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DEI Task Force Update (November 2, 2023)

Diversity | November 2, 2023

Since the Supreme Court struck down race-based college admissions in SFFA v. Harvard last June, plaintiffs' counsel and anti–affirmative action activists have turned their attention to corporate diversity programs. Although, as a technical matter, SFFA did not change existing law applicable to employer DEI programs, the increased scrutiny on affirmative action programs in the workplace in the wake of SFFA has heightened the risk that employers with robust DEI initiatives may face litigation from employees, potential contracting partners, advocacy groups, and government agencies. We have been closely tracking developments in this area and have prepared this analysis to help our clients navigate the increasingly thorny environment of DEI post-SFFA. We plan to circulate similar updates bi-monthly moving forward, although we anticipate this inaugural update will be longer than future updates. We have also formed a Workplace DEI Task Force, bringing to bear the Firm's experience in employment, appellate and Constitutional law, DEI programs, securities and corporate governance, and government contracts to help our clients conduct legally privileged audits of their DEI programs, assess litigation risk, develop creative and practical approaches to accomplish their DEI objectives in a lawful manner, and defend those programs in private litigation and government enforcement actions as needed. Should you have questions about developments in this space or about your own DEI programs, please do not hesitate to reach out to any member of our DEI Task Force or the authors of this Update.

Key Developments:

Since June, several federal and state officials have issued statements regarding the legality of corporate diversity efforts. For example, thirteen Republican Attorneys General wrote letters to Fortune 100 companies, stating their view that many corporate DEI programs are discriminatory, while a group of Democrat Attorneys General separately opined that companies should "double-down on diversity-focused programs." The Colorado Attorney General, who had joined the Democrat letter, recently issued a formal legal opinion, stating his view that DEI programs comply with federal law. On June 29, 2023, EEOC Chair Charlotte Burrows issued an EEOC press release, taking the position that the Court's decision does "not address employer efforts to foster diverse and inclusive workforces," and that "[i]t remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace." On the same day, EEOC Commissioner Andrea Lucas authored a Reuters article, stating her perspective that *SFFA* does not alter federal employment law because race-based decision-making by employers is already presumptively illegal under Title VII. Commissioner Lucas expressed her view that many employers' programs already run afoul of existing law.
Shortly after *SFFA*, the Supreme Court granted certiorari in *Muldrow v. City of St. Louis*, an important case concerning the scope of the "adverse action" requirement under Title VII. The question presented in *Muldrow* is whether a lateral job transfer without an accompanying change in pay or benefits constitutes an adverse action sufficient to give rise to liability under Title VII. *Muldrow* could have substantial implications for employers' diversity programs to the extent that the Court in *Muldrow* expands the definition of what can give rise to a claim under Title VII, as many corporate DEI programs do not implicate concrete employment decisions such as hiring, firing, or promotion but arguably impact other aspects of employment. Judge Ho on the Fifth Circuit seemingly embraced this more expansive position in a concurrence in *Hamilton v. Dallas County*, in which he suggested

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Title VII protects “anyone harmed by divisive workplace policies that allocate professional opportunities to employees based on their sex or skin color, under the guise of furthering diversity, equity, and inclusion.” Gibson Dunn recently filed an amicus brief in *Muldrow* on behalf of the Chamber of Commerce, National Federation of Independent Business Small Business Legal Center, Restaurant Law Center, and National Retail Federation, arguing that Title VII does not apply as a categorical matter to all allegedly discriminatory transfer decisions. The case will be argued on December 6, 2023. In addition, plaintiffs have filed several new reverse-discrimination lawsuits under Section 1981 and Title VII. Those new lawsuits include challenges to specific, individual employment decisions as well as challenges to companies’ efforts to increase the diversity of their suppliers and other contracting partners. These cases are listed in the “Current Litigation” section below.

Data and Trends:

The majority of cases we have identified that were filed after the *SFFA* decision have involved claims under Section 1981 (which prohibits race discrimination in contracting relationships, including employment and procurement, among other things). Only two cases have involved claims under Title VII for employment discrimination, while a handful of others have asserted claims under state law, the Securities Exchange Act, the Fifth or Fourteenth Amendments, and Titles VI and IX. Because Title VII complainants must first file a charge with the Equal Employment Opportunity Commission (“EEOC”) before proceeding to federal court, we may see an increase in Title VII reverse discrimination litigation in the next several years as plaintiffs first make their way through the administrative process. Most cases post-*SFFA* have been filed against private companies, although three cases have been filed against universities. Advocacy groups also have taken a specific focus on law firms, filing three lawsuits against large law firms and sending many other threatening letters to law firms with DEI initiatives. One advocacy group has increasingly urged the EEOC to take action against employers for their DEI programs. America First Legal (“AFL”) has filed over fifteen letters with the EEOC since June 2022, and the stream has intensified since *SFFA*. These letters allege that companies are implementing discriminatory DEI policies in violation of Title VII, and request that one or more EEOC Commissioners file a Commissioner’s Charge. Commissioner’s Charges allow a Commissioner to initiate EEOC investigations equivalent to those initiated by an individual employee’s charge of discrimination—although an actual enforcement action requires a majority commission vote. While AFL’s letters differ somewhat in substance, they are broadly similar and allege that elements of companies’ DEI programs (including hiring, training, mentorship, partnerships, and public statements committing to diversity) constitute unlawful employment practices in violation of Title VII. A list of companies whose policies AFL has challenged include: Major League Baseball, Salesforce, Activision/Blizzard, The Kellogg Company, Nordstrom, Inc., Alaska Air, Unilever, Mars, Anheuser-Busch, McDonald’s Corporation, The Hershey Company, Starbucks, Lyft, DICK’S Sporting Goods, Yum! Brands and Morgan Stanley. While in previous years the number of Commissioner’s Charges filed were low, last year they increased dramatically, jumping from three in 2020 and 2021 to 29 filed in 2022. Commissioner Andrea Lucas, who is on record viewing DEI programs as unlawful, filed twelve Commissioner’s Charges last year, more than any other Commissioner. The nature of those charges is not public, so it is not clear that they relate to DEI programs. The past two years have also seen increased anti-DEI advocacy and litigation threats by shareholders. Plaintiffs and advocacy groups have filed shareholder derivative actions claiming that employer DEI programs constitute a breach of corporate fiduciary duties. Additionally, advocacy groups like the American Civil Rights Project (“ACRP”) have sent threat letters to corporations and their boards, claiming that the legal risk associated with DEI programs threatens stockholders’ value. ACRP has publicly announced that it sent these letters to the boards of Lowe’s, Coca-Cola, Novartis AG, Pfizer, American Airlines, McDonald’s, Levi Strauss & Co., and more. As the list below shows, shareholder lawsuits have generally been unsuccessful thus far.

Current Litigation:

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Below is a list of relevant cases, along with recent letters threatening litigation.

1. Contracting claims under Section 1981, the U.S. Constitution, and other statutes:

- ***Am. Alliance for Equal Rights v. Winston & Strawn LLP***, No. 4:23-cv-04113 (S.D. Tex. 2023): On October 30, 2023, advocacy group American Alliance for Equal Rights ("AAER") sued law firm Winston & Strawn, challenging its 1L diversity fellowship program as racially discriminatory in violation of Section 1981. The firm had previously announced that it would continue the program in response to a threat letter from AAER.
- ***Am. Alliance for Equal Rights v. Perkins Coie LLP***, No. 3:23-cv-01877-L (N.D. Tex. 2023) and ***Am. Alliance for Equal Rights v. Morrison & Foerster LLP***, No. 1:23-cv-23189 (S.D. Fl. 2023): On August 22, 2023, AAER sued two law firms, challenging their 1L diversity fellowship programs as racially discriminatory in violation of Section 1981. Morrison & Foerster is represented by Gibson Dunn.
    - **Latest updates:** On October 6 (Morrison & Foerster) and October 11 (Perkins Coie), AAER voluntarily dismissed the suits based on the firms' changes to their programs' eligibility criteria; both firms' diversity fellowships will be race-neutral moving forward.
- ***Am. Alliance for Equal Rights v. Fearless Fund Mgmt.***, No. 1:23-cv-03424-TWT (N.D. Ga. 2023): On August 2, 2023, AAER sued a Black women-owned venture-capital fund that has a charitable grant program that provides $20,000 grants to Black female entrepreneurs; AAER alleged that the program violates Section 1981 and sought a preliminary injunction. Fearless Fund is represented by Gibson Dunn.
    - **Latest update:** The district court denied the plaintiff's motion for a preliminary injunction, but on September 30, 2023, the Eleventh Circuit temporarily enjoined the program pending appeal. The motions panel, over a strong dissent, rejected the fund's argument that the grant program was protected by the First Amendment, reasoning that the First Amendment does not protect the right to "exclude persons from a contractual regime based on their race" unless the contracts are for the provision of "expressive services" or "pure speech." AAER's merits brief in the Eleventh Circuit is due to be filed on November 6, 2023.
- ***Landscape Consultants of Texas, Inc, v. City of Houston***, No. 4:23-cv-3516 (S.D. Tex. 2023): On September 19, 2023, plaintiff landscaping companies owned by white individuals filed an injunction against Houston's government contracting set-aside program for "minority business enterprises" that are owned by members of racial and ethnic minority groups. The companies claim the program violates the Fourteenth Amendment and Section 1981.
    - **Latest update:** The defendants' deadline to file an answer or motion is November 13, 2023.
- ***Correll v. Amazon.com, Inc.***, No. 3:21-cv-1833 (S.D. Cal. 2022): On October 28, 2021, a white male businessman sued Amazon, alleging that by having a feature within its website that allows consumers to identify products sold by non-white, non-male sellers, the company violated Section 1981 and separately California Civil Code §§ 51 and 51.5, which prohibit racial discrimination by businesses.
    - **Latest update:** On September 19, 2023, the court granted Amazon's motion to dismiss as to the Section 1981 allegations for failure to state a claim, but denied the motion as to the California Civil Code allegations and authorized limited discovery until November 22 as to the plaintiff's standing for those claims. The court will hear oral argument on a motion for summary judgment on December 21.
- ***Meyersburg v. Morgan Stanley & Co. LLC***, No. 1:23-cv-07638 (S.D.N.Y. 2023): On August 29, 2023, a white male former executive director at Morgan Stanley

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sued his former employer, alleging he was fired and replaced with a Black woman with less experience, in violation of Section 1981 and the New York State Human Rights Law. Plaintiff cited Morgan Stanley's DEI programs as evidence of discrimination.

  - **Latest update:** On October 12, 2023, the parties jointly stipulated that the action would be arbitrated pursuant to a signed arbitration agreement, and the court stayed the action on October 23 pending the outcome of arbitration.

- ***Bradley, et al. v. Gannett Co. Inc.***, 1:23-cv-01100 (E.D.V.A. 2023): On August 18, 2023, white plaintiffs sued Gannett over its alleged "Reverse Race Discrimination Policy," in response to Gannett's expressed commitment to having its staff demographics reflect the communities it covers, alleging violations of Section 1981.

  - **Latest update:** Gannett has not yet filed a response.

- ***Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co.***, No. 23-cv-1597 (N.D. Ohio. 2023): On August 16, 2023, plaintiffs represented by advocacy group America First Legal (AFL) sued Progressive Insurance, alleging that a grant program that awarded funding specifically to Black entrepreneurs to support their small businesses violated Section 1981.

  - **Latest update:** Defendants' initial motion to dismiss is due December 13, 2023.

- ***Ultima Servs. Corp. v. USDA***, No. 2:20-CV00041 (E.D. Tenn.): In March 2020, a company (owned by a white woman) that competes for USDA contracts sued to challenge a Small Business Administration (SBA) program giving preference in federal contracting to small businesses owned by racial minorities; the program at issue presumed that small businesses owned by racial minorities were entitled to participate in a program that sets aside contracts for "socially disadvantaged individuals."

  - **Latest update:** On July 19, 2023, the District Court held that the program was unconstitutional, in violation of Fifth Amendment equal protection, and enjoined the government from applying a race-based rebuttable presumption of social disadvantage in administering the SBA's contracting program.

- ***Alexandre v. Amazon.com, Inc.***, No. 3:22-cv-1459 (S.D. Cal. 2022): On September 29, 2022, White, Asian, and Native Hawaiian entrepreneur plaintiffs, on behalf of a putative class of past and future Amazon "delivery service partner" program applicants, challenged a DEI program that provides a $10,000 grant to qualifying delivery service providers who are "Black, Latinx, and Native American entrepreneurs." Plaintiffs alleged violations of California state civil rights laws prohibiting discrimination.

  - **Latest update:** As of October 2023, Amazon's motion to dismiss is still pending with the court.

- ***Crystal Bolduc v. Amazon.com, Inc.***, No. 4:22-cv-615-ALM (E.D. Tex. 2022): On July 20, 2022, AFL filed a putative federal class action lawsuit on behalf of white plaintiff who sought to become an Amazon delivery service provider alleging race discrimination in violation of Section 1981 in Amazon's supplier-diversity initiatives, including a program extending $10,000 grants to Amazon delivery service providers allegedly based in part on race.

  - **Latest update:** Amazon filed a motion to dismiss that was fully briefed as of May 15, 2023, and is still under consideration by the district court.

- ***Do No Harm v. Pfizer***, No. 1:22-cv-07908 (S.D.N.Y. 2022): On September 15, 2022, plaintiff association representing physicians, medical students, and

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policymakers sued Pfizer, alleging that the company's Breakthrough Fellowship Program, which provided minority college seniors summer internships, two years of employment post-graduation, and a scholarship, violated Section 1981, in addition to Title VII and New York laws. The plaintiff-association alleges that the program illegally excludes white and Asian applicants. The association is represented by Consovoy McCarthy PLLC, the firm that also represents AAER in multiple lawsuits.

- **Latest update:** The case was dismissed on standing grounds in December 2022. Plaintiffs appealed and the Second Circuit heard argument in the case on October 3, 2023.

2. Employment discrimination under Title VII and other statutory law:

Retaliation for challenging or expressing concerns about diversity programs:

- ***Farkas v. FirstEnergy Corp.***, No. cv-23-986280 (Ohio Ct. Common Pleas): On September 29, 2023, a white male former corporate counsel at FirstEnergy sued the company under Ohio's antidiscrimination statute, alleging that he was fired in retaliation for expressing concerns about the company's DEI programs.
  - **Latest update:** FirstEnergy's deadline to file an answer or motion is November 28, 2023.
- ***Harker v. Meta Platforms, Inc.***, No. 23-cv-7865 (S.D.N.Y. 2023): On September 5, 2023, a lighting tech who worked on a set where a Meta commercial was produced sued Meta and a film producers' association, alleging that Meta and the association violated Title VII, Sections 1981 and 1985 (conspiracy to interfere with rights) and New York law, through a diversity initiative called Double the Line. The plaintiff claims that after he raised questions about the qualifications of a coworker hired under the program, he was retaliated against by the defendants.
  - **Latest update:** The defendants' deadline to file an answer or motion is November 3, 2023.
- ***Rogers v. Compass Group USA, Inc.***, No. 23-cv-1347 (S.D. Cal. 2023): On July 24, 2023, a former recruiter for Compass Group USA sued the company under Title VII for allegedly terminating her after she refused to administer the company's "Operation Equity" diversity program, in which only women and people of color were entitled to participate. The plaintiff alleged that she was wrongfully terminated after she requested a religious accommodation to avoid managing the program, claiming it conflicted with her religious beliefs.
  - **Latest update:** Compass Group filed its answer and affirmative defenses on to the plaintiff's amended complaint on October 5, 2023, and the deadline for initial disclosures is January 3, 2023.

Hiring, firing, and other adverse actions on account of race:

- ***Diemert v. City of Seattle***, No. 2:22-cv-01640 (W.D. Wash. 2022): On November 16, 2022, the plaintiff, a white male, sued his former employer, the City of Seattle, alleging that the City's diversity initiatives, which allegedly included mandatory diversity trainings involving critical race theory and encouraged participation in "race-based affinity group, caucuses, and employee resource groups," amounted to racial discrimination in violation of Title VII and the Fourteenth Amendment. The plaintiff also alleged a hostile work environment claim.
  - **Latest update:** On August 28, 2023, the court denied the City's motion to dismiss, citing SFFA and the need for the city to demonstrate that the affinity groups and other programs meet strict scrutiny.
- ***Netzel v. American Express Company***, No. 2:22-cv-01423 (D. Ariz. 2022): On August 23, 2022, a group of former American Express employees alleged that the

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company's diversity initiatives discriminated against white workers and that the company retaliated against the same workers after they complained, in violation of Title VII and Section 1981.

  - **Latest update:** On August 3, 2023, the court granted American Express's motion to compel the case to arbitration. An appeal is pending in the Ninth Circuit.

- ***Phillips v. Starbucks Corp.***, No. 19-cv-19432 (D.N.J. 2019): On October 28, 2019, a white former Starbucks regional director sued the company for firing her based on her race, allegedly to protect its image after the coffee chain suffered bad press when two Black men were arrested in a café under the plaintiff's purview. The plaintiff alleged discrimination and retaliation in violation of Title VII, Section 1981, and New Jersey state law.

  - **Latest update:** On June 12, 2023, a New Jersey federal jury awarded $25.6 million in compensatory and punitive damages to the plaintiff. Post-trial motions are currently pending.

- ***Duvall v. Novant Health Inc.***, No. 3:19-CV-00624 (W.D.N.C. 2019): On November 18, 2019, a white male marketing executive sued Novant, alleging that he was fired without cause from his management position because of his race and sex in violation of Title VII and North Carolina state law.

  - **Latest update:** On October 26, 2021, a jury found for the plaintiff, who presented evidence at trial of Novant's DEI programs and similar terminations of other white managers. The jury initially awarded $10 million in punitive damages, but the court later reduced this award to $300,000. Novant appealed and the Fourth Circuit has argument scheduled for December 7, 2023.

- ***DiBenedetto v. AT&T Servs., Inc.***, No. 21-cv-4527 (N.D. Ga. 2021): On November 2, 2021, the plaintiff, a white male former executive, brought claims under Title VII, Section 1981, and the Age Discrimination in Employment Act against AT&T, alleging that he was wrongfully terminated due to his race, gender, and age.

  - **Latest update:** On June 6, 2022, the court denied AT&T's motion to dismiss. The court found that plaintiff's allegations, including that AT&T "implemented a company-wide employment policy that programmatically favored non-white persons and women for hiring and retention," plausibly suggested race or gender played an unlawful role in his termination.

Hostile work environment claims:

- ***Young v. Colorado Dep't of Corrections***, No. 1:22-cv-00145-NYW-KLM (D. Co. 2022): On January 19, 2022, a white male former employee of Colorado's Department of Corrections sued his former employer under Title VII, claiming that Colorado's training materials for its "Equity, Diversity, and Inclusion" programs subjected him to a hostile work environment such that he was ultimately forced to resign.

  - **Latest update:** The District Court granted Colorado's motion to dismiss. The case is pending on appeal to the Tenth Circuit.

3. Challenges to agency rules, laws, and regulatory decisions:

- ***Alliance for Fair Board Recruitment v. SEC***, No. 21-60626 (5th Cir.): Plaintiff advocacy group sought review of the SEC's approval of Nasdaq's Board Diversity Disclosure Rule, which requires Nasdaq-listed companies to annually report aggregated statistical information about the Board's self-identified gender and racial characteristics, and also requires companies to appoint at least two diverse

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directors or explain why they have not done so. Gibson Dunn represents Nasdaq as an intervenor in the case.

  - **Latest update:** On October 18, 2023, the 5th Circuit rejected the plaintiff's challenge to the rule on the grounds that Nasdaq, not the SEC, created the rule, and the SEC's approval and potential future enforcement of the rule was not sufficient state action to bring a constitutional challenge against the SEC. On October 25, the plaintiff petitioned the Fifth Circuit for rehearing en banc.

- ***Nat'l Ctr. for Pub. Policy Research v. SEC***, No. 23-60230 (5th Cir. 2023): The petitioners, Kroger shareholders, had previously sought to require the Kroger Company to include a shareholder proposal that would have required Kroger to issue a report detailing risks associated with omitting "viewpoint" and "ideology" from the list of protected characteristics in its equal opportunity policy. The SEC concluded that Kroger could exclude the proposal from its proxy materials. On April 28, 2023, the petitioners sought judicial review of the SEC's decision in the Fifth Circuit.
  - **Latest update:** The petition for review is currently pending in the Fifth Circuit.
- ***Alliance for Fair Board Recruitment v. Weber***, No. 2:21-cv-1951 (E.D. Cal.): California passed Assembly Bill 979, which requires boards of public companies headquartered in California to include at least one to three members of "underrepresented groups"—individuals who identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaska Native, gay, lesbian, bisexual, or transgender—or face a fine. On July 12, 2021, advocacy group Alliance for Fair Board Recruitment sued for an injunction, arguing the law violates the Equal Protection Clause and Section 1981.
  - **Latest update:** The District Court enjoined the law in May 2023, and appeals from both sides are pending in the Ninth Circuit.

4. Board of Director or Stockholder Actions:

- ***Nat'l Ctr. for Pub. Policy Research v. Schultz***, No. 2:22-cv-00267-SAB (E.D. Wash. 2023): On August 30, 2022, shareholders and a conservative think tank filed a shareholder derivative action against Starbucks and its CEO over the company's hiring goals for minorities, contracts with diverse suppliers and advertisers, and alleged practice of tying executive pay to diversity goals. The shareholders argued that the policies violate Section 1981, Title VII, and numerous state civil rights statutes, and thus the defendants endangered Starbucks and breached their fiduciary duties to shareholders.
  - **Latest update:** On August 11, 2023, the court granted Starbucks' motion to dismiss, reasoning that the public policy questions raised in the complaint are for companies and lawmakers, not courts, to decide. The court firmly stated that "[t]his Complaint has no business being before this Court and resembles nothing more than a political platform. Whether DEI and ESG initiatives are good for addressing long simmering inequalities in American society is up for the political branches to decide . . . it is clear to the Court that Plaintiff did not file this action to enforce the interests of Starbucks, but to advance its own political and public policy agendas."
- ***Craig v. Target Corp. et al.***, No. 23-00599 (M.D. Fl. 2023): On August 8, 2023, America First Legal on behalf of a Target stockholder sued the company and certain of its officers, claiming the Target board falsely represented that it monitored social and political risk, when it allegedly only focused on risks associated with not achieving ESG and DEI goals, thereby allegedly depressing Target's stock price. The suit alleges violations of Sec. 10(b) and 14(a) of the Securities Exchange Act of 1934.

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- **Latest update:** The defendants' deadline to file an answer or motion is November 7, 2023.

- ***Simeone v. Walt Disney Co.***, No. 2022-1120-LWW (Del. Chancery 2022): On December 9, 2022, a plaintiff shareholder sued under 8 Del. C. § 220 claiming that Disney breached its fiduciary duty to shareholders by expressing public opposition to Florida's "Don't Say Gay" bill, despite promises from Governor DeSantis that it would cause Disney economic harm, and filed a demand to inspect Disney's books and records.
    - **Latest update:** Disney won the suit on June 27, 2023, with a ruling that taking a position on the bill was a calculated management decision and that the shareholders were motivated by political ideology, not shareholder concerns.

5. Educational Institutions and Admissions (Fifth Amendment, Fourteenth Amendment, Title VI, Title IX):

- ***Doe v. New York University***, No. 1:23-cv-09187 (S.D.N.Y. 2023): On October 19, 2023, a white male first-year law student at NYU who intends to apply for the NYU Law Review sued the university, alleging the NYU Law Review's use of race and sex or gender preferences in selecting its members constitutes a violation of Title VI and Title IX of the Civil Rights Act.
- ***Students for Fair Admissions v. United States Naval Academy et al.***, No. 1:23-cv-02699-ABA (D. Md. 2023): On October 5, 2023, SFFA sued the U.S. Naval Academy in Annapolis, arguing that affirmative action in its admissions process violates the Fifth Amendment of the U.S. Constitution by taking applicants' race into account.
    - **Latest update:** On October 6, 2023, the plaintiffs moved for a preliminary injunction, and the defendants' response is due December 1.
- ***Students for Fair Admissions v. U.S. Military Academy at West Point***, No. 7:23-cv-08262 (S.D.N.Y. 2023): On September 19, 2023, SFFA sued West Point Academy, arguing that affirmative action in its admissions process, including alleged racial "benchmarks" of "desired percentages" of minority representation, violates the Fifth Amendment of the U.S. Constitution by taking applicants' race into account.
    - **Latest update:** Plaintiffs filed for a preliminary injunction, and the defendants' deadline to respond is November 17, 2023, with oral argument scheduled for December 21.
- ***Coal. For TJ v. Fairfax County School Board***, No. 1:21-cv-00296 (E.D.V.A. 2021): On March 3, 2021, an organization of primarily Asian American parents sued the Fairfax County School Board, claiming that the Board's admissions procedures for the selective Thomas Jefferson High School for Science and Technology unconstitutionally discriminated against Asian Americans in violation of the Equal Protection Clause of the Fourteenth Amendment.
    - **Latest update:** After the trial court granted summary judgment to the plaintiffs, on May 23, 2023, the Fourth Circuit reversed, holding that the admissions policy was constitutional. The plaintiffs filed a petition for certiorari to the Supreme Court in August 2023.

Threat Letters:

Threat letters to law firms regarding their diversity programs: In October, AAER sent litigation threat letters to five law firms: Fox Rothschild (October 16), Susman Godfrey (October 16), Winston & Strawn (October 9), Hunton Andrews Kurth (October 9), and Adams & Reese (October 9). AAER asked if the firms intend to continue with their 1L

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diversity fellowship programs, and threatened to sue them under Section 1981 if they did. On October 12, Adams & Reese responded with a letter, announcing their intention to not proceed with their 1L Minority Fellowship program in 2024. On October 19, Winston & Strawn responded by affirming their intention to continue its 1L diversity fellowship program. On October 30, AAER sued Winston & Strawn, which is described above.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Mylan Denerstein, Blaine Evanson, Molly Senger, Zakiyyah Salim-Williams, Zoë Klein, Matt Gregory, and Teddy Rube*.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following practice leaders and authors:

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