

Submitted to the Rocky Mountain Institute

**The Implication of the Supreme Court’s Affirmative Action Decision in *Students for Fair Admissions v. Harvard* for Private Foundations and Philanthropy and Considerations for Funders to Continue Their Missions**

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**The Lede**

The Supreme Court’s [opinion](#)<sup>2</sup> gutting affirmative action in higher education, while not unexpected, was still difficult for many advocates of racial justice to stomach. It effectively reversed forty-five years of precedent, whitewashed history, and minimized the continued vestiges of racist systems faced by many people of color. Subsequent actions by conservative groups suing universities, businesses, law firms, foundations, and government agencies for alleged violations of anti-discrimination laws and/or the Constitution, and written threats from politicians and States’s Attorneys General suggests more battles – and perhaps pain – to come.

This reality, however daunting, does not strike a death knell for racial justice. There are steps organizations can take to pursue goals of racial equity while complying with law and seeking real change. Foundations and organizations whose missions rest on advancing social justice should not be deterred by the decision or the coordinated attacks that have followed.

This article is a follow-up to an earlier [article](#) anticipating the decision and offers reflections on possible steps a foundation or other charitable organization might consider given its mission, culture, and risk tolerance. Like in the earlier article, I suggest below that the decision on how to respond to the Supreme Court’s decision and the risk tolerance and opportunities available should be discussed with the board of the organization and a strategy determined with board and executive approval.

**Why It Matters**

The Court’s opinion does not directly change the law pertaining to the work of most foundations or charitable organizations. The federal statutes<sup>3</sup> most directly applicable to a foundation’s work were not at issue in the case: Section 1981 of the Civil Rights Act of 1866<sup>4</sup> which prohibits discrimination based on

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<sup>1</sup> For identification purposes only. This paper represents the views expressed by Joshua Mintz in his personal capacity and does not necessarily reflect the views of the MacArthur Foundation. In addition, some of the legal analysis is based on materials and conversations with several experienced outside counsel and with fellow general counsel but should not be construed as legal advice to any party. This is a complicated area and obtaining advice of experienced counsel is critical to understanding the risks involved and making informed decisions. Special thanks to Emily DeSmedt of Morgan, Lewis & Bockius LLP, Debo Adegbile of Wilmer Cutler Pickering Hale and Dorr LLP, and Jill Rosenberg of Orrick Herrington & Sutcliffe LLP whose expertise have informed my understanding and, to my friends, you know who you are who improved the article with their perspectives.

<sup>2</sup> Appendix 1 is a further description of the relevant parts of the Court’s opinion.

<sup>3</sup> Foundations are also subject to state and local anti-discrimination statutes.

<sup>4</sup> Section 1981 was promulgated after the Civil War as a protection for Black Americans who had been systemically deprived of contractual rights based on their race. It provides in part: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” Courts have interpreted it, however, to prohibit *all* discrimination based on race, including discrimination that benefits Black and other people of color who have faced discrimination.

race, color, and ethnicity in the making of contracts and Title VII which prohibits discrimination in employment.<sup>5</sup>

Nevertheless, the language in the majority and concurring opinions, has fueled the aforementioned barrage of threats and complaints against a range of entities.<sup>6</sup> This continued a pattern that began well before the *Harvard* opinion was issued and will likely continue.

It will take time for case law to emerge that will define permissible approaches as trial courts interpret relevant law and appellate courts weigh in. Another Supreme Court opinion to resolve conflicts that may emerge is also a distinct possibility. In the meantime, we can expect an array of opinions with some courts no doubt adjudicating the legality of programs through the lens of the ahistorical “colorblind” application of laws suggested by the Supreme Court in the *Harvard* opinion. This frame, in which anti-discrimination laws are applied equally to all races despite historical or current inequities and the original purposes of anti-discrimination laws, is viewed by many – including Justices Sotomayor and Jackson as reflected in their dissents in the *Harvard* case – as an unfortunate distortion of history. And some courts may yet give greater weight to the origins and purposes of the anti-discrimination laws in specific cases.

Right now, however, for foundations, the decision only materially impacts the risk of making contracts, investments, and, perhaps, certain grants *on the basis of race*. For the moment, foundations can still make *race-neutral* decisions that benefit historically underrepresented groups and can make grants or investments on the basis of other factors such as socioeconomic status, geographic location, first-generation status, or an individual or organization’s commitment to diversity and equity. There will be, however, inevitable challenges plaintiffs to facially race-neutral applications on the basis that they are simply a front to achieve an otherwise illegal purpose.<sup>7</sup> It will be important, therefore, for organizations to implement programs carefully and avoid characterizations that would undermine the legal rationale.

There are also other defenses that foundations may rely on including that philanthropic gifts are not contracts under Section 1981, and First Amendment and standing arguments. These should be asserted after consultation with counsel in appropriate cases.

### **Critical Elements of the Court’s Decision of Relevance to Foundations**

The following observations drawn from the Court’s opinions will need to be considered in other contexts beyond higher education:

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<sup>5</sup> Unlike these statutes, Title VI was at issue in the *Harvard* case. It prohibits discrimination on the basis of race in any program or activity receiving Federal financial and could have implications for organizations that receive any federal assistance. As indicated in Appendix 1, Justice Gorsuch wrote a concurrence that focused heavily on a textual analysis of Title VI and suggesting that Title VII which uses similar language) and implicitly Section 1981 would prohibit any use of race in matters covered by those statutes. This is not controlling but indicates his thinking about the interrelationship of the statutes.

<sup>6</sup> Appendix 2 reflects the range of actions already taken by various actors which is only expected to continue. A recent [case](#) garnering considerable attention is a challenge by American Alliance for Equal Rights, an organization led by Ed Blum, the same person heading Students for Fair Admissions, attacking as violative of Section 1981 a grant program launched by the Fearless Foundation, an affiliate of a venture capital firm to benefit Black women entrepreneurs. See Appendix 2 for more detail.

<sup>7</sup> A case that may end up before the Supreme Court out of the Fourth Circuit, [Coalition for TJ v. Fairfax County School Board](#) (4<sup>th</sup> Circuit 2023) starkly presents this question. In that case, the Court upheld a new program adopted by a highly rated high school, Thomas Jefferson, to achieve diversity by using race neutral factors in a holistic approach, such as tapping students from local schools that had not usually sent students to TJ for admission, admitting a certain percentage of students from each middle school in the district and using other experiential factors. The dissent argued, however, the program violated the 14<sup>th</sup> Amendment because based on the record of school board meetings and text and other messages, the intent was to achieve prohibited racial balancing at the expense of Asian Americans. A petition for [certiorari](#) has been filed with the Supreme Court.

- There are only two types of interests sufficiently compelling under the 14<sup>th</sup> Amendment to justify race-based government action: (1) remediating specific, identified instances of past discrimination that violated the Constitution or a statute, and (2) avoiding imminent and serious risks to human safety, like a race riot.
- Remedying the effects of *societal* discrimination does *not* constitute a compelling interest that justifies race-based government action. Consequently, a general racial underrepresentation in a particular workplace, industry, or market will likely not be sufficient to permit an entity to grant tangible benefits to certain groups, and not others, on the basis of race.
- This finding may impact negatively how courts assess the racial equity and DEI programs of private organizations because the Court has expressly held that its analysis under the Equal Protection Clause applies equally to claims under Title VI, and courts have historically interpreted other federal anti-discrimination laws, such as Section 1981 and Title VII, consistent with Title VI and the Equal Protection Clause.
- The Court’s opinion casts raise questions whether a party can rely on an affirmative action plan to justify racial preferences under Section 1981 unless it can point to specific discriminatory actions it is addressing, not, for example, that an industry is lacking representation such as the private equity or investment fields. This suggests foundations should carefully assess strategies for investments and program-related investments to achieve greater assets under management by people of color as described below.
- Justice Roberts’ opinion noted that the ruling does not prohibit universities from considering an applicant’s discussion of how race has impacted his or her life, be it through discrimination, inspiration, or otherwise. Charitable organizations should consider how this carve-out may apply in different situations applicable to their work.

### **Steps for Organizations to Consider**

The increased attention on the pursuit of racial equity and the Court’s endorsement of a color-blind approach in assessing anti-discrimination laws suggests it is prudent for an organization to take steps now to mitigate unnecessary risk.

There is also a risk, however, of retreating from a commitment to racial equity. There are pathways to continue racial equity work and foundations committed to their mission should consider what steps they can take to advance justice within the bounds of the law.

*Aspirational Goals Remain Okay; Quotas Are Not.*

Aspirational goals remain acceptable so long as the methods to achieve those goals do not cross the line in using the racial identity of persons involved in the activity or organization as a factor in the decision (Justice Gorsuch’s concurrence in the *Harvard* case describes the textualist approach he would bring to interpretation of Titles VI, VII, and presumably Section 1981 and asserts that if race was a “but for” factor even if there were other factors present the laws would be violated).

Setting quotas or working towards quotas is illegal. This includes, for example, setting an explicit floor or ceiling tied to racial characteristics. The difference between goals and quotas comes down to both language and implementation. Foundations should remain diligent in ensuring language and approaches respect the difference.

### **A Possible Approach**

Given the nature of the opinion and the expected scrutiny of practices across organizations and fields, organizations should consider the following:

- An inventory and review of current approaches and DEI practices across the organization.
- Review messaging and communications.
- Develop talking points for all board and staff so that they speak with a consistent voice in describing efforts and approach. This may include focusing on race-neutral characteristics such as geography, proximity to and/or knowledge of communities we seek to serve, socio economic status, experiences of leaders that give rise to the characteristics we seek such as grit, determination, overcoming adversity, valuing diversity, equity, and inclusion, and others.
- Conduct refresher trainings for staff on Title VII, Section 1981, and related laws.
- Emphasize as part of the training the importance of consistent language in e-mails, texts, or conversations and avoiding language that suggests the characteristics used to make decisions are a way to “get-around” the prohibition on the use of race.
- Discuss with the organization’s board the approach and risk tolerance and obtain feedback, input, and consensus on the approach.
- Mitigate unnecessary risk while pursuing mission.
- For foundations, consider increasing grants to allow grantees to retain counsel to assist them in ensuring their efforts are compliant with law.
- Collaborate with other organizations to address issues that arise and combine resources.

### **Practices Requiring Assessment**

The tools to comply with the law while pursuing mission will differ depending on the activity but there are certain fundamental tenets and practices that should, for the moment at least, be legal.

*Process is Critical.*

Tools a foundation can use to comply with the law and mitigate risk while pursuing their mission will differ depending on the activity. One effective tool to help accomplish goals within existing law is to ensure that processes are inclusive. This means with respect to prospective grantees, vendors, investment managers, and staff, to reach out to organizations and people that will ensure a diverse pool

of candidates and encourage historically under-represented groups and people to apply for jobs, grants, contracts, and investments. Foundations and their staffs must reach outside networks that might be rooted in historical patterns that have limited inclusion of people of color.

## **Grantmaking**

### *Section 1981 Does Not Apply to Gifts.*

A critical issue in grantmaking is a determination whether a grant constitutes a gift, in which case, Section 1981 would not be applicable, or a contract. This analysis also pertains to the underlying work supported through grants.

There are compelling arguments that Section 1981 was never intended to apply to philanthropic grants. Even if the breadth of that argument may not convince some judges, foundations should consider assessing the terms of the grant agreement to determine whether changes might be appropriate to make it more “gift” like. Grants for general support provide additional distance for a foundation from the underlying activities of the grantee and may be seen as more of a gift than a project grant or expenditure responsibility grant depending on the terms of each agreement.

### *Some Organizations May Have Defenses Under the First Amendment.*

Foundations and organizations should assess how they might use a First Amendment analysis to support their activities and grants made to organizations that are engaged in expressive activity protected by the First Amendment. This is a nuanced legal argument that requires consultation with experienced counsel. It is, however, supported by Supreme Court cases, including most recently, 303 Creative LLC v. Elenis (2023).<sup>8</sup>

The thrust of the argument is that if an organization is engaged in expressive activity, such as when it creates an “expressive work” or if being required to associate with persons or entities will undermine a message it seeks to convey, the activity will be protected by the First Amendment. The defense might also apply to the choices made by the foundation on who receives grants. *Id.* A court applying a strict scrutiny analysis would have to find application of Section 1981 furthers a compelling governmental interest and is narrowly tailored to serve that interest, a difficult hurdle to overcome.<sup>9</sup> The defense does have its limits, however, and an organization would be wise to establish clear principles on the use of this argument.

## **Investments and Impact Investments**

It is likely investment subscriptions and investments in portfolio companies, whether convention or impact investments, will be considered contracts. Similarly, program-related investments made in the form of loans or guarantees would likely constitute contracts although arguments relying on the

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<sup>8</sup> In Elenis, the Court found that a wedding website developer could lawfully refuse to make a wedding website for a gay couple despite a Colorado public accommodation law prohibiting discrimination because the action of making the website was expressive activity and forcing the developer to make a website contrary to her beliefs would be compelling speech in violation of the First Amendment. Other relevant cases include Dale v. Boy Scouts of America (2000); Janus v. Am. Fed’n of State, City, & Mun. Emps., Council 31 (2018); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston (1995). A recent 11<sup>th</sup> Circuit case, Coral Ridge Ministries v. Amazon.com Inc., held that forcing Amazon to donate to organizations that it does support would violate its First Amendment rights in the face of a public accommodation law that prohibited discrimination. How the *Harvard* case will affect this reasoning remains to be seen.

<sup>9</sup> The recent case of American Alliance for Equal Rights v. Fearless Fund discussed *infra* and in Appendix 2 will likely test this theory.

charitable purpose may have resonance with some courts. The Supreme Court’s decision also made clear that addressing general societal discrimination, as opposed to discrimination against identified persons, is insufficient to justify racial discrimination. This may make an “affirmative action plan”<sup>10</sup> defense or portfolio approach to justify race-based investing more problematic.

An organization might address this risk through one or more of the following approaches:

- Modifying investment criteria to be sure the organization can attract emerging managers who may lack a long-term track record or assets under management of a certain size;
- Using new networks to engage with emerging managers;
- Attending and sponsoring conferences where emerging managers are encouraged to attend; and
- Encouraging submissions of interest to the Foundation by emerging managers.

An organization can also use race-neutral criteria to help identify qualified managers who may have diverse backgrounds characteristics that would be attractive to the organization outside of race. There may be organizations who wish to take more aggressive postures to continuing their efforts to address past and current discrimination. These efforts should be discussed with counsel and agreed to by the organization’s board.

## **Employment**

A foundation should review its employment and DEI practices preferably with the assistance of qualified counsel and provide training to staff on the permitted processes, steps, and language to achieving racial equity in the workplace.

## **Vendor Diversity Programs**

Vendor contracts are subject to Section 1981. Vendor diversity programs can have aspirational goals, but the implementation of such programs should take care to avoid using race as a basis to select a contractor. Description of the status of these efforts should also hew to the aspirational goals articulated and not suggest decisions were made because of the race of the contractor.

## **Demographic Data Gathering (and Use)**

Over the last few years, many foundations have sought data on the diversity of grantees, vendors, and investees.

Collecting data is an important step in accountability and knowing where a foundation stands relative to goals it may have set. Foundations must, however, be sensitive that the data is not used in a manner that suggests the organization is using race as a factor in decision-making. Aggregating data at a top level and not sharing individual data with program staff is one way to mitigate the risk that the processes will be viewed as race-based.

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<sup>10</sup> The Supreme Court recognized in the employment context that an employer, faced with a manifest imbalance in traditionally segregated job categories, could adopt an affirmative action plan to address the imbalance by favoring the race where the imbalance existed as long as such plan was time-limited and narrowly drawn to address the imbalance without unnecessarily trammeling the rights of others. United Steel Workers v. Weber (1979) and Johnson v. Transportation Agency (1987). The Harvard opinion’s failure to cite the Weber and Johnson cases and its reliance on a case decided before those cases to point to the need for specific discrimination raises questions for some advocates about the viability of this defense certainly outside the employment context.

## **Workplace DEI Programs**

A foundation and other organizations should continue or initiate legally compliant diversity, equity, and inclusion programs consistent with their culture, history, and preferences. But foundations should be aware that DEI programs can be a target and, therefore, a careful review with experienced counsel is prudent.

## **What Foundations Can Do to Support Grantees and the Sector**

Foundations have resources that many grantees lack and missions to further charitable purposes. Foundations can consider one or more of the following steps based on their philosophies, culture, and resources recognizing that disparate and separate efforts that splinter the field result in less effective programs and responses:

- Providing grants so that grantees can retain qualified counsel to build legally sound programs and approaches to pursue their racial equity mission.
- Establish programs that might provide free sources to grantees and others, such as a pro bono network or through payments to law firms, to assist grantees as direct charitable expenditures.
- Collaborate with other similarly situated funders to provide an overarching approach to provide funds for defense of claims, establish other resources, and support organizations that are providing resources and assistance to grantees. The Association of Black Foundation Executives and other organizations are taking steps to collect and curate resources.
- Foundations that have general counsels and legal departments should continue to work together and collaborate to help the field and their grantees while respecting the individual needs, priorities, strategies, and risk tolerances of their organizations.
- Foundations can also reach out to highly qualified counsel for advice and expertise and should do so when necessary. This is an evolving area of the law and the benefit of good counsel with expertise cannot be overstated.
- It is important for the sector to be strategic in how it approaches issues in an evolving legal environment. Stretching to achieve goals is commendable and even necessary at times. In an environment, however, where opposing groups are looking for targets and opportunities to test their theories, those committed to racial equity goals should try to avoid the oft quoted adage: “bad facts can result in bad law.”

## **Conclusion**

The Supreme Court opinion and its aftermath have reminded many that the path to racial justice was never linear. People of good will can disagree about the impact of the case and the strategies to follow in response. Foundations should, however, continue to work within the law to support their mission and the quest for social justice using all available tools.

## Appendix 1

### **Critical Elements of the Court's Decision<sup>1</sup>**

#### The Supreme Court's Holding in *Harvard* and *UNC*

In *Harvard* and *UNC*, the Supreme Court held that Harvard and UNC's race-based affirmative action programs are unlawful. Although the Court only analyzed Harvard and UNC's programs under the Equal Protection Clause, the Court held in a footnote that discrimination that violates the Equal Protection Clause also violates Title VI when the discriminating actor receives federal funding. In reaching its decision, the Court purported to apply its prior analysis from *Grutter* and its progeny, but has effectively overruled *Grutter* in several respects.<sup>2</sup>

#### i Basis for the Court's Holding that Harvard and UNC's Admissions Processes Violate the Equal Protection Clause

The Court reaffirmed that race-based decisions violate the Equal Protection Clause unless they are narrowly tailored to further compelling governmental interests. The Court held, however, that Harvard and UNC's programs do not survive strict scrutiny under that standard for several reasons.

First, the Court held that the educational benefits of a diverse student body are not a compelling interest. Harvard and UNC had argued that their admissions programs serve the government's interest in the educational benefits of a diverse study body, which the Court had recognized as compelling in *Bakke* and *Grutter*.<sup>3</sup> In rejecting that argument, the Court effectively overruled *Bakke* and *Grutter*.

The universities had argued that a diverse student body helped better train future leaders, better educate students through diversity and diverse outlooks, promoted the robust exchange of ideas, broadened understanding, and prepared engaged and productive citizens. Notably, in *Grutter*, the Court had deferred to the University of Michigan Law School's educational judgment that these same benefits of diversity were essential to its educational mission.<sup>4</sup> In contrast, the Court has held in *Harvard* and *UNC* that the universities' diversity goals are "commendable," but are "not sufficiently coherent for purposes of strict scrutiny" because they cannot be measured and there is no way to determine when they have been reached. Thus, the Court held that the educational benefits Harvard and UNC described "lack sufficiently focused and measurable objectives warranting the use of race."<sup>5</sup>

Second, the Court held that there was no "meaningful connection" between the universities' admissions processes and the educational benefits they purport to pursue because the race categories that Harvard and UNC use to measure their classes' diversity are imprecise and do not capture all groups that might constitute an underrepresented racial minority.

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<sup>1</sup> This summary is taken from a memorandum supplied by the law firm of Morgan, Lewis & Bockius LLP.

<sup>2</sup> Indeed, Justice Thomas in his concurrence and Justice Sotomayor in her dissent each acknowledged that "*Grutter* is, for all intents and purposes, overruled." See Thomas Concurrence, p. 58; Sotomayor Dissent, p. 28.

<sup>3</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003).

<sup>4</sup> *Id.* at 328, 332.

<sup>5</sup> Opinion, p. 39.

Third, the Court held that Harvard and UNC's admissions processes fail strict scrutiny because they make race a "negative" factor for some applicants. The Court noted that the Equal Protection Clause prohibits using an individual's race against him. Because college admissions are a "zero-sum" game, Harvard and UNC's practices of considering race a "plus factor" for some applicants inevitably makes race a "negative" factor for other applicants who do not receive an equivalent tip.

Fourth, the Court found that the universities' processes improperly rely on and perpetuate racial stereotypes insofar as they assume that all applicants of a particular race will provide a diverse perspective that an applicant of another race will not. The Court held that the universities' admissions processes "tolerate the very thing that *Grutter* foreswore," by assuming "that there is an inherent benefit in ... race for race's sake," and that students of a particular race think alike or have the same life experiences.

Finally, the Court noted that the programs do not allow for the determination of a meaningful end point, as required under *Grutter*. The Court rejected the universities' response that the race-conscious admissions process will end when there is meaningful representation and diversity; instead, it viewed the universities' approach as "outright racial balancing" that is "patently unconstitutional." For example, through Harvard's use of racial demographics in prior classes to guide admissions, and its fairly consistent percentages of each African-American, Hispanic, and Asian-American students admitted in each of the last 10 years.

## APPENDIX 2

### COURT CASES

The following are some of the cases that have been filed attacking various programs as illegal under section 1981 or, with respect to government programs under the 14<sup>th</sup> or 5<sup>th</sup> Amendments. These cases are representative, may not reflect the latest developments in the cases and the list does not purport to capture every pending case.

- In a case that has generated considerable [attention](#), the American Alliance for Equal Rights recently filed a race discrimination lawsuit in US District Court in the Northern District of Georgia against several entities affiliated with Fearless Fund Management, LLC (Fearless), an Atlanta-based asset manager, including its corporate foundation. In the complaint, the Plaintiff alleges that Fearless' grant program for Black female business owners violates Section 1981. The organization that filed the *Fearless* suit is affiliated with Students for Fair Admissions (SFFA), the organization that sued Harvard and UNC in the affirmative action cases the U.S. Supreme Court decided this term.
- In two recent [cases](#), the same Plaintiff as in the above case, has sued two law firms, Perkins Coie and Morrison & Foerster for diversity fellowships maintained by the firm under Section 1981 on the basis that the fellowships were race exclusive.
- America First Legal, the conservative nonprofit organization backed by former Trump adviser Stephen Miller, has filed complaints against Nordstrom, Activision Blizzard, and Kellogg's alleging that their DEI policies constitute racial discrimination.
- In *Ultima Servs. Corp. v. U.S. Dep't of Agriculture*, the U.S. District Court for the Eastern District of Tennessee ruled on July 19, 2023, that the U.S. Small Business Administration's (SBA) and the U.S. Department of Agriculture's (USDA) use of a "rebuttable presumption" of social disadvantage for certain minority groups to qualify for inclusion in the SBA's 8(a) Business Development Program (the 8(a) Program) violates the Fifth Amendment's Due Process Clause.
- In *Moses v. Comcast* (filed in the federal District Court for the Southern District of Indiana in 2022), the plaintiffs alleged that a program provided by Comcast through which it "offers small businesses the chance to participate in a grant program offering 'resources and tools to elevate your business,' including consulting, creative production of a 30-second TV commercial, and a TV media schedule, among other things violated Section 1981 because the program was only available to businesses that are at least 51% "owned and operated by someone who identifies as Black, Indigenous, a Person of Color, or a female." The defendant argued donative intent and that the relationship involved gift(s) rather than a contract.

The parties settled the matter after the court denied putting a preliminary injunction into place.

- In 2021, Pfizer launched a competitive Breakthrough Fellowship Program, which selects students during their junior year of college and provides a summer internship before senior year, a two-year analyst position upon graduation, a scholarship for certain two-year graduate programs, and an offer of a full-time manager-level position. In *Do No Harm v. Pfizer* (S.D.N.Y. 2022), the plaintiff asserted that, because applicants to the program must “[m]eet the program’s goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans,” the program impermissibly discriminates on the basis of race in violation of Section 1981, Title VI of the Civil Rights Act of 1964, Section 1557 of the Affordable Care Act, the New York State Human Rights Law, and the New York City Human Rights Law.

The district court dismissed Do No Harm’s action, finding that the organization failed to establish that it had standing to sue on the basis of anonymous declarations from two Do No Harm members, which stated that they were “able and ready” to apply to the fellowship “if Pfizer stops” discriminating on the basis of race. The case is now on appeal before the Second Circuit.

- Two lawsuits were filed in 2020 in Oregon state court over state dollars made available only for Black entrepreneurs in Oregon. The case involving a white plaintiff was settled,<sup>16</sup> and the other one involving a Latina is pending without any substantive judicial pronouncements.<sup>17</sup>
- In 2018, Amazon launched its Delivery Services Partners Program to help entrepreneurs secure a share of profits from online orders by setting up their own companies and employing their own drivers. As part of this program, Amazon offered \$10,000 grants to Black, Latinx, and Native American entrepreneurs who wished to contract with Amazon as delivery service partners. In *Alexandre, et al. v. Amazon.com Inc.* (S.D. Cal. 2022), plaintiffs filed a proposed class-action alleging that Amazon’s grant program discriminates against Asian and white partners because it is provided only to Black, Latinx, and Native American entrepreneurs. Plaintiffs allege that, in deploying a race-conscious grant program, Amazon has violated California state civil rights laws.
- In *National Center for Public Policy Research v. Schultz* (E.D. Wash. 2022), a conservative organization and shareholder challenged seven policies adopted by Starbucks, including setting hiring goals for people of color, awarding contracts to diverse suppliers and advertisers, and tying executive pay to achievement on diversity metrics. These programs are being challenged under Section 1981 of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, and Washington state civil rights laws. This case was recently dismissed with the court characterizing the complaint as frivolous.
- Texas A&M launched a program, called the Accountability, Climate, Equity and Scholarship Fellows Program, to improve its hiring of diverse mid-level faculty. During the fall semester of 2021, about 60% of Texas A&M’s faculty were white; only 6% were Latino, and less than 4% were Black. In *Lowery v. Texas A&M* (S.D. Tex. 2022), a white male finance professor at the University of Texas at Austin sued Texas A&M, alleging that the University’s hiring program impermissibly discriminates on the basis of race and sex, in violation of Title VI of the Civil Rights

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<sup>16</sup> *Great Northern Res., Inc. v. Coba*, Case No. 3:20-cv-01866-IM (U.S.D.Ct. D. Or.). Settlement referenced in *Cocina Cultura LLC v. Oregon Dep’t of Admin. Servs.*, Case No. 3:20-cv-01866-IM (Lead); Case No. 3:20-cv-02022-IM (Trailing), 2021 U.S. Dist. LEXIS 162629 (U.S.D.Ct. D.Or., August 27, 2021).

<sup>17</sup> *Cocina Cultura LLC v. Oregon Dep’t of Admin. Servs.*, Case No. 3:20-cv-01866-IM (Lead); Case No. 3:20-cv-02022-IM (Trailing), 2021 U.S. Dist. LEXIS 162629 (U.S.D.Ct. D. Or., August 27, 2021).

Act of 1964, Title IX of the Education Amendments of 1972, and the Equal Protection Clause of the 14<sup>th</sup> Amendment.

**LETTERS AND OTHER ACTIONS**

**Senator Cotton Warns Top Law Firms about Race-Based Hiring Practices, July 17, 2023**

(Press Release, includes template letter to law firms below re race-based hiring quotas and benchmarks as part of DEI initiatives)

Akin Gump Strauss Hauer & Feld	Herbert Smith Freehills	Quinn Emanuel Urquhart & Sullivan
Allen & Overy	Hogan Lovells	Reed Smith LLP
Baker Donelson	Holland & Knight	Ropes & Gray
Baker McKenzie	Jones Day	Shearman & Sterling
Cleary Gottlieb Steen & Hamilton	King & Spalding	Sidley Austin
Clifford Chance	Kirkland & Ellis	Simpson Thacher
Cooley LLP	K&L Gates	Skadden, Arps, Slate, Meagher & Flom LLP
Covington & Burling	Latham & Watkins LLP	Squire Patton Boggs
Davis Polk	Linklaters LLP	Sullivan & Cromwell LLP
Debevoise & Plimpton	Mayer Brown	Weil, Gotshal & Manges
Dechert LLP	McDermott, Will & Emery	White & Case LLP
Dentons US LLP	Milbank LLP	Wilmer Cutler Pickering Hale & Dorr
DLA Piper	Morgan, Lewis & Bockius	Wilson Sonsini
Eversheds Sutherland	Morrison & Foerster	Winston & Strawn LLP
Freshfields Bruckhaus Deringer	Norton Rose Fulbright	
Gibson, Dunn & Crutcher	Orrick, Herrington & Sutcliffe	
Goodwin Procter	Paul Hastings	
Greenberg Traurig	Paul, Weiss, Rifkind, Wharton & Garrison	
	Proskauer Rose LLP	

**Letter dated July 13, 2023 to Fortune 100 CEOs from States’ Attorneys General re Legal Consequences of Race-Based Employment Preferences and Diversity Policies**

(Sent by Attorneys General of 13 states: Kansas, Tennessee, Alabama, Arkansas, Indiana, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, and West Virginia)

Abbott Laboratories	Caterpillar	Exelon	Liberty Mutual
AbbVie	Centene	Exxon Mobil	Insurance Group
AIG	Charter	Fannie Mae	Lockheed Martin
Albertsons	Communications	FedEx	Lowe's
Allstate	Chevron	Ford Motor	Marathon Petroleum
Alphabet	CHS	Freddie Mac	Massachusetts Mutual
Amazon	Cigna	General Dynamics	Life insurance
American Express	Cisco Systems	General Electric	McKesson
AmerisourceBergen	Citigroup	General Motors	Merck
Anthem	Coca-Cola	Goldman Sachs Group	Meta Platforms
Apple	Comcast	HCA Healthcare	MetLife
Archer Daniels Midland (ADM)	ConocoPhillips	Home Depot	Microsoft
AT&T	Costco Wholesale	HP	Morgan Stanley
Bank of America	CVS Health	Humana	Nationwide
Berkshire Hathaway	Deere	Intel	New York Life Insurance
Best Buy	Dell Technologies	International Business Machines	Nike
Boeing	Dow	Johnson & Johnson	Northwestern Mutual
Bristol-Myers Squibb	Energy Transfer	JPMorgan Chase	Nucor
Cardinal Health	Enterprise Products Partners	Kroger	Oracle
			PepsiCo

Pfizer  
Phillips 66  
Plains GP Holdings  
Procter & Gamble  
Progressive  
Prudential Financial  
Publix Super Markets

Raytheon Technologies  
State Farm Insurance  
StoneX Group  
Sysco  
Target  
Tesla  
Thermo Fisher Scientific

TIAA  
TJX  
Tyson Foods  
United Parcel Service  
UnitedHealth Group  
USAA  
Valero Energy

Verizon  
Communications  
Walgreens Boots  
Walmart  
Walt Disney  
Wells Fargo

Letter dated July 19, 2023 to Fortune 100 CEOs from States' Attorneys General Refuting the Foregoing Letter dated July 13, 2023

(Sent by Attorneys General of 21 states: Nevada, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington)

Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs, dated June 29, 2023

(Press Release in response to Supreme Court's Decision in *Harvard* and *UNC* cases: It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace)

Commentary from EEOC Commissioner Andrea R. Lucas, with Supreme Court Affirmative Action Ruling, It's Time for Companies to Take a Hard Look at Their Corporate Diversity Programs, dated June 29, 2023 (Reuters)

Students for Fair Admissions Sends Demands to 150 Colleges, Inside Higher Education, July 11, 2023  
(E-mail sent to approximately 100 "flagship" public universities and approximately 50 private schools from Edward J. Blum, founder of Students for Fair Admissions (list of schools not made public))