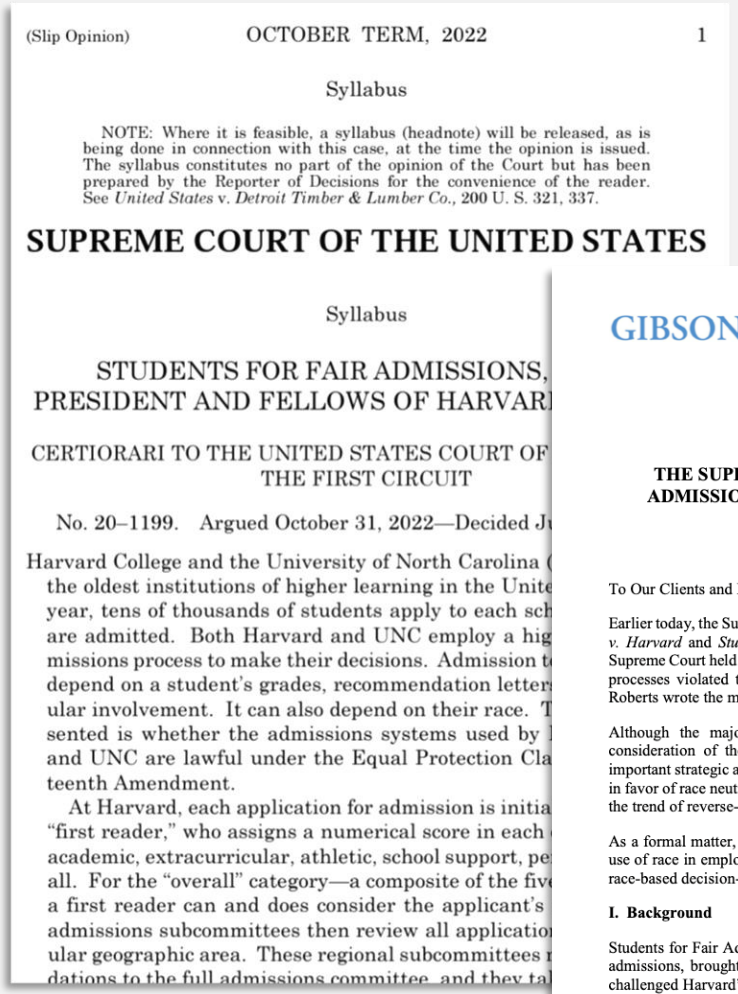
October 2024

Diversity, Equity & Inclusion Post-*SFFA*

GIBSON DUNN

The June 2023 SCOTUS Affirmative Action Decision (the "SFFA Decision")



(Slip Opinion) OCTOBER TERM, 2022 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

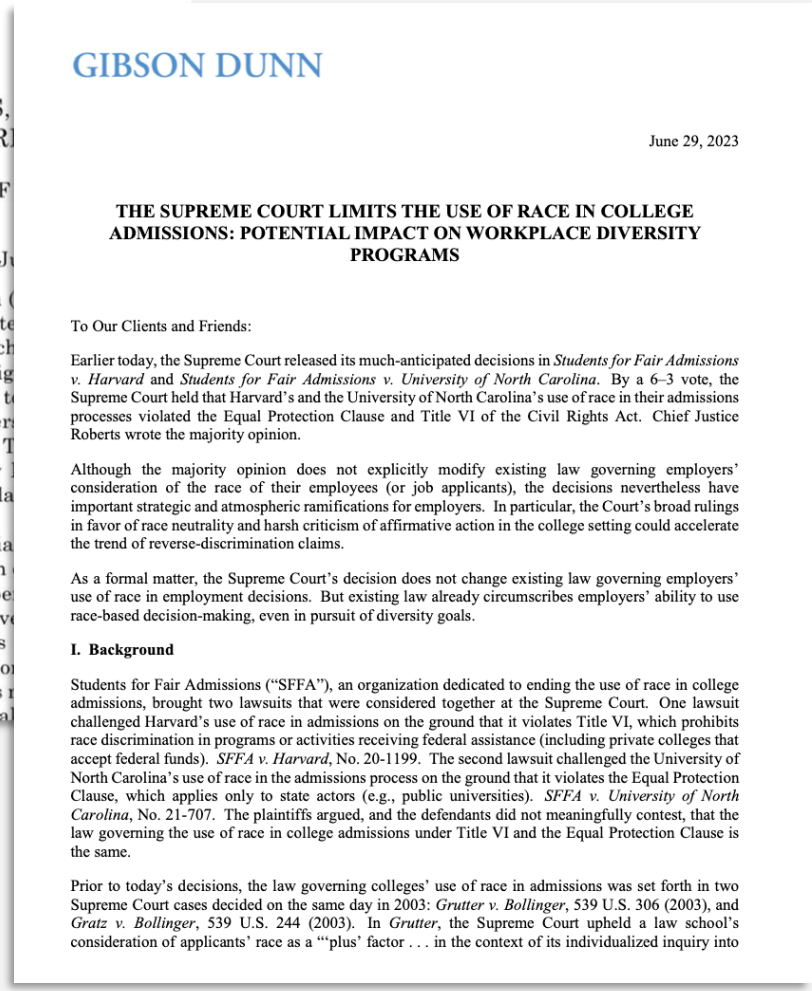
Syllabus

STUDENTS FOR FAIR ADMISSIONS,
PRESIDENT AND FELLOWS OF HARVAR

CERTIORARI TO THE UNITED STATES COURT OF
THE FIRST CIRCUIT

No. 20–1199. Argued October 31, 2022—Decided Ju

Harvard College and the University of North Carolina (
the oldest institutions of higher learning in the Unite
year, tens of thousands of students apply to each sch
are admitted. Both Harvard and UNC employ a hig
missions process to make their decisions. Admission t
depend on a student's grades, recommendation letter
ular involvement. It can also depend on their race. T
sented is whether the admissions systems used by
and UNC are lawful under the Equal Protection Cla
teenth Amendment.
At Harvard, each application for admission is initia
"first reader," who assigns a numerical score in each
academic, extracurricular, athletic, school support, pe
all. For the "overall" category—a composite of the fiv
a first reader can and does consider the applicant's
admissions subcommittees then review all applicatio
ular geographic area. These regional subcommittees
dations to the full admissions committee, and they ta



GIBSON DUNN

June 29, 2023

THE SUPREME COURT LIMITS THE USE OF RACE IN COLLEGE ADMISSIONS: POTENTIAL IMPACT ON WORKPLACE DIVERSITY PROGRAMS

To Our Clients and Friends:

Earlier today, the Supreme Court released its much-anticipated decisions in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*. By a 6–3 vote, the Supreme Court held that Harvard's and the University of North Carolina's use of race in their admissions processes violated the Equal Protection Clause and Title VI of the Civil Rights Act. Chief Justice Roberts wrote the majority opinion.

Although the majority opinion does not explicitly modify existing law governing employers' consideration of the race of their employees (or job applicants), the decisions nevertheless have important strategic and atmospheric ramifications for employers. In particular, the Court's broad rulings in favor of race neutrality and harsh criticism of affirmative action in the college setting could accelerate the trend of reverse-discrimination claims.

As a formal matter, the Supreme Court's decision does not change existing law governing employers' use of race in employment decisions. But existing law already circumscribes employers' ability to use race-based decision-making, even in pursuit of diversity goals.

I. Background

Students for Fair Admissions ("SFFA"), an organization dedicated to ending the use of race in college admissions, brought two lawsuits that were considered together at the Supreme Court. One lawsuit challenged Harvard's use of race in admissions on the ground that it violates Title VI, which prohibits race discrimination in programs or activities receiving federal assistance (including private colleges that accept federal funds). *SFFA v. Harvard*, No. 20-1199. The second lawsuit challenged the University of North Carolina's use of race in the admissions process on the ground that it violates the Equal Protection Clause, which applies only to state actors (e.g., public universities). *SFFA v. University of North Carolina*, No. 21-707. The plaintiffs argued, and the defendants did not meaningfully contest, that the law governing the use of race in college admissions under Title VI and the Equal Protection Clause is the same.

Prior to today's decisions, the law governing colleges' use of race in admissions was set forth in two Supreme Court cases decided on the same day in 2003: *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Grutter*, the Supreme Court upheld a law school's consideration of applicants' race as a "'plus' factor . . . in the context of its individualized inquiry into

Inconsistent Guidance from EEOC on Legality of DEI Programs

On the day of the *SFFA* decision, EEOC chair Charlotte Burrows, a Democrat, issued a press release reassuring employers that their DEI programs were lawful.

The same day, fellow EEOC Commissioner Andrea Lucas, a Republican, wrote an op-ed for Reuters effectively telling employers that although the ruling didn't apply to them, many existing DEI programs were already unlawful.

On November 7, the newest EEOC commissioner, Kalpana Kotagal, voiced support for lawful DEI programming in workplaces.


U.S. Equal Employment Opportunity Commission

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Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs

Press Release
06-29-2023

Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs

The following is a statement from U.S. EEOC Chair Charlotte A. Burrows, in response to today's Supreme Court decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*:

"Today's Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies. That's a problem for our economy because businesses often rely on


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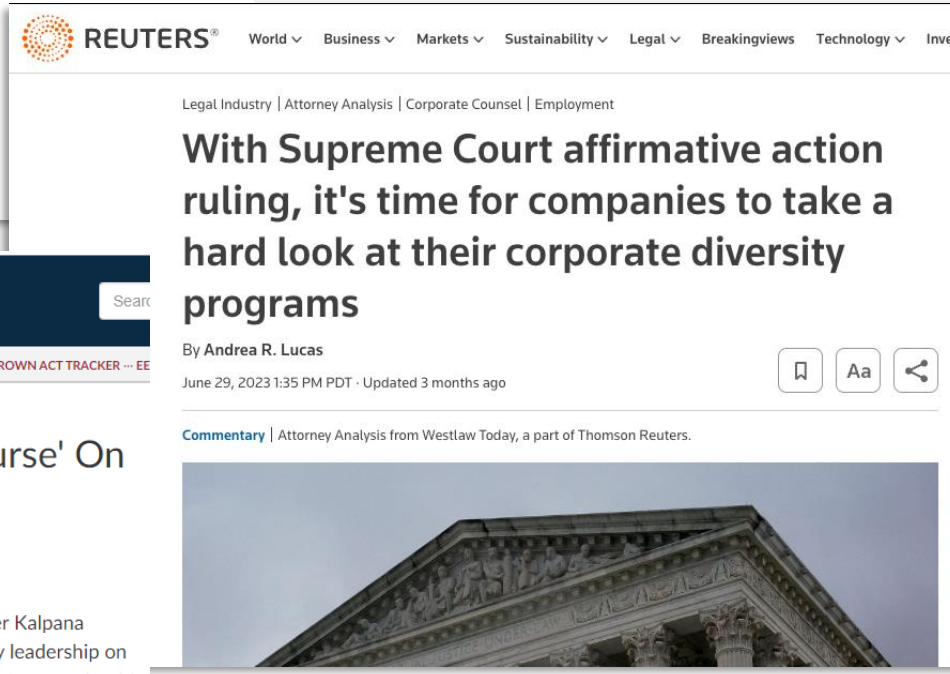
EEOC's Kotagal Says 'Stay The Course' On Diversity Efforts

By Anne Cullen · 2023-11-07 17:02:51 -0500 · Listen to article

Newest U.S. Equal Employment Opportunity Commission member Kalpana Kotagal said Tuesday that employers will "hear more" from agency leadership on diversity, equity, inclusion and accessibility programs, and that businesses should "stay the course" despite recent pushback.

While workplace DEIA efforts have been under fire in the wake of the U.S. Supreme Court's dissolution of affirmative action in college admissions, Kotagal said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Legal Industry | Attorney Analysis | Corporate Counsel | Employment

With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs

By Andrea R. Lucas

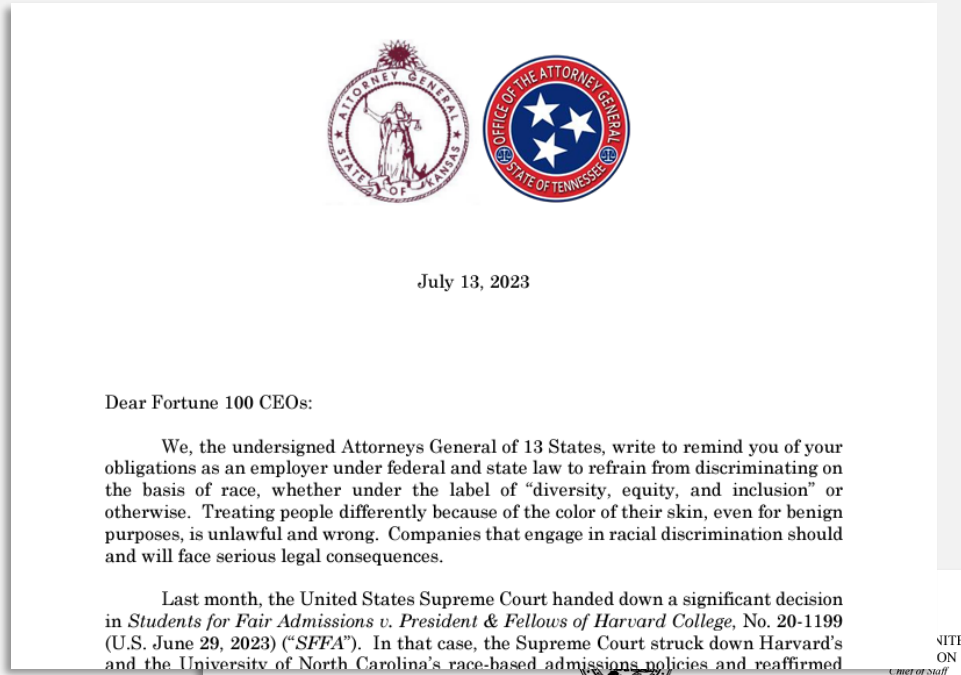
June 29, 2023 1:35 PM PDT · Updated 3 months ago

Commentary | Attorney Analysis from Westlaw Today, a part of Thomson Reuters.

DUELING LETTERS BY ATTORNEYS GENERAL

Republican Attorneys General of **13 states** issued a warning to the CEOs of Fortune 100 companies threatening "serious legal consequences" over corporate race-based employment preferences and diversity policies.

Democrat Attorneys General of **20 states and Washington D.C.** responded with a letter to major companies asserting that efforts to develop diverse and inclusive work environments are legal.

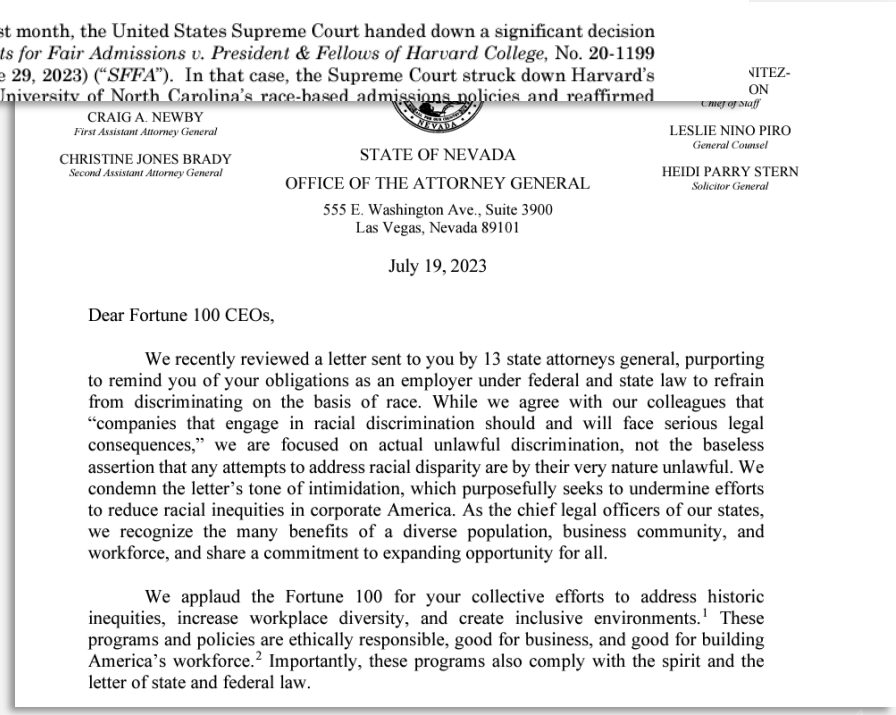


July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

Last month, the United States Supreme Court handed down a significant decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) ("*SFFA*"). In that case, the Supreme Court struck down Harvard's and the University of North Carolina's race-based admissions policies and reaffirmed



CRAIG A. NEWBY
First Assistant Attorney General

CHRISTINE JONES BRADY
Second Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101

LESLIE NINO PIRO
General Counsel

HEIDI PARRY STERN
Solicitor General

July 19, 2023

Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences," we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter's tone of intimidation, which purposefully seeks to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.

We applaud the Fortune 100 for your collective efforts to address historic inequities, increase workplace diversity, and create inclusive environments.[1] These programs and policies are ethically responsible, good for business, and good for building America's workforce.[2] Importantly, these programs also comply with the spirit and the letter of state and federal law.

Post-*SFFA* Activity
Fifteen Months Later

Post-*SFFA* Activity
By the Numbers

Over 50

New cases filed related to *SFFA*

Over 100

Legislation introduced related to DEI

28

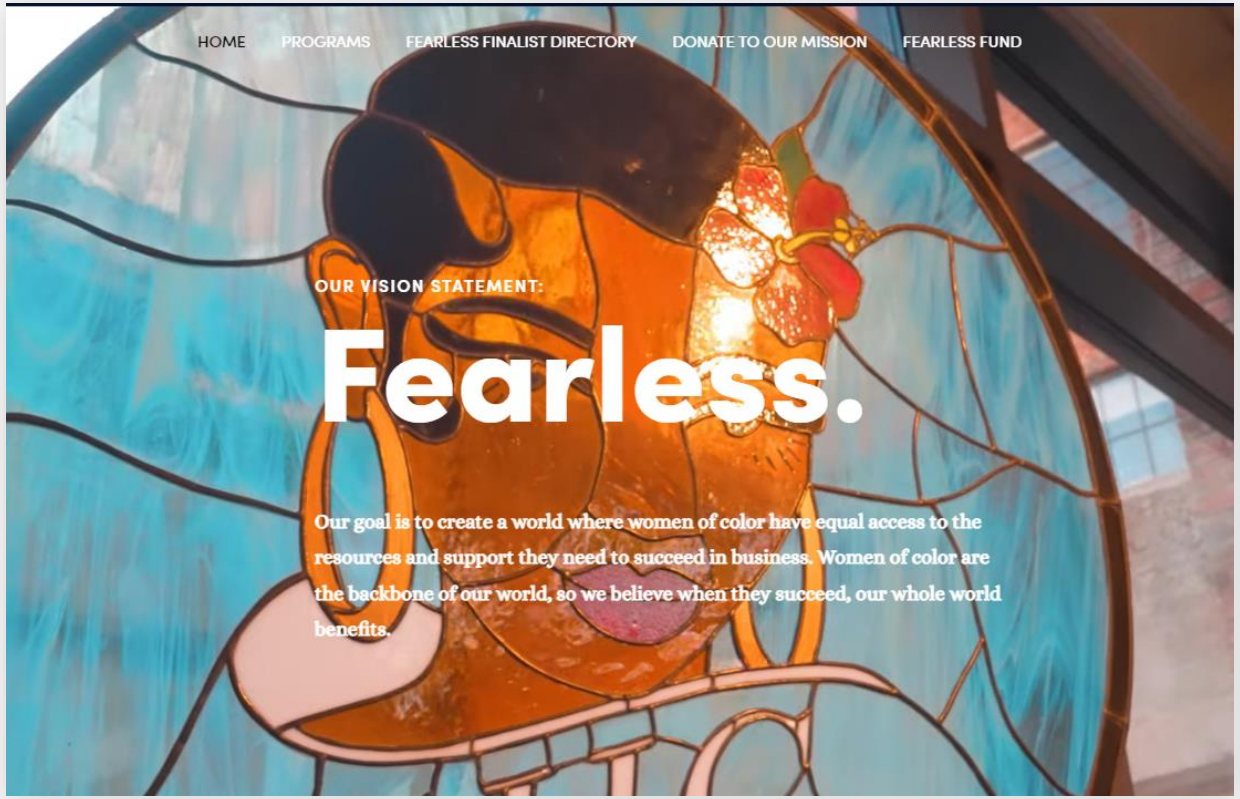
Letters sent to the EEOC

2

AG Investigations

Fearless Fund Litigation

Fearless Fund Lawsuit Update:
AAER sought a preliminary injunction to require Fearless Fund to adopt race-neutral requirements for its grant program for Black women entrepreneurs. The Court denied the motion for preliminary injunction, ruling that the grant program constituted protected speech. AAER appealed. The Eleventh Circuit held in a 2-1 decision that AAER is entitled to a preliminary injunction. The case has since settled, and the case has been dismissed with prejudice.



FEARLESS fund

Anti-DEI Organizations

- 1792 Exchange
- Alliance for Fair Board Recruitment (AFBR)
- America First Legal
- American Alliance for Equal Rights
- American Civil Rights Project (ACRP)
- Color Us United
- Do No Harm
- Equal Protection Project
- Foundation Against Intolerance and Racism (FAIR)
- Foundation for Individual Rights and Expression (FIRE)
- Goldwater Institute
- National Center for Public Policy Research (NCPPR)
- Students for Fair Admissions (SFFA)
- National Legal and Policy Center
- Pacific Legal Foundation
- Wisconsin Institute for Law & Liberty (WILL)

Starbuck's Ongoing Activist Campaigns

Robby Starbuck, 36
Anti-Trans Activist
Content Creator
Candidate, 2022 United States House of Representatives, TN
Documentary Director, *War on Children* (2023)
Music Video Director
Over 70 music videos and over 87 credits on IMDb
Active on X and all social media platforms

Starbuck's Ongoing Activist Campaigns

- **Tractor Supply**
  - **June 6:** First post re Tractor Supply.
  - **June 27**: Tractor Supply announces DEI changes.
- **John Deere**
  - **July 9:** First post re John Deere.
  - **July 16**: John Deere announces DEI changes.
- **Harley Davidson**
  - **July 23:** First post re Harley Davidson.
  - **August 19**: Harley-Davidson announces DEI changes.
- **Brown-Forman**
  - **August 22**: Brown-Forman announces DEI changes.
- **Lowe's**
  - **August 26**: Lowe's announces DEI changes.
- **Ford**
  - **August 29**: Ford announces DEI changes.
- **Molson Coors**
  - **September 3**: Molson Coors announces DEI changes
- **Stanley Black & Decker**
  - **September 16:** Stanley Black & Decker announces DEI changes.
- **Caterpillar, Inc.**
  - **September 19:** Caterpillar announces DEI Changes
- **Toyota**
  - **September 26:** First post re Toyota
  - **October 3**: Toyota announces DEI changes

Gibson Dunn DEI Task Force

In the wake of *SFFA*, we formed a multidisciplinary DEI Task Force to help advise our clients on potential challenges to their DEI programs

Mylan Denerstein

Co-Chair of Public Policy Practice Group & Global Diversity Committee Chair

New York

Jason Schwartz

Co-Chair of Labor & Employment Practice Group

Washington, D.C.

Molly Senger

Labor & Employment Partner

Washington, D.C.

Zakiyyah Salim-Williams

Partner & Chief Diversity Officer

Washington, D.C.

Katherine Smith

Co-Chair of Labor and Employment Practice

Los Angeles

In addition to the leadership team, the task force includes partners with deep government and private sector experience in employment, civil rights, appellate, securities, DEI work and ESG, corporate governance and government contracts:

- Zainab Ahmad | New York
- Jessica Brown | Denver
- Megan Cooney | Orange County
- Theane Evangelis | Los Angeles
- Blain Evanson | Orange County
- George Hazel | Washington, D.C.
- Beth Ising | Washington, D.C.
- Roscoe Jones | Washington, D.C.
- Brian Lutz | San Francisco
- DJ Manthripragada | Los Angeles
- Michele Maryott | Orange County
- Marcellus McRae | Los Angeles
- Ron Mueller | Washington, D.C.
- Karl Nelson | Dallas
- Lindsay Paulin | Washington, D.C.
- Tiffany Phan | Los Angeles
- Alex Southwell | New York
- Greta Williams | Washington, D.C.
- Lori Zyskowski | New York

DEI Task Force Updates


GIBSON DUNN

DEI Task Force Update

January 17, 2024

GIBSON DUNN

DEI Task Force Update

January 4, 2024

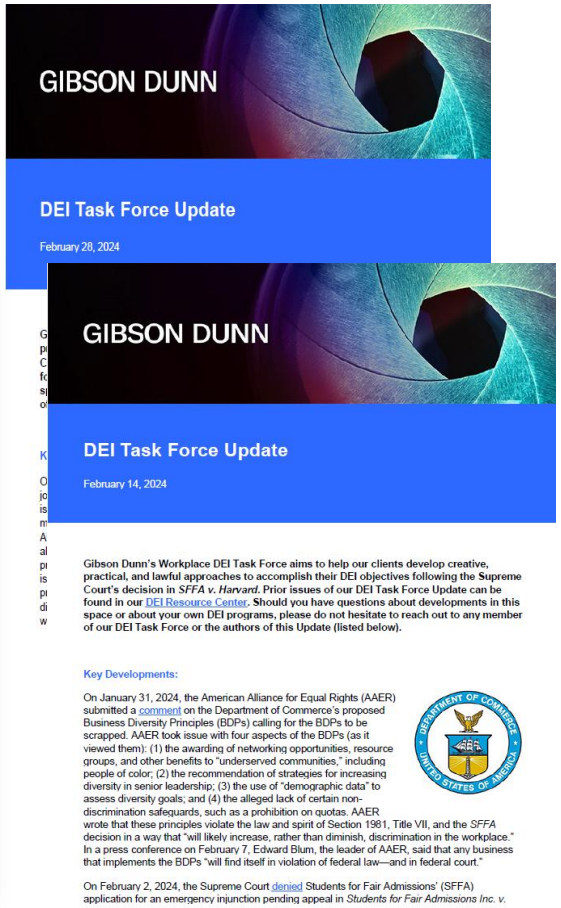
Gibson Dunn has formed a Workplace DEI Task Force, bringing to bear the Firm's experience in employment, appellate and Constitutional law, DEI programs, securities and corporate governance, and government contracts to help our clients develop creative, practical, and lawful approaches to accomplish their 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).

Key Developments:

On December 19, 2023, a dues-paying member of the Wisconsin Bar filed a complaint against the Bar over its "Diversity Clerkship Program," a summer hiring program for first-year law students. *Suhr v. Dietrich*, No. 2:23-cv-01697-SCD (E.D. Wis. 2023). The program's application requirements had previously stated that eligibility was based on membership in a minority group. After *SFFA v. Harvard*, the eligibility requirements were changed to include students with "backgrounds that have been historically excluded from the legal field." The plaintiff claims that the Bar's program is unconstitutional after *SFFA*, even with the new race-neutral language, because, in practice, the selection process is still based on the applicant's race or gender. The plaintiff also alleges that the Bar's diversity program constitutes compelled speech and compelled freedom of association in violation of the First Amendment.

STATE BAR OF WISCONSIN

In December 2023, America First Legal ("AFL") filed FOIA requests with two federal agencies, seeking records related to the agencies' DEI practices and decision making. On December 13,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DEI Task Force Update

February 28, 2024

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DEI Task Force Update

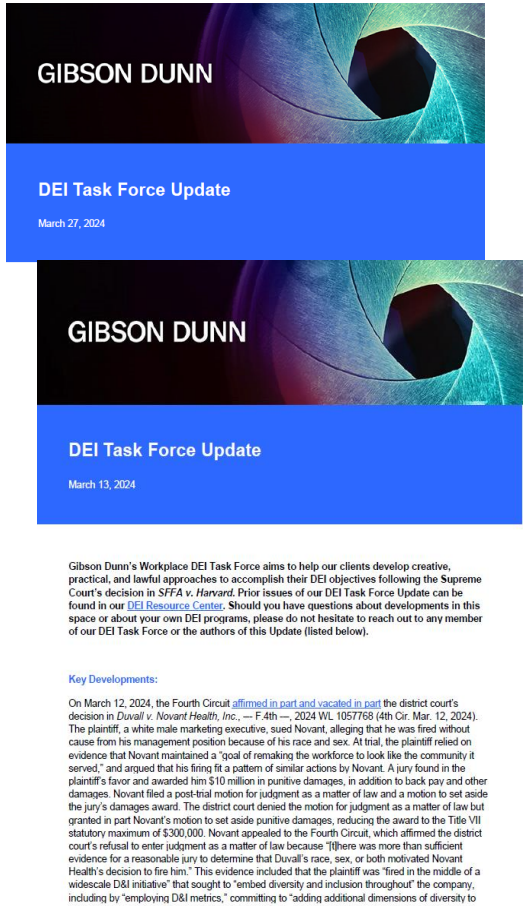
February 14, 2024

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 January 31, 2024, the American Alliance for Equal Rights (AAER) submitted a comment on the Department of Commerce's proposed Business Diversity Principles (BDPs) calling for the BDPs to be scrapped. AAER took issue with four aspects of the BDPs (as it viewed them): (1) the awarding of networking opportunities, resource groups, and other benefits to "underserved communities," including people of color; (2) the recommendation of strategies for increasing diversity in senior leadership; (3) the use of "demographic data" to assess diversity goals; and (4) the alleged lack of certain non-discrimination safeguards, such as a prohibition on quotas. AAER wrote that these principles violate the law and spirit of Section 1981, Title VII, and the *SFFA* decision in a way that "will likely increase, rather than diminish, discrimination in the workplace." In a press conference on February 7, Edward Blum, the leader of AAER, said that any business that implements the BDPs "will find itself in violation of federal law—and in federal court."

On February 2, 2024, the Supreme Court denied Students for Fair Admissions' (SFFA) application for an emergency injunction pending appeal in *Students for Fair Admissions Inc. v.*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DEI Task Force Update

March 27, 2024

GIBSON DUNN

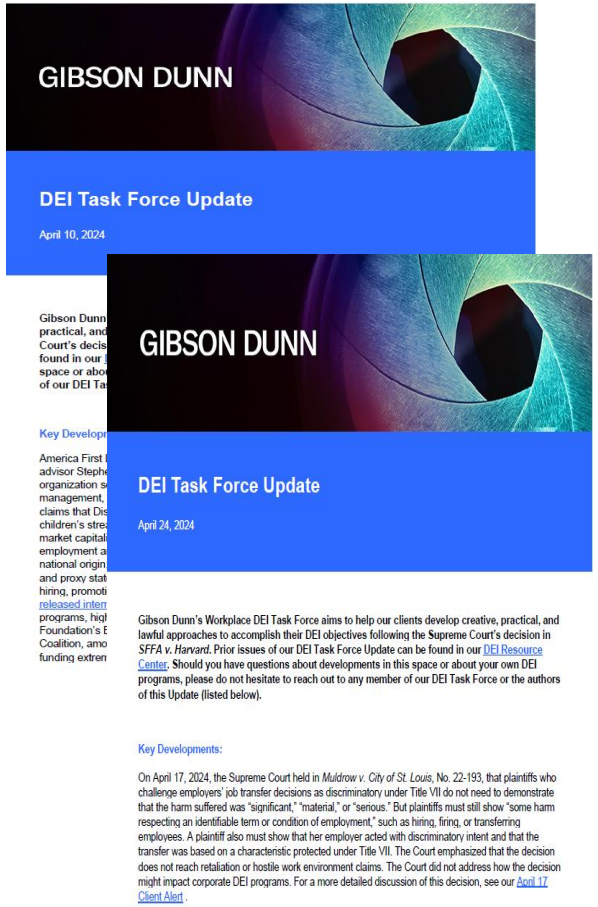
DEI Task Force Update

March 13, 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 March 12, 2024, the Fourth Circuit affirmed in part and vacated in part the district court's decision in *Duvall v. Novant Health, Inc.*, — F.4th —, 2024 WL 1057768 (4th Cir. Mar. 12, 2024). The plaintiff, a white male marketing executive, sued Novant, alleging that he was fired without cause from his management position because of his race and sex. At trial, the plaintiff relied on evidence that Novant maintained a "goal of remaking the workforce to look like the community it served," and argued that his firing fit a pattern of similar actions by Novant. A jury found in the plaintiff's favor and awarded him $10 million in punitive damages, in addition to back pay and other damages. Novant filed a post-trial motion for judgment as a matter of law and a motion to set aside the jury's damages award. The district court denied the motion for judgment as a matter of law but granted in part Novant's motion to set aside punitive damages, reducing the award to the Title VII statutory maximum of $300,000. Novant appealed to the Fourth Circuit, which affirmed the district court's refusal to enter judgment as a matter of law because "[t]here was more than sufficient evidence for a reasonable jury to determine that Duvall's race, sex, or both motivated Novant Health's decision to fire him." This evidence included that the plaintiff was "fired in the middle of a widescale D&I initiative" that sought to "embed diversity and inclusion throughout" the company, including by "employing D&I metrics," committing to "adding additional dimensions of diversity to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DEI Task Force Update

April 10, 2024

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DEI Task Force Update

April 24, 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 April 17, 2024, the Supreme Court held in *Muldrow v. City of St. Louis*, No. 22-193, that plaintiffs who challenge employers' job transfer decisions as discriminatory under Title VII do not need to demonstrate that the harm suffered was "significant," "material," or "serious." But plaintiffs must still show "some harm respecting an identifiable term or condition of employment," such as hiring, firing, or transferring employees. A plaintiff also must show that her employer acted with discriminatory intent and that the transfer was based on a characteristic protected under Title VII. The Court emphasized that the decision does not reach retaliation or hostile work environment claims. The Court did not address how the decision might impact corporate DEI programs. For a more detailed discussion of this decision, see our April 17 Client Alert .