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ATTORNEYS AND COUNSELORS AT LAW

The Legal Landscape for Racial Equity Initiatives

Ed Chaney

What's Going On?

SCOTUS rules against affirmative action in college admissions

Colleges and universities can no longer consider race in their admissions processes after the US Supreme Court ruled against affirmative action, overturning decades of precedent that has benefitted Black and Latino students.

Majority



Roberts Thomas Alito Gorsuch Kavanaugh Barrett

Dissenting



Sotomayor Kagan Jackson



Best Deal!

Dangerous Dw

Source: US Supreme Court, Students for Fair Admissions, Inc. v. President and
Graphic: Annette Choi, CNN

BREAKING | Appeals court pauses Atlanta VC fund grant for Black women

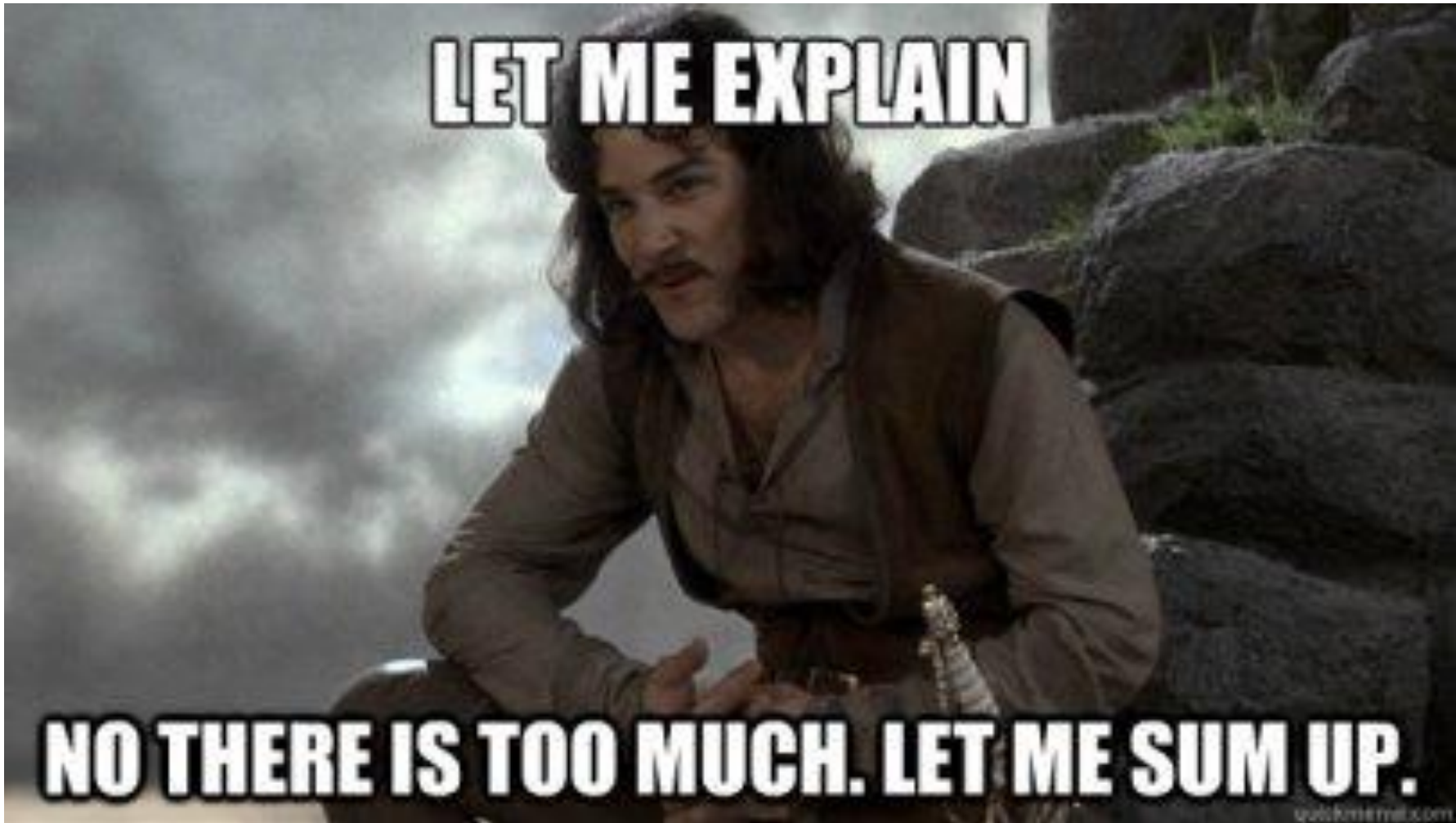
Conservative group sued the Fearless Fund, alleging racial discrimination for helping Black female founders

BUSINESS

Progressive insurance sued for 'patently unlawful' racism for offering \$25K grants only to black-owned businesses

Hello Alice named in lawsuit claiming grant program racially discriminates against non-Black business owners

What's Going On?



Anti-Discrimination General Framework

- I. US Constitution
- II. Title VI and Federal Funding
- III. Other Federal Laws
 - i. Employment
 - ii. Housing
 - iii. Public Accommodations
 - iv. Contracting
- IV. State Laws

SCOTUS

Students for Fair Admissions v Harvard & UNC

- What it held:
 - Diversity in the classroom is no longer a compelling interest
 - Race can no longer be a factor in admissions
- Who it applies to:
 - Public education institutions
 - Private education institutions that receive federal funds

SCOTUS

Students for Fair Admissions v Harvard & UNC

- It does not apply to private parties conducting activities using private funds
- Nor does it create any standards for such actors
- Nor does it address action designed to be a remedy for discrimination

Section 1981

Section 1981 generally prohibits discriminating in commercial contracting.

- Reconstruction era law
- Now being used by same actors who brought the UNC/Harvard case as a sword against racial equity programs
 - Fearless Fund
 - Law firm fellowship
 - Hello Alice

Nonprofit Concerns

To what extent can nonprofits consider race in:

- Grantmaking to nonprofits
- Scholarships
- Grants to individuals and businesses
- Programs
- DEI Advocacy & Efforts

Unsettled Law

To what extent can Section 1981 be applied to nonprofits using private funds?

- **Statutory**
 - Gift vs. Contract
 - “But for” test
 - Affirmative Action Plan
- **Constitutionally**
 - Fundamental Freedom/First Amendment
 - Commerce Clause

Section 1981 Test Cases



Section 1981 Test Cases

- Settled
 - Law firm fellowships
 - American Association of University Women
 - Fearless Fund
 - Cleveland Clinic
- Pending
 - Progressive (won but under appeal)
- Resolved
 - Hello Alice (won)

Considerations

- Stand firm or adjust
- Speech vs. action
- Leadership/advocacy
- Talk & Strategize
 - Include philanthropy and other allies





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