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GOVERNMENT AND REGULATION

## Supreme Court Could Set Back Philanthropy's Racial-Diversity Efforts With Affirmative-Action Ruling

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Affirmative-action advocates rally outside the U.S. Supreme Court as justices heard oral arguments on two cases on whether colleges

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As the Supreme Court deliberates two major cases challenging affirmative action at colleges, foundations and charities are getting ready for a widespread ripple effect that could transform their work to advance racial diversity. Legal experts say the odds are that the justices will knock down at least part of the system that for decades has enabled colleges to consider race in admissions.

At issue are two lawsuits by Students for Fair Admissions, which [sued](#) Harvard and the University of North Carolina.

To help nonprofits and foundations better understand the impact of the case, the William and Flora Hewlett Foundation commissioned a law firm to study how the ruling might affect [nonprofits' ability](#) to access federal funds, how they could achieve a diverse work force, and how philanthropy could still make grants that aim to benefit people of a specific race no matter what the outcome.

Hewlett's president, Larry Kramer, said regardless of the scope of the court's ruling, the foundation would stay committed to racial justice. He said Hewlett sought a comprehensive analysis because nonprofits had not sufficiently prepared for the outcome of the case.

"Considering the potential risks beyond higher education for a much wider swath of work in our sector, we wanted to start a conversation, with plans for a follow-up on possible responses once we see the actual opinions," he wrote in a statement.

*(The Hewlett Foundation is a [financial supporter](#) of the Chronicle.)*

Few experts expect the court to leave the current system in place. The court "is poised to redefine what it means to engage in racial discrimination," said the Hewlett-financed review, written by the law firm Munger, Tolles & Olson. "That holding will likely be transposed to a number of other federal antidiscrimination statutes that apply to nonprofits and charitable actors."

The memo predicted that the court, which is likely to act before it adjourns for its summer break, would take one of the following approaches in its ruling:

**Declare that considering race as a "plus factor" in a college application is forbidden under the Civil Rights Act of 1964.**

Still, it might allow race-neutral measures that have the broad goal of increasing diversity of college student bodies.

**Forbid race-neutral approaches that are in essence a proxy for race.** For instance, colleges could favor applicants based on their economic status but might run afoul of the ruling if the decisions are made based on an applicant's ZIP code if they live in an area that is predominately Black.

**Bar all attempts to increase racial diversity.** The court could say any such efforts are illegal under the Constitution.

In any of those scenarios, the law firm said, nonprofits could put their tax-exempt status at risk by advancing diversity efforts.

The lawyers note that the ruling would enable the Internal Revenue Service to terminate a group's charity status if its efforts to support diversity were viewed as discriminatory. That would mean a nonprofit couldn't, for example, make a grant specifically to benefit people based on their race and keep its tax-exempt status.

The law firm said it was unlikely the IRS would take that kind of position as long as President Biden is in office, but things could change when the White House changes hands.

## Foundations' Legal Arguments

Gene Takagi, who is a principal at NEO Law Group, in San Francisco, says if the court makes any efforts to limit or ban affirmative action, its ruling could have a "chilling effect" on [foundation efforts](#) to specifically support [Black-led organizations](#), a move that has grown in popularity since the protests over the police murder of George Floyd.

Takagi thinks foundations would be in a strong position to challenge any lawsuits. He says they could argue that grants are not the same as contracts and therefore don't have to follow federal laws on discrimination.

However, Takagi warned that foundation disbursements to organizations that aren't charities, such as businesses that receive a program-related investment or loan, would be affected since those arrangements are more like contracts.

The court's ruling, he says, could make foundation investments in businesses owned by people of color, if their race was part of the criteria used, a target for lawyers eager to test the Supreme Court decision.

## Perpetuating Stereotypes

While progressive nonprofits and foundations have expressed concern about the potential court ban on affirmative action, other organizations in philanthropy are leading the charge. The case itself was pursued by a charitable organization, [Students for Fair Admissions](#). With 20,000 members, the group is supported by individual donors and conservative grant makers including the 85 Fund, DonorsTrust, the Searle Freedom Trust, and the Sarah Scaife Foundation

Devon Westhill, president and general counsel of the Center for Equal Opportunity, an advocacy group that promotes "colorblind equal opportunity" and filed a friend of the court brief in support of the student group's position, says he doubts the ruling from the court would provide a "bright line" nonprofits could use to determine whether they could use grant criteria that substitute other things, such as socioeconomic data, as a proxy for race.

"In light of that, the real question is what sort of race-neutral alternatives are going to be permitted, if any, for racial diversity," he says.

He said his organization told the Supreme Court that it agreed with Students for Fair Admissions that racial classifications are arbitrary and used to perpetuate harmful stereotypes.

The center's brief argues that "a truly diverse student body may produce a number of benefits. It might teach tolerance, acceptance, and open-mindedness. But none of those purported benefits can justify the harm of racial preferences: racial discrimination."

## 'Bring on the Lawsuits'

The threat of legal challenges to grant making that emphasizes race doesn't scare off some in the world of philanthropy.

Satonya Fair, president of PEAK Grantmaking, an organization that works to ensure grant-making practices are effective and equitable, says her response to any challenge would be: "Bring on the lawsuits."

Fair says if foundations feel intimidated by the ruling, she and other advocates will call upon them to move beyond their "comfort level" and advocate for the work they do supporting racial equity.

"Every foundation I know has got some money in the bank, and they've definitely got lawyers," she says.

The court's ruling could forbid not only direct considerations of race on an application but also aspects of applications that serve as stand-ins for checking a box on a form. For instance, the ruling could be interpreted as disallowing reflections in an essay on how an applicant has experienced discrimination. If that's the case, Fair says, she will not be silenced.

She recounted a recent interview during a grant application process she and other PEAK staff members had with the W.K. Kellogg Foundation. Much of the conversation centered on the diversity of experiences and backgrounds of employees at PEAK, which, in turn, plays a key part in the pride they have in the organization and the work they do promoting racial equity, Fair says.

"As a Black woman ... I get to talk about my racialized, marginalized, discriminatory experience," she says. "I get to tell my story. How you receive my story is up to you. There is no Supreme Court decision that can change that."

## Unrealistic Approaches

Some foundation leaders say they will be undeterred by a ruling that would limit efforts to support diversity among students and grantees.

The notion that a college or nonprofit official would expunge firsthand accounts provided by applicants for admission or a grant to achieve a race-neutral decision is impractical and unrealistic, says Jamie Merisotis, president of the Lumina Foundation, which works to reduce barriers to higher education, particularly among BIPOC students.

Merisotis says the foundation is prepared to defend its work if it is the target of lawsuits stemming from the decision.

"The real risk is to either respond to whatever the outcome in these cases is by hesitating or even retreating, he says. "What the Supreme Court has to say is not going to deter us from our efforts to support Black and brown students."

A ruling that limits efforts to promote diversity shouldn't deter progressive nonprofits from their support of racial equity, agreed Robert Raben, whose public-policy and communications firm represents many grant makers, including the Kellogg, Robert Wood Johnson, and Rockefeller foundations, the Silicon Valley Community Foundation, and the California Endowment.