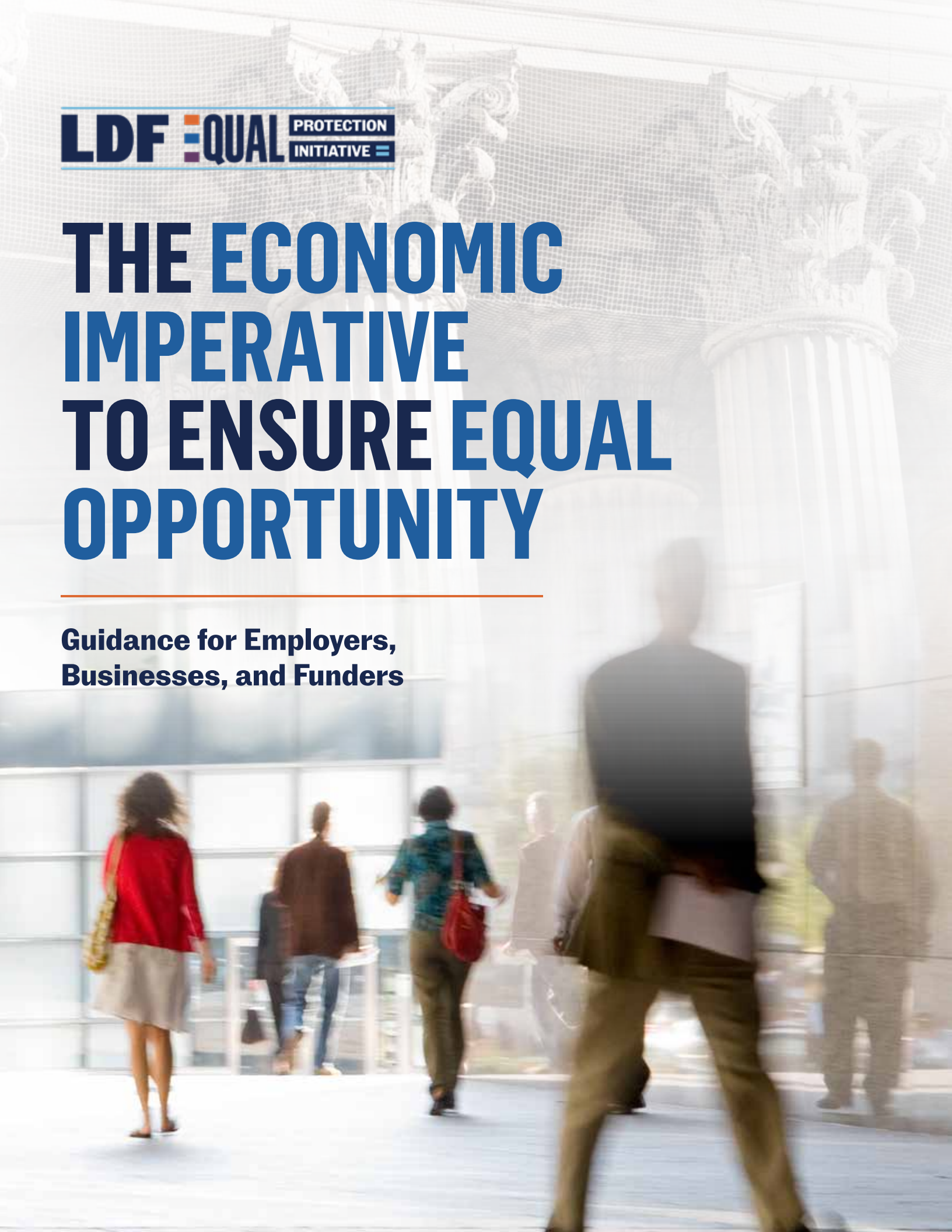


# THE ECONOMIC IMPERATIVE TO ENSURE EQUAL OPPORTUNITY

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**Guidance for Employers,  
Businesses, and Funders**



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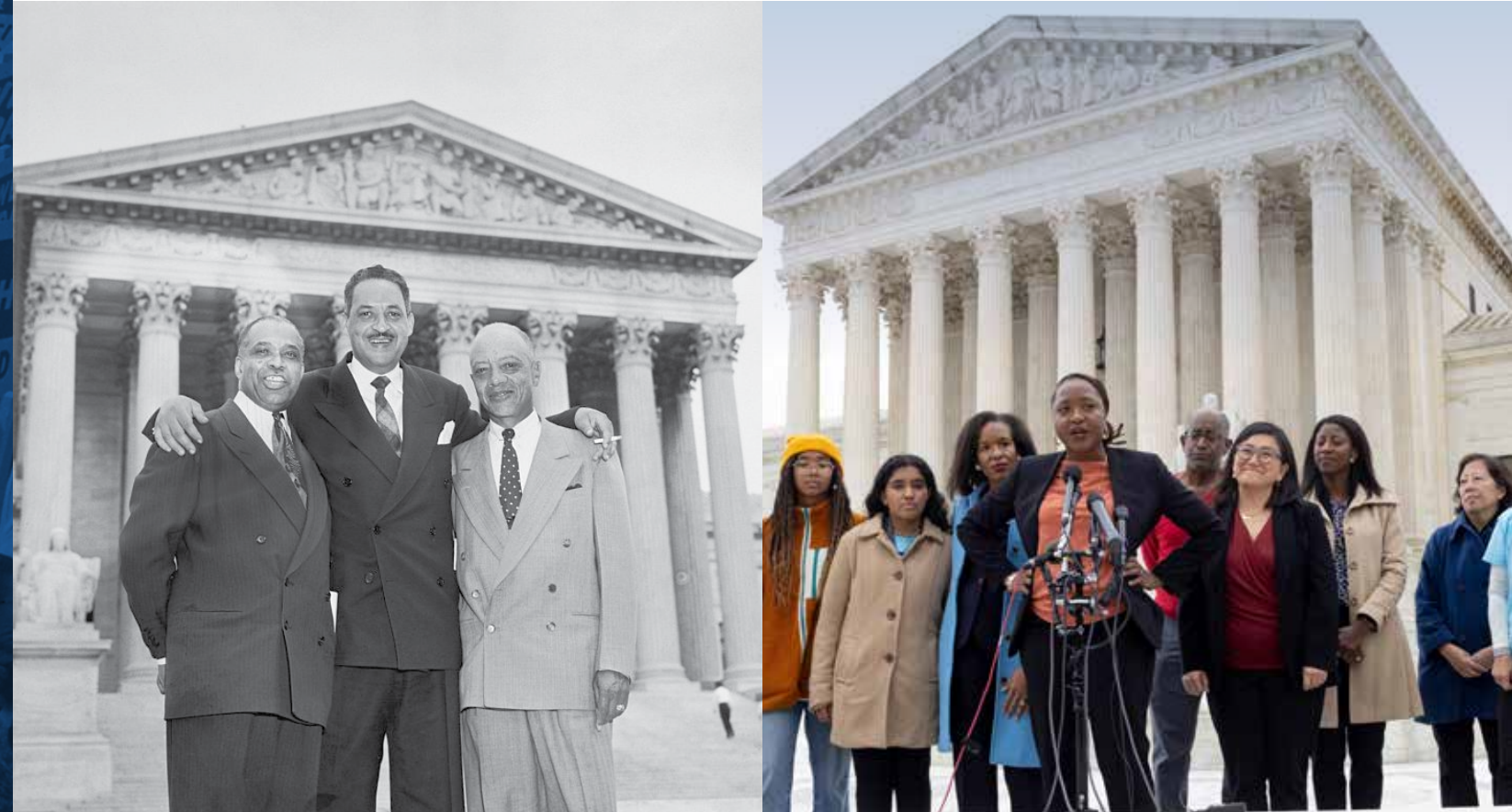
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# I. INTRODUCTION

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Elevated view of demonstrators, many of whom carry signs, during the March on Washington for Jobs and Freedom, Washington DC, August 28, 1963. Photo by Marion S Trikosko/PhotoQuest/Getty Images



For over eight decades, the Legal Defense Fund (LDF) has been a stalwart advocate for the dignity and freedom of Black people in the United States. Having led the successful eradication of legal apartheid in the seminal case, *Brown v. Board of Education*, LDF continues to fight for the full equality and citizenship of Black Americans in their everyday lives, including challenging public and private policies and practices that deny Black Americans equal opportunities.<sup>1</sup> Through litigation and policymaking, LDF has endeavored to dismantle segregation and break down barriers to opportunity in education, housing, employment, and other areas that shape the ability of Black people to thrive and reach their full potential.

Despite essential civil rights laws such as the Civil Rights Act of 1866 and the Civil Rights Act of 1964, systemic inequalities based on race, gender, and LGBTQ+ status persist in all aspects of American life. These laws require employers to ensure their policies and practices do not discriminate against people of color, women, LGBTQ+ people, and other protected groups, among other critical protections. Yet Black people continue to face barriers to equal employment opportunities. According to a [study](#) published by the National Bureau of Economic Research, Black workers remain disproportionately concentrated in lower-wage professions compared to white workers with the same level of education. Black workers also earn more than 20% less than similarly educated white workers, the study found.<sup>2</sup>

The need to secure full equality, as envisioned in *Brown*, is particularly urgent as the United States becomes increasingly diverse. People of color are

expected to comprise the majority of Americans as soon as 2043, and people under 18 are already approaching this threshold. In addition, almost one in four people under the age of 30 identify as LGBTQ+, and our electorate will soon contain more people in that age group than any other. Yet after the Supreme Court's June 2023 [decision](#) in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina (SFFA)*, which struck down the use of race as a tip in higher education admissions, we are witnessing an unprecedented attack on measures that serve to advance equity across society. These attacks extend beyond the scope of the opinion and higher education to areas including employment, contracting, and grantmaking. In doing so, opponents of civil rights hope that employers and funders will abandon efforts to equalize opportunity, regardless of whether their legal arguments would prevail.

## THE NEED TO SECURE FULL EQUALITY, AS ENVISIONED IN *BROWN*, IS PARTICULARLY URGENT AS THE UNITED STATES BECOMES INCREASINGLY DIVERSE.

At this critical moment, employers, businesses, and funders have a moral, legal, and economic imperative to sustain a deep and substantive commitment to initiatives that create diversity, equity, inclusion, and accessibility (DEIA). For too long, people of color, women, and LGBTQ+ people have been excluded, stigmatized, and undervalued. Many spaces within the workforce and in the business community have been unwelcoming and even hostile to their presence and their perspectives. Proactive and targeted measures are necessary to level the playing field so that all Americans can be valued and bring their full selves into the workplaces and communities of our multiracial democracy.

Advancing equity is also crucial to the success of our economy. Talent and potential are found in people of all backgrounds, and we are all deprived of their contributions if historically marginalized people struggle to access opportunity. Creating an environment where diverse people and business enterprises can thrive not only helps redress discrimination and ensure equal opportunity, but also benefits everyone by growing our economy. Because diversity fosters feelings of representation, recognition, and solidarity, employees seek out and invest in workplaces that share a commitment to this important value.<sup>3</sup> Additionally, multiple studies have shown that diversity increases innovation and productivity in myriad types of fields and organizations.<sup>4</sup>

Most importantly, however, business and philanthropic actors are as duty bound now to comply with federal, state, and local anti-discrimination laws as they were before the *SFFA* decision. Indeed, the current climate of hostility in some workplaces has been exacerbated by the decision, requiring employers and other actors to redouble their efforts to ensure equal protection

under the law for all employees and avoid legal liability. Thus, the business and philanthropic communities must remain vigilant in their strict compliance with federal, state, and local anti-discrimination laws. And they must continue to do all they can to ensure that opportunities and resources are equitably shared.

To support important, ongoing efforts to advance DEIA and equal opportunity, LDF offers this general guidance to employers and funders as they navigate the current legal landscape in the aftermath of the *SFFA* decision.<sup>5</sup> As discussed below, employers have numerous lawful means of creating more diverse and inclusive workplaces and meeting their obligation to ensure equal opportunities for all. Employers should not cede ground by prematurely curtailing DEIA programs that are consistent with current law. Moreover, employers that abandon equity efforts risk increasing their own exposure to lawsuits by heightening the likelihood of discrimination against Black people and other protected groups in their workplace. **As the United States becomes increasingly more diverse—and the demand for greater equity becomes ever more pressing—we must work together across sectors to ensure the success of our multiracial democracy. We at LDF welcome this collaboration.**



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## II. CURRENT LEGAL OBLIGATIONS TO ERADICATE BARRIERS TO EQUAL OPPORTUNITY

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### A. Title VII of Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits covered employers from discriminating against employees based on their race, color, religion, sex, or national origin.<sup>6</sup> Title VII's prohibitions on discrimination cover both disparate treatment (i.e., explicitly treating employees differently based on a protected characteristic) and disparate impact (i.e., policies or practices that appear neutral but result in an unjustifiable discriminatory effect). Title VII's prohibition against employment discrimination is broad and covers all terms and conditions of employment, including but not limited to hiring and firing, promotions and demotions, compensation decisions, and access to benefits.<sup>7</sup> The statute's coverage is broad to ensure that any discriminatory barrier to equitable employment is eradicated. Whether a particular fellowship or other pipeline program qualifies as "employment" for the purposes of Title VII is a fact-specific inquiry, but many programs may qualify.<sup>8</sup>

Additionally, under Title VII, it is unlawful for an employer to retaliate or discriminate against an employee because they: 1) opposed a discriminatory employment practice; 2) made a formal charge of discrimination with an agency like the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal

anti-discrimination laws in the workplace; or 3) "testified, assisted, or participated" as a witness in an employment discrimination investigation or lawsuit.<sup>9</sup>

Many DEIA programs are designed to help employers reduce barriers to equal employment opportunities and comply with Title VII.<sup>10</sup> These programs typically do not involve using race or other protected characteristics as a criterion in hiring, promotion, pay, or other employment decisions. As such, these programs also are less vulnerable to "reverse discrimination" challenges. For example, the EEOC has stated that an employer may "adopt strategies to expand the applicant pool of qualified [Black] applicants, such as recruiting at schools with high Black enrollment,"<sup>11</sup> without making hiring decisions based on race.

In addition to DEIA programs, some employers have implemented affirmative action programs that may consider race or gender as one factor in employment decisions. Consistent with Title VII's remedial purpose, employers may consider race or gender in employment decisions in limited circumstances to "correct the effects of past discrimination and to prevent present and future discrimination."<sup>12</sup> The EEOC has promulgated regulations governing such affirmative action by employers, consistent with current case law.<sup>13</sup>

Affirmative action plans in employment may be developed voluntarily or may be ordered by a court or administrative agency to remedy a finding of discrimination.<sup>14</sup> According to the EEOC, affirmative action is appropriate when existing or contemplated employment practices are likely to cause an adverse impact; when facts reveal that it is necessary to correct the effects of prior discriminatory practices; or when there is a limited labor pool of qualified people of color or women for employment or promotional opportunities that has been historically limited by employers, labor organizations, and others.<sup>15</sup> The plan must contain: 1) a "reasonable self-analysis" that there have been measurable, negative effects of prior discrimination on the labor pool; 2) a "reasonable basis" for the program highlighting the areas where there is a discrepancy or underutilization of people of color or women; and 3) "reasonable action," including specific practical steps the employer will take to correct this discrepancy.<sup>16</sup>

### B. 42 U.S.C. § 1981

Section 1 of the Civil Rights Act of 1866, codified as 42 U.S.C. § 1981 (Section 1981), prohibits private sector discrimination on the basis of race, color, and ethnicity when making and enforcing contracts. The text of Section 1981 requires that all citizens have the same rights "enjoyed by white citizens" in contractual relationships.<sup>17</sup> However, in *McDonald v. Santa Fe Trail Transportation Company*, the Supreme Court held that people of any race may bring discrimination claims under Section 1981.<sup>18</sup>

Unlike Title VII, Section 1981 only prohibits disparate treatment in private contracting; it does not recognize a disparate impact theory of discrimination.<sup>19</sup> Specifically, in order to successfully bring a claim under Section 1981, a plaintiff must show: 1) they are a member of a protected class; 2) the defendant intended to discriminate on the basis of race or ethnicity; and 3) the discrimination interfered with the equitable making or enforcement of contracts. Additionally, under Section 1981, a plaintiff bears the burden of proving

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## MANY DEIA PROGRAMS ARE DESIGNED TO HELP EMPLOYERS REDUCE BARRIERS TO EQUAL EMPLOYMENT OPPORTUNITIES AND COMPLY WITH TITLE VII.

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that their race or citizenship was the “but for” cause of their denial of contracting rights.<sup>20</sup>

Courts have interpreted Section 1981’s prohibition on racial discrimination in private contracting to apply to the private employment context.<sup>21</sup> Courts have also held that the affirmative action principles applicable under Title VII are also applicable under Section 1981.<sup>22</sup> However, there are several notable differences between Section 1981 protections and Title VII protections. Unlike Title VII, Section 1981 protects independent contractors from discrimination,<sup>23</sup> requires no numerical threshold of employees for enforcement,<sup>24</sup> permits liability claims against individual supervisors,<sup>25</sup> has a longer statute of limitations of four years (as compared to as little as 180 days to file a charge of discrimination under Title VII),<sup>26</sup> and does not require plaintiffs to file a claim with the EEOC or a state agency before filing a lawsuit. And, as stated above, unlike Title VII, Section 1981 does not permit a cause of action with a disparate impact theory of discrimination.

Recently, plaintiffs have attempted to bring claims under Section 1981 to challenge private-sector DEIA initiatives. However, as will be discussed below, some of these lawsuits have been dismissed for plaintiffs’ failure to satisfy the requirements listed above or for procedural reasons.

### **C. Executive Order 11246 — Equal Employment Opportunity**

Executive Order 11246—Equal Employment Opportunity (EO 11246) prohibits federal contractors who generate over \$10,000 per year in business from the federal government from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.<sup>27</sup> Importantly, EO 11246 requires that federal contractors

take affirmative action to ensure applicants and employees are treated equally, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. EO 11246’s prohibition against discriminatory treatment covers any employment decision made by a federal contractor, including but not limited to promotions, demotions, or selection for training, including apprenticeships. However, it does not require or allow covered employers to make employment decisions on the basis of race or other protected characteristics, including hiring and promotion decisions. Instead, employers may use both race-conscious and race-neutral tactics that are not employment decisions, such as targeted recruiting, to increase the representation of underrepresented groups. Furthermore, EO 11246 prohibits contractors from discriminating against employees or applicants who inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

### **D. Title VI of Civil Rights Act of 1964**

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.<sup>28</sup> Both for-profit and nonprofit entities, as well as state and local governments, that receive federal grants to provide services must comply with Title VI. However, “federal financial assistance” does not include government procurement contracts—i.e., contracts in which goods or services are sold or purchased by the government at fair market value.<sup>29</sup> Such federal contractors are not subject to Title VI unless the federal contract includes a subsidy.<sup>30</sup> Moreover, Title VI does not govern the relationship between an entity that receives federal financial assistance and its employees unless a primary objective of the federal financial assistance is to

provide employment,<sup>31</sup> or where the employment discrimination affects the ability of beneficiaries to participate meaningfully in and/or receive the benefits of a federally-assisted program in a nondiscriminatory manner—for example, where segregated faculty prevent students of color from receiving equal educational opportunities.<sup>32</sup> Except in those limited circumstances, employers’ nondiscrimination obligations to their employees are governed by Title VII, not Title VI.

### **E. State Law Civil Rights Protections**

Some states have civil rights laws that are more robust than their federal counterparts. Private corporations might be subject to these state laws depending on where they are located and where they conduct business. For example, California’s Fair Employment and Housing Act protects more categories of people from employment discrimination than those covered under federal law. Specifically, California’s nondiscrimination protections cover ancestry; religious dress and grooming practices; marital status; medical conditions, including genetic characteristics; breastfeeding and medical conditions related to breastfeeding; reproductive health decision-making; and traits associated with race, including but not limited to hair texture and natural hairstyles.<sup>33</sup> Additionally, New York State law requires that state contractors have an affirmative action program to ensure that people of color and women are afforded equal employment opportunities.<sup>34</sup> And New York’s Human Rights Law permits employers to carry out a plan to increase employment for people of color where unemployment numbers for that group are significantly higher than state-wide unemployment.<sup>35</sup> In addition to California and New York, several other states permit bona fide, voluntary affirmative action plans in employment.

Such permissible affirmative action plans usually follow EEOC guidance.

Unfortunately, some states have also passed laws that prohibit otherwise lawful employment actions. For example, Florida’s Senate Bill 266 prohibits universities from spending funds on programs advocating for diversity, equity, and inclusion, including among their employees. Likewise, Texas’s Senate Bill 17 prohibits public universities from maintaining DEI offices and policies, assigning employees or third-party consultants to perform the duties of a DEI office, soliciting DEI statements from job candidates, and holding mandatory diversity training. These laws may be subject to challenge under the U.S. Constitution.

Given these differences at the state and local level, it is imperative that businesses consult all relevant state and local laws with the assistance of counsel if possible.

### **F. Obligations to Shareholders**

The corporate board and management of publicly traded companies have a variety of obligations to their shareholders, including fiduciary duties. In at least one case, which was dismissed, opponents of civil rights argued that a corporation’s DEIA policies breached those duties.<sup>36</sup> If managers breach a fiduciary duty, a shareholder can bring suit on behalf of the corporation.<sup>37</sup> However, a shareholder may not maintain a lawsuit “if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders . . . in enforcing the right of the corporation[.]”<sup>38</sup> This rule “prevent[s] shareholders from suing in place of the corporation in circumstances where the action would disserve the legitimate interests of the company or its shareholders.”<sup>39</sup>

# III. THE SUPREME COURT'S DECISION IN *STUDENTS FOR FAIR ADMISSIONS V. HARVARD/UNC*

In June 2023, the U.S. Supreme Court held in *SFFA*, that the race-conscious admissions programs at Harvard and the University of North Carolina (UNC) were unconstitutional.<sup>40</sup> Specifically, the Court ruled that the universities' admissions policies violated the Fourteenth Amendment's Equal Protection Clause,<sup>41</sup> which prohibits state actors—like UNC—from denying anyone equal protection of the law.<sup>42</sup> The Court noted that an act that would violate the Equal Protection Clause also violates Title VI,<sup>43</sup> which prohibits federally funded institutions—like Harvard—from engaging in racial discrimination.<sup>44</sup> The Court reasoned that those universities' consideration of an individual student's race—"however well-intentioned and implemented in good faith"—failed to pass constitutional muster under strict scrutiny as it was not narrowly tailored to a compelling government interest.<sup>45</sup> In so holding, the Court upended almost five decades of precedent by applying a radical and much more stringent interpretation of strict scrutiny than it had applied in previous affirmative action cases.

Importantly, the *SFFA* decision is limited to the use of race-conscious admissions programs in higher education and does not apply beyond this narrow context. As recently as 2016, the Court held that the pursuit of the educational benefits of diversity was a compelling government interest that could justify the limited consideration of race in college

admissions.<sup>46</sup> While the Court's decision did not overrule that precedent, it nevertheless found that Harvard's and UNC's articulated interests in the educational benefits of diversity—though "plainly worthy" and "commendable goals"—were insufficiently coherent and measurable to justify giving a tip to an applicant based solely on the applicant's race.<sup>47</sup> The Supreme Court also held that, under a strict scrutiny analysis, the race-conscious admissions policies at Harvard and UNC were insufficiently narrowly tailored because the consideration of race, as one of 40 factors at UNC and as one of more than 100 factors at Harvard, negatively impacted white and Asian American applicants. According to the Supreme Court's ruling, college admissions are a zero-sum game, wherein a tip for one applicant necessarily disadvantages all other applicants.<sup>48</sup> The Court further criticized the means used to achieve the educational benefits of diversity, considering racial categories like "Asian American" or "Hispanic" to be imprecise.<sup>49</sup> The Court also concluded that the admissions policies were not sufficiently narrowly tailored because, according to the Court, a person's race could influence their perspective or identity amounted to racial stereotyping.<sup>50</sup> Moreover, the Court held that race-conscious admissions programs at Harvard and UNC lacked a "logical end point," and accused the schools of using impermissible "racial balancing."<sup>51</sup>



Notably, the Court ruled that nothing in its opinion should be construed to prohibit universities from considering an applicant's discussion of how race affected their life, be it through discrimination, inspiration, or otherwise.<sup>52</sup> The Court recognized that what an applicant shares about their experiences with race could indicate "courage and determination" or "that student's unique ability to contribute to the university."<sup>53</sup>

In addition, the Court recognized that race-conscious measures remain permissible where there is an interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute."<sup>54</sup> Indeed, the Court reaffirmed in *Allen v. Milligan*, a voting rights case decided in the same

term as *SFFA*, that government actions undertaken to ensure that opportunities are "equally open" to people of all races are permissible practices consistent with the Equal Protection Clause.<sup>55</sup>

Moreover, race-neutral efforts to increase diversity remain constitutional. In *SFFA*, Justice Brett M. Kavanaugh made explicit in his concurrence that "governments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'"<sup>56</sup> Justice Clarence Thomas also acknowledged the use of race-neutral policies in his concurrence, stating that "[r]ace-neutral policies may thus achieve the same benefits of racial harmony and equality."<sup>57</sup>

# IV. IMPACT OF THE *SFFA* DECISION ON PRIVATE EMPLOYMENT, CONTRACTING, AND GRANTMAKING

While the Supreme Court’s *SFFA* decision has emboldened opponents of civil rights to challenge programs that create equal employment opportunities, it did not pertain to the body of law governing private employment, contracting, grantmaking, or many other contexts. As U.S. EEOC Chair Charlotte A. Burrows confirmed, “the decision in [*SFFA*] ... does not address employer efforts to foster diverse and inclusive workforces to engage the talents of all qualified workers, regardless of their background.... It remains lawful ... to ensure that workers of all backgrounds are afforded equal opportunity in the workplace.”<sup>58</sup> Likewise, following the *SFFA* decision, the Office of Federal Contract Compliance Programs (OFCCP) stated on its website that “[t] here continue to be lawful and appropriate ways to foster equitable and inclusive work environments and recruit qualified workers of all backgrounds. OFCCP’s affirmative action requirements enable employers to reduce the risk of discrimination in their workforces and recruit and retain diverse talent.”<sup>59</sup> In short, the decision’s reach is limited to the context of affirmative action in higher education. Any expansion of its contested reasoning to other settings would require new litigation and court holdings that would further erode legal precedent.

As discussed above, most private employers, funders, and contractors are covered by federal statutes and distinct bodies of law that are different than those at issue in *SFFA*.<sup>60</sup> The Supreme Court in

*SFFA* did not decide any issues related to Title VII or Section 1981, or any other bodies of law outside of the Equal Protection Clause or Title VI. Nor did the majority opinion state that its views on the legality of Harvard and UNC’s limited use of race in college admissions should alter the consideration of race in other, unrelated areas.

Because Title VII and Section 1981 are different legal frameworks than those at issue in *SFFA*, and because interpretations of the Equal Protection Clause and Title VI in higher education have developed a unique body of law, the *SFFA* decision has no direct precedential value in areas outside of race-conscious admissions policies in higher education. Litigants arguing otherwise are attempting to expand the scope of the decision, but lower courts remain bound by prior precedent interpreting Title VII and Section 1981, which is described above.

Many of the challenges, both pre- and post-*SFFA*, to employer policies designed to promote diversity and equal opportunity have not survived judicial scrutiny at the early stages of the litigation because the plaintiffs could not show that they were harmed by the policies at issue, and we expect future cases to face similar obstacles.<sup>61</sup> Moreover, because opponents of civil rights will have to bring new cases, it will likely take years for successful challenges to progress through the courts to alter the law if they ultimately prevail. Nevertheless,

policies that are overtly race-conscious are more likely to be closely scrutinized than policies that use race-neutral measures to achieve diversity goals, and organizations must ensure that all policies comply with existing constitutional and statutory anti-discrimination requirements.

## 1. Private Employment and Fellowships

The *SFFA* decision does not change covered employers’ obligations under Title VII or Section 1981. As noted above, private employers’ relationship with their employees—even for those employers that receive federal financial assistance—is generally covered by Title VII, not Title VI. As explained above, Title VII has long prohibited employers from using race or other protected characteristics as a criterion for employment decisions—such as hiring, firing, and other actions that impact the terms, conditions, and privileges of employment—except to address discrimination through a valid affirmative action plan.<sup>62</sup> Section 1981 similarly prohibits racial discrimination in the making and enforcement of employment contracts,<sup>63</sup> but permits affirmative action plans to redress prior discrimination.<sup>64</sup> Policies and practices that do not explicitly consider race are permissible under Section 1981,<sup>65</sup> and are also permissible under Title VII unless they have an unjustified, disparate impact on protected groups.<sup>66</sup> Indeed, the Court in *SFFA* cited prior Title VII caselaw upholding a race-based remedy to address prior discrimination.<sup>67</sup>

The *SFFA* decision did not alter the legality of employer DEIA programs, particularly because these programs usually do not involve the use of race in employment decisions. As discussed further below, courts have previously held that many DEIA programs are lawful and are not evidence of discriminatory intent in an employment decision.

While the legality of an organization’s particular DEIA program is a fact-specific inquiry, courts have upheld the following types of programs against a variety of challenges:

- **Diversity Policies and Statements:** Numerous cases have held that the existence of a diversity policy or a statement reflecting a desire to increase diversity is not itself evidence of discrimination.<sup>68</sup>
- **Anti-Bias Training:** Courts have dismissed challenges to anti-bias trainings, holding that they do not create a hostile work environment,<sup>69</sup> nor are they a racially discriminatory employment practice that could form the basis of a retaliation claim.<sup>70</sup>
- **Recruiting:** Courts have held that efforts to address disparities in the applicant pool and to expand the number of qualified candidates by actively recruiting underrepresented groups are lawful.<sup>71</sup>
- **Goals:** Aspirational diversity goals have been recognized as lawful. These goals need not satisfy the stricter standards for affirmative action programs, provided they are achieved through race-neutral means.<sup>72</sup> While employers can encourage managers to engage in DEIA activities, they should not tie performance evaluations or compensation to achieving numerical goals for hiring, promotion, or retention.<sup>73</sup>

While opponents of civil rights may challenge these programs in their ongoing attempt to change the law, the *SFFA* decision did not upset prior court rulings upholding the legality of diversity statements, anti-bias trainings, targeted recruiting, and aspirational diversity goals. Indeed, although opponents of civil





## **AFFIRMATIVE ACTION PROGRAMS IN PRIVATE EMPLOYMENT ALSO REMAIN LAWFUL FOLLOWING THE *SFFA* DECISION. UNLIKE IN THE EDUCATION CONTEXT, EMPLOYERS HAVE LONG BEEN PROHIBITED FROM USING RACE AS A CRITERION IN AN EMPLOYMENT DECISION FOR THE PURPOSE OF REAPING THE BENEFITS OF DIVERSITY.**

rights have filed suit challenging DEIA programs both before and after *SFFA*,<sup>74</sup> many of these challenges have failed on multiple legal grounds.<sup>75</sup>

Affirmative action programs in private employment also remain lawful following the *SFFA* decision. Unlike in the education context, employers have long been prohibited from using race as a criterion in an employment decision for the purpose of reaping the benefits of diversity.<sup>76</sup> The case law holds that the only permissible reason for an employer to consider race in an employment decision is to remedy past discrimination, whether at a particular company or within an industry more generally.<sup>77</sup> Nothing in the decision or reasoning of

*SFFA* purports to alter the law in this area, as the justification for using race in employment decisions was already narrow.

Finally, *SFFA* did not alter employers' obligations to root out discrimination, including by eliminating policies and practices that create unfair barriers to employment for people of color and people in other protected categories. Employers that roll back existing DEIA programs risk erecting new barriers to equal employment opportunities for people of color, opening themselves up to possible discrimination claims under Title VII, and creating challenges to hiring and retaining a diverse workforce.

## 2. Federal Contractors and Other Recipients of Federal Funds

Federal contractors, like other private employers, are governed by Section 1981 and often by Title VII. As noted in the previous section, the *SFFA* decision did not change employers' obligation to offer equal employment opportunities, including through DEIA measures.

Federal contractors must also comply with Executive Order 11246, which, as discussed above, requires all federal contractors and subcontractors to engage in "affirmative action." However, unlike the affirmative action programs at issue in *SFFA*, EO 11246 and related regulations by OFCCP do not permit the use of race as a criterion in hiring, employment, or personnel decisions.<sup>78</sup> Indeed, while federal contractors must set goals for hiring and promoting employees of color and other protected groups if contractors find that they are underrepresented in their workforce, federal regulations expressly prohibit contractors from giving a preference based on race to meet these goals.<sup>79</sup> Instead, employers must meet their affirmative action goals through measures that are not race-based employment decisions, such as reassessing policies that impose barriers to equal employment opportunities or engaging in adequate recruiting and outreach.

Finally, *SFFA*'s discussion of Title VI is likely to have limited impact on the practices of federal contractors. As noted above, many federal contractors are not subject to Title VI,<sup>80</sup> nor are most employer-employee relationships. To the extent that any federal contractor or employer is covered by Title VI, they were already forbidden from making race-based employment decisions unless they were remedying past discrimination through a valid affirmative action plan under Title VII.



However, certain federal programs that more directly consider race in the decision-making process have been challenged.<sup>81</sup> For example, on July 19, 2023, the District Court for the Eastern District of Tennessee, in *Ultima Services Corporation v. U.S. Department of Agriculture*, found that the federal government's presumption that members of particular racial groups are "socially disadvantaged"—and therefore eligible for government contracting preferences as "socially and economically disadvantaged businesses"—violated the Equal Protection Clause.<sup>82</sup> Following the district court's decision in *Ultima*, the U.S. Small Business Administration (SBA) reached out to all contractors who previously qualified under the presumption and asked them to submit documentation demonstrating that they qualified as a socially and economically disadvantaged business because they had experienced individual discrimination.<sup>83</sup> The SBA also created an expedited process to review that documentation.<sup>84</sup> On September 29, 2023, the SBA began accepting new applications under the revised criteria.<sup>85</sup> The litigation in *Ultima* and similar cases is ongoing.

## 3. Grantmaking, Investments, and Corporate Donations

While the *SFFA* decision did not change the law governing how organizations can administer grant programs or make investments or donations, programs that target specific racial groups are likely to receive additional legal scrutiny, as demonstrated by recent litigation. For example, private venture capital funds have seen challenges to grant programs created to support businesses led by women of color.<sup>86</sup> Opponents of civil rights have argued that grants, investments, and corporate donations that seek to benefit particular racial groups violate Section 1981.<sup>87</sup> Some of these challenges have failed at early stages because the plaintiffs could not show that there was an existing or future contract which the defendant impaired or blocked.<sup>88</sup> While there is little controlling case law on whether grants are contracts covered by Section 1981, at least one court has held that they are.<sup>89</sup>

Moreover, while the First Amendment may bar using Section 1981 to force organizations to donate to entities whose message they do not support,<sup>90</sup> some courts have held that does not equate to a First Amendment right to distribute funds based on the race of the recipient.<sup>91</sup> This is a controversial and evolving area of law, which requires caution and thoughtfulness to avoid arguments that may actually conflict with an organization's overall diversity and equity goals and commitments.

## 4. Obligations to Shareholders

Finally, the *SFFA* decision did not address or alter the obligations of corporate boards and managers to their shareholders. While opponents of civil rights have argued that DEIA initiatives violate the fiduciary duties of corporate boards and management, to date, many such shareholder derivative suits have failed for a variety of reasons.<sup>92</sup>

# V. RECOMMENDATIONS

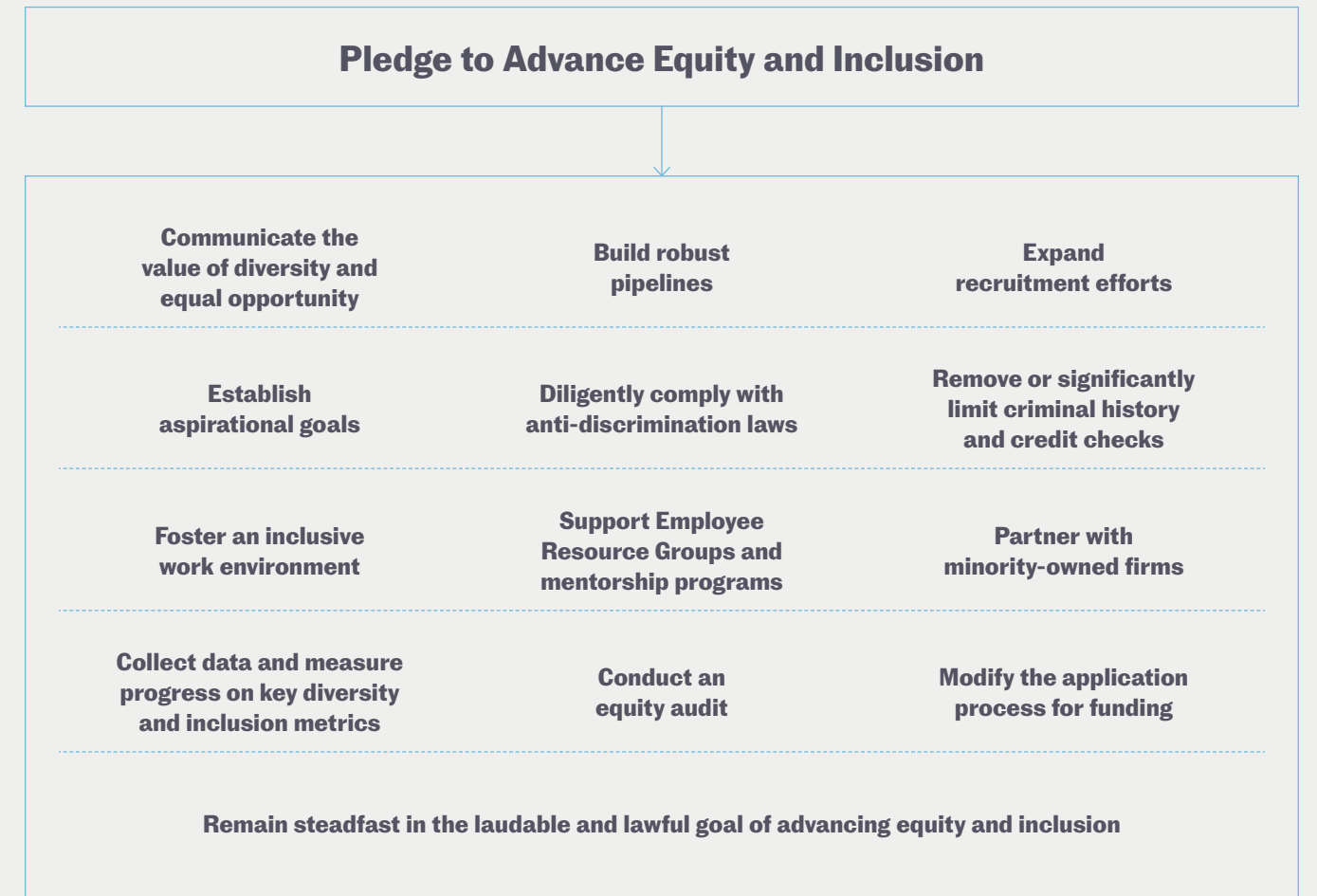
As a nation, we cannot afford to forgo the talents and gifts of people who have long been denied equal access to opportunities. We must overcome the challenges of the current moment and push for lasting changes to ensure that those who are currently underrepresented in many economic spheres—Black, Latinx, Indigenous, Asian American, and Pacific Islander individuals—enjoy an equal opportunity to thrive. Our ability to compete in an increasingly global economy, develop scientific and technological innovations, foster the health of our increasingly multiracial democracy, and overcome the complex challenges of climate change and other crises depends on our ability to produce leaders and a well-trained workforce capable of navigating and thriving in a racially diverse society. Moreover, as noted above, investing in DEIA programs and other equity initiatives creates workplaces where everyone feels welcomed and valued. Indeed, as Intel explained to Congress in 2019: “Improving ethnic and gender diversity in the U.S. technology workforce represents an economic opportunity that could create \$470 billion to \$570 billion in new value for the technology industry and could add 1.2%-1.6% to the national GDP.”<sup>93</sup>

In light of the growing number of challenges in the wake of *SFFA*, some organizations might consider ending their DEIA efforts to avoid legal exposure. But dialing back DEIA efforts may cause an organization to incur significant legal risks. Notably, public companies have faced lawsuits for failing to follow through on commitments they made to increase diversity and inclusion in their workforces. According to *Bloomberg*, almost 40 lawsuits have been filed within the last three years against companies that allegedly made misleading statements about diversity and equity

commitments.<sup>94</sup> For example, on September 26, 2023, a Wells Fargo shareholder filed a shareholder derivative complaint against the company, alleging that its hiring managers engaged in sham interviews with racially and ethnically diverse candidates to give the false impression of success in its DEIA initiatives.<sup>95</sup>

Importantly, organizations must be mindful of their continuing obligation to root out discrimination in their workplaces before they take the drastic step of halting or pulling back DEIA efforts. Title VII forbids intentional discrimination or the use of policies or practices that, while seemingly neutral on their face, have the effect of discriminating against people because of their race, color, national origin, or other protected characteristics. The EEOC has signaled its intention to increase focus on systemic barriers to equal opportunity in the workplace.<sup>96</sup> As a result, it is imperative for employers to identify and remove discriminatory policies and practices to avoid legal liability. The successful implementation of an effective diversity and inclusion program can assist companies and government agencies alike with the vital task of identifying policies and practices that may stifle equity in the workplace, even if unintentionally.

To further a shared commitment to racial equity and justice, it is imperative for the business and philanthropic communities to use this opportunity to leverage their influence, resources, and power to move our country closer to fulfilling the promise of equal opportunity for all. To that end, we suggest implementing the following recommendations to unequivocally demonstrate a steadfast commitment to advancing equity and inclusion and supporting the health of our multiracial democracy.



**Communicate the value of diversity and equal opportunity.** Explain to employees, board members, shareholders, lawmakers, and the public what DEIA means to the organization, its importance, and how it impacts the organization’s mission and goals at all levels (from the corporate boardroom to the mailroom). Be sure to incorporate the advancement of racial equity into the organization’s environmental, social, and governance goals (ESG) and corporate social responsibility efforts. For example, communicate that the organization believes in equal opportunity, inclusion, and belonging, and that accordingly,

the organization prioritizes creating a supportive and empowering workplace for all employees, including intentionally creating safe spaces for employees from marginalized and underrepresented groups. Such efforts boost morale and create a healthier workplace for everyone. Likewise, ensure stakeholders understand that DEIA programs are lawful because they do not use race as a motivating factor in employment decisions, but instead allow employers to use recruiting, mentoring, training, and other measures to expand opportunity; create and maintain an inclusive workplace; and reduce discrimination and bias for all workers.

An organization may wish to explain to stakeholders that their DEIA efforts boost morale and goodwill, help retain important talent, minimize exposure to lawsuits and administrative complaints alleging violations of anti-discrimination laws, enhance customer service and technological innovation, and promote better decision-making and outcomes. Leverage the data about how diversity contributes to financial success to explain why it is a business necessity that measurably improves outcomes. Organizations should undertake periodic assessments of their communications concerning DEIA programs to ensure that these communications accurately and effectively describe the organization's activities.

**Build robust pipelines.** Organizations should make every effort to maximize their talent pipelines. Towards this end, organizations may wish to: (a) objectively identify promising candidates for internal promotions and board membership (while ensuring that candidates from underrepresented communities are not overlooked) and give them robust opportunities to develop their talents; (b) ensure that all internship and mentoring programs are open to students of Historically Black Colleges and Universities, other [Minority-Serving Institutions](#), and other universities that serve a disproportionate share of students from communities that are underrepresented in the organization's economic sector and, to the extent these are new partnerships, work closely with the educational institutions to make these programs a success; and (c) create pipeline programs, like Emerging Manager Programs or fellowship programs, with communities, schools, or institutions that serve a disproportionate share of individuals that are underrepresented in the organizations' economic sector.



**Expand recruitment efforts.** Employers should periodically assess whether their pool of applicants reflects the racial demographics of the labor pool of available workers in the relevant job market, and whether the industry more broadly lacks diversity. If applicants from identifiable groups (e.g., Black applicants) are underrepresented, the employer should make a reasonable effort to identify why they are not attracting applicants from the underrepresented group by reviewing and evaluating current recruitment methods, among other strategies. Employers should make every effort to maximize the number of underrepresented applicants in the applicant pool from which it selects its employees, interns, and board members. If such efforts do not yield an increase in the number of underrepresented applicants within a reasonable amount of time (e.g., two years), the employer should re-evaluate its recruitment efforts and explore additional measures to increase the number of underrepresented applicants in the applicant pool.

Employers may wish to increase the number of underrepresented candidates in the applicant pool with strategies that include: (a) encouraging all personnel to actively participate in recruitment efforts; (b) ensuring that the organization's representatives attend diversity career fairs and career fairs at Historically Black Colleges and Universities, other [Minority-Serving Institutions](#), and other universities that serve a disproportionate share of students from communities that are underrepresented in the organization's applicant pool; (c) arranging for the organization's representatives to recruit via student organizations or professional organizations that serve underrepresented candidates interested in that particular industry; (d) consulting professional organizations that provide support to members of the underrepresented community for suggestions to improve recruitment of workers from that

# AS A NATION, WE CANNOT AFFORD TO FORGO THE TALENTS AND GIFTS OF PEOPLE WHO HAVE LONG BEEN DENIED EQUAL ACCESS TO OPPORTUNITIES.

community; (e) advertising job vacancies with professional and civic organizations that serve the underrepresented community and in print, audio, video, and internet media outlets whose audience includes a substantial share of the underrepresented community; and (f) holding job vacancies open for a reasonable amount of time (e.g., at least 30 days) to allow time for interested candidates to apply.

**Establish aspirational goals.** Organizations can and should establish aspirational goals to achieve greater equity and inclusion. However, organizations should be careful about how aspirational goals are used. If an investigation reveals that Black candidates are sorely underrepresented in the applicant pool even though they are well-represented in the labor pool of available workers in relevant job categories within the pertinent geographic area, it may be helpful to adopt a numerical goal to guide recruitment efforts. For example, a company facing such a challenge may have an aspirational goal of increasing the share of applications it

receives from Black applicants by 50% each year until the representation of Black applicants in its applicant pool is on par with the representation of Black people in the labor pool of available workers in relevant job categories within the pertinent geographic area. If the company does not meet its goal, it may wish to reassess and recalibrate its recruitment strategies to identify any remaining barriers to equal opportunity. An organization could also set an aspirational goal that the composition of its workforce or senior management team reflects the relevant labor pool in the area, provided that the organization is scrupulous about using only lawful means (e.g., increased recruiting) to try to achieve those goals while ensuring that race plays no role in actual hiring, promotions, or other employment decisions. Organizations should avoid tying anyone's compensation to the achievement of numerical goals regarding hiring, promotion, pay, and other employment decisions, so that race is not a motivating factor in those employment decisions.

## **Diligently comply with anti-discrimination laws.**

Companies, philanthropic organizations, and other entities must comply with applicable civil rights laws that require them to provide an equal opportunity to all applicants. Legal counsel should monitor developments in the law to ensure continued compliance. It may be advisable to periodically conduct a privileged review of recruiting, hiring, pay, assignment, retention, promotion, and termination policies to identify and remove obstacles that prevent all individuals from enjoying equal opportunities. This should involve taking a hard look at the criteria for employment decisions to avoid inadvertently excluding or disadvantaging candidates from certain communities by preferring unnecessary credentials that not all candidates have a fair chance to earn.

For example, many organizations have long relied on informal preferences for candidates who bear the traditional indicia of what their economic sector considers an elite pedigree (e.g., almost exclusively hiring candidates with a degree from a university listed at the top of the U.S. News and World Report rankings). Likewise, some organizations have partnered with universities to host mentorship or internship programs but have only partnered with Predominantly White Institutions. Careful consideration should be given to whether such choices are serving the organization's mission; whether they are valid predictors of the knowledge, skills, and abilities needed for a given role; or whether they merely serve to artificially depress the likelihood that candidates from underrepresented communities are given a fair opportunity to interview and be meaningfully considered for a position. In addition, all technology used in hiring, such as resume screening tools or testing, should be independently audited to identify and eliminate algorithmic bias that may unfairly screen out qualified candidates from underrepresented

communities. To learn more about this issue, please consult guidance from [the U.S. Department of Justice](#) and [the Equal Employment Opportunity Commission](#). Likewise, as discussed below, ensure that criminal background and credit checks are not unfairly excluding applicants from underrepresented communities from consideration.

Written job vacancy announcements should inform readers that the organization is an equal opportunity employer that does not discriminate on the basis of race, gender, gender identity, sexual orientation, age, religion, ethnic group, disability, or national origin. Likewise, vacancy announcements should reassure potential applicants that no person shall be disqualified from employment, solely or in part, because of a prior conviction, unless it is a job-related conviction. Vacancy announcements should use gender-neutral language and avoid superfluous technical jargon that can implicitly discourage applications from promising candidates in underrepresented communities.

Except as part of a valid affirmative action program, race should not be a motivating factor behind any employment decision or a part of the selection criteria for any employment benefit. Instead, selection criteria might include a longstanding demonstrated interest in serving underserved communities to remedy service gaps or persistent social inequities. While these criteria may attract candidates from those underserved communities, race should not serve as a proxy for a willingness to serve in those underserved communities. But race should not serve as a proxy for a willingness to serve in those underserved communities. Other permissible considerations include skills, such as multilingualism, needed to successfully navigate an increasingly diverse marketplace; the ability to foster and maintain cross-cultural connections; and a demonstrated ability to overcome adversity

(including challenges associated with encounters with racial discrimination, socioeconomic disadvantage, or unequal access to educational opportunities). An organization can consider how an applicant’s demonstrated cultural literacy may assist the organization in achieving its goals with respect to a certain subset of its customers because that literacy is not exclusive to any specific race or ethnicity.

**Remove or significantly limit criminal history and credit checks.**

Ensure that a person’s criminal or credit history does not unduly prevent a candidate from advancing. Indeed, “studies have consistently found that African American and Latino households tend, on average, to have lower credit scores than [white] households.”<sup>97</sup> As a result, “[t]he growing list of credit checks ... may disproportionately screen otherwise qualified racial and ethnic minorities out of jobs, leading to discriminatory hiring practices, and further exacerbating the trend where unemployment for African American and Latino communities is elevated well above the rate of [their white counterparts.]”<sup>98</sup> Given this, many states and localities prohibit the use of credit reports in employment decisions.<sup>99</sup>

Criminal history checks can likewise improperly screen out qualified underrepresented candidates, and, because of racial discrimination at every stage of the criminal legal system, criminal history checks have an adverse disparate impact on Black and Latinx candidates. Accordingly, at the very least, employers who plan to conduct criminal background checks during the application process should do so after a conditional offer has been made. Moreover, any consideration of an employee or potential employee’s criminal record should be limited to recent job-related convictions and serve a legitimate business purpose. Any arrests that did not result in a conviction should not be considered.

For more on how criminal background checks can have a racially disparate impact in violation of Title VII, see the LDF Thurgood Marshall Institute’s [report](#) *Barred from Work: The Discriminatory Impacts of Criminal Background Checks in Employment*. Organizations should ask their legal counsel to consider how criminal background checks may also cause an adverse racially disparate impact that violates state and local laws, as well as Title VII.

**Foster an inclusive work environment.**

Periodically assess the organization’s culture to ensure that everyone feels welcome to bring their full selves to work. For example, consider whether the idea of “professionalism” within the organization allows for religious garb, cultural or natural hairstyles, fluid gender identities, and flexible work hours to accommodate caregiving responsibilities. Assess the organization’s dress and grooming code to ensure that it enables everyone to bring their authentic selves to work. Ensure that actual job performance determines opportunities for advancement, rather than narrow and outdated perceptions of professionalism that disadvantage members of underrepresented groups. Scrutinize whether prevailing notions of professionalism influence plum assignments, participation in client pitches and networking events, and other career opportunities. Adopt policies that support work/life balance and accommodate employees with caregiving responsibilities by, for example, providing flexibility in work hours and remote work, if possible, as well as generous family leave that is available to all parents of children and encompasses care for elderly and other family members. Invest in anti-bias trainings and other experiences—paired with organizational policies and leadership commitment—that promote greater understanding and inclusivity to help the organizational culture evolve so that all employees feel welcomed and valued.

**Support Employee Resource Groups and mentorship programs.**

Employee Resource Groups (ERGs) are voluntary affinity groups that provide a safe, supportive space for employees to: (a) discuss strategies for navigating the particular challenges associated with a certain shared identity and (b) celebrate the joys, customs, and heritage associated with a certain community. Although members of ERGs may share a common aspect of their identity, such groups—and the events they host—should be explicitly open to all. Provide administrative and financial support generously and equally to all ERGs to minimize the burden of organizing meetings and events and providing honorariums to speakers. The contributions of employees to the operation of ERGs should be recognized as a valued demonstration of leadership and dedication to the organization. Likewise, employees should be given the bandwidth to attend ERG meetings during the workday so that attendance is possible for employees who have obligations outside of normal work hours. ERGs can help address the specific needs of employees from underrepresented groups and ensure that they have a meaningful voice in the operation and direction of the organization, as well as effective access to mentorship and pipelines for promotion within the organization.

Formal mentorship programs may facilitate connections for employees who have less access to informal networking opportunities. Such programs may be especially valuable in connecting underrepresented employees to more senior colleagues who may serve as a valuable resource. However, mentorship programs should not play a role in promotion decisions or other terms and conditions of employment, and all employees should have the opportunity to participate.

**Partner with minority-owned firms.** Ensure that investment firms, auditors, legal counsel, and vendors that are owned by people of color, are meaningfully included in the pool of applicants to be considered for the organization’s portfolio of partners, suppliers, and service providers. Periodically assess the pool of candidates that the organization considers for such roles to determine whether the candidate pool reflects the entire range of available talent. If it is determined that service providers from certain communities are underrepresented among the group of candidates, assess the reasons for the underrepresentation and devise a plan to broaden the candidate pool to reflect the full range of available talent.

**Collect data and measure progress on key diversity and inclusion metrics.**

Collect data and keep records of the demographic makeup of the applicant pool, candidates invited to interview, candidates who made it to a second or third round of interviews, and candidates offered a position to better understand whether everyone is afforded an equal opportunity to advance without regard to race, ethnicity, national origin, sex, gender, gender identity, sexual orientation, disability, or age. Similar records should be kept regarding promotions, pay equity, attrition, and surveys measuring employee satisfaction and perceptions of workplace culture.

Periodically run quantitative and qualitative analyses of organizational health in terms of key diversity and inclusion metrics. These analyses should include those mentioned in other areas of our recommendations, as well as a thorough analysis of pay equity, including the fairness of wages, benefits, executive compensation, stock buybacks, and profit sharing. Report these measures of organizational well-being to internal and external stakeholders, including the

organization’s leadership. These metrics should facilitate an understanding of the effectiveness and value of DEIA programs, how such measures can be fine-tuned to yield even better results, and how such programs further the organization’s mission and/or business priorities.

**Conduct an equity audit.** Also known as a “racial equity audit” or a “civil rights audit,” a number of companies have found this exercise helpful in assessing whether any current policies or practices deny anyone an equal opportunity based on a protected category. An equity audit can offer valuable, tailored guidance on a broad array of measures to advance equality in the workplace. Such an audit may include an evaluation of whether an organization’s recruitment, hiring, assignment, retention, pay, promotion, and termination practices and policies are marred by obstacles to equal opportunity that unfairly deny some candidates a fair chance to succeed. Likewise, an audit might determine whether algorithmic bias is distorting an organization’s operations and hindering its ability to leverage the talents and potential of both workers and potential customers from underrepresented communities. In addition, an equity audit might use quantitative and qualitative analyses to evaluate whether measures adopted to foster DEIA and/or ESG goals have been effective and, if not, what other lawful changes can be made to achieve the desired outcomes. An equity audit can also examine whether the organization’s operations and practices have an unintended impact on historically marginalized communities. Such audits can be a worthy investment, as they may proactively improve organizational policies and practices and decrease legal exposure to potential violations of anti-discrimination laws.

**Modify the application process for funding.** Funders should carefully consider whether their application process presents an insurmountable administrative hurdle to promising organizations and individuals. Thus, funders may want to conduct an in-depth analysis to determine ways to simplify and streamline the application process to equalize access for promising applicants with limited resources and experiences with grants. In addition, funders may wish to identify potential applicants, emerging managers, or partners by performing their own search, perhaps after immersing themselves in the community of target candidates. Funders should be intentional about ensuring that this search is broad enough to include all candidates who meet the funders’ parameters, and they may want to consult with experts in the field and local stakeholders.

**Remain steadfast in the laudable and lawful goal of advancing equity and inclusion.** Although the *SFFA* decision has no direct precedential impact on business, employment, or philanthropy, it has emboldened those who oppose equal opportunity. Some are attempting to change current law—a slow process that likely will take years to progress through the courts with no guarantee of success. Multiple organizations have received demand letters or have been subject to lawsuits, pressuring them to retreat from efforts to advance equal opportunity. It is, of course, imperative to have legal counsel make a careful assessment of whether any accusations are factually supported and legally sound. Frivolous allegations should not deter anyone from their obligations to break down barriers to opportunity and ensure equality for all.

## Support the Health of our Multiracial Democracy

Invest in civil rights

Get involved in local community activities

Publicly support racial justice



**Invest in civil rights.** Review financial investments and ventures to ensure that resources are aligned with core civil rights efforts to provide pathways to education and economic opportunity for underrepresented communities (especially Black families), full voting access for all eligible voters, and meaningful criminal justice reform. Establish standards for federal, state, and local political donations to avoid giving to candidates and organizations that advance anti-civil rights positions or spread misinformation about DEIA and its benefits for all.

**Get involved in local community activities.** Encourage employees and partners to engage with the local communities where headquarters and offices are located. Employees and partners should

be encouraged to volunteer with and donate to worthy causes, get informed about the issues that affect these communities, and vote in every election, including local elections for school board members, judges, prosecutors, and other important officials. Provide employees with paid time off to vote. LDF monitors voter suppression, which can be reported [here](#).

**Publicly support racial justice.** Take a public position in support of racial justice and encourage colleagues to do the same (e.g., with an open letter, press statement, or newspaper advertisement). Monitor legal developments that affect efforts to advance equal opportunity and racial justice and amplify support for equity and inclusion through the organization. Successful examples include 82 leading corporations and business groups submitting [amicus briefs](#) to the Supreme Court in the *SFFA* case to reaffirm how the American economy derives direct benefits from employees educated in diverse settings, and the Executive Leadership Council, a group of prominent Black executives, issuing [an open letter](#) to the nation’s CEOs urging them to commit to DEIA initiatives. Organizations that may be hesitant to make such public pronouncements individually should consider supporting these efforts through a trade group or another business organization.

# VI. CONCLUSION

We all benefit when people from every background can access economic opportunity and contribute their talents in the workplace. DEIA programs and other measures aimed at increasing access to employment, funding, and other opportunities are essential to our multiracial democracy, ensuring that everyone can thrive and that companies have the skills and perspectives needed to solve the complex challenges of today. Opponents of civil rights have sought to expand the scope of the Supreme Court’s decision in *SFFA* to challenge and chill these programs. But rolling back DEIA programs and similar measures can create legal risk for employers and other entities and harm the organizations themselves, depriving them of the insight and contributions of talented individuals who, for too long, have been underrepresented or excluded from certain spaces. It is therefore imperative for employers, funders, and government contractors to continue to invest in lawful efforts to increase access to opportunity and ensure the success of our economy and our democratic institutions.



## Endnotes

- 1 See, e.g., *Allen v. Milligan*, 599 U.S. 1, 13 (2023); *Lewis v. Chicago*, 560 U.S. 205 (2010); *Anderson v. Bessemer City*, 470 U.S. 564 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); and *Griggs v. Duke Power Co.* 401 U.S. 424 (1971).
- 2 Ashley Jardina et al., *The Limits of Educational Attainment in Mitigating Occupational Segregation Between Black and White Workers* 13, Nat’l Bureau Econ. Res., Working Papers No. 31641 (2023), [https://www.nber.org/system/files/working\\_papers/w31641/w31641.pdf](https://www.nber.org/system/files/working_papers/w31641/w31641.pdf).
- 3 Susan Caminiti, *Majority of employees want to work for a company that values diversity, equity and inclusion, survey shows*, CNBC (Apr. 30, 2021), <https://www.cnbc.com/2021/04/30/diversity-equity-and-inclusion-are-important-to-workers-survey-shows.html>; Jennifer Miller, *For younger job seekers, diversity and inclusion in the workplace aren’t a preference. They’re a requirement.*, Wash. Post (Feb. 18, 2021), <https://www.washingtonpost.com/business/2021/02/18/millennial-genz-workplace-diversity-equity-inclusion/>.
- 4 See Sundiatu Dixon-Fyle et al., *Diversity Wins: How Inclusion Matters* 20, McKinsey & Co. (May 19, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>; see generally Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, Harvard Bus. Rev. (July-Aug. 2018); Roger C. Mayer et al., *Do Pro-Diversity Policies Improve Corporate Innovation?*, 47 Fin. Mgmt. 617 (2018), <https://doi.org/10.1111/fima.12205>; Cedric Herring, *Is Diversity Still a Good Thing?*, 82 Am. Soc. Rev. 868 (2017), <https://doi.org/10.1177/0003122417716611>; David Rock & Heidi Grant, *Why Diverse Teams are Smarter*, Harvard Bus. Rev. (Nov. 4, 2016); William J. Holstein, *Diversity is Even More Important in Hard Times*, N.Y. Times (Feb. 13, 2009), <https://www.nytimes.com/2009/02/14/business/14interview.html> (“[I]t’s difficult, if not impossible, for [a] homogenous board[] to challenge and offer different perspectives, unique experiences and the broad-based wisdom that makes the board, and therefore the company, as effective as they can be.”); Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Socio. Rev. 208, 208 (2009), <https://doi.org/10.1177/000312240907400203>.
- 5 This report does not constitute legal advice. Should anyone reading this report seek legal advice, we suggest finding an attorney.
- 6 Notably, discrimination on the basis of sex includes pregnancy, childbirth, sexual orientation, and gender identity.
- 7 42 U.S.C. §§ 2000e–2000e-17.
- 8 *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (employing the “common law test” for determining who qualifies as an “employee” under the Employee Retirement Income Security Act of 1974 (ERISA), which examines the hiring party’s right to control the manner and means by which production is accomplished, the skill required, the source of instrumentalities and tools, the location of work, the duration of the relationship, the right to assign additional projects, the extent of the hiring party’s discretion over when and how long to work, the method of payment, the hiring party’s role in hiring and paying assistants, the regular business of the hiring party, the employee’s benefits, and the tax treatment of the hired party). The *Darden* rationale applies to Title VII as well as ERISA. See, e.g., *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 213 (3d Cir. 2015); *Lopez v. Massachusetts*, 588 F.3d 69 (1st Cir. 2009).
- 9 42 U.S.C. § 2000e-3(a).



10 *E.g., Duffy v. Wolle*, 123 F.3d 1026, 1038–39 (8th Cir. 1997), *abrogated on other grounds by Torgerson v. Rochester*, 643 F.3d 1031 (8th Cir. 2011) (“An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it is an excellent way to avoid lawsuits.”); Equal Emp. Opportunity Comm’n, *Section 15 Race and Color Discrimination, in Directives Transmittal*: (EEOC No. 915.003) 15-31 (2006), [https://www.eeoc.gov/sites/default/files/migrated\\_files/policy/docs/race-color.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/policy/docs/race-color.pdf), (“EEOC Compl. Man.”) (stating that diversity “initiatives may also help to avoid discrimination”); *see also Section 15 Race and Color Discrimination*, Equal Emp. Opportunity Comm’n, <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination>.

11 EEOC Compl. Man., *supra* note 10, at 15-31; *see id.* at 15.

12 29 CFR § 1608.1(c). *See also Johnson v. Transp. Agency*, 480 U.S. 616, 628–29 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

13 *See, e.g., Johnson*, 480 U.S. at 628–29; *Weber*, 443 U.S. 193.

14 *Compare Johnson*, 480 U.S. at 616 (upholding voluntary affirmative action plan) *with Loc. 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 445 (1986) (holding that Title VII “does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination”); 29 C.F.R. § 1608.6 (discussing affirmative action plans as part of EEOC settlements).

15 29 C.F.R. § 1608.3; *see Johnson*, 480 U.S. 616 (upholding an affirmative action plan designed to remedy disparities between the availability of women and people of color in the area labor market and in the defendant agency’s workforce, as well as effects of prior discrimination that led women to not seek employment opportunities in positions in which they had been traditionally underrepresented); *Loc. 28 of Sheet Metal Workers’ Int’l Ass’n*, 478 U.S. 421 (upholding an affirmative action plan intended to remedy specific policies and practices that excluded Black people from the union and its apprenticeship program); *Weber*, 443 U.S. 193 (approving affirmative action plan intended to redress lack of Black craftworkers at plant; company had previously only hired people with prior craft experience for its plant, but Black people could not get such experience because they were excluded from the craft union).

16 *See* 29 C.F.R. § 1608.4.

17 42 U.S.C. § 1981(a).

18 427 U.S. 273 (1976).

19 *See, e.g., General Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Pollard v. Wawa Food Mkt.*, 366 F. Supp. 2d 247, 252 (E.D. Pa. 2005) (concluding that disparate impact claims “are not actionable under section 1981” because section 1981 requires proof of discriminatory motive, and disparate impact claims do not).

20 *Comcast Corp. v. Nat’l Ass’n of Afr. Am. Owned Media*, 140 S. Ct. 1009 (2020).

21 *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (holding that Section 1981 “affords a federal remedy against discrimination in private employment on the basis of race”).

22 *See, e.g., Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *judgment vacated on other grounds sub nom. Bos. Firefighters Union, Loc. 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *United States v. Miami*, 614 F.2d 1322 (5th Cir. 1980), *on reh’g*, 664 F.2d 435 (5th Cir. 1981); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir. 1981); *Loc. Union No. 35 of Intern. Broth. of Elec. Workers v. Hartford*, 625 F.2d 416 (2d Cir. 1980).

23 *See Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1265 (10th Cir. 2013) (“Independent contractors can state a discrimination claim under [Section] 1981.”).

24 *See Lauture v. Int’l Bus. Machines Corp.*, 216 F.3d 258, 264 (2d Cir. 2000) (citing 42 U.S.C. Section 2000e(b)).

25 *See Brown v. Children’s Nat’l Med. Ctr.*, 773 F. Supp. 2d 125, 136 (D.D.C. 2011).

26 *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

27 Exec. Order No. 11246, 41 C.F.R. 60 (2003). Other federal statutes and regulations require affirmative action for people with disabilities, Rehabilitation Act of 1973, 29 U.S.C. § 793, and veterans, Vietnam Era Veterans’ Readjustment Assistance Act of 1974, 38 U.S.C. § 4212.

28 42 U.S.C. § 2000d.

29 *E.g., Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1209–11 (9th Cir. 1984) (holding that an entity receives “federal financial assistance” when it receives a subsidy, as opposed to compensation; as such, the term does not include government procurement contracts—i.e., contracts in which goods or services are sold or purchased by the government at fair market value).

30 *Id.*

31 *See, e.g., 42 U.S.C. § 2000d-3* (“Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.”); *Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1531 & 1531 n.8 (10th Cir. 1995) (“Although the literal language of § 2000d-3 establishing the requirement that a primary objective of federal funding be to provide employment only applies to federal administrative action to redress civil rights violations under Title VI, we apply the requirement to the implied private rights of action which have been read into the statute.”); *Ass’n Against Discrimination in Emp. v. Bridgeport*, 647 F.2d 256, 276 (2d Cir. 1981) (holding that “for a claimant to recover under Title VI against an employer for discriminatory employment practices, a threshold requirement is that the employer be the recipient of federal funds aimed primarily at providing employment”); *Middlebrooks v. Godwin Corp.*, 722 F. Supp. 2d 82, 91–92 (D.D.C. 2010). *See also Johnson*, 480 U.S. at 627 n. 6, 628 (citing 42 U.S.C. § 2000d–3 and noting that it was Congress’s intention that Title VI not “impinge” on Title VII, which prohibits discriminatory employment practices).

32 *E.g., Ahern v. Bd. of Educ.*, 133 F.3d 975, 983–84 (7th Cir. 1998) (“Title VI authorizes remedial action if employment practices tend to exclude from participation, deny benefits to, or otherwise subject the primary beneficiaries of a federal program to discrimination in violation of 42 U.S.C. § 2000d.”); *Caulfield v. Bd. of Educ.*, 632 F.2d 999, 1005 (2d Cir. 1980) (holding that 42 U.S.C. § 2000d-3 does not bar an action requiring desegregation of school faculty because faculty integration is essential to student integration and, as such, is aimed at benefitting the beneficiaries of the federal funding—i.e., school children).

33 Cal. Gov. Code §§12900–12996.

34 N.Y. Exec. L. § 312.  
35 N.Y. Exec. L. § 296.  
36 *Nat'l Ctr. for Pub. Pol'y Rsch. v. Schultz* ("Starbucks"), No. 2:22-cv-00267-SAB, 2023 WL 5945958 (E.D. Wash. Sept. 11, 2023).  
37 *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549-50 (1949).  
38 Fed. R. Civ. P. 23.1(a).  
39 *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984); *see also Starbucks*, 2023 WL 5945958, at \*3.  
40 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213, 230 (2023).  
41 *Id.*  
42 U.S. Const., amend. XIV.  
43 *Students for Fair Admissions, Inc.*, 600 U.S. at 198 n.2 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276, n.23 (2003)).  
44 42 U.S.C. § 2000d.  
45 *Students for Fair Admissions, Inc.*, 600 U.S. at 213.  
46 *See Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 381 (2016).  
47 *Students for Fair Admissions, Inc.*, 600 U.S. at 214–15.  
48 *Id.* at 218–19.  
49 *Id.* at 216–17.  
50 *Id.* at 220–21.  
51 *Id.* at 221–25.  
52 *Id.* at 230.  
53 *Id.* at 231.  
54 *Id.* at 207.  
55 *Allen*, 599 U.S. at 13 (citing *White v. Regester*, 412 U.S. 755, 766 (1973)).  
56 *Students for Fair Admissions, Inc.*, 600 U.S. at 317.  
57 *Id.* at 284.  
58 Charlotte A. Burrows, U.S. Equal Emp. Opportunity Comm'n, *Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs* (Jun. 29, 2023), <https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action>.

59 U.S. Dep't of Labor, Off. Fed. Contract Compliance Programs, *Affirmative Action Frequently Asked Questions* (Aug. 30, 2023), <https://www.dol.gov/agencies/ofccp/faqs/AAFAQs>.  
60 *See, e.g., Weber*, 443 U.S. 193.  
61 *E.g. Do No Harm v. Pfizer Inc.*, 646 F. Supp. 3d 490 (S.D.N.Y. 2022); *Lowery v. Tex. A&M Univ.*, 4:22-cv-03091, 2023 WL 6445788 (S.D. Tex. Sept. 29, 2023).  
62 *Johnson*, 480 U.S. at 628–29 (stating that “taking race into account [is] consistent with Title VII’s objective of breaking down old patterns of racial segregation and hierarchy”) (internal quotations omitted); *Weber*, 443 U.S. at 209 (stating that Title VII does not prohibit “affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories”).  
63 *Patterson v. McLean Credit Union*, 491 U.S. 164, 181–82 (1989); *Johnson*, 421 U.S. at 459–60.  
64 *See, e.g., Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *judgment vacated on other grounds sub nom, Boston Firefighters Union v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *on reh'g*, 664 F.2d 435 (5th Cir. 1981); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir. 1981); *Local Union No. 35 of Int'l. Bhd. of Elec. Workers v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980).  
65 *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390–91 (1982).  
66 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).  
67 *Students for Fair Admissions, Inc.*, 600 U.S. at 215 (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976)).  
68 *See, e.g., Johnson v. Metro. Gov't of Nashville*, 502 F. App'x 523, 535 (6th Cir. 2012); *Bissett v. Beau Rivage Resorts*, 442 F. App'x 148, 152–53 (5th Cir. 2011); *Mlynczak v. Bodman*, 442 F.3d 1050, 1058 (7th Cir. 2006); *Tomaszewski v. City of Philadelphia*, 460 F. Supp. 3d 577, 594 (E.D. Pa. 2020).  
69 *Young v. Colo. Dep't of Corr.*, No. 22-cv-00145-NYW-KLM, 2023 WL 1437894 (D. Colo. Feb. 1, 2023).  
70 *Vavra v. Honeywell Int'l Inc.*, No. 21-cv-06847, 2023 WL 5348764 (N.D. Ill. Aug. 21, 2023). *Cf. Henderson v. Sch. Dist. of Springfield R-12*, No. 6:21-cv-03219-MDH, 2023 WL 170594 (W.D. Mo. Jan. 12, 2023) (dismissing plaintiffs’ claims that anti-bias training violated 42 U.S.C. § 1983 and the First Amendment for lack of standing because they could not demonstrate that they were harmed); *but cf. Diemert v. City of Seattle*, No. 2:22-cv-1640, 2023 WL 5530009 (W.D. Wash. Aug. 28, 2023) (holding that plaintiff plausibly stated a hostile work environment claim, as plaintiff alleged that he experienced verbal and physical harassment from his co-workers, in addition to raising concerns about defendant’s anti-bias training).  
71 *See, e.g., Mlynczak*, 442 F.3d 1050 (finding that U.S. Department of Energy’s recruitment policy was intended to ensure “diversity in the applicant pool for positions at the agency” and was not evidence of discrimination because they “were of the type that expand the pool of persons under consideration, which is permitted”); *Duffy*, 123 F.3d at 1038–39 (“An employer’s affirmative efforts to recruit minority and female applicants does not constitute discrimination. . . . An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment.”).

- 72 *Mlynczak*, 442 F.3d at 1058–59.
- 73 *See Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003).
- 74 *See, e.g., Do No Harm v. Health Aff.*, No. 8:22-cv-02670 (D.D.C.) (challenging defendant’s Health Equity Fellowship for Trainees as discriminatory under Title VI of the Civil Rights Act of 1964, Section 1557 of the Affordable Care Act and the D.C. Human Rights Law; a motion to dismiss is pending.); *Am. All. for Equal Rts. v. Perkins Coie*, No. 3:23-cv-01877 (N.D. Tex.) (alleging that the defendant law firm violated Section 1981 by running a diversity fellowship program for members of groups historically underrepresented in the legal profession; the case has since settled.); *Am. All. for Equal Rts. v. Morrison & Foerster*, No. 1:23-cv-23189 (S.D. Fla.) (same).
- 75 *See Young v. Colo. Dep’t of Corr.*, No. 22-cv-00145-NYW-KLM, 2023 WL 1437894 (D. Colo. Feb. 1, 2023) (dismissing claim that DEI training violated the Equal Protection Clause); *Henderson v. Sch. Dist. of Springfield*, No. 6:21-cv-03219-MDH, 2023 WL 170594 (W.D. Mo. Jan. 12, 2023) (dismissing claim that DEI training violated plaintiff’s First Amendment rights); *Do No Harm v. Pfizer Inc.*, No. 1:22-cv-07908 (JLR), 2022 WL 17740157 (S.D.N.Y. Dec. 16, 2022) (dismissing claim that Pfizer’s efforts to recruit, retain, and promote diverse talent, including aspirational executive hiring goals and its fellowship program, violated 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, and other laws).
- 76 *See, e.g., Taxman v. Bd of Educ. of the Twp. of Piscataway*, 91 F.3d 1547, 1557–58 (3d Cir. 1996) (holding that school board’s affirmative action policy was not valid because it was aimed at maintaining diversity rather than remedying past discrimination); Equal Emp. Opportunity Comm’n Compliance Manual § 607.2(a) (“Affirmative action under the Guidelines is ... a justification for a policy or practice based on race, sex, or national origin.”); EEOC Compl. Man., *supra* note 10, at 42 (“The Supreme Court has not yet ruled on whether [a] ... diversity rationale could justify voluntary affirmative action efforts under Title VII ...”).
- 77 *See, e.g., Johnson*, 480 U.S. 616.
- 78 60 CFR § 60-2; U.S. Dep’t of Labor, Off. Fed. Contract Compliance Programs, *supra* note 59.
- 79 60 CFR § 60-2.16.
- 80 *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1209–11 (9th Cir. 1984) (holding that an entity receives “federal financial assistance” when it receives a subsidy, as opposed to compensation; as such, the term does not include government procurement contracts—i.e., contracts in which goods or services are sold or purchased by the government at fair market value).
- 81 *Ultima Servs. Corp. v. U.S. Dep’t of Agriculture*, No. 2:20-CV-00041-DCLC-CRW, 2023 WL 4633481, at \*18 (E.D. Tenn. July 19, 2023) (holding that rebuttable presumption that members of certain racial groups were “socially disadvantaged” and did not have to demonstrate that they experienced discrimination to be eligible for government contracting preferences as “socially and economically disadvantaged businesses” violated the Equal Protection Clause); *Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-cv-00278 (N.D. Tex. 2023) (alleging that the agency is running afoul of equal protection guarantees because it provides technical assistance, business development services, and specialty services to “minority business enterprises”); *see also Hierholzer v. Guzman*, No. 2:23-cv-00024 (E.D. Va. 2023) (alleging the Small Business Administration’s 8(a) Program—a training and technical assistance program for businesses controlled by “socially and economically disadvantaged people”—violates the Fifth Amendment’s equal protection guarantee).
- 82 *Ultima Servs. Corp.*, 2023 WL 4633481, at \*18.
- 83 U.S. Small Bus. Admin., *Updates on the 8(a) Business Development program*, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program> (last updated Nov. 22, 2023).
- 84 *Id.*
- 85 *Id.*
- 86 *See* Dominic Madori-Davis, *Fearless Fund Barred from Awarding Grant to Black Women Founders*, TechCrunch, (Oct. 2, 2023), <https://techcrunch.com/2023/10/02/fearless-fund-trial-aer/>.
- 87 *See Am. All. for Equal Rts. v. Fearless Fund Mgmt., Inc.*, No. 1:23-cv-3424-TWT, 2023 WL 6295121 (N.D. Ga. Sept. 27, 2023).
- 88 *See, e.g., Correll v. Amazon.com, Inc.*, No.: 3:21-cv-01833-BTM-MDD, 2023 WL 6131080 (S.D. Cal. Sept. 19, 2023).
- 89 *See Am. All. for Equal Rts.* 2023 WL 6295121 (holding that the Fearless Fund’s venture capital grant program targeted at Black women violated Section 1981).
- 90 *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021).
- 91 *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-13138, 2023 WL 6520763, at \*1 (11th Cir. Sept. 30, 2023) (citing *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), and holding that the First Amendment does not provide a “right to exclude persons from a contractual regime based on their race.”).
- 92 *See Starbucks*, 2023 WL 5945958. (granting Starbucks’ motion to dismiss a lawsuit challenging various of its DEIA efforts where the derivative shareholder plaintiff did not adequately and fairly represent the interests of Starbucks or its shareholders given that the plaintiff was clearly more interested in its own political ends than what was best for Starbucks); Jody Godoy, *Conservative Starbucks Investor Loses Diversity Challenge*, Reuters (Aug. 14, 2023) (recounting that the *Starbucks* court commented at an earlier hearing, “If the plaintiff doesn’t want to be invested in ‘woke’ corporate America, perhaps it should seek other investment opportunities rather than wasting this court’s time”); Martin Lipton et al., *Wachtell Lipton Discusses Mounting Pressure on DEI Initiatives*, The CLS Blue Sky (Aug. 22, 2023) (reporting that the *Starbucks* court said, as a part of its oral ruling on the motion to dismiss, “[t]he plaintiffs have ignored the fundamental rules of corporate law, including the business judgment rule. Courts of law have no business involving themselves with legitimate and legal decisions made by the board of directors of public corporations”); *Simeone v. Walt Disney Co.*, 302 A.3d 956, 2023 WL 4208481, at \*1 (Del. Ch. Jun. 27, 2023) (denying a plaintiff’s request for records to enable the plaintiff to determine whether Disney breached its fiduciary duties by failing to withdraw its public opposition to Florida’s so-called “Don’t Say Gay” bill because Disney’s “business decision” “cannot provide a credible basis to suspect potential mismanagement irrespective of its outcome”); *Lee v. Fisher et al.*, 70 F.4th 1129 (9th Cir. 2023) (dismissing a lawsuit alleging that Gap Inc. and its directors breached fiduciary duties by ignoring public-facing commitments to increase management-level diversity because the plaintiff did not sue in the forum designated by the forum-selection clause of Gap Inc.’s bylaws).

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- 93 *Achieving the Promise of a Diverse STEM Workforce: Hearing Before the H. Comm. on Science, Space, & Tech.*, 116th Cong. 2 (May 9, 2019) (Testimony of Barbara Whye, Chief Diversity and Inclusion Officer and Vice President of HR, Intel Corp.), <https://republicans-science.house.gov/cache/files/c/9/c9f5273f-06be-4388-880b-05f53efdd61f/EAAF3466B462CB7589EDEE7A2FCCF739.2019-05-09-testimony-and-report-whye.pdf>.
- 94 David Hood, *Lawsuits Challenge Corporate Diversity Pledges After Floyd*, Bloomberg Law (Apr. 7, 2023), <https://news.bloomberglaw.com/esg/host-of-companies-sued-alleging-unmet-diversity-equity-pledges>.
- 95 *See Amy Cook v. Steven D. Black, et al.*, No. 3:23-cv-04934-JCS (N.D. Cal. 2023).
- 96 Press Release, Equal Emp. Opportunity Comm’n, *EEOC Adopts New Strategic Plan* (Aug. 22, 2023) <https://www.eeoc.gov/newsroom/eeoc-adopts-new-strategic-plan>.
- 97 H.R. Rep No. 116-305, at 3 (2019), <https://www.congress.gov/116/crpt/hrpt305/CRPT-116hrpt305.pdf>.
- 98 *Id.*
- 99 *See* Nancy Gunzenhauser Popper & Amanda M. Gomez, *House Passes Bill Restricting Employer Credit Checks*, Nat’l L. Rev. (Feb. 15, 2020), <https://www.natlawreview.com/article/house-passes-bill-restricting-employer-credit-checks> (“As of last year, 11 states—including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington—and the District of Columbia have enacted laws that restrict the use of credit reports in employment decisions. Cities such as Philadelphia, New York City and Chicago have also passed laws regarding the use of credit checks in employment settings.”).

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