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# **Navigating the Legal Landscape Following the SCOTUS Affirmative Action Ruling**

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Dorothy Deng, Partner, Whiteford

Kevin M Serafino, Associate, Tenenbaum Law Group PLLC

## Disclaimer

- This webinar is provided for educational purposes only and should not be construed as legal advice. The information presented in this webinar is intended to provide general guidance and awareness on the discussed topics. For specific legal advice tailored to your individual circumstances, please consult with a qualified legal expert.

# Introduction

- Associations are mission-based entities that bring people together, sometimes through gender, sexual orientation, religious beliefs, race, and ethnicity.
- On June 29, 2023, the Supreme Court issued its ruling in *Students for Fair Admissions v. Harvard College & UNC* and held that using race as a plus factor in college admissions (affirmative action) is unconstitutional
- On June 30, 2023, the Supreme Court issued its ruling in *303 Creative LLC v. Elenis* and held that the First Amendment prohibits the state of Colorado from forcing a website designer to create designs (i.e. express speech) that the designer disagrees with, such as a website for same-sex weddings
- Following the Supreme Court rulings, several lawsuits have been filed to challenge various types of DE&I initiatives

## Harvard's Admission Process

- Final “lop list” stage, only four pieces of information included: legacy status, recruited athlete status, financial aid eligibility, and race
- Harvard's goal: make sure that Harvard does not have a dramatic drop-off in minority admissions from the prior class
- In 2014, SFFA filed lawsuits on the basis that race “plus” admissions programs violated Title VI of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment

## The Strict Scrutiny Test

- The Supreme Court analyzed the admission program under the standards of the Equal Protection Clause itself.
  - Any exception the Equal Protection Clause must pass the “strict scrutiny test”.
- (1) whether the racial classification is used to “further **compelling governmental interests**;
  - (2) if so, whether the government’s use of race is “**narrowly tailored**”, meaning “necessary” to achieve that interest.

# SFFA v. Harvard Holding

Hold: Harvard's admission program failed the "narrowly tailored" test:

- lack measurable objectives warranting use of race
- employ race in a negative manner (fewer Asians and White students admitted)
- involve racial stereotyping (minority students always express some characteristic minority viewpoint)
- lack meaningful end points.
  
- Majority opinion states: "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."
- The Equal Protection Clause analysis would likely be applied to any future legal challenges to DEI programs involving an admission process where race (or gender, sexual orientation) is used as a plus factor, and when certain participants are excluded from participation in the program.

## Post SFFA Development

- Shortly after the SFFA ruling, American Alliance for Equal Rights filed several lawsuits based on violation of Section 1981 of the Civil Rights Act of 1866.
- AAER has ~200 members who pay dues and are ready and able to apply for the various programs challenged
- Relevant statutory language of Section 1981 (a): all persons within the jurisdiction of the United States shall have the same right in every state and territory to **make and enforce contracts...as is enjoyed by white citizens...**
- The employer-employee relationship is based on a contract
- AAER first targeted prominent law firms' DEI fellowship/internship programs
- AAER also challenges nonprofit organization's grant programs

# AAER v. various law firms—Summary of Section 1981 Settlement

	Program Challenged	Revised Eligibility Criteria
Perkins Coie (filed 8/22/23; settled 10/11/23)	Diversity Fellowship; paid summer-associate & \$15K & \$25K stipend. Applicants must be <b>members in a group historically underrepresented in the legal profession, including students of color, students who identify as LGBTQ+, and students with disabilities.</b>	<ul style="list-style-type: none"> <li>• Good standing at an ABA-accredited law school....regardless of race, color, religion, sex, age, national origin, veteran status, sexual orientation, gender identity/gender expression, disability status, or any other identity.</li> </ul>
Morrison & Forester (filed 8/22/23; settled 10/6/23)	Fellowship; paid summer associate & \$50K stipend. Must be a <b>member in a historically underrepresented group in the legal professional, including racial/ethnic minority groups and members of the LGBTQ+ community.</b>	<ul style="list-style-type: none"> <li>• Demonstrated commitment to promote diversity, including, and accessibility</li> <li>• Ability to bring a diverse perspective to the firm as a result of adaptability, cultural fluency, resilience, and life experiences</li> </ul>
Winston Strawn (filed 10/30/23; settled 12/6/23)	Scholars Program; paid summer associate & \$50K scholarship. Applicants must be <b>“members of a disadvantaged and/or historically underrepresented group in the legal profession.”</b>	<ul style="list-style-type: none"> <li>• Demonstrated commitment to promoting the firm’s values of DE &amp; I within the community</li> <li>• Ability to bring a unique perspective based on experiences as an individual, including challenges overcome, skills built, or lessons learned that have shaped the applicant’s identity.</li> </ul>



## AAER v. other entities—Section 1981 litigation Status

	Program Challenged	
Hidden Star, a 501(c)(3) nonprofit (filed 2/5/24; settled 2/25/24)	Galaxy Grants program; offers contestants “a chance to win \$2750 Galaxy Grant”; requires contestants to be “a confirmable ethnic minority or female.”	<ul style="list-style-type: none"><li>• Grants awarded based on random-selection device</li><li>• There will be no verification of race or sex</li><li>• FAQ will remove the phrase “for minority and women-owned businesses”</li><li>• Contestants can select “prefer not to say” when asked for their race or ethnicity</li></ul>
Founders First Community Development Corporation (filed 4/16/24)	“Texas Job Creators Grant”; Eligibility for the contestant must “identify as one of the following: Latinx, Black, Asian, Women, LGBTQIA+, Military, Veteran, or [someone] located in a Low to Moderate Income area.	

## *American Alliance for Equal Rights v. Fearless Fund Management, LLC et al.*

- The primary defendant is the Fearless Foundation, a 501 (c)(3) organization.
- AAER challenges the Fearless Strives Grant Contest; only black women owned businesses are eligible to participate; winner receives \$20,000 grant
- Issues relevant to our nonprofit clients:
  - (1) Whether the Foundation's Contest constitutes a contractual agreement that places the case within the Section 1981 realm
  - (2) Whether the First Amendment bars the Plaintiff's claim

## Fearless Fund lawsuit legal issues

- Plaintiff says the grant contest is a contract because the applicant must agree to the official rules—how to enter, judging criteria, permission to use likeness, etc.
- Fearless Foundation says the grant contest is a discretionary charitable gift, not a contract award. In addition, there is a First Amendment right to free speech and expression to promote black women owned businesses. *Per 303 Creative*, antidiscrimination statutes cannot be used to compel an organization's expressive conduct.
- Complaint seeks declaratory judgment, preliminary injunction, and permanent injunction. On 9/27/23, the District Court denied the preliminary injunction; plaintiff filed an appeal to the 11<sup>th</sup> Circuit the same day. On 9/30/23, the 11<sup>th</sup> Circuit granted the preliminary injunction.

## Fearless Fund lawsuit status

- District Court finds that “the Plaintiff has carried its burden at the preliminary injunction stage to show that the case clearly falls within the scope of Section 1981.”
- However, the District Court ruled in the Foundation’s favor because the Foundation’s grant program is expressive and subject to the First Amendment.
- 11<sup>th</sup> Circuit disagrees; ruled that the Foundation does not provide “expressive services” or otherwise engage in “pure speech”; “Although the First Amendment protects the Foundation’s right to promote beliefs about race, it does not give the Foundation the right to exclude persons from a contractual regime based on their race.”
- Full briefing & oral argument completed; await 11<sup>th</sup> Circuit ruling

## *American Alliance for Equal Rights v. Zamanillo, et al.*

- AAER appears to be expanding legal challenges based on different statutes
- AAER filed a lawsuit against the directors of the National Museum of the American Latino and Institute of Museum and Library Services (Smithsonian). The complaint challenges the Museum's undergraduate internship program, which is "designed to increase hands-on training opportunities for Latina, Latino, and Latinx-identifying undergraduate students."
- Complaint filed on 2/22/24 and settled on 3/26/24. Museum agreed to state on the website: "The Undergraduate Internship is equally open to students of all races and ethnicities. Reviewers should not give preference or restrict selection based on race or ethnicity."
- Complaint was based on the Fifth Amendment's Equal Protection clause that binds the US government.
- Note: SFFA v. Harvard holding pertains to the Fourteenth Amendment's Equal Protection clause

## *Suhr v. Dietrich*

- A member of the Wisconsin Bar Association sued the association to challenge the Diversity Clerkship Program”; the program is for law students “with backgrounds that have been historically excluded from the legal field...
- Plaintiff claims that being compelled to pay membership dues to support the program violates plaintiff’s First Amendment right to free speech.
- Parties settled. The Bar Association agreed to use the following definition of “Diversity” in connection with the program:

“Diversity” means including people with differing characteristics, beliefs, experiences, interests, and viewpoints. Diversity promotes an environment in which all individuals are treated with dignity and respect, regardless of their differences and without regard to stereotypes, and helps to ensure a better understanding and consideration of the needs and viewpoints of others with whom we interact.”

## *Ultima Services Corp. v. Department of Agriculture*

- The U.S. Small Business Administration (SBA) and the Department administer an 8 (a) business development program for federal contractors. The program has a “rebuttable presumption” that individuals of certain racial groups are socially disadvantaged.
- A small business contractor owned by a white woman argued that the Department’s use of rebuttable presumption” violates the Fifth Amendment guarantee of equal protection.
- Shortly following the SFFA ruling, the court enjoined the U.S. Small Business Administration (SBA) from determining federal contractor eligibility for its 8 (a) program.
- The SBA revised the program to require a social disadvantage narrative.

# Takeaways

- DEI programs that set eligibility requirements based on racial categories (and exclude individuals from certain racial categories) are vulnerable to legal challenges. Eligibility requirements based on gender and sexual orientation could be vulnerable as well.
- DEI programs that form a clear contractual basis are vulnerable to Section 1981 legal challenges, including fellowship and internship programs that are short-term employment contracts.
- In addition to Section 1981 lawsuits, Plaintiffs such as AAER are expected to identify defendants in different sectors, and formulate new lawsuits based on various state and federal statutes.
- Certain race-based grants and scholarships may be deemed as charitable gifts and therefore protected free speech. The 11<sup>th</sup> Circuit's anticipated ruling in Fearless Fund may address the issue.



## Timeline – U.S. Supreme Court, June 2023

*SFFA v. Harvard*

June 29, 2023

*SFFA v. UNC*

June 29, 2023

*303 Creative v.  
Elenis*

June 30, 2023

# Timeline – U.S. Supreme Court, June 2023



## 303 Creative v. Elenis

- Affirmative action cases may pose a threat to DEI-related **programs**; *303 Creative v. Elenis* relates to DEI-related **membership practices**
- Case Summary:
  - Website designer creates wedding websites, but wants to refuse service to same-sex couples, as violative of designer's views
  - Colorado Anti-Discrimination Act prohibits “public accommodations” from denying services to customers based on sexual orientation
  - “Public accommodation” is broad, includes almost every public-facing business



## 303 Creative v. Elenis

- Holding:
  - State has compelling interest in eliminating discrimination, but First Amendment demands that “expressive” activity be protected
  - Website design is an “expressive” activity; designer does not lose First Amendment protection by accepting compensation
- Key precedent: *Boy Scouts of America v. Dale* (2000)
  - Scouts revoke membership of gay scout leader, leader sues under NJ public accommodation law
  - Scouts – homosexual conduct is inconsistent with Scouts’ value system, entitled to First Amendment protection for “expressive association”
  - Holding – requiring Scouts to admit Dale violates Scouts’ First Amendment right of expressive association

## *Boy Scouts of America v. Dale (2000)*

- While this outcome is un-inclusive, it is a powerful precedent for membership organizations
- Orgs may adopt their own requirements for membership
- “Impediments to the exercise of one’s right to choose one’s associates can violate the right of association protected by the First Amendment.”



# Applying *Dale* for Inclusive Governance

- Recent litigation trend: challenging membership orgs' decisions to increase diversity through inclusive governance
- *Westenbroek v. Kappa Kappa Gamma* (D. Wyo., Aug. 25, 2023)
- Kappa chapter at Univ. of Wyoming admitted transgender woman as member; group of sorority members challenged
- Chapter interpreted “woman” requirement in Bylaws to include trans women
- ***“Dale’s takeaway for the Court: the government may not defy the internal decision-making of a private organization, including the criteria governing that entity’s membership . . . Whether excluding gay scoutmasters in Dale or including transgender women in Kappa, this Judge may not invade Kappa’s sacrosanct, associational right to engage in protected speech. KKG’s “official position” of admitting transgender women . . . is speech which this Court may not impinge.”***

## *Westenbroek v. Kappa Kappa Gamma* (10<sup>th</sup> Cir.)

- Westenbroek appealed to U.S. Court of Appeals for the 10th Circuit; court will hear oral arguments on **May 14, 2024**
- **Plaintiffs' Complaint:** Kappa cannot admit trans women without amendments to corporate charter
- **Kappa MTD:** Kappa has a constitutional right to determine who to include and who to exclude from its membership



## Takeaways – Inclusive Governance and Membership



### Identify Expressive Association

*What does it mean to be a member?*



### Know Your Governing Docs

*Who has authority to interpret?*



### Ground DEI in Governance

*Is the goal related to the expressive association?*



## Questions or Comments?



Dorothy Deng

Partner

[ddeng@whitefordlaw.com](mailto:ddeng@whitefordlaw.com)

202.659.6789



Kevin M. Serafino

Associate

[kserafino@TenenbaumLegal.com](mailto:kserafino@TenenbaumLegal.com)

771.240.3831