April 2024

Diversity, Equity & Inclusion in 2024

GIBSON DUNN

Agenda

I. Legal Background

II. Recent Trends & Litigation

III. Fearless Fund Litigation

IV. Next Steps

April 2024

I. Legal Background

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DEI Legal Framework

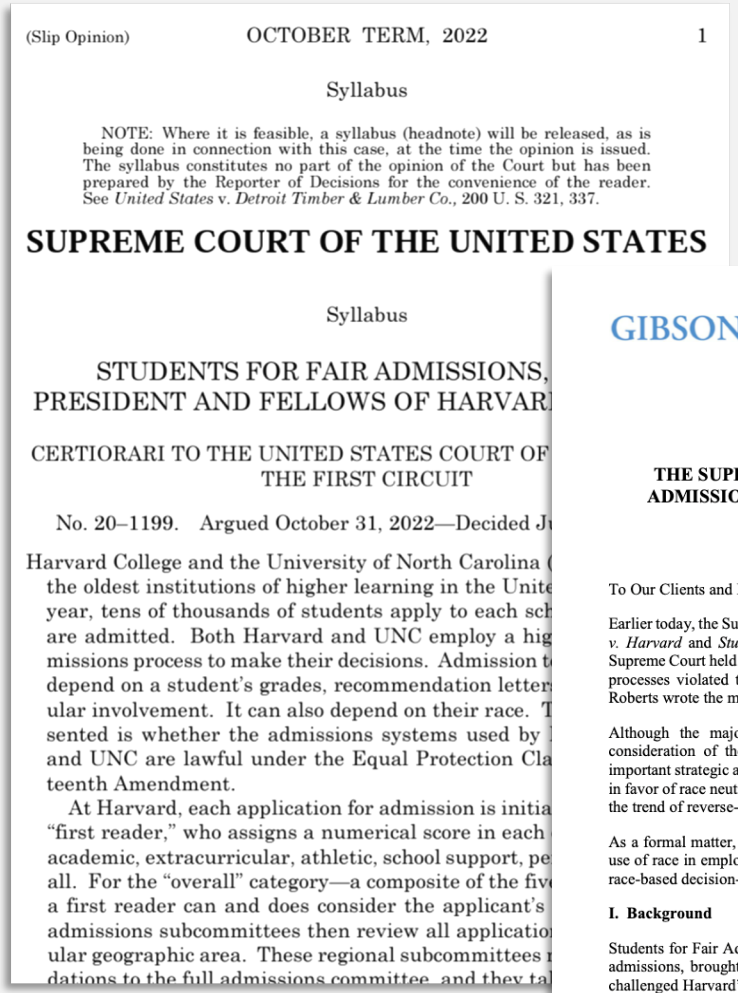
The DEI legal landscape for private employers is shaped by two federal laws:

I. Title VII
II. Section 1981

Most recently, DEI-related litigation has also been influenced by *Students for Fair Admissions v. Harvard*, which the Supreme Court decided in June 2023.

- The ruling speaks directly to college and university admissions, not private sector employers.
- Nonetheless, the decision has inspired litigation and advocacy against employer DEI programming.
- The decision continues to have far-reaching implications.

The June 2023 SCOTUS Affirmative Action Decision (the "SFFA Decision")



(Slip Opinion) OCTOBER TERM, 2022 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

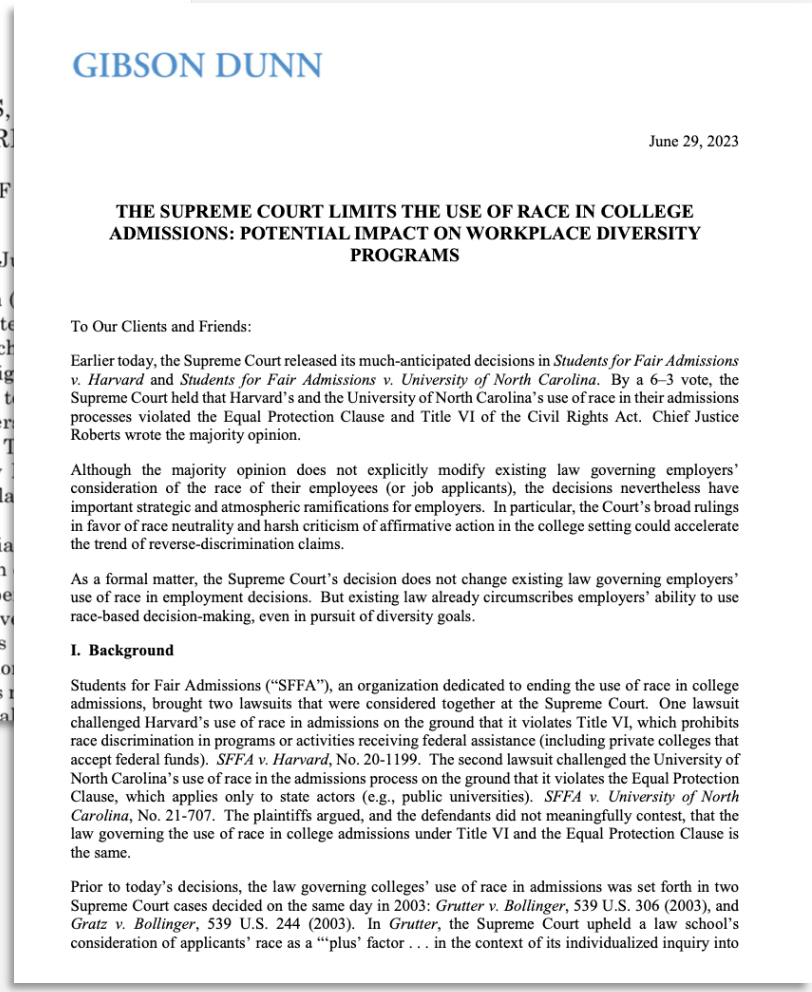
Syllabus

STUDENTS FOR FAIR ADMISSIONS,
PRESIDENT AND FELLOWS OF HARVAR

CERTIORARI TO THE UNITED STATES COURT OF
THE FIRST CIRCUIT

No. 20–1199. Argued October 31, 2022—Decided Ju

Harvard College and the University of North Carolina (
the oldest institutions of higher learning in the Unite
year, tens of thousands of students apply to each sch
are admitted. Both Harvard and UNC employ a hig
missions process to make their decisions. Admission t
depend on a student's grades, recommendation letter
ular involvement. It can also depend on their race. T
sented is whether the admissions systems used by
and UNC are lawful under the Equal Protection Cla
teenth Amendment.
At Harvard, each application for admission is initia
"first reader," who assigns a numerical score in each
academic, extracurricular, athletic, school support, pe
all. For the "overall" category—a composite of the fiv
a first reader can and does consider the applicant's
admissions subcommittees then review all applicatio
ular geographic area. These regional subcommittees
dations to the full admissions committee, and they ta



GIBSON DUNN

June 29, 2023

THE SUPREME COURT LIMITS THE USE OF RACE IN COLLEGE ADMISSIONS: POTENTIAL IMPACT ON WORKPLACE DIVERSITY PROGRAMS

To Our Clients and Friends:

Earlier today, the Supreme Court released its much-anticipated decisions in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*. By a 6–3 vote, the Supreme Court held that Harvard's and the University of North Carolina's use of race in their admissions processes violated the Equal Protection Clause and Title VI of the Civil Rights Act. Chief Justice Roberts wrote the majority opinion.

Although the majority opinion does not explicitly modify existing law governing employers' consideration of the race of their employees (or job applicants), the decisions nevertheless have important strategic and atmospheric ramifications for employers. In particular, the Court's broad rulings in favor of race neutrality and harsh criticism of affirmative action in the college setting could accelerate the trend of reverse-discrimination claims.

As a formal matter, the Supreme Court's decision does not change existing law governing employers' use of race in employment decisions. But existing law already circumscribes employers' ability to use race-based decision-making, even in pursuit of diversity goals.

I. Background

Students for Fair Admissions ("SFFA"), an organization dedicated to ending the use of race in college admissions, brought two lawsuits that were considered together at the Supreme Court. One lawsuit challenged Harvard's use of race in admissions on the ground that it violates Title VI, which prohibits race discrimination in programs or activities receiving federal assistance (including private colleges that accept federal funds). *SFFA v. Harvard*, No. 20-1199. The second lawsuit challenged the University of North Carolina's use of race in the admissions process on the ground that it violates the Equal Protection Clause, which applies only to state actors (e.g., public universities). *SFFA v. University of North Carolina*, No. 21-707. The plaintiffs argued, and the defendants did not meaningfully contest, that the law governing the use of race in college admissions under Title VI and the Equal Protection Clause is the same.

Prior to today's decisions, the law governing colleges' use of race in admissions was set forth in two Supreme Court cases decided on the same day in 2003: *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Grutter*, the Supreme Court upheld a law school's consideration of applicants' race as a "'plus' factor . . . in the context of its individualized inquiry into

Inconsistent Guidance from EEOC on Legality of DEI Programs

On the day of the *SFFA* decision, EEOC chair Charlotte Burrows, a Democrat, issued a press release reassuring employers that their DEI programs were lawful.

The same day, fellow EEOC Commissioner Andrea Lucas, a Republican, wrote an op-ed for Reuters effectively telling employers that although the ruling didn't apply to them, many existing DEI programs were already unlawful.

On November 7, the newest EEOC commissioner, Kalpana Kotagal, voiced support for lawful DEI programming in workplaces.


U.S. Equal Employment Opportunity Commission

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Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs

Press Release
06-29-2023

Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs

The following is a statement from U.S. EEOC Chair Charlotte A. Burrows, in response to today's Supreme Court decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*:

"Today's Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies. That's a problem for our economy because businesses often rely on


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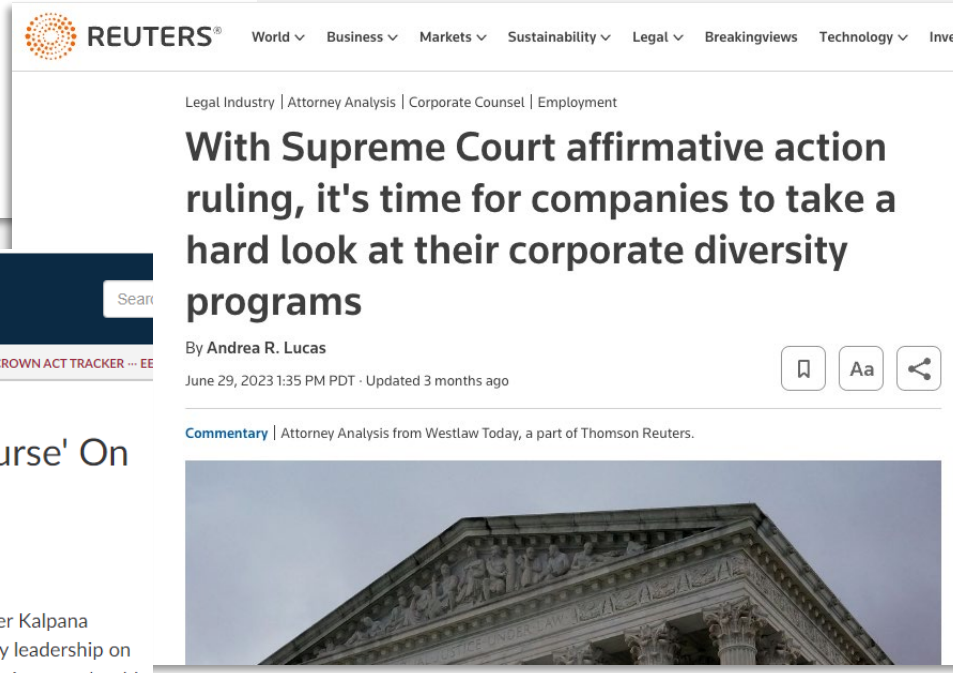
EEOC's Kotagal Says 'Stay The Course' On Diversity Efforts

By Anne Cullen · 2023-11-07 17:02:51 -0500 · Listen to article

Newest U.S. Equal Employment Opportunity Commission member Kalpana Kotagal said Tuesday that employers will "hear more" from agency leadership on diversity, equity, inclusion and accessibility programs, and that businesses should "stay the course" despite recent pushback.

While workplace DEIA efforts have been under fire in the wake of the U.S. Supreme Court's dissolution of affirmative action in college admissions, Kotagal said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Legal Industry | Attorney Analysis | Corporate Counsel | Employment

With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs

By Andrea R. Lucas

June 29, 2023 1:35 PM PDT · Updated 3 months ago

Commentary | Attorney Analysis from Westlaw Today, a part of Thomson Reuters.

April 2024

II. Recent Trends & Litigation

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Overview of Recent Trends

Challenges to Workplace Diversity Initiatives & Programs Include

litigation

1. Employment suits, including reverse discrimination claims
2. Discriminatory contracting suits
3. Investor suits and shareholder derivative suits (and letters to CEOs and Boards)
4. Continued attacks on colleges and universities
5. Government enforcement efforts via AG investigations and enforcement proceedings & letters requesting that the EEOC make use of "Commissioner Charges"
6. Introduction of legislation limiting the scope of DEI programs and policies

1 Employment Suits

Young v. Colorado Dep't of Corrections (10th Cir. 2024)

Duvall v. Novant Health, Inc. (4th Cir. 2024)

Honeyfund.com, Inc. v. DeSantis (11th Cir. 2024)

Muldrow v. City of St. Louis (S. Ct. 2023)

Am. Alliance for Equal Rights Lawsuits Challenging Law Firms' Diversity Fellowship Programs

Bradley, et al. v. Gannett Co. Inc., (E.D. Va. 2023)

Phillips v. Starbucks Corp., (D.N.J. 2019)

2 Discrimination in Contracting Suits

Nuziard v. Minority Business Development Agency (N.D. Tex. 2024)

Do No Harm v. Pfizer (2d Cir. 2024)

Alexandre v. Amazon.com, Inc., (S.D. Cal. 2022)

Landscape Consultants of Texas, Inc. v. City of Houston, (S.D. Tex. 2023):

3

Shareholder & Investor Actions

Nat'l Ctr. For Public Policy Rsch. v. Schultz et al., (E.D. Wash. 2023)

Ardalan v. Wells Fargo, (N.D. Cal. 2022)

4

Continued Attacks on Colleges and Universities

SFFA v. University of Texas at Austin, (W.D. Tex. 2020)

SFFA v. U.S. Naval Academy et al., (D. Md. 2023)

SFFA v. U.S. Military Academy at West Point, (S.D.N.Y. 2023)

Doe v. NYU, (S.D.N.Y. 2023)

Gerber v. Ohio Northern Univ., (Ohio Ct. Common Pleas 2023)

Palsgaard v. Christian, (E.D. Cal. 2023)

Coalition for TJ v. Fairfax County School Board, (4th Cir. 2023)

Chu v. Rosa, (N.D.N.Y. 2024)

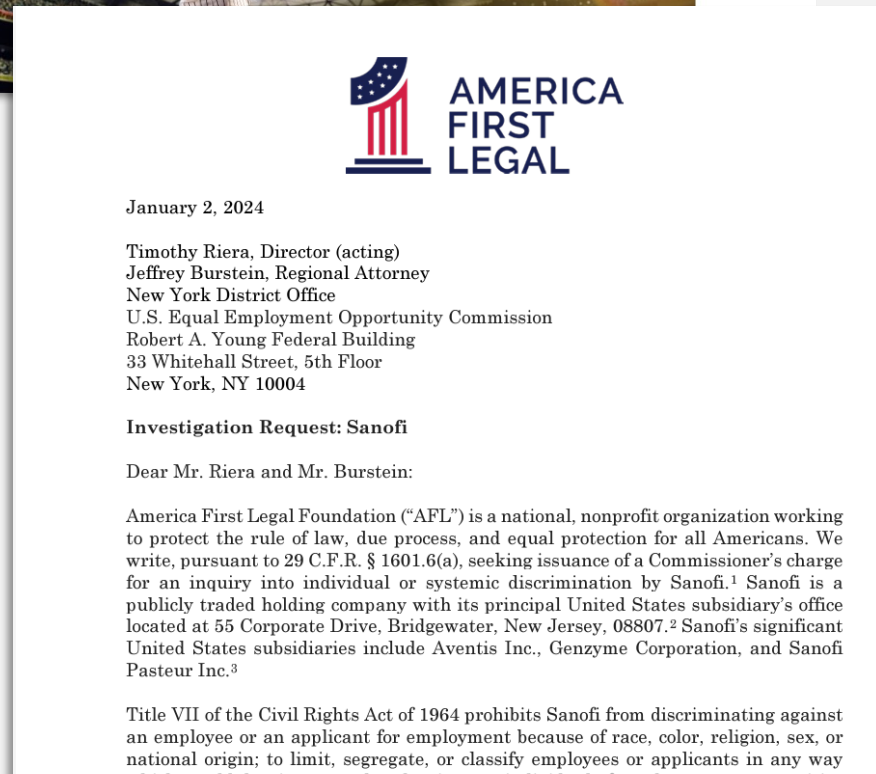
Anderson v. Arizona Board of Regents (Ariz. Super. 2024)

LETTERS TO THE EEOC & OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

America First Legal ("AFL") has submitted letters to the EEOC regarding these 26 companies:

Disney	American Airlines	Corporation
NFL	Major League Baseball	The Hershey
Nike	Salesforce	Company
Sanofi	Activision/Blizzard	Starbucks
Hasbro	The Kellogg Company	Lyft
Mattel	Nordstrom, Inc.	DICK'S Sporting
IBM	Alaska Air	Goods
Macy's	Unilever	Yum! Brands
NASCAR	Mars	Morgan Stanley
Southwest Airlines	Anheuser-Busch	
United Airlines	McDonald's	

Recently, AFL has also started sending letters to the OFCCP.



AMERICA FIRST LEGAL

January 2, 2024

Timothy Riera, Director (acting)
Jeffrey Burstein, Regional Attorney
New York District Office
U.S. Equal Employment Opportunity Commission
Robert A. Young Federal Building
33 Whitehall Street, 5th Floor
New York, NY 10004

Investigation Request: Sanofi

Dear Mr. Riera and Mr. Burstein:

America First Legal Foundation ("AFL") is a national, nonprofit organization working to protect the rule of law, due process, and equal protection for all Americans. We write, pursuant to 29 C.F.R. § 1601.6(a), seeking issuance of a Commissioner's charge for an inquiry into individual or systemic discrimination by Sanofi.[1] Sanofi is a publicly traded holding company with its principal United States subsidiary's office located at 55 Corporate Drive, Bridgewater, New Jersey, 08807.[2] Sanofi's significant United States subsidiaries include Aventis Inc., Genzyme Corporation, and Sanofi Pasteur Inc.[3]

Title VII of the Civil Rights Act of 1964 prohibits Sanofi from discriminating against an employee or an applicant for employment because of race, color, religion, sex, or national origin; to limit, segregate, or classify employees or applicants in any way

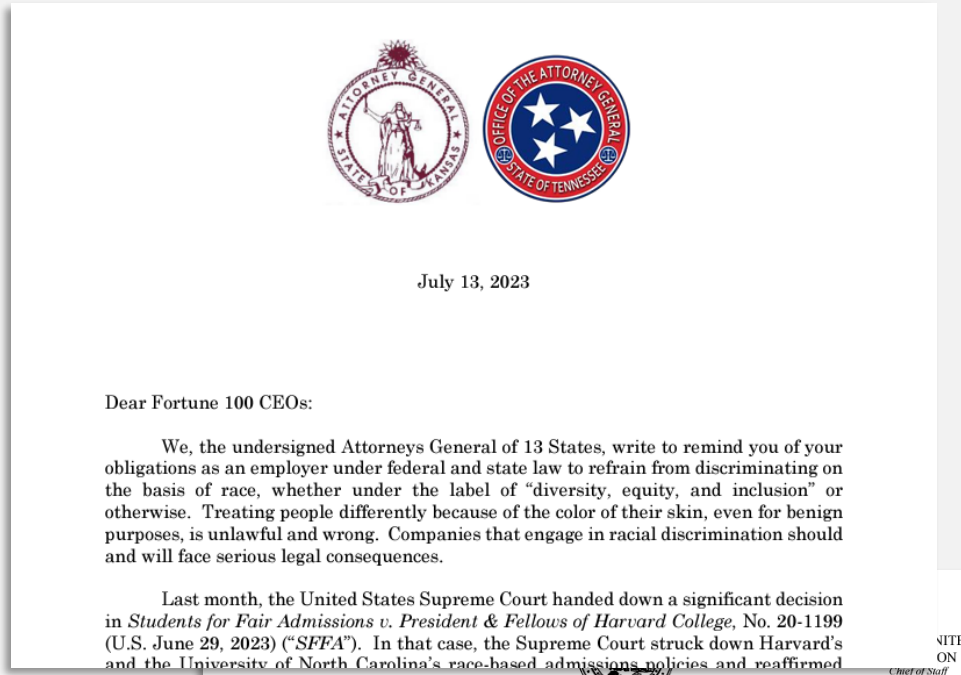
DUELING LETTERS BY ATTORNEYS GENERAL

Republican Attorneys General of **13 states** issued a warning to the CEOs of Fortune 100 companies threatening "serious legal consequences" over corporate race-based employment preferences and diversity policies:

Alabama	Kentucky	South Carolina
Arkansas	Mississippi	Tennessee
Indiana	Missouri	West Virginia
Iowa	Montana	
Kansas	Nebraska	

Democrat Attorneys General of **20 states and Washington D.C.** responded with a letter to major companies asserting that efforts to develop diverse and inclusive work environments are legal.

Arizona	Maine	New York
California	Maryland	Oregon
Colorado	Massachusetts	Rhode Island
Connecticut	Michigan	Vermont
Delaware	Minnesota	Washington
District of Columbia	Nevada	
Hawaii	New Jersey	
Illinois	New Mexico	

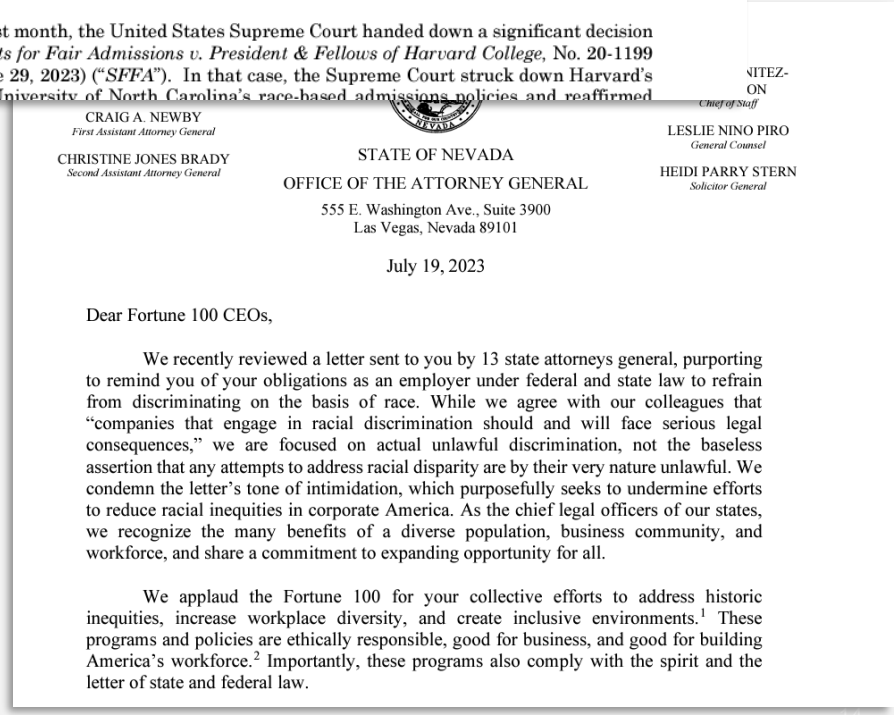


July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

Last month, the United States Supreme Court handed down a significant decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) ("*SFFA*"). In that case, the Supreme Court struck down Harvard's and the University of North Carolina's race-based admissions policies and reaffirmed



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First Assistant Attorney General

CHRISTINE JONES BRADY
Second Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101

LESLIE NINO PIRO
General Counsel

HEIDI PARRY STERN
Solicitor General

July 19, 2023

Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences," we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter's tone of intimidation, which purposefully seeks to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.

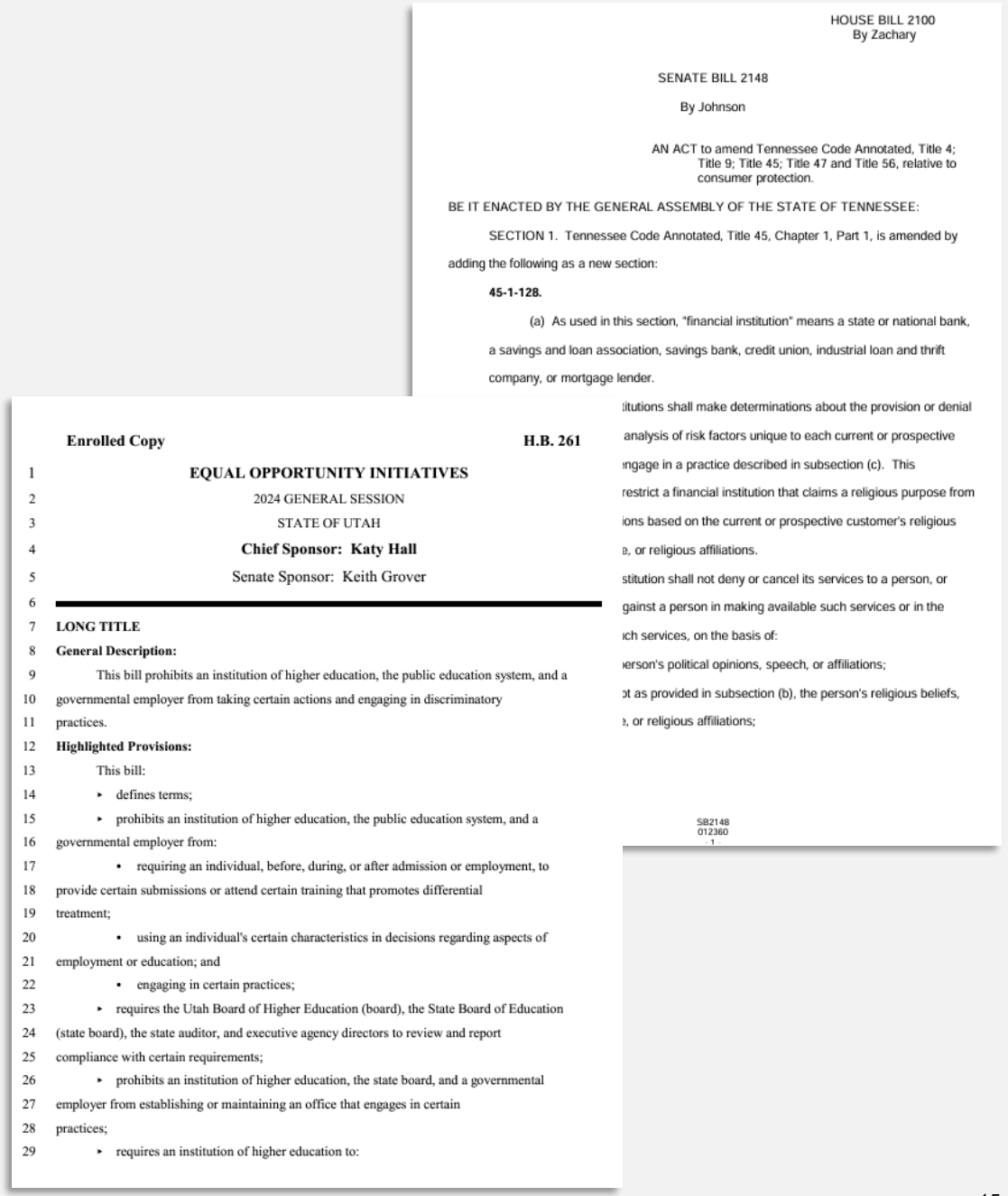
We applaud the Fortune 100 for your collective efforts to address historic inequities, increase workplace diversity, and create inclusive environments.[1] These programs and policies are ethically responsible, good for business, and good for building America's workforce.[2] Importantly, these programs also comply with the spirit and the letter of state and federal law.

STATES HAVE BEGUN TO INTRODUCE AND ADVANCE LEGISLATION THAT WOULD CURB OR PROHIBIT DEI EFFORTS

A sizeable minority of bills would protect DEI initiatives

Most bills relate to:

- ***Higher education***
- ***Social credit scores***
- ***State funding & programming***
- ***Pro-DEI initiatives***
- ***Private Employers***



HOUSE BILL 2100
By Zachary

SENATE BILL 2148

By Johnson

AN ACT to amend Tennessee Code Annotated, Title 4; Title 9; Title 45; Title 47 and Title 56, relative to consumer protection.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 45, Chapter 1, Part 1, is amended by adding the following as a new section:

45-1-128.

(a) As used in this section, "financial institution" means a state or national bank, a savings and loan association, savings bank, credit union, industrial loan and thrift company, or mortgage lender.

...itutions shall make determinations about the provision or denial
...analysis of risk factors unique to each current or prospective
...ngage in a practice described in subsection (c). This
...restrict a financial institution that claims a religious purpose from
...ions based on the current or prospective customer's religious
..., or religious affiliations.
...stitution shall not deny or cancel its services to a person, or
...gainst a person in making available such services or in the
...ich services, on the basis of:
...erson's political opinions, speech, or affiliations;
...ot as provided in subsection (b), the person's religious beliefs,
..., or religious affiliations;

SB2148
012360

Enrolled Copy **H.B. 261**

EQUAL OPPORTUNITY INITIATIVES

2024 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Katy Hall

Senate Sponsor: Keith Grover

LONG TITLE

General Description:

This bill prohibits an institution of higher education, the public education system, and a governmental employer from taking certain actions and engaging in discriminatory practices.

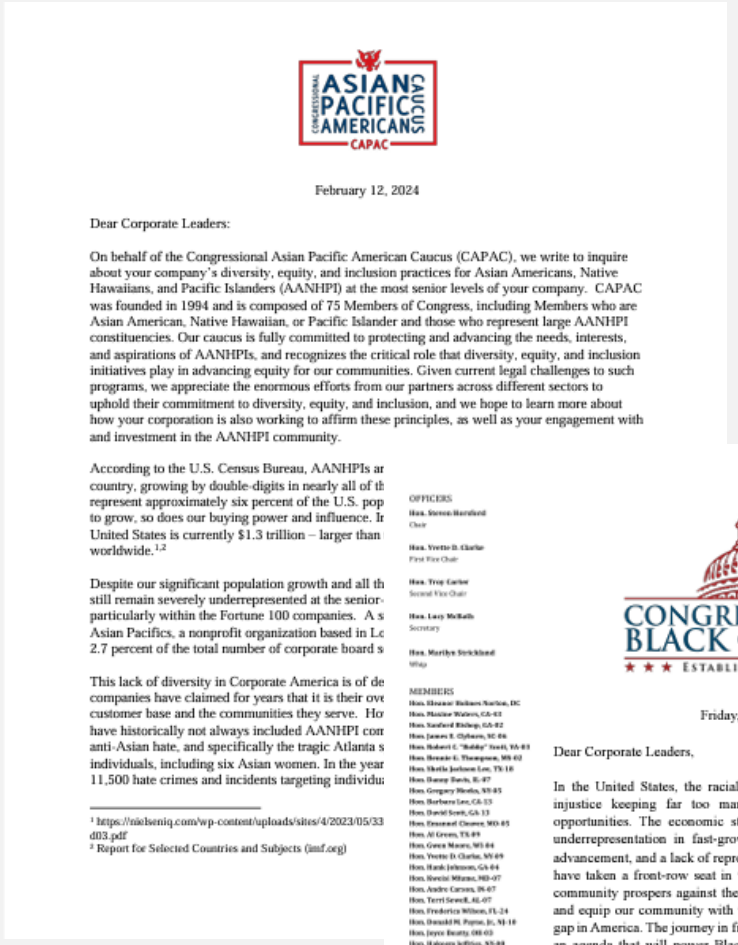
Highlighted Provisions:

This bill:

- defines terms;
- prohibits an institution of higher education, the public education system, and a governmental employer from:
  - requiring an individual, before, during, or after admission or employment, to provide certain submissions or attend certain training that promotes differential treatment;
  - using an individual's certain characteristics in decisions regarding aspects of employment or education; and
  - engaging in certain practices;
- requires the Utah Board of Higher Education (board), the State Board of Education (state board), the state auditor, and executive agency directors to review and report compliance with certain requirements;
- prohibits an institution of higher education, the state board, and a governmental employer from establishing or maintaining an office that engages in certain practices;
- requires an institution of higher education to:

CONGRESSIONAL CAUCUSES SEEK INFORMATION FROM FORTUNE 100 COMPANIES ON DEI EFFORTS

- Congressional Black Caucus
- Congressional Asian Pacific American Caucus
- Congressional Hispanic Caucus



CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS
CAPAC

February 12, 2024

Dear Corporate Leaders:

On behalf of the Congressional Asian Pacific American Caucus (CAPAC), we write to inquire about your company's diversity, equity, and inclusion practices for Asian Americans, Native Hawaiians, and Pacific Islanders (AANHPI) at the most senior levels of your company. CAPAC was founded in 1994 and is composed of 75 Members of Congress, including Members who are Asian American, Native Hawaiian, or Pacific Islander and those who represent large AANHPI constituencies. Our caucus is fully committed to protecting and advancing the needs, interests, and aspirations of AANHPIs, and recognizes the critical role that diversity, equity, and inclusion initiatives play in advancing equity for our communities. Given current legal challenges to such programs, we appreciate the enormous efforts from our partners across different sectors to uphold their commitment to diversity, equity, and inclusion, and we hope to learn more about how your corporation is also working to affirm these principles, as well as your engagement with and investment in the AANHPI community.

According to the U.S. Census Bureau, AANHPIs ar
country, growing by double-digits in nearly all of th
represent approximately six percent of the U.S. pop
to grow, so does our buying power and influence. Ir
United States is currently $1.3 trillion – larger than
worldwide.[1,2]

Despite our significant population growth and all th
still remain severely underrepresented at the senior-
particularly within the Fortune 100 companies. A s
Asian Pacifics, a nonprofit organization based in Lo
2.7 percent of the total number of corporate board s

This lack of diversity in Corporate America is of de
companies have claimed for years that it is their ove
customer base and the communities they serve. Ho
have historically not always included AANHPI com
anti-Asian hate, and specifically the tragic Atlanta s
individuals, including six Asian women. In the year
11,500 hate crimes and incidents targeting individu

[1] https://nielseniq.com/wp-content/uploads/sites/4/2023/05/33
d03.pdf
[2] Report for Selected Countries and Subjects (imf.org)

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CONGRESSIONAL BLACK CAUCUS
★ ★ ★ ESTABLISHED 1971 ★ ★ ★

Friday, December 15, 2023

Dear Corporate Leaders,

In the United States, the racial wealth gap continues to persist as a chasm of injustice keeping far too many Black Americans from essential economic opportunities. The economic state of Black America continues to suffer with underrepresentation in fast-growing high-wage industries, low probabilities of advancement, and a lack of representation in executive roles.[1] For years advocates have taken a front-row seat in this fight, working tirelessly to ensure the Black community prospers against these odds. It is past time to concentrate our efforts and equip our community with the necessary resources to close the racial wealth gap in America. The journey in front of us requires Corporate America to help drive an agenda that will power Black economic mobility. The Congressional Black Caucus is calling on Corporate America to join us in the necessary work to create a more racially inclusive economy. We are asking corporate organizations to reaffirm their commitments to diversity, equity, and inclusion, update us on their racial equity investments, and work with the Congressional Black Caucus to create legislative solutions that will help close the racial wealth gap.

Following the murder of George Floyd on May 25, 2020, we witnessed a nationwide response calling for long-overdue justice and accountability. Millions of Americans flooded the streets in protest and to advocate for an end to the cycles of violence against Black Americans that are perpetuated by systemic racism ingrained deeply in the United States. Leading these unjust systems were many corporations that stood by and not only benefited greatly from overtly racist policies, practices, and laws but also created their own systems of oppression that have continued to widen the racial wealth gap. This includes discriminatory hiring practices, the denial of financial opportunities to build success through corporate banking, and the exploitation of our community to build wealth for others.

[1] *The economic state of Black America: What is and what could be*. McKinsey & Company (2021, June 17) https://www.mckinsey.com/featured-insights/diversity-and-inclusion/the-economic-state-of-black-america-what-is-and-what-could-be

2355 Rayburn House Office Building , Washington, DC 20516
CBC.House.gov

February 2024

III. *Fearless Fund* Litigation

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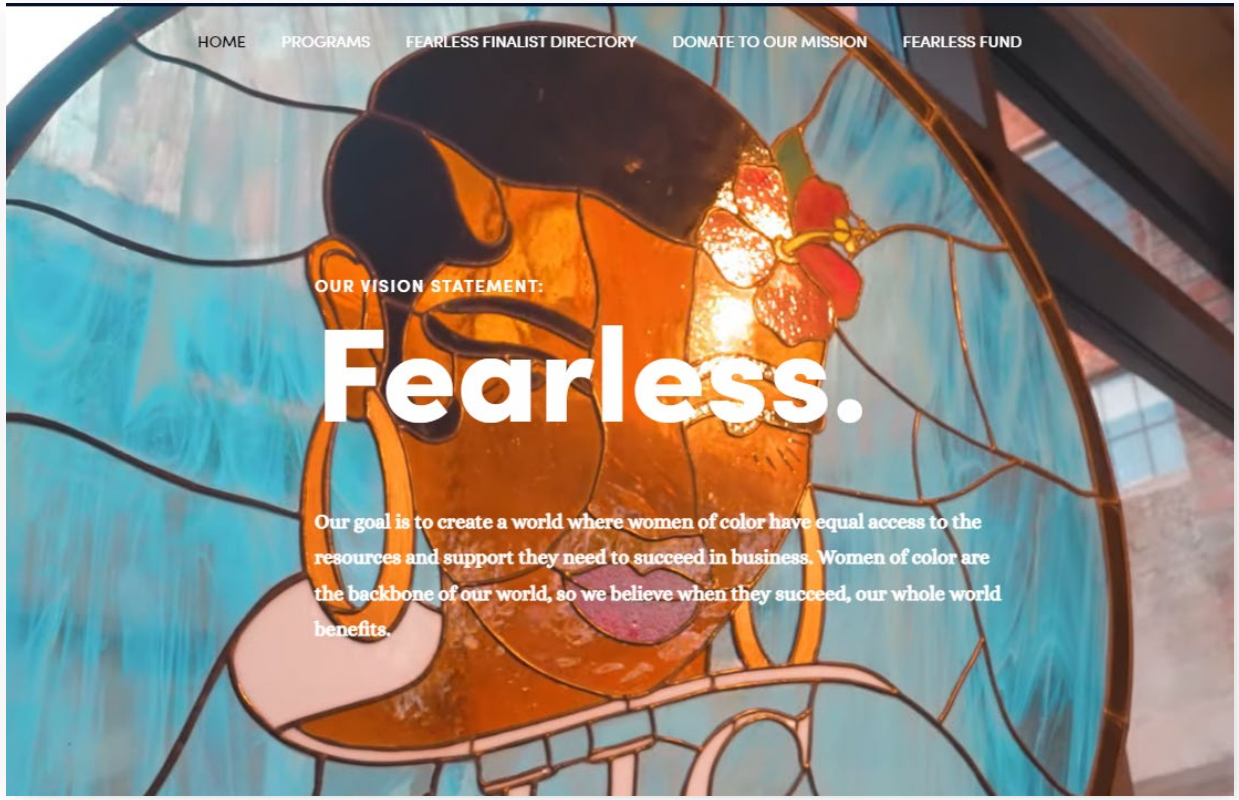
Fearless Fund Litigation

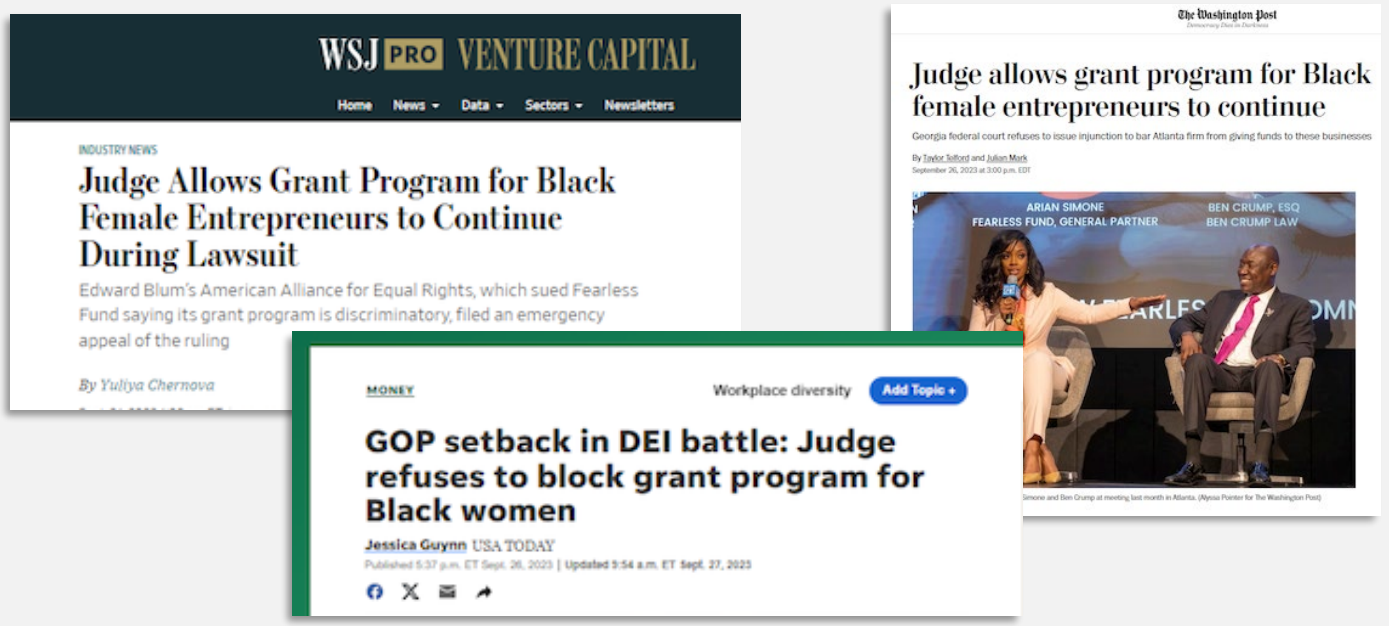


FEARLESS fund

GIBSON DUNN

Fearless Fund Litigation & Oral Argument

Fearless Fund Lawsuit Update:
AAER sought a preliminary injunction to require Fearless Fund to adopt race-neutral requirements for its grant program. The Court denied the motion for preliminary injunction, ruling that the grant program constituted protected speech, and AAER's attempt to change the content of that speech by requiring Fearless Fund to accept applicants on a race-neutral basis would violate the First Amendment. AAER appealed. The Eleventh Circuit granted the parties' motion to expedite oral argument, and Gibson Dunn argued before the Court on January 31.



FEARLESS fund

GIBSON DUNN

Fearless Fund Oral Argument

23-13138	American Alliance for Equal Rights, Appellant v. Fearless Fund Management, LLC, et al	2024-01-31

UNITED STATES COURT OF APPEALS
for the Eleventh Circuit

Honorable William H. Pryor Jr., Chief Judge

Text Size: – A +

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1. Your name, address, and telephone number.
2. The name of the case, the appeal number, and the date on which oral argument was heard.
3. A check for the required fee prescribed by the Judicial Conference of the United States in the Court of Appeals Miscellaneous Fee Schedule, payable to Clerk, U.S. Court of Appeals, Eleventh Circuit, unless exempt from payment.

If you have any further questions, please call the Clerk's Office at 404-335-6100.

Fearless Fund Oral Argument: The Merits

***Judge Rosenbaum*:** "If . . . the entire point of the organization and the donation is to send the message that . . . Black businesswomen are worthy and have been overlooked and left out, then why isn't that speech?"

***Mr. Dickey**:* The law does not consider an organization's "previously expressed views to decide whether the actual conduct is expressive."

Mr. Schwartz:

- "Americans speak with their money; they magnify their message with their money."
- Fearless Fund's grant program is "core expressive activity," and AAER's suit is an "unprecedented effort to use Section 1981 to force a charity to reverse its message or shut down."
- "In the context of small giving, you can't say it's not remedial just because it's not solving everyone's problems . The answer can't possibly be give to everyone or no one."

Fearless Fund Oral Argument: Standing

Mylan Denerstein of Gibson Dunn argued the issue of standing on behalf of Fearless Fund.

Ms. Denerstein:

- AAER "fail[s] to state that they've applied for grants or need money or mentorship. They don't show the viability of their business. Should the court grant a preliminary injunction when we don't even know who the businesses are?"
- Citing to "owners A, B, and C is not sufficient to show there is a member of the organization who could bring a claim on their own."

IV. Next Steps

February 2024

GIBSON DUNN

Next Steps

- DEI Audits/Risk Assessments
  - Employment
  - Supplier Diversity
  - Education
  - Community Involvement
  - Investments
- Risk Spectrum
  - Eligibility
  - Benefit
  - Goals
- Practical Options

ABA

&

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