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Ban on Affirmative Action: Implications, Risks, and Strategies for the Charitable Sector

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How could the Supreme Court ruling on college admissions extend past education to impact nonprofits' race-based programs?

A pair of recent U.S. Supreme Court cases regarding college admissions standards has potentially wide-ranging implications for all nonprofit organizations that use race as a consideration in their programs. In *Students for Fair Admissions Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions Inc. v. University of North Carolina*, a six-member majority of the Supreme Court held that the use of race as an independent factor in college admissions policies violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The University of North Carolina, as a public institution, is subject to the Fourteenth Amendment, which prohibits state governments from discriminating on the basis of race, except to further a compelling government interest. The Supreme Court has further interpreted it to apply to the federal government. Harvard, as a private university that receives federal funding, is subject to Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race "under any program or activity receiving Federal financial assistance." The majority opinion in the case takes the view that the standards under the Fourteenth Amendment and Title VI are "coextensive," meaning that the same analysis applies to both public institutions and private institutions receiving federal funding, and found that both universities fa

demonstrate that their consideration of race was necessary to further a compelling government interest.

While the decision bans race-based affirmative action in higher education, the opinion notes that it does not "prohibit[ ] universities from considering an applicant's discussion of how race affected his or her life," through "discrimination, inspiration, or otherwise." At the same time, it warns that using "application essays or other means" as a proxy for considering race as an independent factor will not enable a university to do indirectly what it cannot legally do directly. Rather, "the student must be treated based on his or her experiences as an individual—not on the basis of race."

Potential for Lawsuits Alleging Illegal Discrimination in Race-Based Charitable Programs

The *Students for Fair Admissions* cases address only the use of race as a stand-alone factor in college admissions policies. But colleges and universities are hardly the only organizations in the nonprofit sector to use race as a factor in decision-making. Charitable nonprofits and social welfare organizations often consider race in decisions regarding grantmaking, the delivery of programs and services, program-related investments, and diversity, equity, and inclusion (DEI) initiatives more broadly. (For a discussion of the impact of the decision in the employment context, see this previous advisory). Thus, while the *Students for Fair Admissions* cases may have immediate consequences only for colleges and universities, the cases raise questions and create legal uncertainty for all nonprofits with charitable programs that take race into account.

Notably, the *Students for Fair Admissions* lawsuits were brought by a legal advocacy group formed for the purpose of challenging the use of race in admissions practices. It seems likely that the success of those actions will lead to more lawsuits by similar advocacy groups, alleging discrimination on the basis of race against nonprofit organizations in areas that go well beyond the higher education sphere. Regardless of whether any such lawsuits succeed, the expense and distraction of defending against them could deplete charitable assets and exhaust nonprofit leaders. Organizations should take steps now to evaluate their risk profiles and consider strategies to protect

themselves in the event of any legal actions that allege discrimination on the basis of race.

The suit against Harvard asserted discrimination under **Title VI of the Civil Rights Act of 1964**. Programs that receive "Federal financial assistance" are subject to Title VI, and organizations that receive or received such funding (including federal grants, use of federal property, and Paycheck Protection Program loans) may be vulnerable to suit if they use race as an independent factor in their decision-making. Such organizations should identify the situations in which they explicitly consider race, and consider whether the organization can utilize alternative factors that may still effectively target or reach the charitable class that the organization serves, such as socioeconomic criteria, experience working with historically-underserved communities, the use of English as a second language, or immigration status.

It is not clear whether tax benefits such as tax exemption, tax deductions, and tax credits constitute federal financial assistance for purposes of Title VI. Such benefits do not appear in either the statutory or regulatory definitions of the term, and most courts that have considered the question have found that such benefits are not federal financial assistance.[1] But there is no Supreme Court decision on point, and at least two lower court decisions have found that tax benefits constitute federal financial assistance in certain instances.[2] So while the current case law suggests that mere tax-exempt status should not bring an organization within the scope of Title VI, a more sweeping interpretation of the definition of federal financial assistance could subject all tax-exempt organizations to Title VI claims.

Risks and Strategies for Grantmakers

Organizations that are not covered by Title VI but which use race as a factor in their decision-making may also be targeted by legal advocacy groups under statutes such as **Section 1981 of the Civil Rights Act of 1886**, which prohibits discrimination based on race in the making of contracts. One such advocacy group, Do No Harm, has recently brought two suits alleging that certain fellowship programs, one created to address underrepresentation of minority groups in leadership positions in the pharmaceutical industry and another in health journalism, violate Section 1981.[3]

Grantmakers that engage in race-conscious grantmaking should be alert to the potential for assertions that their grant agreements are contracts, and are therefore covered by Section 1981. Such grantmakers should consider reviewing their grantmaking practices to mitigate the risk of a lawsuit. For example, a grantmaker that makes charitable grants as outright gifts for which the funder receives nothing in return, rather than using grant agreements under which each party receives something in exchange, may have little vulnerability regarding its grantmaking program under Section 1981. On the other hand, a grantmaker that requires its grantees to enter into detailed grant agreements that include highly specific deliverables, as well as indemnification, insurance, and other provisions common in commercial contractual arrangements, may give advocacy groups ammunition to assert that the funder's grants are made pursuant to contracts within the meaning of Section 1981, giving rise to a claim that the selection process illegally discriminates on the basis of race.

This distinction raises the question of whether any funder requirements in a grant agreement will cause it to be treated as a contract. There is fortunately a strong position that certain common elements of charitable grant agreements will not convert them into contracts. Funders have, for centuries, placed restrictions on the use and spending of gift funds (such as restrictions requiring use for a specific purpose and endowment restrictions) and sought reporting from charitable recipients to confirm compliance with those restrictions. Such requirements have not fundamentally altered the nature of the transfers as gifts. Indeed, the binding nature of such donor restrictions is a core principle of the traditional law of charity. State law fiduciary obligations require that charities ensure that charitable assets be used for charitable purposes. Additionally, under the federal tax law, the "expenditure responsibility" rules have, for over fifty years, required private foundations to enter into written agreements for grants to certain types of grantees. The agreements must contain specific covenants regarding the grantee's use of the funds and its obligations to report to the funder on the manner in which it spends the grant funds; a foundation that fails to enter into such an agreement is subject to penalty excise taxes. It would be inconsistent with historic concepts of charitable gifts, and with legal obligations of charitable funders to ensure that their funds are used for charitable purposes, to treat traditional charitable restrictions and reporting obligations as creating a "contract."

Accordingly, paring grant agreements back to the essential terms necessary to fulfill the funder's charitable purposes and legal obligations may put grantmakers in the best position to defend against a Section 1981 claim. In appropriate situations, such as when giving general support grants to Section 501(c)(3) public charities, funders may wish to explore eliminating grant agreements altogether. This approach would certainly reinforce the argument that the contribution is not a contract, and also offer the added benefit of aligning with the "trust-based philanthropy" movement and its goals of advancing equity and shifting power to grantees. *See* Legal Considerations for Trust-Based Philanthropy — Trust-Based Philanthropy (trustbasedphilanthropy.org).

Defense for Charitable Funders under the First Amendment

Grantmakers may also be able to defeat a claim that alleges discrimination on the basis of race by invoking the First Amendment's protections of freedom of speech and freedom of association. The Supreme Court has interpreted the First Amendment to prohibit both federal and state laws from abridging freedom of speech, and has further interpreted "speech" to encompass not only the spoken and written word, but also "expressive conduct." For example, in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Supreme Court held that a Massachusetts law could not force a veterans group to include LGBTQ groups in a parade, because the group's decision as to which organizations could participate in the parade was expressive conduct protected by the First Amendment.

Protected expressive conduct may, for a charitable funder, include how and to whom it gives away its money. For example, in a case brought against the AmazonSmile Foundation, the foundation excluded certain charities from receiving charitable funds under the AmazonSmile program because the Southern Poverty Law Center had identified the charities as "hate groups." One such group, Coral Ridge Ministries Media ("Coral Ridge"), was labeled a hate group on the basis of its anti-LGBTQ positions, which Coral Ridge asserted had religious underpinnings. Coral Ridge claimed that its exclusion from the AmazonSmile program violated **Title II of the Civil Rights Act of 1964**, which prohibits discrimination on the basis of race, color, religion, or national origin in places of public accommodation. The trial court rejected Coral Ridge's claim, and the U.S. Court of Appeals for the Eleventh Circuit affirmed, on the

basis that Coral Ridge's interpretation of Title II violated the First Amendment because it would alter Amazon's expression by forcing it to donate to an organization that it did not wish to promote.[4]

The Coral Ridge suit alleged that the funding program discriminated on the basis of religion, but the court's reasoning that anti-discrimination statutes cannot force a funder to give money to organizations that it does not agree with applies equally to claims of discrimination on the basis of race. Funders should consider how best to document that their grant programs express their core values, in order to assert a robust defense on this basis.

The Road Ahead

By prohibiting consideration of race as an independent factor in college admissions, the decision in the *Students for Fair Admissions* cases has opened the door for challenges to race-based decision-making by nonprofit organizations more broadly. Every organization that uses race as a factor in its determinations should be mindful of the potential for legal challenges, evaluate its exposure, and develop a strategy for the future.

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[1] *See* "Title VI Legal Manual" at p. 8, Civil Rights Division, Department of Justice; *see*, e.g., *Paralyzed Veterans of Am. v. Civil Aeronautics Bd.*, 752 F.2d 694, 708–09 (D.C. Cir. 1985); *Johnny's Icehouse, Inca v. Amateur Hockey Ass'n of Ill., Inc.*, 134 F. Supp. 2d 965, 971–72 (N.D. Ill. 2001); *Chaplin v. Consol. Edison Co.*, 628 F. Supp. 143, 145–46 (S.D.N.Y. 1986).

[2] *See McGlotten v. Connally*, 338 F. Supp. 448, 462 (D.D.C. 1972) (provision of a tax deduction for charitable contributions is a grant of federal financial assistance within the scope of the 1964 Civil Rights Act); *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988), aff'd, 882 F.2d 621 (2d Cir. 1989) (jurisdiction under Title VI and Title IX because "the League receives federal assistance indirectly through its tax exemption and directly through grants from the Department of Energy and the EPA.").

[3] *Do No Harm v. Pfizer Inc.*, No. 1:22-CV-07908 (JLR), 2022 WL 17740157 (S.D.N.Y. Dec. 16, 2022) (a ruling against Do No Harm solely on procedural grounds is currently on appeal); *Do No Harm v. Health Affairs et al.* Docket No. 1:22-cv-02670 (D.D.C. Sep 06, 2022) (currently in pre-trial stage).

[4] *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021).
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