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Supreme Court Denial in Virginia School Case Is a Diversity Win

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SFFA docket

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Moore & Van Allen's Valecia McDowell, Joshua Lanning, and Elena Mitchell explain why a recent Supreme Court denial supports race-neutral diversity efforts in private companies and organizations, as well as in academia.

In the wake of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, public and private sector programs encouraging diversity, equity, and inclusion have been hit with a wave of reverse discrimination lawsuits.

Most of these challenges target programs that, on their face, only benefit individuals of certain races. It is unclear whether courts will be more receptive to challenges targeting facially neutral DEI programs, for which proving discriminatory intent poses a greater challenge.

However, the US Supreme Court's refusal to hear arguments in *Coalition for TJ v. Fairfax County School Board* suggests the justices aren't eager to disrupt current jurisprudence on the legality of facially neutral programs that advance DEI goals. The decision is a win for diversity not only in the academic context, but also for private companies and organizations operating DEI programs.

In *SFFA,* the court held that race-conscious admissions programs at Harvard and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment. Justices on both sides of the decision positioned themselves on a question *SFFA* didn't answer: How exacting should courts be when assessing the lawfulness of policies and programs that advance DEI goals but are racially neutral on their face?

Chief Justice John Roberts' majority opinion noted that nothing in *SFFA* prohibited consideration of how race or racial discrimination affected an applicant's life. But he cautioned that schools "may not simply establish through application essays or other means the regime we hold unlawful today." Justice Elena Kagan's dissent emphasized that *SFFA* leaves holistic admissions and recruitment efforts intact "that seek to enroll diverse classes without using racial classifications."

Some judges have already signaled a readiness to entertain arguments that DEI efforts are a front for achieving preferred racial outcomes. For example, in a recent Fifth Circuit Title VII case, *Hamilton v. Dallas County*, a concurring judge opined that, after *SFFA*, courts must assess whether a claimed "interest in diversity" is "sincere or pretextual" and "whether diversity is nothing more than a pretext for race."

The stage now is set for courts to consider the extent to which DEI goals may be advanced through racially neutral criteria and policies. But the Supreme Court appears uneager to take up the matter.

In *Coalition for TJ*, the court declined to review the Fourth Circuit's rejection of a challenge to a revised school admissions policy on the basis that it unlawfully promoted admittance of certain racial groups. Although the policy was facially neutral, it rewarded applicants for certain "experience factors," including "eligibility for free or reduced-price meals," eligibility for "special education services," and an applicant's "status as an English language learner."

Justice Samuel Alito wrote a pointed dissent arguing that the school's revised policy was being hailed "as a blueprint for evading" *SFFA* and labeled the Fourth Circuit's reasoning a "virus that may spread if not promptly eliminated."

The court's certiorari denial in *Coalition for TJ* underscores that, for now, one of the primary ways a company or organization pursuing DEI efforts can attempt to reduce litigation risk is by developing racially neutral eligibility criteria.

"Intentional discrimination" is a common element of claims under the Fourteenth Amendment and anti-discrimination statutes, and it is easily established where a program's criteria expressly favor some races over others. But, as the Fourth Circuit demonstrated in *Coalition for TJ*, proving intentional discrimination is much tougher where criteria are facially race-neutral, even when application of that criteria effectively impacts the racial make-up of accepted applicants.

Notably, plaintiffs in several cases brought under Section 1981 of the Civil Rights Act of 1866 have been quick to dismiss claims when the defendant entity amended program eligibility criteria from being race-based to race-neutral. Their willingness to do so suggests reluctance to take on the more fact-intensive challenge of proving intentional discrimination when all races are eligible for consideration. In *Coalition for TJ*, the court declined to make that challenge easier.

Although the outcome of *Coalition for TJ* is a win for diversity advocates, more challenges to racially neutral DEI programs are inevitable. Businesses and other organizations should continue to monitor developments in this space.

The cases are Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, U.S., Nos. 20-1199 and 21-707, 6/29/23, and Coalition for TJ v. Fairfax County School Board, U.S., No. 23-170, 2/20/24.

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