NEXT ON THE CHOPPING BLOCK: THE LITIGATION CAMPAIGN AGAINST RACE-CONSCIOUS POLICIES BEYOND AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS

By Nino C. Monea*

The Supreme Court recently ended university affirmative action. But the decision could have far-reaching implications for all types of race-conscious policies across the country. This Article examines those poised to take advantage of the anticipated Supreme Court ruling: the vast collection of conservative and libertarian impact litigation firms challenging the use of race in any context. Over five-dozen ongoing and recent lawsuits across the country are analyzed to both understand how these suits are pled and defended against, and presage what types of policies will come under assault in the coming months and years.

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* Assistant Professor, Law Department, United States Military Academy at West Point. J.D., Harvard Law School; B.S. Eastern Michigan University. All views expressed are the author's alone and do not represent those of the United States Government or any of its components. Thank you to Keshav Dimri, Charlie Lincoln, Dr. Perry Francis, and James Tatum for their feedback on this Article. Special thanks to the editors of the *Boston University Public Interest Law Journal* for their yeoman work improving the article.

INTRODUCTION

"Affirmative action" is normally associated with university admissions policies that began in the late 1960s,[1] but the phrase has a different origin. In one telling, it can be traced back to 1961, when President John F. Kennedy issued an executive order directing contractors working with federal agencies to "take affirmative action" to ensure employees were treated fairly and "without regard to their race, creed, color, or national origin."[2] But in 1959, federal Judge John E. Miller declared that the Eighth Circuit had a mandate from the Supreme Court to

[1] Genevieve Carlton, *A History of Affirmative Action in College Admissions*, BEST COLLEGES (Dec. 7, 2022), https://www.bestcolleges.com/news/analysis/2020/08/10/history-affirmative-action-college/.
[2] Exec. Order 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

take "affirmative action" to integrate Little Rock high schools.[3] Even before that, a 1954 pamphlet by a Quaker organization—the American Friends Service Committee—said the first step toward integrating education was that "affirmative action" be taken by school administrators.[4]

Whenever affirmative action started, the Supreme Court looks to have ended it in 2023. The twin cases of *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina* (collectively referred to as "*SFFA*") essentially banned race-based admissions.[5]

Naturally, ending the use of race in student admissions will be felt first in higher education. In one sense, the immediate impact may be limited. After all, three-fifths of schools do not use race in their admissions.[6] And surely some families will get admissions consultants to help students navigate how to tailor an application to comply with the Supreme Court's ruling.

But the decision may well have a much larger impact outside of college admissions. To take one example, several lower courts have held that racial diversity among a police force is a compelling interest to justify affirmative action in officer selection.[7] One court explicitly cited university admission cases to justify why a police force needed to be diverse.[8] Relatedly, a California court upheld giving female and minority applicants a "plus" for prison guard job promotions and transfers, analogizing it to university admission case law.[9]

The potential impact of *SFFA* goes far beyond public safety. Many have predicted that a decision banning the use of race in admissions could jeopardize "[d]ozens of government programs that address past and current discrimination, advance racial equity, and seek to close the racial wealth gap," along with countless other things.[10] But we need not rely on prediction alone, for there is already a wave of litigation that looks poised to take advantage of the recent Supreme Court ruling.

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[3] *L.R. Judge Fails to Remove Gov't from Segregation Trial*, BASTROP DAILY ENTER., Jan. 6, 1959, at 1, https://www.newspapers.com/image/844037675/.

[4] *Quakers Issue Booklet on School Integration*, ITEM, Apr. 28, 1954, at 4 https://www.newspapers.com/image/668983973/.

[5] Although the cases were considered and decided concurrently, the Harvard case received top billing in the United States Report. 600 U.S. 181 (2023) (hereinafter SFFA v. Harvard).

[6] *See* SFFA v. Harvard, 600 U.S. 181 (2023) at 229 n.9.

[7] *See e.g.* Petit v. City of Chicago, 352 F.3d 1111, 1115 (7th Cir. 2003); Reynolds v. City of Chicago, 296 F.3d 524, 530-31 (7th Cir. 2002); Talbert v. City of Richmond, 648 F.2d 925, 931-32 (4th Cir. 1981).

[8] *See* Petit, 352 F.3d at 1114 ("Under the Grutter standards, we hold, the City of Chicago has set out a compelling operational need for a diverse police department."); Lomack v. City of Newark, 463 F.3d 303, 310 n.8 (3d Cir. 2006).

[9] *See* Minnick v. Dep't of Corr., 157 Cal. Rptr. 260, 268 (Cal. App. 1979). *See also* Wittmer v. Peters, 904 F. Supp. 845, 850 (C.D. Ill. 1995).

[10] *What You Need to Know about Affirmative Action at the Supreme Court*, AM. CIV. LIBERTIES UNION (Oct. 31, 2022), https://www.aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court; *see also* Amy Howe, *In cases challenging affirmative action, court will confront wide-ranging arguments on history, diversity, and the role of race in America*, SCOTUSBLOG (Oct. 26, 2022), https://www.scotusblog.com/2022/10/in-cases-challenging-affirmative-action-court-will-confront-wide-ranging-arguments-on-history-diversity-and-the-role-of-race-in-america/; Steve Friess, *Ending Affirmative Action Will Be an 'Earthquake' for Colleges, Companies*, NEWSWEEK (Nov. 16, 2022),

This Article seeks to document that litigation campaign, analyzing over five-dozen recent and current lawsuits. These suits challenge nearly every possible manifestation of affirmative action. Sometimes they are brought by individuals, but they are frequently orchestrated by conservative or libertarian impact litigation firms. The Supreme Court ruling in *SFFA v. Harvard* gives new precedent undermining the value of diversity and mandating colorblindness. It will also likely embolden impact litigation firms to push the envelope by challenging more and more modest attempts to remedy past societal discrimination and signal to lower courts to take these claims seriously. This, in turn, will tee up a massive number of cases challenging race conscious policies, allowing the Supreme Court to cherry pick cert petitions the next time it wants to limit the use of race.

This Article proceeds in ten Parts. Part I gives an overview of affirmative action precedent, major anti-discrimination laws, and the cadre of conservative impact litigation firms bringing suits against race-conscious policies. Part II looks at commonly contested issues in these lawsuits: standing, preliminary injunctions, motions to dismiss, and summary judgment. Part III kicks off the examination of these anti-affirmative action lawsuits, starting with membership requirements for public and private bodies. Part IV covers Diversity, Equity, and Inclusion (DEI) lawsuits. Part V is about school policies like secondary school admission, teacher-student meetings, and scholarships. Part VI looks at employment lawsuits claiming reverse discrimination. Part VII goes over contracting set-asides for minority businesses. Part VIII addresses COVID policies, including both race-based medical triage and financial aid programs. Part IX collects various miscellaneous lawsuits alleging improper use of race in public and private decision-making. Part X provides takeaways and a conclusion.

I. THE LEGAL LANDSCAPE

a. University Admissions Precedent

The evolution of university admissions precedent shows just how hard it is to craft race-conscious policies that survive judicial review. *Regents of Univ. of Cal. v. Bakke* (1978) struck down a hard quota for minority students but acknowledged having a diverse student body (rather than remediation for societal discrimination) was a valid goal.[11] *Gratz v. Bollinger* (2003)[12] struck down a rigid numeric bonus based on race, but *Grutter v. Bollinger* (2003)[13] permitted a "highly individualized, holistic review" where race was one of many ways "an applicant might contribute to a diverse educational environment."[14] The 2013 case of *Fisher v. University of Texas* (Fisher I) signaled growing skepticism of the use of race and made clear "good faith" by the school was not enough to justify racial classifications; strict

https://www.newsweek.com/2022/11/25/ending-affirmative-action-will-earthquake-colleges-companies-1759783.html.

[11] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307, 315 (1978).

[12] Gratz v. Bollinger, 539 U.S. 244, 275-76 (2003)

[13] Grutter v. Bollinger, 539 U.S. 306 (2003).

[14] *Id*. at 337.

scrutiny must apply with full rigor.[15] In the 2016 follow-up case (Fisher II), the Court affirmed a holistic review that made race a "factor of a factor of a factor" in its admissions process.[16]

Then came *SFFA*. The Court received over 100 amicus briefs on the issues, including from many major conservative legal groups.[17] In the majority opinion, Chief Justice Roberts interpreted the animating spirit of the Fourteenth Amendment to be colorblindness.[18] In this telling, one can scarcely tell whether the civil rights leaders were more concerned about protecting white children, or Black ones. For example, the opinion states "the mere act of separating children [in *Brown v. Board*] . . . because of their race . . . generated a feeling of inferiority" without bothering to mention *who*, exactly, was left feeling inferior.[19] The opinion goes through a parade of cases striking down unequal laws without noting every one of them was designed to exclude and stigmatize Black people, never white people.[20] Because Black suffering is all but absent from the analysis, the logical conclusion is that the Fourteenth applies regardless of whether a law is seeking to help or hurt.

Only two justifications for race-based policies were mentioned as compelling interests sufficient to survive strict scrutiny: "remediating specific, identified instances of past discrimination" and avoiding serious, imminent risks in prison, such as a race riot.[21] Gone was the justification of creating a diverse student body. The Court swept aside the schools' arguments that affirmative action was necessary to improve the quality of education or prepare students for a pluralistic society as impossible to measure or assess.[22] As additional knocks against affirmative action, relative drops in white and Asian enrollment were viewed as penalties against them, it was said to create stereotypes, and the schools had no logical endpoint for their policies.[23] Responding to the dissent, the majority reaffirmed its opposition to allowing past societal discrimination to justify affirmative action.[24]

And while the Court conceded schools could consider a student's reflections on how race shaped who they are, they held that schools could not merely create an

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[15] Fisher v. Univ. of Tex., 570 U.S. 297, 312-15 (2013) (hereafter Fisher I).

[16] Fisher v. Univ. of Tex., 579 U.S. 365, 373, 375 (2016) (hereafter Fisher II). The decision also urged schools to continue to "scrutinize the fairness" of affirmative action, and to assess its "positive and negative" effects. *Id.* at 388.

[17] *See e*.g. Students for Fair Admissions, Inc. v. University of North Carolina, SCOTUSBLOG (last visited Jan. 22, 2023), https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-university-of-north-carolina/; Students for Fair Admissions Inc. v. President & Fellows of Harvard College, SCOTUSBLOG (last visited Jan. 22, 2023), https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/. For a summary of these arguments, *see* Ellena Erskine, Angie Gou, and Elisabeth Snyder, *A guide to the amicus briefs in the affirmative-action cases*, SCOTUSBLOG (Oct. 29, 2022), https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases/.

[18] SFFA v. Harvard, 600 U.S. at 201-02.

[19] *Id.* at 203-04.

[20] *Id.* at 202-06.

[21] *Id.* at 207.

[22] *Id.* at 214.

[23] *Id.* at 218-25.

[24] *Id.* at 227-31.

essay-based system that duplicates the admissions system that was just struck down.[25] In sum, the Court not only struck down affirmative action as practiced, but its underlying rationale.

At times, Roberts hinted at broader implications of the decision. "Eliminating racial discrimination means eliminating all of it" he intoned in a sentence that will likely festoon a hundred briefs challenging the use of race in other contexts.[26] He portrayed the dissent as creating "a judiciary that picks winners and losers based on the color of their skin."[27] Allowing courts to help Black or Latino applicants would be a "power so radical, so destructive, that it required a Second Founding to undo."[28]

b. Other Affirmative Action Precedent

The university admissions cases may be some of the most famous, but similar battles about race-conscious policies have played out in other public settings. Following a brief spell where the federal government could seek to remedy past discrimination,[29] the Court grew hostile to these sorts of programs. *Richmond v. J. A. Croson Co.* (1989) held municipal governments could not use set-asides to help minority businesses unless the cities had perpetuated the discrimination they sought to cure.[30] The opinion also clarified that *strict scrutiny* would apply to racial classifications regardless of whether they were remedial or insidious.[31] A few years later, *Adarand Constructors v. Pena* (1995) held that the federal government would be held to the same strict scrutiny requirements to justify discrimination as other levels of government.[32] And *Ricci v. DeStefano* (2009)[33] held that an employer could only engage in remedial discrimination if there was an "objective, strong basis in evidence" that such action was necessary to prevent a disparate impact suit.[34] Much like the university admissions case law, the trendline is clear: it has become harder and harder to justify race-conscious policies.

c. Major Anti-Discrimination Laws

Several legal provisions crop up again and again in modern anti-affirmative action lawsuits. First, there are Constitutional provisions. The Fourteenth Amendment guarantees the "equal protection of the laws."[35] The Fifth Amendment

[25] *Id.* at 230.
[26] *Id.* at 206.
[27] *Id.* at 229.
[28] *Id.* at 230.
[29] *See* Fullilove v. Klutznick, 448 U.S. 448, 452–53 (1980).
[30] Richmond v. J. A. Croson Co., 488 U.S. 469, 477, 490, 492, 498, 499, 511 (1989)*; see also* Wygant v. Jackson Board of Education, 476 U.S. 267, 274, 276 (1986) (stating before a school could use remedial discrimination, it needed to correct direct, prior discrimination by the school, not societal discrimination writ large).
[31] Croson, 488 U.S. at 493-94.
[32] Adarand Constructors v. Pena, 515 U.S. 200, 235, 237 (1995).
[33] Ricci v. DeStefano, 557 U.S. 557, 567, 574, 582, 585 (2009).
[34] Id. at 567, 574, 582, 585 (2009).
[35] U.S. Const. amend. XIV, §1.

only says that no person shall be "deprived of life, liberty, or property, without due process of law,"[36] and this phrase has been interpreted to incorporate the Fourteenth Amendment's equal protection guarantee and apply it to the federal government.[37] The core of the Equal Protection Clause is that "the Government must treat citizens as individuals, not as simply components of a racial . . . class."[38] These constitutional provisions are operationalized by 42 U.S.C. § 1983, which provides a private right of action for constitutional violations committed by government actors.[39] Many state constitutions have similar Equal Protection provisions, which offer another potential avenue for relief.[40]

Beyond these constitutional bedrocks, a number of statutes enshrine the same principle in law. Some of the most important come from the Civil Rights Act of 1964. Title VI of the law attaches non-discrimination requirements to all federally supported programs, including education. It states "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[41] The term "discrimination" simply means "[t]o make a difference in treatment or favor (of one as compared with others)."[42] Thus, there is no need to show vitriol behind the difference in treatment.[43]

Title VII of the Civil Rights Act deals with employment law. It makes it unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . [or] to limit, segregate, or classify his employees or applicants for employment . . . because of such individual's race, color, religion, sex, or national origin."[44] If a protected characteristic, like race, is a "motivating factor" for an adverse employment action, the law is triggered.[45] The law also permits disparate impact claims, which are challenges to facially neutral policies that have a disproportionate impact on protected groups.[46]

There are also older laws that date back to Reconstruction. Section 1981 of Title 42 of the U.S. Code (originally part of the Civil Rights Act of 1866) says all persons shall have the right to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the

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[36] U.S. Const. amend. V.
[37] *See* Adarand, 515 U.S. at 223–24.
[38] Miller v. Johnson, 515 U.S. 900, 911 (1995) (citations omitted).
[39] 42 U.S.C. § 1983.
[40] *See e.g.* CONN. CONST. art. 1, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.")
[41] 42 U.S.C. § 2000d.
[42] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740 (2020).
[43] A potential limitation is that it only applies to employment practices if the purpose of the federal assistance is to provide employment. *See* 42 U.S.C. § 2000d-3.
[44] 42 U.S.C. § 2000e–2. Other laws emulate this requirement. 42 U.S.C. § 18116 (Section 1557 of the Affordable Care Act), states "an individual shall not . . . subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance."
[45] Bostock, 140 S. Ct. at 1739.
[46] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988).

security of persons and property as is enjoyed by white citizens."[47] Notably, this law applies to private actors,[48] and also applies to a refusal to contract with someone because of race.[49]

Section 1982 of Title 42 states that all citizens shall have the same right "as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[50] This law too was part of the Civil Rights Act of 1866, and has a similar structure to section 1981, leading courts to interpret them similarly.[51]

d. The Plaintiffs

A large percentage of the lawsuits analyzed in this article were filed by conservative and libertarian legal groups. Some of these groups have styled themselves as part of the "freedom-based public interest law movement," a movement that began in 1973 with the creation of the Pacific Legal Foundation.[52] This Article will refer to them as "impact litigation firms," as they all share the goal of using the courts to vindicate their view that the law should be colorblind.

Though all of them are skeptical of race-conscious policies, these impact litigation firms are not monolithic. Some of them dabble in causes progressives could agree with. The Pacific Legal Foundation, for example, has sued Roseville High School in Minnesota for gender discrimination when it classified competitive dance as a "girls only" sport.[53] The Institute for Justice has sued to hold abusive police officers accountable.[54]

Others are more openly political. Judicial Watch not only files lawsuits against racial equity programs, but also issues heavily slanted press releases. For example, one release claimed "[t]he Obama-Biden administrations and Deep State spying on Trump and his associates is the worst government corruption scandal in American history" in response to Trump being investigated for mishandling classified documents.[55] America First Legal, headed by Donald Trump acolyte Stephen Miller, viciously attacks the mere use of the word "equity" in conversation, even when it is unconnected to any policy.[56]

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[47] 42 U.S.C. § 1981.
[48] *See* 42 U.S.C. 1981(c).
[49] *See* Runyon v. McCrary, 427 U.S. 160, 172 (1976).
[50] 42 U.S.C. § 1982.
[51] *See* Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1016 (2020).
[52] Timothy L. Foden, *The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement*, 20 CONN. PUB. INT. L.J. 159, 160, 162 (2021).
[53] *Discrimination dance: "Girls only" school dance team is unconstitutional*, PAC. LEGAL FOUND., https://pacificlegal.org/case/d-m-z-g-v-minnesota-state-high-school-league/ (last visited Dec. 19, 2022).
[54] *See Joint Task Force Immunity*, INST. JUST., https://ij.org/case/yassin-v-weyker/ (last visited Jan. 15, 2023).
[55] *Mar-a-Lago Search Warrant Travesty*, JUD. WATCH (Aug. 12, 2022), https://www.judicialwatch.org/mar-a-lago-search-warrant-travesty/.
[56] Letter from Reed D. Rubinstein, Director of Oversight for America First Legal Foundation, to Derrick Johnson, President of the National Association for the Advancement of Colored People, (Nov. 7, 2022), https://aflegal.org/wp-content/uploads/2022/11/NAACP-LETTER-11072022.pdf

The substance of the complaints, too, can stray beyond the facts of the case to engage in political theater. In a lawsuit alleging that Harvard Law School discriminated in favor of hiring women and minorities, a complaint simply asserted that "nearly every law school in the United States" engaged in discriminatory conduct without giving facts in support.[57] The court dismissed this allegation with hardly any need for analysis.[58] An America First Legal complaint challenging faculty hiring policies at Texas A&M University could not help but take swings at broader trends. It needlessly asserted that "nearly every university in the United States" was seized by "woke ideologues who populate the so-called diversity, equity, and inclusion offices . . . The existence of these offices is subverting meritocracy and encouraging wholesale violations of civil-rights laws throughout our nation's university system."[59] These statements are irrelevant to whether *Texas A&M University* violated the law but went into the complaint all the same. In a separate suit challenging diversity and inclusion training, the district court, of its own motion, struck out several paragraphs from a Southeastern Legal Foundation complaint as being political advocacy, rather than legally pertinent.[60]

These impact litigation firms work hard to find ideal plaintiffs to bring suits. When challenging a private grant program by Comcast that did not apply to white people, an impact litigation firm assembled a team of sympathetic plaintiffs, such as a disabled combat veteran and a Greek immigrant who arrived in America with $10 to his name.[61] One of the plaintiffs had previously sued the Small Business Administration for its own race-conscious policy.[62]

Though this Article focuses on lawsuits, they are far from the only front in the effort against race-conscious policies. A fellow at the American Enterprise Institute—a conservative think tank—has filed hundreds of complaints with the Education Department's Office for Civil Rights for alleged discrimination against whites, men, and Asians.[63] America First Legal has been filing complaints with the

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(claiming that when Vice President Kamala Harris merely used the word "equity" in remarks it was "shorthand for disparate impact, and justification for unlawful anti-white and anti-Asian ("white adjacent") discrimination."); *see also* Haisten Willis, *Kamala Harris rolls out plan to confront racial bias in home appraisals*, WASH. EXAMINER (Mar. 23, 2022, 2:15pm), https://www.washingtonexaminer.com/news/white-house/kamala-harris-rolls-out-plan-to-confront-racial-bias-in-home-appraisals?utm_campaign=article_rail&utm_source=internal&utm_medium=article_rail (stating that when Vice President Kamala Harris announced a plan to stop racial prejudice in home appraisals where non-white homeowners get lowball estimates, Judicial Watch complained it would "inflate the values of homes.").

[57] Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard L. Rev., Ass'n, No. 18-12105-LTS, 2019 U.S. Dist. LEXIS 133181, at *26 (D. Mass. Aug. 8, 2019).

[58] *See id.*

[59] Complaint, Lowery v. Texas A&M University, 4:22-cv-3091, at 2-3, (S.D. Tex. Sept. 10, 2022).

[60] Henderson v. Sch. Dist. of Springfield R-12, No. 6:21-cv-03219-MDH, 2021 U.S. Dist. LEXIS 222766, at *4 (W.D. Mo. Nov. 17, 2021).

[61] *See* Complaint at 3, Moses v. Comcast Cable Commc'n Mgmt, No. 1:22-cv-00665-JPH-MJD, 2022 WL 2046345 (S.D. Ind. Apr. 4, 2022).

[62] *See id.*

[63] Mark J. Perry, *Let's Work Together to Challenge the Selective Double Standard for the Enforcement of Title VI and Title IX in Higher Education*, AM. ENTERPRISE INST. (Mar. 22, 2022),

Equal Employment Opportunity Commission to challenge race-based scholarships.[64] Some groups, like the Independent Women's Law Center[65] or the Cato Institute,[66] focus on filing amicus briefs to support existing lawsuits.

Demand letters are another common tactic. When the Madison Metropolitan School District sponsored a Zoom discussion about police brutality, it provided two links: one for parents of color, and one for white parents, stating it was doing so to provide a "level of emotional safety and security."[67] This led to a demand letter from an impact litigation firm calling the school's arguments "no different from those advanced by the proponents of Jim Crow."[68] The same organization cited the *SFFA* case in a demand letter to the City of Madison challenging its "BIPOC" (Black, Indigenous, People of Color) business incubation program.[69] On the government side, Republican state attorneys general wrote a letter to Fortune 100 companies warning them not to use race as a factor in hiring or promotion decisions.[70]

The Legal Insurrection Foundation filed a civil rights complaint with the Department of Education over a loan forgiveness program in the Providence, Rhode Island, Public School District.[71] The school district created an "Educator of Color Loan Forgiveness Program," which, as the name implies, offered up to $25,000 in student loan forgiveness for newly hired teachers of color.[72] The scholarship was part of a larger agreement to hire 127 teachers of color over five years.[73] The

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https://www.aei.org/carpe-diem/lets-work-together-to-challenge-the-selective-double-standard-for-the-enforcement-of-title-vi-and-title-ix-in-higher-education/.

America First Legal Files Federal Civil Rights Complaint Against Mars, Inc. for Illegal, Racist, and Sexist Hiring Practices, AM. FIRST LEGAL (Apr. 27, 2023), https://aflegal.org/america-first-legal-files-federal-civil-rights-complaint-against-mars-inc-for-illegal-racist-and-sexist-hiring-practices/#:~:text=The%20complaint%20asks%20the%20U.S.,and%20job%2Dtraining%20employment%20practices. (noting this was the "latest complaint follow[ing] a long line of others filed by AFL's Center for Legal Equality against woke corporations like Anheuser-Busch, Hershey, Amazon, Starbucks, and others.").

[65] *See* Amicus Brief of Independent Women's Law Center, Meland v. Padilla, No. 20-15762 (9th Cir. July 30, 2020).

[66] See *Cato at the Supreme Court*, CATO INST. (last visited Feb. 3, 2023), https://www.cato.org/about/cato-amicus-program (asserting that the Cato Institute is "one of the biggest filers of amicus curiae . . . briefs in the Supreme Court.").

[67] Benjamin Yount, *Legal group presses Madison schools over racially segregated parents' Zoom call*, WASH. EXAMINER (April 27, 2021, 5:00pm), https://www.washingtonexaminer.com/politics/legal-group-presses-madison-schools-over-racially-segregated-parents-zoom-call.

[68] Letter from Daniel P. Lennington, Deputy Counsel for Wisconsin Institute for Law & Liberty, to Dr. Carlton D. Jenkins, Superintendent, Madison Metropolitan School District (Apr. 26, 2021), https://will-law.org/wp-content/uploads/2021/04/Final-Madison-Letter.pdf.

[69] Letter from Daniel P. Lennington, Deputy Counsel for Wisconsin Institute for Law & Liberty, to Satya Rhodes-Conway, Mayor of Madison (Aug. 1, 2023), https://will-law.org/wp-content/uploads/2023/07/2023-08-01-FINAL-Letter-to-Mayor-re-BizReady-Program.pdf.

[70] Sarah Fortinsky, *GOP attorneys general urge corporations against using affirmative action to hire, promote*, THE HILL (July 13, 2023), https://thehill.com/homenews/state-watch/4096749-gop-attorneys-general-urge-corporations-against-using-affirmative-action-to-hire-promote/.

[71] See Discrimination Civil Rights Complaint Against The Providence Public School District, at 2, LEGAL INSURRECTION FOUND. (Nov. 14, 2022), https://legalinsurrection.com/wp-content/uploads/2022/11/LIF-Admin-Cmplt-With-DOE-OCR-Against-PPSD-11-14-22.pdf.

[72] *Id.* at 2-3.

[73] *See id.* at 3.

complaint alleged a violation of Title VI and the Equal Protection Clause and called on the Department of Education to put an end to the school policy.[74]

The Wisconsin Institute for Law & Liberty sent a letter to the University of Wisconsin system after its flagship university announced it was hiring mental health counselors who "exclusively serve students of color."[75] No lawsuit was filed, but the school revised its press release to "clarify" that these counselors had "special expertise addressing issues that students of color often experience" but were not exclusively for them.[76]

Or consider the Homeowner Assistance Fund of the American Rescue Plan.[77] At least 60 percent of the funds that states receive under this program must go to middle-income residents and any remaining funds shall be prioritized for "socially disadvantaged individuals."[78] To this end, Wisconsin proposed giving assistance to non-white homeowners earning up to 150 percent of the median income.[79] It received a letter from an impact litigation firm advising it that such an action was illegal.[80] A little later, the state removed the racial component of the plan.[81] Filing a lawsuit proved unnecessary to bring about the firm's desired result.

Sometimes, a government actor may be in hot water no matter what it does. In Cedarburg, Wisconsin the local school board received a complaint that it was "discriminating against its diverse students" by not providing a "diverse and representative" curriculum.[82] In response, an impact litigation firm sent a dueling letter, telling the school that, "if taught in certain ways," racial curriculums could "violate nondiscrimination laws by creating a hostile racial environment."[83] The school is left to choose between risking one lawsuit or another.

II. COMMON CONTESTED ISSUES IN AFFIRMATIVE ACTION LITIGATION

[74] *See id.* at 2, 18.

[75] Letter from Daniel P. Lennington, Deputy Counsel for Wisconsin Institute for Law & Liberty, to Tommy G. Thompson, President of the University of Wisconsin system (Oct. 6, 2021), https://will-law.org/wp-content/uploads/2021/10/2021-10-06-UW-letter.pdf.

[76] *Nine new mental health providers join UHS Mental Health Services*, UNIV. WIS.-MADISON (Oct. 5, 2021), https://www.uhs.wisc.edu/newprovidersfall2021/ (stating that the press release was revised the day before the impact litigation firm dated its demand letter, so the causal chain is not clear).

[77] *See* American Rescue Plan § 3206, Pub. L. No. 117-2, 135 Stat. 63 (2021) (codified as 15 U.S.C. § 9058d)

[78] 15 U.S.C. § 9058d(c)(2).

[79] *See* Letter from Rick Esenberg, President of the Wis. Institute for L. & Liberty, to Tony Evers, Governor of Wisconsin, at 2, (Jan. 12, 2022), https://will-law.org/wp-content/uploads/2022/01/Final-Letter-to-Evers-re-Homeowners-Assistance-Fund-racial-discrimination.pdf.

[80] *See id.* at 3.

[81] *See* State of Wisconsin, Homeowner Assistance Fund (HAF) Needs Assessment and Plan, Amendment #1, at 4 n.1 (Jan. 2022) https://doa.wi.gov/Secretary/WI%20WHH%20Plan_Amendment1_FINAL_to_Treasury.pdf (defining "socially disadvantaged individuals" as having diminished access to credit, instead of basing it on race).

[82] Letter from Rick Eisenberg, President of Wis. Institute for L. & Liberty, to Todd Bugnacki, Superintendent for Cedarburg Sch. Dist., at 1, (Mar. 17, 2022), https://will-law.org/wp-content/uploads/2022/03/Cedarburg-Curriculum-Letter-FINAL-1.pdf.

[83] *Id.* at 2.

The previous Part covered the *substantive* laws that plaintiffs typically rely on to challenge race-conscious policies. This Part goes over the surrounding legal issues that come up in these suits, such as defenses that the government can file, preliminary relief, and methods for resolving cases on the law. Because of the rigor of strict scrutiny, governments will almost always be on the back foot when defending race-conscious policies on the merits. So these ancillary legal issues may be their best chance to prevail in a case.

a. Standing

Even if the government is using a race-conscious policy, a plaintiff must have standing before they can attempt to strike it down. To demonstrate standing, a party must show the offending action (1) will result in a "concrete and particularized" harm that is imminent or actual; (2) the harm is fairly traceable to the defendant's action; and (3) the harm can be redressed by the courts.[84]

1. Injury

In the context of a racial discrimination claim, per *Associated General Contractors v. Jacksonville*, the plaintiff must show the government has created a barrier that makes it "more difficult for members of one group to obtain a benefit than" another group.[85] The plaintiff "need not allege that he would have obtained the benefit but for the barrier in order to establish standing," as the injury-in-fact caused by discrimination is the creation of the barrier, not the ultimate failure to obtain the benefit.[86] All a plaintiff need show for standing is that they are "able and ready" to apply for a benefit.[87]

Meland v. Weber, a sex discrimination case, gives an example that applies just as well to race. There, the plaintiff challenged a California law that mandated a certain number of women had to be on the boards of publicly traded companies.[88] A shareholder of a corporation sued, claiming the law forced him to engage in sex discrimination.[89] The lower court dismissed the suit for lack of standing, reasoning that the obligations and penalties fell on corporations, not shareholders, and he was free to vote for male directors.[90] But the Ninth Circuit reversed, saying that a person has standing to sue if the government "requires or encourages" them to discriminate based on race or gender, even if they are not discriminated against themselves.[91] It

[84] Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560–61 (1992).
[85] Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).
[86] *Id.* at 666.
[87] *Id.*
[88] Meland v. Weber, 2 F.4th 838, 842 (9th Cir. 2021). Though this is not a racial discrimination suit, the Equal Protection questions are fairly similar.
[89] *Id.* at 843.
[90] *Id.* at 843.
[91] *Id.* at 844 (citations omitted). Likewise, a contractor who refused to comply with a state law to subcontract work to women or minority firms had standing to sue. *Id.*

did not matter that the plaintiff owned only 0.000363 percent of the corporation, meaning it was "mathematically impossible" to sway any particular election.[92]

This does not mean standing is a given. A Texas nonprofit sued the New York University Law Review claiming it gave a discriminatory preference to women and minorities in membership and article selection.[93] The suit failed to make it past the pleadings because the plaintiff organization failed to adequately explain how its members would actually be hurt.[94] This shows that merely asserting that a plaintiff is "able and ready" to avail themselves of a benefit will not work unless they can explain in concrete terms how this is so.

Even if plaintiffs are descriptive, relying on too many assumptions can also diffuse standing. When New York State prioritized COVID treatments for nonwhite individuals, white plaintiffs sued. District courts dismissed their cases for lack of standing, and appeals were consolidated at the Second Circuit.[95] The Second Circuit ruled that even if an injurious racial classification existed, it was not actual or imminent as there was no delay or denial of COVID treatments based on racial prioritization, as the plaintiff had not gotten sick or applied for the treatment.[96] It went on to reject the claim that white plaintiffs were at a higher risk for severe COVID because of the prioritization for the same reason: no one had actually been denied or delayed treatment.[97] In other words, the plaintiffs were not "able and ready" to get the COVID treatment, so the guidelines did not affect them.[98] And it rejected the claim of emotional harm for lack of traceability, saying the true reason he was not eligible for prioritized treatment was federal CDC guidelines, not state guidelines.[99]

Some states have more generous standing laws. California law is plaintiff-friendly. A California court said a taxpayer had standing to challenge a statewide law mandating gender quotas for corporate boards, as it would require the expenditure of public funds to implement.[100] But the Golden State is an outlier. Standing is normally the government's best shot to defeat challenges to race-conscious policies by impact litigation firms, particularly on the injury prong. No wonder government defendants challenge standing so often.[101]

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[92] *Id.*

[93] *See* Fac., Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ., 11 F.4th 68, 73 (2d Cir. 2021).

[94] *See id.* at 76-78.

[95] *See* Summary Order, Roberts v. Bassett, 22-cv-00622, at 3, (2d Cir. Nov. 15, 2022), https://pacificlegal.org/wp-content/uploads/2022/02/2022-11-15-Roberts-v-Bassett-Summary-Order-and-Judgment.pdf.

[96] *See id.* at 4.

[97] *Id.*

[98] *See* Appellants' Opening Brief, Roberts v. Bassett, 22-cv-00622 (2d Cir. May 12, 2022), https://pacificlegal.org/wp-content/uploads/2022/02/2022.05.12-Roberts-v.-Bassett-PLF-Opening-Brief.pdf. (illustrating how daunting of a defense of standing can be. The treatment had to be taken within five days of the onset of symptoms, so bringing a lawsuit after getting sick would guarantee the virus would run its course before litigation could conclude, presumably mooting the case.)

[99] *See id.* at 5.

[100] *See* Verdict, Crest v. Padilla, 19-STCV-27561, at 2 (Cal. Sup. Ct. May 13, 2022).

[101] *See e.g.* Plaintiff's Response to Motion to Dismiss, Deemar v. Bd. Educ. of City of Evanston/Skokie, 1:21-cv-03466 (N.D. Ill. Oct. 20, 2021); Summary Order, Roberts v. Bassett, 22-cv-00622, at 3, (2d Cir. Nov. 15, 2022), https://pacificlegal.org/wp-

The second element of standing, causation, is almost never pivotal in these sorts of cases. That makes sense, as it would be strange to have someone who could show a concrete, particularized injury from a racial classification, yet fail to show the causation, since the *unlevel* playing field is enough—there is no need to prove denial of a benefit on the basis of race.

2. Redressability

Even if a defendant caused an injury, courts will not intervene unless they have the power to make it right, or "redress" it.[102] A court order need not be a panacea, but it must be "likely" to help.[103] This prong only comes up occasionally. One example is *Haaland v. Brackeen*,[104] which brought an equal protection challenge to a federal law that gives a preference for Native American children up for adoption to stay with Native American families. The Court held that the lawsuit failed the redressability prong since it sought to enjoin *federal* officials, but *state* officials made all determinations of preferences for Native families.[105] While a Supreme Court ruling against federal officials, may well have persuaded state courts to comply, redressability means a court must exercise its power to achieve a result, not merely persuade others to do so.[106]

Another example was *Bruckner v. Biden*.[107] There, the government set aside some money in an aid program for "socially and economically disadvantaged" businesses.[108] The definition of "socially disadvantaged" was in part based on race, and a white business owner sued.[109] The government responded by arguing that even if the "social" aspect of the program was struck down by the courts, the plaintiff might not be able to demonstrate he was "economically disadvantaged," and thus, a court ruling would not affect his rights.[110] The court has not yet ruled on this argument.

3. Ripeness

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content/uploads/2022/02/2022-11-15-Roberts-v-Bassett-Summary-Order-and-Judgment.pdf.; Pietrangelo v. Sununu, 2021 U.S. Dist. LEXIS 65632, at *14(D.N.H. Apr. 5, 2021); Memorandum Order, Ultima Serv. Corp. v. U.S. Dep't Agriculture, 2:20-cv-00041, at 5-8, (E.D. Tenn. Mar. 31, 2021), https://www.cir-usa.org/wp-content/uploads/2020/03/ultima_v_usda-order-on-mtd.pdf; Opposition to Motion to Dismiss, E.L. v. Voluntary Interdistrict Choice Corp., 4:16-cv-00629, at 8, (E.D. Mo. June 13, 2016), https://pacificlegal.org/wp-content/uploads/pdf/edmund-lee-jr-v-voluntary-interdistrict-choice-corporation/Edmund-Lee-Jr-Opposition-to-Motion-to-Dismiss-6-13-16.pdf.

[102] Vill. of Arlington Heights, v. Metro. Hous. Dev. Corp., 429 U.S. 252, 262 (1977).

[103] *Id*.

[104] 143 S. Ct. 1609, 1622-23 (2023).

[105] *See id*. at 1638.

[106] *See id*. at 1639-40.

[107] Complaint, Bruckner v. Biden, 8:22-cv-01582, at 2, (M.D. Fla. July 13, 2022), https://will-law.org/wp-content/uploads/2022/07/Bruckner-Filed-Complaint.pdf.

[108] *Id*.

[109] *Id*. at 6-8.

[110] Motion to Dismiss, Bruckner v. Biden, 8:22-cv-01582, at 12-13 (M.D. Fla. Sept. 27, 2022), https://storage.courtlistener.com/recap/gov.uscourts.flmd.403520/gov.uscourts.flmd.403520.31.0.pdf.

Ripeness is not one of the three traditional prongs for standing, but it can still be a reason to stop a plaintiff from bringing a case. The ripeness doctrine is designed to stop courts from wading into abstract disputes about policies that have not fully blossomed.[111] The mere existence of a rule the plaintiff does not like is ordinarily insufficient—courts wait until "the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."[112] The doctrine is a component of standing, but also a prudential reason for courts to avoid hearing unnecessary cases.[113] Sometimes, the mere promulgation of a rule is enough to ripen a dispute, but other times, the plaintiff must wait until it is actually applied to their situation.[114] That said, if an injury is all but certain to occur, a court may hear the dispute before it actually does.[115]

When a non-minority business challenged a Colorado statute that dedicated some COVID relief funds through a formula that advantaged minority-owned businesses, the court dismissed the suit as unripe.[116] This is because the law did not directly apportion money, and instead directed a state agency to create rules to determine eligibility and create an application process.[117] The plaintiff might have been ineligible for something that had nothing to do with race, and thus, it was too early to bring suit.[118] Moreover, the plaintiff would suffer no harm by the court declining to rule immediately.[119] So governments may be able to forestall lawsuits if they have a multi-factored eligibility process.

To the contrary, a California court held a challenge to a state gender quota law for corporate boards was ripe before regulations were promulgated due to the sufficiently high threat that the law was illegal and implementation was forthcoming.[120] This conclusion may have been reached because the state was telling corporations to comply in advance.[121]

4. Mootness

Like ripeness, mootness is another reason to dismiss apart from the merits.[122] If a controversy fizzles out before the court can rule, the suit may be

[111] *See* Nat'l Park Hosp. Ass'n v. DOI, 538 U.S. 803, 807-08 (2003).
[112] *Id.* at 808.
[113] *See* Reno v. Catholic Soc. Servs., 509 U.S. 43, 57 n.18 (1993).
[114] *See id.* at 58.
[115] *See* Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974).
[116] *See* Hardre v. Markey, No. 20-cv-03594-PAB-KMT, 2021 U.S. Dist. LEXIS 75274, at *11 (D. Colo. Apr. 19, 2021).
[117] *See id.* at *12-13.
[118] *See id.* at *13-14.
[119] *See id.* at *18.
[120] *See* Verdict, Crest v. Padilla, 19-STCV-27561, at 3–5, (Cal. Sup. Ct. May 13, 2022).
[121] *See* Complaint, Crest v. Padilla (Crest II), No. 20-STCV-37513, at 17-18 (Cal. Sup. Ct. Sept. 30, 2020), https://www.judicialwatch.org/wp-content/uploads/2020/10/Crest-v-Padilla-complaint-37513.pdf.
[122] *See* Chafin v. Chafin, 568 U.S. 165, 172 (2013).

declared moot and dismissed. When a plaintiff challenged New Hampshire's plan to designate some of its initial COVID vaccines to non-white patients, by the time it got to the appellate phase, vaccine shortages had dissipated and all state residents could get the shot.[123] Thus, there was no longer any live controversy about whether the state should be barred from considering race in vaccine distribution.[124] Though even if a case is mooted when the racial policy ends, plaintiffs may still be able to seek damages.[125]

b. Preliminary Injunction.

Apart from the ultimate merits decision, the most important victory for a plaintiff in a lawsuit challenging a race-conscious policy tends to be the preliminary injunction. It is known as an "extraordinary remedy" that the movant has the burden to justify.[126] If successful, it can stop a policy in its tracks, and usually harkens defeat. To disable a policy while the litigation is pending, the plaintiff must make a clear showing that (1) they are likely to ultimately win; (2) they will suffer irreparable injury without the injunction; (3) the equities favor them; and (4) an injunction is in the public interest.[127] When the government is the defendant, the third and fourth factors merge.[128] Due to the critical importance of a preliminary injunction in affirmative action litigation, it is worth going through the factors.

1. Likelihood of Success on the Merits

Naturally, the likelihood of success on the merits depends on the individual facts and law of each case. But if a race-conscious policy is being challenged, odds are the biggest merits issue will be strict scrutiny. Strict scrutiny demands that any racial classification (1) identify a compelling interest; (2) be necessary to serve that interest; and (3) be narrowly tailored[129]—though the last two factors may be blended at times.

The only two recognized compelling interests to justify racial classifications are to remedy specific past discrimination and prevent imminent harm in prisons.[130] The prison example is extremely niche. That leaves remedying past intentional discrimination as the sole remaining compelling interest for a race-conscious policy. The Court has made clear that past discrimination must be insidious, extreme, and recent: for education, it means showing a school was legally

[123] *See* Pietrangelo v. Sununu, 15 F.4th 103, 105–06 (1st Cir. 2021).
[124] *See id.* at 106.
[125] *See* David Blaska, *Madison does about-face on racial discrimination*, BLASKA POL'Y WERKES (May 11, 2022), https://davidblaska.com/2022/05/11/madison-does-about-face-on-racial-discrimination/.
[126] Mitchell v. City of Cincinnati, No. 21-4061, 2021 U.S. App. LEXIS 35399, at *2 (6th Cir. Nov. 30, 2021).
[127] *See* Winter v. NRDC, Inc., 555 U.S. 7, 20, 22 (2008).
[128] *See* Nken v. Holder , 556 U.S. 418, 435 (2009).
[129] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Coll.) 397 F. Supp. 3d 126, 191 (D. Mass. 2019)
[130] *See* SFFA v. Harvard, 600 U.S. at 207.

segregated in the not-too-distant past, not merely that there is de facto segregation or societal discrimination.[131] Likewise, huge statistical disparities between races are often dismissed as insufficient. In *Croson*, the fact that the city was 50 percent minority, yet minority firms held only 0.67 percent of city contracts was not enough to prove that minority contractors were being discriminated against.[132] Evidence must be exceptionally persuasive to show that race-specific remedies are necessary.[133]

Even if a plausible interest is identified, the solution must be "necessary" to achieve that interest. For example, when California imposed a gender quota for corporate boards, it offered up several justifications, one being that having women on boards would improve corporate governance and performance.[134] Regardless of whether these were compelling interests, the court said the solution was not necessary because the evidence submitted did not convincingly prove that gender quotas would lead to better outcomes.[135]

For narrow tailoring, the government must show that its policy is tightly focused on advancing the compelling interest.[136] In the context of student admissions, this traditionally meant making race part of a holistic process, rather than using quotas or making race the defining feature of the application, though the SFFA decision indicates that race—in and of itself—cannot be a plus at all.[137] Narrow tailoring also requires the government to determine there are no workable race-neutral alternatives.[138]

To sum up, before the government brings race into an equation, it must articulate a court-approved compelling interest, the policy must actually further the asserted interest, the policy must be carefully drawn to avoid overuse of race, and race-neutral alternatives must have been scrutinized and deemed inadequate.

A few other notes for the likelihood of success on the merits prong. First, when a constitutional violation is alleged (as is typically true of discrimination suits), the first factor may be deemed dispositive, since constitutional harms are presumed to be irreparable, and preventing them tends to be in the public interest.[139] Second, some courts utilize a sliding scale for this prong, meaning if the balance of the hardships of an injunction strongly favors the plaintiff, they need only show "serious questions" about them prevailing on the merits.[140] That said, courts are not obligated to treat the first factor as definitive.[141]

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[131] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720, 736 (2007); Wygant v. Jackson Board of Education, 476 U.S. 267, 274, 276 (1986).
[132] 488 U.S. at 499-500.
[133] *See* Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 970 (8th Cir. 2003) (recounting the mountain of evidence showing the need for a race-conscious solution).
[134] *See* Verdict, Crest v. Padilla, 19-STCV-27561, at 7-8, (Cal. Super. Ct. May 13, 2022), https://www.documentcloud.org/documents/22016185-crest-v-padilla-verdict-ca-may-2022.
[135] *See id.* at 13.
[136] *See* Students for Fair Admissions, Inc., 397 F. Supp. 3d at 192.
[137] *See id*.
[138] *See id.* at 177.
[139] *See* Vitolo v. Guzman, 999 F.3d 353, 360 (6th Cir. 2021).
[140] Cocina Cultura LLC v. Oregon, No. 3:20-cv-02022-IM, 2020 U.S. Dist. LEXIS 229214, at *5 (D. Or. Dec. 7, 2020).
[141] *See id.* at *5.

2. Irreparable Harm

Irreparable harm is known as an "indispensable" element of a preliminary injunction.[142] That means if this element is lacking, a court need not consider the other factors.[143] To be irreparable, the harm must be "certain and immediate" and not speculative or theoretical."[144] This also means there must be some forward-looking harm for the injunction to block; it is inadequate to show past harm.[145]

Even though constitutional violations are presumed to be irreparable, the harm must still be imminent.[146] For example, in *Kohler v. City of Cincinnati*, a white police officer challenged a racial quota system for promotions.[147] Despite being an equal protection claim, there was no imminence, as the plaintiff had not even sat for the promotion exam himself when he sued.[148] His claim that he would eventually take the test and be harmed was too speculative.[149] Or in *Cocina Cultura v. Oregon*, where a Hispanic-owned business was denied aid from a fund for Black-owned businesses only, the government diffused the imminence by depositing a check with the court for the amount the plaintiff would have gotten if eligible.[150] And a plaintiff's own delays in filing for an injunction can be used as evidence that harm is not imminent.[151]

c. Motion to Dismiss

Assuming a plaintiff has proven they have a right to bring a suit, the government's next opportunity to thwart a case is to file a motion to dismiss. Rule 12(b) of the Federal Rules of Civil Procedure provides several grounds to file a motion to dismiss, but the most relevant is 12(b)(6), a failure to state a claim upon which relief can be granted. In other words, the law does not entitle the plaintiff to relief. In ruling on a motion to dismiss, the court will accept well-pleaded facts as true and interpret them in the light most favorable to the plaintiff.[152] If these facts are enough to make the legal claim "plausible," it must be allowed to proceed, though the facts must be more than conclusory assertions or rote listings of the elements of a claim.[153] Even if the complaint does not make out a prima facie case

[142] Mitchell v. City of Cincinnati, No. 21-4061, 2021 U.S. App. LEXIS 35399, at *3 (6th Cir. Nov. 30, 2021).
[143] *See* Cocina, 2020 U.S. Dist. LEXIS 229214, at *5.
[144] Mitchell, 2021 U.S. App. LEXIS 35399, at *3.
[145] *See* Cocina, 2020 U.S. Dist. LEXIS 229214, at *6.
[146] *See* Mitchell v. City of Cincinnati, No. 1:21-cv-00626, 2021 U.S. Dist. LEXIS 219429, at *12 (S.D. Ohio Nov. 14, 2021).
[147] Kohler v. City of Cincinnati, No. 21-3466, 2021 U.S. App. LEXIS 32574, at *1 (6th Cir. Nov. 1, 2021).
[148] *See id.* at *5.
[149] *See id.*
[150] 2020 U.S. Dist. LEXIS 229214, at *2.
[151] *See id.* at *11.
[152] *See* Memorandum Opinion, Krehbiel v. BrightKey, 1:21-cv-02927, at 2, (D. Md. Mar. 4, 2021), https://www.cir-usa.org/wp-content/uploads/2021/11/krehbiel_v_brightkey_memorandum-op.pdf.
[153] *Id.* at 4.

by itself, it can still go forward if there is a "reasonable expectation" that discovery will reveal evidence to support the elements.[154]

d. Summary Judgment

After the motion to dismiss, the case can proceed and facts may be fleshed out. Once factual development is complete, either party may file for summary judgment. For a summary judgment motion, the court views all evidence in the light most favorable to the non-moving party, and will only grant the motion if there are no genuine disagreements about the facts.[155] By way of example, an unsuccessful white applicant for a job alleged that the employer-school violated its internal policy by not performing a background check on the Black candidate who ultimately got the job, and this was proof he was being racially discriminated against.[156] The school responded that the Black candidate was an internal hire, and it was not their practice to run background checks on internal hires.[157] Because the plaintiff could not counter this explanation without anything other than speculation, the court said there was no factual dispute for a jury to resolve at trial.[158] The plaintiff lost the suit on purely legal grounds.

III. MEMBERSHIP REQUIREMENTS

This is the first of several Parts analyzing lawsuits that have been filed challenging race-conscious policies, starting with membership requirements. Public and private institutions may designate seats for members of certain groups. Sometimes, these reserved seats are for people with certain life experiences, like seats for people with law enforcement backgrounds serve on boards that oversee policing standards and training.[159] Other times, seats are reserved based on identity, like race, gender, or sexual orientation. Larger institutions have faced legal challenges for diversity quotas in the past,[160] but most occurred in the 1990s. Lawsuits challenging membership requirements have surged in recent years.

a. NASDAQ Corporate Diversity Requirements

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[154] Memorandum Opinion, Wang v. University of Pittsburgh, 2:20-cv-01952, at 7, (W.D. Pa. Aug. 31, 2022), https://www.cir-usa.org/wp-content/uploads/2022/11/wang_v_pitt-3-order-on-mtd.pdf.
[155] *See* Henderson v. Sch. Dist. of Springfield R-12, No. 6:21-cv-03219-MDH, 2023 U.S. Dist. LEXIS 5691, at *6 (W.D. Mo. Jan. 12, 2023).
[156] See Groves v. S. Bend Cmty. Sch. Corp., 51 F.4th 766, 770 (7th Cir. 2022).
[157] *See id.* at 770.
[158] *See id.*
[159] *See, e.g.* KAN. STAT. ANN. § 74-5606 (2023).
[160] *See, e.g.* Mallory v. Harkness, 895 F. Supp. 1556, 1558 (S.D. Fla. 1995); Back v. Bayh, 933 F. Supp. 738, 748 (N.D. Ind. 1996); Brooks v. State Bd. of Elections, 848 F. Supp. 1548, 1551 (S.D. Ga. 1994); Ravitch v. City of New York, No. 90-5752, 1992 U.S. Dist. LEXIS 11481 (S.D.N.Y. Aug. 3, 1992); Peters v. Moses, 613 F. Supp. 1328 (W.D. Va. 1985); Uzzell v. Friday, 592 F. Supp. 1502 (M.D.N.C. 1984).

Corporate Boardrooms are less diverse than the population overall.[161] One potential solution to this issue is to mandate some seats be filled by underrepresented groups. Two recent lawsuits challenged an effort to diversify boardrooms in this way. In 2020, the National Association of Securities Dealers Automated Quotations ("NASDAQ") filed a proposed rule with the SEC that would require all listed corporations to have at least one director who was a woman, minority, or LGBTQ+, or else explain why it did not.[162] In March 2021, the SEC began proceedings on whether to approve the rule, and in fact approved it in August.[163] The Alliance for Fair Board Recruitment sued in federal court, and two months later, the National Center for Public Policy Research filed a petition with the Third Circuit challenging the rule. The case was transferred to the Fifth Circuit for consolidation with the earlier-filed Alliance for Fair Board Recruitment suit.

The Alliance for Fair Board Recruitment alleged that NASDAQ was a "self-regulatory organization" and was therefore bound by the Constitution when working in conjunction with the SEC, as was the SEC itself for approving the rule and implicit threat to enforce it.[164] Based on this argument, the plaintiff alleged the NASDAQ diversity rule (1) violated equal protection principles by encouraging decisions made on protected classifications; (2) could not pass strict scrutiny because racial balancing can never be a compelling interest; and (3) could not be narrowly tailored due to the "inconclusive" evidence supporting the rule and lack of race-neutral alternatives attempted.[165] Additionally, the plaintiff claimed that the rule violated the First Amendment by "compelling the disclosure of controversial information in a non-viewpoint-neutral manner," and the rule was inconsistent with the Exchange Act.[166] The plaintiff also pilloried the fact that the rule gave flexibility to foreign corporations to forego the racial and sexual orientation diversity requirements.[167]

In another suit, the National Center for Public Policy Research argued that NASDAQ's filing of the rule and the SEC's approval were "state action[s]" that subjected it to constitutional scrutiny.[168] Although NASDAQ is a private organization, federal law grants it special authority, leading plaintiffs to argue it was a state actor.[169] Beyond the state action question, the National Center for Public Policy Research argued that the rules violated the First Amendment by compelling an explanation for why a board did not meet the diversity requirement; the diversity rule went beyond the scope of the SEC's regulatory authority; and it was "arbitrary

[161] Stan Choe, Boards of U.S. companies are still disproportionately white, despite greater overall diversity, PBS (May 5, 2022), https://www.pbs.org/newshour/nation/boards-of-u-s-companies-are-still-disproportionately-white-despite-greater-overall-diversity.

[162] *See* Brief for Petitioner Nat'l Ctr. for Pub. Pol'y Rsch at 5-6, All. for Fair Bd. Recruitment v. SEC, No. 21-60626, at 5-6 (5th Cir. Aug. 10, 2021) (hereinafter NCPPR Brief).

[163] *See id.* at 7, 9.

[164] Brief for Plaintiff All. for Fair Bd. Recruitment at 21-23, All. for Fair Bd. Recruitment v. SEC, No. 21-60626, at 21-23 (5th Cir. Aug. 10, 2021).

[165] *Id.* at 31-34.

[166] *Id.* at 42, 54.

[167] *See id.* at 64-65.

[168] NCPPR Brief, *supra* note 159, at 15.

[169] *See id.* at 15, 17 (citing 15 U.S.C. § 78f).

and capricious" under the Administrative Procedure Act because the SEC did not perform its own independent fact-finding and decision making.[170]

The Fifth Circuit rejected the consolidated challenges in October 2023. It held that First and Fourteenth Amendment could not be enforced against NASDAQ.[171] It addressed two arguments: that (1) NASDAQ was a state actor, and (2) its rules were attributable to the government.[172] On the first point, the court said that heavy regulation of NASDAQ was insufficient to transform a private entity into a state actor, and other circuits recognized that self-regulatory organizations did not count as state actors.[173] NASDAQ was not created by the government, operate at the direction of government, or have leadership selected by the government.[174] To the second argument, a private action can only be attributed to government in rare circumstances that were not met.[175] The government did not compel NASDAQ to create the rule or even "significantly encourage" it.[176] Nor did the government closely collaborate to draft the rule.[177] Although the *enactment* of the diversity rule was thus allowed, the court implied that if the SEC was involved in the subsequent *enforcement* of the rule, the outcome might be different.[178]

b. California Corporate Diversity Requirements

We may look to California for a potential preview of how federal litigation will pan out. In 2018, California passed a law that created a gender quota for corporate boards (S.B. 826)[179] and followed up with a racial quota in 2020 (A.B. 979).[180] The race quota law required that a certain number of corporate directors be from "an underrepresented community" which essentially meant self-identifying as non-white or as part of the LGBT community.[181] A variety of plaintiffs scrambled to file lawsuits challenging one or both laws in both state and federal courts.[182]

1. Crest v. Padilla

[170] *Id.* at 21-22, 24-25, 30, 47-48.
[171] *See* All. for Fair Bd. Recruitment v. SEC, No. 21-60626, 2023 U.S. App. LEXIS 27705, at *10 (5th Cir. Oct. 18, 2023). Likewise, the court rejected challenges under the Administrative Procedures Act. Id. at *29.
[172] *See id.* at *10.
[173] *See id.* at *10-13.
[174] *See id.* at *19.
[175] *See id.* at *22.
[176] Id. at *24.
[177] *See id.* at *25-26.
[178] *See id.* at *28.
[179] *See* Meland v. Padilla, No. 2:19-cv-02288-JAM-AC, 2020 U.S. Dist. LEXIS 69114, at *1-2 (E.D. Cal. Apr. 20, 2020).
[180] *See* Harold R. Jones, *Update on Challenges to California's Board Diversity Statutes*, SOC'Y FOR HUMAN RESOURCE MGMT. (Apr. 1, 2022), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/challenges-to-california-board-diversity-statutes.aspx.
[181] Complaint at 2-3, Crest v. Padilla (Crest II), No. 20-STCV-37513 (Cal. Sup. Ct. Sept. 30, 2020), https://www.judicialwatch.org/wp-content/uploads/2020/10/Crest-v-Padilla-complaint-37513.pdf.
[182] *See, e.g.*, Meland v. Weber, No. 2:10-15762, 2021 U.S. Dist. LEXIS 246227, at *1 (E.D. Cal. Dec. 27, 2021); Jones, *supra* note 177.

Plaintiff Robin Crest challenged both the gender and racial quotas in separate lawsuits, known as Crest I and Crest II, respectively. In the racial quota lawsuit complaint, Crest II, she asserted standing under California's common law taxpayer standing doctrine and state law, which allows taxpayers to sue unconstitutional expenditures of funds.[183] Crest brought claims under the California Constitution's equal protection clause and non-discrimination clause, and sought declaratory judgment, an injunction, and costs and fees.[184]

The Los Angeles County Superior Court ruled in favor of the plaintiff.[185] Crest had standing under California law, and the state had already spent money on the law by collecting demographic information.[186] Ripeness was no bar because, even though no corporation had yet been penalized, the state was telling corporations to comply.[187]

Moving to the merits, the court held that the state constitution's non-discrimination clause was not violated because it only applied to public employment, contracting, and education.[188] As for federal equal protection, the state was not so lucky. The law created suspect categories based on race and sexual orientation, the selection of which groups were "underrepresented" was deemed arbitrary, and statistics supporting the law were based on national data, not California-specific material.[189] The state asserted a compelling interest in remedying board discrimination and in improving performance through more diverse boards.[190] However, the court decided that the remedial target was not specific enough and the evidence of discrimination in board selection was lacking.[191] As for improved performance, while it may be correct that diverse boards perform better, the court held that this was not enough to clear the high bar of a compelling interest.[192] The court held that the quota was not narrowly tailored since a quota is the bluntest tool to achieve diversity, and though the legislature had tried less coercive methods before that failed to achieve results, the court said the state had not considered race-neutral alternatives seriously enough.[193] The court also said intermediate steps could have been taken before resorting to quotas.[194] The court declared the law unconstitutional, and the state was enjoined from spending money to enforce it.[195]

In a later case, the federal court reached the same conclusion that the law was invalid. The Eastern District of California held that the law was a quota, and

[183] See Complaint, *supra* note 178, at 1.
[184] *See id.* at 5-6.
[185] *See* Crest v. Padilla, No. 20CV37513, 2022 Cal. Super. LEXIS 11070, at *5, (Apr. 1, 2022).
[186] *See id.* at *15–16.
[187] *See id.* at *17–18.
[188] *See id.* at *18-19.
[189] *Id.* at *20, *24–25.
[190] *See id.* at *27-28.
[191] *See id.* at *28, *37-39.
[192] *See id.* at *40.
[193] *See id.* at *43–46.
[194] *See id.* at *48–49.
[195] *See id.* at *53.

thus, had to be struck down the same as in university admission cases.[196] It did not matter that the government argued it was more flexible than a standard quota.[197]

Similar legal analysis can be seen in gender discrimination suits. *Crest v. Padilla (Crest I)* was a state case challenging the California gender quota law.[198] Thanks to California's generous standing laws, a taxpayer had standing to sue the statutory scheme.[199] The court applied strict scrutiny, and the government asserted combating discrimination and increasing diversity as compelling interests.[200] The court noted that a quota was not necessary to advance these goals, as the link between women on boards and improved corporate governance was unclear, and the studies cited by the government did not use the "most sophisticated, econometric methodologies and current statistical analysis available."[201] Rather, the court said the true purpose was achieving a "critical mass" of women on boards, not remedying past discrimination; called arguments that women were consensus builders or less risky "stereotypes;" and found no evidence that corporations engage in intentional discrimination.[202] Furthermore, the law was not narrowly tailored as the government did not consider gender-neutral alternatives, and the remedy was not actually remedial and not sufficiently limited enough in scope or duration.[203] The court thus enjoined the law.[204]

2. Meland v. Padilla

Another suit by corporation shareholder Creighton Meland also challenged the gender quota law. The district court ruled that a shareholder in an affected corporation did not have standing to sue.[205] It reasoned that the obligations and penalties in the law, and penalties, were imposed on corporations, not shareholders, and the plaintiff remains free to vote for whatever director he wishes.[206] But the Ninth Circuit reversed.[207] The court said that if the government forces a person (like a shareholder) to discriminate, they are harmed along with the people being discriminated against.[208] Even though the law operates upon corporations, shareholders must elect women to comply with the law and avoid sanctions on their

[196] *See* All. for Fair Bd. Recruitment v. Weber, No. 2:21-cv-01951, 2023 WL 166359, at *4–6, (E.D. Cal. May 16, 2023), https://www.bloomberglaw.com/public/desktop/document/AllianceforFairBoardRecruitmentvWeberDocketNo221cv01951EDCalOct21?doc_id=X4UODHII6QA9TJP32JQA3DSIK3I.
[197] *See id.* at *5.
[198] Verdict at 1, Crest v. Padilla, 19-STCV-27561, at 1 (Cal. May 13, 2022), https://www.documentcloud.org/documents/22016185-crest-v-padilla-verdict-ca-may-2022.
[199] *See id.* at 7-8.
[200] *See id.* Under California law, strict scrutiny analysis applies to gender discrimination as well as race. Id. at 5.
[201] *Id.* at 9-12, 14, 17.
[202] *Id.* at 16-17, 20.
[203] *See id.* at 22-23.
[204] *See id.* at 23.
[205] *See* Meland v. Padilla, No. 2:19-cv-02288-JAM-AC, 2020 U.S. Dist. LEXIS 69114, at *14-15 (E.D. Cal. Apr. 20, 2020).
[206] *See id.* at *10-11.
[207] *See* Meland v. Weber, 2 F.4th 838 (9th Cir. 2021).
[208] *See id.* at 844.

corporation—at the very least, this encourages gender discrimination.[209] The case was later voluntarily dropped,[210] presumably because other cases already achieved victory.[211]

c. Law Review Membership Selection

1. Harvard Law Review

A Texas nonprofit, Faculty, Alumni, & Students Opposed to Racial Preferences, sued the Harvard Law Review alleging that it used race and sex preferences to select student members and articles to publish.[212] While the Law Review has stated a commitment to a diverse membership and reviews applicants' demographic information, the Law Review did not state its exact selection calculus.[213] Plaintiffs alleged the editor selection was discriminatory, and minorities and women were also given preferences when the Law Review decided which articles to publish.[214] Plaintiffs argued they were harmed in three ways: (1) white and male members of the nonprofit faced discrimination; (2) female and minority members were harmed by having their accomplishments diminished by the specter of "diversity set-asides;" and (3) everyone was hurt by having the Law Review run by supposedly less capable students.[215] Thus, plaintiffs asserted a violation of Titles VI and IX against Harvard and its Law Review.[216]

Defendants moved to dismiss, so plaintiffs amended their complaint, adding a like-minded nonprofit as a co-plaintiff, shuffling the defendants, and bolstering its standing allegations.[217] The amended complaint sought declaratory judgment, an injunction against using race or sex for Law Review membership or article selection, an order requiring the Law Review to establish new merits-based membership and article selection policies, an order requiring preclearance from the court and Department of Education for these new policies, an order requiring the Department of Education to change its interpretation of Titles VI and IX to align with plaintiffs' views, and costs and fees.[218]

The District Court granted defendant's motion to dismiss.[219] It held the complaint was too vague about injury since it refused to "name names" of who was

[209] *See id.* at 846.
[210] *See* Meland v. Weber, Nos. 22-15149, 22-15207, 2022 U.S. App. LEXIS 4570 (9th Cir. Feb. 18, 2022).
[211] The other cases filed were All. for Fair Bd. Recruitment v. Weber, No. 2:21-cv-01951, 2023 WL 166359 (E.D. Cal. May 15, 2023) and Nat'l Ctr. for Pub. Pol'y Rsch. v. Weber, No. 2:21-cv-02168 (E.D. Cal. May 22, 2022).
[212] Fac., Alumni, & Students Opposed to Racial Preferences v. Harvard L. Rev. Ass'n, No. 18-12105-LTS, 2019 U.S. Dist. LEXIS 133181, at *2-3 (D. Mass. Aug. 8, 2019).
[213] *See id.* at *6.
[214] *See id.* at *7.
[215] *Id.* at *7-8.
[216] *See id.* at *10.
[217] *See id.*
[218] *See id.* at *10-12.
[219] *See id.* at *2.

actually hurt by what.[220] Even if the plaintiffs had used names, there was no indication that anyone had been harmed by these ostensibly discriminatory policies, or was facing imminent injuries under them.[221] As to the argument that diversity policies meant the Law Review was less capable and less prestigious, the court called these inappropriate attempts to seek standing based on harm felt more directly by others.[222] And because the Law Review is independent of the larger school, plaintiffs failed to adequately show it received federal funding, and thus, that Titles VI and IX applied.[223]

2. New York University Law Review

Two years later, the same nonprofit sued New York University's Law Review for the same basic concept, using the same basic arguments, and had its case dismissed for the same basic reasons before the Second Circuit, affirming the lower court's decision to dismiss.[224] The Supreme Court denied cert.[225] While it seems that law reviews are safe for now, they might have a harder fight if plaintiffs can do a better job pleading injury.

d. Police Oversight Board Diversity Requirements

Lawsuits against Ivy League schools or the federal government garner headlines and lawsuits, but there are innumerable, smaller examples of governmental bodies with racial membership requirements that are being challenged. For example, Madison, Wisconsin created a police oversight board in 2021 that stipulated certain seats on the board would belong to "African American," "Asian," "Latinx," and "Native American" people and declared that the board "shall be composed of at least 50% Black members."[226] All told, only two of the eleven seats were not reserved for a specific racial group.[227] A white plaintiff applied for a board seat and was not selected.[228] He then claimed the board violated the Equal Protection Clause, both for assigning specific seats to racial groups and for mandating a percentage of Black members.[229] He sought declaratory judgement, an injunction, that the board be disbanded and reconstituted without regard to race, damages, and costs and fees.[230]

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[220] *Id.* at *19, 28.
[221] *See id.* at *20-21.
[222] *See id.* at *21.
[223] *See id.* at *22-23.
[224] *See* Fac., Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ., 11 F.4th 68, 75-76 (2d Cir. 2021).
[225] *See* Fac., Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ., 142 S. Ct. 2813 (2022).
[226] Complaint at 1, Blaska v. City of Madison, 3:21-cv-00426 (W.D. Wis. June 30, 2021), https://will-law.org/blaska-v-city-of-madison-2/.
[227] *See id.* at 1-2.
[228] *See id.* at 2.
[229] *See id.* at 5-7.
[230] *See id.* at 8.

About a year later, the city passed a new ordinance that made the diversity goals aspirational.[231] Though the ordinance moots the thrust of the lawsuit, the plaintiff could still seek damages and attorney fees as the city has essentially conceded the merits of the case.[232]

Madison is hardly the only local government that is vulnerable. Alexandria, Virginia, for example, has a police oversight board that requires at least three members to come from "historically, racially or socially marginalized communities that have commonly experienced disparate policing" and one from "an organization, office, or agency that seeks racial or social justice" or advocates for marginalized communities.[233] The city's Gang Prevention Community Task Force has one seat for a person representing "a community organization with specific outreach to the Latino community" and another for someone "from and representing the African American community."[234] Some cities do not have explicit quotas but express a desire to increase the percentage of minority employment. Syracuse, New York, for example, states its "ultimate goal is to achieve and maintain employment levels for [underrepresented communities] commensurate with their representation in the city's population."[235] If these trends continue, cities all across America could come under fire for diversity policies.

IV. DIVERSITY, EQUITY, AND INCLUSION

a. DEI Initiatives

1. Diemert v. City of Seattle

Beyond outright quotas for underrepresented groups, some organizations have tried to become more welcoming through the use of Diversity, Equity, and Inclusion (DEI) initiatives. While these programs are not supposed to favor one race over another, lawsuits have resulted all the same. Joshua Diemert was a white, male employee of the City of Seattle hired in 2013 in the Human Services Department.[236] Diemert alleged that he was the victim of racial discrimination throughout his employment with the city. This included being told that he was using his "white privilege" to keep his leadership position and his doing so denied a person of color the job, that it was impossible to be racist toward white people, and

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[231] *See* MADISON, WIS., ORDINANCE OF POLICE CIVILIAN OVERSIGHT BOARD, MADISON GENERAL ORDINANCES, § 5.20 (2022), https://madison.legistar.com/LegislationDetail.aspx?ID=5556927&GUID=88690BB2-6F0D-44E7-BC5D-7494337F94FF&FullText=1. Other cities have adopted similar aspirational language, possibly due to fears of lawsuits. *See e.g.* Syracuse, N.Y., CODE OF ORDINANCES § 28-2 (2022) (stating that the mayor's commission on human rights shall have members who are "broadly representative of the religious, racial and ethnic groups in our community.").

[232] *See* David Blaska, *Madison does about-face on racial discrimination*, BLASKA POL'Y WERKES (May 11, 2022), https://davidblaska.com/2022/05/11/madison-does-about-face-on-racial-discrimination/.

[233] ALEXANDRIA, VA., CODE OF ORDINANCES § 2-4-222 (2023).

[234] ALEXANDRIA, VA., CODE OF ORDINANCES, § 2-4-180 (2023).

[235] SYRACUSE, N.Y., CODE OF ORDINANCES § 39-5 (2022).

[236] *See* Complaint at 4, Diemert v. City of Seattle, 2:22-cv-01640 (W.D. Wash. Nov. 16, 2022).

that he was complicit in the sins of slavery.[237] He also pointed to a city-instituted equity training that allegedly said "white people are like the devil" and "racism is in white people's DNA," created racially segregated meeting groups for employees, and aggressively promoted the concept of collective guilt for white employees.[238] He claimed these actions amounted to a violation of the Equal Protection Clause and constituted a hostile work environment under Title VII, illegal retaliation under Title VII, and constructive discharge under Title VII.[239] He sought declaratory judgment, court monitoring of the city, $300,000 in compensatory and punitive damages, nominal damages, and costs and fees.[240] In January 2023, Diemert amended his complaint to expand his allegations of racial discrimination, adding hundreds of pages of exhibits of the training materials.[241]

In August 2023, the district court denied a motion by the city to dismiss.[242] The court made clear Diemert had survived the low bar for surviving a motion to dismiss for failure to state a claim.[243] His allegations about how the DEI initiative at his job stigmatized white people were enough to bring claims for hostile work environment, disparate treatment, Equal Protection, and retaliation.[244] In allowing the Equal Protection claim to proceed against the city for having race-based affinity groups, the court said the city would have to show that affinity group distinctions are narrowly tailored to achieve a compelling interest, citing *SFFA v. Harvard*.[245] If this becomes the standard for permitting racial affinity groups, one doubts any employer or school will be able to meet them, given that promoting diversity would likely not be deemed a compelling interest.

2. Henderson v. School District of Springfield, Missouri

Springfield, Missouri Public Schools held a professional development training in October 2020.[246] The training covered themes of "equity" and "anti-racism," and two of the attendees expressed their disagreement with the material.[247] Though they had to attend and select answers they disagreed with on an online quiz, they did not suffer any adverse employment action.[248] They nonetheless brought a First Amendment claim.[249]

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[237] *Id.* at 5, 7-8.
[238] *Id.* at 7, 9.
[239] *See id.* at 22-25.
[240] *Id.* at 26.
[241] Amended Complaint at 63-205, Diemert v. City of Seattle, 2:22-cv-01640 (W.D. Wash. Jan. 19, 2023).
[242] Order on Defendant Motion to Dismiss at 1, Diemert v. City of Seattle, 2:22-cv-01640 (W.D. Wash. Aug. 28, 2023).
[243] *See id.*
[244] *See id.* at 6-7, 9, 11.
[245] *Id.* at 10-11.
[246] Henderson v. Sch. Dist. of Springfield R-12, No. 6:21-CV-03219-MDH, 2023 U.S. Dist. LEXIS 5691, at *3 (W.D. Mo. Jan. 12, 2023).
[247] *Id.* at *4-5.
[248] *Id.* at *5-6.
[249] *Id.* at *6.

A few months later, the federal district court for the Western District of Missouri granted summary judgment for the defendants.[250] The court focused on the lack of injury. The plaintiffs said they suffered harm from being forced to hold their tongues during the training or else risk being called racists or losing credit for the training.[251] But the plaintiffs did, in fact, push back on some of the themes, and all that happened to them was that they were criticized.[252] There was no evidence the school even suggested there would be formal punishment for expressing disagreement with the training.[253] The plaintiffs filed an appeal to the Eighth Circuit in May 2023, and the suit is pending.[254]

3. Deemar v. Board of Education of City of Evanston/Skokie, Illinois

The Evanston/Skokie, Illinois school district adopted several new policies related to diversity.[255] All teachers were required to take "antiracist training" that required them to accept that white people are "loud, authoritative . . . [and] controlling," that "White identity is inherently racist," and to segregate themselves into racial affinity groups.[256] The suit also claimed students were being taught things like "White people have a very, very serious problem and they should start thinking about what they should do about it."[257]

A white teacher within the district filed a complaint with the United States Commission on Civil Rights and sued, claiming violations of the Equal Protection Clause, Title VI, and the creation of a hostile work environment.[258] She requested declaratory judgment, an injunction, court monitoring, nominal damages, and costs and fees.[259] The Department of Education, Office for Civil Rights determined that the school violated Title VI by separating staff, students, parents, and community members based on race, directing staff to consider race when evaluating disciplinary situations, and treating kids differently based on race.[260] Be that as it may, the lawsuit trudges on, with the defendant school filing to dismiss the case for lack of standing and failure to state a claim.[261]

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[250] *Id.* at *3.
[251] *Id.* at *8.
[252] *Id.* at *12-13.
[253] *Id.* at *20.
[254] Brief of Appellant at 1, Henderson v. Sch. Dist. of Springfield R-12, Case Nos. 23-1374 & 23-1880 (8th Cir. May 12, 2023). *See* Henderson v. Springfield Public Schools, S.E. LEG. FOUND., https://www.slfliberty.org/case/henderson-v-springfield-public-schools/ (last visited Nov. 17, 2023) (listing the case status as "Appeals").
[255] Complaint at 9-10, Deemar v. Bd. Educ. of City of Evanston/Skokie, 1:21-CV-03466 (N.D. Ill. June 29, 2021).
[256] *Id.* at 3.
[257] *Id.* at 4-5.
[258] *Id.* at 7, 30.
[259] *Id.* at 33.
[260] Letter from to Carol Ashley, Enf't Dir., the Dep't of Educ. Off. of Civ. Rts., to Dr. Devon Horton, Superintendent for Evanston/Skokie Sch. Dis. 65 (Jan. 2021), https://www.slfliberty.org/case/deemar-v-evanston-skokie-school-district-65/.
[261] Plaintiff's Response to Motion to Dismiss at 7, Deemar v. Bd. Educ. of City of Evanston/Skokie, 1:21-cv-03466 (N.D. Ill. Oct. 20, 2021).

4. Duvall v. Novant Health

In this case, a white male employee was terminated and replaced with two women: one white and one Black.[262] This was done amid a diversity and inclusion initiative that expressed a timeline to remake the workforce to reflect the community and "embed" a culture of diversity and inclusion at the workplace.[263] Evidence showed the plaintiff had performed well.[264] He alleged discrimination and the jury awarded $10 million in punitive damages.[265] The district court in the Western District of North Carolina found a reasonable jury could have found that race and/or gender was a motivating factor for the termination.[266] According to Lexis, an appeal was filed in November 2022.[267] Suits like this raise the risk for private employers to have diversity goals.

5. Colville v. Becerra

On President Biden's first day in office, he issued an executive order on advancing and supporting racial equity.[268] In response, the Medicare program created a rule allowing clinicians to submit an "Anti-Racism Plan" to secure merit-based incentive payments.[269] Aided by the group Do No Harm, a doctor and several states sued, claiming a lack of statutory authority to issue such as rule.[270] The individual doctor was dropped because the rule had not actually affected her incentive payments yet.[271] However, considering the states were entitled to "special solicitude" in the standing analysis, she claimed the rule hurt them by encouraging doctors consider race.[272] The lawsuit proceeded, seeking declaratory and injunctive relief.[273] In July 2023, the federal government moved for summary judgment, claiming the plaintiffs lacked standing and the rule was within the agency's statutory authority.[274] The case is pending as of November 2023.[275]

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[262] Duvall v. Novant Health Inc., No. 3:19-CV-00624-DSC, 2022 U.S. Dist. LEXIS 143209, at *10 (W.D.N.C. Aug. 11, 2022).
[263] *Id.*
[264] *Id.*
[265] *Id.* at *6. The punitive damages were reduced to $300,000, but the plaintiff still won roughly $4 million in other forms of compensation. *Id.* at *55-56.
[266] *Id.* at *10-11.
[267] Duvall v. Novant Health Inc., No. 3:19-CV-00624-DSC, 2022 U.S. Dist. LEXIS 190520 (W.D.N.C. Oct. 19, 2022) (click "History" tab and scroll down).
[268] Exec. Order No. 13985, 88 Fed. Reg. 10,825 (Jan. 20, 2021).
[269] Colville v. Becerra, No. 1:22-CV-113-HSO-RPM, 2023 U.S. Dist. LEXIS 52527, at *4, *16 (S.D. Miss. Mar. 28, 2023).
[270] *Id.* at *5.
[271] *Id.* at *35–37.
[272] *Id.* at *42, *44.
[273] Complaint at 1, Colville v. Becerra, No. 1:22-CV-00113 (S.D. Miss. May 5, 2022).
[274] Def. Motion for Summary Judgment at 1, Colville v. Becerra, No. 1:22-CV-00113-HSO-RPM, (S.D. Miss. July 28, 2023).
[275] *See* State of Mississippi et al. v. Becerra et al., O'NEILL INST., https://litigationtracker.law.georgetown.edu/litigation/colville-et-al-v-becerra-et-al/ (last visited Nov. 17, 2023) (listing the current status as "briefing is ongoing").

b. Military Service Academy Cases

The military's service academies are key incubators of the future leaders of the armed forces. Like many other educational institutions, they provide instruction on topics of race that could be described as Critical Race Theory. Alarmed by this prospect, the conservative group Judicial Watch filed Freedom of Information Act requests against the Army, Navy, and Air Force service academies.[276] When the schools did not respond quickly, the organization sued in federal court.

1. West Point

In July 2021, Judicial Watch sued West Point seeking copies of "all diversity, inclusion, and equity training materials" and copies of contracts with organizations or companies that organized the trainings.[277] That October, Judicial Watch separately sued West Point for emails and PowerPoints relating to "Critical Race Theory" or "CRT."[278] These lawsuits resulted in hundreds of pages of material, which contained statements such as "White people and people of color live racially different structured lives," noted that Black people were more likely to live in poverty, be victims of homicide, or be incarcerated, and that white networks exclude Black men from blue-collar jobs.[279] From these assertions, Judicial Watch claimed "Our military is under attack – from within. The documents show racist, anti-American CRT propaganda is being used to try to radicalize our rising generation of Army leadership at West Point."[280]

2. Naval Academy

It did not end with West Point. The following year, Judicial Watch filed a similar lawsuit against the Naval Academy, demanding all emails and training/teaching materials relating to "Critical Race Theory," "CRT," or "white supremacy."[281] An online docket shows that on November 10, 2022, Judicial Watch filed a stipulation of dismissal, suggesting that the lawsuit successfully produced the documents.[282]

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[276] *Judicial Watch: Records Show Critical Race Theory Propaganda at West Point*, JUD. WATCH (June 20, 2022), https://www.judicialwatch.org/crt-propaganda-at-west-point/; *Judicial Watch Sues for Naval Academy Critical Race Theory Records*, JUD. WATCH (July 26, 2022), https://www.judicialwatch.org/jw-sues-for-naval-academy-crt-records/; Michael W. Chapman, *Judicial Watch Sues Air Force Academy for Records on Critical Race Theory, 'White Supremacy'*, CNS NEWS (Dec. 20, 2022), https://cnsnews.com/article/national/michael-w-chapman/judicial-watch-sues-air-force-academy-records-critical-race.

[277] Jud. Watch v. Dep't of Defense, 1:21-cv-01795 (D.D.C. July 5, 2021).

[278] Jud. Watch v. Dep't of Defense, 1:21-cv-02616 (D.D.C. Oct. 6, 2021).

[279] *Judicial Watch: Records Show Critical Race Theory Propaganda at West Point*, *supra* note 273.

[280] *Id*.

[281] Judicial Watch v. Dep't of Defense, 1:22-cv-02172, at 2, (July 23, 2022).

[282] Jud. Watch v. Dep't of Defense, PACERMONITOR, https://www.pacermonitor.com/public/case/45364109/JUDICIAL_WATCH,_INC_v_US_DEPARTMENT_OF_DEFENSE (last visited Feb. 16, 2023),

3. Air Force Academy

A few weeks after the Navy case ended, Judicial Watch sued the Air Force Academy, seeking essentially the same materials.[283] In July 2023, Judicial Watch announced it received 478 pages showing how the academy addressed Critical Race Theory, white privilege, and Black Lives Matter.[284] Although Judicial Watch has successfully used the judicial process to speed up its FOIA requests, thus far, the only results of these suits are press releases, not policy changes.

a. Social Justice Activism

1. Flynn v. Welch

Sometimes, a school does not institute diversity and inclusion training, but draws a lawsuit by expressing a position on a cultural issue. David Flynn was concerned that the Dedham Public School, where he worked as a coach and his children attended, was wrongfully injecting race and politics into the curriculum, such as by displaying support for Black Lives Matter.[285] He had a series of conversations with school officials, culminating in him openly criticizing the superintendent.[286] The school declined to renew his annual coaching contract after nearly a decade on the job because of the criticism.[287] With the assistance of Judicial Watch, Flynn sued under the First Amendment, seeking compensatory and punitive damages, along with fees and costs.[288]

A year and a half later, the parties settled. The school admitted that the coach had legitimate concerns about changes in the school's curriculum.[289] School staff were directed not to wear Black Lives Matter shirts in the classroom, and the school apologized for how the situation was handled.[290] The settlement letter was unclear on whether the coach would receive any form of compensation,[291] but the suit successfully reduced the focus on race within the school. It may also give pause to other schools with similar changes to their curriculum.

2. Hening v. Adair

[283] Jud. Watch v. Dep't of Defense, 1:22-cv-03510 (D.D.C. Nov. 16, 2022)
[284] *Judicial Watch: Records Show Air Force Academy Instructional Materials Include Presentations on Critical Race Theory, White Privilege, and Black Lives Matter – Attacks American 'Creation Myth' of the Declaration of Independence*, JUD. WATCH (July 7, 2023), https://www.judicialwatch.org/air-force-academy-instructional-materials-include-presentations-on-critical-race-theory/.
[285] Complaint at 4-5, Flynn v. Welch, 1:21-cv-10256, (D. Mass. Feb. 16, 2021).
[286] *Id.* at 5–6.
[287] *Id.* at 7–8.
[288] *Id.* at 10–12.
[289] Letter from Michael J. Welch, Superintendent of Dedham Pub. Schs., to Mr. David Flynn (July 22, 2022)
[290] *Id.*
[291] *Id.*

Kiersten Hening was a player on the Virginia Tech women's soccer team who refused to kneel in support of social justice causes like Black Lives Matter.[292] She claimed that her coach berated her in retaliation, removed her from the starting lineup, and gave her less field time.[293] The defendant coach filed a motion for summary judgment, but the court denied it.[294] Instead, the court said there was sufficient evidence that the coach took an adverse action against Hening by berating her, and the adverse action was caused by her refusal to kneel.[295] The court even found the constitutional violation was clear enough to overcome qualified immunity.[296] Apparently spooked by this outcome, the school settled about a month later, paying her $100,000 in exchange for her dropping the case.[297]

V. SCHOOL POLICIES

a. Secondary School Admissions

The Thomas Jefferson High School for Science and Technology ("TJ") is a prestigious Governor's School in Virginia whose student body has a far greater share of Asians than the rest of Fairfax County Public Schools (all other races are underrepresented at TJ, relative to their overall share of the population).[298] Before 2020, admission to TJ was based on a merits-based application that looked at GPA, standardized tests, writing skills, and teacher recommendations.[299] In 2020, the admission process dropped the standardized tests and added a holistic evaluation.[300] This new evaluation considered, among other things, a "Student Portrait Sheet," "Experience Factors," and whether the student came from an underrepresented middle school.[301] There were also guaranteed seats for students from each constituent middle schools.[302] Class sizes grew, but the number of Asian students fell.[303] As these changes were being implemented, the state passed a law requiring schools to develop diversity goals to promote access for historically underserved students, and school administrators explicitly sought to increase the number of Black and Hispanic students.[304]

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[292] Memorandum Opinion at 1, Hening v. Adair, 7:21-cv-00131 (W.D. Va. Dec. 2, 2022).
[293] *Id.* at 1-2.
[294] *Id.* at 2.
[295] *See id.* at 6, 9.
[296] *See id.* at 14.
[297] Holly Matkin, *Former College Soccer Player Gets $100K Payout After Coach Benched Her For Refusing To Kneel*, POLICE TRIBUNE (Jan. 20, 2023), https://policetribune.com/former-college-soccer-player-gets-100k-payout-after-coach-benched-her-for-refusing-to-kneel/.
[298] Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-CV-296, 2022 U.S. Dist. LEXIS 33684, at *3, (E.D. Va. Feb. 25, 2022).
[299] *Id.* at *5.
[300] *Id.* at *6.
[301] *Id.*
[302] *Id.*
[303] *Id.* at *6–7.
[304] *Id.* at *7–8.

An organization was formed to oppose the new admissions policies, and the district court held that it had standing to sue for an injunction.[305] The district court granted the injunction, saying the facially neutral policies were motivated by a racial purpose or object.[306] By guaranteeing admission to the top 1.5 percent of each constituent middle school, TJ was disproportionately forcing Asian students to compete among themselves for the at-large spots.[307] Moreover, the new "Experience Factors" that boosted students from underrepresented middle schools hurt Asian students who were from the main feeder middle schools.[308] These changes occurred against the backdrop of administrators saying they needed to increase Black and Hispanic enrollment and that Asians were "overrepresented."[309] Despite no documented animus toward Asian students, because admissions were zero-sum, seeking to help other races was the same as harming Asians.[310] The court found there was no narrow tailoring, as the school did not try increasing its size or offering free test prep.[311] TJ was enjoined from using the new admissions system.[312]

The school sought and received a stay on the injunction pending appeal from the Fourth Circuit, meaning it could continue using its new admissions plan.[313] The Supreme Court declined to vacate the stay.[314] Justices Thomas, Alito, and Gorsuch dissented.[315]

When the Fourth Circuit ruled, it reversed the district court and held the new policies constitutional.[316] It held that the policies were facially neutral, not adopted out of racial animus, and that there was no disparate impact on Asian students because they were still successful at getting into TJ.[317] However, the opinion also looks vulnerable to reversal by the Supreme Court, as it relies on old cases saying that diversity in education is a compelling state interest.[318] The Pacific Legal Foundation is appealing the case to the Supreme Court.[319]

b. Student-Teacher Meetings

In 2022, the Wisconsin Institute for Law & Liberty received anonymous reports that the Madison Metropolitan School District had created a new policy that

[305] *Id.* at *14.
[306] *See id.* at *15.
[307] *See id.* at *17–18.
[308] *See id.* at *18.
[309] *See id.* at *15, *20.
[310] *See id.* at *32.
[311] *See id.* at *34–35.
[312] *Id.* at *36.
[313] Coal. for TJ v. Fairfax Cty. Sch. Bd., No. 22-1280, 2022 U.S. App. LEXIS 8682, at *2 (4th Cir. Mar. 31, 2022).
[314] Coal. For TJ v. Fairfax Cty. Sch. Bd., No. 21-A-590 2022 U.S. LEXIS 2228 (Sup. Ct. Apr. 25, 2022).
[315] *Id.*
[316] Coal. for TJ v. Fairfax Cty. Sch. Bd., 68 F.4th 864, 871 (4th Cir. 2023).
[317] *See id.* at 881, 886.
[318] *See id.* at 887.
[319] *Fighting Race-Based Discrimination at Nation's Top-Ranked High School*, PAC. LEGAL FOUND., https://pacificlegal.org/case/coalition_for_tj/ (last visited Oct. 20, 2023).

teachers were required to meet with African American students "first and more often" and English language learners "second and more often" than other students.[320] The organization sent an open record request to the district seeking information about such policies in January 2022 and repeatedly asked for updates through December without hearing anything.[321] In January 2023, it sued, claiming violations of the state open records law, seeking to compel the school to produce the records, along with punitive damages and costs and fees.[322] That August, the parties settled, with the school agreeing to pay $18,000 in damages and fees, reforming its public records request system, and disavowing the policy of race-based teacher meetings.[323]

c. Academic Articles

Norman Wang was a physician and faculty member of the University of Pittsburgh School of Medicine.[324] He wrote an article in 2020 on diversity and the medical field, and in it, questioned the wisdom and effectiveness of affirmative action policies.[325] When it was published, the article received harsh criticism online, and some resolved to see him suffer employment consequences.[326] Around the same time, he said that his school's use of racial preferences for applicants was illegal.[327] Shortly thereafter, Wang was removed from his director position for a fellowship program, he was barred from having contact with fellows, residents, or medical students, the chair of his department sent an email to faculty condemning his article, and his article was retracted by the journal he published it with.[328] He sued his online critics, school administrators, and the journal that retracted his article for violations of the First Amendment, Title VI, 42 U.S.C. § 1981, defamation, breach of contract, tortious interference, and the state whistleblower law—though not every defendant was hit with every charge.[329] Wang sought declaratory judgment, injunctive relief, reinstatement to his position damages, and costs and fees.[330]

Each of the defendants filed a motion to dismiss, and most claims were dropped with time.[331] The only defendants left are the medical school and a few administrators.[332] We await a conclusive decision for that case as of November

[320] Petition for Writ of Mandamus at 2-3, Wis. Inst. for Law & Liberty v. Madison Metro. Sch. Dist., No. 30952 (Wis. Cir. Ct. Jan. 17, 2023).
[321] *Id.* at 3–4.
[322] *Id.* at 7, 10.
[323] Settlement Agreement and Release at 2, Wis. Inst. for Law & Liberty (Aug. 2, 2023), https://will-law.org/wp-content/uploads/2023/08/Fully-Executed-WILL-MMSD-Settlement-Agreement13.pdf.
[324] Complaint at 2, Wang v. Univ. of Pittsburgh, 2:20-cv-01952 (W.D. Pa. Dec. 15, 2020).
[325] *Id.* at 4.
[326] *Id.* at 5.
[327] *Id.* at 5.
[328] *Id.* at 5–8.
[329] *Id.* at 10–16.
[330] *Id.* at 19.
[331] Wang v. Univ. of Pittsburgh, No. 2:20-CV-01952, 2022 U.S. Dist. LEXIS 156850, at *1, (W.D. Pa. Aug. 31, 2022).
[332] *See id.* at 2.

2023. In the meantime, Wang filed a new lawsuit against many of the same defendants for retaliation.[333]

d. Scholarship Cases

1. WNC Citizens for Equality v. City of Asheville

In May 2021, the City of Asheville, North Carolina, created a scholarship fund.[334] By its terms, one scholarship it funded was to be awarded to Black students in Asheville, particularly those pursuing a career in education.[335] The city provided nearly half a million dollars in support of the fund.[336] An organization of non-Black students was formed to oppose the scholarship sued, represented by Judicial Watch.[337] The suit alleged a violation of the Equal Protection Clause, a conspiracy to violate equal protection under 42 U.S.C § 1985, and a violation of North Carolina's constitution's equal protection clause.[338] For relief, the organization sought declaratory judgment, an injunction, nominal damages, and costs and fees.[339]

A few months after filing the lawsuit, the parties settled. The city agreed to alter the scholarship criteria so that it would instead go to first-generation college students, particularly those pursuing a career in education.[340] The scholarship fund specifically stated it would not discriminate on the basis of race, gender, or sexual identity in awarding the scholarships, with the plaintiffs agreeing to drop all claims and renounce all compensation.[341] Thus, the suit was a straightforward victory for opponents of affirmative action.

2. Rabiebna v. Higher Educational Aids Board

Wisconsin's Minority Grant Program distributes public money to colleges which in turn award funds to "minority undergraduate" students, which is essentially defined as a student who is Black, American Indian, Hispanic, Loatian, Vietnamese, or Cambodian.[342] In 2021, a multi-racial group of people ineligible for the scholarship and taxpayers opposed to spending on the program sued,

[333] Complaint, Wang v. Univ. of Pittsburgh, No. 2:05-MC-02025 (W.D. Pa. Apr. 4, 2023).
[334] Complaint at 3, WNC Citizens for Equality v. City of Asheville, No. 1:21-CV-00310 (W.D.N.C. Oct. 19, 2021).
[335] *Id.* at 3–4. Although not challenged by the suit, a second scholarship it funded was for teachers or staff who identified as Black, indigenous, or as a person of color pursuing further education or certification. *Id.*
[336] *Id.* at 4.
[337] *Id.* at 5.
[338] *Id.* at 5–6.
[339] *Id.* at 7.
[340] Settlement Agreement at 1, WNC Citizens for Equality v. City of Asheville, No. 1:21-CV-00310 (W.D.N.C. Jan. 11, 2022). The same alteration was made for the second scholarship for teachers and staff pursuing additional education. *Id.* at 2.
[341] *Id.* at 2.
[342] Complaint at 4-5, Rabiebna v. Higher Educ. Aids Bd., No. 30701 (Wis. Cir. Ct. Apr. 15, 2021).

represented by the Wisconsin Institute for Law & Liberty.[343] They alleged a violation of the Wisconsin Constitution's equal protection clause, and requested a declaratory judgment, an injunction, and costs.[344] According to news reports in 2022, that trial court tossed the lawsuit.[345] The plaintiffs' attorneys vowed to appeal, expressing confidence that the legal landscape would shift in their favor once the Supreme Court ruled in the *Harvard/UNC* cases.[346]

VI. EMPLOYMENT POLICIES

a. Faculty Hiring

Richard Lowery was a finance professor at the University of Texas – Austin who challenged university faculty hiring policies that gave "discriminatory preferences to female or non-Asian minorities at the expense of white and Asian men."[347] Specifically, he took issue with a policy that gave a 50 percent match to base salary and benefits, but only for "underrepresented minority groups," and set-aside jobs for underrepresented minorities.[348] He alleged these policies violated Title VI, 42 U.S.C. § 1981, the Equal Protection Clause, and (even though no gender discrimination was explained) Title IX.[349] As relief, he asked for class certification, declaratory judgment, an injunction, court monitoring of the university's faculty hiring and "diversity office," and costs and fees.[350]

A few months after the initial complaint, the university filed a motion to dismiss, citing a lack of subject matter jurisdiction and a failure to state a claim.[351] The motion attacked the injury prong of standing, arguing that the plaintiff failed to demonstrate he actually intended to apply for a job or took any steps to apply.[352] It also argued that simply reciting that phrase that he was "able and ready" to apply was insufficient, particularly as the school had, at that point, only proclaimed a diversity goal and set aside funds for it.[353] This also meant the school could argue the challenge was not yet ripe.[354] Additionally, the school said because there was

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[343] *Id.* at 3.
[344] *Id.* at 7, 9 (citing Wis. Const. art. 1, § 1).
[345] Matthew Vadum, *Wisconsin Group to Appeal Court Loss in Challenge of Racially Discriminatory College Grant Program*, EPOCH TIMES (Sept. 26, 2022), https://www.theepochtimes.com/wisconsin-group-to-appeal-court-loss-in-challenge-of-racially-discriminatory-college-grant-program_4755367.html?welcomeuser=1. *See also*, Complaint at 1, Rabiebna v. Higher Educational Aids Board, No. 21CV137 (Wis. Ct. App. April 15, 2021), https://will-law.org/rabiebna-v-higher-educational-aids-board/ (last visited Oct. 19, 2023) (stating that the current status of the case is "Fully briefed in the Court of Appeals, awaiting decision").
[346] *Id.*
[347] Complaint at 2–3, Lowery v. Texas A&M Univ., No. 4:22-CV-3091 (S.D. Tex. Sept. 10, 2022).
[348] *Id.* at 4.
[349] *Id.* at 5–7.
[350] *Id.* at 7–8.
[351] Motion to Dismiss at 4–5, Lowery v. Texas A&M Univ., No. 4::22-CV-3091 (S.D. Tex. Dec. 2, 2022).
[352] *Id.* at 6–7.
[353] *Id.* at 7.
[354] *Id.* at 8.

no present violation of federal law, sovereign immunity barred the statutory claims.[355]

As for its failure to state a claim argument, the university started by asserting Title VI only applied to programs receiving federal funds where the *primary objective* was to provide employment—something not present here.[356] The plaintiff was also outside the "zone-of-interests" test for standing, meaning he was not an intended beneficiary of funds, he sued too many officials, and he should have sued the specific school that had the hiring policy, not the university system writ-large.[357] The university said no gender discrimination was alleged, nullifying the Title IX claim.[358] It argued the plaintiff should have used 42 U.S.C § 1983 rather than § 1981.[359] As for Equal Protection, the defendant said the university system could not be sued under this theory for the actions of a constituent school, and the complaint lacked enough facts to show discriminatory intent.[360]

In response to the motion to dismiss, the plaintiff filed an amended complaint.[361] It added allegations that the faculty senate endorsed the diversity plan, highlighted faculty debate that indicated the diversity plan would require reducing the number of Asian faculty members, and noted that these same faculty are involved in hiring decisions.[362] The amended complaint added more facts to account for the defendant's standing arguments: Lowery was actively looking for employment opportunities and sending out applications, and the only reason he had not already applied to Texas A&M University was that he did not believe he would get a fair shake.[363] According to a Joint Status Report in June 2023, the parties were unable to reach an agreement on the case and asked for a ruling on the standing question.[364]

That September, the district court granted the university's motion to dismiss on standing grounds, along with mootness and lack of ripeness.[365] The key fact was that Lowery, by admission, had never applied.[366] He could not simply assume he would be subjected to an unfair evaluation and thus suffer an injury.[367] The cases Lowery cited in support of his position involved plaintiffs who had at least applied at some point in the past and were ready to reapply.[368] The other allegedly discriminatory actions by the university either did not exist, had not gone into effect

[355] *Id.* at 9–10.
[356] *Id.* at 11.
[357] *Id.* at 12–13.
[358] *Id.* at 14.
[359] *Id.* at 15.
[360] *Id.* at 16–17.
[361] Amended Complaint, Lowery v. Texas A&M Univ., No. 4:22-CV-3091 (S.D. Tex. Dec. 23, 2022).
[362] *Id.* at 5–9.
[363] *Id.* at 9–11.
[364] Joint Status Report, Lowery v. Texas A&M Univ., No. 4:22-CV-3091 (S.D. Tex. June 12, 2023).
[365] Lowery v. Texas A&M Univ., No. 4:22-CV-3091, at 12 (S.D. Tex. Sept. 29, 2023), https://storage.courtlistener.com/recap/gov.uscourts.txsd.1888057/gov.uscourts.txsd.1888057.47.0.pdf.
[366] Id. at 6.
[367] Id.
[368] Id. at 7.

yet, or were purely advisory.[369] However, the court noted that the university will have to reexamine its hiring practices to ensure compliance with the *SFFA* decision,[370] so Lowery may get the result he sought.

b. Layoff Protections

Clapp v. Cox involves a Minneapolis teachers' union that ratified a contract in 2022 with a section labeled "Protections for Educators of Color."[371] Under that heading, the contract provided that teachers of color were exempt from normal seniority-based layoffs, meaning a senior, white teacher would be laid off before a junior teacher of color, and that teachers of color got priority for reinstatement.[372] A local taxpayer sued, alleging a violation of the state constitution's Equal Protection Clause and seeking declaratory relief, a permanent injunction, and costs and fees.[373] The case is pending.

The lawsuit does not mention this, but the contract may have been influenced by state statutes. Minnesota law directs a state educational licensing board to award grants to "increase the number of teacher candidates who are of color,"[374] and another law directs school districts to develop mentoring programs for "teachers of color," and says schools that receive a grant must create retention strategies for "educators of color," which may include financial incentives.[375] Delaware has a similar law.[376] Rhode Island's department of education has a subcommittee to focus on "Hiring and Retention Support System for Educators of Color."[377] It is easy to imagine these sorts of programs drawing lawsuits in the future.

c. Promotion Policies

The City of Cincinnati Police Department, following a consent decree over racial and gender discrimination, adopted a policy that held if four promotions went to white men, a fifth promotion would open up, known as a "double fill" that was guaranteed to go to a woman or Black officer.[378] In 2021, after the top four scorers were promoted, two white officers, ranked fifth and sixth in terms of test scores

[369] Id. at 7–8.
[370] Id. at 10.
[371] Complaint at 3, Clapp v. Cox, No. 27-CV22-12454 (Minn. Dist. Ct. Aug. 22, 2022).
[372] *Id.*
[373] *Id.* at 2, 5–6.
[374] Minn. Stat. § 122A.635.
[375] Minn. Stat. § 122A.70.
[376] Del. Code tit. 14, § 4505(c)(3) (requiring that schools seeking state grants must give a description of their "staff retention goals, specifically in regard to educators of color.").
[377] Letter from R.I. Dep't Educ., to Educ. Cmty., (Oct. 29, 2020), https://www.ride.ri.gov/Portals/0/Uploads/Documents/Inside-RIDE/EducatorsofColor/RIDEEOCCommunityLetter.pdf?ver=2020-10-29-104957-243.
[378] Mitchell v. City of Cincinnati, No. 21-4061, 2022 U.S. App. LEXIS 27444, at *3 (6th Cir. Sept. 29, 2022).

were passed over for promotion by a Black officer who was ranked seventh, they sued, alleging a violation of Equal Protection.[379]

The district court rejected a request for a preliminary injunction, focusing on the lack of irreparable harm.[380] On appeal to the Sixth Circuit, the court adopted the same reasoning as the lower court.[381] This was because the plaintiffs were fifth and sixth, so they had no claim for the top four spots, and the "double-fill" promotion was a new position created through the consent decree, not a spot the plaintiffs could have competed for at all.[382] In other words, if the consent decree were thrown out, the plaintiffs still would not have been promoted.[383] According to the docket, the parties began settlement negotiations in December 2022, and the present status of negotiations is unclear.[384]

d. Retaliatory Firing

1. Beaudin v. DeKroub

Conservative groups may take up reverse discrimination cases as a sort of proxy battle. The Thomas Moore Legal Center represented Richard Beaudin, a realtor with Re/Max for over 20 years, living in Pinckney, Michigan.[385] In response to a planned Black Lives Matter ("BLM") protest in 2020, he posted on a local community Facebook "Can't we all just promote in Pinckney That All Lives Matter?"[386] According to the complaint, a BLM affiliate contacted his employer, which led to the plaintiff's termination.[387] He sued for breach of his employment contract, tortious interference with his contract, interference with a business relationship, intentional infliction of emotional distress, asking for damages, plus costs and fees.[388]

The suit looked to be a transparent political messaging tool. It opens up with the line "The Black Lives Matter ('BLM') 'cancel culture' playbook is on full display in this case."[389] It goes on to say that BLM's purpose involves trying to "financially destroy ('cancel') individuals or entities that disagree with its mission or methods."[390] As of writing, it does not appear to have gone anywhere.

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[379] *Id.* at *4–6.
[380] Mitchell v. City of Cincinnati, No. 1:21-cv-00626, 2021 U.S. Dist. LEXIS 219429, at *9 (S.D. Ohio Nov. 14, 2021).
[381] Mitchell, 2022 U.S. App. LEXIS 27444, at *7.
[382] *Id.* at *8.
[383] A different white officer in the same city with the same grievance had a similar outcome when they brought their own equal protection suit. *See* Kohler v. City of Cincinnati, No. 21-3466, 2021 U.S. App. LEXIS 32574, at *4–5 (6th Cir. Nov. 1, 2021).
[384] Mitchell et al v. City of Cincinnati et al., PACERMONITOR, https://www.pacermonitor.com/public/case/42051456/Mitchell_et_al_v_City_Of_Cincinnati_et_al (last visited Oct. 19, 2023).
[385] Complaint at 3, Beaudin v. DeKroub, No. 21-31042 (Mich. Cir. Ct. Feb. 17, 2021).
[386] *Id.* at 4.
[387] *Id.*
[388] *Id.* at 6–9.
[389] *Id.* at 2.
[390] *Id.* at 2–3.

2. Krehbiel v. BrightKey

The Center for Individual Rights represented Gregory Krehbiel, a white employee at a Maryland company called BrightKey, handling client support and warehouse operations.[391] On the side, the plaintiff hosted a podcast where he and a friend spoke about the news of the day over drinks—a podcast his boss had said he could do.[392] In 2020, the plaintiff expressed skepticism regarding diversity requirements and hate crimes on his podcast.[393] This led to other BrightKey employees calling for the plaintiff to be terminated because they did not think a white person should express such opinions, staging a walkout in protest.[394] BrightKey fired the plaintiff, and the plaintiff sued under Title VII, state law, the city charter, and breach of contract.[395] He sought backpay, frontpay, damages, and costs and fees.[396]

A district court dismissed the plaintiff's lawsuit.[397] It noted that although under both state and federal law, employers could not discriminate, there was no evidence plaintiff was terminated because of his race.[398] While subordinate employees may have wanted him fired in part because of his race, these people had no supervisory authority over him, and the court would not impute their bias onto the superior who ultimately fired the plaintiff.[399] Although the county charter protected employees against discrimination based on "political opinion," the federal court refused to exercise supplemental jurisdiction over it or his other state law claims since the anchoring federal claims were invalid.[400] After dismissal, the plaintiff filed an appeal to the Fourth Circuit, primarily arguing that his employer knowingly adopted the discriminatory motive of the subordinate employees who lobbied to have the plaintiff fired.[401]

The appeal is still pending,[402] but this case illustrates how these sorts of claims could become even more prevalent if plaintiffs embrace local law. Under Title VII, a plaintiff must show they were punished because of their *race*. But under the charter of Howard County, Maryland, it is unlawful for private employers to discriminate based on an employee's "political opinion."[403] Other jurisdictions also protect political opinions.[404] Had the plaintiff simply filed in state court, rather than

[391] Complaint at 1–2, Krehbiel v. BrightKey, No. 1:21-cv-02927 (D. Md. Nov. 15, 2021).
[392] *Id.* at 2.
[393] *Id.* at 3.
[394] *Id.*
[395] *Id.* at 4–6.
[396] *Id.* at 6.
[397] Krehbiel v. BrightKey, No. 1:21-CV-02927, 2022 U.S. Dist. LEXIS 38628 (D. Md. Mar. 4, 2021).
[398] *Id.* at 5–7.
[399] *Id.* at 7 (citing Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 290 (4th Cir. 2004)).
[400] *Id.* at 8 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).
[401] Plaintiff-Appellant Brief, Krehbiel v. BrightKey, No. 22-1385, at 7 (4th Cir. July 14, 2022).
[402] Krehbiel v. BrightKey, Inc., Cent. for Individual Rights (last visited Nov. 17, 2023), https://www.cir-usa.org/case/krehbiel-v-brightkey/ (listing the case status as "Pending.").
[403] Howard Cnty, Md. Charter, § 12.208.
[404] *See* N.Y. Civ. Serv. L. § 107.

trying to bootstrap the local claims onto a federal lawsuit, it could very well have changed the outcome.

3. Ossmann v. Meredith Corp.

Paul Ossmann was a white meteorologist at an Atlanta news station.[405] Multiple women filed sexual harassment complaints against him, and he was eventually fired.[406] On this termination form, the company included his race, the race of other employees, the impact his termination would have on the racial composition of the company.[407] The company said it was using the data to ensure it was "being equitable" and treating similar people similarly.[408] Nonetheless, Ossmann sued, claiming race discrimination in violation of 42 U.S.C. § 1981, and that the sexual harassment was a pretext.

The Eleventh Circuit rejected the lawsuit, affirming summary judgment in October 2023.[409] It held that the form merely listed racial information in a neutral fashion and did not tell supervisors what to do with it.[410] The fact that he was replaced by a non-white employer was not enough either.[411] But the case drew a spirited dissent, arguing that the only reason an employer would consider the racial consequences of a termination is if race affected the decision.[412] The Eleventh Circuit rejected *en banc* review in November.[413] Whether it will be appealed to the Supreme Court remains to be seen.

VII. CONTRACTING

Under federal law, there is a government-wide goal of setting aside a percentage of federal contracts to ensure they go to certain kinds of businesses.[414] For example, three percent of contract awards are supposed to go to small businesses owned by disabled veterans.[415] More relevantly, five percent is set aside for small businesses owned by "socially and economically disadvantaged individuals."[416] This set-aside for "disadvantaged" individuals is sometimes referred to as the Section 8(a) program for shorthand[417] but requires looking at many authorities to fully understand.

A separate statute defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of

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[405] Ossmann v. Meredith Corp., 82 F.4th 1007, 1010 (11th Cir. 2023)
[406] *Id.* at 1010.
[407] *Id.* at 1013.
[408] *Id.*
[409] *Id.* at 1021.
[410] *Id.* at 1015.
[411] *Id.* at 1019.
[412] *Id.* at 1022 (Maze, J., dissenting).
[413] Ossmann v. Meredith Corp., No. 22-11462, 2023 U.S. App. LEXIS 29264 (11th Cir. Nov. 2, 2023).
[414] 15 U.S.C.S. § 644.
[415] *Id.* at § 644(g)(1)(A)(ii).
[416] *Id.* at § 644(g)(1)(A)(iv).
[417] *See* Rothe Dev., Inc. v. U. S. Dep't of Def., 836 F.3d 57, 61 (D.C. Cir. 2016).

their identity as a member of a group without regard to their individual qualities."[418] "Economically disadvantaged" is defined as those whose ability to compete has "been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[419] And a statement of policy declares that individuals may be socially disadvantaged if they belong to certain groups, and "such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities."[420]

Beyond the statute, the Small Business Administration has promulgated regulations that define "socially disadvantaged" as individuals "who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities."[421] Regulations further provide that most racial minorities have a rebuttable presumption of being socially disadvantaged, while all others had to prove an individual social disadvantage by a preponderance of the evidence.[422]

The five percent goal for minority businesses is rather modest, all things considered. There are fewer than two million disabled veterans in the country (less than one percent of the population), and this group gets a three percent set-aside.[423] People of color make up 43 percent of the United States, yet this group gets a five percent set aside.[424] Percentages aside, race-conscious set-asides have resulted in litigation.

a. Department of Agriculture

Ultima Services was a small business that contracted with a sub-agency of the U.S. Department of Agriculture.[425] After many years of winning contracts, in 2018, the Department instead went with Section 8(a) contractors, which presumptively went to non-white businesses.[426] The plaintiff alleged this presumption was a violation of the Fifth Amendment and 42 U.S.C § 1981, seeking declaratory and injunctive relief, money damages for lost contracts, a reinstatement of lost contracts, and costs and fees.[427]

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[418] 15 U.S.C. § 637(a)(5).
[419] 15 U.S.C. § 637(a)(6)(A).
[420] 15 U.S.C. § 631(f)(1)(C).
[421] 13 C.F.R. § 124.103(a) (2023).
[422] 13 C.F.R. § 124.103(b)–(c) (2023).
[423] *See* Statista Research Department, *Number of veterans in the United States in 2021, by service-connected disability status*, STATISTA (June 2, 2022), https://www.statista.com/statistics/250316/us-veterans-by-disability-status/.
[424] Janie Boschma et al., *Census release shows America is more diverse and more multiracial than ever*, CNN (Aug. 12, 2021), https://www.cnn.com/2021/08/12/politics/us-census-2020-data/index.html.
[425] Complaint at 2, Ultima Servs. Corp. v. U.S. Dep't of Agric., No. 2:20-cv-00041-DCLC (E.D. Tenn., Mar. 4, 2020).
[426] *Id.* at 3–5.
[427] *Id.* at 9–10.

The government filed a motion to dismiss and the district court granted in part and denied in part.[428] Starting with standing, the court said the injury was the unequal playing field by the set-aside, could be traced to the Section 8(a) program, and was redressable by the courts.[429] As to the claims, the equal protection claim was adequately pled by the plaintiff saying it was treated differently based on race.[430] But the Section 1981 claim failed, as it does not apply to federal agencies.[431] Still, the bulk of the lawsuit was allowed to proceed. Both parties filed motions for summary judgment, and the court asked the parties if the case should be stayed pending the outcome of the *SFFA* cases at the Supreme Court.[432] Both parties said no.[433]

Less than a month after *SFFA*, the district court in *Ultima* issued its ruling, making it the first case in the country to apply the *SFFA* to strike down a race-conscious policy.[434] The court once again said injury was demonstrated by the unequal racial playing field, regardless of whether there might be some other reason the company might not qualify for the program, and the injury would be redressable by removing the race-based presumption.[435] Although the court said Congress has authorized the agency to use a racial presumption, it still had to survive strict scrutiny.[436]

Starting with the compelling interest of remedying discrimination, the court said the government's data showing discrimination against minority business was too generalized. It could not point to a specific instance of discrimination the presumption sought to address, show intentional discrimination, rule out confounding variables in the data showing racial disparities, nor show the government was a participant in the discrimination.[437] For narrow tailoring, the court said that receiving the presumption was all but dispositive, it had no sunset date, had no specific objectives linked to the presumption, the program was underinclusive and overinclusive by drawing arbitrary lines over which racial groups qualified.[438] There was no good-faith effort to try race-neutral alternatives because the government never tried other methods over the past several decades.[439] And it did not matter than only a small percentage of federal contracting dollars

[428] Memorandum Opinion and Order at 11, Ultima Servs. Corp. v. U.S. Dep't of Agric., No. 2:20-cv-00041-DCLC (E.D. Tenn. Mar. 31, 2021).
[429] *Id.* at 6–8.
[430] *Id.* at 10.
[431] *Id.* at 11.
[432] Christopher Slottee & Darrias Sime, *Update on Challenge to the Constitutionality of the SBA 8(a) Program*, SCHWABE (Jan. 9, 2023), https://www.schwabe.com/publication/update-on-challenge-to-the-constitutionality-of-the-sba-8a-program/.
[433] *Id.*
[434] As of August 9, 2023, Lexis lists only ten cases that cite SFFA. Of these, *Ultima* is the only one using SFFA to strike down a race-conscious policy.
[435] Ultima Servs. Corp. v. U.S. Dep't of Agric., No. 2:20-CV-00041-DCLC-CRW, 2023 U.S. Dist. LEXIS 124268, at *22–25 (E.D. Tenn. July 19, 2023).
[436] *Id.* at *32–33.
[437] *Id.* at *38–42, *44.
[438] *Id.* at *48–51, *54.
[439] *Id.* at *56–57.

went through the Section 8(a) program—it still harmed Ultima.[440] Thus, it held the program violated the Fifth Amendment,[441] and *SFFA* was cited throughout. This opinion has already thrown the program into disarray, the Small Business Administration issued guidance saying that applicants can no longer qualify on the basis of race alone.[442] Instead, business owners must submit an essay explaining how their race has put them at a social disadvantage[443]—reminiscent of the Supreme Court's language in *SFFA* about an acceptable alternative to race-based affirmative action.

b. Department of Transportation

As part of the 2021 Infrastructure Investment and Jobs Act, $370 billion was designated for roads, bridges, and other surface transportation projects.[444] Of this pot, 10 percent was set aside for "socially and economically disadvantaged" small businesses, which only included women and certain minorities in the "socially" disadvantaged category.[445] The law relied on the same definition of "socially disadvantaged" as set out in the Small Business Act's Section 8(a) program.[446] A white male plaintiff sued, arguing that as a disabled immigrant, he should qualify for the "disadvantaged" set-aside.[447] He claimed without an injunction, he would lose out on the ability to compete for all contracts available under the Infrastructure Act.[448] He therefore alleged a violation of Equal Protection, and sought an injunction, declaratory judgment, and attorney fees.[449]

The government filed a motion to dismiss.[450] It seized on the lack of injury. It said that while the law authorized money for disadvantaged firms, none had actually been spent yet, and thus, the plaintiff had not bid on any contract receiving money from the law.[451] The government claimed that he would actually have to submit the low bid and have it passed over in favor of a disadvantaged business to have an injury.[452] Additionally, the government argued that eliminating racial-and gender-conscious policies would not redress the plaintiff's injuries, since he might still be barred by the requirement that he be "economically" disadvantaged, and that the claims were not yet ripe.[453]

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[440] *Id.* at *60.
[441] *Id.* at *61.
[442] Julian Mark, *SBA Program Upended in Wake of Supreme Court Affirmative Action Ruling*, WASH. POST (Sept. 7, 2023), https://www.washingtonpost.com/business/2023/09/07/sba-8a-program-ruling-affirmative-action/.
[443] *Id.*
[444] Complaint at 1, Bruckner v. Biden, No. 8:22-CV-01582 (M.D. Fla. July 13, 2022).
[445] *Id.* at 1–2.
[446] *Id.* at 6.
[447] *Id.* at 2.
[448] *Id.* at 8.
[449] *Id.* at 9, 11.
[450] Motion to Dismiss at 1, Bruckner v. Biden, No. 8:22-CV-01582-KKM-SPF (M.D. Fla. Sept. 27, 2022).
[451] *Id.* at 7–9.
[452] *Id.* at 10.
[453] *Id.* at 11–13.

Assuming the case went to the merits, the government still contended they would prevail. It noted that every circuit that has addressed the constitutionality of the disadvantaged business program has upheld it—citing cases between 2000 and 2016.[454] Since 2010, there were over 200 disparity studies, along with congressional testimony, showing that disadvantaged businesses could not compete equally for government contracts, which over 100 published from 2015 to 2021.[455] These studies used statistical techniques to reduce the risk that disparities are due to chance, and were supplemented by surveys, interviews, and other qualitative evidence of personal discrimination.[456] Finally, the government claimed the plaintiff failed to sue any state or local agency that received federal funding, and that because these would be the ones actually implementing the disadvantaged business program, the lawsuit could not proceed without them being present.[457]

The court found the plaintiffs lacked standing. It said that because federal money was given to states and localities, and those bodies each had their own funding process, the plaintiffs would need to demonstrate they applied for a contract where race was taken into account.[458] But the judge left no doubt as to where she fell on the debate, writing "Racial discrimination . . . tarnishes the integrity of the government. . . One would hope then that the federal government would abstain from discriminating based on race. Unfortunately, it has not, which leads to this action."[459] Because the case was dismissed for lack of standing, this preamble was dicta, but it all but announces a foregone conclusion on the merits.

The same infrastructure law that doled out money also created the Minority Business Development Agency.[460] Using the same definition of "socially or economically disadvantaged individual," and the same presumption for certain minority groups, the Agency offers business incubation services to eligible businesses.[461] A group of white business owners challenged the business incubation program as race discrimination barred by the Fifth Amendment.[462]

Judge Pittman of the Northern District of Texas ruled in favor of the plaintiffs on a motion for preliminary injunction. The court said there was standing because the plaintiffs were eligible for the Agency's services, but for their race, and contacted the Agency about assistance.[463] Turning to the merits, the court said the

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[454] *Id.* at 16 (citing Midwest Fence Corp. v. Dep't of Transp., 840 F.3d 932, 941, 935–36 (7th Cir. 2016); W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 995 (9th Cir. 2005); Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 967–68 (8th Cir. 2003); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1155 (10th Cir. 2000)).

[455] Motion to Dismiss at 18, Bruckner v. Biden, No. 8:22-CV-01582-KKM-SPF (M.D. Fla. Sept. 27, 2022).

[456] *Id.* at 19.

[457] *Id.* at 23.

[458] Brucker v. Biden, No. 8:22-CV-1582-KKM-SPF, 2023 U.S. Dist. LEXIS 57189, at *21-22 (M.D. Fla. Mar. 31, 2023).

[459] *Id.* at *2.

[460] Nuziard v. Minority Bus. Dev. Agency, No. 4:23-CV-0278-P, 2023 U.S. Dist. LEXIS 97066, at *2 (N.D. Tex. June 5, 2023)

[461] *Id.* at *2.

[462] *Id.* at *3.

[463] *Id.* at *7–8.

government lacked a compelling interest.[464] For remedying past discrimination to be a compelling interest, the court said there must be (1) a specific episode of discrimination, (2) a showing of intentional discrimination, not just statistical disparities, and (3) the government must have participated in the discrimination.[465] The government failed on all three.[466] And the court found the government had not tried race-neutral alternatives, and the presumption was arbitrary because of how it drew lines based on geography and excluded minority businessowners who controlled less than 51 percent of their company.[467] Thus, the court found a likelihood of success on the merits that the race-based presumption was unconstitutional.[468]

VIII. COVID-19 POLICIES

a. Medical Triage

When COVID-19 treatments first became available, public health officials had the difficult task of deciding who should get them first. Various governmental bodies decided that race should be taken into the account. For example, the Veterans Administration initially gave vaccine priority to Black, Hispanic, and Native American veterans.[469] These sorts of policies have been justified on public health grounds that people of color are more likely to hold frontline worker positions, and are more likely to suffer from preexisting conditions, like diabetes, that elevate the mortality risk from COVID-19, though none assert that race itself causes the disease.[470]

There was no legal precedent for using race to allocate medical resources.[471] And there are intense unfairness concerns over using *group* characteristics to justify *individual* risk calculations. One commentator noted these kinds of policies would face an "uphill battle" in the courts.[472] Two members of the United States Commission on Civil Rights expressed Equal Protection concerns with using race to prioritize vaccines.[473] Others have gone ahead and sued.

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[464] *Id.* at *12.
[465] *Id.*
[466] *Id.* at *12–15.
[467] *Id.* at *15–17.
[468] *Id.* at *17.
[469] Nikki Wentling, *Minority Veterans to Receive Priority for Coronavirus Vaccines*, STARS & STRIPES (Dec. 10, 2020), https://www.stripes.com/theaters/us/minority-veterans-to-receive-priority-for-coronavirus-vaccines-1.654624.
[470] *See* Walter Olson, *Why a Racial Priority for COVID-19 Vaccine Distribution Poses Problems*, CATO INST. (Dec. 30, 2020), https://www.cato.org/commentary/why-racial-priority-covid-19-vaccine-distribution-poses-problems.
[471] Harald Schmidt et al., *Is It Lawful and Ethical to Prioritize Racial Minorities for COVID-19 Vaccines?*, JAMA NETWORK (Oct. 14, 2020), https://jamanetwork.com/journals/jama/fullarticle/2771874.
[472] Michael Conklin, *Legality of Explicit Racial Discrimination in the Distribution of Lifesaving COVID-19 Treatments*, 19 IND. HEALTH L. REV. 315, 317–318 (2022).
[473] Letter from Gail Heriot & Peter Kirsanow, Comm'rs on the U.S. Comm'n on Civ. Rts., to Robert Wilkie, Sec'y of Veterans Affs. (Dec. 15, 2020), http://www.newamericancivilrightsproject.org/wp-content/uploads/2020/12/Letter-to-Secretary-Wilkie-12.15.2020.pdf.

1. Vaccine Prioritization

James E. Pietrangelo is an attorney who frequently files lawsuits challenging what he sees as discrimination, such as forcing a women's only club to admit men.[474] In 2021, he turned his sights on New Hampshire, which announced that 10 percent of its early supply of vaccines would go to "critical populations," which was defined to include being non-white.[475] Pietrangelo sued, asserting violations of the Fifth and Fourteenth Amendments, Title VI, the Affordable Care Act.[476] He requested a preliminary injunction, but it was shot down by the district court for lack of standing.[477] Plaintiffs challenging discriminatory actions must be "able and ready" to apply for the contested government benefit,[478] and Pietrangelo could not do this because the area of the state he lived in was not eligible for the vaccine equity plan, meaning his race did not affect his access to care.[479]

The matter of the preliminary injunction was appealed to the First Circuit, where the case was dismissed as moot, since by the time of the appeal, New Hampshire was providing vaccines to all residents, regardless of race.[480] Although the plaintiff argued the racial equity plan could be reinstituted down the road if there were a vaccine crunch or when he sought a booster, the court said this was too speculative and there was no reason to think there would be future shortages.[481] A few months later, the district court dismissed the suit but did not explain its reasoning other than by referencing the defendant's motion.[482]

2. Antiviral COVID-19 Drug Cases

There have also been lawsuits about the distribution of other COVID-19 drugs. In late 2021, New York's health department announced that being "non-white" was a risk factor that help meet eligibility criteria for access to antiviral COVID-19 treatment.[483] Lawsuits swiftly followed. America First Legal represented Cornell Law Professor William A. Jacobson to challenge the rule.[484] He argued the policy was a straightforward violation of the Fourteenth Amendment,

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[474] J.K. Trotter, *Women's Club The Wing Quietly Dropped its Practice of Banning Men After a Man Filed a $12 Million Gender Discrimination Lawsuit*, INSIDER (Jan. 7, 2019), https://www.insider.com/the-wing-changed-membership-policy-to-allow-men-after-gender-discrimination-lawsuit-2019-1.

[475] Pietrangelo v. Sununu, No. 21-CV-124-PB, 2021 U.S. Dist. LEXIS 65632, at *5–6 (D.N.H. Apr. 5, 2021).

[476] *Id.* at *11.

[477] *Id.* at *14.

[478] *Id.* at *16–17 (citations omitted).

[479] *Id.* at *18–19.

[480] Pietrangelo v. Sununu, 15 F.4th 103, 105 (1st Cir. 2021).

[481] *Id.* at 106.

[482] Pietrangelo v. Sununu, 2022 U.S. Dist. LEXIS 59136 (D.N.H. Mar. 10, 2022).

[483] *Covid-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Antiviral and Monoclonal Antibody Treatment Products*, N.Y. DEP'T HEALTH (Dec. 27, 2021), http://www.mssnyenews.org/wp-content/uploads/2021/12/122821_Notification_107774.pdf.

[484] Complaint at 2, 9, Jacobson v. Basset, No. 3:22-CV-00033 (N.D.N.Y. Jan. 16, 2022).

Title VI, and the Affordable Care Act, all of which prohibit discrimination.[485] The lawsuit sought to certify a class of non-white plaintiffs to seek declaratory relief, a permanent injunction against considering race, and attorney fees.[486] The lawsuit was ultimately defeated for lack of standing, though the court did not say the underlying plan was lawful.[487]

New York managed to beat the lawsuit, but other states with similar plans did not bother fighting. Utah, Minnesota, and New Mexico also had plans to take race into account to distribute antiviral COVID-19 treatments, but received letters from America First Legal, threatening to sue.[488] All three states abandoned their efforts to use race shortly thereafter, though it is not clear whether it was the threat of a lawsuit or other political pressure that led to the reversal.[489] Judicial Watch filed public record requests after Vermont prioritized Black, indigenous, and people of color for vaccine access,[490] and separately, Montana prioritized Native Americans and people of color for vaccines,[491] though the author could not locate any resulting lawsuits in these states.

3. COVID-19 Testing

For a twist on the standard equal protection COVID-19 claim, in *Castillo v. Whitmer*, a group of plaintiffs challenged a Michigan requirement for agricultural businesses and housing providers to perform COVID-19 testing.[492] Although the order was facially race-neutral, the plaintiffs claimed it violated equal protection because it would have a disproportionate impact on Latinos due to targeting the agricultural industry.[493] The Sixth Circuit said there was insufficient evidence that race motivated the rule. Although plaintiffs could point to evidence the state was aware of the racial dimension of the pandemic, the government was not disabled from looking at data on race, and there was no evidence the rule was adopted to target Latinos.[494] The disparate impact alone was not enough to show discriminatory intent.[495]

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[485] *Id.* at 7–8.
[486] *Id.* at 8–9.
[487] Summary Order at 3, Roberts v. Bassett, No. 22-CV-00622 (2d Cir. Nov. 15, 2022).
[488] Xander Landen, U*tah, Minnesota Back Down on Race-Based COVID Care as New York Faces Lawsuit*, NEWSWEEK (Jan. 23, 2022), https://www.newsweek.com/utah-minnesota-back-down-race-based-covid-care-new-york-faces-lawsuit-1672011; *Victory by America First Legal on Behalf of New Mexico's Covid Patients: New Mexico ABANDONS Its Race-Based COVID Treatment Policy*, AM. FIRST LEGAL (Mar. 1, 2022), https://aflegal.org/victory-by-america-first-legal-on-behalf-of-new-mexicos-covid-patients-new-mexico-abandons-its-race-based-covid-treatment-policy/.
[489] *Victory by America First Legal on Behalf of New Mexico's Covid Patients, supra* note 458.
[490] *Vaccine Priority in Vermont for People of Color, Indigenous, English Language Learners, Refugees*, JUD. WATCH (Apr. 8, 2021), https://www.judicialwatch.org/vaccine-priority-in-vermont-for-people-of-color-indigenous-english-language-learners-refugees/.
[491] Press Release, Montana Moves to Phase 1B of Vaccine Distribution (Jan. 19, 2021), https://news.mt.gov/Governors-Office/montana-moves-to-phase-1b-of-vaccine-distribution.
[492] Castillo v. Whitmer, 823 F. App'x 413, 414 (6th Cir. 2020).
[493] *Id.* at 415–16.
[494] *Id.* at 416–17.
[495] *Id.* at 417.

4. Other COVID-19 Health Issues

Some groups went further than challenging strict racial classifications. America First Legal not only challenged treatment priority for people of color, it opposed *educating* people of color about treatments. As late as December 2022, it criticized the CDC for using "Black Twitter" to promote vaccination.[496] It said the CDC was "infantiliz[ing] Black Americans" by using "community partners" to "disseminate messages and conduct outreach in a trusted and culturally responsive and linguistically appropriate way."[497] Judicial Watch filed public record requests to investigate a Maryland clinic that vaccinated Latinos in Prince George's County, though the clinic did not state it would turn away other races.[498] It was unclear from the court records of any these cases whether any white person had actually been denied or delayed medical treatment because of their race.

b. COVID Financial Aid Cases

1. Vitolo v. Guzman

One part of the fight against COVID-19 involved providing medical treatment for the disease; another was about keeping businesses afloat during a steep economic downturn. As part of the federal government's response to COVID-19, Congress allocated $29 billion to help struggling restaurants, administered by the Small Business Administration.[499] The agency gave priority to businesses controlled by a "socially and economically disadvantaged" person, which means one who has been "subjected to racial or ethnic prejudice" or "cultural bias."[500] The Administration presumed that most non-white races fit into the disadvantaged category; without the presumption, an applicant had the burden to prove they were disadvantaged.[501]

A white plaintiff sued, but the district court rejected his claims. Firstly, it rejected the plaintiff's request for a temporary restraining order, saying there was evidence of minority businesses struggling a disproportionate amount, early governmental attempts to help did not reach them, and discrimination played a role.[502] The program was narrowly tailored because it was a one-time infusion, with finite money, supported by evidence, and there was no absolute bar to non-

[496] *AFL Releases More CDC Documents Revealing Bizarre "Equity" Agenda in COVID-19 Vaccination and Slides Discussing the Policy Objective of Injecting Children Even When "Parent Is Not Present,"* AM. FIRST LEGAL (Dec. 15, 2022), https://aflegal.org/afl-releases-more-cdc-documents-revealing-bizarre-equity-agenda-in-covid-19-vaccination-and-slides-discussing-the-policy-objective-of-injecting-children-even-when-parent-is/.
[497] *Id.*
[498] *Maryland Opens "Special Clinic" to Give Latinos COVID-19 Vaccines in Biggest Counties*, JUD. WATCH (Apr. 6, 2021), https://www.judicialwatch.org/maryland-opens-special-clinic-to-give-latinos-covid-19-vaccines-in-biggest-counties/.
[499] Vitolo v. Guzman, 999 F.3d 353, 356–57 (6th Cir. 2021).
[500] *Id.* at 357.
[501] *Id.* at 357–58.
[502] Vitolo v. Guzman, 540 F. Supp. 3d 765, 777, 779–80 (E.D. Tenn. 2021).

minorities.[503] But it was not a complete loss for the plaintiff, as the district court ruled there was standing because having to compete on an uneven playing field was injury, even if there had been no outright rejection.[504]

On appeal to the Sixth Circuit for a preliminary injunction, the court held the plaintiff had standing merely by applying for aid in a system that considered race.[505] It did not matter, according to the court, "that the plaintiffs might not otherwise qualify for priority consideration," since race still affected the order in which applications were processed.[506] Similarly, there was no mootness issue even though the 21-day "priority" phase of the grant program had already ended, the prioritization affected when the plaintiff would have his application considered, and thus, the program might burn through its money before it got to him.[507]

Moving to the substance of the injunction, the court said any racial classifications were presumptively invalid, only to survive if there is a compelling interest and a narrowly tailored remedy.[508] For remediation of past discrimination to be a compelling interest, it would have to (1) target specific discrimination, (2) be in response to intentional discrimination, and (3) the government must have played a part in the discrimination.[509] The court said the policy met none of these factors, it was simply passed to address generalized, societal discrimination of which the government played no part.[510] Furthermore, there were arbitrary distinctions between which races qualified: Pakistanis, but not Afghans, for instance, and no attempt to try race-neutral alternatives.[511] So the preliminary injunction was granted, and the government was ordered to process aid applications without regard to race.[512] The dissent pointed out Congress had multiple hearings to support its targeted aid,[513] but this was insufficient.

2. Great Northern Resources v. Coba

In Oregon, the state earmarked $62 million out of its $1.4 billion federal COVID-19 relief money—or about five percent—for Black residents and businesses experiencing hardships related to COVID-19.[514] White and Hispanic business owners sued, represented by conservative legal organizations..[515] The named party in the first suit was Great Northern Resources, a logging company that

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[503] *Id.* at 781.
[504] Vitolo & Jake's Bar v. Guzman, No. 3:21-CV-176, 2021 U.S. Dist. LEXIS 102016, at *6–7 (E.D. Tenn. May 25, 2021).
[505] Vitolo, 999 F.3d at 359.
[506] *Id.* at 359.
[507] *Id.* at 359–60.
[508] *Id.* at 360.
[509] *Id.* at 361.
[510] *Id.* at 361–62.
[511] *Id.* at 361–63.
[512] *Id.* at 365–66.
[513] *Id.* at 371 (Bouie Donald, J., dissenting).
[514] John Eligon, *A Covid-19 Relief Fund Was Only for Black Residents. Then Came the Lawsuits*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2021/01/03/us/oregon-cares-fund-lawsuit.html.
[515] *Id.*

applied for aid but did not receive any.[516] It claimed the special fund was a violation of the Equal Protection Clause, Title VI, and 42 U.S.C. 1981, and sought declaratory judgment, an injunction, nominal and compensatory damages, and costs and fees.[517] An opinion from the state legislative counsel said that the fund was adopted without evidence of past discrimination by the state, and thus, it "would almost certainly be unconstitutional under the Fourteenth Amendment."[518]

The plaintiff sought a preliminary injunction, which the district court denied.[519] The plaintiff had already applied for aid and been rejected, thus, the harm was already done.[520] Preliminary injunctions are designed to stop ongoing harm or prevent future harm, not past harm.[521] And the court declined to impose an injunction for the sake of future applicants, as they were not before the court.[522] Great Northern may have lost the battle, but it won the war. Oregon later announced a settlement agreement where applicants of any race could apply for funds.[523]

3. Hardre v. Markey

Colorado devoted $4 million in COVID relief payments in 2020 to "minority-owned businesses" and provided growth and start-up capital to them.[524] A non-minority businessowner, Etienne Hardre, sued, alleging a violation of the Equal Protection Clause, saying it classified businesses based on race yet lacked a compelling interest or need to remedy past discrimination.[525] The lawsuit sought declaratory judgment, a permanent injunction, nominal damages, and attorney fees.[526] After the lawsuit was filed, the law was tweaked to give the money to "disproportionately impacted businesses," which was defined to automatically include minority-owned businesses, but require non-minority businesses to meet additional criteria, such as being in an economically distressed area.[527]

In April 2021, Judge Philip Brimmer of the District of Colorado ruled that the case was unripe, as the state had yet to promulgate regulations and make final

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[516] Complaint at 5–6, Great N. Res., Inc. v. Coba, No. 3:20-CV-01866, 2020 U.S. Dist. LEXIS 217930 (Oct. 29, 2020).
[517] *Id.* at 12–14.
[518] Letter from Dexter A. Johnson, Oregon Legis. Couns., to Sen. Fred Girod, at 2, (July 13, 2020), https://olis.oregonlegislature.gov/liz/2019I1/Downloads/CommitteeMeetingDocument/224703.
[519] Great N. Res., Inc. v. Coba, No. 3:20-cv-01866-IM, 2020 U.S. Dist. LEXIS 217930, at *2 (D. Or. Nov. 20, 2020).
[520] *Id.* at *4.
[521] *Id.*
[522] *Id.* at *5. A second business that filed a similar lawsuit met with the same result. Cocina Cultura LLC v. Oregon, No. 3:20-cv-02022-IM, 2020 U.S. Dist. LEXIS 229214, at *6–7 (D. Or. Dec. 7, 2020).
[523] Great N. Res., Inc., et al. v. Coba, No. 3:20-cv-01866-IM, 2020 WL 6820793 (D. Or. Nov. 11, 2020).
[524] First Amended Complaint at 2, Hardre v. Markey, No. 1:20-cv-03594-PAB-KMT (D. Colo. Feb. 18, 2021).
[525] *Id.* at 1, 3, 10–11.
[526] *Id.* at 11–12.
[527] *Id.* at 2, 15 (showing that the law was amended on January 21, 2021, and the lawsuit was originally filed December 8, 2020).

determinations about who was eligible for assistance.[528] Rather than monitor the actions of the government as it was finalizing regulations, the court dismissed the suit altogether and placed the onus on the plaintiff to refile when appropriate.[529]

4. Collins v. Meyers

A few months after the *Hardre* suit was dismissed, the same organization, the Pacific Legal Foundation, brought a new suit through plaintiff Stephen E. Collins.[530] This time, the organization waited until the state had finalized regulations, though the funding pot had shrunk to $1.7 million.[531] Once again, the suit alleged a violation of the Equal Protection Clause and sought declaratory judgment, a permanent injunction, and attorney fees, as well as class certification.[532]

Judge William J. Martinez of the District of Colorado granted a preliminary injunction for the second suit, going through three of the four prongs of analysis: likelihood of success on the merits, irreparable harm, and the public interest.[533] First, the court said that racial classifications like this one were subject to strict scrutiny, and the only justification that could serve as a compelling interest was "remedying the effects of past intentional discrimination."[534] This, in turn, required showing the presence of specific discrimination backed up by a "strong basis in evidence" that remedial action was necessary.[535] At the initial stage, the court said the government could not meet this high test, nor could it show narrow tailoring since it could have directed funds to vulnerable businesses without using race.[536] The other factors were simpler. A probable constitutional violation typically qualifies as an irreparable injury, and this also tilts the public interest in favor of an injunction.[537]

The next day, the government told the court the plaintiff's business would receive the full grant, as would every other business that met the rather lenient definition of disproportionately impacted business, and that "race played no role in [the] funding decisions."[538] Claiming victory, the plaintiff voluntarily dropped the

[528] Hardre v. Markey, No. 20-cv-03594-PAB-KMT, 2021 U.S. Dist. LEXIS 75274, at *26 (D. Colo. Apr. 19, 2021).
[529] *Id.* at *25–26.
[530] Complaint, Collins v. Meyers, No. 1:21-cv-2713 (D. Colo. Oct. 7, 2021).
[531] *Id.* at 3.
[532] *Id.* at 13–16.
[533] Preliminary Injunction Order at 4-9, Collins v. Meyers, No. 1:21-cv-271 (D. Colo. Oct. 12, 2021), https://pacificlegal.org/wp-content/uploads/2021/10/Filed-Complaint-Collins.pdf.
[534] *Id.* at 5–6 (citations omitted).
[535] *Id.* at 6 (citing Concrete Works of Colo., Inc. v. City & Cnty. of Denver, 321 F.3d 950, 958 (10th Cir. 2003)).
[536] *Id.* at 7–8.
[537] *Id.* at 8–9.
[538] Motion to Dismiss at 1, Collins v. Meyers, 1:21-cv-2713 (D. Colo. Oct. 13, 2021), https://www.scribd.com/document/532696156/Stephen-E-Collins-v-Patrick-Meyers-Motion-to-Dismiss.

case.[539] There was no final determination that the state violated the Equal Protection Clause, but a finding of likelihood of success on the merits means the government would probably lose if the issue came to a head.

5. Farmer Debt Forgiveness Cases

As part of the American Rescue Plan, "socially disadvantaged" farmers were entitled to debt forgiveness, along with relief for tax liabilities.[540] Following a parade of sub-definitions, a farmer must essentially be non-white to qualify.[541] A white, indebted farmer, Robert Holman, otherwise eligible for relief, sued.[542] To support the claim that it was improper racial classification, the plaintiff relied on not only the text of the law, but also statements by public officials emphasizing the equity aspects of the plan.[543] The suit alleged a violation of the Fifth Amendment's Equal Protection Clause, and a generalized allegation of illegality without citing an authority.[544] The requested relief included declaratory judgment, an injunction, nominal damages, and costs and fees.[545]

Holman was one of many. Several other farmers brought essentially the same suit: Ryan Kent,[546] Kathryn Dunlap,[547] Adam Faust,[548] Leisl Carpenter,[549] Scott Wynn,[550] Adam Joyner,[551] James Tiegs,[552] and Jarrod McKinney.[553] Most of these cases were stayed pending the outcome of *Miller v. Vilsack*, yet another lawsuit against the same program.[554]

In the *Miller* case, an enormous number of liberal groups, most represented by the Southern Poverty Law Center, sought to participate as amici.[555] Four of these cases, including *Miller*, granted a preliminary injunction or temporary restraining

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[539] *Colorado Small Business Owner Fights for His Right to Equality Before the Law*, PAC. LEGAL FOUND. https://pacificlegal.org/case/co-covid-discrimination/ (last visited Jan. 26, 2023).
[540] Complaint, at 3 Holman v. Vilsack, No. 1:21-cv-01085 (W.D. Tenn. June 2, 2021).
[541] *Id.* at 3.
[542] *Id.* at 3, 6.
[543] *Id.* at 8–9.
[544] *Id.* at 13–16.
[545] *Id.* at 17.
[546] Kent v. Vilsack, No. 3:21-cv-540-NJR, 2021 U.S. Dist. LEXIS 217336 (S.D. Ill. Nov. 10, 2021) (denying the government's motion to stay the case pending outcomes of the other cases).
[547] Dunlap v. Vilsack, No. 2:21-cv-00942-SU, 2021 U.S. Dist. LEXIS 179858 (D. Or. Sep. 21, 2021) (granting motion to stay pending outcome of similar Texas case).
[548] Faust v. Vilsack, No. 21-C-548, 2021 U.S. Dist. LEXIS 187423 (E.D. Wis. Aug. 20, 2021) (granting motion to stay pending outcome of similar Texas case).
[549] Carpenter v. Vilsack, No. 21-CV-0103-F, 2021 U.S. Dist. LEXIS 219377 (D. Wyo. Aug. 16, 2021) (granting motion to stay pending outcome of similar Texas case).
[550] Wynn v. Vilsack, No. 3:21-cv-514-MMH-LLL, 2021 U.S. Dist. LEXIS 255100 (M.D. Fla. Dec. 7, 2021) (granting motion to stay pending outcome of similar Texas case).
[551] Joyner v. Vilsack, No. 1:21-cv-01089-STA-jay, 2021 U.S. Dist. LEXIS 156862 (W.D. Tenn. Aug. 19, 2021) (granting motion to stay pending outcome of similar Texas case).
[552] Complaint, Tiegs v. Vilsack, No. 3:21-cv-00147-PDW-ARS (D. N.D. July 6, 2021).
[553] Complaint, McKinney v. Vilsack, No. 2:21-cv-00212 (E.D. Tex. June 10, 2021).
[554] Miller v. Vilsack, No. 21-11271, 2022 U.S. App. LEXIS 7563 (5th Cir. filed Mar. 22, 2022).
[555] Miller v. Vilsack, Civil Action No. 4:21-cv-0595-O, 2021 U.S. Dist. LEXIS 248421, at *1–17 (N.D. Tex. Dec. 8, 2021).

order against the program.[556] Ultimately, Congress scrapped the program and created two new funds: one for farmers in financial distress, and one for those who faced discrimination.[557] The law did not define "discrimination" but it does not appear to be explicitly and exclusively based on race.[558] The existing lawsuits were thus mooted,[559] but the legislative rewrite was a major victory for opponents of affirmative action. Incidentally, it is now Black farmers who are suing the government, claiming it breached a promise to provide debt relief.[560]

IX. MISCELLANEOUS

The above-mentioned topics all had multiple lawsuits that were challenging race-conscious policies that were roughly similar. But just about any time a public institution (and even private institution) mentions race, there is a decent chance they will get sued. The below cases illustrate the broad array of race-conscious policies that have been challenged that affect other social institutions beyond those mentioned.

a. Interviewing Journalists of Color

To commemorate the second anniversary of her inauguration, then-Chicago Mayor Lori Lightfoot announced she would only provide one-on-one interviews with journalists of color for one day.[561] This led to a lawsuit from the Daily Caller Foundation and Judicial Watch, arguing a violation of the First Amendment and Equal Protection Clause, seeking declaratory and injunctive relief, costs and fees, and a court order that the mayor interview a white male reporter.[562] In the course of litigation, the mayor stated that "there are no plans or intentions" to grant interviews based on race in the future.[563] So the lawsuit obtained an injunction by another name.

b. Indigenous People's Day

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[556] Kent v. Vilsack, No. 3:21-cv-540-NJR, 2021 U.S. Dist. LEXIS 217336, at *9 (S.D. Ill. Nov. 10, 2021).

[557] Alan Rappeport, *Climate and Tax Bill Rewrites Embattled Black Farmer Relief Program*, N.Y. TIMES (Aug. 12, 2022), https://www.nytimes.com/2022/08/12/business/economy/inflation-reduction-act-black-farmers.html.

[558] *See* § 1006(e) Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 1006(e), 136 Stat. 1818 (2022).

[559] Aallyah Wright, *Racial Discrimination Lawsuit Against Federal Debt Relief Program Dismissed*, CAPITAL B (Sept. 9, 2022, 10:30 AM), https://capitalbnews.org/usda-farmer-debt-relief-lawsuit-dismissed/.

[560] *Black Farmers Sue Government for Promised Federal Aid*, PBS (Dec. 6, 2022, 1:57 PM), https://www.pbs.org/newshour/politics/black-farmers-sue-government-for-promised-federal-aid.

[561] Def. Memorandum in Support of Motion to Dismiss Amended Complaint at 1, Catenacci v. Lightfoot, No. 21-cv-02852, 2022 WL 6750723 (N.D. Ill. Apr. 29, 2022), https://www.judicialwatch.org/wp-content/uploads/2022/05/Catenacci-v-Lightfoot-Motion-to-Dismiss-02852.pdf.

[562] Complaint at 3–5, Catenacci v. Lightfoot, No. 21-cv-02852 (N.D. Ill. Apr. 29, 2022).

[563] Def. Memorandum, *supra* note 549, at 8.

In 2021, the city of Philadelphia replaced Columbus Day with Indigenous People's Day.[564] The act was largely ceremonial, but a group of Italian Americans saw it as a pattern of hostility against them, since it followed the removal of a statute of Italian mayor Frank Rizzo, and a planned removal of a statue of Columbus, among other things.[565] They claimed that changing the holiday violated the Equal Protection Clause.[566] The district court dismissed for lack of injury, and the matter was appealed to the Third Circuit.[567]

The Third Circuit agreed there was no injury-in-fact, as they had no legally protected interest.[568] It said the government did not violate Equal Protection just because it affirms or celebrates an affinity group.[569] Otherwise, any group could sue if it were not specifically recognized—including groups left out by Columbus Day.[570] The plaintiffs' claims were dismissed as generalized political, not legal, grievances.[571]

c. Native American Policy

The Indian Child Welfare Act[572] gives a preference for Native American children up for adoption to stay with Native American families. An array of plaintiffs including non-Native parents and several states challenged the law, arguing, among other things, it violates Equal Protection.[573] After a fractured review process among the lower courts,[574] the Supreme Court upheld the law in June 2023.[575]

Justice Barrett wrote for the majority that plaintiffs lacked standing on their Equal Protection claim, as their injury was not redressable.[576] The plaintiffs sued federal officials, but the Act is administered by state officials—including decisions about giving a preference to Native families.[577] It mattered not that the state courts would likely respect a ruling from the United States Supreme Court applied to federal officials, as redressability must come through the court's "exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion

[564] Conf. of Presidents of Major Italian Am. Orgs., Inc. v. City of Phila., No. 22-1116, 2023 U.S. App. LEXIS 2200, at *2 (3d Cir. Jan. 27, 2023).
[565] *Id.* at *2–3.
[566] *Id.* at *3.
[567] *Id.*
[568] *Id.* at *5.
[569] *Id.* at *6.
[570] *Id.*
[571] *Id.* at *8.
[572] 25 U.S.C. § 1901–63.
[573] Brackeen v. Haaland, 994 F.3d 249, 267 (5th Cir. 2021) (per curiam).
[574] *Id.* at 268.
[575] Haaland v. Brackeen, 143 S. Ct. 1609, 1617 (2023).
[576] *Id.* at 1622–23.
[577] *Id.* at 1639.

explaining" itself.[578] Nor could a state assert a claim on behalf of its citizens because it was suing the federal government.[579]

Since the Court did not rule on the substance of the Equal Protection claim, one imagines the plaintiffs will be re-filing their lawsuit and naming state officials in short order. Except this time, they will be armed with shiny new precedent from *SFFA v. Harvard* waxing poetic on the colorblind Fourteenth Amendment.

d. Redistricting

The California Voting Rights Act requires localities to abandon at-large elections in favor of district elections if "racially polarized voting occurs," even if a minority group is not large enough to form the majority in any district.[580] The City of Poway used at-large elections for its city council elections for many years, but in 2017, in response to a complaint claiming racially polarized voting existed and threatening a lawsuit, the city adopted a four-district plan.[581] Resident Don Higginson claimed the California Voting Rights Act forces cities to racial gerrymander, in violation of the Equal Protection Clause.[582] He argued that under Supreme Court precedent and the federal Voting Rights Act, municipalities were only required to abandon at-large districts if the minority group is large enough to predominate a district, is politically cohesive, and the majority votes as a bloc to defeat minority candidates.[583] California, the plaintiff asserted, tried to subvert these precedents and make it easier to eliminate at-large elections.[584] He sought declaratory judgment, an injunction for the California Voting Rights Act, and invalidation of the electoral district maps, plus costs and fees.[585]

The State of California filed a 12(b)(6) motion to dismiss, and the district court granted it.[586] It noted that legislative districts had a presumption of good faith, and the plaintiff bore the burden of showing that racial considerations dominated all others.[587] The court found the plaintiff failed to show that the state voting rights act led to state action that classified "individuals based on the racial group to which those individuals belong."[588] Although the locality adopted its at-large system based on a threat of a lawsuit that alleged the at-large system disenfranchised Latinos, this was insufficient to prove that the legislators who passed the state law or drew the district maps for his town put him in a particular district because of his race.[589] The Ninth Circuit affirmed in a short opinion,[590] and the Supreme Court

[578] *Id.* at 1639.
[579] *Id.* at 1640.
[580] Cal. Elec. Code § 14027–14028(a), (c) (West 2003).
[581] Complaint at 2–3, Higginson v. Becerra, No. 17cv2032-WQH-JLB (S.D. Cal. Oct. 4, 2017).
[582] *Id.* at 3.
[583] *Id.* at 5.
[584] *Id.* at 7.
[585] *Id.* at 14–15.
[586] Higginson v. Becerra, 363 F. Supp. 3d 1118, 1128 (S.D. Cal. 2019).
[587] *Id.* at 1123-24.
[588] *Id.* at 1126-27.
[589] *Id.*
[590] Higginson v. Becerra, 786 F. App'x 705 (9th Cir. 2019).

denied cert in 2020.[591] In another redistricting case, the SFFA decision was subsequently relied upon to challenge the use of race in redistricting, but so far this approach has also been unsuccessful.[592]

e. Legalized Cannabis Cases

During the War on Drugs, legions of people were jailed for marijuana-related offenses—with a disproportionate share of the impact falling on people of color.[593] After various jurisdictions legalized cannabis, many sought to try and right some of the wrongs of the past by giving people of color a step up in the nascent industry. New Jersey's Cannabis Regulatory Commission, for example, prioritizes "minority-owned" businesses seeking to set up new shops.[594] Maryland too gave out some of its early licenses to "disadvantaged" businesses, which included minority-owned ones, along with women-owned businesses.[595] These sorts of programs got off to a slow start[596] but still saw some litigation.

In Maryland, Curio Wellness sued to stop new licenses going to diverse businesses because it was trying to stop competition of any color.[597] Though the lawsuit did not cite any equal protection authorities, it had the effect of blocking a diversity initiative. The Curio lawsuit was withdrawn due to "concerns from [its] customers on social media about racial insensitivity."[598] This demonstrates that public pressure can nullify this kind of lawsuit, but it is a rare occurrence.

Later, a lawsuit was filed by Hippocratic Growth, a business owned by white women who argued the licensing process was unfair to them since the state indicated that Black people and Native Americans were even more disadvantaged than women.[599] Although the author could not locate the litigation documents for

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[591] Higginson v. Becerra, 140 S. Ct. 2807 (2020).

[592] Singleton v. Allen, No. 2:21-cv-1291-AMM, 2023 U.S. Dist. LEXIS 155998, at *224–25 (N.D. Ala. Sep. 5, 2023).

[593] *Race and the Drug War*, DRUG POL'Y ALLIANCE (Apr. 12, 2016), https://drugpolicy.org/issues/race-and-drug-war.

[594] *Priority Applicants*, N.J. CANNABIS REGUL. COMM'N, https://www.nj.gov/cannabis/businesses/priority-applications/ (last visited Nov. 1, 2023). Many other cities and states attempted to take equity into account, although not necessarily based on race alone. See Sophie Quinton, *Black-Owned Pot Businesses Remain Rare Despite Diversity Efforts*, STATELINE (Jan. 15, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/15/black-owned-pot-businesses-remain-rare-despite-diversity-efforts.

[595] Brandon Soderberg, *Maryland Medical Cannabis Commission Finally Awards Grower and Processor Approvals*, OUTLAW REPORT (Oct. 6, 2020), https://outlawreport.com/mmcc-approvals-licenses/.

[596] *See* Scott Rodd, *'Cannabis Equity' Runs Into Roadblocks*, STATELINE (Dec. 28, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/12/28/cannabis-equity-runs-into-roadblocks.

[597] *See* Press Release, Michael Bronfein, Curio Wellness Media Statement, (Mar. 29, 2019), (https://baltimorefishbowl.com/wp-content/uploads/2019/03/CURIO-WELLNESS-MEDIA-STATEMENT_1903291.pdf).

[598] *Id.*

[599] *See* Brandon Soderberg, *Lawsuit From White, Women-owned Cannabis Company Argues Black and Indigenous Cannabis Entrepreneurs Not "More Disadvantaged,"* OUTLAW REPORT (Nov. 3, 2020), https://outlawreport.com/maryland-cannabis-diversity-lawsuit/.

the Hippocratic Growth lawsuit, a 2022 National Cannabis Equity Report indicated the suit at least delayed the state's efforts to roll out a racial equity application process.[600] So even without organized impact-litigation firms getting involved, individual lawsuits can stall diversity initiatives.

Even race-neutral means to advance equity can run into legal challenges. Detroit, for instance, attempted to prioritize longtime Motor City residents when handing out cannabis licenses.[601] But a court enjoined this as an "unfair, irrational, and likely unconstitutional" violation of the dormant Commerce Clause.[602] Similar policies in Missouri[603] and Maine[604] met the same fate.

f. Business Incubation

Comcast Cable announced a grant program for small businesses that promised the "resources and tools to elevate your business," including consulting and production of a 30-second TV commercial.[605] The grant program was not available for white people, so a group of white business owners from several states sued, saying that a private business imposed a racial qualification on a contractual benefit, it violated 42 U.S.C. § 1981.[606] The plaintiffs also filed a motion for preliminary injunction,[607] but the motion, along with the case, is pending.

Fearless Fund Management is an organization dedicated to "bridg[ing] the gap in venture capital funding for women of color" businessowners.[608] To that end, it offers $20,000 grants to Black women with small businesses that have strong growth potential.[609] For this, the American Alliance for Equal Rights sued, claiming a violation of § 1981, seeking a declaratory judgment and an injunction.[610] A district court denied the request for a preliminary injunction in September 2023,[611] meaning the Fearless Fund can continue to operate while the lawsuit is pending. The court held the Alliance likely had standing to sue and the grants were a contract covered

[600] *See* Minority Cannabis Business Association, MCBA NATIONAL CANNABIS EQUITY REPORT 21 n.40 (2020), https://mjbizdaily.com/wp-content/uploads/2022/02/National-Cannabis-Equity-Report-1.pdf.
[601] *See* Lowe v. City of Detroit, 544 F. Supp. 3d 804, 806 (E.D. Mich. 2021).
[602] *Id*.
[603] Toigo v. Dep't of Health & Senior Servs., 549 F. Supp. 3d 985 (W.D. Mo. 2021).
[604] NPG, LLC v. City of Portland, No. 2:20-cv-00208-NT, 2020 U.S. Dist. LEXIS 146958 (D. Me. Aug. 14, 2020).
[605] Complaint at 1, Moses v. Comcast, No. 1:22-cv-00665-JPH-MJD, 2022 WL 2046345 (S.D. Ind. Apr. 4, 2022).
[606] *Id*. at 2.
[607] Motion for Preliminary Injunction, Moses v. Comcast, No. 1:22-cv-00665-JPH-MJD, 2022 WL 2046345 (S.D. Ind. Apr. 4, 2022).
[608] Complaint at 3, Am. All. for Equal Rights v. Fearless Fund Mgmt., No. 1:23-CV-3424-TWT, 2023 WL 6295121 (N.D. Ga., Aug. 2, 2023), https://fingfx.thomsonreuters.com/gfx/legaldocs/gdvzwyxzkpw/08012023fearless.pdf.
[609] *Id.* at 3–4.
[610] *Id.* at 12.
[611] Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC, No. 1:23-CV-3424-TWT, 2023 U.S. Dist. LEXIS 172392 (N.D. Ga. Sep. 27, 2023).

by § 1981, but Fearless Fund's First Amendment interests in the program were strong enough to forestall a preliminary injunction.[612]

g. All the Rest

As thorough as this article has attempted to be, there is not enough space to cover everything. Starbucks was sued for allegedly discriminating against white job applicants.[613] A New Jersey school was sued for distributing a pamphlet on institutional racism.[614] The Arkansas Minority Health Commission settled a lawsuit challenging its scholarship for students of color.[615] American Express was accused in a suit of giving preferential treatment to employees of color.[616] AT&T had its Diversity & Inclusion Plan used as a basis to challenge the termination of a white manager as discriminatory.[617] Pfizer got hit with a lawsuit for creating a fellowship for Black, Latino, and Native American students, and which was dismissed at the district court level.[618] Yet even that victory proved fleeting, as Pfizer quietly amended the fellowship criteria to remove race.[619] Major law firms like Perkins Coie or Morrison Foerster dropped fellowships for underrepresented law students in response to lawsuits.[620] Some companies are quieting eliminating diversity policies on their own accord.[621] Possibilities for future lawsuits are almost infinite.[622]

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[612] Id. at *14, *16, *21.

[613] Caroline Colvin, *Starbucks shareholder files suit over diverse hiring*, HR DIVE (Sept. 6, 2022), https://www.hrdive.com/news/starbucks-anti-white-discrimination/631222/.

[614] Kaitlyn Kanzler, *Mountain Lakes school district discriminates against white students: lawsuit*, NORTHJERSEY.COM (June 16, 2022), https://www.northjersey.com/story/news/morris/mountain-lakes/2022/06/16/mountain-lakes-nj-schools-racism-white-discrimination-lawsuit/7632809001/.

[615] *See* Agreement, Do No Harm v. Eddings, No. 4:23-cv-00347 (E.D. Ark. May 8, 2023).

[616] Complaint at 9, Netzel v. Am. Express, No. 2:22-cv-01423 (D. Ariz. Aug. 23, 2022).

[617] DiBenedetto v. AT&T Servs., No. 1:21-cv-04527-MHC-RDC, 2022 U.S. Dist. LEXIS 96102, at *5–7 (N.D. Ga. May 19, 2022).

[618] Complaint at 2, Do No Harm v. Pfizer, No 1:22-cv-07908 (S.D.N.Y. Sept. 15, 2022).

[619] *Pfizer Reverses Course, Changes Race-Based Fellowship Following Do No Harm Lawsuit*, DO NO HARM (Feb. 21, 2023), https://donoharmmedicine.org/2023/02/21/pfizer-reverses-course-changes-race-based-fellowship-following-do-no-harm-lawsuit/.

[620] Julian Mark, *Edward Blum Group Drops Suit After Perkins Coie Expands Diversity Program*, WASH. POST (Oct. 11, 2023, 9:37 PM), https://www.washingtonpost.com/business/2023/10/11/perkins-coie-dei-fellowship/.

For example, using the internet sleuthing website Wayback Machine, we can see McDonalds had a pledge in 2020 to have gender parity in its leadership by 20230. *Women Empowering Women in The McDonalds Community*, MCDONALDS (Mar. 8, 2020), https://web.archive.org/web/20220704053531/https://corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/OurPeople.mcd-womens-history.html. But that pledge can no longer be found on the corporate website.

[622] *See, e.g.*, *Jade District-Oldtown COVID-19 Small Business Response Fund*, APANO (Mar. 19, 2020), https://apano.org/jade-district-covid-19-small-business-response-fund/ (announcing grant program "with a priority on Asian and Pacific Islander owned businesses"); Caroline Colvin, *Once neglected, DEI initiatives now present at all Fortune 100 companies*, HR DIVE (July 20, 2022), https://www.hrdive.com/news/2022-fortune-companies-dei/627651/ (noting that companies have linked executive compensation to DEI progress); GUARANTEED INCOME FOR TRANSGENDER PEOPLE, https://www.giftincome.org/ (last visited Dec. 16, 2022) (pilot basic guaranteed income program for transgender people of color).

X. TAKEAWAYS

There are a few lessons that can be drawn from all this. First, even minor attempts to consider race will draw lawsuits. Not only do multi-billion aid programs get targeted, so too do race-conscious policies for interviewing journalists on a single day, selecting student members for a law review, or having separate Zoom calls for parents of color. What this means is that government actors, and possibly even private businesses, need to be prepared for the chance of litigation any time they want to consider race. Doubtless, many smaller organizations will decide the hassle is not worth the risk, and forego the use of race altogether.

Second, race-conscious policies under fire are not limited to deep blue cities. Republican Governor Larry Hogan of Maryland signed a law allowing the state to take race into account when granting licenses to legalized marijuana businesses.[623] Montana tried to prioritize people of color to distribute vaccines,[624] and Utah did the same for antiviral COVID treatments.[625] School districts from Massachusetts to Missouri have been sued for instruction on race.[626] All of these sorts of programs are imperiled by a Supreme Court decision further minimizing the consideration of race.

Third, it is usually easier to challenge a race-conscious policy than it is to defend it. As one court described it, "When a statute makes express use of a suspect classification, a plaintiff challenging the statute meets their initial and ultimate burden simply by pointing out the classification."[627] At that point, the statute is presumed unconstitutional, and the government bears the burden of proving otherwise.[628] Case in point, most of the complaints examined for this Article were only about a dozen pages long.[629]

In response, the government may have to work orders of magnitude harder. To survive strict scrutiny, the government must assemble reams and reams of evidence showing that discrimination is pervasive and that the selected policy will be effective, and that race-neutral policies would not work.[630] And the evidence

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[623] Ethan McLeod, *After Public Backlash, Curio Wellness Drops Lawsuit to Halt New Round of Growing Licenses*, BALTIMORE FISHBOWL, (Mar. 29, 2019), https://baltimorefishbowl.com/stories/after-public-backlash-curio-wellness-drops-lawsuit-to-halt-new-round-of-growing-licenses/.

[624] Press Release, MONT. GOV. OFFICE, *Montana Moves to Phase 1B of Vaccine Distribution*, (Jan. 19, 2021), https://news.mt.gov/Governors-Office/montana-moves-to-phase-1b-of-vaccine-distribution.

[625] Xander Landen, *Utah, Minnesota Back Down on Race-Based COVID Care as New York Faces Lawsuit*, NEWSWEEK (Sept. 26, 2023), https://www.newsweek.com/utah-minnesota-back-down-race-based-covid-care-new-york-faces-lawsuit-1672011.

[626] Complaint at 4–5, Flynn v. Forrest, Np. 1:21-cv-10256-IT, 605 F. Supp. 3d. 319 (D. Mass. 2022); Henderson v. Sch. Dist. of Springfield R-12, No. 6:21-cv-03219-MDH, 2023 U.S. Dist. LEXIS 60003 (W.D. Mo. Nov. 17, 2021).

[627] Verdict at 5-6, Crest v. Padilla, No. 19-STCV-27561, 2022 Cal. Super. LEXIS 48298 (Cal. Sup. Ct. 2022).

[628] *Id.* at 6.

[629] Based on the author's review of complaints studied for this Article.

[630] *See* Motion to Dismiss, Bruckner v. Biden at 15–23, No. 8:22-cv-01582, 2023 U.S. Dist. LEXIS 57189 (M.D. Fla. Sept. 27, 2022). Ironically, this means a state's history of forward-thinking racial

must be high quality. The State of California cited numerous studies showing diverse companies performed better to justify a gender quota law for corporate boards, but the court balked in part because the studies did not prove causation.[631] But as any social scientist knows, proving causation is next to impossible no matter how good an observational study[632]—probably the only kind of study available to examine discrimination.

This brings us to the fourth point: the federal government and other elite, well-heeled institutions may be able to successfully defend race-conscious policies (to an extent), but states, localities, and smaller institutions may find it impossible. The Department of Transportation's contracting set-asides for Disadvantaged Business Enterprises, known as DBEs, is a rare example of a government program that explicitly favors certain races, yet has been upheld by the courts.[633] It has a voluminous record in support. In the following years after the Supreme Court's *Adarand* decision in 1995, Congress assembled more than 50 documents and 30 hearings showing the persistence of discrimination in highway construction—enough for the Eighth Circuit to conclude it had a "strong basis in evidence" to support race-based measures in 2003.[634] Or when Congress wanted to improve minority representation for radio and television broadcast licenses, it had the Congressional Research Service analyze data from 8,720 licensed stations to show a strong correlation between minority ownership and diverse programming—demonstrating the value of diverse ownership and helping to uphold the policy.[635]

It is harder for the states. Granted, if the federal government has already established something as a compelling interest, states can assert the same compelling interest when carrying out the federal program, even if the prerequisite evidence was national in scope.[636] But the localities still have to independently prove narrow tailoring to meet the compelling interest,[637] and that means a national program "must be limited to those parts of the country where its race-based measures are demonstrably needed."[638]

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policies could wind up kneecapping its ability to pass future racial equity laws. *See* Hans Bader, *Vermont Limits Access to COVID Vaccine Based on Race, Which is Unconstitutional*, LIBERTY UNYIELDING (Apr. 2, 2021), https://libertyunyielding.com/2021/04/02/vermont-limits-access-to-covid-vaccine-based-on-race-which-is-unconstitutional/ (arguing Vermont could not grant a preference in COVID vaccine access, in part because of its progressive history on race).

[631] Verdict at 11, Crest v. Padilla, No. 19-STCV-27561, 2022 Cal. Super. LEXIS 48298 (Cal. Sup. Ct. May 13, 2022).

[632] *Causation and Observational Studies*, UF HEALTH, https://bolt.mph.ufl.edu/6050-6052/unit-2/causation-and-observational-studies/ (last visited Mar. 2, 2023).

[633] *See* Midwest Fence Corp. v. U.S. Dept. of Transp., 840 F.3d 932, 935 (7th Cir. 2016).

[634] Sherbrooke Turf, Inc. v. Minn. Dept. of Transp., 345 F.3d 964, 970 (8th Cir. 2003).

[635] Metro Broad. v. FCC, 497 U.S. 547, 580 n.31 (1990); *cf.* Turner Broad. Sys. v. FCC, 520 U.S. 180, 199 (1997) (noting that Congress heard "years of testimony, and review[ed] volumes of documentary evidence and studies offered by both sides" before deciding the cable industry threatened broadcast television).

[636] N. Contracting, Inc. v. Illinois, 473 F.3d 715, 720-21 (7th Cir. 2007).

[637] *Id.* at 721.

[638] Sherbrooke Turf, Inc. v. Minn. Dept. of Transp., 345 F.3d 964, 971 (8th Cir. 2003); *see also* W. States Paving Co. v. Wash. State Dept. of Transp., 407 F.3d 983, 998 (9th Cir. 2005) ("it cannot be said that [a race-conscious program] is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present").

This is not a given. The city of Columbus conducted dozens of interviews and questionnaires to help document past contracting discrimination to justify a set aside for minority-owned businesses, but a federal district court said this was insufficient.[639] Dade County, Florida, had enough evidence of past discrimination to fill a four-day bench trial, but not enough to convince the court that affirmative action was justified.[640] And of course, states frequently fell short in the lawsuits documented in this Article.

If states struggle that much, what prayer does a cash-strapped town or school have? If Ashville, North Carolina wants to create a scholarship for Black students, it will probably never be able to muster up hundreds of studies proving that Black students in Western North Carolina have faced undue hardships on account of race in the near past. The odds of success are low.

Fifth, because winning during the strict scrutiny phase is so difficult, if a challenge is rebuffed, it normally happens in the standing phase. Plaintiffs frequently had cases dismissed for making conclusory statements, suing before the policy had gone into effect, or suing without showing an injury beyond a political grievance. This indicates that impact litigation firms are often leaning ahead in the saddle.

Sixth and finally, there is no easy fix for policymakers. Justice Scalia once said that government could adopt facially neutral policies that were intentionally designed to further racial equality, so long as they are not explicitly based on race.[641] But even facially neutral policies that are motivated by a desire for racial balancing can be struck down.[642]

Moreover, conservatives and libertarians leading the fight appear to care little whether a policy is facially neutral. When asked during oral arguments in the *UNC* case about whether a school could give a preference to descendants of slaves a race-neutral means to achieve equality, the attorney opposing affirmative action refused to say they could.[643] When pressed, he said such a policy would look like a "pure proxy for race," which he and his organization would presumably oppose.[644]

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[639] Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363, 1441, 1441–61 (S.D. Ohio 1996).

[640] Eng'g Contractors Ass'n v. Metro. Dade Cty., 943 F. Supp. 1546, 1551 (S.D. Fla. 1996).

[641] Richmond v. J. A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring); *see also* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545 (2015) (indicating that the government may "eliminate racial disparities through race-neutral means"); Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race").

[642] *See* Coal. for Thomas Jefferson High Sch. For Sci. & Tech. v. Fairfax Cnty. Sch. Bd., No. 1:21cv296, 2022 U.S. Dist. LEXIS 33684, at *33–34 (Sup. Ct. Feb. 25, 2022). The decision was later reversed and remanded by the Fourth Circuit, finding that the challenged policy "does not disparately impact Asian American students and the Coalition cannot establish that the Board adopted its race-neutral policy with any discriminatory intent." Coal. For Thomas Jefferson High Sch. For Sci. & Tech. v. Fairfax Cnty. Sch. Bd., 68 F. 4th 864, 871 (4th Cir. 2023).

[643] Transcript of Oral Argument at 15–16, Students for Fair Admissions v. President and Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199).

[644] *Id.* at 16. Additionally, the conservative/libertarian law blog Volokh Conspiracy has criticized facially neutral policies that seek to achieve racial balancing. Ilya Somin, *Fourth Circuit Ruling in Anti-Asian Discrimination Case Sets a Dangerous Precedent*, REASON (May 23, 2023), https://reason.com/volokh/2023/05/23/fourth-circuit-ruling-in-anti-asian-discrimination-case-sets-

This is not to say that race-neutral policies designed to achieve a certain outcome will never survive judicial review, but they will probably draw lawsuits all the same.

America's racial inequities are the result of hundreds of years of prejudicial policies and attitudes. It will take a great deal of ingenuity to right the wrongs of the past. To navigate Supreme Court precedent and legions of lawsuits narrowing the menu of options, policymakers will have their work cut out for them to find fresh solutions.

a-dangerous-precedent ("So long as facially neutral means are used and the overall success rate of different groups are similar, this reasoning would allow even the most blatant discriminatorily motivated policies intended to reduce the population of some groups for the benefit of others.").