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U.S. Equal Employment Opportunity Commission

"The Future of DEI, Disparate Impact, and EO 11246 after *Students for Fair Admissions v. Harvard/UNC*"[1]

Prepared Remarks and Additional Remarks During Panel Discussion

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Prepared Remarks

Today's panel considers the future of Diversity, Equity, and Inclusion (DEI) programs in the workplace in the wake of the Supreme Court's recent decision in *Students for Fair Admissions* (or *SFFA*).[2] The Civil Rights Act of 1964 includes both Title VI, covering education contexts, and Title VII, applying to employment contexts.[3] While these statutory sections are similar, they

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* As a single Commissioner on a five-person panel, I cannot speak on behalf of the Commission by myself. As a result, the views I express are my own and do not necessarily reflect those of the EEOC or any other Commissioner, except where I refer to Commission policy guidance and other documents and information published by the Commission. I have served on the EEOC since 2020, when I was nominated by President Trump during his first term and confirmed by the U.S. Senate as a Commissioner. I was designated as Acting Chair of the EEOC by President Trump on January 20, 2025.

Thank you to Mary Kate Littlejohn and Sabrina Ruch for their assistance in the annotation and editing of my prepared and delivered remarks.

[1] Pending publication in ABA Journal of Labor & Employment Law (forthcoming Jan. 2025).

[2] *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (ruling that Harvard and UNC's consideration of race in their admissions process violated the Equal Protection Clause).

[3] *See* Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, 2000e (1964).

nonetheless are distinct and the Court historically had interpreted their requirements differently. *Students for Fair Admissions* arose in the Title VI context of higher education admissions, not the workplace. In my opinion, the primary connection between *SFFA* and the employment context is that in *SFFA*, the Supreme Court finally brought university admissions caselaw into closer parallel with the longstanding, more restrictive standards of federal employment law. Prior to the *SFFA* ruling, the Court permitted universities to use race as a factor in higher education admissions, based on an interest in promoting "diversity."[4] *SFFA* overruled previous cases and barred race-based decision-making or "affirmative action" in higher education admissions.

As Title VI education case, *SFFA* likely has no immediate, direct legal impact on the existing standards in the employment context under Title VII. Unlike the pre-*SFFA* university admissions standards permitting the use of race-motivated decision-making, a different, more restrictive set of standards applied in the employment context under Title VII for decades prior to *SFFA*—and continues to apply today. I will discuss those standards in more detail shortly. Because *SFFA* did not directly change the law in the employment context, DEI programs and policies and other employment policies, programs, and decisions that were legal before *SFFA* likely remain legal. Likewise, previously unlawful ones remain illegal. Whether this state of the law post-*SFFA* is good or bad news for a particular employer depends on whether that employer already was complying with the preexisting and continuing restrictive standards that apply to the use of race, sex, or other protected characteristics in employment decisions under Title VII.

[4] *See Grutter v. Bollinger*, 539 U.S. 306 (2003) (ruling that the University of Michigan Law School's use of race as a "plus factor" in their holistic admissions process was valid under the Equal Protection Clause).

So, what specifically are these employment law standards? In my experience, much of the public and far too many employers—even large, sophisticated employers—have critical gaps in their high-level understanding of federal civil rights law. This leads to some common blind spots around DEI programs and policies and, in turn, legal risk. To assess risk and understand the current state of the law, employers and the public need to understand five key points. Each of these points has significant and wide-ranging implications. And, more importantly and perhaps surprisingly, these points generally are not in dispute. These are generally well accepted principles and supported by Supreme Court precedent and Commission policy. Where an application of these principles is solely my opinion, I will try to make that clear.

First, there is no such thing as "reverse" race or sex discrimination under our civil rights laws—there just is discrimination. Different treatment based on race or sex is unlawful discrimination, regardless of which group of employees is harmed or benefited.[5] That has been the long-standing position of the EEOC and the Supreme Court.[6] Title VII's protections

[5] Title VII prohibits, among other things, employers from "fail[ing] or refus[ing] to hire or . . . discharge[ing] *any individual*, or otherwise . . . discriminat[ing] against *any individual* with respect to his compensation, terms, conditions, or privileges of employment *because of such individual's* race, color, religion, sex, or national origin;" and "limit[ing], segregat[ing], or classify[ing] his employees or applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)-(2) (emphases added).

[6] *See, e.g.*, EEOC, Section 15 Race and Color Discrimination, EEOC-CVG-2006-1 (Apr. 2006) ("EEOC Race Discrimination Guidance"), available at https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination ("Congress drafted the statute broadly to cover race or color discrimination against anyone – Whites, Blacks, Asians, Latinos, Arabs, American Indians and Alaska Natives, Native Hawaiians and Pacific Islanders, persons of more than one race, and all other persons."); *see, e.g.*, *McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273, 280 (1976) (holding that Title VII protects all races, including white employees, from employment discrimination and observing that the EEOC "has consistently

universally and even-handedly apply to employees of all races and all sexes.[7] Likewise, Section 1981's protections apply to all races as well.[8] These civil rights protections do not exclusively apply to "historically underrepresented" employees, "diverse" employees, "BIPOC" (Black, Indigenous, and People of Color) employees, or any other subset of employees.

Second, in general, employers are not permitted to take any employment actions motivated by race or sex.[9] That also has been the clear rule for decades in employment law. Critically, it is not a defense to claim that race or sex was not the "but-for" (deciding) factor or the sole reason for the employment decision, if race or sex nonetheless played a part in the decision.[10] Unlike the old rules for university admissions prior to *SFFA*, race or sex cannot be even a plus factor, a tiebreaker, or a tipping point in the employment context. People sometimes think that race or sex can be part

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interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites").

[7] *See* EEOC, Race Discrimination Guidance (noting the Commission "applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used"); *McDonald*, 427 U.S. at 280 (holding "Title VII prohibits racial discrimination against the white petitioners in this case upon the *same standards* as would be applicable" if the petitioners were Black) (emphasis added).

[8] 42 U.S.C. § 1981 (1866) ("*All persons* within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."); *see McDonald*, 427 U.S. at 285 (holding "§ 1981 is applicable to racial discrimination in private employment against white persons" and noting "the statute [Section 1981] explicitly applies to "*all* persons" (emphasis added), including white persons").

[9] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion) (holding plaintiff's burden was to show their protected status "play[ed] a motivating part in an employment decision"); 42 U.S.C. § 2000e–2(m) (An "unlawful employment practice is established" if "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.") (added to Title VII in the Civil Rights Act of 1991).

[10] *See* 42 U.S.C. § 2000e–2(m) (providing for liability "even though other factors also motivated the practice").

of the equation for an employment decision if race or sex is not the sole factor, the exclusive factor, or the deciding factor. That is dead wrong. If race or sex was all *or part* of an employer's motivation, that violates federal employment law.[11] Neither the Supreme Court nor the EEOC ever has deemed general business interests in diversity and equity (including perceived operational benefits or customer/client preference) to be sufficient to allow race-motivated employment actions.[12] Indeed, Title VII's very limited carve-out for bona fide occupational qualifications (BFOQ) excludes race and includes only religion, national origin, and sex.[13] Prior to *SFFA*, some DEI advocates may have hoped that the Supreme Court might bless a new "diversity" exception to the default rule against race- or sex-motivated actions in employment law. However, as a practical matter, the Supreme Court's decision in *SFFA* slammed the door on that possibility. That arguably is the most direct legal ramification of *SFFA*—a new, general exception based on "diversity" interests almost certainly will not be created in the employment context in the

[11] *Id.*; EEOC Race Discrimination Guidance ("Title VII is violated if race was all or part of the motivation for an employment decision.").

[12] *See* 42 U.S.C. § 2000e-2(e)(1) (Title VII's limited exception for "bona fide occupational qualifications" (BFOQs) does not permit disparate treatment based on race or color); 42 U.S.C. § 2000e-2(k)(2) ("A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination"); *see also*, EEOC Race Discrimination Guidance ("Title VII also does not permit racially motivated decisions driven by business concerns – for example, concerns about the effect on employee relations, or the negative reaction of clients or customers. Nor may race or color ever be a bona fide occupational qualification under Title VII.") (citing *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987).

[13] *See* 42 U.S.C. § 2000e-2(e) (providing a limited exception permitting disparate treatment "on the basis of [an individual's] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

foreseeable future by the Supreme Court, given its recent rejection of such interests in the higher education admissions context.

Third, Title VII's protections do not just apply to current employees, or only to employees in regular, full-time positions.[14] In addition to employees, Title VII protects job applicants,[15] and applicants for and participants in training programs (including on-the-job training programs),[16] including interns.[17] This is important to note since many race-conscious DEI programs are, or were, implemented at the early-career stage of the employment life cycle, including internships, fellowships, and related "scholarships" for some of these programs. That posture does not exempt those programs from Title VII coverage.

Fourth, the rules against employers acting based on race or sex apply to more than just hiring, firing, and compensation decisions—or other tangible, material, or "ultimate" employment decisions. Recently, in *Muldrow v. City of St. Louis, Missouri, et. al.*, the Supreme Court addressed the scope of employment actions covered by Title VII.[18] In addition to barring discrimination in

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[14] *See* EEOC, Section 2 Threshold Issues, Part 2-III(A), available at https://www.eeoc.gov/laws/guidance/section-2-threshold-issues (EEOC Threshold Issue Guidance).

[15] 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 2000e–3(a).

[16] 42 U.S.C. § 2000e-2(d).

[17] *See, e.g.*, *id.* (protecting applicants to, and participants in, training programs, regardless of whether the individual is an employee); EEOC Threshold Issues Guidance, Part 2-III(A)(1)(c) ("volunteers", including unpaid interns, "may also be covered by the EEO statutes if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity"); EEOC Information Discussion Letter, Federal EEO Laws: When Interns May Be Employees (Dec. 8, 2011), available at https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-231.

[18] *See* 144 S. Ct. 967 (2024) (ruling that Tile VII claims need to show some harm from an employment decision, but do not need to show that the harm was significant).

hiring and termination decisions, the text of Title VII prohibits "otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment."[19] Despite this text, some federal circuit courts historically required a heightened showing for what counted as an actionable "adverse action" sufficient to trigger Title VII coverage—requirements ranging from tangible harm to material harm to an "ultimate employment decision."[20] However, even before *Muldrow*, the position of the EEOC and DOJ was that Title VII barred discrimination in all actions affecting "terms, conditions, or privileges of employment," including actions falling short of hiring, firing, compensation, demotion, or promotion.[21]

In the *Muldrow* decision, a unanimous Supreme Court sided with the EEOC and DOJ's broad position—holding that employees only need to show "some injury" affecting their "terms, conditions, or privileges" of employment.[22] The Supreme Court made clear that Title VII does not limit covered employment actions to actions that are a "materially adverse," or a "material

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[19] 42 U.S.C. § 2000e-2(a)(1).

[20] *Caraballo-Caraballo v. Correctional Admin.*, 892 F. 3d 53, 61 (1st Cir. 2018) ("materially changes" employment conditions in a manner "more disruptive than a mere inconvenience or an alteration of job responsibilities"); *Williams v. R. H. Donnelley, Corp.*, 368 F. 3d 123, 128 (2nd Cir. 2004) ("materially significant disadvantage"); *James v. Booz-Allen & Hamilton, Inc.*, 368 F. 3d 371, 376 (4th Cir. 2004) ("significant detrimental effect"); *O'Neal v. Chicago*, 392 F. 3d 909, 911 (7th Cir. 2004) ("materially adverse"); *Muldrow v. City of St. Louis*, 30 F. 4th 680, 688 (8th Cir. 2022) ("materially significant disadvantage"), rev'd, 144 S. Ct. 967 (2024); *Sanchez v. Denver Public Schools*, 164 F. 3d 527, 532 (10th Cir. 1998) ("significant change"); *Webb-Edwards v. Orange Cty. Sheriff 's Office*, 525 F. 3d 1013, 1033 (11th Cir. 2008) ("serious and material change").

[21] *See* Brief for the US and EEOC as Amici Curiae supporting Petitioner, at 6, *Muldrow*, 144 S. Ct. 967 (2024) (No. 22-193) (summarizing federal government's prior amicus briefs on this issue throughout the circuit courts); *see, e.g.*, EEOC, Compliance Manual § 15-VII(B)(1) (2006) ("Work assignments are part-and-parcel of employees' everyday terms and conditions of employment.").

[22] *See Muldrow*, 144 S. Ct. at 974 (explaining that "terms [or] conditions" should be interpreted broadly).

change," or an "ultimate employment decision," or are "significant."[23] *Muldrow* also made clear that covered employment actions are not limited to "economic or tangible" actions—the Court emphasized that the phrase "terms, conditions, and privileges" of employment "is not used in the narrow contractual sense, it covers more than the economic or tangible."[24] *Muldrow*'s decision clearly overturns prior holdings in the First, Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits on the standard for a covered employment action.[25] Given that the Court explicitly made clear that those decisions are being overruled, I think there is no question that the Supreme Court's ruling in *Muldrow* applies more broadly than just the limited fact pattern in *Muldrow*—which involved a lateral position transfer[26]—and instead clarifies the standard for all employment actions under Title VII.

So, what is the takeaway on what types of employment actions are covered under Title VII, relevant to potential types of DEI programs? Under the broad and low threshold for a covered employment action post-*Muldrow*, Title VII arguably extends to employment actions like restricting employment training programs, leadership development programs, or mentoring or sponsorship programs to only employees of certain races or sexes; or selecting employees for those types of programs in whole, or in part, motivated by their race or sex. Each of those programs is

[23] *Id.* at 974 and 980, n.2.

[24] *See id.* at 974 (cleaned up).

[25] *Id.* at 980, n.2.

[26] *See id.* at 972 (explaining that this case involved a transfer from one position to a less-desirable position).

arguably a "privilege" of employment.[27] Additionally, many of these types of programs likely fall under the stand-alone "training programs" liability provision under Title VII.[28] Likewise, covered employment actions arguably also include selecting applicants for interviews or placing them on a candidate slate, like a diverse slate policy, motivated in whole, or in part, by race or sex.[29] In short, I think it is a major blind spot for employers to not scrutinize DEI programs that fall outside of hiring, firing, and compensation decisions, based on a misimpression that the DEI program in question does not involve an "adverse action" that is covered under Title VII.

Finally, the extremely narrow exception to the rule: Employers can consider race and sex only in very limited circumstances as part of voluntary, *remedial* affirmative action plans under Title VII.[30] A few key points about the guardrails for those, as these programs are often significantly misunderstood. As an initial matter, courts have held the existence of an affirmative

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[27] *See, e.g.*, EEOC Enforcement Guidance on Terms, Conditions, And Privileges of Employment, §613.6(a) ("The opportunity to advance in a job is also a term, condition, or privilege of employment."), available at https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment (last visited July 31, 2024); EEOC Compliance Manual Section 2 Threshold Issues, Section 2(II)(B)(1) (listing training as a term, condition, or privilege of employment), available at https://www.eeoc.gov/laws/guidance/section-2-threshold-issues (last visited July 31, 2024)

[28] *See* 42 U.S.C. § 2000e-2(d).

[29] *See, e.g.*, EEOC Race Discrimination Guidance ("The process of screening or culling recruits presents another opportunity for discrimination. Race obviously cannot be used as a screening criterion.").

[30] *See United Steelworkers, Inc. v. Weber*, 443 U.S. 193, 208 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616, 639–42 (1987); *see also* EEOC, CM-607 Affirmative Action Plans, https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action (last visited June 10, 2024) (detailing the types of affirmative action plans that are valid under Title VII).

action plan is direct evidence of unlawful discrimination unless the plan is valid.[31] So, if a company adopts such a plan, it must get it right, or else essentially admit discrimination.[32] And, importantly, labels are not dispositive. Courts and the EEOC look to functional realities. Courts have treated "diversity" programs as invalid affirmative action plans, where a company focused on achieving a desired racial balance in the workforce and took race-conscious action towards that goal.[33]

It is also important to keep in mind that to justify a voluntary affirmative action plan, a company needs either actual past discrimination, the existence of a *significant* statistical disparity, or a "manifest imbalance" in "traditionally segregated" job categories.[34] Thus, companies must compare the right data source to their company's workforce demographics. A company's numbers typically should be compared against the labor market for that particular company and job position

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[31] *See, e.g.*, *McGarry v. Bd. Of Cnty. Comm'rs of Cnty of Pitkin*, 175, F.3d 1193, 1199 (10th Cir. 1999); *Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1110 (11th Cir. 2001); *Frank v. Xerox Corp.*, 347 F.3d 130, 137 (5th Cir. 2003) ("The existence of an affirmative action plan . . . when combined with evidence that the plan was followed in an employment decision is sufficient to constitute direct evidence of the unlawful discrimination unless the plan is valid."); *Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 693 (8th Cir. 2009); *Rogers v. Haley*, 421 F. Supp. 2d 1361, 1365 (M.D. Ala. 2006); *Bowdish v. Fed. Express Corp.*, 699 F. Supp. 2d 1306, 1317, n.2 (W.D. Okla. 2010); *Murray v. Vill. of Hazel Crest*, 2011 WL 382694, at *4 (N.D. Ill. Jan. 31, 2011).
[32] *See id.*

[33] *See, e.g.*, *Decorte v. Jordan*, 497 F.3d 433, 441 (5th Cir. 2007); *Frank,* 347 F.3d at 137.

[34] *See Weber*, 443 U.S. at 208-09; *Johnson* 480 U.S. at 631-32; and *Ricci v. DeStefano,* 557 U.S. 557 (2009).

in question.[35] Not its customer base. Not its local community. Not the general U.S. population.[36] And even with a valid voluntary affirmative action plan, a company can never use quotas or inflexible goals.[37] It also must be a temporary plan, not for maintaining a "balanced" workforce.[38]

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In short, each of these five key points are well-established and not particularly controversial. While the general public may be confused about what rules apply to DEI, the *law itself* is clear. And there are some serious implications for some very popular types of DEI programs.

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[35] *See Weber*, 443 U.S. at 198 (comparing workforce representation to "respective local labor forces"); *Johnson*, 480 U.S. at 631-32 ("Where a job requires special training, . . . the comparison should be with those in the labor force who possess the relevant qualifications," and "comparison of the percentage of minorities or women in the employer's workforce with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise").

[36] *C.f.*, *Johnson*, 480 U.S. at 632 (indicating that for "jobs that require no special expertise," comparison of workforce to "general population" may be appropriate).

[37] *See, e.g.*, *Johnson*, 480 U.S. at 635 (emphasizing that voluntary affirmative action plan's "goals" were not "quotas that must be met", that "the long-term goals were not to be taken as guides for actual hiring decisions," and that "had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring by governed solely by those figures, its validity fairly could be called into question") (cleaned up).

[38] *See Weber*, 443 U.S. at 208-09; *Johnson*, 480 U.S. at 640 (noting approvingly that employer did "not seek to use its Plan to maintain a permanent racial and sexual balance"); *see also Ricci*, 557 U.S. at 584 ("Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing") (citing 42 U.S.C. §2000e–2(j)).

Additional Remarks During Panel Discussion

Question from Audience: You mentioned the word quota. Are you able to share the EEOC's definition of "quota?" I know there's published guidance on it, but is there anything to be taken from that post-SSFA that is of note?

I think it would be more practical for me to answer in terms of how it may function, because again, labels are not dispositive. You can say that something is a "goal" versus a "quota"—[but] the question is, how is [the number] actually operating? If you have a number that is deeply mismatched with your labor market, and you are bound and determined to achieve it, and you make clear at the corporate level that you will achieve it, and you will incentivize your executives to do so, and you will incentivize them via monetary penalties or bonuses, sometimes to the tune of millions of dollars—that's a quota. Practically, it is a high-risk possibility that that [scenario] is going to be deemed a quota because you are doing everything in your power to make sure someone achieves it. That is my functional definition of a quota, as it applies to what I see in a lot of DEI contexts.

Question from Audience: Understanding that you are constrained by confidentiality, is there anything you can share as it pertains to any new types of claims, charges, or increased activity in any particular area post-SFFA, in terms of EEOC charges?

Not really. The EEOC releases substantive charge breakdowns and [has] taken a rather long time to do that. Finally, [the agency] released our fiscal year 2023 substantive charge breakdowns.[39] That will show you how many [charges] are [on the basis of] race or sex or

[39] S*ee* EEOC, *Tables and Downloads, Table E4e. Title VII Race-Based Charge Receipts and Resolutions by Type of Resolution FY 1997 – FY2023,* EEOC ENFORCEMENT AND LITIGATION

disability, but we never break down [to the public] which races are filing [race discrimination] charges. [I am not certain of the exact numbers,] but you can [] go and see whether or not race claims are up; I think they are somewhat.[40] Certainly, as a general observer of what is happening in the public space, I []am seeing [around] a case every week it seems in this [DEI-related] space. It is obviously a fairly active one.

Question from Moderator: *Should all companies have some DEI programing, some DEI mission or initiative? All companies? And if so, why? I'm a management side lawyer. I get this question from employers post-SFFA: "Look at our stats, Amy. Our workforce is highly diverse already, we don't have any work to do on the DEI front. So, is there a risk in doing absolutely nothing?"*

I think that the terminology [of] "DEI" is deeply fraught, and I don't think you have to have a DEI program. You [should] have an equal opportunity program, and a robust one. *That* is [effectively] required by the law. There is no requirement to do "DEI," but there is absolutely a requirement to [have] robust equal opportunity. Not a tired, dated [EEO policy], [one] that is a check-the-box attempt to remove liability, where you just have an EEO policy that says, "we do not discriminate," and you do nothing. That is not what equal opportunity requires. You do need to remove barriers. I think that many employers, by doing lazy, high-level virtue signaling, paint-by-numbers DEI, have mass discrimination. "Good" numbers, "good" painted at a very high level,

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STATISTICS, available at https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (last visited July 30, 2024).

[40] EEOC data indicates that race-based charge receipts in fact have increased by approximately 7,000 since FY 2022, growing from 20,992 to 27,505. *See* EEOC, *Tables and Downloads Table E4e. Title VII Race-Based Charge Receipts and Resolutions by Type of Resolution FY 1997 – FY2023*, ENFORCEMENT AND LITIGATION STATISTICS, available at https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (last visited July 30, 2024). ().

and done by basically something you can sell to an investor or to an activist [], do not actually allow you to see where you have serious barriers to equal opportunity, or you have active discrimination or harassment.

Justice Thomas, when he was Chair [of the EEOC], wrote about this decades ago.[41] He said affirmative action is actually the lazy solution because it is vastly cheaper for an employer to have a prospective thumb on the scale for hiring, than actually dig through its workforce, and look at its hiring, and look at its positions, and look at what is happening, and remedy the discrimination or harassment that [the company] has [engaged in].[42] It costs a lot of money to pay someone who actually suffered discrimination or harassment. That is more costly, but it is also the right thing to do. It is the morally right thing to do, and it is the legally right thing to do.

I will also push back on the business case. I do not think the business case matters because what if all these studies—which, if we had a longer debate, I would push back on—but let's say they are all wrong.[43] [What if] it actually turns out that a homogenous workforce is vastly better for business? Should we just have an all-white workforce? [No.] All of these arguments that come from the business side of things can be flipped the other direction to [] harm "traditionally

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[41] *See* Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough - Not Tough Enough*, 5 YALE L. & POL'Y REV. 402 (1987).

[42] *Id.* at 406.

[43] *See, e.g.*, Jerimiah Green and John R. M. Hand, *McKinsey's Diversity Matters/ Delivers/Wins Results Revisited*, 21 ECON J. WATCH 1 (March 2024), available at https://econjwatch.org/File+download/1296/GreenHandMar2024.pdf?mimetype=pdf (finding no empirical support for McKinsey's claims that greater racial/ethnic diversity in firms' executives improved business results); *see also* James Mackintosh, *Diversity Was Supposed to Make Us Rich. Not so Much*, WALL ST. J. (June 28, 2024), available at https://www.wsj.com/finance/investing/diversity-was-supposed-to-make-us-rich-not-so-much-39da6a23 (last visited July 30, 2024).

discriminated against" populations, however you want to formulate that [group]. The [right] answer is the law demands equal opportunity, whether it is good or bad for business. The law demands there be no discrimination, whether it is good or bad for business. If you have a discriminator in your workforce, you should fire them, even if they are the best business producer in the world. If you only are looking at top-level [diversity] numbers and [those numbers or efforts] look[] pretty on your company balance sheet or your brochure, you [still may not] actually have . . . complied with the law.[44]

Question from Audience: *I don't think the Supreme Court has rejected race conscious hiring.*[45]

Title VII rejects it. The Supreme Court does not need to reject it, Title VII already rejected it. *Weber* and *Johnson* are narrow, they just are.[46] You are not going to get a drop more [based on trends in Supreme Court precedent]. There is no way, as a practical matter, that the Supreme Court is going to broaden *Weber* and *Johnson*. They are only going to tighten [the exception created by those cases]. Any case attempting to challenge or push [for the expansion of the *Weber/Johnson* exception] is going to lead to [that exception] either being removed or restricted further. You have to decide whether or not you want that [potential outcome]. As I said in my opening, if you have a voluntary affirmative action program, it is direct evidence of discrimination

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[44] *See, e.g.*, Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough - Not Tough Enough*, 5 YALE L. & POL'Y REV. 402, 406-07 (1987) (noting numerical goals can "allow[] an employer to hide continuing discrimination behind good numbers" and providing Supreme Court and Commission case examples of such conduct).

[45] The remainder of the audience member's question is largely indecipherable based on the event audio.

[46] *See Weber*, 443 U.S. 193; *see also, Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

[unless it is valid].[47] So, you need to get it right, and maybe you can in some situations. I think I am much more skeptical than Professor [Yelnosky] [] about how often you can [defend a voluntary affirmative action plan as valid]. Certainly, you need to do it in a competent manner. To [panelist] Craig [Leen]'s point, companies do in fact know, in context, how to do data analysis. What I have heard from many employers' side stakeholders, and [this] is certainly consistent with my experience, is that many employers forgot all of that data analysis that they were doing in the OFCCP [Office of Federal Contract Compliance Programs] space when it came to DEI. So, they set a lot of [diversity representation] goals that had nothing to do with the numbers that they had in very parallel things. That, too, is evidence out there of discrimination, because right now you have a data source that shows significant disparity in the goals that you were setting for yourself in a DEI context versus the goals that you are acknowledging to the federal government and to OFCCP. That is a dangerous place to be in.

Motivation matters tremendously. The direction that you are approaching matters tremendously. If you are remedying discrimination, that is very different than race-conscious action from the other direction in order to create preferences or act prospectively. I do think the motivation and angle which you're approaching things can make the world of difference.

[47] *See, e.g.*, *Frank*, 347 F.3d at 137.