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January 31, 2024

By Email
American Bar Association Business Law Section
c/o Susan Daly Tobias, Section Director (susan.tobias@americanbar.org)

Re: **Diversity Clerkship Program**

Ladies and Gentlemen:

The American Civil Rights Project (the "ACR Project") and Center for Equal Opportunity ("CEO") are nonprofit organizations devoted to promoting equal protection under the law. Publicly available information suggests that for at least sixteen years (and counting), the American Bar Association Business Law Section ("ABA BLS") has intentionally treated—and now treats—applicants to its Diversity Clerkship Program differently because of their race, color, national origin, and sex.

According to the ABA BLS Diversity Clerkship website, the Diversity Clerkship Program secures for its beneficiaries employment in judicial clerkships and provides them "compensation" for that employment in the form of a stipend.[1] The website also admits that these positions serve a training function for future legal work, providing a "background [that] will prove invaluable to a career in business law, whether it be litigation or transactional work."

According to the ABA BLS Diversity Clerkship website, to be considered for the program:

> Applicants must be considered diverse in one of the following ways:
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> - Law student of color
> - Women

[1] https://www.americanbar.org/groups/business_law/about/awards-initiatives/diversity/. Last accessed Jan. 13, 2024.

- Law students with disabilities
- LGBTQ+ law students
- Students who have overcome social or economic disadvantages such as a physical disability, financial constraints, or cultural impediments to becoming a law student[.]

Thus, the ABA BLS Diversity Clerkship Program automatically qualifies applicants "of color" and women, while allowing White male applicants to qualify only if they assert an LGBTQ+ identification, disability, or history of overcoming social or economic disadvantages. The structure's inclusion of additional criteria that may permit White male applicants to be considered removes none of the taint from the Diversity Clerkship Program: its structure explicitly discriminates against applicants based on race, among other protected traits, and assures that for some applicants, their race, national origin, or sex will be the but-for cause of qualification or exclusion from the program.

As a result, the Diversity Clerkship Program appears to violate numerous civil rights laws, including:

> **42 U.S.C. § 1981.** Section 1981 requires that "[a]ll persons ... shall have the same right ... to make and enforce contracts ... and to the full and equal benefit of all laws" regardless of race.[2] The Diversity Clerkship Program's race discrimination is designed to lead to a contractual relationship. Making contract entry contingent on applicants' races would facially violate Section 1981.
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> **Title VII of the Civil Rights Act of 1964**. By all appearances, the Diversity Clerkship Program is both paid employment and a job-training controlled by employers. As such 42 USC §§ 2000e-2(a) and (2)(d) leave the Diversity Clerkship Program's qualification and disqualification of applicants based on their race, national origin, and sex "an unlawful employment practice."
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> **Fourteenth Amendment's Equal Protection Clause**. To the extent that the Diversity Clerkship Program places judicial clerks in the chambers of *state* judges, the participation of such chambers in the Diversity Clerkship Program may also violate 42 U.S.C. § 1983 and the Equal Protection Clause.[3]

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[2] 42 U.S.C. §1981(a).

[3] The Supreme Court has recognized that a state-court judge enjoys no absolute immunity from suit against allegations of employment discrimination in violation of 42 U.S.C. § 1983 and the Equal Protection Clause. *Forrester v. White*, 484 U.S. 219, 230 (1988). It is true that the 1996 amendments to 42 U.S.C. § 1983 established that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted…." However, this amendment curtailed the availability of *injunctive* relief alone, without impacting judicial officers' *damages liability* for employment discrimination. More importantly, the 1996 amendment curtailed the availability of injunctive relief only in actions brought against judges in their "judicial capacity," while *Forrester* relied on the Supreme Court's conclusion that "it [is] clear that [a state-court judge] was acting in an administrative capacity" and not a judicial one "when he" engaged in illegal employment

Federal Judiciary's Policy on Equal Opportunity. To the extent that the Diversity Clerkship Program places any judicial clerks in the chambers of *federal* judges (and so beyond the reach of Title VII and the Equal Protection Clause), [the Federal Judiciary's Policy on Equal Opportunity] would still apply. The participation of any *federal* judge in the expressly-discriminatory Diversity Clerkship Program would appear to facially violate that policy.[4]

Title VI of the Civil Rights Act of 1964. Any complicity by law schools in this discriminatory process may violate Title VI's requirement that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[5]

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program and activity operated by a recipient of Federal financial assistance. Again, if sufficiently supported by schools who enroll the law student applicants, the ABA BLS program may violate Title IX.[6]

The kind of rank discrimination perpetrated by the ABA BLS through the Diversity Clerkship Program was unlawful for decades before the decisions in *Students for Fair Admissions v. Harvard* and *UNC* prohibited colleges from using race in admissions. By all appearances, the ABA BLS makes decisions that lead to contractual relationships, which involve both employment and job-training and uses the kind of non-remedial, open-ended, crude, discriminatory selection criteria the law has banned for generations.[7] Institutions as committed to the rule of law as the ABA BLS and America's judiciary must recognize and follow the Supreme Court's reminder that "Eliminating racial discrimination means eliminating all of it."[8]

For the foregoing reasons, the ACR Project and CEO demand the ABA BLS immediately cease unlawfully discriminating against applicants to the Diversity Clerkship Program on the basis of race, color, national origin, or sex. Rather, the ABA should treat applicants equally, respecting their shared humanity and recognizing the vastness of the diversity of individuals. This is the way to following the law, pursuing excellence, and achieving what

discrimination. *Id*. at 229. By all appearances, then, state judges illegally discriminating in their hiring decisions may remain liable for such violations (and for violating the equal protection clause under color of law).

4 The Policy applies to "all judges, current and former employees (including all law clerks….)" Sec. 210.10(a). It establishes "a right to a workplace free of discrimination," Sec. 220(a). It defines "Wrongful conduct" to include "an adverse employment action that either: (1) materially affects the terms, conditions, or privileges of employment (e.g. hiring, firing, failing to promote…) based on one of the following protected categories: * race, * color, * sex, * gender, * gender identity, … * sexual orientation, * religion, * national origin, … or *disability." Sec. 220.10(a). It requires all judicial unit executives to "ensure that … (2) all hiring, promotion, and other employment decisions are based solely on job-related factors and an evaluation of a person's qualifications and ability to perform the job duties." Sec. 230(b).

5 42 U.S.C. § 2000d.

6 20 U.S.C. § 1681 et seq.

7 See generally *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

8 *S.F.F.A. v. Fellows & Pres. of Harvard College*, 143 S. Ct. 2141, 2161 (2023).

SFFA called the "commendable goals" of diversity.

Respectfully Yours,

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The ACR Project,
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President and General Counsel