The Entertainment Industry Gets a (Tax) Break, But AAPIs Don’t

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I. INTRODUCTION

Blinding lights, ruby red carpets, and a sea of bodies scramble for a second of your attention. Hollywood is a status symbol.1 The glitz and

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glam accompanying stardom is the standard by which society gauges a celebrity’s star power and, consequently, his or her level of success.\(^2\) Behind the scenes, Hollywood is simultaneously a complex web of finance and business considerations centered around the commercialization of a product.\(^3\) In this respect, tax credit incentives play a critical role, as they are a decisive method by which entertainment companies finance their projects.\(^4\) In effect, they serve as a powerful regulator of the entertainment industry as a whole.\(^5\)

Despite the societal impact of the United States entertainment industry, rare and few are notable opportunities provided to names representing a substantial portion of the country’s population: Asian American Pacific Islanders (“AAPIs”).\(^6\) AAPIs have participated in, contributed to, and influenced the United States entertainment industry since its onset.\(^7\) Notwithstanding the efforts devoted, AAPIs remain disproportionately underrepresented and misrepresented in Western media compared to other minority groups.\(^8\) This Comment advocates


\(^2\) Id.


for a more proactive effort to include AAPIs – one that obligates the entertainment industry to actively reform, rather than passively observe, as AAPIs fight for representation. Specifically, this Comment argues that directly including a representation provision in the primary tax credit programs offered by states may serve as a viable solution to combating the underrepresentation of AAPIs in the United States entertainment industry, both on the screen and behind the curtain. Some may propose that there is no need for employment-related assistance because the AAPI population frequently performs better on certain economic indicators, such as household income and overall employment rates. But this overlooks the reality that the entertainment industry is uniquely positioned to inform cultural perceptions, which can seriously injure the AAPI community if inaccurate.

Part II of this Comment unveils the dearth of AAPIs in the entertainment industry and introduces current tax incentives that states provide to entertainment companies. Part III analyzes such tax credit programs and eligibility requirements, considering their effectiveness in the three most influential states of the entertainment industry: California, New York, and Georgia. It also briefly discusses

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9 See Abby Budiman and Neil G. Ruiz, Key facts about Asian Americans, a diverse and growing population, PEW RSC. CTR. (Apr. 29, 2021) (highlighting that the median annual income of Asian American households were comparatively higher among all U.S. households); Kyle K. Moore, Economic Indicators: State Unemployment by Race and Ethnicity, Econ. Pol'y Inst. (Feb. 2024) https://www.epi.org/indicators/state-unemployment-race-ethnicity/ (finding the AAPI population had a lower overall unemployment rate than non-white counterparts).

10 Kiara Alfonseca, Asians and Pacific Islanders Battle ‘Invisibility’ in Media, Hollywood: Study (May 22, 2021, 6:06 AM), ABC NEWS, https://abcnews.go.com/Entertainment/asians-pacific-islanders-battle-invisibility-media-hollywood/story?id=77753812; see infra Figure 1 and Figure 2.

the analogous programs enacted in New Jersey. This section asserts that the current programs do not adequately address the issue of AAPI representation and, in fact, further isolate AAPIs because eligibility requirements center around (1) costs incurred in the state, (2) filming or production location, and (3) fees and wages. This section also contemplates the potential challenges of attempting to integrate a representation provision by looking at both historical and recent attempts to diversify, ultimately concluding that action must nevertheless be taken. Lastly, Part IV summarizes and highlights the conclusions of the prior sections.

II. BACKGROUND AND OVERVIEW

A. AAPI Presence in the Entertainment Industry

Though largely invisible, AAPIs have participated in Western media since the early 1900s. AAPI presence has increased since, but primarily as the subject of overused and largely inappropriate cliches that have been ingrained in the minds of the public. First impressions have been made, and they are debilitating.

In film and television, the repertoire consists of the model minority, forever foreigner, dragon lady or lotus flower, and nerd tropes. AAPIs have been historically underrepresented in the music sector as well. As Karen Kwak, Executive Vice President and Head of A&R at Warner Records, states, "AAPI representation was essentially non-existent... There is [however,] significantly more AAPI representation than before, albeit it is still significantly less than what it should be."

13 See infra Figure 1 and Figure 2 (showcasing eligibility requirements of costs incurred in-state, location, and fees and wages emphasized in red).
16 Id.
It was not until the latter half of the 20th century that AAPI names began breaking the mold. Bruce Lee emerged as the first successful Asian American action hero through the 1973 blockbuster Enter the Dragon.\textsuperscript{19} Then followed Fresh Off the Boat in 2015, a landmark television show starring AAPIs for the first time in over two decades.\textsuperscript{20} In 2018, 88rising and its annual Head In The Clouds Festival marked the innovative creation of a music label and festival founded by AAPIs for AAPI artists.\textsuperscript{21}

Some may claim that many other achievements deserve recognition and celebration. For example, artists like BTS and Blackpink have signed with major American labels for U.S. promotions, and Parasite was the first non-English film to win an Oscar for Best Picture in 2019.\textsuperscript{22} However, these claims overlook the second “A” in “AAPI.” American. As impressive as these feats may be, AAPIs did not accomplish them; rather, they are the successes of those born or raised outside the United States. “Asian” is not an all-encompassing term to be used in lumping together Asians and Asian Americans/Pacific Islanders. Thus, it is crucial to distinguish the unique experiences and personally claimed identities of AAPIs from the familial history or culture of the general Asian race.\textsuperscript{23}

Recent studies have taken a closer look at the extent to which AAPIs are underrepresented and misrepresented in Western film and


\textsuperscript{20} Cary Chow, Why ‘Fresh Off the Boat’ was a Game-Changer, ANDSCAPE (Nov. 12, 2019), https://andscape.com/features/why-fresh-off-the-boat-was-a-game-changer/.


television.\textsuperscript{24} A study released by the University of Southern California Annenberg School for Communication and Journalism ("USC Annenberg") analyzed the top 1,300 films from the years 2007 through 2019, finding that only forty-four or 3.38% featured an AAPI lead or co-lead.\textsuperscript{25} Even more shocking is that of these forty-four films, only six depicted girls or women as AAPI leads or co-leads, and fourteen portrayed the same male AAPI actor as the lead or co-lead (Dwayne Johnson).\textsuperscript{26} The Geena Davis Institute on Gender in Media, in collaboration with Asian-American nonprofit organizations Coalition of Asian Pacifics in Entertainment ("CAPE") and Gold House, further unpacked the nature of the roles typically portrayed by AAPIs in entertainment.\textsuperscript{27} The study analyzed all mainstream U.S. films from 2017 through 2020 that featured AAPI actors in the main title cast, finding that 72.6% of the roles played by AAPI actors were supporting character roles.\textsuperscript{28} Approximately a third of AAPI actors portrayed at least one of the twenty-six stereotypes that have ordinarily been associated with Asians in Western media (dragon lady, nerd, Asian shop owner, yakuza, geisha, tiger mom, quiet wife, school girl, model minority, exotic woman, non-English speaker, controlling parent, exotic love interest, medical professional, guru, bad drivers, submissive, weak (male), unable to handle liquor, exotic/foreign, work in tech, martial arts, poor, bejeweled, and spiritually enlightened).\textsuperscript{29} Of these, the most commonly portrayed stereotypes were the martial arts (5.5%), model minority (5%), and nerd (4.5%) tropes.\textsuperscript{30}

Historically, AAPIs have been one of the most underrepresented minorities in U.S. film and television.\textsuperscript{31} Although the demographic has experienced growth throughout the past decade, it has not been


\textsuperscript{26} Id.

\textsuperscript{27} Geena Davis Institute, supra note 15.

\textsuperscript{28} Geena Davis Institute, supra note 15, at 27.

\textsuperscript{29} Geena Davis Institute, supra note 15, at 34 (describing the tropes and stereotypes of AAPI characters in Chart 15).

\textsuperscript{30} Geena Davis Institute, supra note 15, at 34.

\textsuperscript{31} Geena Davis Institute, supra note 15, at 24.
noteworthy in comparison to other minority groups. Similar results translate to off-screen presence, as AAPIs are also prominently lacking in the industry's workforce. The USC Annenberg study found that only 6.4% of executives in leadership positions across eight U.S. major film studios and distributors were AAPIs. Additionally, a mere 3.5% of directors and 2.5% of producers credited were AAPIs. According to the U.S. Bureau of Labor Statistics, the ratio of on-screen talent (actor employment) to off-screen workers (producers and directors) is approximately 40.5%, or two in every five. These national estimates are a stark contrast to the figures reported via the USC Annenberg study, even when accounting for margin of error. These findings make clear that, in reality, AAPIs do not operate in a leadership capacity because the true statistics do not accurately reflect the estimates.

B. Tax Credit Incentives: What They Are and How They Work

The marketability of a project hinges on the balance between its cost and the amount of obtainable funding. Simplified, a project that maximizes the gap between costs and funding will be most profitable and thus, most attractive to investors and entertainment companies. From the perspective of entertainment companies, participating in state tax credit programs is an appealing way to finance their projects.

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33 Nancy Wang Yuen et al., supra note 25.

34 Nancy Wang Yuen et al., supra note 25, at 9.

35 Nancy Wang Yuen et al., supra note 25, at 14.


37 Nancy Wang Yuen et al., supra note 25, at 14.

38 Nancy Wang Yuen et al., supra note 25, at 14.

39 See Arnold, supra note 3.

40 Arnold, supra note 3.

Currently, thirty-five of fifty U.S. states offer film or television tax incentives in some form, varying in degree. The tax credit programs that states provide to entertainment companies are aimed at spurring the creation of new film or television projects and consequently, new jobs. Generally, they are “equal to a percentage of a film or television production's qualified in-state spending and/or exemptions from sales tax on qualified transactions.” In effect, these tax credit programs motivate companies to film and produce in certain states by lowering costs. In exchange for tax advantages and reduced costs, states benefit from film-induced tourism, generating more revenue for the state's economy. Notably, production of Marvel Studios' Black Panther alone generated $83.9 million for Georgia's economy through job creation, film tourism, and support for local businesses.

Average costs associated with filming and production of movies and television series have steadily increased over the years and continue to proceed at an incline. Customarily, the average budget for a feature film ranges from $100 to $150 million. Granted, many movies deviate from this range as independent films may cost less, and Hollywood or major studio films cost excessively more. According to longtime television executive and producer Warren Littlefield, “[t]he $10 million-an-episode budget used to be an extraordinary number. While that's a lot of money, it's just not considered extraordinary

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43 Id.
44 Id.
45 Id.
46 Joseph A. Soba, Beyond Aesthetics: Hollywood Studios, Financial Incentives, and Film-Induced Tourism, InMedia 9.1 at 1 http://journals.openedition.org/inmedia/2929 [https://doi.org/10.4000/inmedia.2929].
47 The Motion Picture Association of America, Production of Marvel's Black Panther Contributes $83.9 Million to the Georgia Economy (Feb. 27, 2018) (“Black Panther employed thousands of Georgians, supported hundreds of local vendors, and created opportunities for film tourism.”), https://www.motionpictures.org/press/black-panther-contributes-83-million-to-georgia-economy/.
50 Id.
anymore.” In addition, the location, scale, and required technology of the project are important variables that may further affect associated costs.

Tax credit programs have proven largely successful, as they have increased film tourism for states and have induced relocation for spin-offs and expansions of films and television series. If a particular project or studio successfully implements a tax incentive, states may be more willing to provide greater tax breaks for bigger projects with the expected hope that this, in turn, will bring in greater revenue and interest in the state. This presents appealing opportunities to both sides, as smaller entertainment companies may find an easier way of financing a project that increases with continued state tax support over time, and less populous states may improve their economy despite their size or access to resources.

C. Tax Credit Eligibility in Entertainment Hubs

1. California

Simply stated, California leads the United States entertainment industry. So much so that Los Angeles is often referred to as “the city of broken dreams”, symbolizing “the lure of success and stardom...[that is] inextricably linked with the inevitability of disappointment and defeat.” As the industry leader, California provides extensive tax credit incentives to entertainment companies seeking to minimize costs associated with their production. The most prominent of these is Film & Television Tax Credit Program 4.0 (“Program 4.0”), the fourth

51 Schneider, supra note 48.
52 How Much Does It Cost To Make A Movie, supra note 49.
55 See McNary, supra note 11; Sandberg, supra note 11.
The program’s previous extensions have proven hugely successful in generating revenue for the state and creating numerous jobs, with the office of California Governor Gavin Newsom stating, “The state’s Film & Television Tax Credit Program has been spurring tens of billions of dollars in economic output, helping create over 110,000 jobs, and bringing shows and films to California.”

Hoping to extend the initiative’s impact, California proposed a bill in 2021 that:

- For credit allocations made on or after July 1, 2023, would revise the definition of qualified motion picture... to require an applicant to provide a diversity workplan that includes goals that are broadly reflective of California’s population, as specified, and would require the [California Film] Commission to approve or reject each diversity workplan, to the extent allowed by federal and state law.

While initially tabled for later consideration, California S.B. 132 was signed into law on July 10, 2023, extending the state’s current $330 million-a-year tax incentive program for an additional five years through 2030. The bill also enacted new diversity requirements in Program 4.0, such that it:

- Would allow a qualified taxpayer to submit a diversity workplan, as defined, and would require the California Film Commission to reduce the monetary value of the motion picture credit 4.0 allocation by 4% if a qualified taxpayer

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chooses not to submit a diversity workplan or if the California Film Commission determines that the qualified taxpayer has not met or made a good-faith effort to meet the diversity goals in its diversity workplan.\(^{62}\)

2. New York

New York implements a variety of tax incentives, such as the New York State Film Tax Credit Program (for both Production and Post-Production), the Television Diversity Tax Credit Bill, and the New York Entertainment Workforce Diversity Grant.\(^{63}\) The Post-Production tax program uses an allocated amount of funds from the primary tax incentive to credit post-production costs associated with the production of original content for a qualified film that are incurred at a qualified post-production facility in New York State.\(^{64}\) The Television Diversity Tax Credit Bill, which became law in late 2019, is one of the state’s two main tax credit initiatives directed at addressing diversity in the entertainment industry.\(^{65}\) Additionally, the New York Entertainment Workforce Diversity Grant Program that was also announced in 2019 is geared explicitly toward diverse workforce development.\(^{66}\) It is similarly funded by a predetermined percentage of the state’s general


film tax credit program that is allocated for financing.\textsuperscript{67} Unlike the state’s other tax credit initiatives, the Workforce Diversity Grant Program is solely aimed at providing off-screen opportunities such as “[the] training of individuals involved in the principal creation of or editing of a film or television product.”\textsuperscript{68} Examples of such jobs include: “Grip/Electric, Carpentry, Writing, Editing, Showrunners, and Production Assistant.”\textsuperscript{69} In essence, the program is strictly geared toward physical labor opportunities.\textsuperscript{70}

Effective January 1, 2023, applicants to the New York State Film Tax Credit Program are required to submit a diversity workplan that outlines specific goals and strategies aimed at hiring a diverse workforce.\textsuperscript{71} The diversity workplan must also include an indication of “whether the applicant intends to participate in training, education, and recruitment programs that are designed to promote and encourage the training and hiring in the film and television industry of New York residents who represent the diversity of the State’s population.”\textsuperscript{72}

3. Georgia

Since the Georgia Entertainment Industry Investment Act (“GEIIA”) was first signed into effect in 2005, the state has secured its place within the top three states for motion picture and television filming and production.\textsuperscript{73} Georgia’s exponential growth as a filming and production hub can largely be attributed to the fact that it does not enforce an annual cap on tax credits, which increases its appeal to entertainment companies, especially those conducting big-budget projects.\textsuperscript{74}

\textsuperscript{67} \textit{Id.} \\
\textsuperscript{68} \textit{Id.} \\
\textsuperscript{69} \textit{Id.} \\
\textsuperscript{70} \textit{Id.} \\
\textsuperscript{71} Empire State Development, \textit{New York State Film Tax Credit Program (Production)}, https://esd.ny.gov/new-york-state-film-tax-credit-program-production (last accessed Mar. 5, 2024). \\
\textsuperscript{72} \textit{Id.} \\
4. New Jersey

Although no longer a leading player in the United States entertainment industry, New Jersey was Hollywood’s predecessor as the movie capital of the world.\textsuperscript{75} Like the industry’s current giants, New Jersey has also implemented an entertainment tax credit incentive, namely the Film and Digital Media Tax Credit Program, which encompasses films, television series, and digital media content.\textsuperscript{76}

D. Figures 1 and 2: Highlights and a Brief Explanation of Tax Credit Programs

Figure 1. Comparison of Film and Television Tax Incentives in Entertainment Hubs - California, New York, and Georgia.

<table>
<thead>
<tr>
<th>California</th>
<th>Film &amp; Television Tax Credit Program 4.0</th>
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<tbody>
<tr>
<td>New diversity provision:</td>
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<td>• “A statement of the diversity goals the motion picture will seek to achieve in terms of qualified wages paid by race, ethnicity, gender, and disability status.”\textsuperscript{77}</td>
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<tr>
<td>• Diversity workplan shall include goals broadly reflective of California’s population, in terms of race, ethnicity, gender, and disability status.\textsuperscript{78}</td>
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<tr>
<td>• Final diversity report shall calculate and provide evidence for the extent to which the applicant met diversity goals laid out in their workplan.\textsuperscript{79}</td>
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<tr>
<td>• “If the California Film Commission determines that the qualified motion picture applicant has met or made a good faith effort to meet the diversity goals in its diversity workplan, the applicant’s credit percentage...shall be increased by up to four percentage points...”\textsuperscript{80}</td>
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\textsuperscript{76} N.J. Economic Development Authority, \textit{Film and Digital Media Tax Credit Program}, https://www.njeda.com/film/ (last accessed Mar. 5, 2024).

\textsuperscript{77} S.B. 132, \textit{supra} note 62, at 39.

\textsuperscript{78} \textit{Id.} at 40.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.}
Film & Television Tax Credit Program 3.0

- Independent film: eligible for “25% of qualified expenditures...[which is capped at $10 million of the qualified expenditure budget.”\(^81\)
- Relocating television series: eligible for “25% tax credits for a maximum qualified expenditure of $100 million. Subsequent seasons, considered recurring TV series, receive 20% tax credits.”\(^82\)
- Non-independent productions: eligible for “20% tax credits...up to a maximum of $100 million of qualified expenditures.”\(^83\)
- “Qualified expenditures” are the “costs incurred and services performed during the ‘production period’ in the state of California.”\(^84\)

Additional tax credits:
- 5% for visual effects expenditures incurred in-state.\(^85\)
- 5% for filming expenditures outside the “Los Angeles Zone.”\(^86\)
- 10% for non-independent productions that hire qualified local labor; 5% for independent productions that hire qualified local labor.\(^87\)

Soundstage Filming Tax Credit Program

- “[T]ax credit in an amount equal to 20% or 25% of qualified expenditures for the production of a qualified motion picture in this state at a certified studio construction project.”\(^88\)

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\(^82\) *Id.*

\(^83\) *Id.* at 4–5.

\(^84\) *Id.* at 6.

\(^85\) *Id.* at 5.

\(^86\) *Id.* at 5–6.


Phase A requires a "third-party Certified Studio Construction Project Verification Report performed by a CPA firm."  
Phase B requires submission of a diversity workplan (no requirements specified), which may grant an additional 4% tax credit "if [applicant] meets or makes a good faith effort to meet the diversity goals in its diversity workplan."

<table>
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<tr>
<th>New York</th>
<th>New York State Film Tax Credit Program (Production)</th>
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|          | “[P]roductions which comply with requirements may be eligible for a tax credit of 30% of qualified production expenses.”  
Qualified production expenses are for “tangible property or services used or performed within New York State directly and predominantly in the production of a qualified film.”  
The credit pertains to companies that “film a substantial portion of their project in NYS.”  
Productions with minimum budgets of $500,000 may qualify for an additional 10% credit on “qualified labor expenses” incurred in enumerated counties.  
As of January 1, 2023, applicants must "file a diversity plan outlining specific goals and strategies for hiring a diverse workforce."  
Applicants must also indicate whether they intend to “participate in training, education, and recruitment programs that are designed to promote and encourage the training and hiring in the film and television industry of New York.” |

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89 Id.  
92 Id.  
93 Id.  
94 Id.  
95 Id.
residents who represent the diversity of the State’s population.”

**New York State Film Tax Credit Program (Post-Production)**

- “[P]roductions which comply with requirements may be eligible for a fully refundable tax credit of 30% of qualified post-production expenses.”
- Such expenses are those associated with the production of original content for a qualified film and are incurred at a qualified post-production facility in New York State.
- "An additional 5% credit may be available in the Post-Production Program for costs incurred in Upstate NY, outside the Metropolitan Commuter Transportation District (MCTD) … [which] includes New York City, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester counties.”

**Television Diversity Tax Credit Bill**

- Eligible projects may receive “up to 30% of the qualifying salaries and fees paid for hiring a minority or woman television writer or director who works or resides in New York.”
- “The credit is capped at $150,000 in salaries or fees per person and $50,000 for such fees or salaries for work done for a single episode of television.”

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96 Id.
98 Id.
99 Id.
101 Id.
## New York Entertainment Workforce Diversity Grant Program
- Grants range from a “minimum of $25,000 to a maximum of $500,000.”\(^{102}\)
- Grantees must provide quarterly invoices including the following documentation: “(1) a description of the proposed program, (2) number of participants, (3) number of hours in classroom and ‘on the job’ training, (4) number of trainees who went on to jobs in the film/TV industry.”\(^{103}\)

## Georgia Base Tax Credit Program
- “[F]lat tax credit of 20 percent to certified projects, based on a minimum investment of $500,000 over a single tax year on qualified expenditures in Georgia.”\(^{104}\)
- Certified projects are those that have satisfied requirements for the state’s Base Tax Credit and received a Base Certification from the Georgia Department of Economic Development.\(^{105}\)
- “Qualified expenditures include materials, services, and labor.”\(^{106}\)

## Georgia Entertainment Promotion (GEP) Uplift
- Approved projects that include “a five-second long, embedded Georgia logo in the finished & commercially distributed product beginning with the initial public screening, and a link to http://exploregeorgia.org/film on the project’s promotion website” may also receive an additional 10% tax credit.\(^{107}\)

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102 NYS Workforce Diversity Grant Program, supra note 66.
103 NYS Workforce Diversity Grant Program, supra note 66.
105 Id. at 5.
106 Id. at 4; see also List of Film Credit Tax Expenditures (2018), https://dor.georgia.gov/list-film-tax-credit-expenditures (last accessed Mar. 24, 2024).
There is no annual program cap.\textsuperscript{108}

Figure 2. Film and Television Tax Incentives in New Jersey.

**New Jersey Film Tax Credit Program**

- "Qualified production companies can receive a transferable tax credit equal to 35% for qualified cast and crew salaries."\textsuperscript{109}
- A qualified production company is one that "incur[s] at least 60% of total film production expenses in-state (exclusive of post-production costs) or incur[s] more than $1 million in qualified production expenses in single privilege period."\textsuperscript{110}
- "30% for purchases and rentals used within the 30 mile radius of Columbus Circle in NYC, and 35% for purchases, rentals and services used outside the 30 mile radius of Columbus Circle in NYC."\textsuperscript{111}
- "Production companies can receive an additional credit of either 2% or 4% percent of the qualified film production expenses depending on the goals included in a provided diversity plan; the plan is approved; and the New Jersey Economic Development Authority has verified that the applicant has met or made good faith efforts in achieving the goals stated within the diversity plan."\textsuperscript{112}
- There is an "annual cap of $100 million per fiscal year (July 1- June 30) thru June 30, 2034."\textsuperscript{113}
- "Film" in this context is understood to mean "a feature film, a television series, or a television show of 22 minutes or more in length, intended for a national audience, or a television series or a television show of 22 minutes or more in length intended for a national or regional audience..."\textsuperscript{114}


\textsuperscript{109} N.J. Motion Picture & Television Comm’n, New Jersey Tax Credit for Filmmakers, 1, (last accessed Apr. 5, 2024); see also N.J., Econ. Dev. Auth., Film and Digital Media Tax Credit Program, https://www.njeda.com/film/ (last accessed Mar. 7, 2024).

\textsuperscript{110} Id.

\textsuperscript{111} Id. (emphasis omitted).

\textsuperscript{112} Id. at 2.

\textsuperscript{113} Id.

New Jersey Digital Media Tax Credit

- Must incur at least $2 million of total digital media production expenses “for services performed and goods purchased through vendors authorized to do business in New Jersey, and at least 50 percent of the qualified digital media content production expenses must be for wages and salaries paid to full-time employees in New Jersey.”  

- Qualification for a 2% additional diversity credit based on: diversity plan, statement of intent to prioritize recruitment and hiring of minority individuals, strategies for execution of the plan, good faith efforts, and reports.  

Figures 1 and 2 consolidate tax credit incentives across the country’s three most influential entertainment media states (California, New York, Georgia) and New Jersey. Specifically, Figure 1 focuses on the primary requirements of such programs, highlighted in red. Comparison of the red text demonstrates that emphasis is placed almost entirely on costs incurred in the state or on filming location. With regard to specific provisions governing diversity, the states vary in consistency of enforcement and degree. Georgia contains no diversity requirement at all, while California has just recently enacted diversity requirements. Additionally, New York considers diversity primarily for purposes of off-screen opportunities, and for production, solely in the context of the hiring process. Although New Jersey does have a program that provides additional credit if a production company states goals for diversity and demonstrates success or good faith efforts to achieve them, it does not explicitly clarify whether its use of the term “diversity workforce” includes on-screen talent. Overall, the most influential states currently providing tax incentives barely scratch the

116 Id.
117 Figure 1.
118 Figure 1, Georgia; Figure 1, California Film & Television Tax Credit Program 4.0.
119 Figure 1, New York Entertainment Workforce Diversity Grant Program and New York State Film Tax Credit Program (Production).
120 Figure 2, Film and Television Tax Incentives in New Jersey.
surface of diversity, and even when their approach seems effective, these polices are often reframed as an optional position.

III. ANALYSIS

A. Why The Present Isn’t Enough for the Future

Despite the largest entertainment markets having multiple tax credit programs intended to benefit applicants, they leave much to be desired. The language of the programs’ requirements suggests that states determine eligibility on three primary factors: (1) in-state expenditures, (2) filming or production location, and (3) fees and wages paid. Generally, states do not implement diversity as a mandatory eligibility requirement but rather as an option to receive additional funding.

California and New York are pioneers in diversity-based tax credit programs for the entertainment industry. As mentioned above, California has recently integrated a diversity initiative by including a standalone representation requirement in the state’s largest ongoing tax credit program. Similarly, New York has created an entirely distinct tax credit program specifically for behind-the-scenes labor in efforts to increase diversity. Although the states may propose good intentions, the current language of their tax credit programs raises two primary concerns: (1) superficiality and (2) lack of supervision.

First, the incentives of both California and New York emphasize aspirations, such as the need for a workplan that will address diversity, expected goals of doing so, or efforts to hire minority individuals. In so doing, they accentuate an extremely superficial standard that does not consider the aftermath of hiring processes. For example, California’s Program 4.0 explicitly requires an applicant to submit a diversity

122 See Figure 1.
123 Id.
124 See Cal. Film Comm’n, https://film.ca.gov/tax-credit/program-1-0-resources/ (last accessed Mar. 5, 2024); S. B. 878 Chapter 456 (Cal. 2018) (proposing that a diversity workplan requirement reflective of California’s overall population be included in ongoing Film & Television Tax Credit Program 3.0).
125 Id.
126 NYS Workforce Diversity Grant Program, supra note 66.
workplan that includes a statement of goals the applicant "will seek to achieve in terms in relation to race, ethnicity, and gender of employees and contractors."\textsuperscript{128} New York’s Workforce Diversity Grant Program has enacted similar legislation, requiring a diversity workplan and quarterly reports with the following information: “a description of the proposed program, number of participants, number of hours in classroom and ‘on the job’ training, [and] number of trainees who went on to jobs in the film/TV industry.”\textsuperscript{129} In the New York State Film Tax Credit Program for Production, the emphasis is on “promot[ing] and encourag[ing] the training and hiring in the film and television industry of New York residents.”\textsuperscript{130} This language permits applicants to satisfy the diversity requirement solely by stating their hopes or intended goals for diversity; it does not suggest remedies if these aspirations are not met.\textsuperscript{131} Instead of developing a consistent standard to be implemented in the industry’s culture, the language insinuates a trial-and-error method that states can opt out of at the expense of receiving fewer tax credits, which ultimately waives responsibility.

This directly impacts the second issue of supervision. As the current language of diversity requirements in tax programs is focused almost entirely on the goals that entertainment companies hope to achieve,\textsuperscript{132} it lacks transparency regarding how such efforts are to be measured or tracked. Entertainment companies submit a workplan to the state, which is either rejected or approved.\textsuperscript{133} If approved, the companies are essentially only required to submit reports to update the state government on the status of the program and its effectiveness.\textsuperscript{134} Unsurprisingly, this entirely ignores the issues of human error and bad faith. There is no realistic way for states to monitor whether the reports of all granted tax credits are accurate or truthful, nor are there any suggested protocols for remedying these potential problems. This, in turn, implies that any arising issues would be dealt with by revoking the

\begin{thebibliography}{99}
\bibitem{128} S.B. 132, 2023 Leg., Reg. Sess. (Cal. 2023) [enacted].
\bibitem{129} \textit{NYS Workforce Diversity Grant Program}, supra note 66; see also \textit{Empire State Dev. and Governor’s Off. of Motion Picture & Television Dev.}, Application for The New York Entertainment Workforce Diversity Grant, https://formrouter.apps.esd.ny.gov/pdfviewer/web/viewer.html?file=/film@ESD/Diversity_Job_Training_Fund_Application.pdf&filefields=/film@ESD/Diversity_Job_Training_Fund_Application.txt (last accessed Feb. 27, 2024).
\bibitem{130} \textit{New York State Film Tax Credit Program (Production)}, supra note 91, at 5.
\bibitem{131} \textit{NYS Workforce Diversity Grant Program}, supra note 66.
\bibitem{132} \textit{NYS Workforce Diversity Grant Program}, supra note 66.
\bibitem{133} \textit{NYS Workforce Diversity Grant Program}, supra note 66.
\bibitem{134} \textit{NYS Workforce Diversity Grant Program}, supra note 66.
\end{thebibliography}
tax incentives entirely, without doing anything more to address the remaining questions of diversity.

Although these laws’ efficacy typically manifests through off-screen jobs, continuing this practice does not sufficiently address the notion of perceptible harm. For example, if an entire film production team is comprised of AAPIs but everyone on-screen is white, this further adds to cultural injury and enables misperception. This is particularly the case with New York’s diversity tax incentives. While efforts to diversify are commendable, a tax-based initiative that overlooks AAPIs on-screen will be unlikely to translate into a visible perceived increase in overall AAPI representation in the entertainment industry. Further, the exponential increase in violence against AAPIs during the COVID-19 pandemic demonstrates such consequences. A survey conducted by Leading Asian Americans to Unite for Change (“LAAUNCH”) and The Asian American Foundation (“TAAF”) found that nearly a third of Americans were unaware of the prevalence of anti-Asian violence despite almost a 340% increase in attacks aimed at Asian-Americans in 2021 alone. The same survey also found that one in five Americans believed that Asian Americans were at least partly responsible for the pandemic. As perception is often directly tied to belief, inaccurate representations about AAPI presence in the entertainment industry leave society both uneducated and misinformed.

Tax incentive programs must implement a bold and progressive view that adequately considers the current and future demographics of AAPIs. There are currently over twenty-two million AAPIs in the United States, accounting for approximately 6.7 percent of the entire United States population. By 2060, this number is estimated to be over forty-six million people. With this projected increase, it is crucial that states


136 Id.

137 Id.


139 Budiman and Ruiz, supra note 138.
begin to address the issue of AAPI representation in the industry now and continue to maintain a corresponding proportion in the future.

Furthermore, a tax credit provision grounded in representation and aimed at diversity must be soundly recognized as the entertainment industry transitions and evolves. Post-COVID, the entertainment industry as a whole is undergoing a revival. Amid this re-emergence, streaming platforms have continued to rise as the largest sector of the industry with “consumer attitude shifting rapidly to online content consumption.” As demand for streaming and on-demand content continues to rise, so does the pool of an international audience. For entertainment companies to expand globally, it becomes clear that efforts must be made to incorporate more diverse representation within the industry to effectively translate into perceivable on-screen presence.

First steps have been taken, as a new joint study between Netflix and USC Annenberg revealed a substantial increase in underrepresented leads and co-leads in the streaming platform’s scripted content. But while the study demonstrates an overall increase across multiple racial groups, AAPIs still hover at the lower end of the range, with Asians and Native Hawaiian/Pacific Islanders separated into two distinct groups and comprising 8.9% and 1.4% of leads and co-leads, respectively. Distribution within the main cast


143 Id. at 13.
was even lower, with Asians comprising 6.9% and Native Hawaiian/Pacific Islanders 0.8% across films and television series.¹⁴⁴

B. Onward and Upward

To set a more uniform standard and increase chances of stabilized success, other states should actively pursue the same purpose but through a different approach. As discussed, California’s S.B. 132 now mandates that eligible applicants submit a “diversity work plan [that] include[s] goals that are broadly reflective of California’s population, in terms of race, ethnicity, gender, and disability status.”¹⁴⁵ Similarly, states should require direct representation in the primary programs already offered to applicants. Rather than focusing on mere plans, strategies, or goals, the governing standard should be defined more substantively through elements such as thresholds. For example, states could enforce stricter measures by requiring a minimum percentage of AAPI employees assigned to work on projects, or by requiring a minimum number of accepted projects to employ AAPI individuals. While these thresholds do not suggest dramatic increases that unrealistically overshadow current statistics, it would nevertheless be a step in the right direction to gain necessary momentum. In addition to preventing entertainment companies from using diversity initiatives as an option or a trial run, incorporating such a provision will instill a sense of responsibility and generate maintained efforts to continue.

C. The Challenges of Representation Requirements in Tax Incentives

Including a standalone representation provision in state tax credit programs may raise questions of feasibility and applicability, particularly with regard to (1) equal protection¹⁴⁶ and (2) the use of state resources and relevant impact on employment.¹⁴⁷ This section

¹⁴⁴ Id. at 15.
argues that such a provision is fundamental to motivate and drive decision-makers in the entertainment industry to proactively advocate for a more inclusive space. Additionally, such a provision may be justified to remedy identified discrimination against the AAPI community that is both historically grounded and prevalent today.148

1. Equal Protection Constitutionality

The Equal Protection Clause of the Fourteenth Amendment mandates that “No state shall... deny to any person within its jurisdiction the equal protection of the laws.”149 Throughout the nation’s history, the Supreme Court of the United States (“SCOTUS”) has recognized that racial classification and discrimination often arise in tandem with the concept of equal protection.150 Thus, SCOTUS has previously considered affirmative action claims in both higher education and employment contexts, utilizing strict scrutiny to determine whether there was a compelling interest for racial classifications and whether the implemented means were narrowly tailored to achieve such goals.151

In Regents of University of California v. Bakke, the Court held that the admissions process at the University of California Davis violated equal protection rights because it established a quota system to ensure seats for applicants of minority groups.152 In 2003, Grutter v. Bollinger analyzed and upheld a similar challenge to the University of Michigan’s law school admission policy which sought to enroll a “critical mass” of students from historically discriminated-against minority groups, finding that diversity was a compelling interest for higher education institutions.153 These cases set forth a framework for a race-based classification analysis, which has been continuously used in similar cases involving race-conscious decision-making. While race-based classifications are analyzed under strict scrutiny and thus often found unconstitutional, they may be justified by an effort to remedy past
discrimination if the means of achieving diversity are specifically and narrowly framed to include individual or holistic consideration.\(^{154}\) Twenty years later, in June of 2023, SCOTUS revisited affirmative action arguments in higher education admissions to dictate law that is both applicable and sensical today.\(^{155}\) In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("SFFA"), SCOTUS consolidated two separate cases from Harvard College and the University of North Carolina to assess whether the institutions’ admissions policies were constitutional under the Equal Protection Clause of the Fourteenth Amendment.\(^{156}\) In a majority opinion that overturned decades of precedent, SCOTUS invalidated the admissions policies of both institutions, holding that the institutions’ asserted compelling interests for race-based admissions policies were insufficient to survive strict scrutiny for equal protection violation.\(^{157}\) Notably, the Court emphasized that the schools improperly used race as a stereotype or negative because the point of the admissions programs was that there was "an inherent benefit in race *qua* race – in race for race’s sake."\(^{158}\) The constitutionality of a representation provision in a state tax credit program may likewise face challenges of race-conscious decision-making. Specifically, like race-conscious admissions policies were struck down, race-conscious representation requirements in state tax credit incentive programs may similarly be deemed inapplicable or improper.\(^{159}\)

This Comment counterargues by narrowly interpreting representation and by analyzing current implementation of diversity initiatives. First, diversifying the entertainment industry must be understood as pursuing *balanced* diversity to remedy past identified discrimination and to accurately reflect the overall makeup of the United States demographic. Although diversity can be explained by an overall increase in the presence of historically disadvantaged groups, it can also be defined as the need to maintain a proportionate balance between these groups. In the past, African Americans, Hispanics, and AAPIs have been the groups most underrepresented and discriminated

\(^{154}\) See *Bakke*, 438 U.S. at 315–18; *Grutter*, 539 U.S. at 306.


\(^{156}\)*Id.*

\(^{157}\)*Id.* at 213–14.

\(^{158}\)*Id.* at 220.

\(^{159}\) *Supra* note 155.
But while the former two have found increased success in recent years, AAPIs comparatively remain the least represented demographic in the entertainment sector. To ensure a true reflection of the United States population, it follows that it is entirely appropriate to prioritize the least represented demographic. Representation must be narrowly interpreted in this manner to obligate entertainment companies to address representation of the national demographic. Simplified, focus must be placed on improving the imbalance of demographics rather than acknowledging individual race categorization.

Moreover, Chief Justice Roberts concluded the SFFA opinion by stating that ". . . nothing in [the] opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." Thus, while higher-level institutions may no longer consider race in making admissions decisions, they may still take into account how race affected an applicant’s life and experiences if such a discussion is concretely tied to the applicant’s unique character or ability to contribute to the institution. This caveat may parallel the implications of representation provisions in tax incentives by highlighting that while such requirements may not be conditioned explicitly on race, they may leave room for a discussion of how race has played a role in the lives and experiences of AAPIs in the entertainment industry.

In the realm of public employment, Wygant v. Jackson Board of Education was the first opinion to analyze preferential treatment, considering a collective bargaining agreement that provided for layoffs based on seniority while simultaneously limiting the number of layoffs to certain demographic groups.


162 Supra note 155 at 230.

163 Supra note 155 at 231.
minority employees who could be let go.⁶⁴ As a result of this system, non-minority teachers lost their jobs despite having been employed for longer than their minority colleagues, who were retained.⁶⁵ The Court invalidated the minority preference in teacher layoffs, finding that the alleged goal of providing “minority role models” to overcome societal discrimination was not a compelling interest sufficient to warrant race-conscious decisions in public employment.⁶⁶ It may similarly be argued that tax incentive programs, which are regulated and provided by state governments, should be met with the same fate.⁶⁷ However, tax incentive programs are distinguishable because they are not within the sphere of public employment. Public employment relates to an individual “employed by a government agency and includes the employees of a municipal, county, state, or federal agency or state college or university.”⁶⁸ Tax incentives do not deal with issues of employment. While they may be provided by government agencies, they do not require employment by any form of government to be granted and the applicants, regardless of whether they receive the incentives, are primarily private filming and production companies.⁶⁹

Further, it cannot be ignored that two of the three states with the largest industry presence in the country already include a representation requirement to some extent.⁷⁰ One can argue that the existence and implementation of such demonstrates that a representation provision is constitutional because it has become law in influential states within the industry and has been successfully maintained since inception.⁷¹

To best address this issue, states should directly tie tax credits to the degree an applicant proportionately employs both on-screen talent and off-screen workers. While such an approach may be invalidated under SCOTUS’ recent affirmative action opinion, this issue is crucial enough that the industry must at least make a good faith attempt to implement it in the present. Moving forward with the understanding

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⁶⁵ Id. at 272.
⁶⁶ Id. at 275–77.
⁶⁷ Id. at 278.
⁶⁹ See supra Figure 1 and Figure 2.
⁷⁰ Id.
that such an approach may be invalidated will, at the very least, create opportunities for underrepresented groups for some time. Data on representation has emerged fairly recently, especially in the context of AAPI presence in the entertainment industry. Though this may seem to suggest that there is still not enough cumulative data to fully grasp the extent of disproportionality, it must not be understated because society has seen notable progress even in the short time it has had access to this data.\footnote{\textsuperscript{172} WANG YUEN ET AL., \textit{supra} note 25, at 19–20.} This rather implies that substantive change does not necessarily demand an extended period and that it is indeed possible. Even if there is the slightest window, the industry must be bold and strive to correct its prior wrongs.

While this Comment aims to explore the potential equal protection constitutionality challenges like those raised in higher education and public employment cases, it does not undertake to definitively settle this issue.\footnote{\textsuperscript{173} Regents of University of California v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).}  

2. Ineffective Use of State Resources and No Meaningful Increase in Employment

Critics have also maintained that the billions of dollars annually set aside for entertainment tax incentives are a misdirected exhaustion of state resources which ultimately results in unnoteworthy changes to employment statistics.\footnote{\textsuperscript{174} Supra note 147.} David Friedfel argues that New York’s tax credit program, while generous, is “a very expensive incentive to provide at a time when New York State is withholding payments to school districts, nonprofits, and others.”\footnote{\textsuperscript{175} David Friedfel, \textit{Live From New York, It’s Excessive Tax Incentives!}, CITIZENS BUDGET COMM’N BLOG at 4 (Oct. 28, 2020), https://cbcny.org/sites/default/files/media/files/CBCBLOG_NYS-Film-Tax_10282020_0.pdf (last accessed Mar. 20, 2023).} However, Friedfel’s analysis did not seek to rule out the use of tax credit programs in their entirety, as he claims that these issues could be resolved by adopting various forms of budget changes.\footnote{\textsuperscript{176} Id. at 3–4.} This leaves room for interpretation that tax credit programs are not in and of themselves problematic if properly regulated to reflect the priorities of a particular community.\footnote{\textsuperscript{177} Id.} Furthermore, the primary reasoning behind including a representation

\footnote{\textsuperscript{172} WANG YUEN ET AL., \textit{supra} note 25, at 19–20.}  
\footnote{\textsuperscript{174} Supra note 147.}  
\footnote{\textsuperscript{175} David Friedfel, \textit{Live From New York, It’s Excessive Tax Incentives!}, CITIZENS BUDGET COMM’N BLOG at 4 (Oct. 28, 2020), https://cbcny.org/sites/default/files/media/files/CBCBLOG_NYS-Film-Tax_10282020_0.pdf (last accessed Mar. 20, 2023).}  
\footnote{\textsuperscript{176} Id. at 3–4.}  
\footnote{\textsuperscript{177} Id.}
provision in tax incentives is to foster change in perception and cultural association through employment in a particularly visible and influential industry rather than to increase overall employment rates.

Another study published by Michael Thom argues that “expenditures in New York had no statistically significant relationship with employment,” and that Georgia displays results that “indicate that employment there was inelastic to tax expenditures.” However, as the Motion Picture Association (“MPA”) pointed out in opposition, the results of the study seem flawed in that they do not reflect an accurate metric because they were obtained by measuring “year-on-year percentage change rather than real employment figures.” The MPA further noted that Thom’s methodology suggested that an increase in employment was the most important factor and ignored the relevance of maintaining production and employment. This counterargument effectively summarizes why the findings based on a year-to-year percentage change instead of real employment figures must be dismissed: such a metric produces changes that are over-emphasized in small states. In essence, it falsely equates the analysis of small states to that of larger ones.

IV. Conclusion

AAsPs, despite their consistent efforts to participate in the American entertainment industry both on and off screen, have not been provided the same opportunities offered to their white or fellow minority counterparts. Fortunately, this has improved with time. However, this outcome could be further enhanced and even expedited by proactively utilizing a means that is largely responsible for financing and expanding the entertainment industry. Tax credit programs fulfill this role, as they serve to relieve the financial burden placed on

180 Id.
181 Id.
182 Id.
183 Supra note 32.
184 Supra note 32.
entertainment companies that generate products for a commercialized market\textsuperscript{185} in exchange for attention and generated revenue toward states.\textsuperscript{186} As is, eligibility requirements focusing on costs incurred in-state, filming or production location, and fees or wages paid do not efficiently or uniformly address the dearth of AAPIs in the entertainment industry.\textsuperscript{187} Rather than directing sole attention to these elements or enacting language that prioritizes hiring processes, states would be better suited to correct this issue by incorporating a standalone representation provision in the main text of their primary tax credit programs, obligating entertainment companies to address and remedy the lack of AAPIs in the industry to reap the benefits of their tax incentives. There is a longstanding need to acknowledge the solidarity and fortitude of the AAPI community and respect its contributions to one of the United States’ most defining industries, and now is the time to execute.

\textsuperscript{185} Arnold, supra note 3.


\textsuperscript{187} See supra Figure 1.