UNDERSTANDING THE TRUMP ADMINISTRATION EXECUTIVE ORDERS REGARDING DEI AND THE EEOC INITIATIVES ON RELIGIOUS DISCRIMINATION

March 19, 2025

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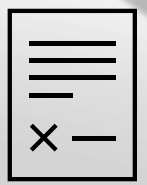
McDermott Will & Emery

Arts Midwest

Overview



The Executive Orders On DEI and Gender Identity

What Is A Legal Versus Illegal Diversity Program

The Tension Between Title VII Protections For LGBTQ

Initial Rescissions Of Harmful Orders and Actions

Executive Order

January 2025

1. Restoring Freedom of Speech and Ending Federal Censorship
2. Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
3. Ending Illegal Discrimination And Restoring Merit-Based Opportunity
4. Reforming The Federal Hiring Process And Restoring Merit To Government Service
5. Ending Radical And Wasteful Government DEI Programs And Preferencing

DEFENDING WOMEN FROM GENDER IDEOLOGY EXTREMISM AND RESTORING BIOLOGICAL TRUTH TO THE FEDERAL GOVERNMENT

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 7301 of title 5, United States Code, it is hereby ordered: hereby ordered:

Section 1. Purpose.

Across the country, ideologues who deny the biological reality of sex have increasingly used legal and other socially coercive means to permit men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women's domestic abuse shelters to women's workplace showers. This is wrong. Efforts to eradicate the biological reality of sex fundamentally attack women by depriving them of their dignity, safety, and wellbeing. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system. Basing Federal policy on truth is critical to scientific inquiry, public safety, morale, and trust in government itself. This unhealthy road is paved by an ongoing and purposeful attack against the ordinary and longstanding use and understanding of biological and scientific terms, replacing the immutable biological reality of sex with an internal, fluid, and subjective sense of self unmoored from biological facts. Invalidating the true and biological category of "woman" improperly transforms laws and policies designed to protect sex-based opportunities into laws and policies that undermine them, replacing longstanding, cherished legal rights and values with an identity-based, inchoate social concept.

Accordingly, my Administration will defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male.

Sec. 2. Policy and Definitions.

It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality, and the following definitions shall govern all Executive interpretation of and application of Federal law and administration policy:

(a) "Sex" shall refer to an individual's immutable biological classification as either male or female. "Sex" is not a synonym for and does not include the concept of "gender identity."

(b) "Women" or "woman" and "girls" or "girl" shall mean adult and juvenile human females, respectively.

(c) "Men" or "man" and "boys" or "boy" shall mean adult and juvenile human males, respectively.

(d) "Female" means a person belonging, at conception, to the sex that produces the large reproductive cell.

(e) "Male" means a person belonging, at conception, to the sex that produces the small reproductive cell.

(f) "Gender ideology" replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender

ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.

(g) "Gender identity" reflects a fully internal and subjective sense of self, dis
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(d) The Secretaries of State and Homeland Security, and the Director of the Office of Personnel Management, shall implement changes to require that government-issued identification documents, including passports, visas, and Global Entry cards, accurately reflect the holder's sex, as defined under section 2 of this order; and the Director of the Office of Personnel Management shall ensure that applicable personnel records accurately report Federal employees' sex, as defined by Section 2 of this order.

- The applicant understands that federal funds shall not be used to promote gender ideology, pursuant to Executive Order No. 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government. *PLEASE NOTE: Pending the outcome of litigation in the United States District Court of Rhode Island, Case No.1:25-cv-00079-WES-PAS, the NEA is not currently requiring any grantee to make any "certification" or other representation pursuant to Executive Order 14168.*

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(g) Federal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology

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By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. Longstanding Federal civil-rights laws protect individual Americans from discrimination based on race, color, religion, sex, or national origin. These civil-rights protections serve as a bedrock supporting equality of opportunity for all Americans. As President, I have a solemn duty to ensure that these laws are enforced for the benefit of all Americans.

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witnessed first-hand the disastrous consequences of illegal, pernicious discrimination that has prioritized how people were born instead of what they were capable of doing.

The Federal Government is charged with enforcing our civil-rights laws. The purpose of this order is to ensure that it does so by ending illegal preferences and discrimination.

Sec. 2. Policy.

It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences,

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to enhance speed and
efficiency, reduce costs, and require Federal contractors and subcontractors to comply with our civil-rights laws. Accordingly:

(i) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), is hereby revoked. For 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.

Sec. 3. Terminating Illegal Discrimination in the Federal Government. (a) The following executive actions are hereby revoked:

(i) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity), is hereby revoked. For 90 days from the date of this order, Federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025.

(ii) The Office of Federal Contract Compliance Programs within the Department of Labor shall immediately cease:

(A) Promoting "diversity";
(B) Holding Federal contractors and subcontractors responsible for taking "affirmative action"; and
(C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, reli

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(iii) Terminate all "diversity," "equity," "equitable decision-making," "equitable deployment of financial and technical assistance," "advancing equity," and like mandates, requirements, programs, or activities, as appropriate.

Sec. 4. Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences.

(a) The heads of all agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order.

(b) To further inform and advise me so that my Administration may formulate
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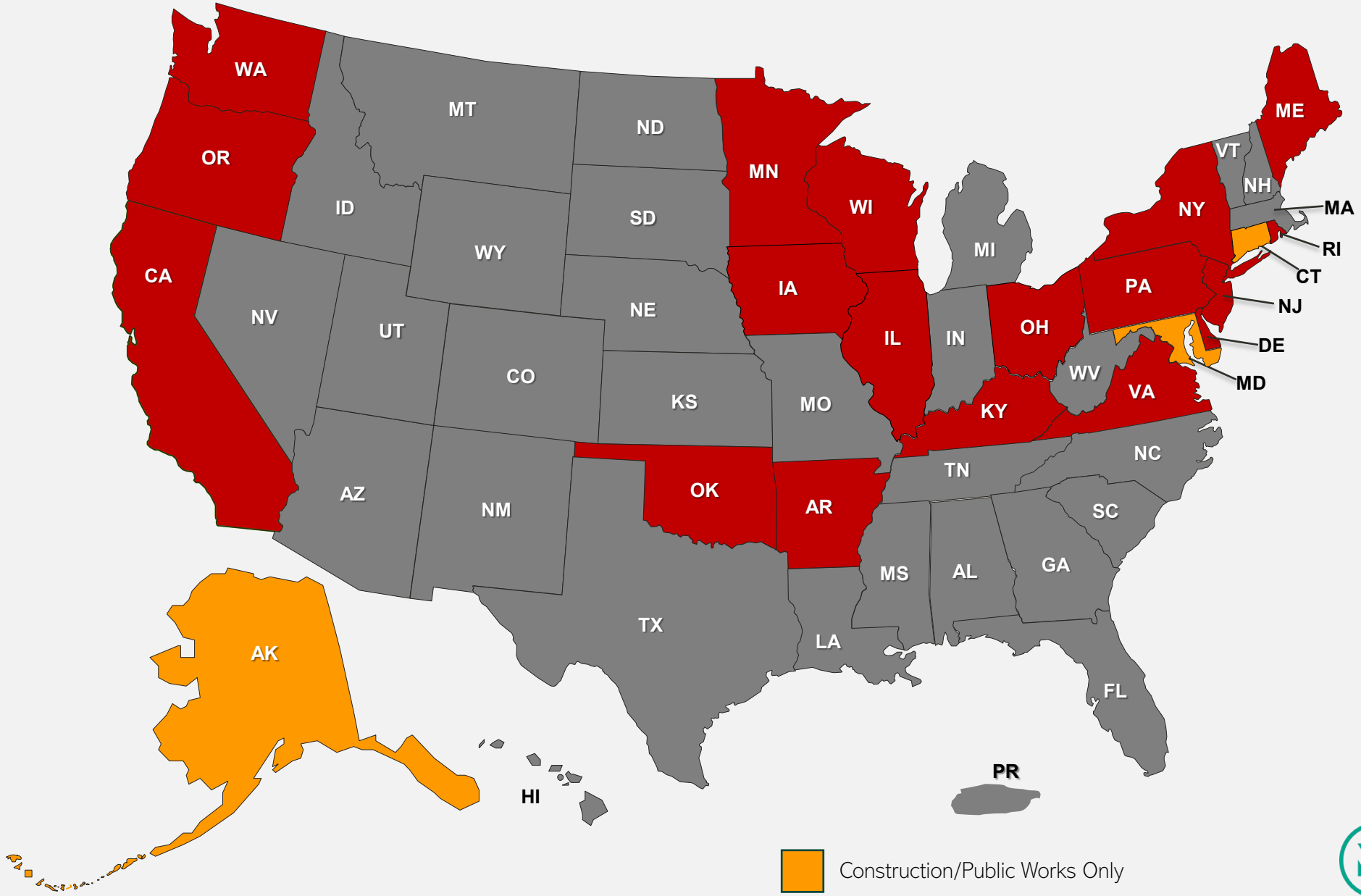
(C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.

Ends OFCCP Reporting & Enforcement

States Requiring Contractors To Maintain An Affirmative Action Plan



McDermott Will & Emery

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(i) Review and revise, as appropriate, all Government-wide processes, directives, and guidance;
(ii) Excise references to DEI and DEIA principles, under whatever name they may appear, from Federal acquisition, contracting, grants, and financial assistance procedures to streamline those procedures, improve speed and efficiency, lower costs, and comply with civil-rights laws; and
(iii) Terminate all "diversity," "equity," "equitable decision-making," "equitable deployment of financial and technical assistance," "advancing equity," and like mandates, requirements, programs, or activities, as appropriate.

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(iii) The head of each agency shall include in every contract or grant award:

(A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is ***material*** to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and

(B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.

(iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws;

(v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and

(vi) Potential regulatory action and sub-regulatory guidance.

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(a) The heads of all agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order.

(b) To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, shall submit a report to the Assistant to the President for Domestic Policy containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI. The report shall contain a proposed strategic enforcement plan identifying:

(ii) The Office of Federal Contract Compliance Programs within the Department of Labor shall immediately cease:

Sec. 4. Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences.

(a) The heads of all agencies, with the assistance of the Attorney General, shall take all

(i) Key sectors of concern within each agency's jurisdiction;

(ii) The most egregious and discriminatory DEI practitioners in each sector of concern;

(iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated "DEI" or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, **each agency shall identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more**, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars;

(iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws;

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(iii) Terminate all "diversity," "equity," "equitable decision-making," "equitable deployment of financial and technical assistance," "advancing equity," and like mandates, requirements, programs, or activities, as appropriate.

(v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and

(vi) Potential regulatory action and sub-regulatory guidance.

Andrea Lucas appointed Chair of the EEOC Commission

"I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. In recent years, this agency has remained silent in the face of multiple forms of widespread, overt discrimination. Consistent with the President's Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."

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(v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and

(vi) Potential regulatory action and sub-regulatory guidance.

Sec. 5. Other Actions.

Within 120 days of this order, the Attorney General and the Secretary of Education shall jointly issue guidance to all State and local educational agencies that receive Federal funds, as well as all institutions of higher education that receive Federal grants or participate in the Federal student loan assistance program under Title IV of the Higher Education Act, 20 U.S.C. 1070 et seq., regarding the measures and practices required to comply with *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

Sec. 6. Severability.

If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

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(b) This order does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech.

(c) This order does not prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.

Sec. 8. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to and does not create any right or benefit,

(b) This order does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech.

Initial Rescissions Of Harmful Orders and Actions

Executive Order

January 2025

3 Ending Illegal Discrimination And Restoring Merit-Based Opportunity

Section 3(b)(iv) requires the heads of each agency to include in every contract or grant award:

"(A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and

(B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

The False Claims Act

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- The FCA permits the Federal Government, or Relaters on the Government's behalf (qui tam actions), to bring civil claims against any contractor who:

    1. knowingly presents, or causes to be presented, a materially false or fraudulent claim for payment or approval;
    2. knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; or
    3. knowingly making false records to avoid or decrease an obligation to pay the Government ("reverse false claim")

- A long statute of limitations:

    1. the longer of 6 years after the violation or 3 years after the material facts are or should reasonably be known.
    2. 10-year statute of repose.

The False Claims Act

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FALSITY:

- Express false certification (affirmative misstatement):
  - Imposes liability if a company or individual expressly certifies compliance with material contract term or regulation in connection with a bill, when in fact the contractor was not in compliance.

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- Implied false certification (failure to disclose):
  - imposes liability *at a minimum* when a defendant:
    - submits a claim that makes specific representations about goods or services provided,
    - but fails to disclose defendant's noncompliance with a statutory, regulatory, or contractual requirement, such that the omission renders the representations misleading half-truths.

US ex rel. Escobar v. Universal Health (2016)

The False Claims Act

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- Unqualified Employees:
  - Computer Sciences Corp. and subcontractor Netcracker Tech. Corp. contracted with Defense Information Systems Agency to implement software to manage DOD's telecommunications network.
  - A former Netcracker employee brought a *qui tam* alleging Netcracker used employees who lacked security clearances when it knew the contract required them to have clearances, and that prime contractor CSC recklessly submitted claims for those employees' work.
  - On November 2, 2015, Netcracker settled for $11.4 million, and CSC settled for $1.35 million.

U.S. ex rel. Kingsley v. CSC & Netcracker (D.D.C. 2015)

Initial Rescissions Of Harmful Orders and Actions

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January 2025

3 Ending Illegal Discrimination And Restoring Merit-Based Opportunity

Sec. 4. Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences.

(a) The heads of all agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order.

(b) To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, shall submit a report to the Assistant to the President for Domestic Policy containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI. The report shall contain a proposed strategic enforcement plan identifying:

Initial Rescissions Of Harmful Orders and Actions

Executive Order

January 2025

3 Ending Illegal Discrimination And Restoring Merit-Based Opportunity

Office of the Attorney General
Washington, D. C. 20530

February 5, 2025

MEMORANDUM FOR ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

SUBJECT: ENDING ILLEGAL DEI AND DEIA DISCRIMINATION AND PREFERENCES

The Department of Justice is committed to enforcing all federal civil rights laws and ensuring equal protection under the law. As the United States Supreme Court recently stated, "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023). On January 21, 2025, President Trump issued Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633 (Jan. 21, 2025), making clear that policies relating to "diversity, equity, and inclusion" ("DEI") and "diversity, equity, inclusion, and accessibility" ("DEIA") "violate the text and spirit of our longstanding Federal civil-rights laws" and "undermine our national unity." *Id.* at 8633.

To fulfill the Nation's promise of equality for all Americans, the Department of Justice's Civil Rights Division will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds.[1]

I. Ending Illegal DEI And DEIA Discrimination and Preferences

By March 1, 2025, consistent with Executive Order 14173, the Civil Rights Division and the Office of Legal Policy shall jointly submit a report to the Associate Attorney General containing recommendations for enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI and DEIA. The report should address:

- Key sectors of concern within the Department's jurisdiction;

[1] This memorandum is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex. It does not prohibit educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.

- The most egregious and discriminatory DEI and DEIA practitioners in each sector of concern;
- A plan including specific steps or measures to deter the use of DEI and DEIA programs or principles that constitute illegal discrimination or preferences, including proposals for criminal investigations and for up to nine potential civil compliance investigations of entities that meet the criteria outlined in section 4(b)(iii) of Executive Order 14173;
- Additional potential litigation activities (including interventions in pending cases, statement of interest submissions, and amicus brief submissions), regulatory actions, and sub-regulatory guidance; and
- Other strategies to end illegal DEI and DEIA discrimination and preferences and to comply with all federal civil-rights laws.

II. Guidance to Institutions Receiving Federal Funds

Educational agencies, colleges, and universities that receive federal funds may not "treat some students worse than others in part because of race." *Students for Fair Admissions*, 600 U.S. at 304 (Gorsuch, J., concurring). Consistent with the January 21, 2025, Executive Order, the Department of Justice will work with the Department of Education to issue directions, and the Civil Rights Division will pursue actions, regarding the measures and practices required to comply with *Students for Fair Admissions*.

Initial Rescissions Of Harmful Orders and Actions

Executive Order

January 2025

3 Ending Illegal Discrimination And Restoring Merit-Based Opportunity

Office of the Attorney General
Washington, D. C. 20530

February 5, 2025

MEMORANDUM FOR ALL DEPARTMENT EMPLOYEES

Memorandum for all Department Employees
Subject: Ending Illegal DEI And DEIA Discrimination and Preferences

Page 2

- The most egregious and discriminatory DEI and DEIA practitioners in each sector of concern;
- A plan including specific steps or measures to deter the use of DEI and DEIA programs or principles that constitute illegal discrimination or preferences, including proposals for criminal investigations and for up to nine potential civil compliance investigations of entities that meet the criteria outlined in section 4(b)(iii) of Executive Order 14173;
- Additional potential litigation activities (including interventions in pending cases, statement of interest submissions, and amicus brief submissions), regulatory actions, and sub-regulatory guidance; and
- Other strategies to end illegal DEI and DEIA discrimination and preferences and to comply with all federal civil-rights laws.

awareness without engaging in exclusion or discrimination.

The False Claims Act

1

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18 U.S. Code § 287 - False, fictitious or fraudulent claims

- Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

Initial Rescissions Of Harmful Orders and Actions

Executive Order

January 2025

3 Ending Illegal Discrimination And Restoring Merit-Based Opportunity

Office of the Attorney General
Washington, D. C. 20530

February 5, 2025

MEMORANDUM FOR ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

SUBJECT: ENDING ILLEGAL DEI AND DEIA DISCRIMINATION AND PREFERENCES

The Department of Justice is committed to enforcing all federal civil rights laws and ensuring equal protection under the law. As the United States Supreme Court recently stated,

measures to encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI and DEIA. The report should address:

- Key sectors of concern within the Department's jurisdiction;

[1] This memorandum is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex. It does not prohibit educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.

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- The most egregious and discriminatory DEI and DEIA practitioners in each sector of concern;
- A plan including specific steps or measures to deter the use of DEI and DEIA programs or principles that constitute illegal discrimination or preferences, including proposals for criminal investigations and for up to nine potential civil compliance investigations of entities that meet the criteria outlined in section 4(b)(iii) of Executive Order 14173;
- Additional potential litigation activities (including interventions in pending cases, statement of interest submissions, and amicus brief submissions), regulatory actions, and sub-regulatory guidance; and
- Other strategies to end illegal DEI and DEIA discrimination and preferences and to comply with all federal civil-rights laws.

II. Guidance to Institutions Receiving Federal Funds

Contracts, Grants & Medicare/Medicaid

Contracts

Contracts are for the "direct benefit or use" of the Government—*i.e.*, not for a "public purpose of support or stimulation."

Contracts, Grants & Medicare/Medicaid

Contracts

Contract types:

- ✓ Firm-Fixed Price
- ✓ Cost Reimbursement
- ✓ Time & Materials
- ✓ Labor-Hour
- ✓ Indefinite-Delivery, Indefinite Quantity (IDIQ)
- ✓ Commercial item

Do The Executive Orders Amend Your Contracts

Contracts

The Terms of these Contracts Are Governed By the Federal Acquisition Regulation, and the Contract Should Reference the Regulation

FAR Includes Potential Contract Terms That May/Must Be Included In Government Contracts. Which Terms Apply Depends On The Type Of Contract, E.G., Firm-fixed Price Vs. Time And Materials

Terms Not Set Forth In FAR Can Only Be Only Be Added By Formal Rule Making—not Executive Order. That Process Should Take At Least 30 Days

Contracts, Grants & Medicare/Medicaid

Contracts

The Terms of these Contracts Are Governed By the Federal Acquisition Regulation, and the Contract Should Reference the Regulation

Grants

Grants Are Awarded To Carry Out A “Public Purpose” With Little Or No Involvement By The Government

Contracts, Grants & Medicare/Medicaid

Contracts

The Terms of these Contracts Are Governed By the Federal Acquisition Regulation, and the Contract Should Reference the Regulation

Grants

Cooperative Agreements Anticipate “Substantial Involvement” By The Government During Performance.

Contracts, Grants & Medicare/Medicaid

Contracts

The Terms of these Contracts Are Governed By the Federal Acquisition Regulation, and the Contract Should Reference the Regulation

Grants

Grants and Cooperative Agreements Are Governed By 2 C.F.R. 200 Et Seq. (“Super Circular”).

Contracts, Grants & Medicare/Medicaid

Contracts

The Terms of these Contracts Are Governed By the Federal Acquisition Regulation, and the Contract Should Reference the Regulation

Grants

Grants and Cooperative Agreements Are Governed By 2 C.F.R. 200 Et Seq. ("Super Circular").

Medicare/Medicaid

Medicare Parts A & B Medicaid, TRICARE Provider Agreements Are Generally Not Considered Grants Or Contracts.

Other Transaction Agreements (OTA)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NATIONAL ASSOCIATION OF DIVERSITY OFFICERS IN HIGHER EDUCATION, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants

PRELIMIN

Pursuant to Federal Rule of Civil

Motion for a Temporary Restraining Or

Plaintiffs National Association of Divers

Association of University Professors, Re

Mayor and City Council of Baltimore, M

Defendants' memorandum in oppositio

brief (ECF No. 39), and the exhibits to t

the Motion on February 19, 2025, and fo

Memorandum Opinion, it is hereby ORI

1. The Motion is GRANTED

2. This Order addresses the f

Ending Radical and Wasteful Governm

Order of January 20, 2025, 90 Fed. Reg.

Exec. Order 14173, *Ending Illegal Discr*

Enjoined

3. Defendants other than the President, and other persons who are in active concert or participation with Defendants (the "Enjoined Parties"), shall not:

a. pause, freeze, impede, block, cancel, or terminate any awards, contracts or obligations ("Current Obligations"), or change the terms of any Current Obligation, on the basis of the Termination Provision;

b. require any grantee or contractor to make any "certification" or other representation pursuant to the Certification Provision; or

c. bring any False Claims Act enforcement action, or other enforcement action, pursuant to the Enforcement Threat Provision, including but not limited to any False Claims Act enforcement action premised on any certification made pursuant to the Certification Provision.

Date: February 21, 2025

/s/
Adam B. Abelson
United States District Judge

O[illegible] Executive Order of January 21, 2025, 90 Fed. Reg. 8633 (Jan. 31, 2025) ("J21 Order").

J20 Order § 2(b)(i) (in part) (the "**Termination Provision**"):

commission head, in
al, the Director of OMB,
ropriate, shall take the
this order:

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ovision"):

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licable Federal anti-

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that my Administration
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days of this order, in
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FILED: March 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-1189

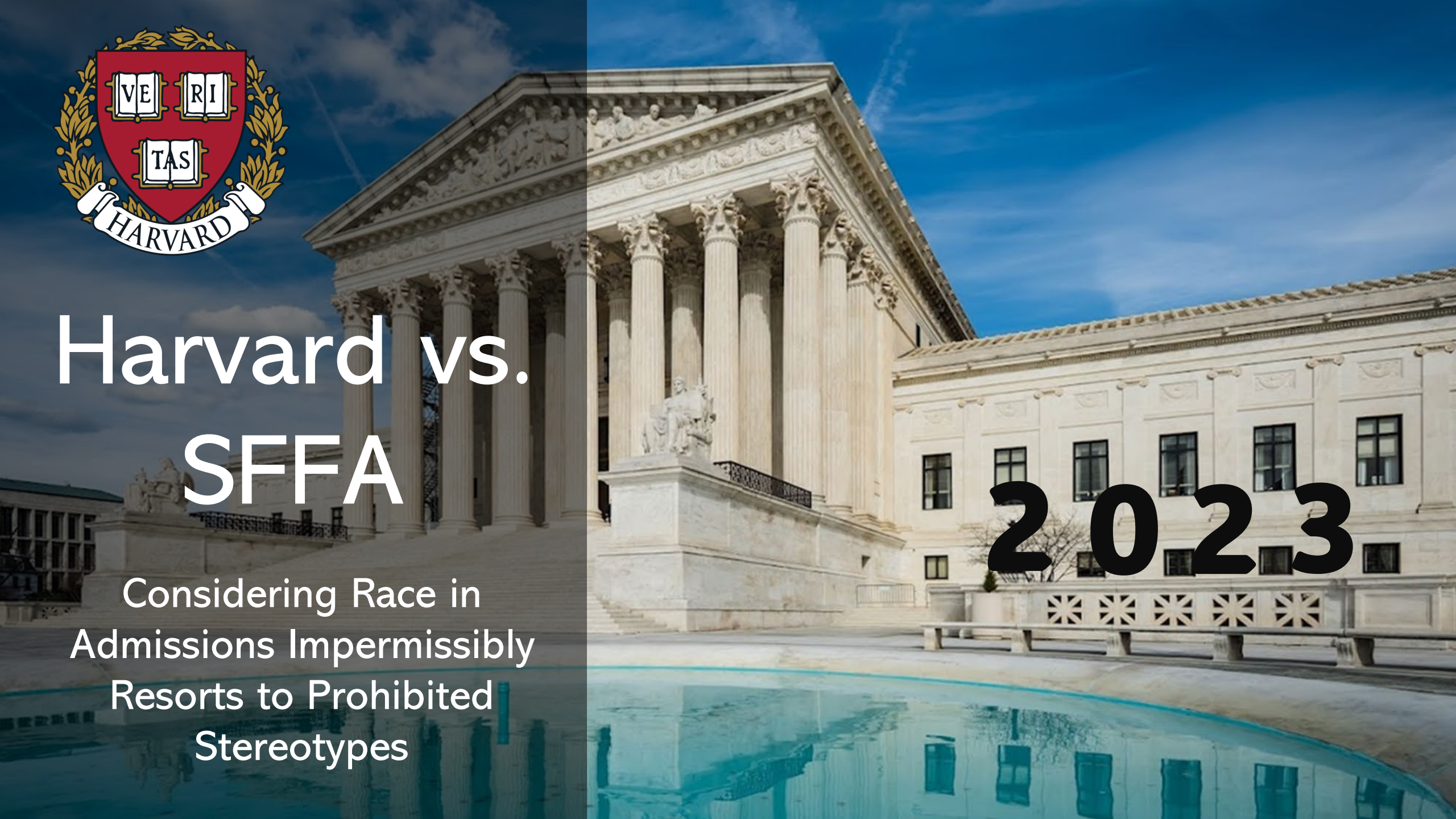
Pending before the court is the government's Motion for a Stay Pending Appeal. The case concerns two Executive Orders that instruct executive agencies to end "diversity, equity, and inclusion" (or "DEI") programs within federal grant and contract processes. *See* Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025); Exec. Order No. 14,173, tiffs—the Mayor and City Council of ns—moved to preliminarily enjoin the ing the constitutionality of three of the dments.

likely unconstitutional and issued a

As the government explains, the challenged Executive Orders, on their face, are of distinctly limited scope. The Executive Orders do not purport to establish the illegality of all efforts to advance diversity, equity o
Instead, the so-called "Certification" an
conduct that violates existing federal ant
the termination of grants based on a gra
funded activities. Rather, the "Termina
subject to applicable legal limits, based
itself. On this understanding, the gover
challenged provisions do not on their fa

In addition, as Judge Harris rightly points out, this case does not challenge any particular agency action implementing the Executive Orders. Yet, in finding the Orders themselves unconstitutional, the district court relied on evidence of how various agencies are implementing, or may implement, the Executive Orders. That highlights serious questions about the ripeness of this lawsuit and plaintiffs' standing to bring it as an initial matter. Ripeness and standing doctrines "prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013), by keeping courts within their "province"—deciding "the rights of individuals" in actual controversies, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Ignoring

What Is A Legal vs Illegal Diversity Program?



Harvard vs. SFFA

2023

Considering Race in Admissions Impermissibly Resorts to Prohibited Stereotypes

Grutter / Gratz v. Bolinger

2003

Considering Race in Admissions May Be Permissible

Grutter v. Bollinger:

Law school

Permissibly used race as a "plus factor" because it did not "insulat[e] the individual from comparison" and was done on an individual basis.

Grutter v. Bollinger:

Law school

Permissibly used race as a "plus factor" because it did not "insulat[e] the individual from comparison" and was done on an individual basis.

Gratz v. Bollinger:

College

Impermissibly used a scoring system of 1-150 for admissions and impermissibly credited certain diverse candidates with 20 additional points

Grutter / Gratz v. Bolinger

2003

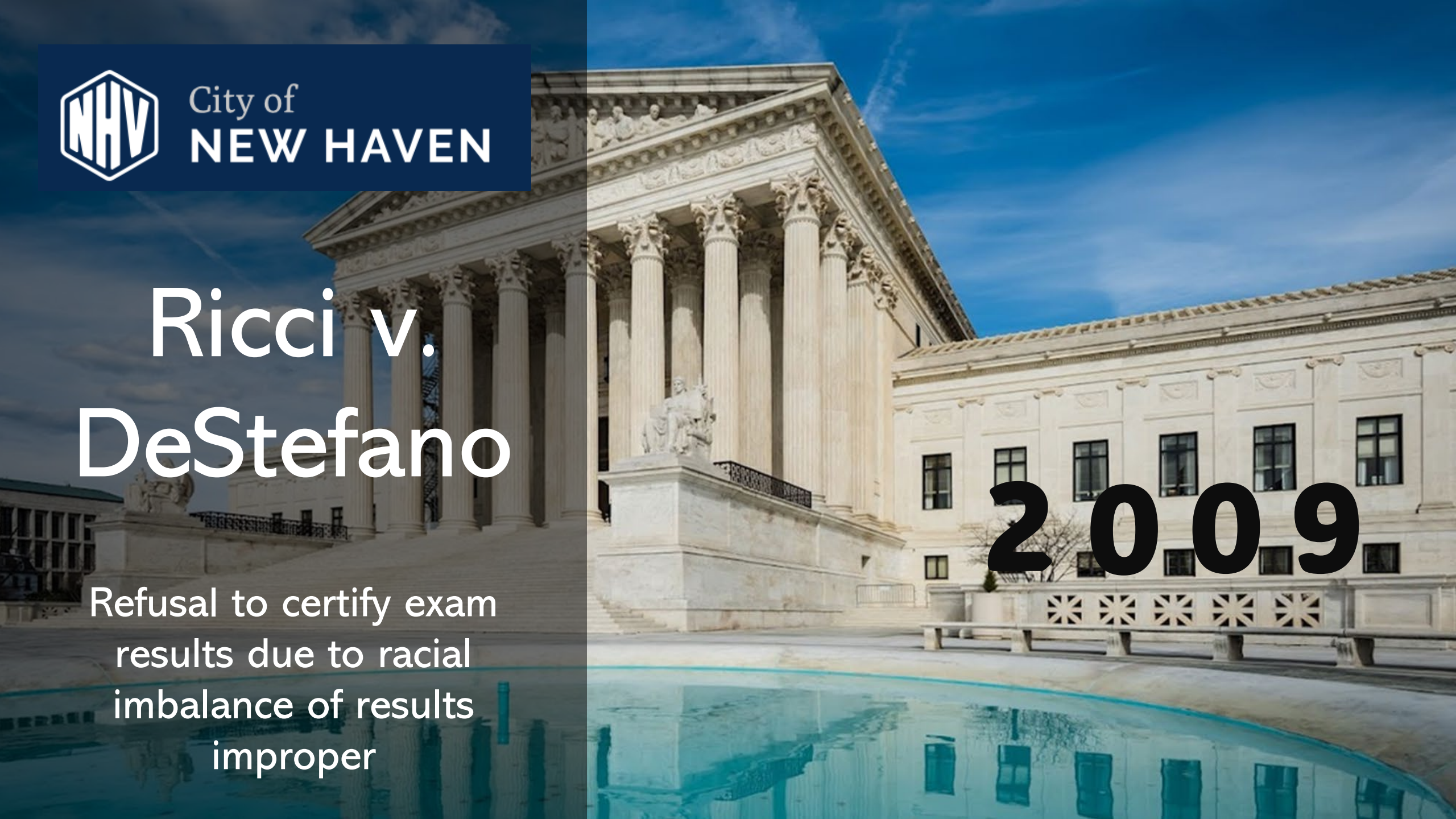
Considering Race in Admissions May Be Permissible

City of
NEW HAVEN

Ricci v. DeStefano

2009

Refusal to certify exam results due to racial imbalance of results improper



City of NEW HAVEN

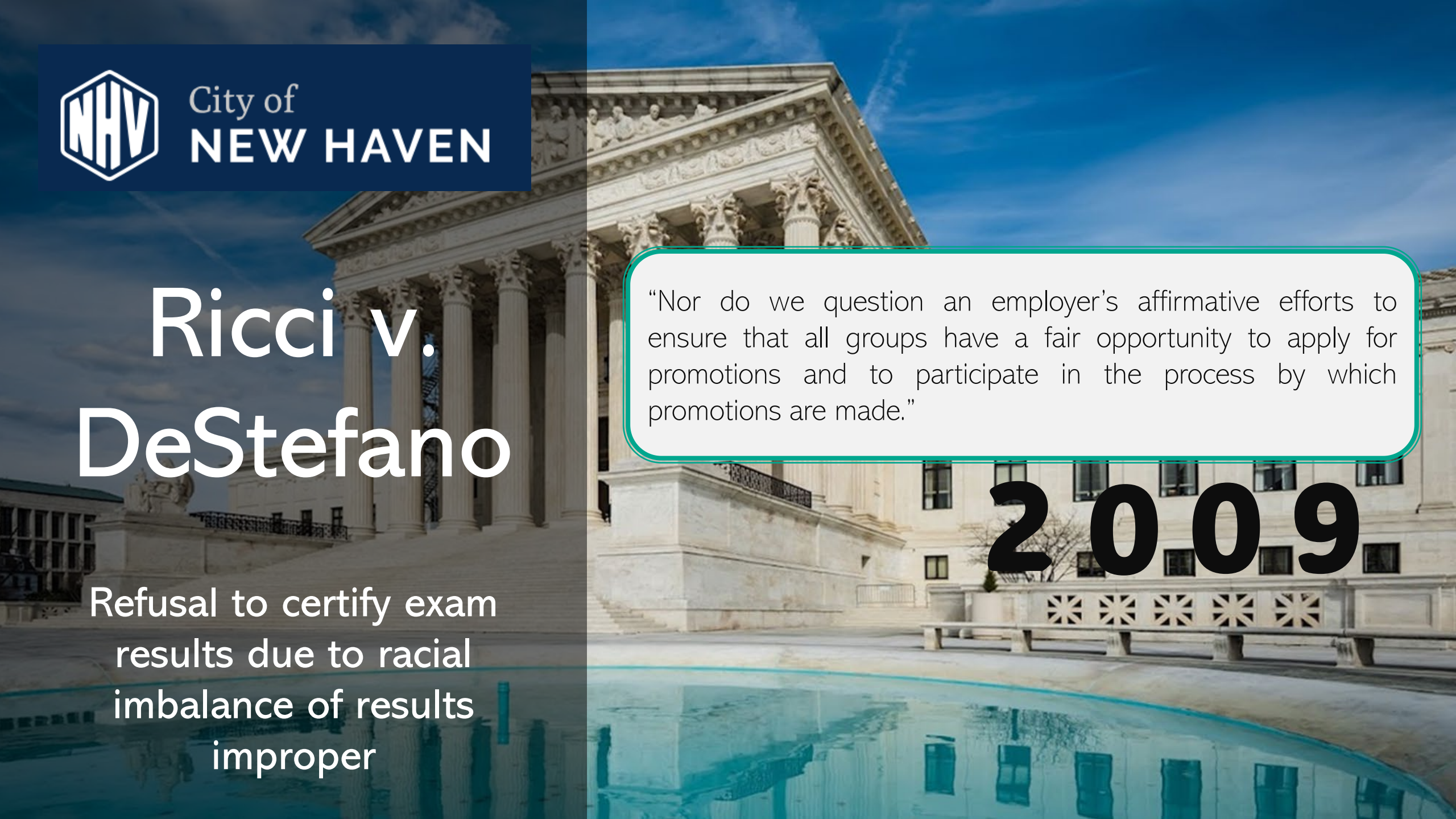
Ricci v. DeStefano

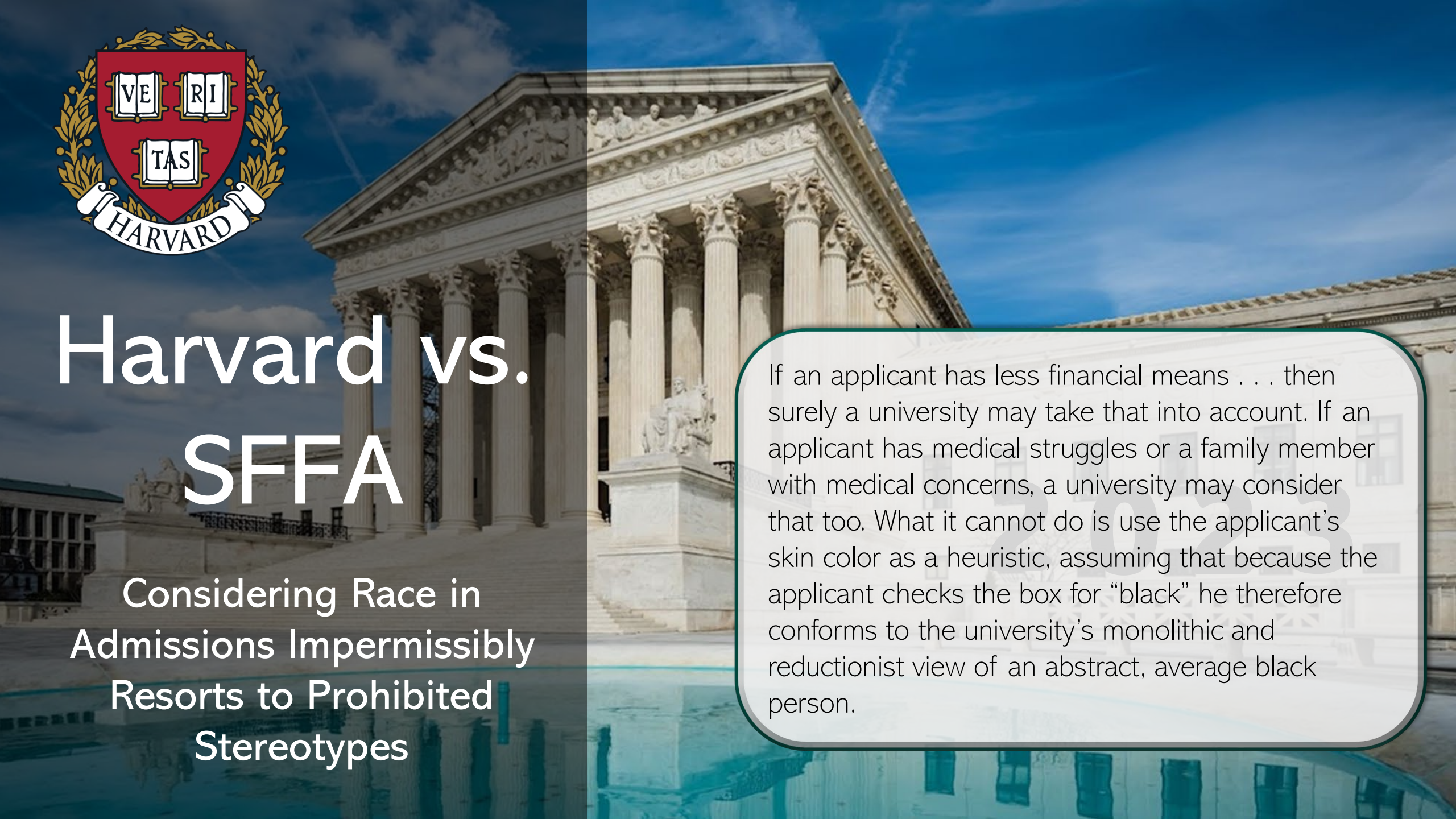
Refusal to certify exam results due to racial imbalance of results improper

"The City chose not to certify the examination results because of the statistical disparity based upon race—*i.e.*, how minority candidates had performed when compared to white candidates. . . . [T]he City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'"

"Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slight hint of disparate impact. . . . That would amount to a **de facto quota system**, in which a '**focus on statistics . . . could put undue pressure on employer to adopt inappropriate prophylactic measures**.'"

"Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."


City of
NEW HAVEN
Ricci v. DeStefano
Refusal to certify exam results due to racial imbalance of results improper
“Nor do we question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions are made.”
2009



Harvard vs. SFFA

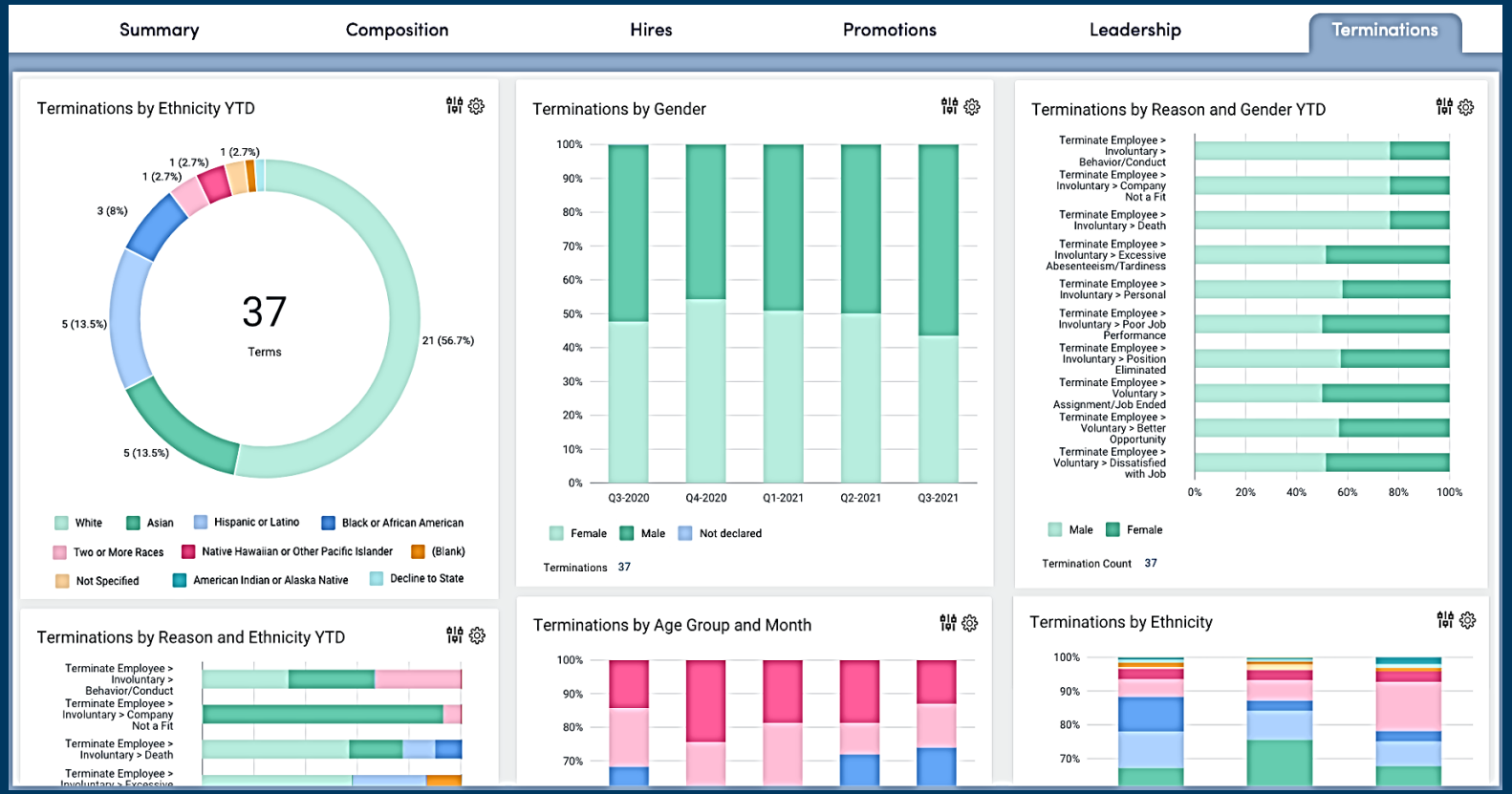
Considering Race in Admissions Impermissibly Resorts to Prohibited Stereotypes

If an applicant has less financial means . . . then surely a university may take that into account. If an applicant has medical struggles or a family member with medical concerns, a university may consider that too. What it cannot do is use the applicant's skin color as a heuristic, assuming that because the applicant checks the box for "black" he therefore conforms to the university's monolithic and reductionist view of an abstract, average black person.

Are They The Same?

SFFA Shines *More* Light On Your Current DEI Programs

SFFA Shines *More* Light On Your Current DEI Programs



Andrea Lucas appointed Chair of the EEOC Commission

Q. You mentioned the word quota. Are you able to share the EEOC's definition of "quota?" I know there's published guidance on it, but is there anything to be taken from that post-*SFFA* that is of note?

A. I think it would be more practical for me to answer in terms of how it may function, because again, labels are not dispositive. You can say that something is a "goal" versus a "quota"—[but] the question is, how is [the number] actually operating? If you have a number that is deeply mismatched with your labor market, and you are bound and determined to achieve it, and you make clear at the corporate level that you will achieve it, and you will incentivize your executives to do so, and you will incentivize them via monetary penalties or bonuses, sometimes to the tune of millions of dollars—that's a quota. Practically, it is a high-risk possibility that that [scenario] is going to be deemed a quota because you are doing everything in your power to make sure someone achieves it. That is my functional definition of a quota, as it applies to what I see in a lot of DEI contexts.

https://www.eeoc.gov/sites/default/files/2025-01/Commissioner_Lucas_Remarks_-_76th_NYU_Annual_L%26E_Conference.pdf

SFFA Shines *More* Light On Your Current DEI Programs

Since 2020, groups such as:

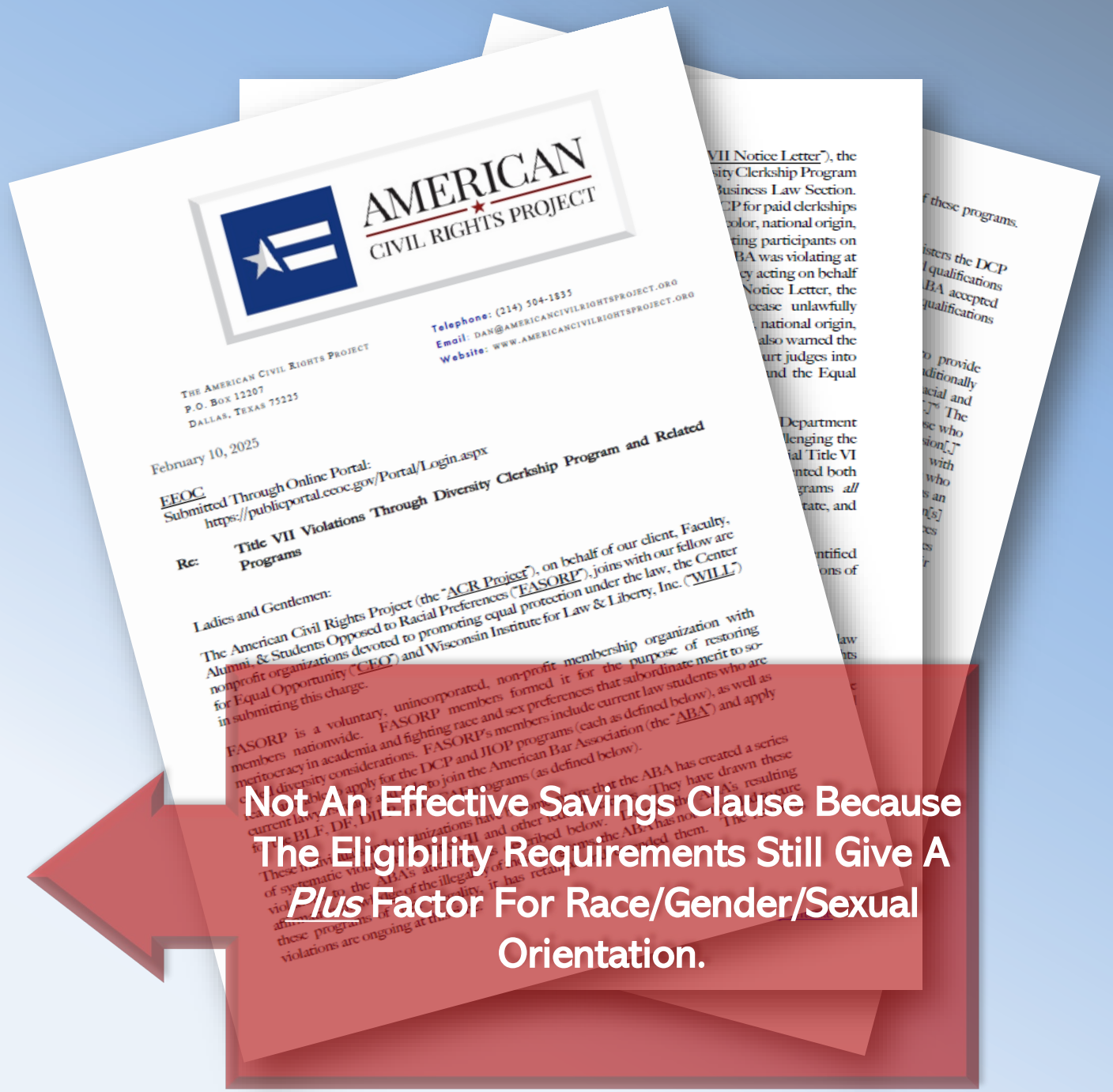
- Do No Harm;
- American Alliance For Equal Rights;
- SFFA;
- Red State Attorney Generals

Have filed ***more than 50 lawsuits*** against universities, charities and large publicly traded companies alleging that these entities maintain unlawful internship and supplier programs because eligibility is tied to race/gender

The Charge alleges the ABA operates various internship programs with impermissible eligibility programs:

Members of groups that are traditionally underrepresented in the profession:

- Minority Racial And Ethnic Groups,
- Students Who Identify As LGBTQ+,
- Women
- Disabilities,
- Veterans,
- Students Who Are Economically Disadvantaged



Not An Effective Savings Clause Because The Eligibility Requirements Still Give A *Plus* Factor For Race/Gender/Sexual Orientation.

NATIONAL BASEBALL HALL OF FAME

Jackie Robinson

Career	
Ave:	.311
HR:	137
RBI:	734
OBP:	409

Are They The Same?

Joey Votto

Ca	
	.311
	269
RBI:	897
OBP:	427

All Non-White Player Will Have 20 Points Added To Their Batting Average

Employers Cancel Diversity Internship and Supplier Programs

Mandatory Diverse Slates:

- The Rooney Rule—at least 1 diverse candidate
- The Mansfield Rule—at least 30% diverse candidates

Andrea Lucas appointed Chair of the EEOC Commission

"In the *Muldrow* . . . , a unanimous Supreme Court sided . . . [held] that employees only need to show "some injury" affecting their "terms, conditions, or privileges" of employment. The Supreme Court made clear that Title VII does not limit covered employment actions to actions that are a "materially adverse," or a "material change," or an "ultimate employment decision," or are "significant." *Muldrow* also made clear that covered employment actions are not limited to "economic or tangible" actions. .. . So, what is the takeaway on what types of employment actions are covered under Title VII, relevant to potential types of DEI programs? . . , Title VII arguably extends to employment actions like restricting employment training programs, leadership development programs, or mentoring or sponsorship programs to only employees of certain races or sexes; or selecting employees for those types of programs in whole, or in part, motivated by their race or sex.. . . Likewise,. In short, I think it is a major blind spot for employers to not scrutinize DEI programs that fall outside of hiring, firing, and compensation decisions, based on a misimpression that the DEI program in question does not involve an "adverse action" that is covered under Title VII."

https://www.eeoc.gov/sites/default/files/2025-01/Commissioner_Lucas_Remarks_-_76th_NYU_Annual_L%26E_Conference.pdf

Employer Resource Groups Are Under Scrutiny

(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, INC. *v.*
PRESIDENT AND FELLOWS OF HARVARD COLLEGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 20

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United States Court of Appeals for the Fourth Circuit.

It has become clear that sorting by race does not stop at the admissions office. In his Grutter opinion, Justice Scalia criticized universities for "talk[ing] of multiculturalism and racial diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." . . . In fact, a recent study considering 173 schools found that 43% of colleges offered segregated housing to students of different races, 46% offered segregated orientation programs, and 72% sponsored segregated graduation ceremonies. In addition to contradicting the universities' claims regarding the need for interracial interaction, . . . these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine.

Employer Resource Groups Are Under Scrutiny

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

MEMORANDUM

TO: Heads and Acting Heads of Departments and Agencies

FROM: Charles Ezell, Acting Director, U.S. Office of Personnel Management

DATE: February 5, 2025

RE: Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives

Pursuant to its authority under 5 U.S.C. § 1103(a)(1) and (a)(5), the U.S. Office of Personnel Management ("***OPM***") is providing additional guidance regarding the President's executive orders, including those titled, "*Ending Radical and Wasteful Government DEI Programs and Preferencing*," "*Ending Illegal Discrimination and Restoring Merit-Based Opportunity*," and "*Initial Rescissions of Harmful Executive Orders and Actions*."

Equal Employment Opportunity Offices:

requests.[2] Such functions can and should be transferred among personnel and offices at the agency if those functions were previously handled by a DEIA office that is subject to a reduction-in-force action. In doing so, agencies should take care that the functions of any such office are strictly limited to the duties within its statutory authority and that staffing levels are consistent with those responsibilities.

Accessibility and Reasonable Accommodation:

The Biden-Harris Administration conflated longstanding, legally-required obligations related to disability accessibility and accommodation with DEI initiatives. President Trump's executive orders require the elimination of discriminatory practices. Agencies should thus rescind policies and practices that are contrary to the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. But agencies should not terminate or prohibit accessibility or disability-related accommodations, assistance, or other programs that are required by those or related laws.[3] In executing reduction-in-force actions regarding employees in DEIA offices, agencies should therefore retain the minimum number of employees necessary to ensure agency compliance with applicable disability and accessibility laws, including those requiring the collection, maintenance, and reporting of disability information.[4]

Employee Resource Groups:

The revocation of Executive Orders 13583 and 14035 removed two of the primary legal authorities for Employee Resource Groups ("ERGs"). Consistent with the President's orders, agencies should prohibit all discriminatory programs. They should thus prohibit ERGs that promote unlawful DEIA initiatives or advance recruitment, hiring, preferential benefits (including but not limited to training or other career development opportunities), or employee retention agendas based on protected characteristics.[5]

Nevertheless, agency heads retain the discretion to allow employees to host affinity group lunches, engage in mentorship programs, and otherwise gather for social and cultural events. When exercising this discretion, agency heads should consider whether activities under consideration are consistent with the "*Ending Radical and Wasteful Government DEI Programs and Preferencing*" and "*Ending Illegal Discrimination and Restoring Merit-Based Opportunity*" executive orders, and the broader goal of creating a federal workplace focused on individual merit.

Employer Resource Groups Are Under Scrutiny

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

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Employee Resource Groups:

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would be unlawful discrimination for an agency to limit attendance at an ethnic affinity group lunch to only members of the ethnic group, or to permit employees to discourage attendance by employees outside of the ethnic group. It would be similarly unlawful to host social or cultural event or other "inclusion"-related event or training while segregating participating employees into separate groups of "White" and "People of Color" (or other compositions based upon protected characteristics). Finally, to the extent that an agency exercises its discretion to permit ERGs, affinity group events, or other similar events, the agency may not draw distinctions based on any protected characteristic in granting permission to groups and events. For example, an agency cannot permit the formation of ERGs only for certain racial groups but not others, or only for one sex, or only certain religions but not others.

How We Talk About Diversity

Duvall v. Novant Health – *$10 Million Dollar Award*

Duvall sued alleged that Novant fired him and seven other white male executives as part of its diversity push. Duvall claimed that he was replaced with a white female and a black female despite receiving positive performance evaluations every year.

a. Duvall characterized Novant's DEI plan established quotas for certain demographic groups and paid bonuses for achieving these goals.

b. another employee stated that Duvall's manager praised Duvall's performance but admit that the company was looking to include newer and fresher perspectives in executive leadership.

c. Novant denied implementing diversity targets or that bonus criteria were linked to diversity-based goals. Instead, Novant argued their D&I plan only monitored demographics. The bonus program related only to inclusion tied to survey responses about engagement and value of employees from different backgrounds.

d. Novant Health further stated that Duvall was selected because he was underperforming

Employers Cancel Diversity Programs

The legal and policy landscape surrounding diversity, equity and inclusion efforts in the United States is changing. The Supreme Court of the United States has recently made decisions signaling a shift in how courts will approach DEI. It reaffirms longstanding principles that discrimination should not be tolerated or promoted on the basis of inherent characteristics. The term "DEI" has also become charged, in part because it is understood by some as a practice that suggests preferential treatment of some groups over others.

* * *

Given the shifting legal and policy landscape, we're making the following changes:

- On hiring, we will continue to source candidates from different backgrounds, but we will stop using the Diverse Slate Approach. This practice has always been subject to public debate and is currently being challenged. We believe there are other ways to build an industry-leading workforce and leverage teams made up of world-class people from all types of backgrounds to build products that work for everyone.

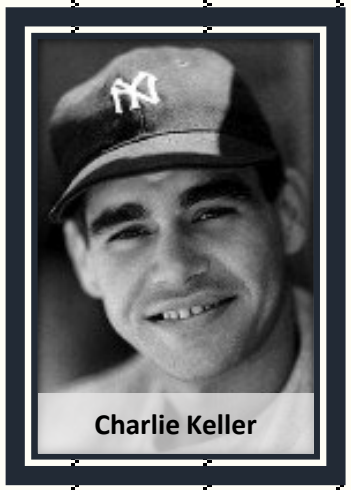
- We previously ended representation goals for women and ethnic minorities. Having goals can create the impression that decisions are being made based on race or gender. While this has never been our practice, we want to eliminate any impression of it.
- We are sunsetting our supplier diversity efforts within our broader supplier strategy. This effort focused on sourcing from diverse-owned businesses; going forward, we will focus our efforts on supporting small and medium sized businesses that power much of our economy. Opportunities will continue to be available to all qualified suppliers, including those who were part of the supplier diversity program.

- Instead of equity and inclusion training programs, we will build programs that focus on how to apply fair and consistent practices that mitigate bias for all, no matter your background.

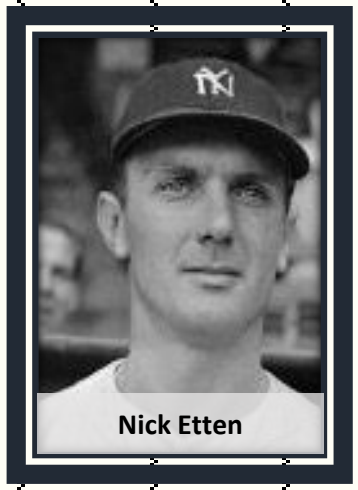
Companies Change Their Language

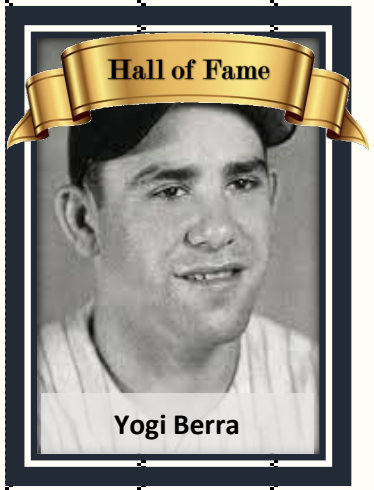
- ~~Do We Have Enough?~~
- Do We Have The Best; and How Do We Identify Who is Best

19 Yankees 46

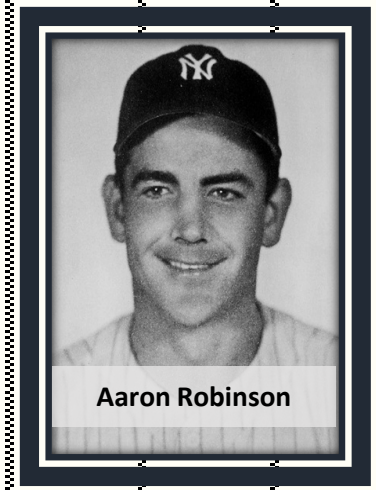

Charlie Keller

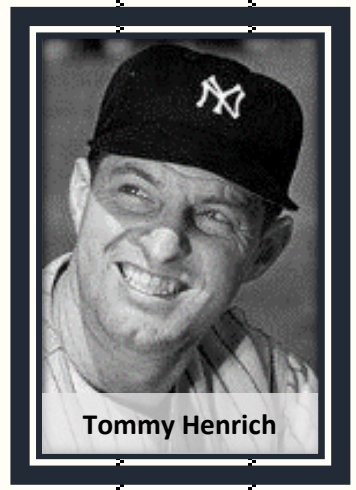
Joe DiMaggio

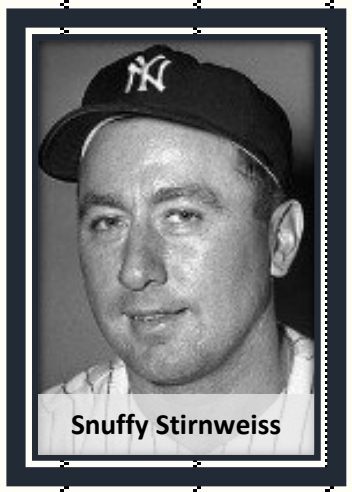

Nick Etten



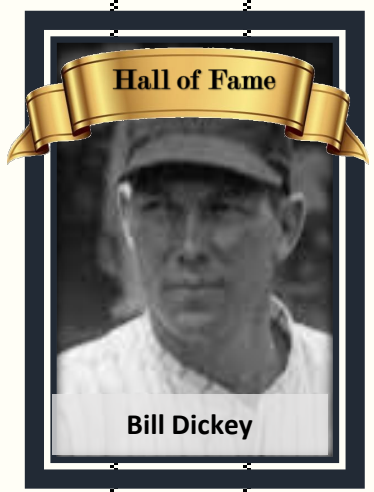
Yogi Berra


Aaron Robinson


Tommy Henrich


Snuffy Stirnweiss

Phil Rizzuto



Bill Dickey

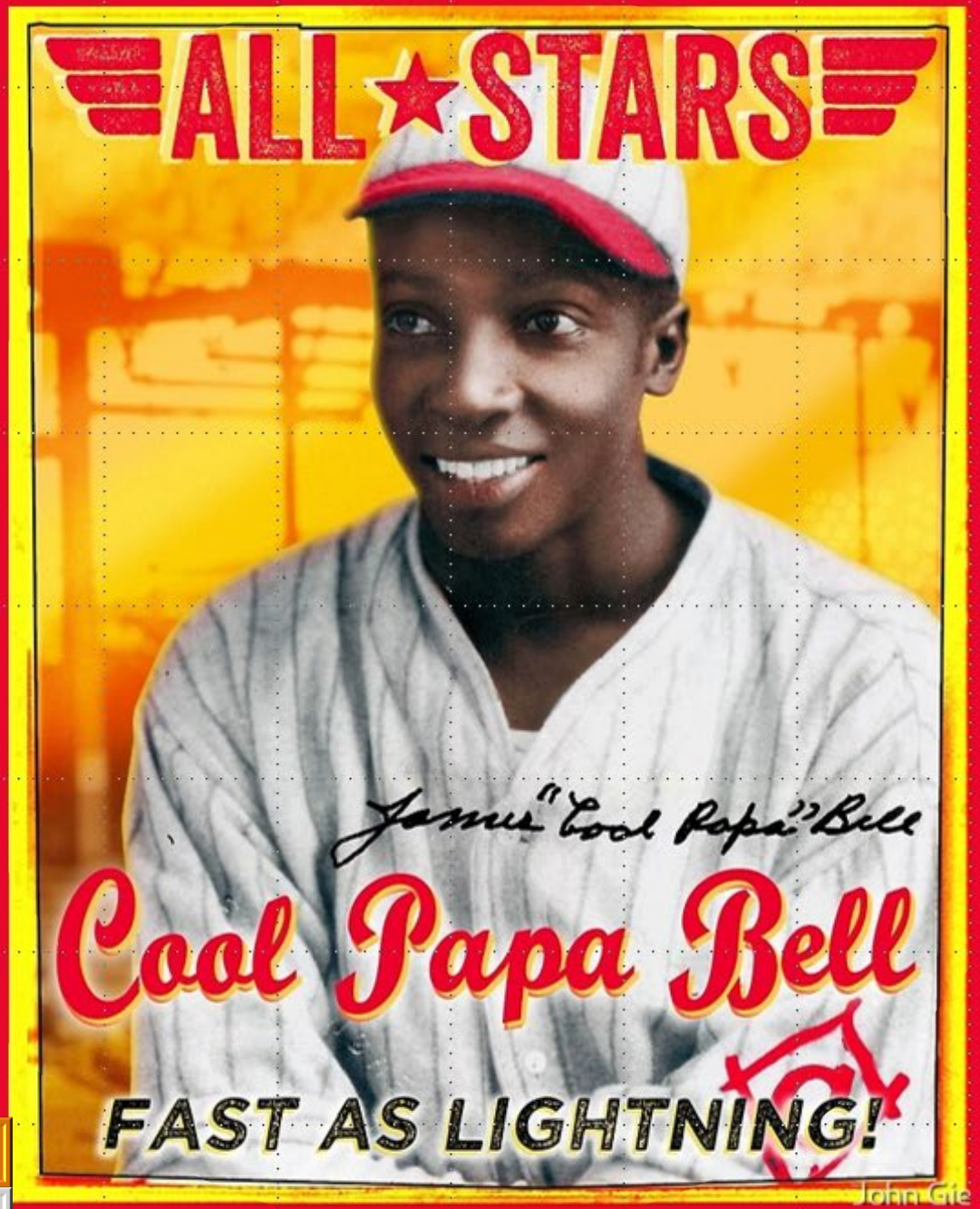
Red Ruffing

Joe Gordon

Satchel Paige

W	L	ERA	G	GS	SV	IP	SO
124	82	2.73	403	198	44	1751.2	1501

Cool Papa Bell



AB	H	HR	BA	R	RBI	SB	OBP	SLG
4767	1548	57	.325	1152	596	285	.394	.446

Buck O'Neil

G	AB	R	H	HR	RBI	BA	OBP	SLG
400	1364	213	361	11	176	.288	.317	.361

Where To Focus

Eliminate practices that are tied to or can unduly influence selection:

- Arbitrary Representation Goals in conjunction with compensation for achieving diversity metrics;
- Mandatory Diverse Slates;
- Internship programs, supplier programs, scholarships or other perks limited to certain races/genders/sexual orientation and therefore not available to everyone;

Where To Focus

Policy/Criteria For ERG Groups:

The Company will provide support to groups that advance the company's interest. For example, groups focused on:

- Improving operations or substantive excellence;
- Recruiting or retaining talent, including ensuring retention in groups for which turnover his higher than company average or the relevant labor market;

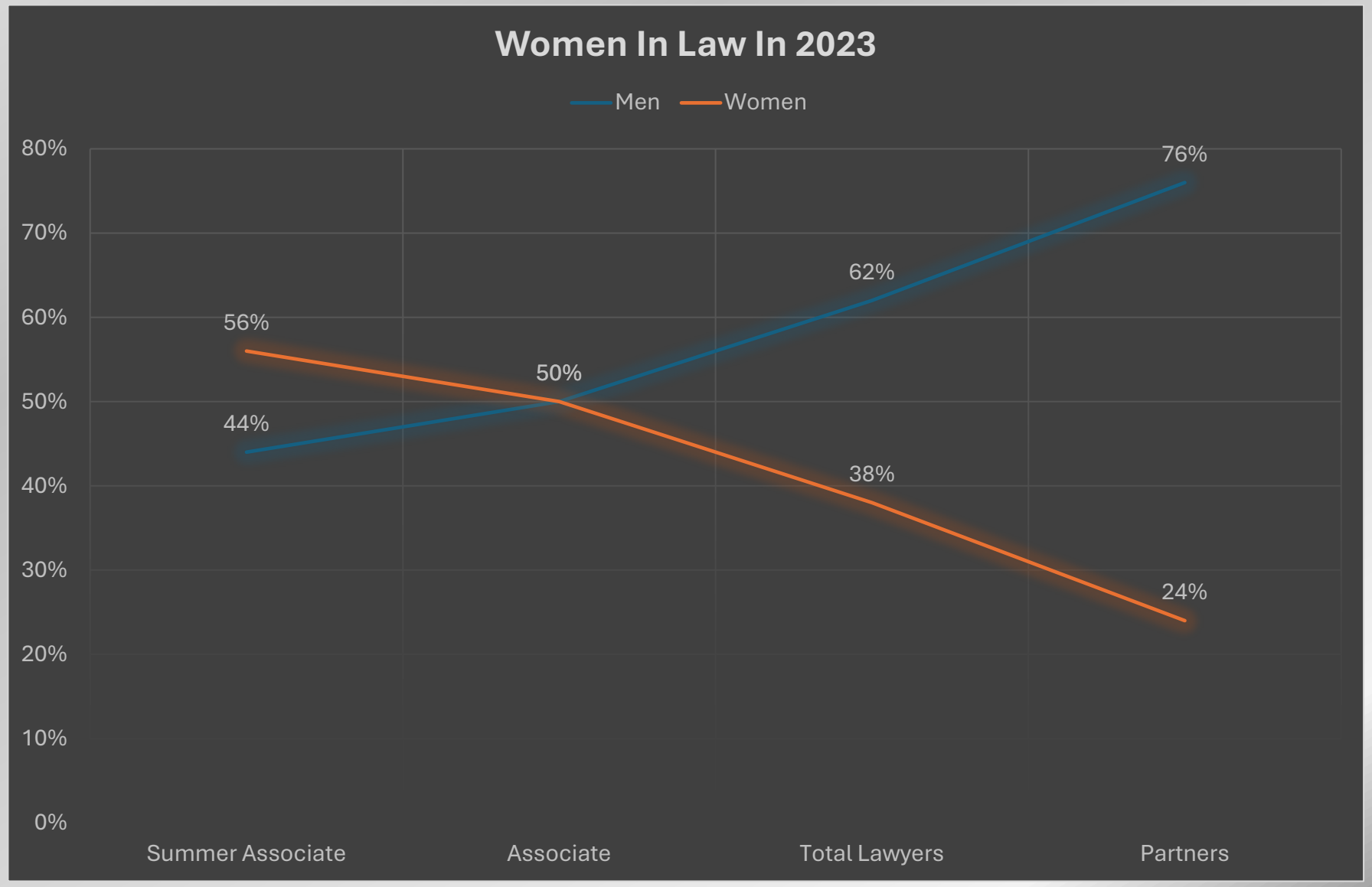
Employee Resource Groups must be available for all employees to participate

Where To Focus

Consider Changing The Vocabulary:

- Get away from terms like diversity which have been depicted as expressing a “plus factor” tied to race/gender during selection and focus on equity and inclusion;
- Keep discussions of diversity, particularly data, focused on “do we have the best” or “why are we losing talent”;

Self Evaluation Is Okay



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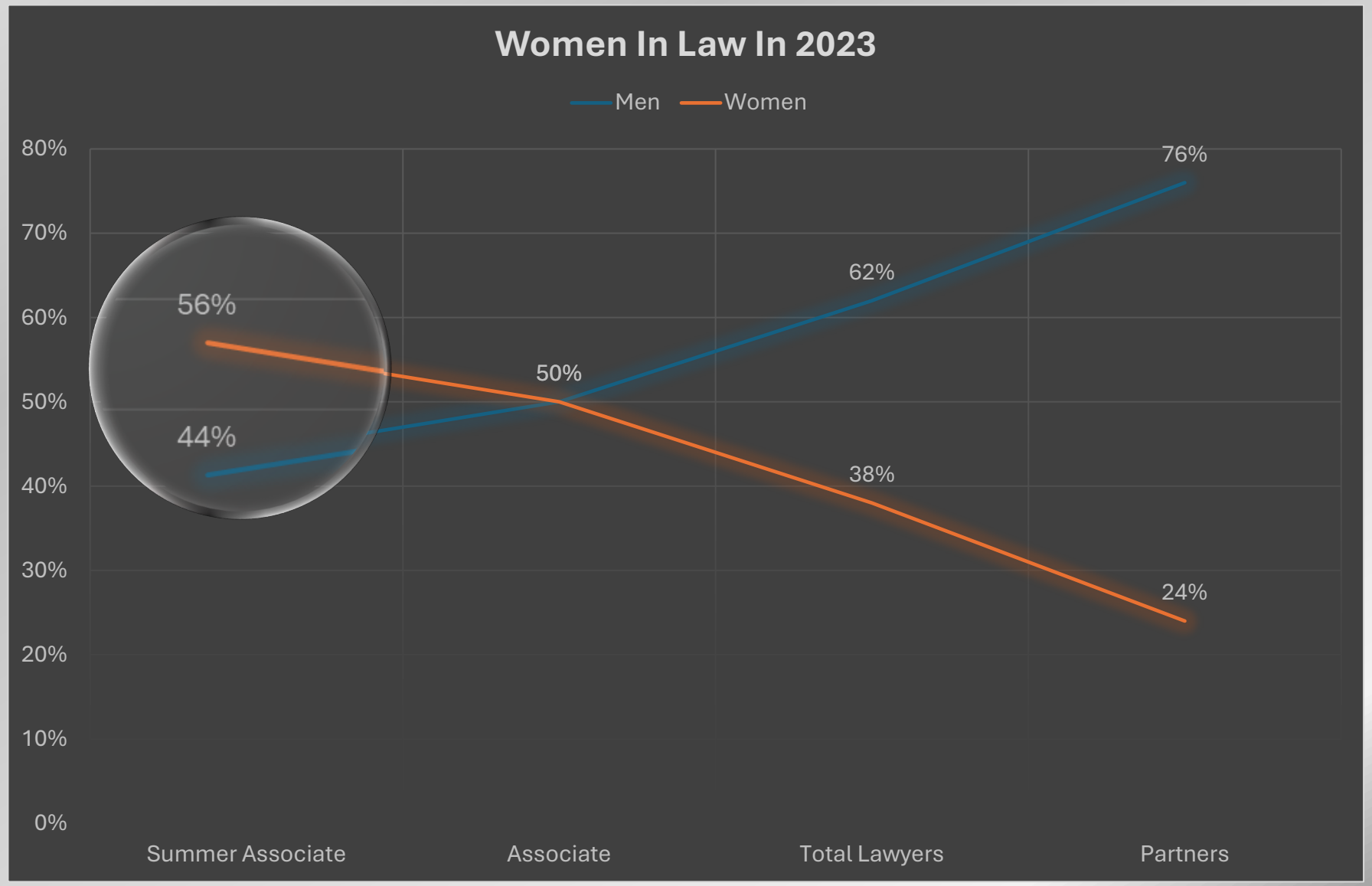

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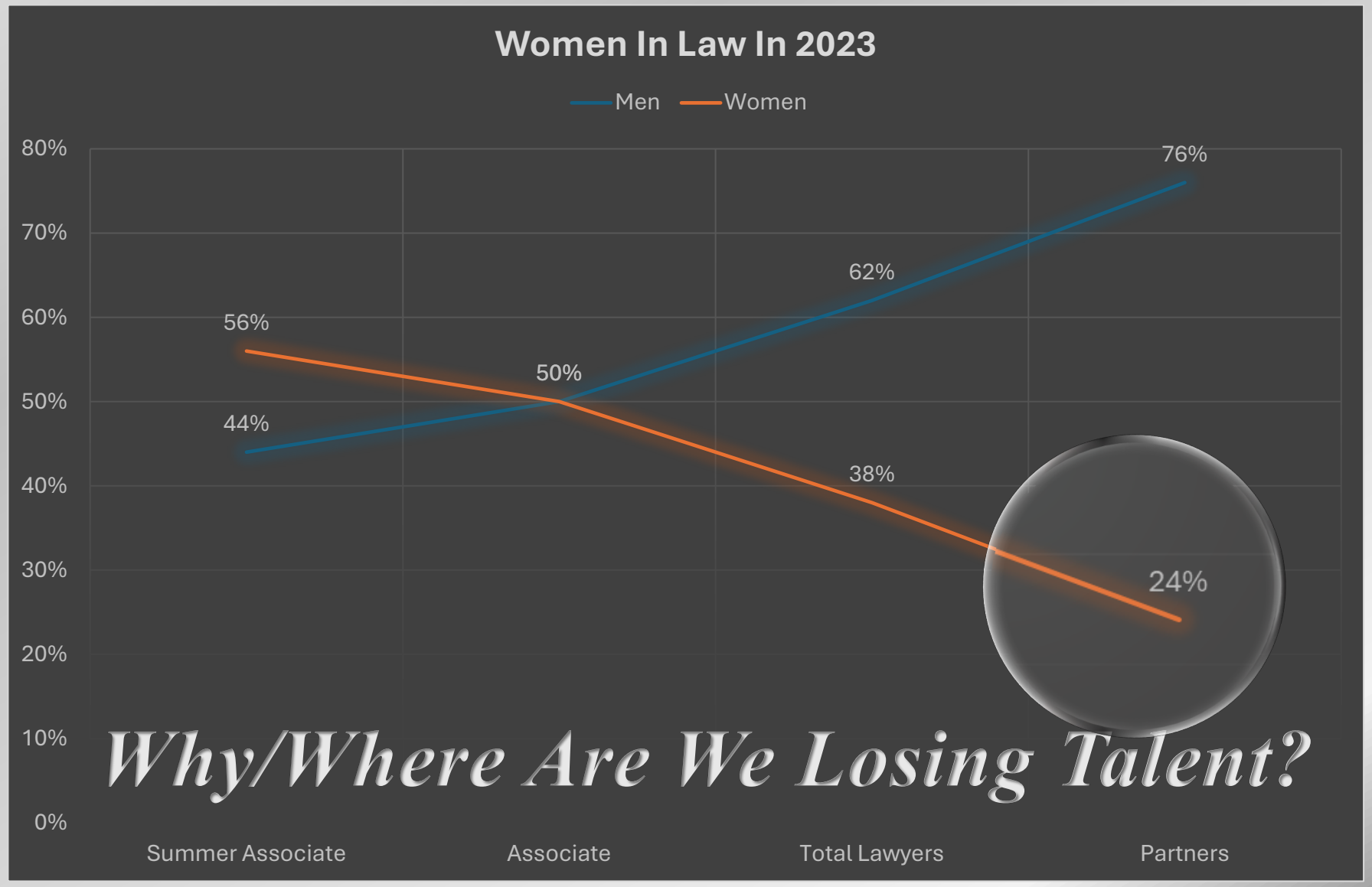


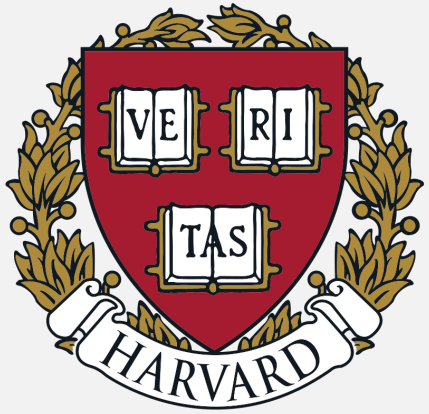
Where To Focus

- Pipeline Initiatives and recruiting Process:
  - Casting a broader net for candidate selection and ensuring the language of postings do not dissuade certain groups from applying;
  - Blinding of application process (removing names and other identifying information from the first level of review);
  - More structured interviews with groups, and more formal structure, *e.g.,* planning substantive questions which are asked to all candidates;
  - Eliminate tap on the shoulder promotions and other informal, subjective process in favor of posting, formal interview process more akin to hiring, decisions by committees, even at the highest levels;

Where To Focus

Focus on neutral mentorships:

- Mentorship programs that focus on equity and inclusion but are available on the same basis to everyone;
- *Neutral* policies and procedures that improve retention of women and minorities, *e.g.*, paid parental leave, work-from-home;
- Eliminating *all* preferences—*e.g.,* nepotism, cronyism, etc.
- Implicit bias training;



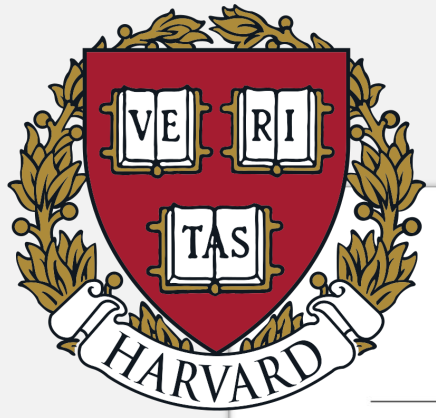
Uniform Meritocracy

Share of Students Admitted to Harvard by Race			
	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%
Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Uniform Meritocracy

43 percent of white students admitted to Harvard University were recruited athletes, legacy students, children of faculty and staff, or on the dean's interest list — applicants whose parents or relatives have donated to Harvard.

75 percent would have been rejected if they were not in one of these preferential categories.



BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

CHICA
ECONC
and GR

v.

PRESI
COLLE

I. INTRODUCTION

Each year, Harvard College grants special preference in its admissions process to hundreds

This preferential treatment violates federal law. Specifically, because Harvard receives substantial federal funds, it is bound by Title VI of the Civil Rights Act of 1964 ("Title VI") and its implementing regulations, which forbid practices that have an unjustified disparate impact on the basis of race. Because Harvard only admits a certain number of students each year, a spot given to a legacy or donor-related applicant is a spot that becomes unavailable to an applicant who meets the admissions criteria based purely on his or her own merit; "[c]ollege admissions are zero sum," as the Supreme Court recently emphasized.[5] In other words, Harvard admits predominantly white students using Donor and Legacy Preferences, and, as a direct result, excludes non-white applicants.

https://www.nber.org/system/files/working_papers/w26316/w26316.pdf. Although the data underlying both articles is the same, some of the data and conclusions are presented differently. Therefore, the Complainants cite to both articles within this complaint.

- We are all biased
- Bias transcends race and gender

[Born good? Babies help unlock the origins of morality]

Andrea Lucas appointed Chair of the EEOC Commission

"I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. In recent years, this agency has remained silent in the face of multiple forms of widespread, overt discrimination. Consistent with the President's Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."

A Trilogy of Supreme Court Cases

Syllabus

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Held: An employer who fires an individual merely for being gay or transgender violates Title VII. Pp. 4–33.

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SUPREME COURT OF THE UNITED STATES

Syllabus

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No. 21–418. Argued April 25, 2022—Decided June 27, 2022

Petitioner Joseph Kennedy lost his job as a high school football coach in the Bremerton School District after he knelt at midfield after games to offer a quiet personal prayer. Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion, and the Ninth Circuit affirmed. After the parties engaged in discovery, they filed cross-motions for summary judgment. The District Court found that the "'sole reason'" for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after three games in October 2015. 443 F. Supp. 3d 1223, 1231. The District Court granted summary judgment to the District and the Ninth Circuit affirmed. The Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. 4 F. 4th 910, 911. Several dissenters argued that the panel applied a flawed understanding of the Establishment Clause reflected in *Lemon* v. *Kurtzman*, 403 U. S. 602, and that this Court has abandoned *Lemon*'s "ahistorical, atextual" approach to discerning Establishment Clause violations. 4 F. 4th, at 911, and n. 3.

Held: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. Pp. 11–32.

(a) Mr. Kennedy contends that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. Where the Free Exercise Clause protects religious exercises, the Free Speech Clause provides overlapping protection for expressive religious

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Petitioner Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. In 2012, Groff took a mail delivery job with the United States Postal Service. Groff's position generally did not involve Sunday work, but that changed after USPS agreed to begin facilitating Sunday deliveries for Amazon. To avoid the requirement to work Sundays on a rotating basis, Groff transferred to a rural USPS station that did not make Sunday deliveries. After Amazon deliveries began at that station as well, Groff remained unwilling to work Sundays, and USPS redistributed Groff's Sunday deliveries to other USPS staff. Groff received "progressive discipline" for failing to work on Sundays, and he eventually resigned.

Groff sued under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. §2000e(j). The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th 162, 174, n. 18 (quoting 432 U. S., at 84). The Third Circuit found the *de minimis* cost standard met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." 35 F. 4th, at 175.

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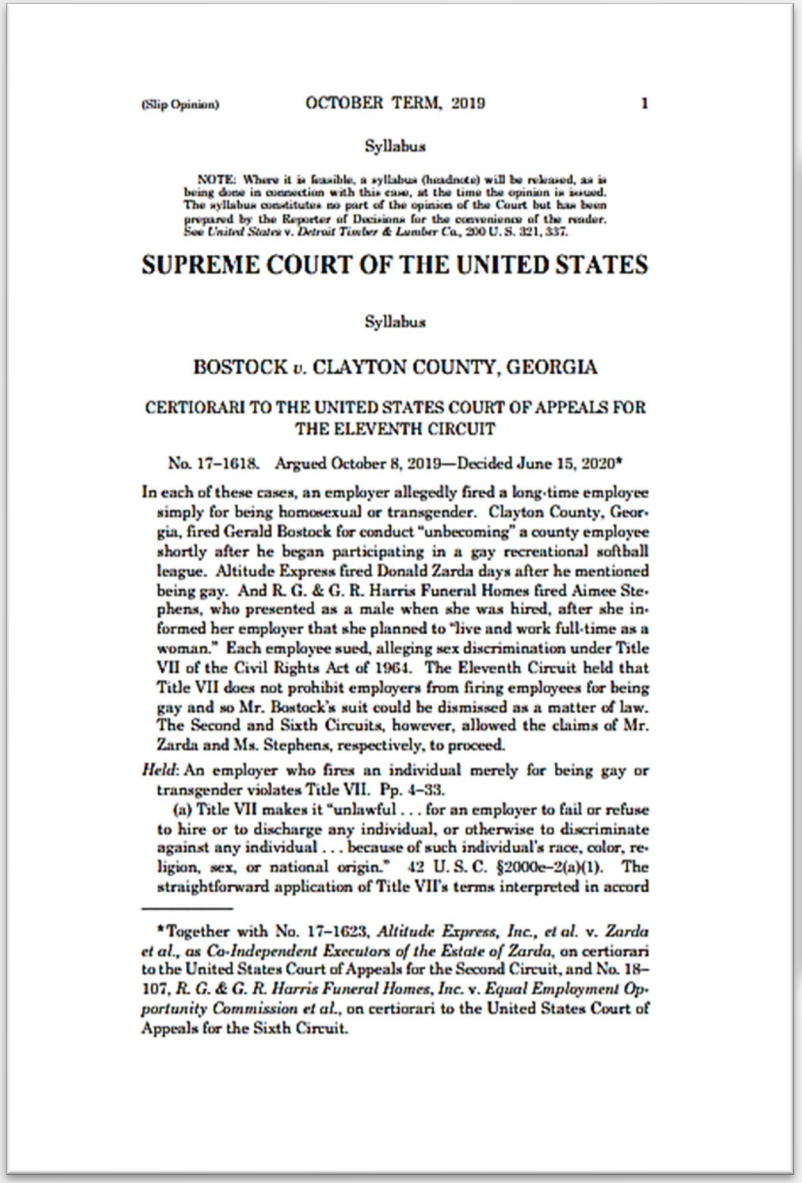
A Trilogy of Supreme Court Cases



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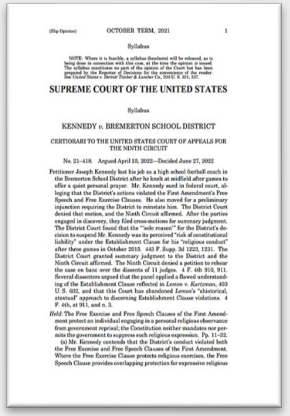
When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play— both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach."



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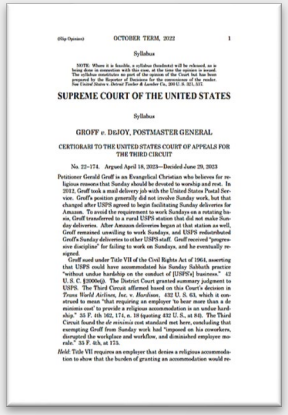

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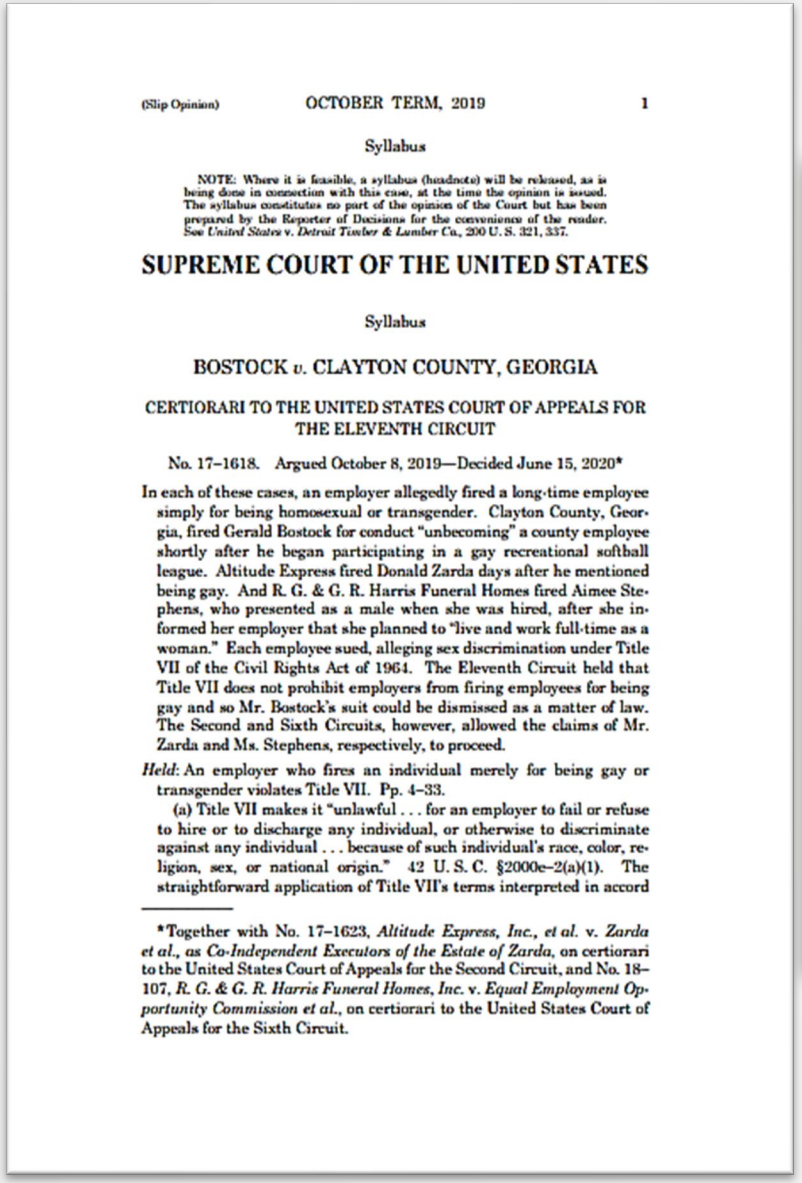

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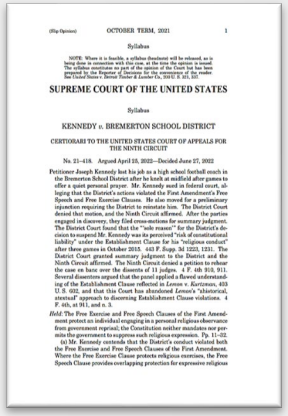
"But how these doctrines protecting religious liberty interact with Title VII are questions for future cases. . .



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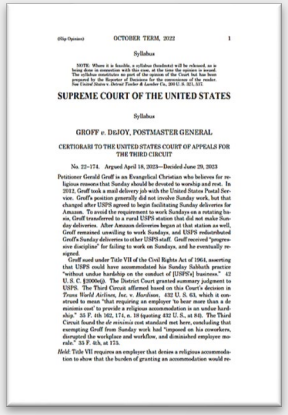

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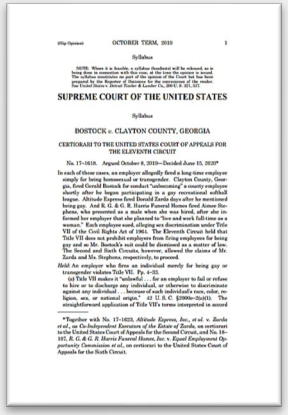

(Slip Opinion) OCTOBER TERM, 2021 1

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

KENNEDY *v.* BREMERTON SCHOOL DISTRICT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 21–418. Argued April 25, 2022—Decided June 27, 2022

Petitioner Joseph Kennedy lost his job as a high school football coach in the Bremerton School District after he knelt at midfield after games to offer a quiet personal prayer. Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion, and the Ninth Circuit affirmed. After the parties engaged in discovery, they filed cross-motions for summary judgment. The District Court found that the "'sole reason'" for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after three games in October 2015. 443 F. Supp. 3d 1223, 1231. The District Court granted summary judgment to the District and the Ninth Circuit affirmed. The Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. 4 F. 4th 910, 911. Several dissenters argued that the panel applied a flawed understanding of the Establishment Clause reflected in *Lemon* v. *Kurtzman*, 403 U. S. 602, and that this Court has abandoned *Lemon*'s "ahistorical, atextual" approach to discerning Establishment Clause violations. 4 F. 4th, at 911, and n. 3.

Held: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. Pp. 11–32.

(a) Mr. Kennedy contends that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. Where the Free Exercise Clause protects religious exercises, the Free Speech Clause provides overlapping protection for expressive religious

The contested exercise of Kennedy does not involve leading prayers with the team; the District disciplined Mr. Kennedy only for his decision to persist in praying quietly without his students after three games in October 2015. In forbidding Mr. Kennedy's brief prayer, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. Prohibiting a religious practice was thus the District's unquestioned 'object.' The District explained that it could not allow an on-duty employee to engage in religious conduct even though it allowed other on-duty employees to engage in personal secular conduct.

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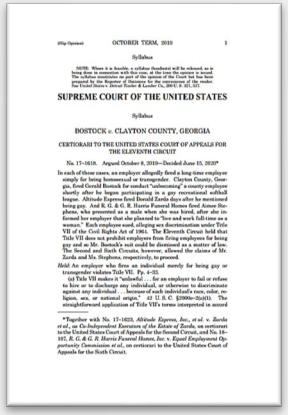
A Trilogy of Supreme Court Cases



(Slip Opinion) OCTOBER TERM, 2019 1

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SUPREME COURT OF THE UNITED STATES

Syllabus

BOSTOCK *v.* CLAYTON COUNTY, GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

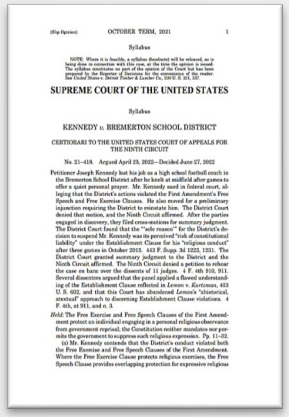
No. 17–1618. Argued October 8, 2019—Decided June 15, 2020*

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens when she informed her employer that she was a transgender woman and would thereafter live and work as a woman. Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed.

Held: An employer who fires an individual merely for being gay or transgender violates Title VII. Pp. 4–33.

(a) Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The straightforward application of Title VII's terms interpreted in accord

*Together with No. 17–1623, *Altitude Express, Inc., et al.* v. *Zarda et al.*, as *Co-Independent Executors of the Estate of Zarda*, on certiorari to the United States Court of Appeals for the Second Circuit, and No. 18–107, *R. G. & G. R. Harris Funeral Homes, Inc.* v. *Equal Employment Opportunity Commission et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit.



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SUPREME COURT OF THE UNITED STATES

Syllabus

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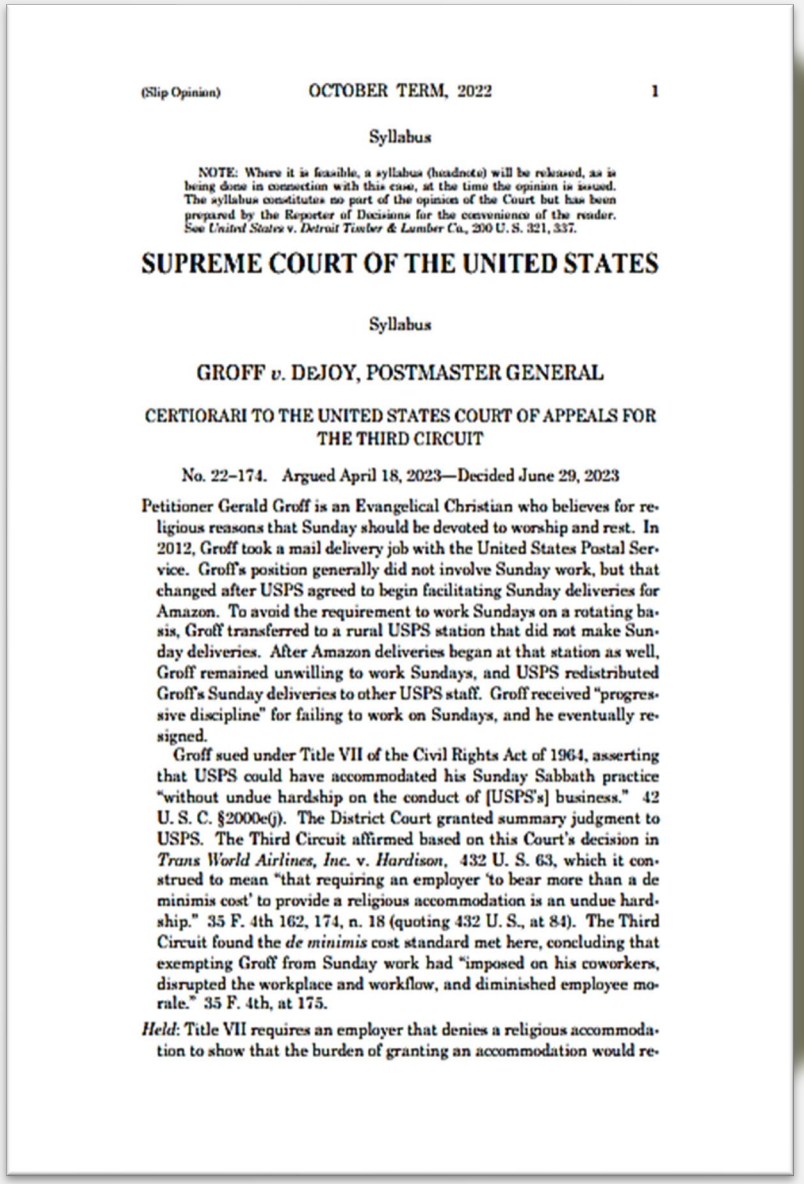

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SUPREME COURT OF THE UNITED STATES

Syllabus

GROFF *v.* DEJOY, POSTMASTER GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22–174. Argued April 18, 2023—Decided June 29, 2023

Petitioner Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. In 2012, Groff took a mail delivery job with the United States Postal Service. Groff's position generally did not involve Sunday work, but that changed after USPS agreed to begin facilitating Sunday deliveries for Amazon. To avoid the requirement to work Sundays on a rotating basis, Groff transferred to a rural USPS station that did not make Sunday deliveries. After Amazon deliveries began at that station as well, Groff remained unwilling to work Sundays, and USPS redistributed Groff's Sunday deliveries to other USPS staff. Groff received "progressive discipline" for failing to work on Sundays, and he eventually resigned.

Groff sued under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. §2000e(j). The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th 162, 174, n. 18 (quoting 432 U. S., at 84). The Third Circuit found the *de minimis* cost standard met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." 35 F. 4th, at 175.

Held: Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would re-

Raising the bar for employers in religious accommodation cases for showing undue hardship from "more than a de minimis cost" to requiring the employer to show that the "burden is substantial in the overall context of an employer's business."

Noting that "What matters more than a favored synonym for 'undue hardship' (which is the actual text) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer."

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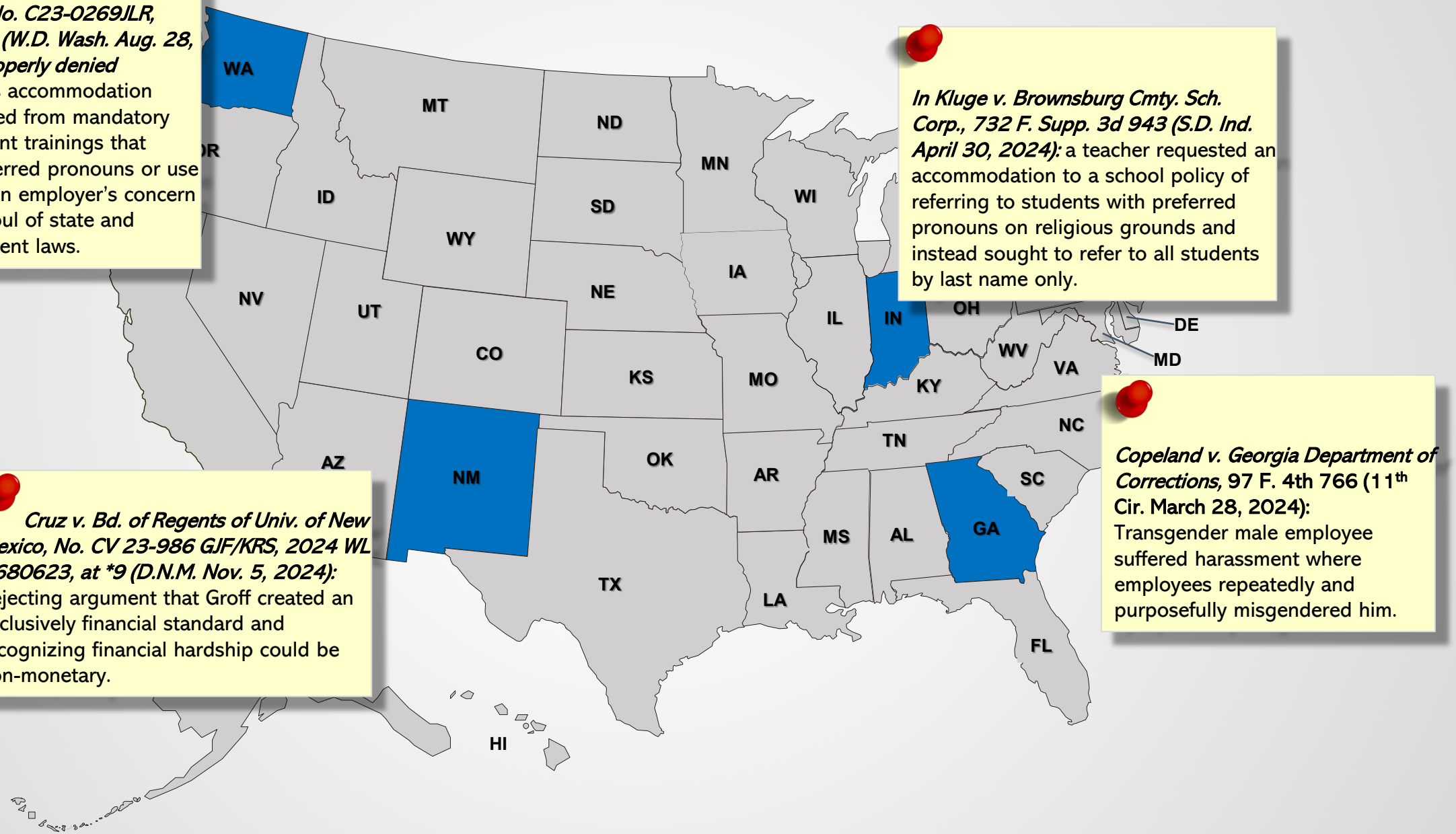
Current State of Case Law

Trueblood v. Valley Cities Counseling & Consultation, Case No. C23-0269JLR, 2024 WL 3965926 (W.D. Wash. Aug. 28, 2024): Employer properly denied employee's religious accommodation request to be excused from mandatory workplace harassment trainings that referred to use preferred pronouns or use of names based upon employer's concern that it would run afoul of state and federal anti-harassment laws.

In Kluge v. Brownsburg Cmty. Sch. Corp., 732 F. Supp. 3d 943 (S.D. Ind. April 30, 2024): a teacher requested an accommodation to a school policy of referring to students with preferred pronouns on religious grounds and instead sought to refer to all students by last name only.



*Cruz v. Bd. of Regents of Univ. of New Mexico, No. CV 23-986 GJF/KRS, 2024 WL 4680623, at *9 (D.N.M. Nov. 5, 2024):* Rejecting argument that Groff created an exclusively financial standard and recognizing financial hardship could be non-monetary.

Copeland v. Georgia Department of Corrections, 97 F. 4th 766 (11th Cir. March 28, 2024): Transgender male employee suffered harassment where employees repeatedly and purposefully misgendered him.

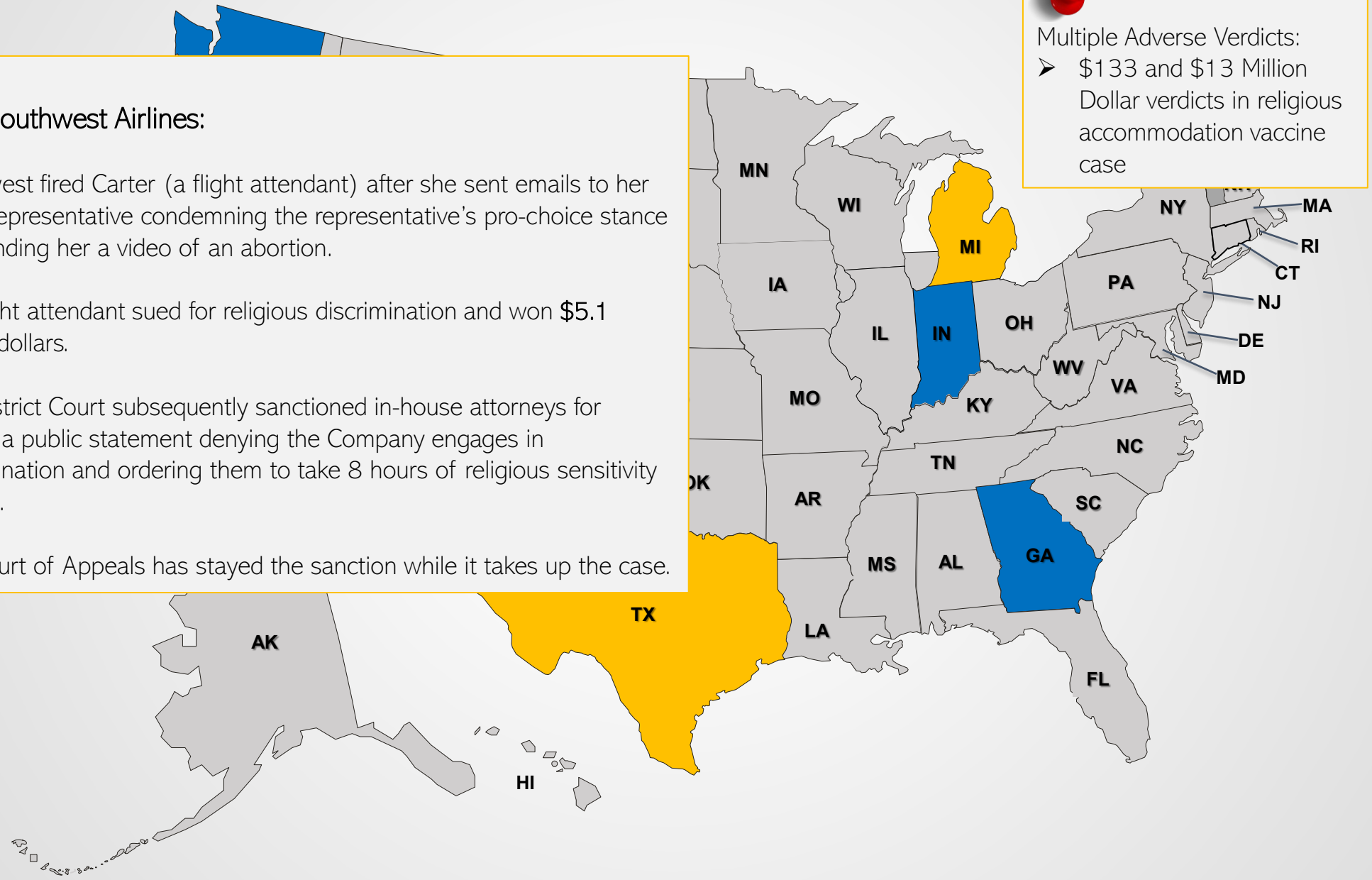
Current State of Case Law

Carter v. Southwest Airlines:

- Southwest fired Carter (a flight attendant) after she sent emails to her union representative condemning the representative's pro-choice stance and sending her a video of an abortion.
- The flight attendant sued for religious discrimination and won $5.1 million dollars.
- The District Court subsequently sanctioned in-house attorneys for issuing a public statement denying the Company engages in discrimination and ordering them to take 8 hours of religious sensitivity training.
- The Court of Appeals has stayed the sanction while it takes up the case.

Multiple Adverse Verdicts:

- $133 and $13 Million Dollar verdicts in religious accommodation vaccine case



Key Takeaways

- Review and revise written policies to make explicit that an employee's acknowledgment to comply therewith does not require the employee to adopt the policies as his own personal beliefs.
- Review and revise training materials to make explicit that participation does not require the employee to personally agree with anything stated during the program.
- Engage in and document a thorough interactive process before denying any religious accommodation request—similar to the ADA.