



Navigating the Legal Landscape Following the SCOTUS Affirmative Action Ruling

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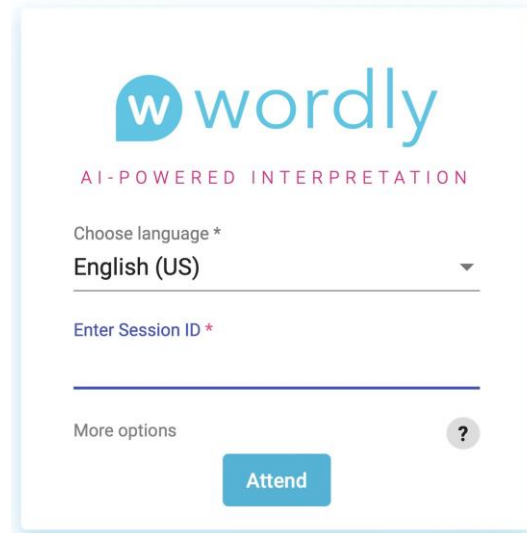
How to Use Live Translation

Step 1



Scan QR Code or Go To:
<https://attend.wordly.ai/join/MGGE-7434>

Step 2

A screenshot of the Wordly app interface. At the top is the 'wordly' logo with a blue speech bubble containing a white 'W'. Below the logo is the text 'AI-POWERED INTERPRETATION'. There are two input fields: 'Choose language *' with 'English (US)' selected, and 'Enter Session ID *'. At the bottom is a blue 'Attend' button and a 'More options' link with a question mark icon.

Choose Language
Click Attend

Step 3



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- This presentation is provided for educational purposes only and should not be construed as legal advice. The information presented at this session 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.

SCOTUS Rulings

- *Students for Fair Admissions v. Harvard College & UNC* : using race as a plus factor in college admissions (affirmative action) is unconstitutional
- *303 Creative LLC v. Elenis*: the First Amendment prohibits the state of Colorado from forcing a website designer to create designs (i.e. expressive speech) that the designer disagrees with.

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
- SFFA: race “plus” admissions programs (affirmative action) violated Title VI of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment

The Strict Scrutiny Test

- The 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:

- employ race in a negative manner (fewer Asians and White students admitted)
- involve racial stereotyping (minority students always express some characteristic minority viewpoint)
- 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."

Post SFFA Development

- American Alliance for Equal Rights filed several lawsuits based on violation of Section 1981 of the Civil Rights Act of 1866.
- “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...**”
- First targeted prominent law firms’ DEI fellowship and internship programs
- Also challenged nonprofit organization’s grant programs

Law firms 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 members in a group historically underrepresented in the legal profession, including students of color, students who identify as LGBTQ+, and students with disabilities.	<ul style="list-style-type: none"> • 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.
Morrison & Forester (filed 8/22/23; settled 10/6/23)	Fellowship; paid summer associate & \$50K stipend. Must be a member in a historically underrepresented group in the legal professional, including racial/ethnic minority groups and members of the LGBTQ+ community.	<ul style="list-style-type: none"> • Demonstrated commitment to promote diversity, including, and accessibility • Ability to bring a diverse perspective to the firm as a result of adaptability, cultural fluency, resilience, and life experiences
Winston Strawn (filed 10/30/23; settled 12/6/23)	Scholars Program; paid summer associate & \$50K scholarship. Applicants must be “members of a disadvantaged and/or historically underrepresented group in the legal profession.”	<ul style="list-style-type: none"> • Demonstrated commitment to promoting the firm’s values of DE & I within the community • 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.

Fearless Fund Management, LLC et al.

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

Fearless Fund lawsuit legal issues

- Plaintiff: 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: 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.

Fearless Fund lawsuit status

On 6/3/24, the 11th Circuit granted a preliminary injunction to halt the Fearless Fund grant.

- Updated official rules still constitute a contract
- First Amendment may protect expression/speech, but does not protect the act of discrimination
- Remedial-program exception: permissible if the race-conscious program address: (1) “manifest racial imbalances” and (2) doesn’t create an absolute bar to the advancement of other [employees]

AAER v. Zamanillo, et al.

- Lawsuit against the directors of the National Museum of the American Latino and Institute of Museum and Library Services (Smithsonian).
- The Museum's undergraduate internship program: "designed to increase hands-on training opportunities for Latina, Latino, and Latinx-identifying undergraduate students."
- Case settled in a month; "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."
- Based on the Fifth Amendment's Equal Protection clause that binds the US government.

Suhr v. Dietrich (Wisconsin Bar Association)

- “Diversity Clerkship Program”; for law students “with backgrounds that have been historically excluded from the legal field...”
- Plaintiff: compelled to pay membership dues to support the program violates his 1st Amendment right to free speech.
- Settled; Revise 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.”

Takeaways

- DEI programs that set eligibility requirements based on racial categories and exclude individuals from certain racial categories are vulnerable to legal challenges.
- Race-conscious grants, contests, and short-term employment programs are vulnerable to Section 1981 challenges
- Plaintiffs are expected to challenge DEI programs in different sectors based on different state & federal statutes.
- 11th Circuit ruling could implicate charitable gifting and scholarship programs

Group Exercise Scenario #1

- WeRead is a membership organization whose members are educators who believe in the power of reading.
- WeRead has a long-standing grant program; recipients will teach summer school in neighborhoods whose residents are predominantly immigrants from Latin America. Applicants must certify they are Latinos; otherwise they are ineligible to receive the \$10K grant. Some participating schools have expressed concerns about the racial criteria.
- As the program director, what are some actionable steps to take?

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

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SFFA v. Harvard

June 29, 2023

SFFA v. UNC

June 29, 2023

303 Creative v. Elenis

June 30, 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**
 - Website designer creates wedding websites, wants to refuse service to same-sex couples, violates designer's views
 - Colorado law - “public accommodations” cannot deny services to customers based on sexual orientation
 - “Public accommodation” 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

303 Creative v. Elenis

- 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

- 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

- Westenbroek appealed to U.S. Court of Appeals for the 10th Circuit; court heard 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



Identify Expressive Association

What does it mean to be a member?



Know Your Governing Docs

Who has authority to interpret?



Ground DEI in Governance

Goal related to expressive association?

Group Exercise Scenario #2

- WeRead is recruiting new Board candidates based on: (i) experience teaching English as second language; (ii) understand public school budgets; (iii) have experience with immigrant mental wellness; and (iv) candidates' identity must reflect the community that WeRead serves.
- WeRead works in neighborhoods with majority immigrants from Latin America. Current Board is mostly men, although women are 75% of educators in U.S.
- WeRead received a balanced distribution of applications from men and women from diverse ethnic backgrounds; The Nominating Committee presents only women of Latin American descent as candidates. Are there legal risks?

Questions or Comments?



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