How the Supreme Court's Affirmative Action Ruling May Impact Your Business

Sam Gandhi, Jeff Green, Kate Roberts, and Natalie Chan
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Sam Gandhi:
The U.S. Supreme Court has declared that university admissions policies must be colorblind under the Equal Protection Clause of the Constitution. That's breaking with decades of legal precedent and resulting in challenges to diversity, equity, and inclusion initiatives at universities and elsewhere. Many employers worry if their own diversity policies and programs may be at risk, with businesses experiencing a flurry of so-called reverse discrimination lawsuits and challenges to corporate diversity initiatives.

Jeff Green:
The major decision was very careful not to go beyond the borders of the university admissions process, but other justices have signaled that they're willing to go there, and we've seen that some lawsuits have been filed, already, far outside of the university admissions context.

Sam Gandhi:
That's Jeff Green, Senior Counsel in Sidley's Supreme Court and Appellate practice.

Kate Roberts:
There's groups on both sides of this issue. It's not a situation where you can just say, fine, we're going to take out all DEI programs, and now we have no risk under Title VII. You may not have the risk of being sued by a non-minority plaintiff, but you may have the risk of being sued by somebody in a protected class.

Sam Gandhi:
That's Kate Roberts, co-chair of Sidley's Labor, Employment, and Immigration practice.

Natalie Chan:
Businesses have to ask the hard questions. What are our values as an

organization? What do we want our values to be? What should workplace culture look like? These are questions many of our clients have been grappling with over the last couple years, and now, it's coming to a head.

Sam Gandhi:
And that's Natalie Chan, Senior Managing Associate in Sidley's Labor, Employment, and Immigration practice. In today's podcast, we'll discuss how the Supreme Court's ruling on affirmative action in higher education may impact businesses and how employers can reduce legal risk.

From the international law firm Sidley Austin, this is *The Sidley Podcast*, where we tackle cutting-edge issues in the law and put them in perspective for businesspeople today. I'm Sam Gandhi.

Hello, and welcome to this edition of *The Sidley Podcast*, episode number 37. Jeff, Kate, Natalie, it's great to have you on the podcast.

Jeff Green:
Sam, thanks for inviting me. It's great to be here.

Kate Roberts:
Thank you, so much, for including me, Sam.

Natalie Chan:
Thanks, so much, Sam.

Sam Gandhi:
On June 29, the Supreme Court struck down the admissions policy of Harvard and the University of North Carolina that considers race a plus factor. This effectively ended race-conscious admissions in higher education across the country. In her dissent, Justice Ketanji Brown Jackson, the court's first Black female justice, said, "today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But," in her words, "deeming race irrelevant in law does not make it so in life."

Many are concerned about the decision's potential effect on progress that has been made in the corporate world. We've already seen an increase in litigation targeting corporate diversity, equity, and inclusion programs, and also an increase in reverse discrimination lawsuits, and high-profile suits

have recently been in the news. Natalie, why don't you talk us through this decision? Give us the broad strokes. What was the crux of the ruling, and how did we get here?

In *SFFA v. Harvard* and *UNC*, which I'll just refer to shorthand as *SFFA* for today's purposes, the Supreme Court struck down affirmative action programs at Harvard and UNC. In a 6 to 3 ruling, the court held that these programs which take race into account at various stages in the process violate the equal protection clause of the 14th Amendment to the U.S. Constitution.

So, ultimately, in *SFFA*, the court found that a race-based classification will rarely pass strict scrutiny, which considers whether the interest in using race is compelling, and whether the law is narrowly tailored to achieve that interest. In the majority opinion, Chief Justice Roberts said eliminating racial discrimination means eliminating all of it, and in its decision, the court criticized the admissions programs for creating what they called a race-based zero sum game.

Essentially, if there's only one slot in the incoming class, accepting one student to the university on the basis of race meant denying another student admission. So, it's zero sum. Another focus of the court's decision was that diversity shouldn't be defined solely in terms of racial diversity.

Rather, the court held students should be evaluated based on their individual experiences, which may or may not be impacted by race at all, and the court noted nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affects his or her life, whether it's through discrimination, inspiration, or otherwise. In short, students must be treated based on his or her experiences as an individual, not on the basis of race.

Sam Gandhi:
Jeff, that doesn't sound very radical. I mean how radical is that? One could already argue that some states, like California, already ban race-conscious admissions.

Jeff Green:
It's not radical, Sam, in the context of university and graduate school

admissions. As you noted, the University of California, for more than two decades, has had a race-blind admissions system, as have many other university systems. Where it's radical is the point you landed on in Justice Jackson's dissent. She says, look, we pulled a ripcord here, and exactly what ripcord is that? And the ripcord is we have now a constitutionally colorblind society, according to the majority.

The majority says that is an equal protection ground, an equal protection rationale, that's a constitutional rationale, Sam. There has to be state action in order for equal protection to kick in, but you saw a couple of justices, most particularly Justice Gorsuch, and also Justice Thomas, note that this decision should reach affirmative action programs.

Now, the majority decision was very careful not to go beyond the borders of the university admissions process, but other justices have signaled that they're willing to go there, and we've seen that some lawsuits have been filed, already, far outside of the university admissions context.

Sam Gandhi:
Kate, so, does that mean Title VII? Are many private employers worried that their policies and programs related to DEI are about to be targeted based on this ruling, as Jeff was saying?

Kate Roberts:
In a word, yes. Many employers are very worried about their DEI policies, and part of that is due to the litigation that has already been filed around the country, mostly by activist groups, seeking to force companies into dismantling their DEI programs. I think we need to talk a little bit about what the *SFFA* decision said and what it didn't say, particularly with regard to businesses.

Where we're at right now is we really don't know yet what the long-term consequences are going to be with regard to businesses. There have been a lot of suits filed. None of them have been resolved definitively on the merits yet. There have been a couple of decisions on procedural grounds, and a lot of these are just moving their way through the courts, right now.

I think it's important to note that in *SFFA*, the Supreme Court's decision turned primarily on the Equal Protection Clause. The court, although it did

decide on the basis if Title VI, it didn't engage in any independent analysis of that statute, but the court also did not have before it any claim under Title VII, which is the section of the Civil Rights Act that deals with employment, and it also didn't deal with section 1981, which is the statute dealing with contracts and the benefits of a contract.

The equal protection clause is applicable only to governments, and Title VI applies only to certain entities receiving federal funding, which is why the Title VI piece of this is important when we're talking about even private universities, like Harvard, that get federal funding. So, Sam, in response to your question, yes, DEI efforts and employment actions are not directly affected by the *Harvard UNC* decision, but the decisions already are having an impact.

First, we're seeing an increase in claims brought under Title VII and Section 1981, and there were actually a lot of claims that were filed even before the decision came down, as these activist groups were essentially lining up their planes on the runway, if you will, to get ready for the decision that everybody pretty much knew which way it was going to go based on the current makeup on the court.

So, again, a lot of those are pending. Title VII is the foundational federal anti-discrimination statute for employment. Plaintiffs can bring claims for adverse employment action based on protected classes, and those classes include things like race, religion, gender, national origin, and other protected classes under the federal law. Section 1981 is a statute that prevents race-based discrimination, which includes reverse discrimination, in the context of contractual relationships, and the court has held that those contractual relationships do extend to employment.

One of the reasons we're seeing a lot of 1981 claims is that those can go directly to court. If you want to bring a case under Title VII, you have to exhaust and you have to go through the EEOC, or one of the analogous state organizations in order to exhaust, and so, a lot of the 1981 claims, especially because they're being brought by advocacy groups who want also to argue their positions in the court of public opinion, as well, want to go straight to court and get those on the record publicly.

So, since the *SFFA* decision came down in June, activist groups have been filing reverse discrimination suits and challenges to corporate DEI initiatives under section 1981 and Title VII. We're seeing a lot of these come through. They started out in Fifth Circuit states. So, a lot of things were coming through in Texas. We're seeing things in Florida, basically filing in what jurisdictions are likely to be friendly to these types of claims. However, since then, in the recent probably 6 to 8 weeks, we're seeing more in different jurisdictions, in New York, in Illinois, in other places. So, they're just coming sort of fast and furiously.

Sam Gandhi:
What's the EEOC's view on the case?

Kate Roberts:
Good question. It depends on who you ask on the EEOC. There was a statement that came out from the EEOC, probably within 24 hours after the *SFFA* decision came down, and the EECO chair at the time underscored the benefits to companies of DEI initiatives and said that the court's decision, and this is quoting, "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, and inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

So, this statement came out, and it was really narrowly focused on Title VII. It essentially said, look, *SFFA* just came out, that decision is based on Title VI and the equal protection clause. It's not a Title VII case. The issue, though, and I think we'll probably talk about this a little bit more, later on, is that Justice Gorsuch wrote a concurrence in which he basically said, look, the language of Title VI is identical to the language in Title VII.

So, even though this wasn't before the court, I think it's pretty safe to assume, and again, Gorsuch said, very specifically, that when you have identical language, you should give it the same meaning. So, even though we're talking about a Title VI decision, really, you've got the identical language that's in Title VII, and so, most folks who are taking a look at this really think it's just a matter of time before the next decision comes out, and this probably gets very specifically imported into the Title VII context.

Employers are not really waiting for that to happen. They're trying to get ahead of it, and that's why a lot of them are looking at these issues, right now, and we're actually doing quite a few audits for clients, where we're looking at their policies, looking at their handbooks, looking at their corporate giving, all of these different pieces of it that could be affected by Title VII and Section 1981 because we're trying to get prepared, assuming that this does get imported into Title VII and 1981, in fairly short order.

Sam Gandhi:
So, before the ruling, more than 60 big companies warned the Supreme Court in an *amicus* brief that ending affirmative action in colleges and universities would imperil their ability to build diverse workforces, and the thinking goes that if students admitted to colleges become less diverse, by extension, the graduate pool for entry-level jobs will also become less diverse. Natalie, is that right?

Natalie Chan:
The upshot is there likely is going to be some impact. As a practical matter, the court's ruling may result in reductions in the pool of diverse talent at universities and colleges, from which employers are recruiting, and certainly, this may make it harder for employers to source diverse talent at the recruiting stage, but there are still steps employers can take to increase the diversity of applicant pools, and these efforts don't appear to fall within the prohibitions that arise from the *SFFA* decision.

So, for example, employers can expand their recruiting efforts to a broader range of schools, geographic markets, industries, other businesses and organizations that they haven't otherwise tapped for those seeking lateral hires. Anything that's a race-neutral criteria can still be used to attract more qualified candidates, and also, it's important to recognize that in the *SFFA* decision, actually, the majority opinion touched on this.

They said, listen, you don't have to exclude race at all costs when you're considering these decisions, but consider an application that asks and invites candidates to talk about adversity that they've faced, and maybe adversity that they've faced includes discrimination based on race, for example.

Now, on the other hand, there are still guardrails around taking these steps. Employers have to make sure they are not creating what we call disparate impact in seeking diversity for the application pool. So, this means the practice seems neutral on its face, but it still has a discriminatory effect on a protected group, even if it's unintentional. So, it's a balancing act in thinking about all of these factors.

Sam Gandhi:
So, Jeff, can employers still then offer diversity scholarships, training, mentorship, directed specifically at diverse candidates?

Jeff Green:
Yes, they can, Sam, but they've got to take care. I think Natalie very adroitly outlined the boundaries of what employers and nonprofits can do these days, in the post-*SFFA* world. The concern is really, and the advice that we sometimes give, is you need to be careful not to offer anything specific only to one group, right?

So, you can still do all of the recruiting. You can still do all of the targeting. You can still make all of those efforts to make sure that your applicant pool is diverse and to make sure that your workforce is diverse, but you can't offer something to one group that you're not offering to all.

Sam Gandhi:
Kate, if employers end up just eliminating or modifying their DEI programs, is that really going to eliminate risk?

Kate Roberts:
Well, I think the thing to remember about these issues is that for decades, up until now, Title VII, and what we've really been looking at, was making sure that there was not an adverse impact against People of Color, against women, against people who are in these protected classes. *SFFA* sort of flipped that on its head, and now, all of a sudden, the concern is being sued by essentially cisgender white men, those who are not in a protected class, for sort of the opposite, right, for reverse discrimination.

So, I think removing DEI programs lowers certain risk. It lowers the risk of being sued by one of the activist groups that is trying to get corporations to dismantle their DEI programs. However, it could create risks on the other

side and problems in the workforce. So, for example, if you've got initiatives that were helping to diversify the workforce, and you take those out completely, then you could face a traditional disparate impact claim to the extent that that decision continues to have a disparate impact in favor of non-minority candidates and employees.

So, there's groups on both sides of this issue. It's not a situation where you can just say, fine, we're going to take out all DEI programs, and now we have no risk under Title VII. You may not have the risk of being sued by a non-minority plaintiff, but you may have the risk of being sued by somebody in a protected class who was seeing the benefit of this, and now, all of a sudden, it's gone away.

So, I think where employers are looking now is really looking more at modifying those DEI programs, making sure that you have a diverse pipeline, making sure that you are considering a broad group of candidates for positions and for promotions. So, we're actively discussing with clients, we're using the term de-risk, and how do you de-risk your program so that you can still fulfill the goal that you want to but without completely overhauling the initiative or gutting it so much that it no longer serves the purpose.

Sam Gandhi:
You're listening to *The Sidley Podcast*, and we're speaking with Sidley thought leaders, Jeff Green, Kate Roberts, and Natalie Chan, about how businesses are reacting to the Supreme Court's affirmative action decision. Natalie, let me come back to you on that same topic, and employment experts have anticipated this ruling would have a chilling effect and that businesses will be fearful of instituting certain diversity policies or programs. Have you seen that?

Natalie Chan:
I have seen a chilling effect to some degree, even though *SFFA* isn't directly applicable to private employers at this time, and in some instances, seeing the pendulum swing far in the other direction. Now, that's not all clients, but it certainly is happening, and I think the Supreme Court's ruling is really pressure-testing the resolve of corporations and organizations that have said that they champion diversity in their workplace.

That said, given how pervasive DEI programming is, it doesn't seem likely it's simply going to disappear, because many businesses and leaders are committed to it, but what's interesting to me, Sam, is if you just go back in time only a couple years, in summer of 2020, the Black Lives Matter movement took center stage across the country.

You know we were looking at mass protests erupting after a Minneapolis police officer killed George Floyd, and many people were outraged and recognized much more work needs to be done to combat racial injustice and systemic inequality that's pervasive in our society, and that includes corporate America.

As a result, increasing diversity in workplace became a bigger corporate priority for many companies, many of our clients, and stakeholders and activists were pushing for this transparency and holding businesses accountable for fostering a more diverse and inclusive workplace.

That was the majority of 2020, 2021, 2022, and now, fast-forward to summer of 2023, after *SFFA*, many of those efforts that took a lot of time and energy to prioritize over the last few years are being questioned, and as Kate mentioned, our clients are asking for audits of their existing DEI programs.

We're seeing requests for reviews of ESG reports given the risk that they could backfire. Some diversity initiatives have been reframed, and others have been halted altogether, but as Kate said, many of our clients are seeking to de-risk. They're not looking to do away entirely with their DEI programs.

They want to understand, "Hey, listen, after *SFFA*, we don't really understand what this means. Does it apply to us? When will it apply to us? What should we do so that we're not the next target of another activist group lawsuit? We just want to understand the evolving legal landscape and then make a decision, a business decision, based on the current landscape."

Now, what remained true before *SFFA*, and is still true today, is that employers can't have quotas or set asides, and aside from limited exceptions in the voluntary affirmative action context, race and other

protected characteristics should not be used as a preference or a deciding factor in employment decisions.

So, in other words, if an employer says, “Hey, listen, we’re looking to do succession planning, and our next CEO needs to be a person of color or a woman, that was unlawful before *SFFA*, and that’s still unlawful today. So, some of these things remain constant, but people are now thinking more critically about, oh, what have we been doing, and is that actually permissible or not?”

Sam Gandhi:
Kate, just building on that, how are you advising clients about things that they can do to reduce legal risk?

Kate Roberts:
Very carefully is the answer to that, honestly, but there are several practical steps businesses can take, and I think one of the things that we’re looking at is evaluating the recruiting, hiring, and promotion practices. Employers should take stock of their recruiting, hiring, and promotion practices to make sure that those decisions are based on individual qualifications and other legitimate business-related criteria.

Race and other protected characteristics generally should not be used as a preference or a deciding factor in employment decisions, and as Natalie said, the idea of a quota or this person must fit XYZ protected characteristics has always been something that we advise employers to be very careful about. Secondly, evaluating DEI and ESG initiatives, policies, and training, and I would also include with that communications.

What you say and how you say it are very important, particularly when we’re talking about things like ESG initiatives or other things that go out publicly. So, to that end, we would recommend employers should review their corporate statement, code of ethics, employee policies, handbooks, marketing materials, things that are out there, and particularly those that are going out to the general public, as well as programs such as mentorship, affinity groups, fellowship opportunities, things that are aimed at creating a more diverse pool of candidates or employees.

And again, there are ways to do this to make sure that the pipeline stays broad but that you're not limiting things, you're not limiting opportunities to certain categories of people, and one of the things, also, that we're really keeping an eye on is there's a case coming up in the next Supreme Court term that is going to construe what it means to engage in an adverse employment action under Title VII.

As it stands, right now, there's some split about what that covers, and I think if the court construes the adverse employment action more broadly under Title VII, you could see more opportunity for litigation if the employee was denied an opportunity to be part of X group, or to attend X events, or things that are now not considered necessarily to rise to the level of an adverse employment action.

I think under the *Muldrow* case that's coming up, we're going to have to keep an eye on those issues, as well, because it may mean that employers need to dig even deeper than what they're doing now with regards to these evaluations. As the court stated, race should never be used as a stereotype or a negative. If employer initiatives appear to disadvantage a particular group of people or ultimately lead to disparate treatment in the terms and conditions of employment, that could be subject to an increase of legal challenge.

This could particularly be this case in zero-sum context, when you're talking about, for example, hiring decisions, where one person is going to get the job, one person is not going to get the job, or several people may not get the job. Those types of things, I think, are particularly important, because that really goes directly to the heart of what the court said in the *SFFA* decision.

Finally, I think it's important that corporations really look at what diversity means to them, and it may be worth zooming out and revisiting the threshold questions of what that means. It was clear in the court's decision, in *SFFA*, that universities can consider experiences as an individual. It's just essentially that the universities cannot make assumptions about individuals' experiences based on their race, and I think here, too, we can import that into the employment situation, where you can look individually at these issues, but again, you shouldn't be considering people

categorically, and then finally, broadening the applicant pool and building your pipeline.

Employers can continue to build the pipeline of diverse talent through investing in programs that support a diverse group of perspective candidates, including things like internship, scholarships, and mentorships, but you just have to be careful how you do it. And it cannot be so narrowly targeted that it only includes individuals and candidates of certain racial categories and excludes others.

So, again, I think it's important to work with counsel, work with experts, people who really understand these programs, really understand the history of Title VII, understand the history of Section 1981, and can look at it from a broad perspective and not a reactionary one.

Sam Gandhi:
Natalie, is there anything else that you're advising clients?

Natalie Chan:
Those were all great suggestions from Kate. Adding on to what she said, going back to the basics, right? Recommit to best practices. Employers should be documenting their internal review process for all employment decisions.

So, if they're going to be making a candidate selection for hiring or for promotions, document why that's the case and why there are legitimate nondiscriminatory reasons for making that choice, and that also will help cultivate transparency around the process and reduce any perception that employees have about unfairness.

I'd also add on training leaders, managers, and other key stakeholders on the process. Employers should continue to train all of these folks who are influencing or making decisions related to diversity in the workplace.

You know, what strategies can we use to continue to advance DEI and fulfill our mission but not run afoul of laws. And those trainings should cover implicit bias as well as anti-discrimination policies, and foundational employment laws to prevent potentially unlawful recruiting practices or employment decisions that are based on protected characteristics.

Additionally, monitor developing case law and trends. We're living in a highly dynamic legal landscape. There are not a lot of answers, and there may be continuing questions that arise as new cases emerge, and it's prudent to monitor the case law and trends and how these issues will play out in lower courts. Kate already alluded to the case before the Supreme Court, that's *Muldrow v. City of St. Louis*.

We're closely monitoring how the Supreme Court will interpret adverse employment action under Title VII, and we are closely watching a number of other cases and setting up alerts to track incoming litigation. So, our clients should continue to keep apprised of these updates.

In a similar vein, monitoring evolving state legislation is also important because lawmakers in states across the country have proposed or passed legislation that affects DEI initiatives and tries to set parameters around these initiatives in various settings. So, as more of these laws are passed, our clients should be aware of what they are and what they say.

Sam Gandhi:
So, there's commentary in the court's ruling that's pointed to Justice Neil Gorsuch's concurrence, and this is kind of the legal equivalent of leaving breadcrumbs in the forest. It briefly discusses the federal statute prohibiting race and sex discrimination in employment, and some view that as a signal that Gorsuch would welcome future lawsuits against employers. Jeff, what do you make of that? Is that a red herring?

Jeff Green:
No, I don't think it's a red herring, at all, Sam. I think it's a signal that Justice Gorsuch thinks that the *SFFA* decision could have gone farther and analytically must go farther. I think Kate had it right in pointing out, earlier, that as Justice Gorsuch said, it's a very short step from Title VI, which was what was involved in the *SFFA* case to Title VII itself, and before the *SFFA* case the Supreme Court had already held that analytically these two things are the same.

So, it's not only not a short step. It's really no step at all, to be honest with you. I also wanted to underscore, if I could take just a second, something that Natalie said that's important, or two things that Natalie said that I think

are important. One is you have to think of mitigating risk in this area, and in all areas, really, in terms of discovery. In the university context, what have your admission people been saying to one another? What's back there? What criteria are they using?

The Chief Justice sent a shot across the bow to universities, at least, and I think it's probably everyone, to say that you can't just substitute something like socioeconomic status for race. If it turns out that your particular socioeconomic status criteria really tracks race perfectly, or very well, we're not going to allow that kind of substitution to take place.

The other thing that I wanted to add, too, Sam, was that in addition to the state laws that Natalie mentioned, there are also other federal laws out there, including federal laws under the Affordable Care Act, that prohibit discrimination when it comes to providing healthcare services under Medicare and Medicaid. So, there are lots of anti-discrimination laws out there, all of them likely to be affected by this decision.

Sam Gandhi:
So, as we wrap up, I want to ask all three of you, we know what the court has said, we know what the potential effects are, going beyond universities, but the one thing that I'm not too sure anybody really understands is where we go from here. So, what's next? What's the aftermath? Is it too early, or are we already seeing what the future is? Natalie, I'm going to start with you, first.

Natalie Chan:
Sure, Sam. I'll highlight how I've started to see clients responding and how I anticipate more of our clients will respond to the *SFFA* ruling. First, businesses have to ask the hard questions, what are our values as an organization, what do we want our values to be, what should workplace culture look like? These are questions many of our clients have been grappling with over the last couple years, and now it's coming to a head.

Obviously, paring back or seizing altogether certain DEI initiatives will have an impact, and as Kate said, you need to look at this from both directions, right? If the pendulum swings too far in the other direction, you're looking at traditional discrimination cases that may be coming down the pipeline. If you already have a homogenous workforce, and it becomes less diverse

because of the inability to recruit or retain diverse talent, that creates additional risk.

And our clients are still getting pressured to show they're doing something to advance DEI. Second, I expect our clients will continue to try to get ahead of this issue and mitigate against the risk of legal challenge. As we talked about, a number of clients are already asking for reviews for audits, and we're helping them through this, assessing what's the level of risk, based on what we know today, for various DEI initiatives?

We may need to do another evaluation six months from now, depending on how the case law evolves, but at least today, we'll try to do the best we can with what we know, and how our clients are responding to this depends greatly on their level of risk tolerance, which varies, and their business objectives.

So, some have said I'm okay with this level of risk, and that my also depend on whether the mission of the organization is one that is focused on diversity. I also expect employers will lean more into the inclusion piece of DEI, or the I in DEI. Instead of limiting eligibility for a grant or a fellowship to individuals based on race, they're saying, "Hey, anyone can apply," or instead of limiting membership for an affinity group, saying, "We're going to invite anybody to be a member."

In other words, it's not just about being of a particular background. It's become more about allyship, and certainly, there's already been litigation emerging that has helped shape these decisions, and lastly, it's worth a reminder, there's no immediate impact to many employers from the *SFFA* decision when it comes to pure DEI initiatives.

Employers can continue to recruit, hire individuals from diverse backgrounds, as long as they're not making those decisions based on race or other protected categories.

Sam Gandhi:
Kate, what about you?

Kate Roberts:
As Natalie mentioned, one of the things that will help in trying to figure this

out is going to be time and getting to a situation… We've got, obviously, sort of the overarching decision from the Supreme Court last June, but we are seeing a lot of court challenges and things that are just now starting to work their way through so that we can start filling in the contours and seeing what the district courts are going to be doing, and what the circuit courts are going to be doing, to try to give additional guidance to this, but it's all very much evolving, and as Natalie mentioned, you may want to take a look at programs now, and we may need to take a look at it six months from now.

We've had a couple of decisions come down within the span of about 72 hours. There was a decision out of a district court in Atlanta that all of a sudden was flipped on a Saturday by the 11th Circuit, and now, we're remanding and heading back.

So, things are just going kind of fast and furiously, and so, we're in the weeds in all of this, but we do have some employers and some clients that just want to sort of take a breath, and take a pause, and see how things shape up a little bit more, especially in their location and in their districts where their court is.

But we certainly saw a flurry of activity, some of it legal, a lot of it political. There were a couple of letters that came out in just a couple of weeks, in July, after the decision came out. There was a letter from 13 Republican State Attorneys General to Fortune 100 companies, warning them, basically, against what they described as illegal racial discrimination in hiring practices.

Then, in response, you had another 20 or so AGs that sent a letter to those same companies in support of DEI efforts. So, obviously, this is a big legal issue. It's also a big political issue, a big cultural issue. We're already getting into the next round of elections. So, that's how all of this is popping up. The other thing that we're keeping a close eye on are cases that talk about standing, right?

Who has the ability to bring a lawsuit? Does it have to be somebody who's already employed by the company. Is it somebody who has just sat back in their chair and thought about maybe applying to a company, but then has decided they're already going to be disadvantaged because they don't fit

into a certain category? Those types of threshold questions are what is going to be hashed out at the district court level.

And so, a lot of those are happening in different areas and in different geographic areas as well as different industries, things like investments. We're going to be looking at those. Also, we can take a look at when we're talking about scholarships, what's tied to those? Is there really a contract that's tied to those scholarships, or is it really just somebody giving away money?

So, I think part of the challenge is, is all of this is very fact-specific. We need to look at individual programs and efforts to understand exactly what the criteria are for each of these programs. We can put things into broader categories, but ultimately, it is going to be fact-specific.

Context is going to matter. History is going to matter. The employer is going to matter. And so, it really is one of those things where as we get more time between the *SFFA* decision and the current practice, and also understand sort of what the lower courts, how they're going to interpret this, I think all of that is going to be helpful.

Sam Gandhi:
Jeff, I'm going to wrap up with you in terms of where you think this is going.

Jeff Green:
One piece of good news, here, Sam, is that the actions that have been filed even before *SFFA* and before the decision came down, and afterwards, for the most part, don't seek much by way of damages. They seek injunctive relief. They seek reformation of diversity programs, and some of these cases have settled when the diversity programs have been altered, but the good news is, not much, not millions and billions of dollars in damages.

So, thus far, it seems to be something that these types of suits are things that interest groups are filing and not so much members of the private bar. So, there's some positivity there. Shareholder suits, we haven't talked about. That's also something that we could see. The Supreme Court also had a case last term about religious accommodation in employment.

I'm very interested to see how religion matches up with race when it comes to Title VII and whether certain employers are allowed to broadly discriminate on the basis of religion, even if no one can discriminate on the basis of race. So, there's some interesting issues there, as well. LGBTQ questions come up a lot, and interestingly enough, Justice Gorsuch, famously, was the justice that cast the vote to declare that LGBTQ status was, in fact, something that was covered by Title VII, and here he is, the justice now, saying that, actually, the *SFFA* decision also implicates Title VII.

So, we'll see how that plays out, as well. I do think there is a call, though, for attending to these things. If you, as a corporation or a nonprofit entity, have diversity as a value or diversity as an issue, then you really need to pay attention to your programs as they sit today. You really need to take a look at your programs in light of this fast-moving landscape. Yes, there could be further changes, but right now, risks abound, and those risks need to be mitigated.

Sam Gandhi:
We've been speaking with Sidley thought leaders, Jeff Green, Kate Roberts, and Natalie Chan, about the monumental Supreme Court decision on affirmative action in higher education and what businesses can do to mitigate their legal risk. Natalie, Kate, Jeff, this has been a great look at the landscape regarding the recent Supreme Court's ruling, and thanks for sharing your thoughts on the podcast.

Natalie Chan:
Very happy to speak on this, Sam.

Kate Roberts:
Thank you, so much, for including us, Sam. It's a pleasure.

Jeff Green:
Thanks, Sam. It's been a pleasure being here with you and with Natalie and Kate.

Sam Gandhi:
You've been listening to *The Sidley Podcast*. I'm Sam Gandhi. Our executive producer is John Metaxas, and our managing editor is Karen

Tucker. Listen to more episodes at Sidley.com/SidleyPodcast, and subscribe on Apple Podcasts, or wherever you get your podcasts.