

United States Senate
Washington, DC 20510

February 7, 2024

The Honorable Diane S. Sykes
Chief Judge
United States Court of Appeals for the Seventh Circuit
Everett McKinley Dirksen United States Courthouse
219 S. Dearborn Street, Room 2722
Chicago, IL 60604

Dear Chief Judge Sykes:

We write to express deep concern regarding the recent discovery of a policy issued by at least three active judges on the U.S. District Court for the Southern District of Illinois, which jeopardizes the integrity of our legal system.

In January 2020, Chief Judge Nancy J. Rosenstengel, along with Judge Staci M. Yandle, and later in October 2020, Judge David W. Dugan, issued nearly identical standing orders implementing a new policy regarding oral arguments in an effort to “encourage[] the participation of newer, female, and minority attorneys in proceedings” in reaction to concerns about “increasing opportunities for courtroom advocacy.”¹

While the standing orders contain minor variations, each establishes a policy under which oral argument requests are granted based on an attorney’s race or sex rather than the substantive merits of the case or the importance of oral argument in clarifying the issue before the court.²

This policy is both unethical and unconstitutional. That is especially true in light of the Supreme Court’s decision in *Students for Fair Admissions v. Harvard*, which instructs that “[r]acial discrimination [is] invidious in all contexts” and that “eliminating racial discrimination means eliminating all of it.”³ Under these standing orders, however, a party that wishes to have the attorney of their choice argue a

¹ Chief Judge Nancy J. Rosenstengel, *Standing Order*, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, (Jan. 17, 2020),

<https://www.ilsd.uscourts.gov/forms/StandingOrderReCourtroomAdvocacyOpportunities.pdf>

² *Id.*

³ 600 U.S. 181 (2023).

motion risks being deprived of oral argument if that attorney is an experienced white male, but is assured of oral argument “if it is at all practicable to do so” if that attorney is female or a racial or ethnic minority.⁴

As articulated by America First Legal Foundation in their January 25, 2024, judicial conduct complaint filing in your Court, “these policies discriminate on their face.”⁵ Moreover, and as outlined in this complaint, these policies suggest ongoing judicial race and sex discrimination, in violation of the Rule for Judicial-Conduct and Judicial-Disability Proceedings 4(a), Judicial Code of Conduct Canon 2(A), and the Fifth Amendment.

Accordingly, we seek your assistance in resolving the following questions:

1. How many oral arguments have been granted since these standing orders issued based on an attorney’s race, sex, or experience rather than the merits of the case?
2. Chief Judge Rosenstengel’s standing order also reads “The Court also recognizes that there may be many circumstances in which it is not appropriate for a newer, female, or minority attorney to argue a motion.” In what circumstances would it be even theoretically inappropriate for a female or minority attorney to argue a motion?
3. What process is in place in the Seventh Circuit to evaluate facially discriminatory standing orders?
4. What specific measures has your Court implemented to promote an environment where individuals (that is, parties and lawyers) feel empowered to raise concerns about potentially discriminatory practices without fear of retribution?
5. Please provide details of any training or educational initiatives that the Seventh Circuit or Administrative Office of the U.S. Courts has undertaken after the Supreme Court issued its opinion in *Students for Fair Admissions v. Harvard*.

⁴ C.J. Rosenstengel Standing Order, *Supra* note 1.

⁵ Press Release, *America First Legal Files Judicial Conduct Complaint Against 3 Federal Judges for Unlawful Race and Sex Discrimination*, AMERICA FIRST LEGAL (Jan 25, 2024), <https://media.aflegal.org/wp-content/uploads/2024/01/25214730/Merged-Complaint-01252024.pdf>

Depriving parties of their right to oral argument based on the sex or race of the attorney undermines the principles of impartiality, fairness, due process, and the equal protection under the law upon which our judicial system is built. It is unfortunate that the federal taxpayer has, in part, supported such discriminatory conduct.

We greatly appreciate your attention to these concerns.

Sincerely,



Ted Cruz
Ranking Member, Subcommittee on the Constitution
U.S. Senate Committee on the Judiciary



John Kennedy
Ranking Member, Subcommittee on Federal Courts, Oversight, Agency Action,
and Federal Rights
U.S. Senate Committee on the Judiciary

Enclosures