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FORMAL OPINION	)	No. 23-02
OF	)	
	)	October 4, 2023
PHILIP J. WEISER Attorney General	)	

Philip J. Weiser, Attorney General of the State of Colorado, as chief legal representative for the State, issues this Formal Opinion pursuant to his authority under § 24-31-101(1)(a), (d), C.R.S. (2023).

QUESTION PRESENTED AND SHORT ANSWER

Question Presented.

(1) Are Diversity, Equity, and Inclusion programs ("DEI programs") used by employers now unlawful following the recently decided U.S. Supreme Court decision, *Students for Fair Admissions, Inc. v. Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, 600 U.S. 181 (2023) ("*SFFA*")?

Short Answer.

(1) No. Workplace DEI programs were not addressed and were not held unconstitutional by the U.S. Supreme Court in *SFFA*. The *SFFA* decision evaluated the consideration of race in university admissions under a strict scrutiny standard, pursuant to the Equal Protection Clause of the United States Constitution and Title VI of the Civil Rights Act of 1964. It did not address employer DEI programs, which are governed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 to 2000e-3.

FACTUAL BACKGROUND

It is widely acknowledged that discrimination—which the enactment of Title VII in 1964 was designed to address—has resulted in multi-generational economic and societal harm. These inequities are well documented and continue to manifest themselves in numerous ways in the workplace, including unequal pay, unequal unemployment rates, and disparate opportunities for hiring and promotion. For example:

- **On average, women are paid less than men.** As of 2022, the median weekly earnings of full-time working women were 83% of the median weekly earnings of full-time working men.[1]

- **Women, and particularly women of color, are less likely to hold executive positions.** Only 1 in 4 C-suite executives are women, and only 1 in 20 C-suite executives are women of color.[2]

- **Black and Hispanic employees suffer workplace discrimination at a 60% higher rate than white employees.** 24% of Black and Hispanic employees have responded to a survey stating that they suffered workplace discrimination in the prior year, compared to just 15% of white employees.[3]

After a legacy of discrimination and unequal opportunities, it is far from the case that the passage of the civil rights laws placed everyone on equal footing with respect to business opportunities. To the contrary—the lack of access to social networks and mentoring opportunities has persisted for generations after formal exclusion policies have come to an end.

In order to combat these persistent inequities and achieve the benefits of a diverse workforce, public and private employers of all types have adopted DEI programs.[4] These programs employ a range of tools to remove barriers to success for

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[1] U.S. Bureau of Labor Statistics, *Median earnings for women in 2022 were 83.0 percent of the median for men* (Jan. 25, 2023), *available at* https://tinyurl.com/5n6zth9x.

[2] McKinsey & Company, *Women in the Workplace 2022* (Oct. 18, 2022), *available at* https://tinyurl.com/28d5reew.

[3] Camille Lloyd, *One in Four Black Workers Report Discrimination at Work*, Gallup (Jan. 12, 2021), *available at* https://tinyurl.com/3m532bfc.

[4] *See, e.g.*, Exec. Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-

under-represented groups, and to achieve the goals of diversity, equity, and inclusion. For example, organizations may employ chief diversity officers who ensure that all employees enjoy access to mentoring and career development opportunities. Similarly, mentorship programs may be used to increase employee engagement and opportunities for advancement, especially among employees from historically disadvantaged communities that may otherwise lack informal access to mentoring. Employers, moreover, may target employee recruiting efforts and materials through diverse channels to ensure a diverse pipeline of applicants. And for existing employees, organizations may support employee resource groups—voluntary internal communities of employees with shared interests—that can help employees feel a sense of belonging, community, and worth in the workplace.

ANALYSIS

In the wake of *SFFA*, assertions have been made that the U.S. Supreme Court's decision held or otherwise implied that DEI programs are unconstitutional and illegal. These assertions misrepresent the Court's decision.

I. *SFFA* Did Not Address Employment Law.

In *SFFA*, the Supreme Court considered claims that the admissions processes used by Harvard University and the University of North Carolina (the "universities")—which considered an applicant's race as a "plus factor"—violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. *Students for Fair Admissions, Inc. v. Harvard College*, 600 U.S. 181, 213-14 (2023).

In analyzing these claims, the Court relied exclusively on case law developed in the context of university admissions programs to hold that admissions decisions that consider race as a plus-factor are permissible only if: (1) they comply with strict scrutiny; (2) they do not use race as a negative or a stereotype; and (3) they have an end point.

The Court found that the universities' admissions processes did not satisfy these criteria. The Court acknowledged, however, that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of

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in-the-federal-workforce/; Colorado Universal Policy, Equity, Diversity, and Inclusion in State Employment (Sept. 16, 2020); U.S. Supreme Court Decision Does Not Foreclose Legally Compliant DEI Initiatives in Corporate America, https://www.law.com/corpcounsel/2023/07/06/u-s-supreme-court-decision-does-not-foreclose-legally-compliant-dei-initiatives-incorporate-america/ ("[N]early every Fortune 100 company has pledged a commitment to DEI initiatives, and over 80 percent of companies are working to implement DEI programs.").

how race affected his or her life, be it through discrimination, inspiration, or otherwise." *Id.* at 230.

SFFA did not address the law governing consideration of race in the employment context, nor did it address the validity of DEI programs in hiring practices and in the workplace. Rather, the *SFFA* analysis was controlled entirely by prior case law confined to Equal Protection and Title VI claims in higher education admissions processes.

II. Under Title VII, Employers May Continue to Use DEI Programs.

Employer DEI programs remain valid under federal law. Both before and after *SFFA*, it was unlawful under Title VII for an employer:

> 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.

42 U.S.C. § 2000e-2(a)(1).[5] The U.S. Equal Opportunity Employment Commission ("EEOC")—the federal agency tasked with enforcing this law—has confirmed that *SFFA* does "not address employer efforts to foster diverse and inclusive workforces," and has advised that, under Title VII, "[i]t remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."[6]

Employer efforts to ensure that all employees receive access to *the same* opportunities in the workplace—not to "adversely affect" or "deprive" employees of opportunities—do not violate Title VII. For example, an organization's efforts to expand its outreach to historically unrepresented groups do not adversely impact other applicants for a position.[7]

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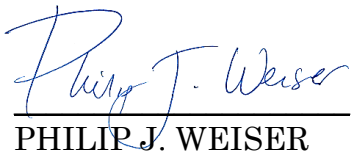
[5] Employment actions may also be challenged under 42 U.S.C. § 1981. Such claims have been analyzed under the same framework as Title VII claims. *Doe v. Kamehameha Schs.*, 470 F.3d 827, 836-40 (9th Cir. 2006) (en banc).

[6] Equal Employment Opportunity Commission, "Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs," June 29, 2023, available at https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.

[7] In addition, the Supreme Court has long recognized that, under Title VII, employers may take protected status into account in employment decisions in certain limited circumstances. *See United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (employer's voluntary plan to reserve 50% of training program spots for

And, of course, Title VII requires that employers *refrain* from implementing policies, even if facially neutral, if such policies have a disparate impact on protected classes of employees and are not consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Thus, employers can and should carefully monitor their policies to ensure that they are not inadvertently disadvantaging protected classes of employees through facially neutral policies.

Issued this 4th day of October, 2023.



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Black craftworkers permissible under Title VII because it sought to remedy manifest underrepresentation of Black workers in those positions, did not unnecessarily trammel the rights of white workers nor create an absolute bar to their advancement); *Johnson v. Transportation Agency*, 480 U.S. 616, 626-27 (1987) (municipal agency's plan that considered an applicant's sex as one factor in making promotions to positions in which women had been significantly underrepresented permissible under Title VII because it sought to remedy manifest underrepresentation of women in those positions and did not unnecessarily trammel the rights of male workers nor create an absolute bar to their advancement); *Shea v. Kerry*, 796 F.3d 42, 51, 53 (D.C. Cir. 2015) ("For nearly thirty years, we have examined Title VII challenges to affirmative action programs under the standards set forth by the Supreme Court in [*Weber*] . . . . For nearly three decades, *Johnson* has guided . . . the analysis of Title VII claims alleging unlawful reverse discrimination.").