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By Email

Skylar Croy
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Re: Judicial Clerkship and Judicial Intern Opportunity Programs

Mr. Croy,

I represent the American Bar Association. My client received your letter of April 24, 2024 regarding the Judicial Clerkship Program ("JCP") and the Judicial Intern Opportunity Program ("JIOP"), and we have reviewed your contentions. The ABA strongly disagrees with your assertion that the programs engage in unlawful racial discrimination, which is based on a number of significant factual and legal misconceptions. To the contrary, the programs expand access to the legal profession for all law students, in a manner fully consistent with all applicable laws.

Your letter suggests that the programs violate the Equal Protection Clause principles expounded in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFA*"), by using racial quotas to select student participants and to encourage judges to hire minority law clerks. That contention is both factually and legally incorrect.

Neither Program Excludes Students Based on Race.

JCP is an educational program designed to inform law students about the work and benefits of a post-graduate judicial clerkship. It aims to disseminate information to law students who may not otherwise have access or exposure to information concerning the nature of judicial clerkships, including students of color and students belonging to other groups that have traditionally been underrepresented in judicial clerkships. Although JCP's mission is to increase minority law students' access to judicial clerkships, the ABA imposes no restrictions on which students can attend the program, and the selection of student participants is left solely to the discretion of participating law schools. Similarly, while the program aims to expose participating judges to the

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possibility of hiring clerks from a broader range of law schools and academic credentials, judges are not asked to make any hiring commitments.

JIOP is an internship pathway program that connects students to participating judges and provides a $2,000 stipend to cover some of the cost of living expenses during participants' unpaid internships. The program is designed to assist students who face obstacles to obtaining and serving in a judicial internship, including racial and ethnic minorities; students with disabilities; veterans; women; students who are economically disadvantaged; first generation law students; and students who identify themselves as LGBTQ+. In accordance with that mission, any law student who considers themself to face obstacles in entering and succeeding in the legal profession is eligible to apply for the program.

Students are selected for participation in JIOP based solely on their interest in and aptitude for a judicial internship; no applicant is given preference or turned away based on their race or any other protected characteristic. Students selected to participate have their materials submitted to participating judges, who make all internship placement decisions independently. The program asks applicants to voluntarily provide demographic information, but—as shown in the screenshot of the checklist included in your letter—whether to provide that information is entirely optional for each applicant, and any demographic information that an applicant chooses to provide is not shared with anyone who makes selection and placement decisions, including screening interviewers and participating judges.

As is evident from the descriptions above, the operation of JCP's and JIOP's selection processes does not use race to exclude, evaluate, or select participants. To be sure, language on the programs' websites references the programs' historical missions to support students belonging to traditionally underrepresented racial and ethnic minority groups, but these programs have long since been expanded to encompass all students facing hardship of any kind. *SFA* thus has no applicability to these programs.

The Programs Are Fully Consistent with the Equal Protection Principles Set Forth in *SFA*.

You are also mistaken because these programs in no way violate the principles set forth in *SFA*. In *SFA*, the Court struck down Harvard and UNC's race-conscious admissions policies because they "fail[ed] to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype." *SFA*, 600 U.S. at 218. Neither rationale is implicated by either program.

First, the programs do not use race as a "negative" because they do not give some students an advantage at the expense of others. As explained above, JCP is purely an informational program. It educates students regarding the prestige and content of a judicial clerkship in an effort to encourage students to pursue a post-graduate clerkship, but does not provide students with any concrete benefit in applying for or obtaining a clerkship. Unlike apportioning scarce goods such

as top-tier college admissions slots, disseminating information about the availability and desirability of a certain type of post-graduate employment is not a "zero-sum" activity that "advantage[s]" one group of students at the expense of others. *Id*. at 218–19. Rather, JCP is more akin to a school's outreach and recruitment programs designed to increase students' awareness of and interest in applying to the school. Nothing in *SFA* suggests that such informational outreach programs cannot be directed at students from underrepresented groups, including racial minorities.

Neither does JIOP use race as a "negative" by advantaging some students at the expense of others. As explained above, any student who faces obstacles to obtaining and serving in a judicial internship may participate in the program. JIOP's eligibility criteria expressly identify students of color, female students, students with disabilities, or gay, lesbian, bisexual or transgender students as eligible to apply, because it is well documented that students in those enumerated groups face systemic challenges in becoming leaders in the legal community. *See, e.g., Nat'l Ass'n for Law Placement*, 2023 Report on Diversity in U.S. Law Firms 15, 39 (Jan. 2024)[1] (finding that, of partners at major law firms, only 12% are non-white lawyers, 28% are women, 1.4% are lawyers with disabilities, and 2.6% are LGBTQ lawyers); *Minority Corp. Counsel Ass'n*, 2021 MCCA Fortune 1000 GC Survey 4 (2021)[2] (finding that, of general counsels at Fortune 1000 companies, only 13% are lawyers of color and only 30% are women). But students who face other forms of social or economic disadvantage resulting in similar challenges are likewise encouraged to apply. JIOP thus serves to level the playing field by helping students who face any form of disadvantage to overcome obstacles that might otherwise prevent them from accessing judicial internship opportunities. As such, any eligible student who demonstrates need for the benefits of the program—financial resources to cover the costs of an unpaid summer internship and connections to internship opportunities—is eligible for the program.

Second, the programs do not assume "an inherent benefit in race *qua* race," nor do they "engage[] in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." *SFA*, 600 U.S. at 220–21. JCP and JIOP provide information and assistance to students who lack the support necessary to compete equally for the same opportunities that should be accessible to all law students, no matter their financial ability or their connections in the legal world. The programs provide additional resources and support to students facing barriers to entry into the legal profession not due to a belief that all minority students think alike, or that there is an "inherent benefit in race *qua* race," but rather due to the belief that students who face social and economic disadvantages are just as capable of achieving the same success as their better-resourced peers, if only they are afforded the same tools and support.

The constitutional infirmities inherent in the "zero sum" and stereotype-based nature of the admissions programs under review in *SFA* thus have no application to JCP and JIOP, which pursue

[1] Available at https://www.nalp.org/uploads/Research/2023NALPReportonDiversityFinal.pdf.
[2] Available at https://mcca.com/wp-content/uploads/2021/08/2021-MCCA-Fortune-1000-GC-Survey.pdf.

their goals of equalizing judicial internship and clerkship opportunities for students of all backgrounds without running afoul of the Equal Protection Clause principles expounded in *SFA*.

The Equal Protection Clause Standards Articulated in *SFA* Do Not Apply to the Programs in Any Event.

Your contentions are further misplaced because you ignore that the Equal Protection Clause standards articulated in *SFA* do not apply to JCP and JIOP. As privately-run and privately-funded programs that do not receive Federal financial assistance, the programs are not subject to the Fourteenth Amendment or Title VI. *See SFA*, 600 U.S. at 308 (Gorsuch, J., concurring) ("The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties."); 42 U.S.C. § 2000d (Title VI, prohibiting discrimination "on the ground of race, color, or national origin" by entities "receiving Federal financial assistance").

Neither are the programs subject to the Equal Protection Clause's standards under Section 1981, which applies only to contractual relationships. *See Johnson v. Ry. Express Agency, Inc*., 421 U.S. 454, 459–60 (1975). As an initial matter, there is simply no contractual relationship between law students and JCP: While a division of the ABA organizes JCP, it is law schools—not anyone at the ABA—that select individual students to attend. Because the ABA plays no role in student selection, there is no cause of action by students against JCP under Section 1981. Likewise, although the ABA facilitates connections between judges and law students through JIOP, it is judges—not the ABA—who make individual internship placement decisions. Further, both programs are designed to further participants' legal education and careers, not to provide a benefit to the programs or to participating judges. *See Hollander v. Sears, Roebuck & Co*., 450 F. Supp. 496, 498, 504–505 (D. Conn. 1978) (holding that a paid summer internship program for "Black, Oriental, Indian, or Spanish-surnamed" college juniors was not a contract under Section 1981, because its purpose was to "provide the minority college student with an opportunity to learn," rather than to "fill regular positions"); *cf. Adam v. Obama for Am*., 210 F. Supp. 3d 979, 985–88 (N.D. Ill. 2016) (holding that an unpaid internship was not a contract under Section 1981, and collecting cases). Indeed, the contribution that schools make to participate in JCP is in fact a charitable donation to the Fund for Justice and Education, and is requested merely to cover some of the costs of running the program—not to induce the ABA to educate the school's students about clerkships.

Moreover, even if the programs did fall within the scope of Section 1981, the ABA's First Amendment right to express its commitment to expanding access to judicial internships and clerkships by providing support to students facing barriers to entry into the legal community overcomes anything in Section 1981 purporting to restrict that expressive conduct. *See 303 Creative LLC v. Elenis*, 600 U.S. 570 (holding that the plaintiff's First Amendment right to express her opposition to same-sex marriage by designing custom wedding websites trumped a state statute prohibiting public businesses from refusing to serve gay and lesbian customers); *Coral Ridge*

Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1254 (11th Cir. 2021) ("[D]onating money qualifies as expressive conduct.").

None of the other sources of law cited in your letter apply to the programs, either. It is clear that the Federal Judiciary's Policy on Equal Opportunity does not apply to the ABA. It is equally clear that the ABA's administration of the programs is not subject to Title VII, which applies only to "employers." 42 U.S.C. § 2000e-2(a). As discussed at length, JCP merely provides information to students about what clerkships are, and bears no resemblance to an employer. JIOP, too, plays no part in hiring decisions or the content of the internship experience, and in no way serves as the selected students' employer. *See, e.g., U.S. Equal Emp't Opportunity Comm'n v. Glob. Horizons, Inc*., 915 F.3d 631, 638 (9th Cir. 2019) (holding that "the common-law agency test should be applied in the Title VII context," the "principal guidepost" of which is "the extent of control that one may exercise over the details of the work of the other"). Finally, your suggestion that the programs violate Section 1985—enacted to address the deprivation of Black citizens' constitutional rights by the Klu Klux Klan, *see United Bhd. of Carpenters & Joiners of Am., Loc. 610, AFL-CIO v. Scott*, 463 U.S. 825, 835 (1983)—is entirely unsupported by precedent and directly contrary to the purpose of the statute.

The ABA remains firmly committed to eliminating discrimination of any kind in legal education and the legal profession. It is in furtherance of that goal that it will continue its current, lawful operation of the Judicial Clerkship Program and the Judicial Intern Opportunity Program.

Sincerely,

s/Tacy F. Flint

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Partner

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