

Massachusetts Bar Association
Position Statement: Affirmative Action
November 16, 2023

In Massachusetts and across the country, the number of attorneys of color are staggeringly low compared with their representative share of the population. As of 2022, the ABA reports that out of 1.3 million lawyers in our country, African American lawyers constitute 5%, Latinx 5.8% and Asian American Pacific Islander (AAPI) 5.5%. Nationally, there are 331.5 million people in the US, of whom 25% or over 82 million people reflect communities of color.

Within our representation in the Commonwealth, out of 42,463 barred attorneys, African American attorneys constitute 2.1%, Latinx 1.7% and AAPI 3.8%. 80% of attorneys identify as white. With a population of 7 million people, nearly 40% of our residents are people of color.

When enrolling and hiring diverse populations, colleges, companies, law firms and other institutions have long been mindful of the principles of diversity, equity and inclusion (DEI) along with the business rationale for committing to fairness and inclusion. Among communities of color, cross-culture gaps in understanding and mistrust of professionals abound, apart from language barriers, and each reflects a challenge that could be addressed through more attorneys who are racially and culturally astute. Unfortunately, economic factors also adversely impact the number of people of color seeking to become counsel, as well as their work options. Consider these key data points – two out of three Black law students will carry over \$100,000 in education debt, almost double the size of white classmates' debt, where median White household wealth is estimated at 8-10 times that of Black households. While some Black students have families with resources and professional experience, this is not the norm, and the debt factor poses obstacles starting with applying to and attending law school through choosing jobs that are less remunerative but could positively impact an affinity community.

With numbers like these, people of color are at greater risk to go unrepresented across a myriad of family, juvenile, criminal, and civil matters. They also face greater barriers securing legal advice to bolster opportunities to purchase homes, grow businesses, and ultimately, build wealth.

It is against this backdrop that the United States Supreme Court, in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* (and in a related case involving the University of North Carolina), determined that affirmative action in higher education is unconstitutional while leaving unchecked the legacy and financial influence that have almost exclusively benefitted white students and families from privileged financial backgrounds for generations.

As the Congressional Black Caucus Foundation bluntly expressed: “this decision overturns years of precedent and undermines decades of progress made towards achieving racial equity and promoting diversity in our educational institutions....” The MBA agrees.

After the abolition of slavery, structural racism was codified with Jim Crow laws, redlining, segregated school systems, poll taxes and numerous other policies and practices to advance systemic inequality: specifically disadvantaging Black Americans, as well as other people of color, to the benefit of the economically privileged white majority. Executive Order 11246 and

the regulations stemming from Title VI of the Civil Rights Act of 1964 called for affirmative action to rectify legal segregation, race-based exclusion in employment and government programs and to extend basic human rights to those who denied equal opportunities for over 400 years. Put simply, affirmative action was implemented to respond to systemic inequities that had denied access to education, employment, health and housing, along with voting rights and equal protection under law, to millions of people in America over generations, from slavery through still unchecked race-based structures and systems that cause discrimination and bias.

Race-conscious policies and hiring practices were created to respond to clear data and history proving the need of increased equity and shared growth in American society. These policies and hiring practices have been essential to correct inequality in the legal profession and justice system. These policies and practices are guideposts and reminders of the human tendency to prejudge and make decisions outside of fairness. The protection of these basic rights is entrusted to our tripartite system of government, all under the rights established by our US Constitution, as ultimately determined by our US Supreme Court. Sadly, its Harvard decision has turned a blind eye to reality by establishing a massive disincentive to institutions that will reasonably fear legal challenges for more affirmative efforts to achieve equity.

Affirmative action works to achieve the intended goal to foster diverse environments for **all** to learn, work, and live as equals. Most critically, affirmative action is a life-sustaining and society building strategy for people who have been historically disadvantaged. We are an expansive country but one where Black, Latinx and AAPI people, people with disabilities, LGBTQ individuals and other underrepresented groups still do not have a fair shot at the American dream. This is the case despite ample proof that our diversity inspires creativity, thoughtfulness, cultural awareness and responsiveness that improve outcomes and productivity in any field of endeavor.

People of color in Massachusetts do not merely face disproportionately low representation in the legal community. They also have a disproportionately small share of our state's wealth, juxtaposed against the disproportionately large share of the state's legal issues that stem from lack of education, adequate housing and nutrition from the poverty that drives people to make risky choices. The barriers to justice for people of color in Massachusetts make it clear that where affirmative action has helped support change, it is being dismantled at a time where the road to equality remains uncertain, unsteady and a source for despair.

As leaders of our legal community, the MBA stands in support of affirmative action's principles and in opposition to its further dismantling. While the Harvard decision has eroded an important and effective tool, other important and effective tools exist. We will continue to lead by fostering greater diversity, equity, and inclusion in both our legal community and our organization's membership and leadership. We'll continue to support and collaborate with affinity bar associations across the Commonwealth in furtherance of this shared objective. And, perhaps most importantly, we'll expand our efforts to inspire young people of color and people in historically disadvantaged communities to pursue careers in the law through our robust community engagement programs. The MBA is committed to the goals of affirmative action and the pursuit of a more diverse, equitable, and inclusive legal system for generations to come.