FROM CAMPUS TO CORPORATE: THE AFTERMATH OF *STUDENTS FOR FAIR ADMISSIONS* ON WORKPLACE INCLUSION*

BY: ALISON M. HAGANI* *

I. Introduction

In *Students for Fair Admissions v. University of North Carolina* and *Students for Fair Admissions v. President and Fellows of Harvard College* ("SFFA"), the Supreme Court held that race-conscious admission practices violate the Equal Protection Clause of the Fourteenth Amendment.[1] In the direct aftermath of the Court's ruling, Chair Charlotte Burrows of the U.S. Equal Employment Opportunity Commission (EEOC) was quick to clarify that the decision "does not address employer efforts to foster diverse and inclusive workforces" and reaffirmed that "it remains lawful for employers to implement diversity, equity, and inclusion, and accessibility (DEIA) programs to ensure workers of all backgrounds are afforded equal opportunity in the workplace."[2] Despite this, many organizations have filed lawsuits, citing *SFFA* in challenging DEIA practices in the employment context.[3]

DEIA employment practices concertedly advance the presence and prosperity of all identities in the workplace. In June 2021, President Biden issued an Executive Order asserting his administration's policy "to cultivate a workforce that draws from the full diversity of the Nation," including by reestablishing and issuing government-wide initiatives and plans to promote diversity and inclusion in the federal workplace.[4] Alluding to a legitimate interest, President Biden's executive order affirmed the value of DEIA practices in cultivating more efficient and higher-performing workforces.[5] Both the federal government and private employers enforce their own DEIA practices. For example, the Department of Commerce's DEIA plan names equal opportunity "a core value and practice norm," and advances numerous strategies and actions, which include conducting pay equality audits by race, gender, and ethnicity, creating a diversity council, and ensuring multiple avenues for employees to voice concerns.[6] Google published its 2023 Diversity and Annual Report on its "progress towards building a Google that reflects and embraces the diversity of the world," highlighting its efforts to increase manager accountability and expand its programs to underrepresented communities.[7]

---

[1]*Author's Note: This article cites cases that are pending and subject to future determinations. It is accurate as of December 10, 2023.

**©2023, Alison Hagani

Students for Fair Admissions, Inc., v. President and Fellows of Havard College; University of North Carolina*,* 143 S.Ct. 2141, 2147 (2023).

[2] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs* (June 29, 2023) https://perma.cc/BZA8-HXRD.

[3] *See, e.g*., American All. for Equal Rights v. Fearless Fund Mgmt, LLC, 2023 WL 6295121 (N.D. GA 2023); Moses v. Comcast Cable Commc'n Mgmt, LLC, 2022 WL 2046345 (S.D. Indiana 2022).

[4] EXEC. ORDER NO. 14035, *Diversity, Equity, Inclusion, and Accessibility in the Federal Workplace,* (June 25, 2021), https://perma.cc/W7FN-Y7M7.

[5] *Id.*

[6] U.S. DEPARTMENT OF COMMERCE, *Diversity, Equity, Inclusion & Accessibility* (DEIA), https://perma.cc/FX96-SGGF.

[7] *2023 Diversity Annual Report: Strengthening Our Culture of Respect for All,* GOOGLE (2023), https://perma.cc/MJM9-AH7M.

DEIA in employment initiatives respond to a dearth of diversity in the workplace, which predominantly affects Black, Indigenous, and People of Color (BIPOC), women of color, LGBTQIA+ individuals, and individuals with disabilities. The unemployment rate, which averaged 8.1% in 2020, was significantly higher among Black (11.5%) and Hispanic (10.6%) populations.[8] While Black men (12.1%) were more likely to be unemployed than Black women (10.9%), 11.4% of Hispanic women were unemployed compared to 9.7% of Hispanic men, and all these groups significantly exceeded the national average, especially relative to unemployment rates of white men (7.0%) and white women (7.6%). Furthermore, the unemployment rate for individuals with a disability was twice as high as those without disabilities.[9] Likewise, nearly 30% of transgender people were unemployed in 2021.[10] Even for marginalized individuals who obtain employment, their experiences are dramatically different than those of non-white or male employees. Black women file sexual harassment charges with the EEOC at nearly three times the rate of white, non-Hispanic women, despite significantly lower reporting rates.[11] Women of color are also significantly less likely to obtain leadership positions.[12] In all these ways and more, judicial intervention against these DEIA initiatives have grave implications for the prosperity of these marginalized identity groups.

In this Note, I will analyze *SFFA* as it pertains to the employment setting, extrapolating holdings relevant to these challenges. I will also analyze the landscape of litigation that challenges DEIA employment practices in a broad range of contexts, from hiring to grants and fellowships, among others. Lastly, I will evaluate how the application of *SFFA* to the employment context may drastically change the shape of the American workforce, exacerbating existing barriers for those who hold one or multiple marginalized identities.

II. *Students for Fair Admissions* and Unconstitutionality of Race-Conscious Admissions

SFFA held that Harvard College and the University of Carolina's admission practices, which purportedly included race as a factor, violated the Equal Protection Clause of the Fourteenth Amendment.[13] The Fourteenth Amendment provides in part that "no state shall deny any person within its jurisdiction the equal protection of laws."[14] In *Civil Rights Cases,* the Supreme Court clarified that the Equal Protections Clause only applies to actions committed by public actors; however, a private party that discriminates while engaging in public action is also subject to the

---

[8] U.S. Department of Labor, Women's Bureau, *Annual Data on Employment Rates* (2020), https://perma.cc/CN7W-C8HP.
[9] U.S. Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics* (2020), https://www.bls.gov/news.release/pdf/disabl.pdf.
[10] *Transgender People Twice as Likely to be Unemployed,* McKinsey & Company (2021), https://perma.cc/WQN6-QW25.
[11] *Black Women Disproportionately Experience Workplace Sexual Harassment, New NWLC Report Reveals,* National Women's Law Center, https://perma.cc/Z6FM-T25Q; U.S. DOJ Bureau of Justice Statistics, *"Female Victims of Sexual Violence, 1994-2010*" (2013), https://perma.cc/74EG-R982
[12] *Black Women's Equal Pay 2020: New Report Explores the Intersection of Gender and Race in the Workplace,* THE 19TH (August 2020) (This study found that for every 100 white men promoted, only 58 Black women are promoted and that Black women only comprise 1.6% of vice-presidential roles and 1.4% of C-suite positions despite comprising 7.4% of the U.S. population). https://perma.cc/C55S-9EWY.
[13] *Students for Fair Admissions,* 143 S.Ct. 2141, 2147 (2023).
[14] U.S. Const. amend. XIV, § 1.

Fourteenth Amendment.[15] In *SFFA,* respondent institutions of higher education were subject to Fourteenth Amendment challenges; while private, they engaged in public action by accepting federal funding and therefore fell within this constitutional purview.[16]

Dissecting the Court's logic and language in *SFFA* exposes at least two major implications for DEIA-conscious employment practices. First, the Court concluded that Students for Fair Admissions Inc. (SFFA), a nonprofit organization aimed at "[defending] human and civil rights secured by law, including the right of individuals to equal protection under law," had organizational standing to bring its claim to the Court.[17] The broad organizational standing afforded to these nonprofits has invited similar organizations to bring anti-DEIA claims with security. Much of the employment litigation filed is on behalf of nonprofit organizations that, like SFFA, are charged by a specific constitutional mission.[18] Second, the Court's broad finding that respondents failed to present an exceedingly persuasive justification for its race-conscious policies can easily be transferred to the employment setting. It remains to be seen how this holding might be extended to other contexts.

A. *Facts of SFFA*

The defendants in *SFFA* were Harvard College and the University of North Carolina, two higher educational institutions with "highly selective admission programs" that, along with a student's grades, recommendation letters, and extracurricular involvements, take into account the applicant's race.[19] In particular, Harvard's admission process included various steps, including a "first reader" who delivered numerical scores of applicants to the Harvard admissions subcommittee, established by geographic area.[20] Both the first reader's score and the Harvard admissions committee take race into account.[21] Their recommendations then went to a full admissions committee who ensured there was "no dramatic drop off" in minority admissions and produced a "lop list" of tentatively admitted students.[22] This "lop list" only considers the applicant's legacy status, recruited athletic status, financial aid need, and race. University of North Carolina's admission process similarly considers an applicant's race; the admission officers tasked with assigning a numerical rating and written recommendation on each

---

[15] *See,* Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited.").
[16] 143 S.Ct. 2141, 2147.
[17] *Id*.
[18] See, e.g., *About Us,* DO NO HARM (2023), https://perma.cc/B4SK-YV5X *("*We are a diverse group of physicians, healthcare, professionals, medical students, patients, and policymakers united by a moral mission: Protect healthcare from a radical, divisive, and discriminatory ideology."); *About American Alliance for Equal Rights,* THE AMERICAN ALLIANCE FOR EQUAL RIGHTS (2023), https://perma.cc/Z8JR-3JAJ ("The American Alliance for Equal Rights is a not-for-profit 501(c)(3) membership organization dedicated to challenging distinctions and preferences made on the basis of race and ethnicity."); THE NATIONAL CENTER FOR PUBLIC POLICY RESEARCH (2023), https://perma.cc/J72W-UX8P ("We believe that the principles of a free market, individual liberty, and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century.).
National Center for Public Policy Research
[19] 143 S.Ct. 2141, 2147.
[20] *Id.*
[21] *Id.*
[22] *Id.*

application are required to consider the applicant's race.[23] The ultimate admissions committee "may" consider race, as well.[24]

SFFA, petitioner in this case, is a nonprofit organization of thousands of students, parents, and professionals that supports litigation charged at ensuring that a "student's race and ethnicity should not be factors that either harm or help that student gain admission to a competitive university."[25] In the case at hand, SFFA sought declaratory relief against the defendants, arguing that its "admission policies and procedures have injured and continued to injure plaintiff's members by intentionally and improperly discriminating against them on the basis of their race and ethnicity in violation of Title VI."[26] In their complaint, SFFA cited various cases that reject racial classification as "odious to a free people whose institutions are founded upon the doctrine of equality."[27]

B. *Organizational Standing*

Broadly, standing requires that the charging plaintiff has "(1) suffered an injury in fact, (2) that is fairly traceable to the charged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[28] An organization can establish standing either by claiming it has suffered an injury itself or that it has standing "solely as the representative of its members," the latter of which is known as "organizational" or "representational" standing.[29] Invoking "organizational standing" requires that an organization establish that "a) its members would otherwise have standing to sue in their own right, b) that the interest it seeks to protect is germane to the organization's purpose, and c) that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[30]

In *SFFA,* the Court rejected the defendants' argument that SFFA could not invoke organizational standing because it "lacked genuine membership."[31] The Court clarified its decision in *Hunt v. Washington State Apple Advertising Commission,* which established the "indicia of membership" analysis.[32] In *Hunt,* the Court recognized that the Commission, a state agency challenging a state statute, was "not a traditional voluntary membership" organization because it had no members and therefore could not apply organizational standing's three-part test.[33] Despite this, the Court

---

[23] *Id.* 195-196.
[24] *Id.* at 196-197.
[25] *Id.;* Students for Fair Admissions (2023), https://perma.cc/63N9-L6KW ("Our mission is to support and participate in litigation that will restore the original principles of our nation's civil rights movement. A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university.").
[26] Students for Fair Admissions v. President and Fellows of Harvard, No. 20-1199, U.S. District Court for District of MA, Boston Division, November 17, 2014, Petitioner's Complaint; 42 U.S.C. § 2000d (Title VI prohibits discrimination in programs that receive federal assistance.).
[27] *Id. See,* Shaw v. Reno, 590 U.S. 630, 643 (1983); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 518 (1989); Grutter v. Bollinger, 539 U.S. 306, 387 (2003), Regents of Univ. of Cal. v. Bakke, 483 U.S. 265, 389-91 (1978); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
[28] Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016).
[29] 143 S.Ct. 2141, 2157.
[30] Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).
[31] 143 S.Ct. 2141, 2157.
[32] *Id.* 432 U.S. 333, 344.
[33] *Id.*

concluded that the Commission did have standing because the apple growers and dealers, to whom the state statute applied, had elected members of the Commission, funded its membership, and "were effectively members of the Commission" by possessing "all the indicia of membership."[34] Therefore, the Court found the Commission to be a "genuine membership organization in substance," which entitled it to the doctrine of organizational standing.[35]

In *SFFA,* however, the Supreme Court denied the applicability of the "indicia of membership analysis," because SFFA, unlike the Commission in *Hunt,* is a "voluntary membership organization with identifiable members."[36] Therefore, the traditional three-part organizational test was probative. Nevertheless, the Supreme Court's clarification of *Hunt* demonstrates that organizational standing exists upon satisfaction of *either* the three-part organizational test for organizations with identifiable members *or* the "indicia of membership analysis" for organizations without such. This broadens the type of organizations that have standing to file suit and is pertinent across contexts.

C. *Strict Scrutiny and Unconstitutionality*

In *SFFA,* the Supreme Court affirmed the use of a strict scrutiny test for exceptions to the Equal Process Clause.[37] First, the Court considered whether the racial classification is used to "further compelling government interests," evaluating how precedent answered this question.[38] In *Regents of University of California v. Bakke,* which considered the constitutionality of preferential treatment for minorities in education, the Supreme Court found that the only compelling interest was "obtaining the educational benefits that flow from a racially diverse student body."[39] Later, *Grutter v. Bollinger* explicitly endorsed the view of the Court in *Bakke* that student body diversity is a compelling interest beneficial to the educational institution.[40] However, similar to *Bakke's* caution that "racial and ethnic distinctions are inherently suspect," *Grutter* insisted on the importance of imposing limits to this interest, citing two risks: first, that the use of race will lead to illegitimate stereotyping and, second, that race would be used negatively and "unduly harm nonminority applicants."[41] Heavily cited by the Court in *SFFA, Grutter* infamously proclaimed that, "all governmental use of race must have a logical endpoint" when they, in the Court's view, are inevitably no longer needed.[42] Building off this precedent, the *SFFA* Court impliedly acknowledged the benefit of diversity in education, but overall affirmed racial distinctions as "odious to a free people whose institutions are founded upon the doctrine of equality."[43]

In the next section, I will discuss incoming litigation challenging DEIA practices in employment. Beforehand, however, it is important to note that the employers implementing DEIA practices

---

[34] *Id.* at 334.
[35] *Id*.
[36] 143 S.Ct. 2141, 2158.
[37] *Id.* at 206, citing *Adarand Constructors Inc. v. Peña,* 515 U.S. 200, 227 (1995).
[38] *Id*.
[39] Bakke*,* 438 U.S. 265 272-276.
[40] Grutter*,* 539 U.S. 306, 307.
[41] 438 U.S. 265, 267; 539 U.S. 307, 309.
[42] 539 U.S. 307, 342.
[43] 143 S.Ct. 2141, 2162-63 (quoting *Hirabayashi v. United States,* 20 U.S. 81, 100 (1943)).

contend similar compelling interests as the school respondents in *SFFA,* including the benefits of a racially diverse workplace.[44] The Court in *SFFA* acknowledged this interest but placed limitations – not protections – on its implementation. The logic stemming from the Court's denial of a legitimate interest in racial preferences in education focused more broadly on the inherently "unAmerican" way of distinguishing between races and the view that "eliminating racial discrimination means eliminating all of it."[45] This language can easily transcend social contexts, from employment to recreation and beyond.

For the second component of the strict scrutiny test, the Court briefly considered whether the schools' use of race in admissions was narrowly tailored to achieving the aforementioned interest.[46] *SFFA* identified only two compelling interests validated by precedent: remedying past discrimination that has occurred and avoiding imminent risks to human safety in prisons.[47] Here, however, the Court found that respondents "did not articulate meaningful connection between means they employ and the goals they pursue."[48] First, the Court found that the defendants' use of racial distinction was overbroad, with ripple effects that negatively affected other racial groups, particularly nonminority groups.[49] The Court cited the lower court's finding that an educational institution's consideration of race resulted in fewer admissions of Asian-American students.[50] The Court found it fundamentally irreconcilable that an alleged exception to the Equal Protection Clause would have negative and stereotypical effects.[51] Second, the Court cautioned that such admission programs "lack a logical endpoint," meaning the Court was unpersuaded by respondent's assertion that race-conscious programs will end once adequate representation is achieved.[52] The metric for evaluating when representation is "adequate" was unclear to the Court.[53]

After summarizing their findings, the Court articulated an at-best amenable rule: that a university can consider an applicant's *discussion* of race and how it affects an applicant's life if "concretely tied" to their character or what they will contribute to the university.[54] Here, the Supreme Court observed that respondents, and universities at large, have for too long wrongly accounted for an individual's race, declaring this contrary to the Constitution, which "is color-blind and neither knows nor tolerates classes among citizens."[55] After *SFFA,* courts will now have to ponder whether and how DEIA employment practices coexist within this new framework.

III. Challenges to DEIA Practices in Employment

---

[44] *See, e.g.* supra 7.
[45] *Id.* at 2160.
[46] *Id.* at 208.
[47] *Id.* See*, e.g.,* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 720 (2007); Johnson v. California, 543 U.S. 499, 512-513 (2005).
[48] 143 S.Ct. 2141, 2166-67.
[49] *Id.* at 2167.
[50] Students for Fair Admissions Inc. v. President and Fellows of Harvard College, 980 F.3d 157, 170 (2020).
[51] *Id.* (declaring this as one of the "twin commands" of the Equal Production).
[52] *Id.* at 221.
[53] *Id.*
[54] *Id.* at 2147.
[55] *Id.* at 230 (quoting *Plessy v. Ferguson v. Ferguson,* 163 U.S. 537, 559 (1896).

Despite the EEOC's declaration that *SFFA* has no bearing on DEIA practices in employment, there is much divergence on this question. For example, in February 2023, prior to the Supreme Court's *SFFA* decision, the American Civil Rights (ACR) Project penned an open letter demanding that American Airlines retract their diversity in hiring practices, which includes racial quotas.[56] This mirrored letters they issued against McDonald's and Novartis in March 2022.[57] The ACR Project alleges that American Airlines' hiring decisions "inject race into the company's internal and external contracting," subsequently violating Title VII of the Civil Rights Act of 1964.[58] Furthermore, in response to *SFFA,* Attorney Generals from thirteen states issued a letter to Fortune 100 CEOs, encouraging them to comply with race-neutral principles and arguing that race discrimination, in addition to being "immoral," is illegal under federal and state law.[59] In response, the Democratic Attorneys General Association clarified that such programs are legal, noting that the programs support employees and enrich the business.[60]

A. *Cause of Action*

The Fourteenth Amendment applies to state agents and private parties "who engag[e] in state action."[61] For example, the government as an employer or any private company that receives federal funds is subject to the Fourteenth Amendment. While pertinent to many educational institutions and *public* employers, many private employers fall through the cracks of the Amendment when they are neither public agents nor engage in public action. With that said, private employers are still obligated to uphold equal protection; Title VII and Section 1981 prohibit private employers and contractors respectively from engaging in discrimination.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment.[62] This protection applies to workplaces with fifteen or more employees, encompassing the vast majority of private employers.[63] Section 703(a) of the statute is similarly encompassing, declaring it an unlawful employment practice for an employer (1) "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;" and (2) to "limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of employee's

---

[56] *Open Letter to Officers and Directors of American Airlines Group, Inc.* AMERICAN CIVIL RIGHTS PROJECT (February 23, 2023), https://perma.cc/9GFU-3YD5.
[57] *Open Letter on Behalf of Shareholders of McDonald's Corporation,* AMERICAN CIVIL RIGHTS PROJECT (March 25, 2022), https://perma.cc/X9L5-6CYX; *Open Letter on Behalf of Shareholders to Officers and Directors of Novartis AG.,* AMERICAN CIVIL RIGHTS PROJECT (March 25, 2022), https://perma.cc/SM6H-6NSM.
[58] *Open Letter to Officers and Directors of American Airlines Group, Inc., supra* note 56.
[59] Attorney Generals of 13 States, *SFFA Letter to Fortune 100 CEO*s (July 13, 2023), https://perma.cc/LW6G-6G7S.
[60] *DAGA Co-Chairs Condemn Republican AG Letter That Threatens Business Over Diversity,* DEMOCRATIC ATTORNEYS GENERAL ASSOCIATION (March 1, 2023), https://perma.cc/PVX4-4Y34.
[61] U.S. CONST., amend. XIV, § 1.
[62] 42 U.S. §2000E-2.
[63] *Id.*

membership in one of the aforementioned protected classes.[64] These protections similarly apply to employment agencies and labor organization practices, as well as training programs.[65]

In alleging discrimination under Title VII, an employee must allege disparate impact (unintentional discrimination)[66] or disparate treatment (intentional discrimination) on behalf of a protected class.[67] To prove discrimination under Title VII, courts engage in a three-part test, coined the "*McDonnell Douglas* burden-shifting framework," as set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*. First, the plaintiff must meet its *prima facie* burden by establishing that the employer's policy or practice has an adverse effect that disproportionately affects members of a protected group. If met, the burden shifts to the employer to present a substantial legitimate interest that justifies the practice. Lastly, the employee can then propose a non-discriminatory alternative that would achieve the same objective.[68]

Next, Section 1981 of the Civil Rights Act of 1866 ("Section 1981") prohibits *racial* discrimination in making and enforcing private contracts.[69] While Title VII applies broadly to discrimination in employment against various protected classes, including but not limited to race, Section 1981 is strictly limited to racial discrimination, but applies broadly to the right to make and enforce contracts.[70] This provision often implicates *private* employers and labor organizations and notably does not apply to discrimination perpetrated by the federal, state, or local government in its capacity as an employer. Section 1981 is especially invoked in cases regarding fellowships and grants.[71] The Supreme Court in *Domino's Pizza Inc. v. McDonald* interpreted Section 1981 as "protect[ing] the equal rights of all persons…to make and enforce contracts without respect to race."[72] Nonetheless, Section 1981 requires a stricter standard of proof; in March 2020, the Supreme Court unanimously held that Section 1981 plaintiffs "bear the burden of showing that the plaintiff's race was a 'but for cause' of its injury," even at the pleading stage.[73] Despite this limitation, Section 1981 holds certain procedural advantages, including a longer statute of limitations, an ability to recover uncapped damages, and its application to employers regardless of size.[74] A private employee alleging racial discrimination

---

[64] *Id.; See,* e.g., Bostock v. Clayton County, 140 S.Ct. 1731, 1734 ("Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.).

[65] 42 U.S. §2000E-2.

[66] *See,* Guardians Ass'n v. Civil Serv. Comm'n*,* 463 U.S. 532, 643 (1983) (holding that Title VII prohibits unintentional adverse discrimination, as well as intentional discrimination).

[67] Disparate impact occurs when facially-neutral policies have a disproportionate adverse impact on a protected group, for example requiring the disclosure of an applicant's credit score. Disparate treatment is intentional employment discrimination.

[68] *See,* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine*,* 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

[69] 42 U.S.C §1981 (2021) (Affords individuals the same rights and benefits "as enjoyed by white citizens.").

[70] *Id.*

[71] *See, e.g.,* Bruckner v. Biden, No. 8:22-CV-1582-KKM-SPF, 2023 WL 2744207 at 2 (M.D. Fla. 2023); American All. for Equal Rights v. Fearless Fund Mgmt., LLC, 2023 WL 6295121 (N.D. GA 2023); Moses v. Comcast Cable Commc'ns Mgmt, LLC, 2022 WL 2046345 (S.D. Indiana 2022).

[72] Domino's Pizza Inc. v. McDonald, 546 U.S. 470, 474 (2006).

[73] Comcast Corp. v. National Ass'n of African American-Owned Media, 140 S.Ct. 1009, 1013 (2020).

[74] *5 Differences Between Title VII and Section 1981 That Can Help Your Employment Race Discrimination Case,* THE NATIONAL LAW REVIEW, Volume XIII, Number 344 (December 10, 2023), https://perma.cc/8LV9-ZAJ7.

might be eligible to litigate under both Title VII, Section 1981, and/or a state cause of action, and often do.

This effectively means that an employee can assert either the Fourteenth Amendment (if their employer implicates state action), Title VII (if their workplace has more than fifteen individuals and they fall under one of the protected classes), or Section 1981 (if confronting a private contract and racial discrimination) in challenging DEIA employment practices. These myriad causes of action represent the broad landscape of the employment sphere, evidenced by the diversified challenges represented below. Notably, while some of these cases have since been closed, many for procedural reasons, much litigation remains open and is pending further determinations.

B. Litigation

I. Grants and fellowships

While only *private* funding implicates Section 1981, *public* grants meet the requisite state action that triggers Fourteenth Amendment protection.[75] Therefore, claims against public grants and training have a constitutional cause of action. *Bruckner v. Biden* effectively demonstrates this class of litigation. Here, a construction company and its owner challenged the constitutionality of the U.S. Department of Transportation's Infrastructure Act's Disadvantaged Business Enterprise (DBE) Program, which appropriates state and local highway funding to "socially and economically disadvantaged" small business owners on public contracts.[76] The DBE program requires state and local recipients of the funding to set quotas for disadvantaged funders, however, it requires that the recipients first attempt to reach their goals by "race-neutral means" and only employ race-conscious means as a last resort.[77] The Program presumes socially and economically disadvantaged individuals include those "subject to racial or ethnic prejudice or bias."[78] The construction company's owner, who identifies as white, sought injunctive relief, arguing that he could not compete equally for the funded contracts because of his disfavored race and gender.[79] The district court granted the defendant's motion to dismiss, predominantly on procedural grounds that no injury was shown.[80] In particular, the district court found the company and owner failed to establish they were "able and ready" to bid on the Infrastructure Act's funded contracts and that they would have been denied equal treatment had they bid.[81]

Similar litigation has been leveraged against state and local programs. For example, a membership organization of healthcare professionals sued the Arkansas Department of Health for its Minority Healthcare Workforce Diversity Scholarship in *Do No Harm v. Eddings*[82]. The

---

[75] U.S. Const. amend. XIV, § 1.
[76] Bruckner v. Biden, No. 8:22-CV-1582-KKM-SPF, 2023 WL 2744207 at 2 (M.D. Fla. 2023).
[77] *Id.*
[78] *Id.*
[79] *Id.* at 3.
[80] *Id.* at 4.
[81] *Id.*
[82] Do No Harm v. Eddings, No. 423-cv-347-LPR at 1 (E.D. Ak. 2023), Complaint. ("The scholarship is blatantly illegal. The Equal Protection Clause requires racial classifications to satisfy strict scrutiny, and the scholarship's gross racial exclusion obviously fails.").

Scholarship requires that applicants represent a racial minority population underrepresented in the health workforce, defining "minority populations" to include Black Americans, Hispanic Americans, and Native Americans, among others.[83] Do No Harm brought the lawsuit on behalf of one of its members, who meets all the eligibility requirements except for being Caucasian.[84] The plaintiffs' argument mirrored the argument alleged in *Bruckner* and was strikingly similar to that in *SFFA*. Do No Harm argued that the Scholarship violated the Equal Protection Clause in requiring racial classifications for eligibility.[85] In this regard, it is crucially different from the facts in *SFFA,* where race was one of many considered factors; here, it is determinative towards exclusion. In adopting the framework from *SFFA,* Do No Harm argued that Arkansas' Department of Health cannot survive two-step strict scrutiny.[86] First, they argued that a general assertion of discrimination in the entire healthcare industry is not adequate to justify the compelling interest behind the Scholarship.[87] Second, they argued that, even if there were such a compelling interest, the complete exclusion of white students was not narrowly tailored as different members of racial and ethnic groups have different experiences and obstacles.[88] The Arkansas Department of Health thereafter discontinued the Scholarship in its settlement with Do No Harm, and the case was consequently dismissed.[89]

Challenges have also been brought against private contracts and grants, distinctly under Section 1981 and often in conjunction with Title VII.[90] For example, in *American Alliance for Equal Rights v. Fearless Fund,* American Alliance for Equal Rights, a representational nonprofit and frequent challenger of DEIA employment initiatives, sued Fearless Fund Management, an Atlanta-based Black women-owned U.S. venture fund whose mission is to "bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies."[91] The petitioner specifically challenged Fearless Fund's grant program, which awards grants of $20,000, support services, and mentorship specifically to Black women-owned businesses.[92] The grant program is based on data that Black entrepreneurs receive less than 2% of venture capital dollars each year, while companies led by Black women receive less than 1%.[93] The petitioner complained that the defendant is "operating a racially-discriminatory program that blatantly violates section 1981's guarantee of race neutrality" because grant eligibility depends on an applicant's race and is "open only to [B]lack females."[94] Notably, the plaintiff's complaint began with a quote from *SFFA,* declaring that "racial discrimination is invidious in all contexts" and "demands the dignity and worth of a person to be judged by ancestry instead of by his or her

---

[83] *Id.* at 1-2
[84] *Id.* at 7.
[85] *Id.* at 1.
[86] *Id.* at 8.
[87] *Id.* ("A generalized assertion that there has been past discrimination in an entire industry like health care is not enough," citing *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 498 (1989).
[88] *Id.* at 9. ("Blanket racial exclusions, with no individualized review, cannot be narrowly tailored.").
[89] *Ellis, Dale, State minority health commission discontinues scholarship in court settlement,* ARKANSAS DEMOCRAT GAZETTE (May 10, 2023), https://perma.cc/6MPF-37QQ
[90] American All. for Equal Rights v. Fearless Fund Mgmt., LLC, 2023 WL 6295121 (N.D. GA 2023).
[91] American All. for Equal Rights v. Fearless Fund Mgmt., LLC, No. 1:23-CV-03424-TWT, (N.D. Ga. August 2, 2023), Petitioner's Complaint at 1-3.
[92] *Id.* at 3.
[93] American All. for Equal Rights v. Fearless Fund Mgmt., LLC, 2023 WL 6295121 at 1 (N.D. GA 2023).
[94] No. 1:23-CV-03424-TWT at 2.

own merit and essential qualifications."[95] Soon after the plaintiff filed its complaint, over 70 venture funds signed an open letter denouncing the lawsuit as an "approach to twist efforts to counter the impacts on racial and gender discrimination as harmful to women of color."[96]

The Alliance asked the court for a temporary restraining order and preliminary injunction against Fearless Fund to prevent them from awarding their next round of grant recipients, a motion the U.S. District Court for the Northern District of Georgia Atlanta Division denied on September 27, 2023.[97] The district court first found the plaintiff to have standing, deploying the three-part organizational test affirmed in *SFFA*.[98] In doing so, the district court rejected the defendant's argument that the plaintiff's failure to specifically identify its injured member by name precluded it from asserting organizational standing, a requisite it reserved for post-discovery. For the second prong of the organizational standing test, the district court rejected the defendant's assertion that the plaintiff is a "recently created sham organization" and "serves no discrete stable group of persons with a definable set of common interests," instead employing *Hunt's* "indicia of membership test" to declare plaintiff a voluntary membership organization. Next, the district court found that the defendant's grant contest constitutes a contractual arrangement under Section 1981, rejecting the defendant's argument that a "charitable donation is a discretionary gift, not a contractual award" and citing the structure of Fearless Fund's contractual regime.[99]

Notably, however, the court ultimately found the plaintiff unable to meet its burden of showing a likelihood of success on the merits and irreparable harm.[100] In analyzing these merits, the district court conceded that the "extent to which *SFFA* overruled the affirmative action plan defense to Section 1981…if at all, is unclear."[101] The district court cited *Johnson v. Transportation Agency, Santa Clara County* in noting the ongoing irony that a law motivated by combating racial injustice, such as Section 1981 of the Civil Rights Act, would prohibit "race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." [102] In the context of raising an affirmative action defense to Section 1981, the court nonetheless stated that "even if [Fearless Fund] has made a showing of a manifest racial balance in access to capital for Black women-owned businesses and a showing that its grant fund does not bar the advancement of other non-Black women, its means of achieving balance in that realm seem unlikely to satisfy the narrow tailoring requirement of strict scrutiny analysis (assuming strict scrutiny under *SFFA*)."[103] The Alliance appealed, which the Eleventh Circuit soon-after granted.[104]

---

[95] *Id.* at 1.
[96] Obialo, Shimite, *All for One: Over 70 Venture Funds Band Together, Sign Open Letter Denouncing Lawsuit Against Fearless Fund,* FORBES (August 18, 2023), https://perma.cc/4YB6-ZYDM.
[97] 2023 WL 6520763 at 1.
[98] *Id.* at 2 (quoting *Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977) ("For an organization to establish standing on For an organization to establish standing on behalf of its members , it must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").
[99] *Id.*
[100] *Id.* at 8.
[101] *Id.* at 7.
[102] *Id* (citing *Johnson v. Transportation Agency, Santa Clara County, Cal.* 480 U.S. 616, 626-26 (1987)).
[103] *Id.*
[104] American All. for Equal Rights v. Fearless Fund Mgmt., LLC, No. 23-13138, 2023 WL 6520763 at 1 (11th Cir. 2023).

Fearless Fund provides critical insights into *SFFA's* impact on DEIA initiatives in grants and funding. First, it considers standing using *SFFA's* clarified framework, finding it not dispositive that the Alliance failed to identify a plaintiff and is a newly established organization.[105] This certainly demonstrates the broadness of organizational standing actualized in *SFFA*. Next, while the court in *Fearless Fund* was "uncertain" about the application of *SFFA* to Section 1981 and acknowledged the legislative intent of Congress in passing the Civil Rights Act, it nonetheless implied that Fearless Fund's grant program, as currently structured, is unlikely to survive the narrow tailoring requirement of strict scrutiny if that were to be applied.[106] This makes it difficult to ignore the looming presence of the strict scrutiny standard and the obstacles DEIA grant programs might face when confronting it, especially as *Fearless Fund* is pending appeal. Lastly, *Fearless Fund* demonstrates the initiatives at stake through such challenges. Grounded in research, Fearless Fund seeks to remedy a deficit in employment opportunities for people of color. Such programs are at the heart of these challenges. For example, *Moses et al. v. Comcast* sued Comcast Cable Communications under Section 1981 for its small business grant program, which accepted applications only from small businesses that were majority-owned by Black, Indigenous, and People of Color (BIPOC), or women.[107] The lawsuit, filed even before *SFFA,* resulted in a confidential settlement after Comcast abandoned the program in its entirety.[108]

Fearless Fund also considered the question of what qualifies as a "grant" and therefore what implicates the "race neutrality" guarantee interpreted in Section 1981 of the Civil Rights Act. This issue makes the categorical approach taken in the organization of this Note at times problematic, where "contracts" often conflate with other sectors of employment and thereby implicate Section 1981. While dismissed in October 2023, another case filed by the American Alliance for Equal Rights raised the question as to whether fellowships are actionable under Section 1981.[109] Specifically, the Alliance filed two federal lawsuits against the law firms Perkins Coie LLP and Morrison & Forrester for their diversity fellowship programs for summer associates, whose stated criteria included "membership in a group historically underrepresented in the legal profession."[110] In bringing its claims, the Alliance claimed that such fellowships are specifically tied to job opportunities to trigger Section 1981 applicability.[111] On the other hand, the law firms argued that the fellowships served as a scholarship or gift from a private company and therefore precluded Section 1981 by there being no contract. This question was never

---

[105] 2023 WL 6520763 at 2. ("The Court agrees with the Plaintiff that it need not identify its injured members by name in order to have organizational standing.").

[106] *Id.* at 7 ("Even if [Fearless Fund] has made a showing of a manifest racial imbalance in access to capital for Black women-owned businesses and a showing that its grant fund does not bar the advancement of other non-Black women, its means of achieving balance in that realm seem unlikely to satisfy the narrow tailoring requirement of the strict scrutiny analysis.").

[107] Moses v. Comcast Cable Commc'n. Mgmt., LLC, 2022 WL 2046345 (S.D. Indiana 2022).

[108] *Moses v. Comcast,* Wisconsin Institute for Law & Liberty (November 2022), https://perma.cc/DW3T-MR6J.

[109] *American Alliance for Equal Rights v. Morrison & Foerster LLP,* No. 1:23-CV-23189-KMW (S.D. Fla. 2022), Petitioner's Complaint at 5*; American Alliance for Equal Rights v. Perkins Coie LLP,* No. 3:2023-CV-01877 (N.D. Tex. 2023), Petitioner's Complaint at 5.

[110] *American Alliance for Equal Rights v. Morrison & Foerster LLP,* No. 1:23-CV-23189-KMW (S.D. Fla. 2022), Petitioner's Complaint at 5.

[111] *Id.*

answered; after the firms reformatted their diversity, equity, and inclusion fellowship, and therefore argued the case was moot, the Alliance dropped the suits.[112]

This question, however, might be context-specific. In *Do No Harm v. Pfizer,* Do No Harm (also the plaintiff in *Bruckner v. Biden*), challenged pharmaceutical company Pfizer for its "Breakthrough Fellowship Program," which it launched in 2021 in conjunction with its efforts to address the company's underrepresentation of minorities.[113] The fellowship was structured as follows: first, accepted fellows would complete an internship at Pfizer between their junior and senior year of college, then Pfizer would fund eligible graduate degree programs for the acceptees, and finally, upon completion of both the internship and degree, Pfizer invited fellows to return to the company as full-time manager-level employees.[114] Eligible applicants must maintain a threshold GPA, demonstrate leadership and a committed interest in Pfizer's work, and "meet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic, and Native Americans."[115] The two unnamed plaintiffs in *Do No Harm v. Pfizer* met all eligibility criteria, were "able and ready to apply to the 2023 Fellowship class," but were White and Asian American respectively.[116] They alleged that Pfizer's fellowship "categorically excludes white and Asian American applicants" in violation of Section 1981 and Title VII.[117]

The district court denied Do No Harm's motion for a preliminary injunction, concluding that the plaintiff failed to show either irreparable harm and a likelihood of success on the merits.[118] The court, notably unlike the U.S. District Court for the Northern District of Georgia Atlanta Division in *Fearless Fund,* found plaintiffs lacked organizational standing by failing to identify and name at least one of its members.[119] Furthermore, the court held that the plaintiff also failed to establish that "at least one identifiable member is able and ready to apply" for the fellowship, as required to establish an injury in fact.[120] Specifically, the plaintiffs' declaration of their intent to apply for the fellowship if discrimination stopped was insufficient, as it was abstract and not concrete.[121] While this case was ultimately unsuccessful, it yields interesting insights. First, it establishes that courts vary on whether an organizational plaintiff needs to identify and name a plaintiff to file suit. Second, the court found no organizational standing available under the Civil Rights Act, but impliedly did not otherwise question the fellowship's application to Section 1981.[122] This is perhaps because Pfizer's fellowship, unlike that of Perkins Coie and Morrison & Forrester, explicitly named and promised employment upon completion. Third, this case was

---

[112] Monnay, Tatyana, *Blum's Group Drop DEI Lawsuit Against Morrison Forrester,* BLOOMBERG LAW (Oct. 6, 2023), https://perma.cc/MZ3J-PHAJ; Monnay, Tatyana, *Perkins Coie DEI Suit Ended by Anti-Affirmative Action Group,* BLOOMBERG LAW (Oct. 11, 2023), https://perma.cc/43HB-7J5W.
[113] Do No Harm v. Pfizer Inc. 646 F.Supp.3d 490, 496 (S.D. N.Y. 2022).
[114] *Id.*
[115] *Id.*
[116] *Id.* at 498.
[117] *Id.* at 496.
[118] *Id.* at 518.
[119] *Id.* at 501 (citing *Summers v. Earth Island Inst.,* 555 U.S. 488, 498-99 ("Associational standing requires that a plaintiff identify by name at least one member with standing."); *Pen Am. Ctr., Inc. v. Trump,* 488 F.Supp 3d 309, 320-21 (S.D.N.Y 2020)).
[120] 646 F.Supp.3d 490, 506.
[121] *Id.*
[122] *Id.* at 508 ("In this Circuit, an association lacks standing to assert claims on behalf of its members under the Civil Rights Act," citing *Aguayo v. Richardson,* 473 F.3d 1090, 1099 (2nd Cir. 1973)).

decided before *SFFA,* so it might warrant revisiting, especially given *SFFA's* debated application to Section 1981 claims.

II. Hiring and Termination

Organizations have also challenged their employer's DEIA initiatives in hiring and termination.[123] In *DiBenedetto v. AT&T Services Inc.*, Joseph DiBenedetto worked for two decades as an assistant vice president at AT&T until 2020, when his position was eliminated and he was laid off.[124] In November 2021, DiBenedetto sued AT&T, alleging that AT&T made employment decisions based on race, gender, and age in violation of Title VII and Section 1981.[125] Specifically, the plaintiff alleged that the company terminated him so they could fill upper management roles with people of color, citing the company's quotas to increase the percentage of women and nonwhites in general management positions.[126] In early 2022, AT&T asked the court to dismiss the suit, responding that the plaintiff and other employees were let go because of financial difficulties and poor leadership, an argument the plaintiff calls pretextual.[127] Nonetheless, the U.S. District Court for the Northern District of Georgia found plaintiff's allegations sufficient for the case to move forward.[128] In September 2023, AT&T filed a motion for summary judgment, which the plaintiff opposed and is currently before the court.[129] Arguments about quotas and preferential treatment for hiring perhaps most explicitly falls within the *SFFA* framework, mirroring an admissions committee's desire to diversify campus demographics.

Other challenges have been significantly more varied. In *National Center for Public Policy Research v. Howard Schultz et al.,* the Center sued Starbucks under Section 1981 and Title VII for setting hiring goals of BIPOC workers and awarding contracts to "diverse" suppliers.[130] The plaintiff, who is a shareholder of Starbucks, characterizes itself as "an advocacy group committed to conservative causes" engaged in a campaign against "so-called 'woke' corporate practices concerning issues of diversity, equity, and inclusion."[131] When Starbucks rejected the plaintiff's demand to retract its DEIA initiatives, the plaintiff filed a derivative action against Starbucks.[132] In its order granting defendants' motion to dismiss, the district court rejected plaintiff's stakeholder derivative lawsuit because the plaintiff "does not fairly and adequately represent the interests of shareholders; plaintiff is advancing their own political and policy agendas rather than the interests of Starbucks."[133]

---

[123] DiBenedetto v. AT&T Services, Inc. 2022 WL 1682420 (N.D. Ga. 2022).
[124] *Id.* at 1-2.
[125] DiBenedetto v. AT&T Services, Inc. No. 1:21-cv-04527-MHC-RDC (N.D. Ga 2021), Petitioner's Complaint.
[126] *Id.*
[127] DiBenedetto v. AT&T Services, Inc. No. 1:21-cv-04527-MHC-RDC (N.D. Ga Jan 3, 2022), Brief in Support of Defendant AT&T Services, Inc., Motion for Summary Judgment.
[128] 2022 WL 1682420 at 1.
[129] DiBenedetto v. AT&T Services, Inc. No. 1:21-cv-04527-MHC-RDC (N.D. Ga September 27, 2022), Brief in Support of Defendant AT&T Services, Inc., Motion for Summary Judgment.
[130] National Center for Public Policy Research v. Schultz, 2023 WL 5945958 at 2 (E.D. Wa. 2023).
[131] *Id.* at 1
[132] *Id.* at 2
[133] *Id.* at 4.

Rogers v. Compass Group USA, Inc. represents the slippery slope of challenging DEIA initiatives.[134] Here, a human resources recruiter sued her employer alleging wrongful termination, religious termination, and retaliation in violation of Title VII of the Civil Rights Act of 1964 after the company fired her for requesting a religious accommodation to avoid managing the company's diversity program.[135] Here, Compass Group, a food service firm, sponsored a diversity program that offered training, mentorship, and the promise of a qualified promotion for employees at the completion of the program.[136] Program participants could be nominated by their supervisors, but white men were not eligible to participate.[137] The plaintiff requested not to work on the program, citing her Christian beliefs that all women and men were created equal in the eyes of God. [138] The plaintiff's attorney conceded to not having heard of another case like this yet, declaring it "the tip of an iceberg."[139] Other legal experts agree, calling anti-DEIA employment challenges a "fast-developing area…that is just going to keep snowballing."[140] The plaintiff filed her initial complaint with jury demand in July 2023 and subsequently amended it in September 2023. It is pending further determination.[141]

Such challenges also reach apprenticeship programs within employment. In *Harker v. Meta Platforms Inc.* a white lighting technician who worked behind the camera on commercials, for the defendant for three decades filed suit under Title VII and Section 1981, claiming that under the defendant's apprenticeship program ("Double the Line") for minority workers, the plaintiff was denied employment opportunities because of his race, color, or national origin.[142] After filing charges with the U.S. Equal Employment Opportunity Commission (EEOC), the plaintiff filed their claim before the U.S. District Court for the Southern District of New York in September 2023.[143] It is also pending further determination. Needless to say, the landscape of anti-DEIA litigation is changing every minute.

IV. DEIA Implications on a Disparate Workplace

These cases demonstrate anti-DEIA arguments, reflecting either the belief that *any* classifications based on identity are unconstitutional, that such classifications are not needed, or both. *SFFA* fuels this fire by validating a similar argument in the educational context.[144] Proponents, however, contend that that DEIA initiatives are both constitutional, in narrowly-tailoring advancing legally protected interests and needed as discrimination in employment persists. The previous paragraphs have addressed the constitutional claims and arguments of many DEIA opponents; I therefore find it critical to introduce key arguments in favor of DEIA initiatives.

---

[134] Rogers v. Compass Group USA, Inc., No. 3:23-CV-01347-TWR-KSC (S.D. Ca. July 24, 2023), Petitioner's Complaint for Damages.
[135] *Id.* at 2-3.
[136] *Id.* at 7.
[137] *Id.*
[138] *Id.* at 15.
[139] Shepherd, Leah, *Recruiter's Lawsuit Challenges Diversity Program on Religious Grounds,* SHRM.org, (August 1, 2023), https://perma.cc/3DHF-B6VE.
[140] *Id.*
[141] *Id.*
[142] Harker v. Meta Platforms, Inc., No. 23-CV-07865 (S.D. NY September 5, 2023), Petitioner's Complaint at 1-3.
[143] *Id.*
[144] *Students for Fair Admissions,* 143 S.Ct. 2141, 2147 (2023).

Proponents of DEIA initiatives emphasize the substantial benefits they provide employer and employee alike. First, a workplace of individuals from different cultural backgrounds is more likely than homogeneous groups to boost innovation and bring novel ideas to the table.[145] Second, companies known for embracing diversity, equity, accessibility, and inclusion are more likely to attract a wider potential talent pool, as well as benefit from a diverse customer base.[146] Furthermore, employers with DEIA practices are more likely to cultivate a culture of trust among employees and thereby harness a healthy workplace environment; employees satisfied with their employer's DEIA initiatives scored higher on the happiness index and reported greater work satisfaction and productivity.[147] This consequently encourages employee retention, eliminating some of the cost and time deficits associated with talent replacement.[148] Perhaps most importantly, it aligns with the majority of employees' needs. A 2021 nationwide survey conducted among more than 8,000 adult employees found that 78% of participants say it is important to work at a company that prioritizes diversity, equity, and inclusion, while more than 50% consider it "very important."[149]

A lack of diversity, equity, inclusion, and accessibility *does* exist in our employment sphere. Employees of color earn less than the average American worker: $878 per week among Black American workers and $823 among Hispanic workers compared to the $1,059 average for those in the same age group.[150] Furthermore, the unemployment rate for Black and Hispanic Americans is roughly double the nationwide employment rate.[151] Black employees are significantly more likely to experience discrimination in the workplace, as well; 41% of Black employees disclosed experiencing racial or ethnic discrimination or unfair treatment in hiring, pay, or promotion, as compared to 25% of Asian, 20% of Hispanic, and 8% of white workers.[152] This statistic is especially illuminating as Black women experience many barriers in disclosing violence; therefore, their rate of reporting is unlikely to capture the true extent of the epidemic against them.[153] Additionally, in the same survey of U.S. workers, 51% of Black workers said being Black makes it harder for them to succeed; 39% of Asian, 29% of Hispanic, and 7% of white workers believe their own race and ethnicity impairs their ability to succeed at work.[154] Women also have remedially different experiences in employment. The corporate pipeline is incredibly

---

[145] *How Diverse Leadership Teams Boost Innovation,* BCG.COM (January 23, 2018) (Innovation revenue at companies with above-average diversity in leadership was 19% higher than those with below-average diversity in management.), https://perma.cc/Y286-9SET.

[146] *Id.*

[147] *CNBC Workforce Survey April 2021,* SURVEYMONKEY, https://perma.cc/5P59-HX23.

[148] *Id.*

[149] *Id.*

[150] Schaeffer, Katherine, *Black Workers' Views and Experiences in the U.S. Labor Force Stand out in Key Ways,* PEW RESEARCH CENTER (August 31, 2023), https://perma.cc/46SY-D3X5.

[151] *Labor Force Statistics from the Current Population Survey,* U.S. BUREAU OF LABOR STATISTICS (According to the U.S. Bureau of Labor Statistics, the unemployment rate in 2013 for Black men and women was 6.3% and 6.0% respectively. The unemployment rate for White and Asian men and women averages around 3%.).

[152] Minkin, Rachel, *Diversity, Equity, and Inclusion in the Workplace,* PEW RESEARCH CENTER (May 17, 2023), https://perma.cc/DAU8-FFAG

[153] *See,* TILLMAN, SHAQUITA, BRYAN-DAVIS, THEMA, MARKS, ALISON, *SHATTERING SILENCE: EXPOSING BARRIERS TO DISCLOSURE FOR AFRICAN AMERICAN SEXUAL ASSAULT SURVIVORS,* TRAUMA, VIOLENCE & ABUSE, VOL. 11, ISSUE 2 (APRIL 2010); *For Many Black Survivors, Reporting Raises Complicated Issues,* RAINN (Jun. 19, 2020), https://perma.cc/5QTU-KWW5.

[154] Minkin, Rachel, *Diversity, Equity, and Inclusion in the Workplace,* PEW RESEARCH CENTER (May 17, 2023), https://perma.cc/DAU8-FFAG.

racialized and gendered; 56% of C-Suite positions belong to white men with 22% held by white women and a mere 6% by women of color.[155] Similar findings apply to other management positions.[156] 35% of female employees say they have been sexually harassed by a colleague.[157] Of the sexual harassment charges filed to the EEOC, 78.2% were filed by women and many concurrently included race and retaliation charges.[158] The DEIA initiatives challenged in emerging litigation often respond to these disparities and obstacles.

V. Conclusion

With a dearth of diversity and disparate experiences already evident in the workplace, litigation against DEIA in employment is likely to have grave implications. While some anti-DEIA litigation has been dismissed, many remain.[159] Even pending resolution, litigation has compelled changes, including elimination, by companies in their DEIA employment practices.[160] Just as dangerous, litigation likely produces a "chilling effect," where employers who have implemented, or are contemplating implementing, such DEIA initiatives, may forgo or sanitize these efforts to avoid costly litigation. This "chilling effect" is especially exacerbated by how unclear the law is on the viability of such claims after *SFFA*.

The future of diversity in employment law is unclear. While directly addressing education, *SFFA* can be expansively construed as opposing the classification of workers based on their identity, even if intended to enhance diversity and mitigate obstacles. The new wave of litigation presents little answers, and even more questions; for example, what makes a fellowship a "contract" under Section 1981, does a charging organization need to identify a plaintiff in order to establish standing, and how might a higher court rule on such a case? As courts weed through procedural errors, the constitutional merits of such cases also remain in dispute. *SFFA,* however, makes at least two things clear: the breadth of impending litigation is surely grave in the face of broad definitions for organizational standing and the very constitutionality of DEIA practices in employment is under attack.

---

[155] *Women in the Workplace 2023,* McKinsey & Company (2023), https://perma.cc/69A3-LBGZ.
[156] *Id*. at 6 ("White men hold 58% and 53% of SVP and VP positions respectively; 21% and 26% of such positions are held by white women, while 7% of VP and SVP positions are held by women of color. 9% of senior management and director positions are held by women of color, while 48% are held by white men, 16% are held by men of color, and 27% are held by white women. Women of color hold 13% of management positions, compared to 42% for white men, 18% for men of color, and 27% for white women.").
[157] Jain-Link, Pooja; Bourgeois, Trudy; Kennedy, Julia Taylor, *Ending Harassment at Work Requires an Intersectional Approach,* Harvard Business Review (April 23, 2019), https://perma.cc/CEF5-Z3FP.
[158] U.S. Equal Employment Opportunity Commission, *Sexual Harassment in Our Nation's Workplaces,* (April 2022) (78.2% of sexual harassment charges from fiscal years 2018 to 2021 have been filed by women.), https://perma.cc/B46Q-FLU4.
[159] *See,* American All. for Equal Rights v. Fearless Fund Mgmt., LLC, No. 23-13138, 2023 WL 6520763 at 1 (11th Cir. 2023)*;* Harker v. Meta Platforms, Inc., No. 23-CV-07865 (S.D. NY September 5, 2023); Rogers v. Compass Group USA, Inc., No. 3:23-CV-01347-TWR-KSC (S.D. Ca. July 24, 2023).
[160] *See, e.g.* supra note 89; supra note 112; supra note 112.