ONE YEAR AFTER *SFFA*: DISCRIMINATORY ANTIDISCRIMINATION?

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I. *SFFA*'S WAKE

Just over a year ago, the Supreme Court decided *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[1] ("*SFFA*"). Many readers will recall that the Court held that Harvard College and the University of North Carolina violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 by giving a tip to minority applicants to help the schools assemble a diverse student body. I predicted *SFFA* would precipitate a "battle royal" over the legality of elements of the popular diversity, equity, and inclusion ("DEI") programs of American businesses,[2] and that battle is now underway. Although the question of whether an employer could engage in analogous conduct consistent with Title VII of the Civil Rights Act of 1964, which prohibits race discrimination in employment,[3] was not before the Court, well-organized and well-funded opponents of workplace diversity programs were poised to lead the assault.[4] In particular, two aspects of the *SFFA* opinion gave them the ammunition.

First, the majority categorically rejected the idea that there might be a consequential legal distinction between 1) centuries of subjugation of Blacks across American society animated by White supremacy, which prompted the passage of the Fourteenth Amendment and federal and state statutes prohibiting race discrimination, and 2) the contemporary use of modest tips in favor of Black college applicants, which was animated by a desire for racial integration. Chief

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1. 600 U.S. 181 (2023).

2. Michael J. Yelnosky, *Racial Preferences in Employment After* Students For Fair Admissions v. Harvard, 112 GEO L.J. ONLINE 74, 74 (2024).

3. *Id.* at 76; 42 U.S.C. §§ 2000e–2000e–17 (2024).

4. *See infra* notes 11–19 and accompanying text.

Justice Roberts's reductionist reasoning ignored the obvious distinction. For him, both were examples of race discrimination that needed to be treated similarly, because "[e]liminating racial discrimination means eliminating all of it."[5]

Second, the Court's dismissal of Harvard and UNC's justification for boosting those applicants portends doom for the most popular employer justification for DEI programs—the business case for diversity. Attracting and supporting a racially diverse workforce, the argument goes, is good for a firm's bottom line.[6] Harvard and UNC had similarly explained that they boosted the applications of minority applicants to help assemble a diverse student body because a diverse student body leads to better educational outcomes. Specifically, they argued that a diverse student body helped the schools 1) better prepare future leaders; 2) better prepare all graduates to thrive in an increasingly pluralistic society; 3) produce new knowledge; and 4) promote a robust exchange of ideas in the classroom, the laboratory, and across campus.[7]

The majority was thoroughly underwhelmed. It reasoned that a reviewing court could never accurately measure the impact on an educational program of an increase or decrease in the racial diversity of the student body. It found it impossible, for example, to evaluate how well UNC was preparing leaders and the role, if any, that racial diversity in the student body (not to mention a specific quantum of racial diversity) played in that preparation.[8]

The tension between the Court's reasoning and the business case for diversity in employment is palpable. How can a court determine whether a racially diverse law firm is more productive than a less diverse firm? Can it determine how much more productive the diverse firm would be? Can it determine how much diversity is necessary to improve productivity? Regarding the business case under Title VII, the die seems cast.[9]

Regardless, *SFFA* undoubtedly ushered in an aggressive legal assault on workplace DEI programs. Within days of the opinion's release, Edward Blum, the lawyer responsible for bringing the *SFFA* cases, told the New York Times that he was interested in challenging the use of racial preferences in

5. *SFFA*, 600 U.S. at 206. To suggest otherwise—for example, that state-sponsored discrimination against Blacks in public education in the 1940s was legally distinguishable from a state giving a boost to Black college applicants decades later—the Chief Justice continued, was "radical," "destructive," and inconsistent with the Second Founding and the Reconstruction Amendments to the Constitution. *Id.* at 230. Justice Thurgood Marshall's recognition of the obvious distinction continues to fall on deaf ears. Almost a half-century before, he had written that "it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier." Regents of University of California v. Bakke, 438 U.S. 265, 387 (1978) (Marshall J., concurring in part and dissenting in part).

6. Yelnosky, *Racial Preferences in Employment*, *supra* note 2, at 80–81.

7. *SFFA*, 600 U.S. at 214.

8. *Id.* at 214–15. "[T]he question whether a particular mix of minority students produces engaged and productive citizens, sufficiently enhance[s] appreciation, respect, and empathy, or effectively train[s] future leaders is standardless." *Id.* at 215.

9. Yelnosky, *Racial Preferences in Employment*, *supra* note 2, at 81–82. Whether workplace racial and ethnic diversity improves firm performance remains a contested issue. *E.g.*, Jeremiah Green & John R.M. Hand, *McKinsey's Diversity Matters/Delivers/Wins Results Revisited*, 21 ECON J. WATCH 5 (2024).

employment.[10] Less than two months later, Blum's American Alliance for Equal Rights filed lawsuits against two national law firms alleging that their diversity fellowship programs, which were not open to white law students, violated Section 1981 of the Civil Rights Act of 1866.[11]

Similarly, America First Legal, an organization headed by former (and likely future) Trump adviser Stephen Miller,[12] issued a press release on the day of the *SFFA* decision putting on notice "[r]adical corporate CEOs, law firm partners, medical directors, and diversity consultants."[13] "[B]eware," it continued, "there's no place to hide. AFL will find you and hold you accountable for any discriminatory actions you take."[14] The press release included a statement from Miller: "As a civil rights organization, America First Legal and its Center for Legal Equality will vigorously pursue legal action against entities and institutions perpetuating woke fascist bigotry against our fellow citizens."[15] Indeed, it got to work quickly in the weeks that followed, formally urging the Equal Employment Opportunity Commission to investigate numerous companies, informing several corporate boards that their firms' DEI programs exposed them to litigation and risked harm to those firms' stock prices, and filing lawsuits on behalf of plaintiffs challenging workplace practices under Title VII.[16]

10. Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html [https://perma.cc/K6L3-3VVC].

11. American Alliance for Equal Rights, *American Alliance for Equal Rights Files Lawsuit Against Perkins Coie LLP and Morrison & Foerster LLP Alleging Discriminatory Diversity Fellowships* (Sept. 14, 2023), https://americanallianceforequalrights.org/american-alliance-for-equal-rights-files-lawsuit-against-perkins-coie-llp-and-morrison-foerster-llp-alleging-discriminatory-diversity-fellowships/ [https://perma.cc/Z8X7-7HCJ]. Section 1981 prohibits private race discrimination in the making of contracts, including the making of employment contracts. 42 U.S.C. §1981 (2024).

12. Miller has described the organization as "the long-awaited answer to the ACLU." Stephen Miller, AM. FIRST LEGAL, https://aflegal.org/ [https://perma.cc/2ARA-MN6P] (last visited Dec. 12, 2024).

13. *America First Legal Puts Woke Corporations, Law Firms, and Hospitals on Notice: All DEI Programs and Workplace "Balancing" Based on Race, National Origin, and Sex Violate the Law*, AM. FIRST LEGAL (June 29, 2023), https://aflegal.org/america-first-legal-puts-woke-corporations-law-firms-and-hospitals-on-notice-all-dei-programs-and-workplace-balancing-based-on-race-national-origin-and-sex-violate-the-law/ [https://perma.cc/XQ3W-ZHXZ].

14. *Id.*

15. *Id.*

16. *E.g.*, *America First Legal Sues Mark Zuckerberg's Meta, the Association of Independent Commerical Producers, and Entertainment Industry Entities for Racial Discrimination*, AM. FIRST LEGAL (Sept. 6, 2023), https://aflegal.org/america-first-legal-sues-mark-zuckerbergs-meta-the-association-of-independent-commerical-producers-and-entertainment-industry-entities-for-racial-discrimination/ [https://perma.cc/V8HB-ZQAV]; *AFL Files Federal Civil Rights Complaint Against Activision for Illegal, Racist, Sexist, and Discriminatory Hiring Practices and Sends Letter to Activision Board Demanding They End Unlawful DEI Policies*, AM. FIRST LEGAL (Aug. 15, 2023), https://aflegal.org/afl-files-federal-civil-rights-complaint-against-activision-for-illegal-racist-sexist-and-discriminatory-hiring-practices [https://perma.cc/PP38-CM4D]; *America First Legal Files Federal Civil Rights Complaint Against Kellogg's; Warns Management That it Is Violating Fiduciary Duties*, AM. FIRST LEGAL (Aug. 9, 2023), https://aflegal.org/america-first-legal-files-federal-civil-rights-complaint-against-kelloggs-warns-management-that-its-violating-fiduciary-duties/ [https://perma.cc/NN33-XWVQ]; Press Release from America First Legal, *America First Legal Sends Warning Letter to Big Three Accounting Firm: Stop Racial Discrimination Now*, AM. FIRST LEGAL (July 26, 2023) https://aflegal.org/america-first-legal-sends-warning-letter-to-big-three-accounting-firm-stop-racial-discrimination-now/ [https://perma.cc/C9PN-2N4R].

As of August 1, 2024, lawsuits had been filed across the country challenging a range of employment practices that could fairly be characterized as DEI initiatives. They run the gamut from mandatory unconscious bias training[17] to the use of racial and gender targets backed by pay practices that incentivize managers to hire and promote workers who will increase the racial and gender diversity of a workforce.[18] And new lawsuits are being filed regularly.[19]

II. DISCRIMINATORY ANTIDISCRIMINATION?[20]

Although the dataset is quite small, I suggest that there is something to see in these cases. Courts appear willing to interfere with employer efforts to prevent employment discrimination against racial minorities and women—antidiscrimination efforts—by characterizing them as unlawful discrimination against Whites and men. Failing to recognize and consider the importance of antidiscrimination efforts to Title VII's enforcement scheme makes courts far too likely to go overboard and declare unlawful employer practices that are entirely consistent with Title VII.[21]

An example may be helpful. On the theory that subjective and informal hiring systems are more likely to be influenced by the biases of those evaluating and selecting candidates, many employers have implemented systems that are more structured, uniform, and objective.[22] In these more formal systems, job descriptions are drafted to articulate, in inclusive and objective language, precisely what an employer is looking for in candidates. Recruiting efforts for vacancies are designed to attract a diverse candidate pool. Candidate interviews are then choreographed to be as uniform as possible. For example, each candidate is asked the same prepared questions in the same order, and candidate responses are evaluated using a rubric formulated in advance that focuses on the important attributes outlined in the job description.[23]

Making that kind of change to a hiring process has never been thought to violate Title VII, even if the system it replaced would have more likely resulted

17. *E.g.*, Vavra v. Honeywell, 106 F.4th 702 (7th Cir. 2024).

18. *E.g.*, Complaint, Missouri v. Int'l Bus. Machs., No. 24-SL-CCO2837 (Mo. Cir. Ct., June 20, 2024).

19. Two of the best sources I have found for an inventory of these cases are *Diversity, Equity, and Inclusion (DEI) Task Force*, GIBSON DUNN, https://www.gibsondunn.com/dei-task-force/ (last visited Dec. 12, 2024) [https://perma.cc/EF6L-57DQ], and *Advancing DEI Initiative*, MELTZER CTR. FOR DIVERSITY, INCLUSION, & BELONGING, N.Y.U. https://advancingdei.meltzercenter.org/cases/ (last visited Dec. 12, 2024) [https://perma.cc/449J-RM9V].

20. By "antidiscrimination" I mean employer actions that are aimed at preventing unlawful workplace discrimination.

21. I first explored the importance and efficacy of antidiscrimination efforts in Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385 (2003).

22. *E.g.*, Becca Carnahan, *6 Best Practices for Creating Inclusive and Equitable Interview Processes*, HARV. BUS. SCH.: INSIGHTS & ADVICE (May 25, 2023), https://www.hbs.edu/recruiting/insights-and-advice/blog/post/6-best-practices-to-creating-inclusive-and-equitable-interview-processes#:~:text=Often%20this%20is%20where%20unconscious,superfluous%20or%20could%20exacerbate%20bias [https://perma.cc/YN7L-TUAH].

23. *Id.*

in the selection of a White applicant. *SFFA* does not change that result because it made unlawful only the use of consequential preferences based on race. Using the race of applicants in admissions was problematic only because it made a difference in admissions decisions, leading to a decrease in the number of Asian and White applicants admitted. A benefit provided to Black applicants because of their race and not Whites, the Court reasoned, necessarily advantaged the former group at the expense of the latter.[24] By contrast, in the more structured, uniform, and objective hiring process hypothesized, all applicants are treated the same. None are favored or disfavored because of their race.

The *SFFA* Court carefully circumscribed its holding on this issue by explaining that not every step taken by a state actor or federal funds recipient to attract a more racially diverse student body was subject to strict scrutiny. Under *SFFA*, race need not be wholly irrelevant to the admissions process.

> [N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. . . . [However, a] benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to . . . attain a particular goal must be tied to that student's unique ability to contribute to the university. . . .[25]

As Kenji Yoshino has helpfully observed, under *SFFA*, DEI programs are most vulnerable to legal challenge if they 1) confer a preference, 2) to members of a legally protected group (Black job applicants for example), 3) related to a "palpable benefit," such as a job or a promotion.[26]

Second, adopting a more structured and objective hiring process is consistent with an employer's obligation under Title VII to take steps to prevent unlawful discrimination. As I have explained elsewhere, the Supreme Court has consistently stated that a primary purpose of Title VII is prophylactic—to spur employer efforts to prevent workplace discrimination.[27] The Court has gone further and operationalized that purpose by creating defenses to Title VII liability for employers who have taken reasonable steps to prevent unlawful discrimination.[28] Famously, because employers have an affirmative obligation to prevent Title VII violations and to give credit to employers who make reasonable

24. *SFFA*, 600 U.S. 181, 218–19 (2023).

25. *Id.* at 230–31.

26. Kenji Yoshino & David Glasgow, *DEI Is Under Attack. Here's How Companies Can Mitigate the Legal Risks*, HARV. BUS. REV. (Jan. 5, 2024) (demonstrating that *SFFA* put at legal risk programs that confer a preference on members of protected groups with respect to palpable benefits).

27. Yelnosky, *The Prevention Justification*, *supra* note 21.

28. In *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton* the Court recognized an employer defense to supervisory hostile environment sexual harassment claims that turns on an employer's harassment prevention efforts. Burlington Industries v. Ellerth, 524 U.S. 742, 759 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). In *Kolstad v. American Dental Association*, the Court concluded that employers would not be liable for punitive damages for discriminatory employment decisions of managerial agents where those decisions "are contrary to the employer's 'good-faith efforts to comply with Title VII.'" Kolstad v. American Dental Association, 527 U.S. 526, 545 (1999).

efforts to discharge that duty, the Court created an affirmative defense to hostile environment supervisory sexual harassment for employers who exercised reasonable care to prevent and correct promptly any sexually harassing behavior.[29] The Supreme Court's understanding of Title VII requires that there be daylight between antidiscrimination efforts and unlawful discrimination.

Third, the Supreme Court's decision this spring in *Muldrow v. City of St. Louis*[30] does not change the Title VII analysis. The plaintiff in *Muldrow* claimed she was transferred to a new position because of her sex. The lower courts concluded her employer was entitled to summary judgment because she could not show the transfer caused a "significant change" or "material disadvantage" in her working conditions.[31] Opponents of robust employer DEI efforts viewed the Supreme Court's decision to grant *certiorari* in *Muldrow* as a positive development. If the Court reversed and rejected the "significant change" or "material disadvantage" standard, they reasoned, White or male employees could challenge DEI programs by alleging and proving simply that they were disfavored by their employer because of their race or sex, regardless of any economic or emotional impact.[32] For example, Andrea Lucas, an EEOC commissioner appointed by Donald Trump, wrote approvingly of the "serious implications for certain diversity programs" of a reversal in *Muldrow*.[33]

The Supreme Court reversed, and it did reject the lower courts' requirement of a heightened showing of harm, but from the standpoint of challenges to workplace DEI programs the case turned out to be a dud. The Court did not rule that the plaintiff in *Muldrow* could prevail under Title VII by proving only that she was transferred because of her sex. She was required to prove that her discriminatory transfer caused her "harm respecting an identifiable term or condition of employment,"[34] such as a decrease in her status, perks, or scheduling flexibility.[35] Only Justice Kavanaugh, in his concurrence, would have concluded that a discriminatory transfer always violates Title VII, reasoning that "the discrimination is harm."[36] Nevertheless, DEI opponents, including Lucas, continued to insist that DEI programs were more susceptible to legal challenge after *Muldrow*.[37]

29. *Faragher*, 524 U.S. at 806–07.

30. 601 U.S. 346, 357–58 (2024).

31. *Id.* at 350–53.

32. For example, an employer might give a junior Black employee an office closer to more powerful and influential members of a firm than a junior White employee because the employer believed it would be more difficult for the former to otherwise seek mentoring from those more powerful employees.

33. Andrea R. Lucas, *With Supreme Court Affirmative Action Ruling it's Time for Companies to Take a Hard Look at their Corporate Diversity Programs*, REUTERS: COMMENT (June 29, 2023), https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/ [https://perma.cc/R4R6-NAAH].

34. *Muldrow*, 601 U.S. at 354–55.

35. *Id*. at 359.

36. *Id*. at 365 (Kavanaugh, J., concurring).

37. Julian Mark, *DEI "Lives On" After Supreme Court Ruling, but Critics See an Opening*, WASH. POST. (Apr. 19, 2024), https://www.washingtonpost.com/business/2024/04/19/dei-supreme-court-muldrow/ [https://perma.cc/7GA3-7TV2].

To summarize, an employer does not violate Title VII by adopting a hiring process designed to use more objective candidate evaluations to reduce the likelihood that racial bias will impact the process. No hiring decisions under those systems are based on an applicant's race, the systems are consistent with Title VII's requirement that employers take steps to prevent employment discrimination, and a White applicant who is not hired under such a system has not suffered any cognizable harm under *Muldrow*, even if she might have been hired under the employer's prior subjective system. Title VII does not guarantee any applicant the right to be evaluated for employment under a selection process more likely than others to favor members of their race.

A. The Case of Antidiscrimination Training

Applying those principles, it seems uncontroversial to conclude that mandatory antiharassment, unconscious bias, or diversity training does not violate Title VII. That was the widely held view before *SFFA*.[38] My view is that antidiscrimination training is not just lawful under Title VII, it is required. One example, mentioned above, is the Supreme Court's creation of an affirmative defense to hostile environment supervisory sexual harassment for employers who "exercised reasonable care to prevent and correct promptly any harassing behavior."[39] Lower courts have regularly found that employers can discharge this duty by 1) promulgating and enforcing antiharassment policies that permit employees to safely complain about alleged harassment, and 2) conducting antiharassment training.[40] And the EEOC, in its most recent *Enforcement Guidance on Harassment in the Workplace*, instructs that judging compliance with the requirements of this affirmative defense involves examining whether the employer promulgated a policy against harassment, established a process for addressing harassment complaints, monitored the workplace to ensure adherence to the policy, and provided "training to ensure employees understand their rights and responsibilities."[41] Consequently, I never anticipated that a court might conclude that an employer with a robust antiharassment training program was discriminating against men required to attend the training.[42]

38. *E.g.*, Martin Lipton, *DEI Initiatives Post-SFFA: Considerations for Boards and Management*, HARV. L. SCHOOL F. ON CORP. GOVERNANCE (Aug. 9, 2023), https://corpgov.law.harvard.edu/2023/08/09/dei-initiatives-post-sffa-considerations-for-boards-and-management/ [https://perma.cc/YA6E-23VK] (explaining that employer efforts to reduce bias in hiring and promotion, such as unconscious bias training, were lawful prior to SFFA and remain lawful).

39. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

40. *E.g.*, Pullen v. Caddo Parish School Board, 830 F.3d 205, 210 (5th Cir. 2016) (explaining that to assert the defense an employer must prove it implemented "suitable institutional policies and educational programs" regarding sexual harassment).

41. U.S. Equal Employment Opportunity Commission, Enforcement Guidance on Harassment in the Workplace § IV.C.2.b.1., EEOC-CVG-2024 (April 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_ftnref269 [https://perma.cc/N7HQ-45XU].

42. While I readily acknowledge that Title VII prohibits harassment by women and harassment against men, most studies show that women are far more likely to be sexually harassed in the workplace than men. *E.g.*, *Ending Sexual Assault and Harassment in the Workplace*, NAT'L SEXUAL VIOLENCE RSCH. CTR.

Nevertheless, in a few recent cases, courts have been solicitous of claims brought by White employees arguing that mandatory antidiscrimination training discriminated against them because of their race in violation of Title VII. Those courts have displayed a misunderstanding of the fundamental principles discussed above, and if antidiscrimination training violates Title VII, a wide swath of DEI programs are at risk—not just those involving the use of consequential racial preferences, which was the focus of *SFFA*.

For example, in *Young v. Colorado Department of Corrections*,[43] the plaintiff, a White male, alleged that his employer's mandatory "Equity, Diversity, and Inclusion" training discriminated against him because of his race, in violation of Title VII. The training was delivered online through modules that employees completed on their own. Specifically, Young alleged that the training constituted unlawful hostile environment racial harassment because it demeaned him based on his race and promoted divisive racial and political theories that harmed his relationships in the workplace.[44] To prevail on that theory, a Title VII plaintiff must prove that race-based harassment was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment. He must prove 1) he subjectively perceived the work environment as hostile or abusive, and 2) a reasonable person would find the environment hostile or abusive.[45]

The subjects covered by the training Young described in his complaint included the social construction of race; white supremacy; white fragility; the history of redlining; intersectionality; antiracism; and diversity, inclusion, equality, and equity.[46] The Tenth Circuit concluded that the complaint did not state a claim because the training as alleged by Young was not objectively severe or pervasive racial harassment.[47]

On the other hand, the Tenth Circuit displayed a deep skepticism about training programs that incorporate information about how the country's legacy of white supremacy can impact today's workplaces. Without citing a single source, the court wrote that "other courts have recognized race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment. The rhetoric of these programs sets the stage for actionable misconduct by organizations that employ them."[48] Applying this reasoning, courts can transform employer efforts to educate employees about the operation of unconscious bias, for example, into acts of anti-White discrimination.

To accelerate the alchemy, the Tenth Circuit panel leveraged the culture wars narrative that teaching about the history, persistence, and causes of racism is an assault on Whites. It elided the employer's obligation to prevent

https://www.nsvrc.org/ending-sexual-assault-and-harassment-workplace (last visited Dec. 12, 2024) [https://perma.cc/5TM5-PEA8].

43. 94 F.4th 1242, 1250–51 (10th Cir. 2024).

44. *Id.* at 1244.

45. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21–22 (1993).

46. *Young*, 94 F.4th at 1245–48.

47. *Id.* at 1251.

48. *Id.* at 1245.

discrimination against Black applicants and employees and rather breezily concluded that the "race-based rhetoric" of the training was "well on the way to arriving at objectively and subjectively harassing messaging."[49] The court affirmed the district court's dismissal of the complaint only because Young did not allege that 1) the training occurred more than once, 2) his supervisors threatened to punish or otherwise discipline employees who failed to complete or agree with the materials, or 3) his co-workers engaged in specific acts of insult or ridicule aimed at him because of the training.[50] *Young* is a case in which the holding is correct but some of the reasoning is troubling.

De Piero v. Pennsylvania State University,[51] by contrast, is a case in which the court's reasoning was sound, but its conclusion was questionable. *De Piero* was also a Title VII hostile environment racial harassment challenge to antiracism training brought by a White employee. Specifically, he alleged that discussions of white supremacy and white privilege in that training repeatedly singled out and demeaned employees on the basis of race.[52] In ruling on the employer's 12(b)(6) motion, the district judge seemed to appreciate the important role of antidiscrimination training in Title VII compliance when she wrote, "Training on concepts such as 'white privilege,' 'white fragility,' implicit bias, or critical race theory can contribute positively to nuanced, important conversations about how to form a healthy and inclusive working environment."[53] And quoting from Justice Jackson's dissent in *SFFA*, the district judge emphasized that it is not and should not be "the norm to maintain a workplace dogmatically committed to race blindness at all costs. To do so would 'blink [at] both history and reality in ways too numerous to count.'"[54] Nevertheless, she denied the employer's motion to dismiss because "the way these conversations are carried out in the workplace matters," and plaintiff's allegations described "a constant drumbeat of essentialist, deterministic, and negative language."[55]

What was it about the training in *De Piero* that overcame the district judge's impulse to insulate antidiscrimination training from Title VII liability? The plaintiff alleged that there had been five training sessions during which "negative traits [were ascribed] to white people or white teachers without exception and as flowing inevitably from their race."[56] And some of the techniques employed in the sessions were unorthodox, to say the least. In one session, De Piero alleged that White employees were told during a breathing exercise to hold their breath longer than Black employees so the former could feel the pain felt by George Floyd in the moments before his death.[57]

49. *Id.* at 1251.
50. *Id.*
51. 711 F.Supp.3d 410, 420–24 (E.D. Pa. 2024).
52. *Id.* at 422.
53. *Id.* at 424.
54. *Id.* ((quoting *SFFA*, 600 U.S. 181, 385 (2023)) (Jackson, J., dissenting)).
55. *Id.*
56. *Id.* at 423.
57. *Id.* at 416.

However, the procedural posture of the case and the allegations of discriminatory interactions De Piero had *outside* of training sessions seemed most important to the district judge. Beyond any problems with the trainings, she explained, De Piero alleged he was verbally assaulted by co-workers and supervisors because of his race.[58] Given those allegations, she concluded, De Piero stated a plausible claim for relief, and "[w]hether there is any merit to his claims is an inquiry for another day."[59] The decision is nevertheless troubling because it is far from clear that racial harassment outside the context of antidiscrimination training was determinative. If it was not, distinguishing antidiscrimination training from unlawful discrimination could be a difficult enterprise.

So far, I have argued that antidiscrimination training should be insulated from liability under Title VII because it does not allocate consequential workplace benefits and burdens based on race, and because Title VII privileges employer efforts to prevent discrimination. A recent Eleventh Circuit decision suggests an additional reason to avoid reading Title VII to prohibit antidiscrimination training that might offend or upset White employees—constitutional avoidance.

Honeyfund.Com, Inc. v. Governor[60] involved a First Amendment challenge to Florida's "Stop Woke Act," which prohibited Florida employers from conducting mandatory workplace training programs that "espouse[], promote[], advance[], inculcate[] or compel[]" a set of beliefs, all of which related to race, color, sex, or national origin.[61] One was the belief that "[a]n individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously."[62] That provision would have made mandatory employee unconscious bias training unlawful in Florida. In defending the statute, Florida argued, in part, that the Act was an antidiscrimination law and not a regulation of speech because espousing the prohibited concepts and forcing them on employees amounted to hostile, invidious discrimination that was well within the state's power to regulate.[63]

The court found the Act violated the First Amendment because it was a direct regulation of speech based on its content, speech with which the State of Florida disagreed.[64] The statute was not an enforceable antidiscrimination law, unlike Title VII, because Title VII's impact on speech is incidental to its primary purpose of prohibiting employment discrimination.[65] However, the court was quick to note that Title VII enforcement, particularly in discrimination cases based exclusively on employer speech, can pose difficult First Amendment

58. *Id.* at 424.
59. *Id.*
60. 94 F.4th 1272, 1275 (11th Cir. 2024).
61. *Id.* at 1275–76.
62. *Id.* at 1275.
63. *Id.* at 1276.
64. *Id.* at 1278–79.
65. *Id.* at 1282–83.

problems. Consequently, it insisted that courts exercise special caution when applying Title VII to matters involving traditionally protected areas of speech.[66]

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Doctrinally, courts could use the objectively severe or pervasive prong of Title VII harassment doctrine to shield antidiscrimination training from liability. The court did so in *Young* after concluding that the plaintiff's allegations were focused almost exclusively on what happened in online training sessions that employees completed individually.[67] The objective test could also be used to vindicate First Amendment principles, as Judge Brasher of the Eleventh Circuit has argued.[68] Finally, on the reasonable assumption that employers are far more likely to use antidiscrimination training to prevent discrimination and not to harass White employees, courts could require, as many do in Title VII disparate treatment cases brought by majority group members alleging they were discriminated against, a heightened showing of discrimination—a showing that the defendant is that unusual employer who discriminates against the majority.[69]

The object should be to create a safe harbor for employers acting to prevent workplace discrimination. This would place the burden on the plaintiff to show how the training goes beyond, in a significant and harmful way, explaining the history of workplace discrimination against Blacks, the persistence of workplace discrimination against Blacks, the causes of that discrimination, and the steps White employees will need to take to prevent future workplace discrimination against Blacks. The safe harbor would not protect targeted, specific, demeaning, and aggressive criticism of White employees because of their race. To reiterate, it is uncontroversial that sexual harassment training does not constitute unlawful discrimination against men. Why would the result be different in this context?[70]

66. *Id.*

67. Young v. Colorado Dep't of Corr., 94 F.4th 1242, 1251 (10th Cir. 2024) ("We know Mr. Young was offended by the . . . training, and that he was upset about the Department's response when he complained about the . . . training. But what we do not know is what he experienced in the workplace due to the . . . training—particularly his interactions with supervisors and co-workers.); *cf.* Vavra v. Honeywell Int'l, 106 F.4th at 705–06 (holding that the plaintiff, who assumed that unconscious bias training "would vilify white people and treat people differently based on their race" could not make out Title VII retaliation claim where he was terminated for refusing to participate because he could not have had an objectively reasonable belief the training violated Title VII).

68. Yelling v. St. Vincent's Health System, 82 F.4th 1329, 1345 (11th Cir. 2023) (Brasher, J. concurring) (explaining that the objective prong can operationalize the idea that the closer speech comes to the heart of the First Amendment, the more reluctant a court should be to impose liability because of it).

69. *E.g.*, Ames v. Ohio Dept. of Youth Services, 87 F.4th 822, 825 (6th Cir. 2023). The Supreme Court recently granted certiorari in Ames to resolve a circuit split on the question "[w]hether, in addition to pleading the other elements of Title VII, a majority-group plaintiff must show 'background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" Question Presented, Ames v. Ohio Dep't of Youth Services, No. 23-1039 (Oct. 4, 2024), https://www.supremecourt.gov/qp/23-01039qp.pdf [https://perma.cc/8QGK-F2X3]; *See also* Dan Schweitzer, *Supreme Court Report, Volume 32, Issue 1*, NAT'L ASS'N ATTN'YS GEN. (Oct. 25, 2024), https://www.naag.org/attorney-general-journal/supreme-court-report-volume-32-issue-1/ [https://perma.cc/35QU-PPAK].

70. Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1167–68 (2019) (explaining that efforts to counteract sexual harassment in

B. The Bigger Picture

I have tried to show that there are troubling signs in the reasoning of some courts that have considered the lawfulness of antidiscrimination programs under Title VII in the wake of *SFFA*. Their fundamental mistake, although there are others, is the failure to recognize Title VII's mandate that employers take steps to prevent workplace discrimination. This failure is easiest to see in challenges to antidiscrimination training programs.

However, there are cases in the pipeline, and no doubt more to come, challenging programs that are more difficult to characterize. For example, some employers have adopted so-called "diverse slate" hiring programs that require them to include a minimum number of candidates from members of underrepresented groups among any group of applicants to be interviewed.[71] Some have opined that these programs are legally vulnerable because they use the race of applicants in a consequential way—to populate candidate pools.[72] A White applicant may be able to show he was not interviewed because of his race or that he was not hired because the employer selected instead someone who would not have been interviewed but for her race.[73]

However, instead of characterizing a diverse slate requirement could also be characterized as a practice intended to prevent discrimination by blunting the impact of biases that have historically deprived members of certain groups of employment opportunities. Under that framing, diverse slate requirements are discrimination prevention programs that further the goal of race neutrality in employment. Understood in that way, they are entitled to statutory protection, in whole or in part.[74]

If we are beginning a new chapter in the struggle for equal employment opportunity—the post-*SFFA* chapter—courts need to recognize the distinction between discrimination and antidiscrimination and draw the line between them in a way that honors the objective of Title VII, which is to prevent discrimination against those historically underrepresented in American workplaces. Time may

the workplace are not understood as gender preferences but as countermeasures that are meant to prevent and counteract the deviation from a fair work environment that sexual harassment represents).

71. Perhaps the best-known program like this is the National Football League's "Rooney Rule," which requires all teams hiring a head coach, general manager, or offensive coordinator to interview at least two minority candidates. *E.g.*, Julian Mark, *DEI's "Rooney Rule" Placed Under Legal Microscope, on and off the Field*, WASH. POST (Feb. 6, 2024), https://www.washingtonpost.com/business/2024/02/06/rooney-rule-legal-complaint
-diversity-eeoc/ [https://perma.cc/N6FS-NAU8].

72. *Id.* (quoting Kenji Yoshino, who explained that diverse slate requirements occupy the "yellow zone" in his "green," "yellow," "red" taxonomy of the legal risk associated with particular employer DEI programs).

73. Kenji Yoshino has argued that diverse slate requirements may not violate Title VII if all candidates selected for a pool are then evaluated without regard to their race. *Id*.

74. *See generally* Jonathan P. Feingold, *Colorblind Capture*, 102 B.U. L. REV. 1949 (2022) (arguing that affirmative action in admissions should be seen as an antidiscrimination measure intended to mitigate racial advantages and disadvantages embedded in the admission process); Carbado, *supra* note 71 (arguing that Justice Powell's opinion in *Bakke* recognizes that using racial classifications in admissions is "no preference at all" but instead a countermeasure to race-based inaccuracies in predicting the academic performance of minority applicants).

be of the essence because many cases are and will be moving through the courts, precedents are being established, and employers and their counsel are watching. I fear that if DEI programs are eliminated or watered down in pursuit of formal and ahistorical equality, the current racial segregation of the labor market will not only persist,[75] but will likely get worse.[76]

75. Yelnosky, *Racial Preferences in Employment*, *supra* note 2, at 83–84 (reviewing some of the literature documenting the overrepresentation of Black workers in the lowest paid occupations and underrepresentation of Black workers in the highest paid occupations and industries throughout the U.S. economy).

76. A recent resume study involving more than 1,000 applications sent to each of 108 Fortune 500 firms showed that employers contacted White applicants almost 10% more often than Black applicants. And perhaps most importantly for our purposes, the authors found significant differences among firms, with the lowest rates of disparate treatment found among firms with a centralized human resources function. Patrick Kline, Evan Rose, & Christopher R. Walters, *A Systemic Discrimination Among Large U.S. Employers*, 137 Q. J. ECON 1963, 1976–77 (2022); *see also* Patrick Kline, Evan Rose, & Christopher R. Walters, *A Discrimination Report Card*, 114 AM. ECON. REV. 2472 (2024).