DEI Task Force Update

February 2, 2024

Gibson Dunn has 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 develop creative, practical, and lawful approaches to accomplish their DEI objectives following the Supreme Court's decision in *SFFA v. Harvard*. Prior issues of our DEI Task Force Update can be found in 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 Update (listed below).

Fearless Fund Oral Argument:

On January 31, 2024, the Eleventh Circuit heard oral argument in American Alliance for Equal Rights' (AAER) appeal of the district court's denial of its motion for preliminary injunction in *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, No. 23-13138 (11th Cir. 2023). On the panel were Judge Robin S. Rosenbaum, Judge Kevin C. Newsom, and Judge Robert J. Luck.

During the argument, AAER asserted that Fearless Fund's charitable grant program—which provides $20,000 grants to Black female entrepreneurs—is a racially discriminatory contract subject to Section 1981. But Fearless Fund, represented by Gibson Dunn, asserted that the program is expressive speech protected by the First Amendment, such that the traditional Section 1981 analysis does not apply.

Judge Rosenbaum addressed the First Amendment issue, asking counsel for AAER, Gilbert Dickey of Consovoy McCarthy, "if . . . the entire point of the organization and the donation is to

send the message that . . . Black businesswomen are worthy and have been overlooked and left out, then why isn't that speech?" Mr. Dickey responded that the case law does not permit consideration of an organization's "previously expressed views to decide whether the actual conduct is expressive." Pressed further by Judge Newsom to explain the "hydraulic relationship between whether [the program] is subject to Section 1981 and the First Amendment interests at stake," Mr. Dickey questioned whether a donation in any circumstance could be considered expressive. And in response to Judge Rosenbaum's hypothetical contest awarded to whoever "does the most to further Black businesswomen," Mr. Dickey argued that "implications of this case for the First Amendment are pretty minor" because nonprofits would be "free to discriminate based on the message an organization is sending but not on protected characteristics."

Arguing on behalf of Fearless Fund, Jason Schwartz of Gibson Dunn emphasized that Fearless Fund's grant program is "core expressive activity" in line with the "proud tradition in this country" of charitable giving by organizations dedicated to specific causes. He called AAER's suit an "unprecedented effort to use Section 1981 to force a charity to reverse its message or shut down." Mr. Schwartz argued this inappropriate application of the Reconstruction-era statute would force an untenable result: "give to everyone or no one."

Mr. Schwartz distinguished "traditional commercial transactions—employment, housing," from "charitable giving . . . recognized as protected by the First Amendment," emphasizing that "Americans speak with their money; they magnify their message with their money." To explore this line between regulatable conduct and First Amendment-protected speech, Judge Luck posed several hypotheticals, including whether, under Fearless Fund's reasoning, a charity's contract for the purchase of office supplies would warrant similar protection. When Judge Luck pressed on the claim that "just because it's a charity it falls outside of 1981 . . . that can't be right," Mr. Schwartz agreed, but contended that, here, "the core expressive activity of the Fearless Foundation is to send this message, which, for what it's worth, is the message of Section 1981."

Judge Newsom also presented Mr. Schwartz with a hypothetical from AAER's brief—a "white man only contest"—to which Mr. Schwartz responded, "First of all, no matter how repugnant I might find that, the First Amendment protects all speech," explaining that a program set up the same way as the Fearless Fund program may be protected, depending on how it is structured.

Mylan Denerstein of Gibson Dunn, also on behalf of the Fearless Fund, argued that AAER had not met the high bar for organizational standing, noting that AAER's position would require "the court [to] grant a preliminary injunction when we don't even know who the businesses are." She emphasized that AAER "fail[ed] to state that they've applied for grants or need money or mentorship" and "don't show the viability of their business," which further weighed against finding injury sufficient for standing.

The panel did not indicate when it expects to issue a ruling.

Media Coverage:

- AP, "Grant Program for Black Women Comes under Tough Questioning in Key Anti-DEI Lawsuit" (including post-argument press conference video) (January 31)

- Law360, "11th Circ. Weighs Legality of Grant Contest for Black Women" (January 31)

- Law.com, “Appellate Judges Ask if Civil Rights Law Bars Grant Program for Black Business Women” (January 31)
- Courthouse News Service, “Challenge to Grant Program for Black Women Entrepreneurs Lands at 11th Circuit” (January 31)
- CNN, “Fearless Fund Challenges Court Order Blocking a Grant Program Exclusively for Black Women Entrepreneurs” (January 31)
- Atlanta Journal-Constitution, “Fearless Fund Goes to Court Again in Racial Discrimination Lawsuit” (January 31)
- U.S. News & World Report, “Venture Capital Fund Defends Grants for Black Women in U.S. Appeals Court” (January 31)
- Bloomberg Law, “Venture Fund’s Diversity Grant Defense Meets Doubtful Court” (January 31)
- Reuters, “Venture Capital Fund Defends Grants for Black Women in U.S. Appeals Court” (January 31)
- Wall Street Journal, “Minority Business Grants: A New Front in the Legal Battle Over Racial Preferences” (January 31)

Key Developments:

On January 30, 2024, Utah Governor Spencer Cox signed House Bill 261 (“HB 261”) into law. HB 261 prohibits state education institutions and government entities from using DEI statements in hiring and providing trainings promoting differential treatment based on personal identity characteristics. HB 261 also mandates that state education institutions replace DEI offices with general access “student success and support” offices. The bill defines maintaining any of these policies or programs as a “prohibited discriminatory practice.” HB 261 progressed rapidly through the legislature, passing only ten days after its introduction. Alongside it, another anti-DEI bill in Utah, House Bill 111 (“HB 111”), has been voted out of committee to the full House. As introduced, HB 111 would prohibit private employers from requiring training in or compelling beliefs about various DEI-related concepts, although the bill was significantly weakened in committee. We are tracking the progress of this bill and will provide additional updates if it passes.

On January 26, 2024, Students for Fair Admissions (“SFFA”) asked the Supreme Court to grant an emergency injunction in its ongoing battle against West Point, bringing its campaign against race-conscious admissions back to the nation’s highest court. SFFA sued West Point on September 19, 2023, arguing that the military academy’s continued use of race-conscious admissions after *SFFA v. Harvard* is unconstitutional. After the district court denied its request for a preliminary injunction on January 3, 2024, SFFA filed an emergency appeal to the Second Circuit the next day. Instead of waiting for the Second Circuit to rule, SFFA filed an emergency

application for an injunction with the Supreme Court, requesting that the court enjoin West Point from considering applicants' race after the school's application window closes on January 31. SFFA argued that West Point should be subject to the same constitutional analysis as other schools, despite language in *SFFA v. Harvard* suggesting military academies might receive more deference. SFFA claimed West Point applicants will suffer irreparable harm if the Supreme Court does not act before West Point's application cycle closes on January 31. On January 30, 2024, West Point filed its opposition to SFFA's requested injunction, arguing that there is no "emergency" supporting the injunction, since West Point has been considering applications since August 2023, will continue to do so through May 2024, and has already issued offers to hundreds of candidates. West Point also noted that SFFA failed to establish irreparable harm because SFFA's members remain eligible to apply to West Point for at least three additional admissions cycles. West Point asserted that the military's judgment merits "substantial deference" and that a diverse officer corps is "necessary for an effective fighting force."

On January 25, 2024, AFL filed a formal judicial conduct complaint with Chief Judge Diane S. Sykes of the United States Court of Appeals for the Seventh Circuit. The complaint accuses three judges on the United States District Court for the Southern District of Illinois—Chief Judge Nancy J. Rosenstengel, Judge Staci M. Yandle, and Judge David W. Dugan—of 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 of the United States Constitution. Specifically, the complaint highlights the judges' policies allowing parties to move for oral argument with the promise that, if the motion is granted, a "newer, female, [or] minority attorney" will argue the motion. AFL's complaint maintains that these policies intentionally discriminate on the basis of sex and race, amounting to "cognizable judicial misconduct" under the applicable judicial rules. Further, AFL argues that allowing these policies to stand undermines judicial integrity and public trust in the judicial system as it gives some parties additional advocacy opportunities for their clients solely on the basis of an advocate's race or gender.

On January 17, 2024, AFL filed an administrative complaint with the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), seeking investigations into three airlines—American Airlines, United Airlines, and Southwest Airlines—for alleged violations of federal contract law. AFL claimed that the airlines' race-based and gender-based hiring targets constitute race- and sex-based discrimination in violation of Executive Order 11246, which requires government contracts to contain an Equal Opportunity Clause prohibiting discrimination, and authorizes the Secretary of Labor to sanction government contractors via contract cancellation, ineligibility, and other penalties. AFL's American Airlines letter mentioned the airline's stated commitment to DEI and programs available to Black professionals, while the Southwest letter cited the increase in the company's diverse hires as evidence of unlawful consideration of race and gender in hiring. Finally, the United letter cited DEI targets in the airline's 2022 Corporate Responsibility Report and DEI initiatives that favor women and minority-owned subcontractors. These letters follow the November 1, 2023 civil rights complaints AFL submitted to the EEOC regarding the same airlines.

On January 17, 2024, AFL sent a FOIA request to the Federal Bureau of Investigation (FBI). AFL requested all records of communications to and from the FBI's Chief Diversity Officer, Scott McMillion, from April 2021 to April 2023. Citing McMillion's comments that "diversity, equity, inclusion and accessibility is literally within [the FBI's] DNA" and an FBI diversity report that

showed the agency has increased employee racial, ethnic, and gender diversity, AFL speculated that the FBI's hiring process violates Title VII and the Equal Protection Clause.

On January 11, 2024, AFL filed a letter with the EEOC calling for the Commission to conduct an investigation of Nike. AFL accused Nike of knowingly and intentionally using race, color, sex, and national origin as motivating factors in numerous employment decisions in violation of Title VII. AFL sent a similar letter to Nike's board, highlighting the same alleged violations. In the letters, AFL pointed to language on Nike's website expressing the company's intent to set "clear and ambitious targets . . . to increase diverse representation at Nike." AFL claimed that one way Nike realizes this target is through the creation of "Employee Networks," which are limited to members of eight specific "favored categories." These categories focus on race, sex, or gender. AFL maintained that Nike's explicit focus on only those categories demonstrates the company's discriminatory intent to deprive "whites, males, and heterosexuals" of the opportunity to gain "real benefits" from inclusion in these Employee Networks. Additionally, AFL cited Nike's self-reported data as evidence of the company's express intent to discriminate in favor of certain historically underrepresented demographics. For example, AFL cited Nike's Fiscal Year 2022 report, which states that the company achieved 51% gender diversity and 38.8% racial diversity. AFL claimed that featuring these statistics demonstrates Nike's efforts to discriminate against other demographics.

Media Coverage and Commentary:

Below is a selection of recent media coverage and commentary on these issues:

- New York Times, "'America Is Under Attack': Inside the Anti-D.E.I. Crusade" (January 20): The Times's Nicholas Confessore reports on thousands of documents newly obtained by the newspaper, providing new details about the recent wave of anti-DEI bills being considered—and in some instances, passed—in state legislatures. Despite polls showing that most Americans support the values underlying DEI, over 20 states considered or passed anti-DEI legislation in 2023. The Times secured documents including emails, grant proposals, and draft reports that the article claims show how conservative activists, centered at California's Claremont Institute, "formed a loose network of think tanks, political groups and Republican operatives in at least a dozen states" in an effort to "eliminat[e] 'social justice education' from American schools." According to Confessore, the internal documents reveal that (at least in some cases) racist, sexist, and homophobic beliefs were motivating factors. Confessore also suggested that the documents signal the importance of the anti-DEI movement as a Republican fundraising tool and talking point that is anticipated to become even more prominent as the 2024 election nears.

- Forbes, “Diversity In Leadership Increases Chances Of Success By 39%” (January 21): Julie Kratz, founder of DEI training organizations Next Pivot Point and Little Allies, reports on new research by McKinsey & Company describing a growing business case for DEI. The research suggests that there is a “39% increased likelihood of outperformance” for companies in the top quartile of ethnic and gender leadership diversity as compared to those in the bottom quartile. Kratz notes that business justifications for diversity are not new, but several factors—including limited diversity in C-suites and lack of accountability—hinder progress. To overcome these challenges, Kratz recommends that companies set aside the “‘one and done’ approach” to DEI training and focus on “a model of continuous learning.”

- Wall Street Journal, “DEI Is Worth Saving From Its Excesses” (January 22): Roland Fryer, Harvard economist and founder of venture capital firm Equal Opportunity Ventures, writes in an opinion piece that “[o]pponents and supporters of DEI have very different ideas about what it is.” Fryer recognizes the need for companies to evaluate their diversity initiatives and to identify and eliminate illegal practices, but also advocates for maintaining commitment to developing diverse talent. Fryer suggests that employers should focus on eliminating racial bias “not only because discrimination is wrong but because it is a market failure that prevents the right people from being placed in the right positions.” Companies should be aware of these biases, evident in disparate rates of hiring, promotion, and starting compensation. Fryer recommends use of machine learning to help avoid bias in personnel decisions.

- Law360, “EEOC’s Lucas Calls Mark Cuban ‘Dead Wrong’ In DEI Push” (January 29): Law360’s Patrick Hoff reports on a public exchange on the social media platform X between billionaire businessman Mark Cuban and EEOC Commissioner Andrea Lucas. In recent weeks, Cuban has taken to X to defend the business case for DEI. But when he posted on January 28 that, in hiring, “race and gender can be part of the equation,” Commissioner Lucas replied, calling Cuban “dead wrong on black-letter Title VII law.” According to Hoff, in an email to Law360, Cuban clarified that X “is a place to argue” and that he follows the law “in every way.” Although a spokesperson for the EEOC told Law360 that Lucas’s social media posts are her own and not reflective of the agency’s opinions, Lucas told the news outlet that she views public education “in any media” as part of her role. Hoff notes that, in the wake of *SFFA*, Lucas has stood alone among the EEOC’s commissioners in publicly denouncing race-based corporate DEI policies.

Case Updates:

Below is a list of updates in new and pending cases:

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

- ***Mid-America Milling Company v. U.S. Department of Transportation***, No. 3:23-cv-00072-GFVT (E.D. Ky. 2023): Two plaintiff construction companies sued the Department of Transportation, asking the court to enjoin DOT's Disadvantaged Business Enterprise (DBE) Program, an affirmative action program that awards contracts to minority-owned and women-owned small businesses in DOT-funded construction projects with the statutory aim of granting 10% of certain DOT-funded contracts to these businesses nationally. Plaintiffs allege that the program constitutes unconstitutional race discrimination in violation of the Fifth Amendment.
    - **Latest update:** On January 16, 2024, DOT filed its motion to dismiss the complaint. DOT argued that the plaintiffs' allegations that they lost contracts to DBE firms were conclusory and speculative because they failed to allege specific facts about the nature of the contracts, the type of industry, and whether or not those contracts were actually covered by the DBE program. DOT also argued that the plaintiffs failed to allege an injury sufficient for standing because, although they alleged they had bid for DBE contracts, they did not identify the contracts with enough specificity, as not all DOT contracts contain a DBE goal. Finally, DOT argued the plaintiffs failed to join as indispensable parties the state or local agencies who actually implement the DBE goals and channel DOT funds to contractors.
- ***Landscape Consultants of Texas, Inc. v. City of Houston***, No. 4:23-cv-3516–DH (S.D. Tx. 2023): Plaintiff landscaping companies owned by white individuals challenged 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:** On January 12, 2024, the district court denied both the City of Houston's and Midtown Management District's motions to dismiss, without issuing a written opinion
- ***Do No Harm v. Pfizer***, No. 1:22-cv-07908–JLR (S.D.N.Y. 2022), on appeal at No. 23-15 (2d Cir. 2023): On September 15, 2022, plaintiff association representing physicians, medical students, and 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, Title VII, and New York law. The association alleges that the program illegally excludes white and Asian applicants. The association is represented by Consovoy McCarthy PLLC, the firm that also represents American Alliance for Equal Rights in multiple lawsuits. In December 2022, the court granted Pfizer's motion to dismiss, finding that the plaintiff did not have associational standing because they did not identify at least one member by name, instead only submitting declarations from

anonymous members. The association appealed to the Second Circuit, which heard oral argument on October 3, 2023.

- **Latest update:** On December 21, 2023, Do No Harm filed a Rule 28(j) notice of supplemental authority to support its claim that it has standing despite its reliance on unnamed members. Pointing to a recent district court decision in *SFFA v. U.S. Naval Academy* that found standing on the basis of pseudonymous plaintiffs, the association argued that the district court misread Supreme Court precedent. On January 12, 2024, Pfizer responded with its own Rule 28(j) letter, contesting the plaintiff's characterization of the Naval Academy decision and arguing that even if the use of pseudonymous members was sufficient to create standing, the pseudonymous members in the current case still lacked standing because they had declined to apply for Pfizer's fellowship program after Pfizer changed the requirements—something Pfizer also argued served to moot the case.

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

- ***Gerber v. Ohio Northern University***, No. 2023-1107-CVH (Ohio. Ct. Common Pleas Hardin Cty. 2023): On June 30, 2023, a law professor sued his former employer, Ohio Northern University, for terminating his employment after an internal investigation determined that he bullied and harassed other faculty members. On January 23, 2024, the plaintiff, now represented by America First Legal, filed an amended complaint. The plaintiff claims that his firing was actually in retaliation for his vocal and public opposition to the university's stated DEI principles and race-conscious hiring, which he believed were illegal. The plaintiff alleged that the investigation and his termination breached his employment contract, violated Ohio civil rights statutes, and constituted various torts, including defamation, false light, conversion, infliction of emotional distress, and wrongful termination in violation of public policy.

  - **Latest update:** The defendant has until February 20, 2024 to respond to the plaintiff's second amended complaint.

- ***De Piero v. Pennsylvania State University,*** No. 2:23-cv-02281-WB (E.D. Pa. 2023): A white male professor sued his employer, Penn State University, claiming that university-mandated DEI trainings, discussions with coworkers and supervisors about race and privilege in the classroom, and comments from coworkers about his "white privilege" constituted a hostile work environment that led him to quit his job. He claimed that after he reported that he felt harassed and published an opinion piece objecting to the impact of DEI concepts in the classroom, the university retaliated against him by investigating him for bullying and aggressive behavior towards his colleagues. The plaintiff alleged harassment, retaliation, and constructive discharge in violation of Title VI, Title VII, Section 1981, Section 1983, the First Amendment, and Pennsylvania civil rights laws.

  - **Latest update:** On January 11, 2024, the district court granted the defendant's motion to dismiss in part, dismissing all of the plaintiff's claims except for his hostile work environment claim. On that claim, the judge found that some of his allegations, including that he was required to attend trainings that "discussed racial issues in essentialist and deterministic terms" and "ascrib[ed] negative traits

to white people . . . plausibly amount to 'pervasive' harassment." The court made clear that "training on concepts such as 'white privilege' . . . can contribute positively . . . in an educational institution," but that when those discussions occur "with a constant drumbeat of essentialist, deterministic, and negative language, they risk liability under federal law."

- ***Haltigan v. Drake***, No. 5:23-cv-02437-EJD (N.D. Cal. 2023): A white male psychologist sued the University of California Santa Cruz, arguing that a requirement that prospective faculty candidates submit and be evaluated in part on the basis of statements explaining their views and understanding of DEI principles functioned as a loyalty oath that violated his First Amendment freedoms. The plaintiff claimed that because he is "committed to colorblindness and viewpoint diversity"—which he alleged was contrary to UC Santa Cruz's position on DEI—he would be compelled to alter his political views to be a viable candidate for the position. The plaintiff sought a declaration that the University's DEI statement requirement violated the First Amendment and a permanent injunction against the enforcement of the requirement.
    - **Latest update:** On January 12, 2024, the district court granted UC Santa Cruz's motion to dismiss with leave to amend, finding that the plaintiff lacked standing because he had not actually applied for a professor position. The court rejected the plaintiff's claim that he had "competitor standing" because he only expressed a general interest in the position, and did not allege that he had undertaken any preparations or concrete steps to apply. The court also rejected the argument that the plaintiff had First Amendment prudential standing, sometimes recognized in license application cases, because he was seeking a job, not a license or a permit. Finally, the court found that the plaintiff had not sufficiently alleged that it would have been futile to apply without a DEI statement because UC Santa Cruz might have accepted his application notwithstanding his lack of a statement.
- ***Weitzman v. Fred Hutchinson Cancer Center***, No. 2:24-cv-00071-TLF (W.D.WA. 2024): On January 16, 2024, a white Jewish female former employee of a medical center sued her former employer, alleging that she was terminated for expressing her discomfort with DEI-related content shared in the workplace by coworkers, objecting to DEI-related training, and expressing her political opposition to DEI-aligned ideologies. She also claimed that her employer failed to act when she was allegedly discriminated against because of her religion and race by other coworkers. The plaintiff alleged her employer's conduct constituted racial discrimination, a hostile work environment, and retaliation in violation of the Washington Law against Discrimination (WLAD) and Section 1981; discrimination and retaliation on the basis of political ideology in violation of the Seattle Municipal Code; and intentional infliction of emotional distress and wrongful termination in violation of public policy under common law.
    - **Latest update:** The defendant has not yet responded to the complaint.

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

- ***Saadeh v. New Jersey State Bar Association***, No. MID-L-006023-21 (N.J. Super. Ct. 2021), on appeal at A-2201-22 (N.J. Super. Ct. App. Div. 2023): On October 15, 2021, a

Palestinian and Muslim attorney and bar member sued the New Jersey State Bar Association (NJSBA), alleging that the NJSBA's practice of reserving certain trustee and committee positions for members of "underrepresented groups" including Black, Hispanic, Asian, women, and LGBTQ attorneys constituted racial discrimination in violation of New Jersey state civil rights laws.

    - **Latest update:** On November 9, 2022, the trial judge ruled that the NJSBA's practice was racially discriminatory, and ordered it to end the practice and consider all attorneys in good standing eligible for the positions. The court found that the practice was an illegal quota rather than a valid affirmative action program. The court also held that the First Amendment did not protect the NJSBA's practices. The NJSBA appealed, and on January 18, 2024, the Appellate Division of the New Jersey Superior Court heard oral argument. The NJSBA argued that the trial court applied the incorrect Supreme Court precedent and that under the correct framework, the NJSBA's practice is a valid, tailored affirmative action plan that redresses the historical underrepresentation of non-white attorneys in the positions at issue. The plaintiff argued that the practice is not legal affirmative action because it does not address the root causes of racial imbalances and is not based on a detailed analysis of the NJSBA's membership and demographic data.

- ***Palsgaard v. Christian, et al.***, No. 1:23-cv-01228-SAB (E.D. Cal. 2023): In August 2023, California community college professors filed suit and moved for a preliminary injunction against the state's new DEI-related evaluation competencies and corresponding language in their faculty contract, which they allege requires them to endorse the state's views on DEI concepts. The plaintiffs challenge the DEI rules and contract language as compelled speech in violation of the First and Fourteenth Amendments. On December 15, 2023 the defendants filed their motions to dismiss.

    - **Latest update:** On January 19, 2024, the plaintiffs filed a joint opposition to the defendants' motions to dismiss. Plaintiffs argued that they had standing to challenge the DEI rules and faculty contract and that they had not waived their First Amendment rights. Plaintiffs also argued that their constitutional claims should not be dismissed because the regulations compel them to espouse the state's preferred message and that both the rules and faculty contract are overbroad and vague.

- ***Earls v. North Carolina Judicial Standards Commission***, No. 1:23-cv-00734-WO-JEP (M.D.N.C. 2023): On June 20, 2023, North Carolina Supreme Court Justice Anita Earls, the only non-white female justice on the court, made comments in an interview regarding the diversity of the appellate bench and of the attorneys who appear before the N.C. Supreme Court, and her opinion regarding implicit bias in the state judiciary and attempts to diversify the North Carolina courts. In response, on August 15, 2023, the North Carolina Judicial Standards Commission initiated an investigation into whether Justice Earls violated provisions of the judicial code requiring her to act in a manner that promotes "public confidence in the integrity" of the judicial system. On August 29, 2023, Justice Earls filed a lawsuit claiming that the Commission's investigation was part of an ongoing effort to restrict and chill her free speech rights in violation of the First

Amendment. She claimed that as a result of the investigation, she turned down opportunities to speak on matters related to diversity and equity, demonstrating the investigation's chilling effect. On November 21, 2023, the district court denied Justice Earls' request for a preliminary injunction on the grounds that the Commission's actions likely met strict scrutiny because its investigation was justified by the compelling interest of safeguarding public confidence in the integrity and fairness of the judicial system, and the investigation process appeared narrowly tailored.

  - **Latest update:** On January 17, 2024, Justice Earls voluntarily dismissed her case after the Commission dismissed the investigation against her without recommending disciplinary action.

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

- ***Students for Fair Admissions, Inc. v. University of Texas at Austin***, 1:20-cv-00763-RP (W.D. Tex. 2020): On July 20, 2020, SFFA sued the University of Texas, alleging that UT Austin's methods of considering race in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Section 1981, Title VII, the Texas Constitution, and Texas state law.

  - **Latest update:** On January 11, 2024, UT Austin replied to SFFA's opposition to its motion to dismiss, renewing its argument that the case is moot because UT Austin has changed its admissions policies. It further argued that the case was not still live under the "voluntary cessation" doctrine because the policy change was compelled by the Supreme Court's *SFFA v. Harvard* decision, and SFFA failed to show UT Austin's change was not made in good faith. UT Austin also responded to SFFA's summary judgment motion, asserting that SFFA's evidence that UT still collects demographic information is not sufficient to show that it discriminates on the basis of race. Also on January 11, civil rights groups acting as intervenors on behalf of UT Austin opposed SFFA's motion for summary judgment, arguing that SFFA is not entitled to summary judgment because it has not shown that UT's facially neutral policy is being implemented in a discriminatory manner. They also replied to SFFA's opposition to the motion to dismiss, arguing that SFFA lacks standing because none of its members have applied to UT Austin under the new policy, and that the case is moot because SFFA is challenging a policy that no longer exists.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Mylan Denerstein, Blaine Evanson, Molly Senger, Zakiyyah Salim-

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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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