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DEI Task Force Update

August 29, 2025

Gibson Dunn's Workplace DEI Task Force aims to help our clients navigate the evolving legal and policy landscape following recent Executive Branch actions and 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 August 21, the U.S. Supreme Court granted in part a motion to stay an order of the U.S. District Court for the District of Massachusetts, which had invalidated the termination of over $1 billion in National Institute of Health-funded research grants due to their perceived connection to DEI and certain other topics. The case is *National Institutes of Health v. American Public Health Association*, 604 U.S. __ (2025); we reported on the district court's opinion in our July 1 Task Force Update. In Thursday's decision, the Supreme Court stayed the portion of the district court's order invalidating the grant terminations but did not stay the portion vacating the NIH's policy guidance.

Justices Thomas, Alito, Gorsuch, and Kavanaugh would have stayed the district court's ruling in full, while Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson would have denied the stay in full. Justice Barrett wrote the controlling opinion and provided the fifth vote for each part of the split result. She concluded that the district court likely lacked jurisdiction to adjudicate the plaintiffs' claims relating to grant terminations, consistent with the Court's decision last term in *Department of Education v. California*, 606 U.S. ___ (2025), in which the Court concluded that

the Court of Federal Claims likely holds exclusive jurisdiction over claims seeking restoration of terminated grants because such claims arise from contracts with the United States government. However, Justice Barrett reasoned that the district court was likely the correct forum for the plaintiffs' challenge to the agency guidance under the Administrative Procedure Act ("APA"), because the guidance-related claims were not contractual. Justice Barrett recognized that the plaintiffs would need to proceed sequentially in litigating the two claims, but she concluded that this was the result of the jurisdictional scheme that Congress designed. Notably, neither the Court's order nor Justice Barrett's opinion discuss the limited availability of injunctive relief in the Court of Federal Claims. The Chief Justice wrote an opinion, joined by Justices Sotomayor, Kagan, and Jackson, concluding that, because the district court had jurisdiction to vacate the guidance, it also had jurisdiction to reinstate the funding. Justices Gorsuch, Kavanaugh, and Jackson also wrote separately, each partially dissenting with the decision.

Also on August 21, the U.S. Court of Appeals for the Ninth Circuit issued an order denying the government's motion to stay a preliminary injunction requiring the Environmental Protection Agency, the National Science Foundation, and the National Endowment for the Humanities to reinstate research grants terminated this year in accordance with President Trump's executive orders relating to DEI and government spending. The agencies will be required to reinstate grants they had awarded to the plaintiffs, six researchers who work in the University of California system, pending a full appeal of the preliminary injunction order. The case is *Thakur et al. v. Donald J. Trump, et al.*, No. 25-4249 (9th Cir. 2025).

In the order, the three judge panel (Judges Paez, Christen, and Desai) reasoned that it was "bound by the bedrock principle that the government cannot 'leverage its power to award subsidies on the bases of subjective criteria into a penalty on disfavored viewpoints,'" and found the record showed that "the agencies selected grants for termination based on viewpoint" in violation of this principle. The court also concluded that the government had "not made a strong showing of a likelihood of success on the merits" and "the government 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" In light of the Supreme Court's decision in *National Institutes of Health v. American Public Health Association*, 606 U.S. __ (2025), discussed above, the agencies might argue that the Court of Federal Claims has exclusive jurisdiction over the plaintiffs' claims, and might seek reconsideration in light of this decision, which was released on the same day, but shortly after, the Ninth Circuit's decision in *Thakur*.

On August 14, the U.S. District Court for the District of Maryland issued a memorandum opinion holding unlawful a "Dear Colleague Letter" the Department of Education ("DOE") issued in February and a "Reminder of Legal Obligations" the DOE issued in April regarding the nondiscrimination obligations of federally funded educational institutions (the"Letter" and the "Certification Requirement"). The case is *American Federation of Teachers, et al. v. Department of Education*, No. 1:25-cv-00628 (D. Md. 2025).

In a 76-page opinion, the court held that both the Letter and the Certification Requirement were procedurally improper because DOE failed to put them through notice and comment before publishing. The court rejected DOE's argument that it satisfied this requirement with a footnote to the Letter containing "mailing and email addresses for anyone 'interested in commenting,'"

reasoning that "the requirements for notice-and-comment are exacting," and that an "after-the-fact opportunity to send an email does not satisfy them." The court also held that the decisions to issue the Letter and the Certification Requirement were arbitrary and capricious because DOE "failed to provide an explanation for its change in position," "announced large-scale policy changes without considering whether they were appropriate based on existing facts and law" and "issue[d] a purported 'guidance' that conflicts with its own regulations and existing case law." The court also held that portions of the Letter are contrary to the First Amendment, and that the Letter exceeds DOE's statutory authority by "exercising control over the content of curriculum." Finally, the court held that both documents were unconstitutionally vague in violation of the Fifth Amendment because they "attach[] consequences to violating provisions rooted in 'broad and value-laden' terms like DEI that mean very different things to different people." DOE may appeal this decision to the Fourth Circuit Court of Appeals.

On August 14, the U.S. District Court for the District of Columbia issued a memorandum opinion granting in part a motion for preliminary injunction filed by various nonprofit organizations who sued the United States Department of Agriculture ("USDA") for terminating grants pursuant to President Trump's EOs relating to DEI. The court vacated the termination of five federal grants and enjoined the USDA from terminating a sixth grant. The case is *Urban Sustainability Directors Network, et al. v. United States Department of Agriculture, et al.*, No. 1:25-cv-1775 (D.D.C. 2025).

In a 92-page opinion, the court held that the plaintiffs demonstrated a likelihood of success in showing that the five grants were terminated arbitrarily and capriciously, in part because the terminations offered only "vague and conclusory reasoning," failed to identify a particular reason for termination, and failed to provide sufficiently individualized explanations for the decisions. The court also held that the planned termination of a sixth grant was unlawful because it conflicted with the statute governing the grant. The court observed that Congress mandated that the grant be used to support "underserved" groups, a term the statute defines to mean "people 'who have been subjected to racial or ethnic prejudice because of their identity.'" So, the court reasoned, the explanation the Secretary of Agriculture gave in a press release for the planned termination—that the grant was a "Diversity, Equity, and Inclusion (DEI) focused award[]" that "wasted [money] on woke DEI propaganda"—indicated that USDA intended to terminate a grant for an improper reason that directly conflicted with Congress's mandate. The court rejected other of the plaintiffs' claims, including a due process claim. Finally, the court held that the plaintiffs had shown they will face irreparable harm in the absence of relief because the grant terminations pose an "existential threat" to their operations and have led to the termination of programming, impairment of their "central missions," and damage to their reputations and relationships, among other harms. USDA may appeal this decision to the D.C. Circuit Court of Appeals. In light of the Supreme Court's decision in *National Institutes of Health v. American Public Health Association*, 606 U.S. __ (2025), discussed above, as well as *Department of Education v. California*, 6064 U. S. ___ (2025), USDA might argue that the Court of Federal Claims has exclusive jurisdiction over the plaintiffs' claims, and might seek reconsideration of this decision on that basis.

On August 13, the United States District Court for the Northern District of Alabama issued a memorandum opinion denying a preliminary injunction to a group of University of Alabama professors and students who had sued to enjoin enforcement of Alabama Senate Bill 129 ("SB 129"). SB 129 prohibits DEI programs at state agencies, local

boards of education, and public universities, and also prohibits public educational institutions from teaching on eight enumerated "divisive concepts." It allows discipline up to and including termination for "knowing[] violat[ion]" of the law. The case is *Simon et al. v. Ivey et al.*, No. 2:25-cv-00067 (N.D. Ala. 2025).

In a 146-page opinion, the court rejected the plaintiffs' contention that the law was void for vagueness, concluding that the law's definitions of "diversity, equity, and inclusion" and "divisive concepts" were sufficiently clear to allow someone to discern whether they violated SB 129. With respect to the definition of "divisive concepts," the court found that the plaintiffs had not shown why statutory phrases such as "inherently superior" and "consciously or subconsciously" are vague, holding that "'men of common intelligence' do not need to guess at their meaning." With respect to the definition of DEI programs—which the law defines as any programs or events "where attendance is based on an individual's race, sex, gender identity, ethnicity, national origin, or sexual orientation"—the court explained that the term of "based on" "indicates a but-for causal relationship and thus a necessary logical condition." The court also rejected the plaintiffs' argument that the phrase "knowingly violates" is vague, observing that the phrase "encompasses a mens rea standard that has a clear and settled meaning in law" and that the phrase helps constrain enforcement discretion by demanding evidence of a culpable mental state. The court also rejected the plaintiffs' contention that the law violates the First Amendment, concluding that the law constitutes a reasonable effort by a public employer to control curriculum and "to ensure that students were not being coerced" into advocating for viewpoints with which they disagreed. The plaintiffs may appeal this decision to the Eleventh Circuit Court of Appeals.

On August 7, President Trump issued an Executive Order titled, "Ensuring Transparency in Higher Education Admissions," which seeks to "ensure institutions of higher education receiving Federal financial assistance are transparent in their admissions practices." The EO states that "the persistent lack of available data—paired with the rampant use of 'diversity statements' and other overt and hidden racial proxies—continues to raise concerns" about whether universities are considering race in admissions decisions. The EO instructs the Secretary of Education to "revamp the online presentation of [Integrated Postsecondary Education Data Systems] data, such that it is easily accessible and intelligibly presented for parents and students." The EO also directs the Secretary of Education to "expand the scope of required reporting," and to "increase accuracy checks of submitted data" to "provide adequate transparency into admissions." Lastly, the EO directs the Secretary of Education to take remedial action if "institutions fail to submit data in a timely manner or are found to have submitted incomplete or inaccurate data."

Shortly after the EO was issued, Linda McMahon, the Secretary of Education, issued a memorandum announcing changes as directed by the President, writing that "the current survey neglects to collect important information that could reveal whether universities are discriminating against applicants based on race." Secretary McMahon's memorandum states that, moving forward, "the Department will collect data disaggregated by race and sex relating to the applicant pool, admitted cohort, and enrolled cohort at the undergraduate level, and for specific graduate and professional programs." The memorandum also states that DOE will require institutions to "report quantitative measures of applicants and admitted students' academic achievement such as standardized test scores, GPAs, first-generation-college-student status, and other applicant characteristics, for each race-and-sex pair." Further, for each "race-and-sex pair," the

memorandum directs the National Center for Education Statistics to "expand the scope" of collected data to include "graduation rates, final GPAs, financial aid offered, financial aid provided, and other relevant measures." Lastly, the memorandum directs the National Center for Education Statistics to "develop a rigorous quality assurance program for reported data" to ensure that the data is "accurate and consistently reported across institutions."

On July 24, the Trump administration announced that it had reached an agreement with Columbia University to settle several federal agency investigations into alleged violations of antidiscrimination laws by the University. Under the terms of the settlement, Columbia agreed to pay $200 million to the federal government in fines, as well as an additional $21 million to settle a separate investigation launched by the Equal Employment Opportunity Commission ("EEOC"). The University also agreed not to maintain programs that promote race-based outcomes, quotas, or diversity targets; to disclose admissions data (including some demographic data) to the government and a "Resolution Monitor"; to maintain certain policies governing student protests, including a policy prohibiting face masks used to conceal one's identity; to appoint an administrator to address antisemitism on campus; and to provide "all-female sports, locker rooms, and showering facilities," among other things. In return, the administration agreed to restore the University's access to federal grants and funding, including by reinstating grants terminated by the administration in March of this year.

On July 23, Claire Shipman, Acting President of Columbia University, released a statement about the settlement. Shipman noted that, under the settlement agreement, the University did not admit any wrongdoing or agree with the administration's conclusion that Columbia violated Title VI of the Civil Rights Act. Shipman explained that the University nonetheless believed a settlement was in its best interest because "[t]he prospect of [the federal funding freeze] continuing indefinitely, along with the potential loss of top scientists, would jeopardize [the University's] status as a world-leading research institution," and because litigating against the administration could result in "long-term damage" to the University, including "the likely loss of future federal funding, the possibility of losing accreditation, and the potential revocation of visa status of thousands of international students."

On August 12, the Department of Justice announced that it settled two lawsuits brought by Students for Fair Admissions against the U.S. Air Force Academy and the U.S. Military Academy at West Point challenging the military academies' admissions policies as unconstitutional under the Fifth Amendment. Under the settlement, the military academies agreed to end the use of race and ethnicity in all aspects of their admissions process, promising that they will maintain no race or ethnicity-based objectives or goals and will shield race and ethnicity information from admissions officers. The settlement states that "the consideration of race and ethnicity in admissions at the [military academies] does not promote military cohesiveness, lethality, recruitment, retention, or legitimacy; national security; or any other governmental interest."

On August 4, Florida Attorney General James Uthmeier sent a memorandum to certain law firms in the state alerting them that "the Florida Attorney General's Office will no longer engage or approve the engagement of private law firms who have or continue to engage in illegal and inappropriate discrimination and bias." The memorandum listed specific disapproved actions that would likely disqualify firms from being hired by the Office, including job postings that indicate a preference for hiring individuals of a certain race or ethnicity; workplace DEI trainings; diversity targets in hiring, promotion, and contracting; and training and mentorship opportunities open only to certain races, genders, or sexual orientations, among other things. The memorandum states that the Attorney General's Office will immediately conduct a review of existing outside counsel engagements to assess compliance with the policy.

Media Coverage and Commentary:

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

- New York Times, "Some Programs for Black Students Become 'Illegal D.E.I.' Under Trump" (August 26): Dana Goldstein of the New York Times reports on the increased scrutiny faced by educational programs intended to achieve racial equity. Goldstein points to the Trump administration's use of executive orders, federal investigations, and threatened funding cuts as tools to end these programs, and uses federal investigations stemming from programs in Chicago and Evanston, Illinois as illustrations of the changing tide. In Chicago, the public school system has introduced a program called the Black Student Success Plan, which seeks to increase the number of Black male teachers, add more courses on Black history, reduce discipline against Black students, and enroll more Black children in advanced courses. In an April statement announcing an investigation related to this program, Craig Trainor, acting assistant secretary for civil rights at the

Education Department, said that Chicago was reserving resources for "favored" students, and that the Trump administration "will not allow federal funds, provided for the benefit of all students, to be used in this pernicious and unlawful manner." In Evanston, a complaint about an antiracism training for teachers resulted in the opening of a separate federal investigation. Goldstein also notes that the administration appears to be relying on what she characterizes as a novel legal theory in these actions: that the Supreme Court's decision in *Students for Fair Admission v. Harvard* prohibits directing benefits to a specific racial group at any level of education.

- Reuters, "ABA Ends Diversity Requirements for Governing Board Seats" (August 12): Karen Sloan of Reuters reports that the ABA will no longer set aside five seats on its Board of Governors for lawyers who are "racially or ethnically diverse, a woman, or self-identify either as LGBTQ+ or as having a disability." Sloan reports that, moving forward, the seats will be open to candidates committed to "advancing the values of diversity, equity, and inclusion," regardless of their demographic backgrounds. Candidates for the seats will be evaluated based on their "involvement in groups or initiatives, lived experience, professional work, or obstacles overcome and resilience developed." Sloan also reports that the ABA did not cite political factors as the reason for making the change, but notes that the organization has previously faced pressure from the Trump administration over its diversity efforts, including a warning issued by the White House to the ABA that the ABA's status as the federal government's designated accreditor of law schools may be revoked due to its requirement that law schools show their commitment to diversity in recruitment and admissions (the ABA suspended that requirement through August 31, 2026).

- Law360, "Reverse Bias Rulings Offer Warning About DEI Quotas" (July 28): In an article for Law360, attorney Noah Bunzl writes that recent district and appellate court decisions have allowed "reverse discrimination" lawsuits to proceed based, in part, on the "mere existence" of a targeted or quota-based diversity program. Bunzl states that these recent cases, including in the Western District of Michigan and the Ninth Circuit, must be viewed in light of the Supreme Court's ruling in *Ames v. Ohio Department of Youth Services*, which held that non-minority plaintiffs in discrimination cases do not have a heightened evidentiary burden compared to minority plaintiffs.

- Law360, "Wisconsin Bar Settles Atty's Legal Challenge Over DEI Efforts" (July 17): Law360's Madison Arnold reports that the State Bar of Wisconsin settled a lawsuit brought by a state bar member and the Wisconsin Institute for Law & Liberty challenging the State Bar's eligibility requirements for certain bar programs as unlawfully based on race. Arnold reports that, as part of the settlement, the bar will redefine eligibility for two leadership programs to remove considerations of race, religion, and other protected characteristics, and instead focus on leadership capability, commitment to the profession, and potential to become a state bar leader.

- New York Times, "The D.E.I. Industry, Scorned by the White House, Turns to 'Safer' Topics" (July 15): The New York Times' Niko Gallogly reports that professionals focusing on diversity, equity, and inclusion are pivoting their work in light of shifting company priorities. Gallogly reports that these professionals are running fewer trainings related to race, gender, sexuality, and unconscious bias, and are instead focusing on topics

including mental health, wellness, and generational differences in the workplace. Gallogly interviewed multiple individuals working in this area, including Joelle Emerson, founder of Paradigm, a firm focused on culture and inclusion. Some expressed concern about ignoring problems related to race and gender in the workplace, while others see the expansion of these trainings as a way to "generate broader buy-in."

Case Updates:

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

1. Challenges to statutes, agency rules, executive orders, and regulatory decisions:

- ***American Alliance for Equal Rights v. Bennett*, No. 1:25-cv-00669 (N.D. Ill. 2025)**: On January 21, 2025, the American Alliance for Equal Rights ("AAER") sued the Attorney General of Illinois, the Director of the Illinois Department of Human Rights, and the Secretary of State of Illinois. AAER alleges that an Illinois law requiring "qualifying nonprofits to gather and publicize" certain demographic data online compels organizations to engage in unlawful discrimination. They assert that "[b]y forcing charities to publicize the demographics of their senior leadership, the law pushes them to hire candidates based on race." AAER also alleges the law violates the First Amendment by compelling organizations "to speak about a host of controversial demographic issues." AAER seeks permanent injunction and declaratory relief. On March 4, 2025, the United States intervened as a plaintiff. AAER filed a motion for preliminary injunction on April 4, 2025. The defendants subsequently moved to dismiss both complaints—for lack of subject matter jurisdiction as to the United States and failure to state a claim as to AAER—and opposed the preliminary injunction motion.
    - **Latest update**: On August 20, 2025, the court issued its ruling on the motions for preliminary injunction and to dismiss. The court granted in part the defendants' motion to dismiss. The court held that AAER lacked standing to sue on behalf of its anonymous members based on alleged public disclosure, which the court held was too speculative to constitute injury in fact. However, the court held that AAER did have standing to sue in relation to the collection of its members' sensitive information. The court granted the motion to dismiss the United States from the case due to lack of injury in fact. The court denied AAER's motion for preliminary injunction, reasoning that AAER proved neither likelihood of success on the merits nor irreparable harm.
- ***Doe v. EEOC*, No. 1:25-cv-01124 (D.D.C. 2025)**: On April 15, 2025, three law students, proceeding under pseudonyms, sued the EEOC, challenging the EEOC's letters seeking law firms' demographic and diversity-related data. The plaintiffs allege that those letters exceed the agency's authority under Title VII and violate the Paperwork Reduction Act.

The plaintiffs seek declaratory judgment, an injunction barring the collection of sensitive information through improper means, and an order compelling withdrawal of the investigative letters and return of any information collected pursuant to those letters. On June 5, 2025, the plaintiffs moved for summary judgment. On July 31, the EEOC moved to dismiss the complaint, moved in the alternative for summary judgment, and opposed the plaintiffs' summary judgment motions. The defendants argue that the letters were not a formal investigation but simply informal fact-gathering. The defendants assert that the plaintiffs lack standing because they did not experience harm, and any harm they may experience would be caused by the law firms, not the EEOC. The defendants also challenge the ultra vires claim and assert that the plaintiffs "have identified no basis for such [an] expansive" remedy as injunctive or declaratory relief.

    - **Latest update**: On August 14, the plaintiffs opposed the EEOC's motions to dismiss and for summary judgment, asserting they experienced concrete harm traceable to the EEOC, as the EEOC was the "but for" cause of the requests for sensitive information.

- ***Glass, Lewis & Co., LLC v. Ken Paxton*, No. 1:25-cv-01153 (W.D. Tex. 2025)**: On July 24, 2025, Glass, Lewis & Co., LLC sued Texas Attorney General Ken Paxton to enjoin Texas Senate Bill 2337, which, starting September 1, 2025, will require proxy advisory services like Glass Lewis to "conspicuously disclose" that their advice or recommendations are "not provided solely in the financial interest of the shareholders of a company" if the advice or recommendations are based wholly or in part on ESG, DEI, social credit, or sustainability factors. Glass Lewis alleges that the law unconstitutionally discriminates based on viewpoint and infringes on its freedom of association in violation of the First Amendment. Glass Lewis also contends that the law is unconstitutionally vague under the First and Fourteenth Amendments and is preempted by ERISA. Also on July 24, 2025, Glass Lewis contemporaneously moved for a preliminary injunction to prevent Texas Senate Bill 2337 from going into effect on September 1, 2025, contending that Glass Lewis will suffer "irreparable harm" if the Act becomes effective.

    - **Latest update**: On August 19, 2025, the Attorney General filed an opposition to the preliminary injunction motion, asserting that (1) the plaintiffs lack standing, having pled no actionable injury in fact, (2) the law does not violate the U.S. Constitution nor is it preempted by federal law, and (3) there is no irreparable harm. The court held an evidentiary hearing on August 29, 2025. During the hearing, the court granted the preliminary injunction motion, reasoning that the law compels speech likely in violation of the First Amendment. The judge stated that he will issue a written order within 30 days. He set a trial date for February 2, 2026.

- ***National Education Association, et al. v. Formella, et al.*, No. 1:25-cv-00293 (D.N.H. 2025)**: On August 7, 2025, the National Education Association (along with four New Hampshire school districts, DEI professionals, and a nonprofit that provides LGBTQ+ programming in schools) sued multiple New Hampshire state officials to enjoin enforcement of New Hampshire statutes RSA 21-I-:112-116 and RSA 186:71-77. These statutes, effective July 1, 2025, prohibit DEI initiatives, programs, trainings, and policies in public schools and other public entities. The plaintiffs allege that the statutes (1) violate

the Supremacy Clause because they conflict with federal anti-discrimination laws, (2) violate the First Amendment rights of students and educators, and (3) are unconstitutionally vague and ambiguous under the United States and New Hampshire Constitutions.

    - **Latest update**: The plaintiffs filed an emergency motion for preliminary injunction on August 11, 2025. On August 21, 2025, the defendants filed an opposition to the motion, asserting that the plaintiffs lack standing, that the challenged laws do not conflict with federal law, and that no irreparable harm has been shown. Following an evidentiary hearing on August 27, 2025, the court took the motion under advisement. A decision remains pending.

- ***National Urban League, et al. Trump, et al*., No. 1:25-cv-00471 (D.D.C. 2025), No. 1:25-cv-00471 (D.D.C. 2025)**: On February 19, 2025, the National Urban League, National Fair Housing Alliance, and AIDS Foundation of Chicago sued President Donald Trump challenging EO 14151, EO 14168, EO 14173, and related agency actions, alleging they violated the First Amendment, Fifth Amendment, and Equal Protection Clause of the Constitution, as well as the APA. The plaintiffs filed a motion for a preliminary injunction, which the court denied on May 2, 2025. On June 30, 2025, the plaintiffs filed an amended complaint, which included new factual allegations and omitted their APA claim.

    - **Latest update**: On August 8, 2025, the defendants moved to dismiss. The defendants contend that the plaintiffs lack Article III standing due to lack of alleged injury and that the court lacks jurisdiction because the Tucker Act vests jurisdiction exclusively in the Court of Federal Claims for these claims. The defendants also challenged each claim on the merits, asserting: (1) the First Amendment claim fails because the EOs do not regulate speech outside federal funds, (2) the Fifth Amendment vagueness claim fails because vagueness claims traditionally do not apply to "presidential directives," (3) the Equal Protection claim fails because the EOs do not discriminate based on race and survive rational basis scrutiny, and (4) the EOs are not *ultravires* because they direct agencies to implement their directives "consistent with applicable law." On August 24, 2025, the court granted a motion by the nonprofit entity Do No Harm for leave to file an amicus brief in support of the defendants. The plaintiffs' opposition to the defendant's motion to dismiss is due September 12. No hearing has been scheduled.

- ***State of California, et al. v. U.S. Department of Education, et al.*, No. 1:25-cv-10548 (D. Mass. 2025)**: On March 6, 2025, the states of California, Massachusetts, New Jersey, Colorado, Illinois, Maryland, New York, and Wisconsin (collectively, "the Plaintiff States") sued DOE, alleging that it arbitrarily terminated previously awarded grants under the Teacher Quality Partnership ("TQP") and Supporting Effective Educator Development ("SEED") programs in violation of the APA. On June 2, 2025, the Plaintiff States filed an amended complaint. On June 30, DOE filed a motion to dismiss for lack of jurisdiction or, in the alternative, to transfer the case to the Court of Federal Claims. In its motion, DOE argued that the APA's waiver of sovereign immunity does not extend to claims sounding in contract, like the Plaintiff States' claims. In the alternative, DOE argued that "the Tucker

Act grants the Court of Federal Claims jurisdiction over suits based on any express or implied contract with the United States."

- **Latest update**: On July 21, 2025, the Plaintiff States filed an opposition to DOE's motion to dismiss, arguing that their claims do not sound in contract and therefore do not belong in the Court of Federal Claims under the Tucker Act. In support of their argument, the Plaintiff States reasoned that their claims are based on the defendants' violations of the APA and the Constitution, not on whether the defendants breached any contract. The Plaintiff States also reasoned that they seek specific relief (i.e., enjoining the defendants' actions), not contract-based remedies of contract enforcement or monetary damages.

2. Actions against educational institutions:

- ***Johnson v. Fliger, et al.*, No. 1:23-cv-00848 (E.D. Cal. 2023), on appeal at No. 24-6008 (9th Cir. 2024)**: On June 1, 2023, Daymon Johnson, a professor at Bakersfield College in California, sued several Bakersfield and Kern Community College District officials, alleging that the district's commitment to "embrac[e] diversity" and "anti-racism" through state and local district statutes, regulations, and policies imposes an "ideological orientation" on district faculty by suppressing opposing viewpoints and political speech in violation of Section 1983 and the First and Fourteenth Amendments of the U.S. Constitution. On September 23, 2024, the court dismissed the complaint, reasoning that the plaintiff lacked standing to bring a pre-enforcement action because he failed to allege sufficient injury and dismissed the case without prejudice. On September 23, 2024, the plaintiff filed a notice of appeal. On July 14, 2025, the Ninth Circuit reversed the district court's conclusion that the plaintiff lacked standing, holding that (1) the plaintiff sufficiently alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest" under the First Amendment, (2) his intended conduct was "arguably proscribed" by the regulations because they directly regulate the plaintiff as a community college employee and faculty member, and (3) the plaintiff adequately alleged a "credible threat" of enforcement under the relevant provisions. The court remanded the plaintiff's motion for preliminary injunction for the district court to consider in the first instance.
    - **Latest update**:On July 28, 2025, the defendants filed a petition for rehearing, arguing that (1) the plaintiff lacks standing to sue under the California Code of Regulations, Title 5, § 53605(c) because he is a faculty member and thus not subject to the provision; and (2) the plaintiff lacks standing to sue under California Education Code § 87732(f) because the defendants disavowed enforcing the statute as to the plaintiff at oral argument. On August 22, 2025, the Ninth Circuit denied defendants' petition for rehearing.

Legislative Updates

- **Texas HB 171**: On July 22, 2025, Texas State Representative Brian Harrison (R) introduced Texas House Bill 171. The bill provides that "[a]n institution of higher education may not offer a certificate or degree program … in lesbian, gay, bisexual, transgender or queer studies… or … in diversity, equity, and inclusion." Further, if an institution of higher education determines that an employee has violated the statute, the institution must first "place the employee on unpaid leave for the next academic year" and then "discharge the employee" for any subsequent violation, and further "report the determination and action taken by the institution to the [Texas Higher Education] coordinating board."

- **U.S. House Bill 4603**: On July 22, 2025, U.S. House Representative John McGuire (R-VA) introduced U.S. House Bill 4603, which would amend the Public Utility Regulatory Policies Act of 1978. The bill would prohibit state regulatory authorities from approving the rate of a state-regulated electric utility if the utility engages in certain DEI practices or considers ESG factors in establishing rates. Prohibited DEI practices include requiring employees to undergo training teaching that any particular race, sex, or other statutorily protected trait "is inherently or systemically superior or inferior, oppressive or oppressed, or privileged or unprivileged." The bill provides a carveout for state-regulated electric utilities to continue complying with existing federal laws and regulations that require specific ESG factors.

- **Ohio HB 96**: On June 30, 2025, Ohio Governor Mike DeWine (R) signed the state's effective operating appropriation bill, House Bill 96, into law. The Act prohibits, to the extent permitted by federal law, any state funding of DEI initiatives or mental health services that "promote or affirm social gender transition." The Act also defines "sex" as the "biological indication of male and female … without regard to an individual's psychological, chosen or subjective experience of gender."

- **Texas SB 2337 (Previously covered)**: On June 20, 2025, Texas Governor Greg Abbott (R) signed Senate Bill 2337 into law. Effective September 1, 2025, the Act requires shareholder proxy advisors to make certain disclosures when recommending shareholder votes based "wholly or partly" on factors other than the financial interest of a company's shareholders. Factors defined as being outside shareholders' financial interest include DEI and ESG goals, factors, and investment principles. Proxy advisors whose recommendations incorporate these factors are required to provide "clear, factual disclosures" for recommending "casting a vote for nonfinancial reasons." The Act renders any violation of these disclosure rules to be an unlawful deceptive trade practice and permits affected parties to pursue either declaratory or injunctive relief.

- **Texas HB 229**: On June 20, 2025, the Texas Legislature approved House Bill 229, which defines biological sex for purposes of Texas state law. The bill, effective on September 1, 2025, defines "sex" as "either male or female," and asserts that "biological differences between the sexes" provide "legitimate reasons to distinguish between the sexes with respect to prisons . . . locker rooms, restrooms, and other areas where biology, safety, or privacy are implicated." The bill states that laws that distinguish between the sexes are subject to "intermediate constitutional scrutiny" which "allows the law to distinguish

between the sexes where such distinctions are substantially related to important governmental objectives." The bill also requires governmental entities that collect "statistics information that identifies the sex of an individual [to] . . . identify each individual as either male or female."

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