DEI Task Force Update

February 28, 2024

Gibson Dunn's Workplace DEI Task Force aims 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).

Key Developments:

On February 25, 2024, the parties in *American Alliance for Equal Rights v. Hidden Star* filed a joint stipulation of dismissal of all claims, and the court closed the case the next day. Hidden Star is an Austin-based nonprofit organization that provides grants with the goal of helping "female, minority, and low-income entrepreneurs" through its Galaxy Grant program. Plaintiff American Alliance for Equal Rights (AAER) had claimed that the program violated Section 1981 based on alleged race- and gender-based eligibility restrictions, and had moved for a preliminary injunction, preventing Hidden Star from proceeding with the next grant contest. While Hidden Star's mission is to help women- and minority-owned business and low-income entrepreneurs, its Galaxy Grant program never limited program eligibility to female and minority candidates. AAER agreed to dismiss the suit in exchange for clarification of grant eligibility-related language on Hidden Star's website. Gibson Dunn represented Hidden Star in this matter.

On February 22, 2024, AAER filed a complaint and motion for a preliminary injunction against Jorge Zamanillo in his official capacity as the Director of the National Museum of the American Latino, part of the Smithsonian Institution. *AAER v. Zamanillo*, No. 1:24-cv-509 (D.D.C. Feb. 22, 2024). The complaint targets the Museum's internship program, which aims to provide Latino, Latina, and Latinx undergraduates with training in non-curatorial art museum careers. AAER claims that the program constitutes race discrimination in violation of the Fifth Amendment because the Museum considers the race of applicants in choosing interns and allegedly refuses to hire non-Latino applicants. AAER has asked for an injunction to prevent the Museum from closing the application window on April 1, or selecting interns for the program (currently scheduled to begin in late April).

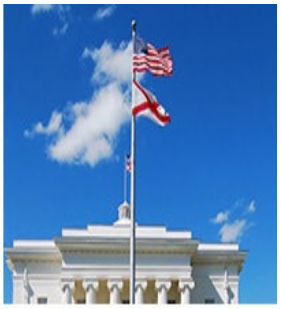
The EEOC filed an amicus curiae brief in *Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co.*, et al. on February 22, 2024. The case concerns a challenge to Progressive's grant program for Black entrepreneurs under Section 1981. (See case update below.) The EEOC explained that courts model Section 1981 standards governing private-sector voluntary affirmative action plans after the Title VII standards for such plans, which the EEOC is charged with enforcing. Accordingly, the EEOC argued, as Title VII permits voluntary affirmative-action plans in private employment, so too does Section 1981. The EEOC argued for evaluating Section 1981 challenges to affirmative action plans under a reasonableness standard, as the EEOC does under Title VII, not the strict scrutiny standard applied to post-secondary education affirmative action programs in the *SFFA* decision.

The Supreme Court denied certiorari in *Coalition for TJ v. Fairfax County School Board* on February 20, 2024. In 2020, Thomas Jefferson High School for Science and Technology (TJ), a public magnet school in Virginia, implemented a new policy of making admissions decisions based on a holistic review of students' grades, written essays, and "Experience Factors," which included family income and attendance at an underrepresented middle school. A coalition of parents and alumni challenged TJ's policy under the Equal Protection Clause, arguing it was adopted to reduce the number of Asian American students admitted to the school. The district court granted the Coalition's requested injunction against the admissions policy, but a month prior to the *SFFA v. Harvard* decision, a Fourth Circuit panel upheld the policy, reasoning that it does not require admissions officers to make race-based distinctions or cause an intentional or disparate impact. The Coalition petitioned the Supreme Court for review, but the Court declined to hear the case. Justice Alito dissented from the denial, criticizing the Fourth Circuit's reasoning as an "indefensible . . . flagrantly wrong . . . virus that may spread if not promptly eliminated." Justice Alito, joined by Justice Thomas, cautioned that the Fourth Circuit's decision is a "grave injustice" to hardworking students and provides a model for flouting the Court's *SFFA* decision.

On February 15, 2024, America First Legal (AFL) filed a lawsuit against the Department of Education (DOE) to enforce three separate Freedom of Information (FOIA) requests. In August 2023, AFL sent a FOIA request to DOE for records and communications related to its "National Summit on Equal Opportunity in Higher Education," a strategy session intended to identify ways to help colleges and universities continue promoting diversity after the Supreme Court's ruling in *SFFA v. Harvard*. AFL alleges in its lawsuit that DOE failed to respond to this and two other FOIA requests and that DOE's "unlawful delays" are evidence that "DOE is covering up an impermissible federal DEI takeover of America's education system."

AFL sent a letter to the EEOC on February 14, 2024, alleging that statements on the Walt Disney Company's "Reimagine Tomorrow" webpage, where the company expresses its goals of "amplifying underrepresented voices and untold stories as well as championing the importance of accurate representation in media and entertainment," show that the company is violating Title VII. AFL claims that Disney uses unlawful quotas to ensure the inclusion of traditionally underrepresented groups—like women and minorities—in the filmmaking industry. In the letter, AFL also takes issue with Disney's "Underrepresented Director" program, which grants recipients $25,000 to support their business endeavors. AFL asserts that this program is unlawful because it is only available to "women, AAPI, Black, Indigenous/Native, Latinx, LGBTQIA+, disability-identifying, and religiously marginalized individuals." The letter asks that the EEOC initiate an investigation into Disney's alleged "unlawful racial discrimination."

On February 14, 2024, the Legal Defense Fund (LDF) launched its Equal Protection Initiative, an "interdisciplinary project to protect and advance public and private sector efforts to remove barriers to equal opportunity for Black people." As part of the Initiative, LDF has issued a guidance report that aims to assist businesses in advancing their diversity goals following the Supreme Court's *SFFA* decision. LDF says that its guidance—developed in partnership with the Lawyers' Committee for Civil Rights Under Law, Asian Americans Advancing Justice, Latino Justice, the ACLU, and the Asian American Legal Defense and Education Fund—offers employers a comprehensive approach to communicating diversity goals to employees and job candidates, developing deep job candidate pools, and creating an inclusive work environment, while maintaining compliance with anti-discrimination laws.



On February 13, 2024, AAER filed a complaint against Alabama Governor Kay Ivey, challenging a state law that requires Governor Ivey to ensure there are no fewer than two individuals "of a minority race" on the Alabama Real Estate Appraisers Board (AREAB). The AREAB consists of nine seats, with eight currently filled. The remaining seat is reserved for a member of the public at large with no real estate background. Because there is only one minority member among the current Board, AAER asserts that state law will require that the open seat go to a minority. AAER states that one of its members applied for this final seat, but was denied purely on the basis of race. The complaint

argues that the state law violates the Equal Protection Clause and asks the court to invalidate the state law entirely and allow for any member of the public to qualify for the open seat.

The Congressional Asian Pacific American Caucus (CAPAC) sent a letter to the leaders of Fortune 100 companies on February 12, 2024, calling for an increase in representation of Asian Americans, Native Hawaiians, and Pacific Islanders (AANHPIs) in executive roles. A study conducted by Los Angeles nonprofit Leadership Education for Asian Pacifics found that members of AANHPI communities are significantly underrepresented in senior corporate positions and "hold only 2.7 percent of the total number of corporate board seats." CAPAC—composed of 75 Members of Congress—asked letter recipients to provide the caucus with data on current AANHPI representation among senior and government relations staff, as well as the percentages of philanthropic funding and contract dollars awarded to AANHPI recipients and AANHPI-owned businesses. In a press statement, CAPAC Chair Rep. Judy Chu (D-Cal.) explained the caucus's goal: "[W]ith this letter to Fortune 100 companies, we will determine whether the largest businesses in America have followed through on their promises and encourage them to continue this crucial work—even in the face of assaults on diversity, equity, and inclusion from Republican officeholders."

Media Coverage and Commentary:

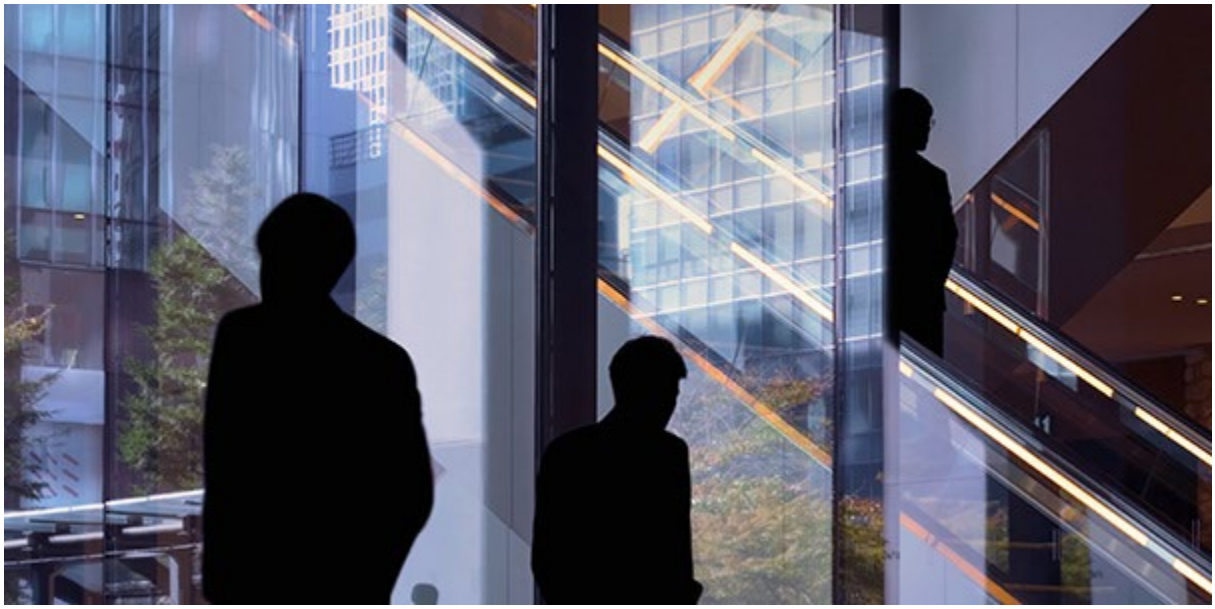
Below is a selection of recent media coverage and commentary on these issues:

- Inside Higher Ed, "Waiting for a 'Last Word' on Affirmative Action" (February 22): Inside Higher Ed's Liam Knox reported on the Supreme Court's February 22 decision to deny the petition for certiorari filed by a group of parents challenging the diversity-driven admissions policy at Thomas Jefferson High School for Science and Technology, Virginia's highly competitive magnet school (case update above). Glenn Roper of the Pacific Legal Foundation (PLF)—counsel for the parents' group and for plaintiffs in a number of other pending lawsuits challenging diversity-based initiatives in publicly-funded institutions—told Knox that his clients were "devastated" by the Supreme Court's decision, but that PLF was undeterred. He remarked that "[i]f anything, this multiplies our efforts," and concluded that "[t]here are multiple unanswered questions from the [*SFFA*] ruling that the court is going to have to address eventually." Knox reported that Richard Kahlenberg, a lecturer at George Washington University's School of Public Policy, interpreted the Court's decision as an answer in itself: "Typically if SCOTUS is upset about the direction of the lower courts, they don't hesitate to intervene. That they didn't is, to me, a green light for authentic, race-neutral strategies to increase diversity." But University of Chicago professor Sonja Starr told Knox that the decision could also be a sign that the Court was willing to "let[] the issue percolate among the lower courts" and to wait for a future "opportunit[y] to take a bite from this particular apple."

- Law.com, “GC of Texas University Taking Heat Over Cancellation of Pride Week” (February 22): Greg Andrews of Law.com reports that the University of North Texas has cancelled its annual Pride Week, which had been planned for March, based on the recommendation of the school’s Office of General Counsel. The recommendation follows the January 1, 2024 implementation of Texas Senate Bill 17, a sweeping anti-DEI measure affecting all state universities. Andrews says that the University’s OGC interpreted the law to prohibit schools from hosting programs tied to race, color, ethnicity, gender identity, or sexual orientation, but many faculty disagree and consider the OGC’s interpretation to be overly broad. At a meeting of the Faculty Senate on February 14, 2024, librarian Coby Condrey reportedly argued that the law’s exceptions for academic freedom in the classroom should apply, as “the library, for librarians, is our classroom.” Other faculty speculated that concerns for funding have motivated the cancellation.

- Inc. Magazine, “‘It All Fell Apart’: Fearless Fund Founder on Impact of DEI Lawsuits” (February 21): Inc. Magazine’s Brit Morse reports on the operational difficulties faced by Fearless Fund and Hello Alice, which are each facing lawsuits, alleging that their grant programs violate Section 1981. In an interview with Morse, Fearless Fund CEO Arian Simone shared that her organization has had to reduce its team of 19 people to only 6, and Hello Alice co-founder Elizabeth Gore reported that the company recently laid off 69% of its team. Both organizations have also struggled with funding, despite their upward trajectories prior to the suits, according to Morse. Simone reported to Morse that only two of Fearless Fund’s corporate partners, Costco and JP Morgan, have remained onboard, and Gore shared that Hello Alice has not raised any funds since the lawsuit was filed. Morse notes that anti-DEI groups’ litigation and advocacy campaign has been successful, as large companies have pulled back on DEI initiatives established in 2020. But Morse says that neither Fearless Fund nor Hello Alice plans to shutter anytime soon, and she shares Simone’s commitment to her mission: “So I have the current industry, the macro-economic climate, the affirmative action ruling in June, the attack on DEI, and now,

on top of that, my company is in litigation . . . I have five things, a whole hand, but guess what: A hand is powerful because it creates a fist and I'm going to continue to fight."



- Washington Post, "As DEI gets more divisive, companies are ditching their teams" (February 18): The Post's Taylor Telford reports on new data from workforce intelligence provider Revelio Labs, indicating that DEI jobs decreased by 5 percent in 2023 and have fallen by 8 percent so far in 2024. According to Revelio, this is twice the rate of non-DEI jobs. Telford notes that Revelio's data is consistent with media reporting in recent weeks about large-scale DEI layoffs at Zoom and Snap; other large companies—including Tesla, DoorDash, Lyft, Home Depot, and X—made similar cuts in 2023. But Lisa Simon, Revelio's senior economist, told Telford that although the "overall number of DEI officers has decreased . . . it's not enough to destroy all the strides that happened after 2020." And Revelio's data indicates that other companies continue to build their DEI teams: in 2023, several corporations (including J.M. Smucker, Victoria's Secret, Michaels, Moderna, Prudential, ConocoPhillips, and Conagra Brands) expanded their DEI teams by 50 percent or more.

- SSRN, "The First Amendment Right to Affirmative Action" (February 15, 2024): Alexander Volokh, Associate Professor at Emory University School of Law, explores the relationship between the First Amendment and federal civil right laws, and proposes that universities—in their role as "speaking associations"—may pursue arguments under the First Amendment to protect their right to promote diversity in their institutions. Professor Volokh asserts that a university's affirmative action programs are part of that institution's "message," thus qualifying for protections under the First Amendment. He argues that universities, as speaking associations, have the right to choose both who speaks on their behalf and who receives the message they wish to communicate. Under that presumption, he posits that the First Amendment will prove crucial to future litigation over the prominence and survival of affirmative action programs in the wake of *SFFA v. Harvard*. He explains that "[u]sing an antidiscrimination law like Title VI or 42 U.S.C. § 1981 to force the university to speak through people not of its choosing . . . could impede

the university's ability to speak." Professor Volokh also suggests that the First Amendment may protect charitable donations (like those at issue in *Fearless Fund*) as expressive speech, depending on "how donations are socially perceived."

- Bloomberg Law, "Alphabet, Microsoft Pivot From Nasdaq Diversity Reporting Format" (February 14): Bloomberg's Andrew Ramonas reports on the different ways that public companies are complying with new Nasdaq board diversity reporting requirements. Although most companies produce tables of numbers—the format suggested in Nasdaq's template—others use dots, checkmarks, or other visual chart formats. According to Ramonas, this variety in reporting makes it more difficult for investors to make side-by-side comparisons between companies. But in an interview with Ramonas, Amy Augustine, director of environmental, social, and governance investing at BostonTrust Walden Co., emphasized the overall benefits of the reporting requirement: "It's so far from where we were when there was no listing standard that it really does feel like progress." The SEC is crafting its own proposal to require public companies to disclose board diversity, with a tentative release date of April 2024.

- Harvard Business Review, "Building a Supplier Diversity Program? Learn from the U.S. Government" (February 9): Chris Parker and Dwaipayan Roy, professors at the University of Virginia's Darden School of Business, provide guidance for corporate leaders seeking to diversify their supply chains. Parker and Roy sought advice from procurement leaders at four federal agencies: the Department of Health and Human Services (HHS), the Department of Veteran Affairs, the National Aeronautics and Space Administration, and the Department of Housing and Urban Development. These leaders advise that companies' first step should be to identify capable small, diverse-owned businesses (SDBs). This may involve creating partnerships with minority business associations, or pooling information on SDBs with other companies or government entities (HHS, for example, maintains a public SDB database). The second step, according to these procurement leaders, involves communicating directly with SDBs, who "often lack awareness about a company's specific procurement needs." Companies can accomplish

this goal through different channels, from outreach events to regular email updates sent to SDB procurement managers.

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:

- ***Alexandre v. Amazon.com, Inc.***, No. 3:22-cv-1459 (S.D. Cal. 2022): White, Asian, and Native Hawaiian entrepreneur plaintiffs, on behalf of a putative class of past and future Amazon "delivery service partner" (DSP) program applicants, challenged a DEI program that provides $10,000 grants to qualifying delivery service providers who are "Black, Latinx, and Native American entrepreneurs." Plaintiffs allege violations of California state civil rights laws prohibiting discrimination. On December 6, 2023, Amazon moved to dismiss.
    - **Latest update:** On February 16, 2024, the plaintiffs filed their opposition to Amazon's motion to dismiss, arguing that they have standing because they visited Amazon's website with the intent to become an Amazon DSP, only to be confronted by Amazon's DEI program, and therefore did not apply. The plaintiffs also assert that Amazon's public policy arguments should fail because the program is designed as "virtue-signaling in order to curry favor with certain races."
- ***Bradley, et al. v. Gannett Co. Inc.***, No. 1:23-cv-01100-RDA-WEF (E.D.Va. 2023): On August 18, 2023, white plaintiffs sued Gannett over its alleged "Reverse Race Discrimination Policy," claiming that Gannett's expressed commitment to having its staff demographics reflect the communities it covers violates Section 1981. On November 24, Gannett moved to dismiss and to strike the plaintiffs' class action allegations. On February 8, 2024, the plaintiffs moved for a preliminary injunction and for class certification. On February 9, 2024, Gannett filed a motion to stay briefing on the plaintiffs' motions pending a ruling on Gannett's motion to dismiss, arguing that it may moot any need for class certification or a preliminary injunction.
    - **Latest update:** The plaintiffs filed their opposition to Gannett's motion on February 13, 2024, urging the court to consider the motion to dismiss, motion for preliminary injunction, and motion for class certification together given their significant legal and factual overlap. The plaintiffs further argued that the stay sought by Gannett required a showing of a "high likelihood of prevailing" on the pending motion to dismiss, which Gannett had not shown, especially given the "rarity with which a claim for § 1981 racial discrimination meets the requirements to be dismissed on a 12(b)(6) motion." Gannett's reply, filed on February 14, 2024, renewed its call for efficiency, noting that resolving the pending motions for

class certification and preliminary injunction would require significant, potentially unnecessary, factual development. On February 21, 2024, the court granted Gannett's motion to stay briefing on the plaintiff's pending motions.

- ***Mid-America Milling Company v. U.S. Dep't 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 the DOT's Disadvantaged Business Enterprise Program (DBE), 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. The plaintiffs alleged that the program constitutes unconstitutional race discrimination in violation of the Fifth Amendment.
    - **Latest Update:** On February 6, 2024, the plaintiffs filed their opposition to DOT's motion to dismiss, arguing that they stated a plausible claim for relief based on allegations that most contracts in Kentucky and Indiana contain DBE goals; that the plaintiffs regularly bid on and compete for those contracts; and that it is highly improbable that the plaintiffs' losses are not due, at least in part, to the DBE program. The plaintiffs underscored that regardless of whether they lost specific contracts due to their race and/or gender, they had sufficiently alleged that they were injured by the unequal opportunity to compete for those contracts. DOT replied on February 20, 2024, reiterating that the plaintiffs had failed to identify "what contract they allegedly lost, to whom, where or when this contract was let or by what state agency." DOT also argued that the plaintiffs' failure to allege specific contracts lost undermines their standing argument, indicating that plaintiffs had not suffered an injury-in-fact.

- ***Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co.***, et al., No. 23-cv-1597 (N.D. Oh. 2023): On August 16, 2023, plaintiffs represented by AFL sued defendants Progressive Insurance, Hello Alice, and Circular Board, Inc., alleging that the defendants' grant program that awarded funding specifically to Black entrepreneurs to support their small businesses violated Section 1981.
    - **Latest update:** On February 7, 2024, defendant Progressive filed a motion to dismiss for lack of jurisdiction and failure to state a claim and defendant Circular Board filed a motion to dismiss for failure to state a claim. The defendants argue that the plaintiffs lack Article III standing because they did not plead causation. The defendants also assert that the plaintiffs' claims do not involve a "contract" under Section 1981 but that, if they do, the court should compel arbitration or transfer the case to federal court in California. The defendants argue that applying Section 1981 to a program "with the express purpose of combatting sociopolitical inequalities" violates the First Amendment, and that the grant program is a "voluntary, private affirmative action program" under *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). On February 16, 2024, the court granted leave to file an *amicus curiae* brief to the Southern Poverty Law Center, the Lawyers' Committee for Civil Rights Under the Law, the National Hispanic Bar Association, and Asian Americans Advancing Justice, and on

February 23, 2024, the court granted leave to file an *amicus curiae* brief to the EEOC (see update above).

2. Employment discrimination and related claims:

- ***Gerber v. Ohio Northern University***, No. 2023-1107-CVH (Ohio. Ct. Common Pleas Hardin Cnty. 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 AFL, 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:** On February 20, 2024, the defendants filed answers and a joint motion for partial dismissal of the plaintiff's second amended complaint. The defendants argued for dismissal of the wrongful termination claims because such claims only apply to at-will employees, and the plaintiff was a contract employee. The defendants also argued for dismissal of all claims against the defendants in their individual capacities, including the "conclusory" tort claims.

- ***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. On January 12, 2024, the district court granted UC Santa Cruz's motion to dismiss with leave to amend.
    - **Latest update:** On February 2, 2024, the plaintiff filed a second amended complaint, adding additional allegations regarding his job search, his DEI statement, and why his application would have been futile. The plaintiff brought the same claims and requested the same relief as in his first complaint.

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

- ***Alliance for Fair Board Recruitment v. SEC***, No. 21-60626 (5th Cir. 2021): On October 18, 2023, a unanimous Fifth Circuit panel rejected petitioners' constitutional and statutory challenges to Nasdaq's Board Diversity Rules and the SEC's approval of those rules. Gibson Dunn represents Nasdaq, which intervened to defend its rules. Petitioners sought a rehearing *en banc*.

- **Latest update:** On February 19, 2024, the Fifth Circuit granted petitioners' motion for rehearing *en banc* and vacated the October 18, 2023 panel opinion. Oral argument is tentatively scheduled for the week of May 13, 2024.

- ***Valencia AG, LLC v. New York State Off. of Cannabis Mgmt., et al.***, No. 5:24-cv-00116-GTS-TWD (N.D.N.Y. 2024): On January 24, 2024, Valencia AG, a cannabis company owned by white men, sued the New York State Office of Cannabis Management for discrimination, alleging that New York's Cannabis Law and implementing regulations favored minority-owned and women-owned businesses. The regulations include goals to promote "social & economic equity" ("SEE") applicants, which the plaintiff claims violates the Equal Protection Clause and Section 1983. On February 7, 2024, the plaintiff filed a motion for a temporary restraining order and preliminary injunction, seeking to prohibit the defendants from implementing the regulations, charging SEE applicants reduced fees, or preferentially granting SEE applicants' applications.

    - **Latest update:** On February 8, 2024, the court denied the plaintiff's motion for a temporary restraining order because Valencia had not made a sufficient showing that it would experience irreparable harm without it, characterizing the motion as "plagued by a lack of personal knowledge." The court will be scheduling a hearing on the plaintiff's motion for preliminary injunction "in the coming days."

4. Actions against educational institutions:

- ***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 alleged require them to endorse the state's views on DEI concepts. The plaintiffs challenged 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. In response, on January 19, 2024, the plaintiffs filed a joint opposition.

    - **Latest update:** On February 9, 2024, the state and district defendants filed replies in support of their motions to dismiss. In both replies, the defendants argued that the plaintiffs did not meet the injury element of standing because the implementation guidelines did not proscribe speech, punish speech, or otherwise bind the plaintiffs. The defendants also argued that the plaintiffs failed to state a viable claim because the regulations do not prohibit speech, compel speech, or discriminate against the viewpoint of certain speech. Finally, the defendants argued that the plaintiffs' overbreadth and vagueness challenges were meritless.

- ***Brooke Henderson, et al. v. Springfield R-12 School District, et al.***, No. 23-01374 (8th Cir. 2023): On August 18, 2021, two educators sued a Springfield, Missouri school district alleging that the district's mandatory equity training violated their First Amendment rights. The educators claimed that the equity training constituted compelled speech, content and viewpoint discrimination, and an unconstitutional condition of employment. The at-issue Fall 2020 equity training included sessions on anti-bias, anti-racism, and white

supremacy. On January 12, 2023, the district court granted the defendants' motion for summary judgment.

  - **Latest update:** The plaintiffs appealed the decision to the U.S. Court of Appeals for the Eighth Circuit. Oral argument was held on February 15, 2024 before Judges James B. Loken, Steven M. Colloton, and Jane L. Kelly. Counsel for the plaintiffs argued that the training compelled educators to engage in political speech, while counsel for the defendants argued that the educators were not compelled because they did not face punishment. The judges questioned the attorneys on several First Amendment issues, including the public forum doctrine, the test applied to public employee trainings, and the standard for compelled speech.

- ***Doe v. New York University***, No. 1:23-cv-09187 (S.D.N.Y. 2023): On December 1, 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 violates Title VI, Title IX, and Section 1981.

  - **Latest update:** On January 29, 2024, NYU filed a motion to dismiss, arguing that the plaintiff lacks standing because his hypothetical injury is too attenuated and that the claim is not yet ripe because the Law Review's policy has not yet been implemented. On February 20, 2024, the plaintiff filed his opposition, arguing that he faces an imminent and severe injury in the coming months due to the university's knowing discrimination.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Mylan Denerstein, Blaine Evanson, Molly Senger, Zakiyyah Salim-Williams, Matt Gregory, Zoë Klein, Mollie Reiss, Alana Bevan, Marquan Robertson, Janice Jiang, Elizabeth Penava, Skylar Drefcinski, Mary Lindsay Krebs, and David Offit.

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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