

Diversity Programs in the Wake of SFFA v. Harvard

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Voting Rights

- *Northwest Austin v. Holder* (2009)
- *Shelby County v. Holder* (2013)
- *Evenwell v. Abbott* (2016)

Higher Education

- *Fisher v. Texas* (2013)
- ***SFFA v. Harvard/UNC* (2023)**
- *SFFA v. Westpoint* (2023)

Contracting/ Employment

- *AAER v. Fearless Fund Mgmt. LLC* (2023)
- *AAER v. Morrison & Foerster/ Perkins Coie / Winston & Strawn* (2023)
- *AAER v. Smithsonian NMAL* (2024)

+ challenges filed to
CA/NASDAQ
Board Diversity Rules

“The Architect”



Grutter/Fisher (2003/2016)

- “Educational Benefits” of “Student Body Diversity” is a **Compelling Interest**
- Consider “**Workable**” race-neutral alternatives
- Race must be “Flexible” and “**Individualized**”
- Use of race must “**End Eventually**” (25 years)



Harvard/UNC (2023)

- Diversity Interest is **neither** sufficiently “**Coherent**” nor “**Measurable**” to permit judicial review
- No discussion of “**Workable**” alternatives
- Race used for “**Negative Discrimination**” and “**Stereotyping**”
- Use of race must **END NOW**

Diversity Admissions

- **Title VI** and the EPC are coextensive
 - *“discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI”*
- The **military academies** exception (see SFFA v. Westpoint)
- The mere fact of race vs. **experience with race**
 - *“nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”*

Important Caveats

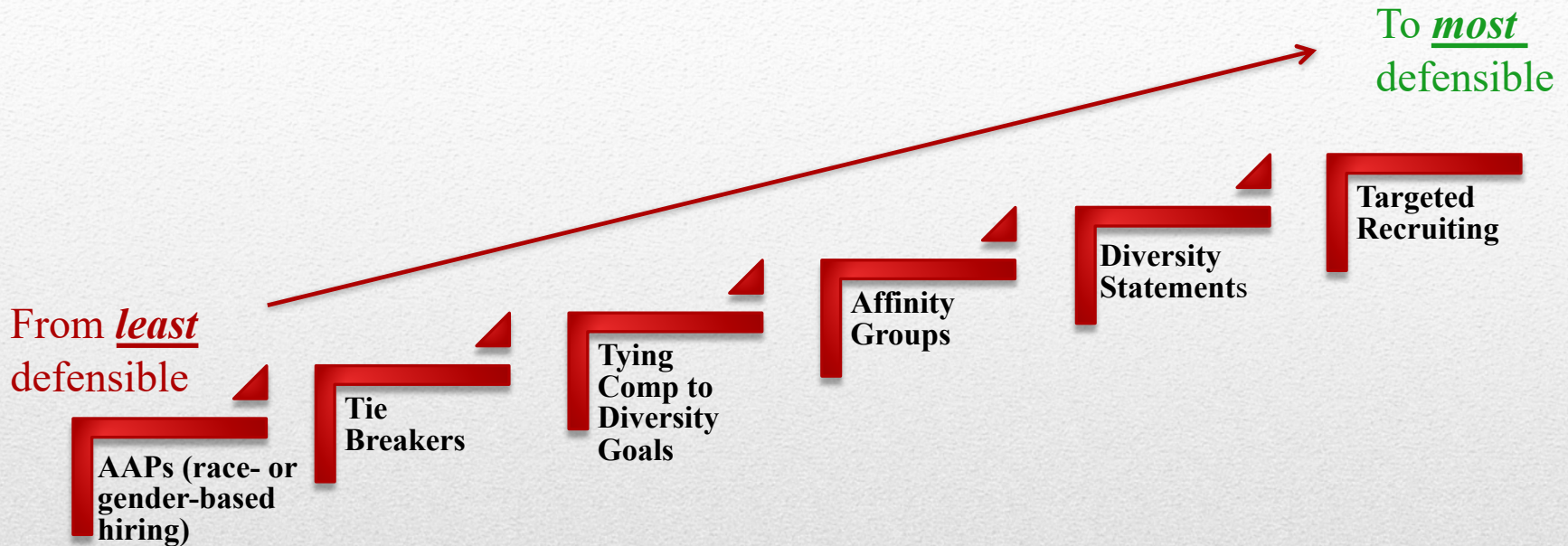
**Table 1:
Outcomes of Federal Cases Challenging Workplace Diversity Efforts*
(2003 – 2015)**

	Plaintiff	Defendant	Mixed
Favorable Decision	19	22	3
AAP/Consent Decree	15	3	2
Diversity Plan	4	19	1
Direct Evidence	2 (both AAPs)	0	1
Weber/Johnson	3	0	1
McDonnell Douglas	8 (5 AAP/CD)	18	1
Other	6	4	0

*Source: Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting An Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 *FORDHAM L. REV.* 101 (2015).

Workplace Diversity

Federal Title VII Diversity Cases (2003 – 2015)



Common Diversity Practices

- Updated federal case data (2015-2023)
 - Same trends BUT pre-SFFA
- Ultima Servs. Corp. v. U.S. Dept. of Agric. (E.D. Tenn. 2023)
 - *enjoining the use of race and ethnicity in administration of SBA programs and services*
- Nuziard v. Minority Bus. Dev. Agency (N.D. Tex. 2024)
 - *enjoining the use of race and ethnicity in administration of MBDA programs and services*
- Muldrow v. City of St. Louis (U.S., April 17, 2024)
 - *Plaintiff states a claim under Title VII if allege “harm” with regard to some “identifiable term or condition of employment.” The “harm” need not be “significant.”*

New Diversity Cases
