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Democracy Dies in Darkness

BUSINESS

DEI programs toppled amid a surge of conservative lawsuits

A year after the Supreme Court struck down race-based college admissions, a new legal campaign is forcing public and private institutions to abandon racial preferences.

By Peter Whoriskey and Julian Mark

Right-leaning public interest groups have filed a barrage of federal lawsuits intended to dismantle long-standing corporate and government programs that consider race in awarding jobs and other perks, and their litigation already is eroding the use of affirmative action in an array of American institutions.

One year after the Supreme Court struck down race-based admissions at Harvard and other schools, court rulings have forced the removal of racial preferences from two major covid relief programs, a federal contracting program that doles out $20 billion a year, and even the U.S. Minority Business Development Agency, a 55-year-old agency that was ordered in March to open its doors to all races. Meanwhile, private companies are acting preemptively, seeking to avoid litigation by terminating fellowships and executive bonus programs aimed at employing minorities.

“The goal is complete race neutrality. That is the end goal of all this litigation,” said Daniel Lennington, a lawyer for the Wisconsin Institute for Law & Liberty (WILL). “It’s a view of radical equality that we think is in line with the Declaration of Independence.”

Encouraged by the Supreme Court’s conservative majority, WILL and other groups have filed more than 100 lawsuits since 2021 challenging racial preferences and other efforts to address demographic disparities in business, government and education, according to a Washington Post tally based on news articles, law firm newsletters and interviews.

More lawsuits are in the pipeline. Through social media, the conservative legal groups are urging anyone with a gripe about racial preferences to give them a call.

“Wherever you live, if you’ve been treated differently because of your race, contact us!” Lennington posted on X.

Another group, Color Us United, runs a “DEI Tip Line” from its website.

And at America First Legal, former Trump adviser Stephen Miller warns in a promotional video that corporate policies “punish Americans for being White, Asian or male” and advertises a toll-free phone number to call for free legal services.

“If you or a loved one were denied a job, raise, promotion or professional opportunity as a result of diversity quotas, equity mandates, affirmative action or other racial preferences, we want to hear from you,” Miller says, fingers pointed at the camera. “Please! Call us.”

While cases of “reverse discrimination” have been brought in U.S. courts for years, the conservative campaign has been invigorated by the Supreme Court’s ruling last June that race-based college admissions decisions at Harvard and the University of North Carolina violated the Constitution’s guarantee of equal protection under the law.

Recent victories in court — along with a rising volume of complaints filed in districts with conservative judges — suggest this wave of litigation could substantially alter how American institutions handle issues of race. Even advocates of diversity programs acknowledge that some long-standing practices are endangered.

Any organization that provides a palpable benefit to a person based on race, national origin or sex now runs a potential legal risk, said Kenji Yoshino, a professor at New York University and the director of the Meltzer Center for Diversity, Inclusion and Belonging. Under the current direction of the Supreme Court, Yoshino said, it will be “virtually always illegal” for a government or private entity to use racial classifications for hiring, promotion or other benefits.

Other, more limited programs to promote diversity — such as anti-bias training and efforts to ensure fairness in hiring — will remain, he said, adding: “The Supreme Court is never going to complain about attempts to remove bias.”

‘A chilling effect’

So far, the conservative groups have won their most significant victories against the federal government.

In addition to rulings against the Minority Business Development Agency and the covid relief programs, a federal judge last year ordered changes in a U.S. Small Business Administration program that offered preferences in contracting to "socially disadvantaged" individuals. After a White woman sued, the court said the agency could no longer automatically presume racial minorities fit that definition, and the agency began requiring all applicants to document their disadvantage.

"The cases are going pretty quickly and decisively against the government programs," said Jason Schwartz, an attorney at Gibson Dunn, which has set up a "DEI Resource Center" and is handling a high-profile case against the Fearless Fund, a venture capital firm that offers grants to Black female entrepreneurs.

Especially since the Harvard decision, Schwartz said, "those [government] cases are harder to defend."

Private companies, by contrast, have more legal leeway to implement diversity programs, attorneys said, and those cases have advanced more slowly. But a recent decision by the U.S. Court of Appeals for the 11th Circuit in the Fearless Fund case may be a harbinger of the challenges ahead for private-sector diversity programs.

This month, the appeals panel blocked the firm from awarding its latest round of grants. The case — filed in August by a group led by Edward Blum, the same activist responsible for the Harvard litigation — could have broad implications for other race-conscious initiatives in the private sector.

"This is the life and blood of the civil rights movement," said the Rev. Al Sharpton, a civil rights advocate following the case. If the Fearless Fund loses, "we are the generation that lost what preceding generations provided for us."

The Harvard decision has so transformed the legal landscape that some companies are abandoning diversity programs as a defensive measure even before any litigation is filed.

Lauren Hartz, an attorney at Jenner & Block who advises companies with diversity, equity and inclusion programs, said the litigation has had "a chilling effect."

"One lesson from the [court] decisions so far is that some of the qualities that can make DEI programs meaningful and effective — like specific targets, accountability in leadership, and significant benefits reserved for the groups most in need — are the same qualities that can make DEI programs more susceptible to legal challenge," Hartz said. "Most companies would rather not be in the position of defending against the next major lawsuit."

A covid backlash

Polls show that Americans have nuanced views about efforts to promote diversity.

While significant majorities have favored limited DEI programs such as anti-bias training, internships and special recruitment efforts for underrepresented groups, according to a 2024 survey by The Post and Ipsos, many Americans appear to oppose explicit racial preferences in decisions about employment, promotions and college admissions.

Before the Supreme Court's Harvard ruling, nearly 2 in 3 people surveyed in a 2022 Washington Post-Schar School poll said they would support banning the use of race and ethnicity in college admissions. Similarly, a 2019 poll by Pew Research found that a majority of adults — whether White, Black or Hispanic — said companies should consider only a person's qualifications in hiring and promotion decisions, even if it results in a less-diverse workforce. However, poll results can shift significantly depending on the questions posed.

Amid this public ambiguity, the economic hardships of the coronavirus pandemic and the police killing of George Floyd in May 2020 inspired a fresh focus on the need for "racial equity," leading to a raft of new public and private diversity programs.

On his first day in office in January 2021, President Biden signed an order declaring that "affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our government." Less than two months later, Biden signed the American Rescue Plan Act, a massive covid relief effort that included at least two programs offering aid dependent on the applicant's race.

One program sought to forgive federal loans issued to farmers who were racial minorities. The other program, worth $28.6 billion, provided restaurateurs with as much as $10 million to recover their pandemic losses, giving priority to restaurants owned by women, veterans, and "socially and economically disadvantaged" individuals.

But a backlash soon followed. Together, the two covid programs provoked 14 lawsuits — the beginning of the current wave.

Surging donations

Most of the cases tallied by The Post were funded by a dozen conservative legal groups, many of them regional nonprofits with relatively small budgets. The Milwaukee-based WILL, for example, reported just $3.6 million in revenue in 2023, the most recent year for which information is available.

America First Legal, which has cultivated a national profile, burst onto the scene in 2021 with a successful challenge to the Biden administration's debt relief program for minority farmers. But other groups have been around for years, including the Pacific Legal Foundation in Sacramento, the Foundation for Individual Rights and Expression in Philadelphia and the National Center for Public Policy Research in Washington.

Those groups have seen a steady uptick in contributions from donors eager to test the waters since President Donald Trump's appointment of three conservative Supreme Court justices. Between 2017 and 2022, funding to 10 of the most active groups nearly quadrupled, from just over $35 million to more than $135 million, according to a Post tally based on their most recent tax disclosures.

These groups generally are not required to disclose the source of their donations. But some of the largest appear to be donor-advised funds such as Donors Trust and the Bradley Impact Fund, tax-exempt organizations that grant money at the recommendation of donors who receive tax breaks for their contributions. As tax-exempt organizations, donor-advised funds also are generally not obligated to disclose their donors.

Lawson Bader, president and CEO of Donors Trust, an Alexandria, Va., nonprofit that held nearly $1.4 billion in assets as of 2022, acknowledged a growing interest in funding these legal groups.

"There has been an increase in the creation of public interest litigation firms at the state level, and conservatives have been engaged in this space for some time," Bader said in an email. "I think the general attitude is 'more' might be accomplished via legal challenges than can be obtained through White House and/or Congressional actions (and that affects both parties)."

Cannabis stores and corporate boards

The flow of cash has helped finance legal operations that have locked onto an astonishing array of targets. In the past three years alone, lawsuits have been filed to:

- Undo racial preferences in awarding licenses for cannabis dispensaries in New York state.
- Pursue employee complaints about diversity training sessions at a major cancer center in Washington state, public schools in Springfield, Mo., and Honeywell, an international conglomerate.
- Abolish racial quotas for boards governing podiatric medical examiners in Tennessee, real estate appraisers in Alabama, a state bar association in New Jersey, and even companies listed on the Nasdaq stock exchange.
- Eliminate racial preferences in fellowships intended for minorities at Pfizer, one of the world's largest pharmaceutical companies; similar fellowships at three nationally prominent law firms; and a nationwide physician partnership that offers incentives to Black physicians.

Many of the cases have yet to be decided, but lawyers are closely watching a handful with potentially significant implications.

A federal judge in Kentucky is expected to rule soon on whether to temporarily enjoin the U.S. Transportation Department from awarding contracts based on race under its Disadvantaged Business Enterprise Program, which received at least $37 billion under Biden's Infrastructure Investment and Jobs Act. The case was filed by WILL on behalf of two contracting businesses that say they were excluded from the program.

And in May, the right-leaning U.S. Court of Appeals for the 5th Circuit heard oral arguments in a case challenging a rule imposed by Nasdaq, which lists more than 3,000 companies, including Nvidia, Microsoft and Apple. Nasdaq requires companies to include at least one "diverse" director on their boards or explain in their filings to the U.S. Securities and Exchange Commission why they do not. Under the rule, "diverse" means someone who identifies as female, an underrepresented minority or LGBTQ+.

The National Center for Public Policy Research and Blum's Alliance for Fair Board Recruitment challenged the rule in 2021, arguing that it amounts to a "quota" that the Securities and Exchange Commission was not authorized to approve. Nasdaq has defended the rule as a requirement for disclosure, not a mandate. The 5th Circuit is expected to issue a decision in the coming months.

Scott Shepard, general counsel for the National Center, said he's confident his group will prevail, not just in the 5th Circuit and not just before the Supreme Court, if the case makes it that far. To Shepard, the Nasdaq case is a small part of a much larger movement that already is reshaping society.

"It's gratifying [to see] Americans saying, 'No, the American ideal — the American experiment — is based on treating individuals as individuals and allowing each of them to rise to the level of their effort and their success and their merit and their possibilities.'

"From our point of view," Shepard said, "it's glorious."

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