

# Client Alert: Senator J.D. Vance Calls for FTC and DOJ to Investigate Admissions Practices of Universities in the Wake of SFFA

## Publications

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On August 10, 2023, Sen. J.D. Vance, R-Ohio, called for the Federal Trade Commission and the U.S. Department of Justice to investigate top universities for allegedly coordinating their admissions policies following the U.S. Supreme Court's decision banning affirmative action.<sup>[1]</sup>

On June 29, 2023, the Supreme Court decided *Students for Fair Admissions (SFFA) v. President & Fellows of Harvard College* and *SFFA v. University of North Carolina*.<sup>[2]</sup> The Court's 6-3 decision held that race-conscious admissions programs at Harvard and UNC violate the federal Equal Protection Clause, and in so holding, effectively proscribed nearly all race-conscious college admissions programs as they currently stand.<sup>[3]</sup> The Court, applying strict scrutiny, rejected the universities' professed diversity goals as too immeasurable and, in any event, held that the admissions programs were not narrowly tailored to meet a permissible interest.<sup>[4]</sup> The majority opinion concluded with a warning: "universities may not simply establish through application essays or other means the regime we hold unlawful today."<sup>[5]</sup> The Court echoed the long-established principle that "what cannot be done directly cannot be done indirectly."<sup>[6]</sup>

In his letters to the FTC and DOJ<sup>[7]</sup>, Sen. Vance explained that he had sent inquiries to ten top universities, many within the Ivy League, regarding their commitment to revise their race-based policies in light of the Supreme Court's ruling in *SFFA*. He characterized the responses he received from nine of the ten institutions as "generalized and dismissive" and stated they featured "uncanny similarit[ies], both in substance and structure."<sup>[8]</sup> Based upon these responses, Sen. Vance concluded these universities have exhibited collusive behavior by coordinating their admissions policies and thus, the institutions should be subject to FTC and DOJ investigation.

## Key Takeaways:

Senator Vance's suspicion of anticompetitive collusion under Section 1 of the Sherman Act or Section 5 of the FTC Act appears misguided. As a general matter, anticompetitive collusion typically

requires proof of: (1) an agreement — express or implied — between two or more independent entities and (2) a likely anticompetitive impact on consumers in a relevant market. Here, Senator Vance’s observations do not provide a reasonable basis to believe either, let alone both, of these elements could be satisfied.

*First*, the fact that the universities responded in a generally consistent manner is not sufficient to establish an agreement among the universities. In his letter, Sen. Vance relies on the universities’ common assurances that they would comply with the *SFFA* decision and referrals to their university website for further information, among other things, as evidence of collusion. However, it is well-established that parallel conduct alone is insufficient to prove collusion.<sup>[9]</sup> That is because the parallel conduct could represent each organization’s independent, rational decision-making and does not necessarily denote coordination. That could be the case here where the universities’ responses are exactly consistent with how a reasonable organization, protecting its self-interest, would unilaterally respond to a discretionary request.

*Second*, to the extent that the universities were coordinated in their activities (again something for which there is no indication at all), critics would be hard-pressed to identify any harmful anticompetitive effect of such coordination. In order to demonstrate collusion, there must be a showing that the alleged unlawful act has a substantial anticompetitive effect that harms consumers in the relevant market.<sup>[10]</sup> It is not clear what harm enrolled and prospective students would suffer if the universities were to collaborate on best practices for achieving student-body diversity in a manner compliant with the new legal standards announced in *SFFA*.

Notwithstanding the foregoing, the FTC might nevertheless take steps in response to Sen. Vance’s letter. Under Chairwoman Lina Khan’s leadership, the FTC has taken a more aggressive stance towards consumer protection and antitrust enforcement.<sup>[11]</sup> Last November, the agency released a policy statement analyzing its authority under Section 5 of the FTC Act to investigate and prosecute unfair methods of competition.<sup>[12]</sup> The policy statement envisions an FTC with significantly broader enforcement authority, proclaiming that the FTC’s mandate “reaches more broadly than the antitrust laws.”<sup>[13]</sup> Since then, the FTC has taken big swings against noteworthy players—pharmacy benefit managers for potentially illegal rebate schemes,<sup>[14]</sup> OpenAI for possible data privacy issues relating to ChatGPT,<sup>[15]</sup> and, most recently, Amazon for alleged antitrust violations.<sup>[16]</sup> Khan and her staff have also come under increasing the scrutiny of congressional Republicans, who have accused her of over-politicizing the nation’s chief consumer protection agency.<sup>[17]</sup> It is possible that Khan may pay at least nominal consideration to Sen. Vance’s accusations to appear even-handed and principally consistent. Higher education institutions should be prepared for potential FTC scrutiny, although for the reasons briefly discussed above, they should be well-placed to push back forcefully against any investigation based on Sen. Vance’s observations.

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## Footnotes

[1] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

[2] *Id.*

[3] *Id.* at 2175.

[4] *Id.* at 2166–68.

[5] *Id.* at 2176.

[6] *Id.* (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) (unaltered quotation taken from original)).

[7] J.D. Vance, Letter to Hon. Lina M. Khan (Aug. 10, 2023) <https://www.vance.senate.gov/wp-content/uploads/2023/08/Sen.-Vance-Letter-To-FTC-8.10.23.pdf>.

[8] *Id.*

[9] *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (“The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”).

[10] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

[11] *FTC Chair Khan Accused of ‘Abuse of Power’ in New US House Probe*, Reuters (June 2, 2023), <https://www.reuters.com/world/us/ftc-chair-khan-accused-abuse-power-new-us-house-probe-2023-06-01/> [hereinafter *FTC Chair Khan*].

[12] Fed. Trade Comm’n, Comm’n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (2022).

[13] *Id.* at 2.

[14] Fred Ashton, *FTC and Congress Put PBMs on Notice*, Am. Action F. (Apr. 17, 2023), <https://www.americanactionforum.org/insight/ftc-and-congress-put-pbms-on-notice>.

[15] Cecilia Kang & Cade Metz, *FTC Opens Investigation Into ChatGPT Maker Over Technology’s Potential Harms*, N.Y. Times (July 13, 2023), <https://www.nytimes.com/2023/07/13/technology/chatgpt-investigation-ftc-openai.html>.

[16] David Shepardson & Diane Bartz, *Amazon.com Set to Meet with US FTC Ahead of Potential Antitrust Lawsuit*, Reuters (Aug. 7, 2023), <https://www.reuters.com/legal/amazoncom-set-meet-with-ftc-ahead-potential-antitrust-lawsuit-source-2023-08-07>.

[17] Mary Clare Jalonick & Matt O'Brien, *House Republicans Interrogate FTC's Khan Over Regulation of Big Tech*, Assoc. Press (July 12, 2023), <https://apnews.com/article/republicans-ftc-khan-technology-companies-41610756160e10732f7ded6c587cec0e>; see *FTC Chair Khan*, *supra* note 11.

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