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# Federal Courts Issue Opinions in Two Important DEI Cases

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*These decisions highlight how courts are continuing to grapple with challenges to DEI initiatives.* Last week, the Second Circuit and a district court in Texas issued decisions in cases involving challenges to DEI. In a case challenging a diversity scholarship program, the Second Circuit held that associations seeking to litigate based on injuries to their members must name at least one injured member to establish standing. And in deciding a challenge to a funding program administered by the federal Minority Business Development Agency, a district court in the Northern District of Texas held that the program violates the equal protection guarantee of the Fifth Amendment by presuming that certain racial groups are disadvantaged as part of determining their eligibility for assistance. Together, the decisions highlight how courts are continuing to grapple with challenges to DEI initiatives. **I. In *Do No Harm v. Pfizer*, the Second Circuit held that an association must name an injured member to establish standing.** On March 6, 2024, the United States Court of Appeals for the Second Circuit affirmed the district court's dismissal of Do No Harm's reverse-discrimination case against Pfizer in *Do No Harm v. Pfizer, Inc.*, --- F.4th ---, 2024 WL 949506 (2d Cir. Mar. 6, 2024). The Second Circuit held that an organization must name at least one affected member to establish Article III standing under the "clear language" of Supreme Court precedent. The holding has implications for several other ongoing lawsuits in which plaintiff advocacy groups represented by the same law firm have relied on organizational standing to challenge diversity initiatives on behalf of anonymous members.

**A. Background**

On September 15, 2022, conservative medical advocacy organization Do No Harm filed suit against Pfizer, alleging that Pfizer discriminated against white and Asian students by excluding them from its Breakthrough Fellowship Program. *Do No Harm v. Pfizer, Inc.*, 646 F. Supp. 3d 490 (S.D.N.Y. 2022). The program's stated aim is to create a new generation of leaders from underrepresented groups by providing college seniors with summer internships, two years of employment post-graduation, mentoring, and a two-year scholarship for a full-time master's program. To be eligible, applicants must "[m]eet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans." Do No Harm alleged that the criteria violate (1) Section 1981 of the Civil Rights Act of 1866 because the program is a contract that discriminates on the basis of race, (2) Title VI of the Civil Rights Act of 1964 because Pfizer receives federal funds to operate a racially discriminatory program, (3) the Affordable Care Act, and (4) multiple New York state laws banning racially discriminatory internships, training programs, and employment. Do No Harm brought the suit on behalf of two purported members, anonymous Members A and B. Via anonymous declarations, Do No Harm stated that Member A is white, Member B is Asian-American, and both are Ivy League university juniors otherwise eligible for the scholarship and "able and ready" to apply. Do No Harm requested a temporary restraining order, and preliminary and permanent injunctions against the program's eligibility criteria.

**B. Analysis**

In December 2022, a district court in the Southern District of New York denied Do No Harm's motion for a preliminary injunction and dismissed the case for lack of subject matter jurisdiction. In particular, the court found that Do No Harm did not have Article III

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standing because it did not identify at least one member by name. The association appealed to the Second Circuit, which heard oral argument on October 3, 2023. In its opinion issued on March 6, the Second Circuit explained that the "decisive issues" in the appeal were (1) whether an association that relies on injuries to individual members to establish Article III standing on a preliminary injunction must name at least one injured member; and (2) whether a case should be dismissed or allowed to proceed if the plaintiff fails to establish Article III standing on a motion for preliminary injunction, but alleges facts sufficient to establish standing under the less onerous pleading standard. On standing, the Second Circuit concluded that the district court was correct in its determination that Do No Harm lacked Article III standing because it did not name any member injured by Pfizer's alleged discrimination. Relying on its decision in *Cacchillo v. Insmed, Inc.*, 638 F.3d 401 (2d Cir. 2011), the court noted that the plaintiff's burden to demonstrate standing for a preliminary injunction is "no less than that required on a motion for summary judgment." As a result, the court was "not decid[ing] whether, at the *pleading* stage, Do No Harm was required to name names." Because Do No Harm was subject to a summary judgment burden of proof, it was required to "set forth by affidavit or other evidence specific facts" demonstrating that the association's members suffered an injury in fact—here, by showing that members were ready and able to apply to the challenged program but for its allegedly discriminatory criteria. The court explained that while "a name on its own is insufficient to confer standing," disclosure of members' names "shows that identified members are genuinely ready and able to apply, and are not merely enabling the organization to lodge a hypothetical legal challenge." As a result, the Second Circuit held that "an association must identify by name at least one injured member for purposes of establishing Article III standing under a summary judgment standard," which is the same standard that is applicable on a motion for preliminary injunction. Regarding the dismissal question, Do No Harm argued that even if it failed to establish standing on its motion for preliminary injunction, the fact that it had properly alleged standing under the pleading standard should preclude dismissal. Recognizing that other circuits have decided the issue differently, the Second Circuit upheld the district court's dismissal of the case, explaining that "when a court determines it lacks subject matter jurisdiction, it *cannot* consider the merits of the preliminary injunction motion and should dismiss the action in its entirety." Judge Wesley wrote a concurring opinion, agreeing with the majority that Do No Harm lacked standing and that the proper action was to dismiss the case. But Judge Wesley disagreed about why Do No Harm lacked standing. In his view, Do No Harm lacked standing because it did not show an imminent injury from the program's selection process. Judge Wesley noted that Do No Harm had submitted "virtually identical declarations" from anonymous members that were "vague and conclusory" and did not substantiate "a concrete readiness to apply" to the challenged program. According to Judge Wesley, under a summary judgment standard that was not enough to demonstrate standing. **II. *Nuziard v. Minority Business Development Agency* applies *SFFA* to a federal agency** On March 5, 2024, a federal district court held in *Nuziard v. Minority Business Development Agency*, No. 4:23-cv-00278-P, 2023 WL 3869323 (N.D. Tex.), that the racial presumption used in apportioning federal funds for minority business assistance violates the Fifth Amendment's equal protection guarantee. The decision extends the Supreme Court's reasoning in *SFFA* to federal agencies administering grant programs, holding that "[t]hough *SFFA* concerned college admissions, nothing in the decision indicates that the Court's holding should be constrained to that context."

### A. Background

The Minority Business Development Agency (MBDA) is a federal agency within the Department of Commerce dedicated to assisting "socially or economically disadvantaged individuals." 15 U.S.C. § 9501(9)(A). The MBDA's formative statute defines the term "socially or economically disadvantaged individual" as "an individual who has been subjected to racial or ethnic prejudice or cultural bias . . . because of the identity of the individual as a member of a group, without regard to any individual quality of the individual that is unrelated to that identity." 15 U.S.C. § 9501(15)(A). Under the statute, certain groups of people, like Black or African Americans, Hispanics or Latinos, American Indians or Alaska Natives, Asians, and Native Hawaiians or other Pacific Islanders, are presumed

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to be socially disadvantaged individuals. If individuals from other groups apply for funding through the MBDA, they must produce sufficient evidence to rebut the presumption that they are not disadvantaged in order to be eligible for assistance. Three business owners sued the MBDA, alleging that they were able and ready to apply for MBDA programming, but the agency improperly required them to show why they were, in fact, socially or economically disadvantaged when it did not require this showing for other ethnic groups. The business owners claimed that this practice is unconstitutional.

**B. Analysis**

In a 93-page opinion, a district court in the Northern District of Texas held that the MBDA's presumption that certain ethnicities are "socially or economically disadvantaged" violates the Fifth Amendment's equal protection component. Addressing the issue of standing first, the court held that two of the three plaintiffs had standing because they met the race-neutral criteria for the programs and took concrete steps to apply. While these two plaintiffs never actually applied for the program, the court found that they were harmed nevertheless because of the MBDA's "imposition of additional obstacles [in the application process] because of their race." The court reasoned that "it's not that they were denied benefits they would otherwise certainly get, but that they didn't have a shot because of their skin color." The court held that the third plaintiff lacked standing because it was not clear that he manifested the requisite intent to apply for the funding. The court then turned to the Agency's argument that its presumption of social or economic disadvantage satisfies strict scrutiny because it remedies the effects of discrimination in access to credit and in private contracting markets. Regarding MBDA's arguments about discrimination in access to credit, the court agreed that the "disenfranchisement" of minority business enterprise is "beyond dispute," but held that the MDBA's interest in remedying these inequalities "is not compelling because it concerns private-sector credit disparities, and the record does not show government participation contributed to such disparities." Regarding the MBDA's assertion that it had a compelling interest in eliminating discrimination in private contracting markets, the court found this category to be too broad. However, the court agreed that the MBDA did have a compelling interest in addressing discrimination in *government* contracting, relying on the agency's proffered statistical evidence of disparities. Even so, the court held that the MBDA's program for addressing its compelling interest in eliminating discrimination in government contracting was not narrowly tailored. Citing *SFFA*, the court held that the ethnicity classifications used by the MDBA were both over- and under-inclusive. They were underinclusive because they "arbitrarily exclude[d]" many disadvantaged individuals, like those from the Middle East and some parts of Asia, and they were overinclusive because they "include[d] large swaths of individuals without ever asking if individual applicants belonging to those groups have experienced discrimination." The court also held that the presumption operated as a stereotype and did not have a logical endpoint, echoing the factors considered by the Supreme Court in *SFFA*. In evaluating whether the program was narrowly tailored, the court also considered the factors set out by the Supreme Court in *Paradise v. United States*, 480 U.S. 149 (1987), which require that a narrowly tailored remedy be necessary, flexible, and minimally impactful to third parties. The court held that the MBDA's presumption was neither necessary nor flexible enough to achieve the MDBA's compelling interest, but that a "generous factfinder" could determine that available alternatives reduced the impact to third parties. Nevertheless, because the Agency's presumption did not satisfy the other narrow-tailoring factors, it failed strict scrutiny. The court concluded by granting summary judgment for two of the three plaintiffs on their equal protection claims, and permanently enjoining the MBDA from presuming that certain ethnicities were "socially or economically disadvantaged." The court summed up its decision on the reasoning that "[r]ather than picking winners and losers based on skin pigmentation, if a 'rising tide lifts all boats,' a holistic, race-neutral approach to assisting marginalized businesses would serve [the Agency's] interests just as well." The government has 60 days to appeal the district court's decision. Prior editions of our DEI Task Force Update may be found on our DEI Resource Center. 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

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The following Gibson Dunn lawyers prepared this update: Jason Schwartz, Katherine Smith, Mylan Denerstein, Zakiyyah Salim-Williams, Molly Senger, Blaine Evanson, Matt Gregory, Zoë Klein, Mary Lindsey Krebs*, and Lauren Meyer*. Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's DEI Task Force or Labor and Employment practice group, or the following authors and practice leaders: Jason C. Schwartz – Partner & Co-Chair, Labor & Employment Group Washington, D.C. (+1 202.955.8242, jschwartz@gibsondunn.com) Katherine V.A. Smith – Partner & Co-Chair, Labor & Employment Group Los Angeles (+1 213.229.7107, ksmith@gibsondunn.com) Mylan L. Denerstein – Partner & Co-Chair, Public Policy Group New York (+1 212.351.3850, mdenerstein@gibsondunn.com) Zakiyyah T. Salim-Williams – Partner & Chief Diversity Officer Washington, D.C. (+1 202.955.8503, zswilliams@gibsondunn.com) Molly T. Senger – Partner, Labor & Employment Group Washington, D.C. (+1 202.955.8571, msenger@gibsondunn.com) Blaine H. Evanson – Partner, Appellate & Constitutional Law Group Orange County (+1 949.451.3805, bevanson@gibsondunn.com) Matt Gregory – Partner, Appellate & Constitutional Law Group Washington, D.C. (+1 202.887.3635, mgregory@gibsondunn.com) **Mary Lindsey Krebs and Lauren Meyer are associates in the firm's Washington, D.C. office. Mary Lindsey currently is admitted to practice law only in Tennessee, and Lauren is a recent law graduate and not admitted to practice law.* © 2024 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. Attorney Advertising: These materials were prepared for general informational purposes only based on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a legal opinion on any specific facts or circumstances. Gibson Dunn (and its affiliates, attorneys, and employees) shall not have any liability in connection with any use of these materials. The sharing of these materials does not establish an attorney-client relationship with the recipient and should not be relied upon as an alternative for advice from qualified counsel. Please note that facts and circumstances may vary, and prior results do not guarantee a similar outcome.

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