdf)

⁸ Interpretation 206-2, 2023-2024 Revised Edition of the Standards and Rules Since August 2023, American Bar Association, at 15 (*available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/23-24-revised-standards-and-rules-since-aug-2023.pdf)

⁹ Justice Sonia Sotomayor noted in her dissent in *SFFA* that the majority’s “decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications.” *SFFA*, 600 U.S. 181, 346 (Sotomayor, J., dissenting).

pools are diverse and that students of color are provided “full opportunities” to study law once admitted, in line with the ABA’s proposed standard – to do so does not run afoul of the holding in *SFFA*.

Indeed, *SFFA* was narrow, and the Supreme Court has not extended its reasoning in *SFFA* to anything outside of the limited context of race-conscious higher education admissions. In fact, the Supreme Court recently declined to rule on a case that argued for a more expansive application of *SFFA* in other admissions contexts.¹⁰

The signatories of the June 3 letter surely understand *SFFA*’s limited applicability, but are hoping that the larger public does not. Their letter did not offer serious legal analysis, but was instead an attempt to control the discourse and expand *SFFA*’s reach in the public’s view. We will not allow that to happen. Diversity, equity, and inclusion initiatives are still lawful in the education context, and they are still lawful in other contexts as well.

Corporate DEI Programs Are Still Lawful Because *SFFA*’s Narrow Holding Did Not Change the Law for Private Businesses

As we have noted before, *SFFA* did not address or govern the behavior or the initiatives of private sector businesses. Instead, *SFFA* followed on, and changed the trajectory of, a very specific line of cases addressing the use of race-conscious decision-making by higher education institutions under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d *et seq.* Indeed, race-based affirmative action in college admissions had always only addressed the specific interests at play in that particular context.

As it relates to businesses, the law has not changed: although private sector companies are generally prohibited from considering race in employment decisions unless they have adopted a voluntary affirmative action plan under *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) or EEOC guidelines, companies have wide latitude to ensure that their applicant pools are diverse and that their workplaces are equitable and inclusive. And companies have an obligation under Title VII to ensure that their workplaces are equitable, including an obligation to ensure that their workplaces are not hostile environments for racial minorities or other types of protected classes.

Headlines regarding litigation in the private sector should not inspire fear that DEI initiatives are now legally intolerable. One case garnering media coverage is *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, (“Fearless Fund”). There, an organization founded by a litigant who spearheaded efforts to overturn affirmative action in higher education filed suit against an Atlanta-based venture capitalist fund that supports businesses owned by Black women. The plaintiff in that case recently won a preliminary injunction, but the impact of this case on other charitable giving initiatives should not be overblown. The legal issues are hardly settled, neither

¹⁰ In *Coalition for TJ v. Fairfax County School Board*, dkt. 23-170, opponents to racial equity explicitly invited the Supreme Court to use their case to expand the reach of *SFFA*. The Supreme Court denied the petition for Certiorari.

as substantive and procedural matters of federal law, nor as they relate directly to Fearless Fund’s grant program.¹¹ The Eleventh Circuit’s ruling was not a final judgment - there are more steps to take before the case reaches its final disposition, and the Fund has pledged to continue the fight in defense of its grant program.

Courts have decisively dismissed other arguments challenging corporate DEI programs, holding that companies retain business judgment as it relates to DEI efforts. *See, e.g., National Center for Public Policy Research v. Schultz et al., No. 2:22-cv-00267* (E.D. Wash.). In a striking opinion dismissing a complaint filed by a Starbucks shareholder challenging the corporation’s DEI efforts, the Eastern District of Washington highlighted the impropriety of using the courts for this type of concerted political agenda:

Plaintiff is apparently unhappy with its investment decisions in so-called “woke” corporations. This Court is uncertain what that term means but Plaintiff uses it repeatedly as somehow negative. This Complaint has no business being before this Court and resembles nothing more than a political platform. Whether DEI and ESG initiatives are good for addressing long simmering inequalities in American society is up for the political branches to decide. If Plaintiff remains so concerned with Starbucks’ DEI and ESG initiatives and programs, the American version of capitalism allows them to freely reallocate their capital elsewhere.¹²

Additionally, the federal government continues to defend DEI programs. The EEOC – the very agency charged with enforcing federal civil rights laws related to discrimination by businesses – took the notable step of filing an amicus brief in support of defendants in *Roberts v. Progressive Preferred Insurance Company*, No. 1:23-cv-01597 (N.D. Ohio) (“Hello Alice”). In its amicus, the EEOC correctly stated the longstanding principle that private employers may adopt voluntary affirmative-action plans to remedy manifest imbalances. The EEOC further correctly argued that strict scrutiny – or, the most stringent level of judicial review – does not apply to a defendant’s conduct in a Section 1981 case. In fact, the Supreme Court has never applied strict scrutiny to the conduct of a purely private entity that does not receive federal funding.¹³

Notably, Congress adopted Section 1981 in 1866 pursuant to its authority in the 13th Amendment to effectuate the abolition of slavery, and did so in an effort to strike down “discriminations ... against the [Black] race.”¹⁴ To attempt to contort the law to have the opposite impact – to in fact

¹¹ Other courts have dismissed similar challenges on standing grounds, holding that the plaintiffs could not establish that they were ready and able to apply for a challenged program or that they would have received a challenged program’s offerings but-for its emphasis on race. *See Do No Harm v. Pfizer*, 96 F.4th 106 (2d Cir. 2024) (dismissing a challenge to a program aimed at increasing diversity in the medical industry); *See also Roberts v. Progressive Preferred Insurance Company*, No. 1:23-cv-01597 (N.D. Ohio) (“Hello Alice”) (dismissing a similar challenge in the trucking industry).

¹² *National Center for Public Policy Research v. Schultz, et al.*, 2023 WL 5945958, No. 2:22-CV-00267-SAB (E.D. Wash. Sept. 11, 2023)

¹³ *See Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est.*, 470 F.3d 827 (9th Cir. 2006).

¹⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1416 (1866).

bar institutions from charitably giving to members of the Black community in recognition of the lasting societal and economic impacts of slavery and discrimination – would be antithetical to the purpose of the statute. The societal and financial impact of the system of enslavement persists in this country – programs that address this legacy are vital to continuing our national project of one day achieving true equality.

The fundamental takeaway from the EEOC's *Hello Alice* brief was simple: “EEOC enforcement actions and private-party litigation play a vital role in rooting out pervasive discrimination but cannot alone fully effectuate Title VII’s vision. Empowering employers to take voluntary measures to remedy past discrimination remains an important component of our nation’s progression toward equal employment opportunity.”¹⁵ These principles are uncontroversial. We cannot – and will not – allow the legislative history and purpose of our nation’s antidiscrimination statutes to be hijacked and turned on their heads.

DEI Efforts Remain Good for Business, and Diversity is Strongly Correlated with Financial Success

We are encouraged by recent studies showing that diversity efforts in corporate America are working: although we have not yet reached equitable representation in corporate workforces, leaderships, and boards, for the first time in history, such parity is in sight for certain top performing companies.¹⁶ This progress is in no small part due to the wide variety of programs implemented to provide opportunities for underrepresented communities, including women, Black people, Latino/Hispanic people, Asian Americans and Pacific Islanders, Native Americans, people who identify as LGBTQ+ and others. These corporate commitments to diversity are vital to our workforce and our states, and they must continue.

The business case for DEI is stronger this year than in the past decade, and companies with diverse leadership teams are associated with higher financial returns, and higher social and environmental impact scores.¹⁷ Companies in the top quartile for ethnic diversity show an average 27% financial advantage over others. *Id.* Companies in the bottom quartile for ethnic diversity are 24% less likely

¹⁵ Amicus Br. of the EEOC Supp. Defs., *Roberts v. Progressive Preferred Insurance Company*, No. 1:23-cv-01597 (N.D. Ohio, Feb. 22, 2024), at *10.

¹⁶ “Diversity Matters Even More: The Case for Holistic Impact,” *Mckinsey*, November 2023, at p. 23, available at <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-matters-even-more-the-case-for-holistic-impact#/> (“[I]t has been particularly inspiring to find that [one of the study’s cohorts of businesses] have attained gender parity and equitable ethnic representation, showing that equitable representation at the top is not just a lofty dream but a realistic goal.”)

<https://www.mckinsey.com/~media/mckinsey/mckinsey%20institute%20for%20black%20economic%20mobility/corporate%20commitments%20to%20racial%20justice%20an%20update/corporate-commitments-to-racial-justice-an-update-vf.pdf?shouldIndex=false>

¹⁷ “Diversity Matters Even More: The Case for Holistic Impact,” *Mckinsey*, November 2023, available at <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-matters-even-more-the-case-for-holistic-impact#/> (“[I]n an increasingly complex and uncertain competitive landscape, diversity matters even more.”)

to outperform. *Id.* And companies in the top quartile for ethnically diverse boards are 13% more likely to outperform than those in the bottom quartile. *Id.*

And despite ongoing attempts to manufacture societal and legal controversy, diversity, equity, and inclusion efforts remain popular among a majority of the American public, cutting across racial and ethnic lines, ages, and political ideologies. According to an August 2023 poll conducted by Harris and the Black Economic Alliance, 78% of adults in the United States support businesses taking active steps to ensure that companies reflect the diversity of the American population.¹⁸ This popularity underscores the need for affirmative efforts at ensuring that our nations' workplaces and industries continue trending toward racial equity.

Further, consumers are paying attention to public pledges, and expect them to be followed with action. 53% of consumers believe companies that issue a statement of racial justice support must follow up with concrete action to avoid being seen as exploitative or opportunistic.¹⁹ And these viewpoints translate directly to market share: 46% of consumers say that they pay close attention to a brand's social justice efforts before purchasing a product, and 70% of consumers want to know what the brands they support are actually *doing* to address social issues. *Id.* This, coupled with the overwhelmingly positive public outlook on diversity initiative and diverse companies makes the point stronger: ensuring diversity, equity and inclusion is more than a moral and legal imperative – it's good business sense.

This business benefit is being noted by regulators, who are seeking to match corporations' actions and workforce demographics with their public pledges. Indeed, fellow governmental entities are seeking updates and tracking progress on DEI programs pledges, including the Congressional Black Caucus,²⁰ the Congressional Asian and Pacific American Caucus,²¹ and the Congressional Hispanic Caucus.²² We applaud our colleagues, and share their vision.

¹⁸ New Poll By The Black Economic Alliance Foundation/The Harris Poll: Corporate Diversity Initiatives Overwhelmingly Supported Across Racial, Ideological, And Generational Lines, available at <https://foundation.blackeconomicalliance.org/press-release/new-poll-by-the-black-economic-alliance-foundation-the-harris-poll-corporate-diversity-initiatives-overwhelmingly-supported-across-racial-ideological-and-generational-lines/>

¹⁹ "Where Do We Go From Here?: A Guide to Advance Racial Equity Through Environmental, Social, and Corporate Governance," Congressional Black Caucus Foundation and the National Racial Equity Initiative for Social Justice (2023), available at https://issuu.com/congressionalblackcaucusfoundation/docs/cbcf_cpar_wheredowegofromhere_csr_guide?fr=xKAE9_zU1NQ

²⁰ Letter from Congressional Black Caucus to Corporate Leaders, December 15, 2023, available at https://cbc.house.gov/uploadedfiles/congressional_black_caucus_letter_re_corporate_accountability.pdf

²¹ Letter from Congressional Asian and Pacific American Caucus to Corporate Leaders, February 9, 2024, available at <https://capac-chu.house.gov/press-release/capac-addresses-fortune-100-ceos-corporate-dei-practices-and-aanhpi-corporate#:~:text=Dear%20Corporate%20Leaders%3A,senior%20levels%20of%20your%20company.>

²² Letter from Congressional Hispanic Caucus to Corporate Leaders, March 8, 2024, available at https://chc.house.gov/sites/evo-subsites/congressionalhispaniccaucus.house.gov/files/evo-media-document/FILE_6776.pdf

To that end, the undersigned Attorneys General stand ready to come to the defense of the principles espoused in this letter. And we welcome leaders in every sector to be in touch with our offices directly to collaborate on these efforts.

We look forward to engaging with the ABA, businesses and organizations in our states to promote DEI initiatives and to push back against efforts to misconstrue the law in an attempt to chill or reverse progress.

Sincerely,

A handwritten signature in black ink, appearing to read 'K Raoul', written in a cursive style.

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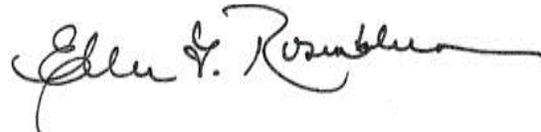
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