

**The Board's Role in Adopting and Overseeing an Organization's
Approach to Race-Conscious and Race-Exclusive Activities and How Counsel Can Help**
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Introduction

Philanthropy cannot escape the cultural wars roiling the country, including the bitter debate about whether the history of the country and its treatment of Blacks, Native Americans, and other marginalized groups justifies the use of racial preferences and diversity programs in a range of activities or such practices are anathema to a color-blind constitution. Over the last several years, a confluence of events has brought to the fore the necessity for organizations focused on social justice as part of their missions to confront the tension between pursuit of their missions through race-conscious practices and the anti-discrimination laws limiting racial preferences in employment, grantmaking, contracting, and investments. These laws are increasingly being used as swords to attack diversity-based programs in education, business, government programs, and philanthropy.

The growing backlash and challenges to diversity programs supported by foundations has put the spotlight squarely on the boards of foundations and other not-for-profits to determine how best to provide oversight and pursue their missions while navigating tricky legal terrain. With the Supreme Court poised to decide two cases (Students for Fair Admissions v. President and Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina) that may significantly change affirmative action in higher education, it behooves boards to carefully consider an organization's approach to funding or operating programs that seek to further racial equity and diversity and to consider the implications of changes that may be wrought by the Court.

A board, as fiduciaries charged with the duty of care, must understand the options, opportunities, and risks and set the parameters for action by the organization. The issues are complex and can be counter-intuitive to the ethical and moral imperatives that drives organizations to address long-standing and systemic racism. Nevertheless, it is important for boards to be cognizant of the risks and to make the important policy and legal decisions that will help underpin necessary strategies. And counsels to boards should play a critical role in ensuring that a board meets its fiduciary duties and lays out strategies, risks, and options.

This paper identifies the role of the Board in assessing the risks involved in funding diversity and racial equity efforts, and that may use race-conscious initiatives, how such risks may be mitigated, and the legal framework that should be considered. It also identifies the role counsel can play to assist the board. Part A discusses the context, social and legal, for considering the issues, Part B offers suggestions

¹ For identification purposes only. This paper represents the views expressed by Joshua Mintz in his personal capacity and does not necessarily reflect the views of the MacArthur Foundation. In addition, some of the legal analysis is based on materials and conversations with experienced outside counsel, but should not be construed as legal advice to any party. This is a complicated area and obtaining advice of experienced counsel is critical to understanding the risks involved and making informed decisions.

for steps a board should consider, and [Part C](#) offers some risk mitigation strategies and methodologies to consider to provide a consistent approach.

[Exhibit A](#) is a paper prepared for the Georgetown Conference last year by Jill Rosenberg of Orrick that provides a more in-depth legal analysis of the issues associated with race-conscious initiatives for those who want a better understanding of the complex legal landscape. This is a constantly evolving field so readers should exercise caution in relying on any past cases or analysis.

Part A: Social Context

The COVID-19 pandemic and its disproportionate impact on communities of color and the murder of George Floyd and killings of other Black Americans triggered a renewed emphasis by many foundations, corporations, and government agencies on funding organizations and people focused on addressing racial inequities and the continuing legacies of systemic racism and slavery. In this regard, some public announcements of programs and the rhetoric surrounding efforts to achieve racial equity often focused on supporting organizations led by or benefitting people of color who have historically been marginalized or faced barriers based on their race or ethnicity from receiving grants or investments (see <https://echoinggreen.org/news/barriers-to-capital-and-racial-equity-in-philanthropy/>).

At the same time, these efforts have resulted in legal and other challenges to a number of diversity programs and other efforts that prioritize, focus on, target people of, or are seen to give preferences to, people of color based on a variety of theories under various anti-discrimination statutes and constitutional provisions.² In addition to lawsuits, there have also been a growing number of legislative and executive steps to bar divisive concepts³ in various contexts including in corporate DEI training, school curriculums, and other areas. Additionally, legislative and executive efforts in states like Florida and Texas have challenged curriculums in schools that may focus on divisive efforts or critical race theory.

Some mistakenly believe that race-conscious activities can be permissible because of the Supreme Court case law⁴ addressing preferences in admissions in higher education. There are also situations where one

² The language and concepts around these issues can be complex, misunderstood, or mean different things to different people. For purposes of this paper, racial preferences include both race-exclusive programs and race-conscious programs. Race-exclusive means that participation is limited to specified racial groups and excludes others. Race-conscious means that race is a factor in the decision-making process. While there is a difference in race-exclusive versus race-conscious activities, both carry legal risks depending on the circumstances.

³ Divisive concepts are not always commonly defined, which is one of the constitutional objections to such bills. They often target what proponents of the bills believe reflect the consequences of critical race theory or prohibit practices that focus on the race of an individual and link to past actions of particular races against other races. See Fla. Statutes SB 148, sect. 760.10.

⁴ The Supreme Court has allowed in the higher education admissions process a consideration of race in a holistic approach because, in the constitutional law context, increasing diversity in higher education is seen as a compelling interest if the approach is narrowly drawn. For an interesting discussion on the history of the Supreme Court's approach, see <https://www.newyorker.com/magazine/2021/08/02/can-affirmative-action-survive>. Courts have not determined that diversity in employment and/or contracting, alone, is sufficient to warrant racial preferences under Title VII or Section 1981.

can be aware of race or have proxies for race that will not run afoul of the law. Understanding the nuances and permissibility of the use of race is not easy given the complex legal regime and the current controversies around race-based theories of change.

This context has created a conundrum for many foundations. Some foundations will not support clearly racially exclusive efforts that explicitly exclude a race, such as White persons, from participating as a matter of policy even if under applicable legal theories the program can be supported. Others are prepared to support such efforts if there is a solid legal underpinning. Understanding the nature of the risk and a board's tolerance for risk is an important first step to developing a methodology and approach to these issues.

The Legal Context and Risk

What are the Risks?

There are three principal risks associated with race-conscious initiatives:

- Legal risks associated with a host of federal or state laws prohibiting discrimination on the basis of race or sex;
- Public-perception risks associated with excluding or preferring certain races or genders or favoring others, even if legally permissible; and
- The risk that a poorly administered program can create "bad law", thereby imperiling the ability to effectively address historical discrimination against people of color.

Under current law, grantmaking or investment strategies that use race to favor a particular race or exclude others could run afoul of a variety of local, state, and federal laws prohibiting racial discrimination and the judicial interpretation of such statutes. Depending on the circumstances, the following federal laws can be implicated:

- Title VII, which prohibits discrimination based on race (and other classifications) with respect to employment;
- Section 1981 of the Civil Rights Act of 1866, which prohibits discrimination based on race, color, and ethnicity in the making of contracts;
- Title VI, which prohibits discrimination on the basis of race in any program or activity receiving Federal financial assistance;
- The Equal Protection Clause of the Fourteenth Amendment of the Constitution to the extent a governmental entity is involved; and
- State or local rules prohibiting discrimination on the basis of race or other protected characteristics.

While the Supreme Court has recognized in higher education that diversity can be a compelling state interest if a program is drawn narrowly enough, this recognition has not been extended to employment

or contracts. Many experts also believe that the Supreme Court may further limit a university's ability to use race as a factor in the admissions process. How this reasoning may apply to foundations or other not-for-profits is unclear at this point.

The concern about legal risks is not just an academic exercise. As noted, a number of cases have been filed in recent years attacking diversity and other programs that appear to be race-conscious or race-exclusive. (A list of some of the more recent cases is attached as [Exhibit B](#) but there are many other cases that have been filed over the last few years.) There are a number of not-for-profit organizations that pursue cases on the basis that any racial preferences are violative of existing anti-discrimination laws even if there is a historical context for the program. Foundations and their boards must be aware of this active set of organizations, their agenda, and possible targets.

At the same time, however, there is growing support for the proposition that, to address the historical (and continuing) pernicious effects of discrimination, remedial efforts must include more "affirmative action" and other steps that could run afoul of present legal framework.

Other Issues/Risks

In addition to legal risks, there is a risk that race-conscious programs could trigger adverse publicity for an organization or make it a target for a legal challenge from individuals or one or more of the groups supporting litigation efforts. There is, however, a countervailing risk should an organization devoted to social justice be too cautious in confronting systemic racism and miss this moment in time or be seen as lacking the courage of its convictions or values.

Another risk, although more remote, is that the aggressive pursuit of race-conscious grantmaking or investments could result in a case that creates a bad precedent that damages the ability of the organization or field to continue to effectively address the inequities and historic racial discrimination.

Part B: What Should a Board Do and How Counsel Can Help

A board of an organization engaged in supporting or operating race-conscious programs should take the following steps. Counsel can help provide the necessary background information and analysis under the attorney client privilege:

- Stay informed of the current legal context.
 - A board should be informed by counsel in a privileged communication of the current legal context around these issues. In general, it is a good practice to have expert counsel either provide a privileged and confidential memorandum or brief to the board about these issues.

- Discuss and determine its risk tolerance with respect to specific steps given its mission.
 - It is challenging to pursue racial equity or race-conscious activities without some risk given the current legal environment. A board and president should carefully consider the nature of the risks, given the mission and values of the organization, culture, and other relevant factors and ways the risks may be mitigated.
- Identify its goals and provide direction to staff.
 - Organizational goals should be understood by all staff and staff should be provided the tools to navigate the terrain.
- Understand the methodology used by the organization in its grantmaking, its investment programs, and other activities to ensure compliance with the law including what, if any, legal theories it will rely on, such as an affirmative action plan.
- Assess periodically progress towards its goals and whether the context has changed. This may include for example changes in the law such as decisions from the Supreme Court in the affirmative action cases.

Policy-Related Questions

As a board and counsel consider the above steps, there are also several fundamental questions a board should also address:

1. From a policy perspective, and assuming there is a legal basis to do so, is the organization comfortable limiting grant awards in a given strategy or making investments only to, or preferring, organizations led by Blacks or other persons of color?
2. Similarly, assuming it is legally defensible, is the organization comfortable funding organizations that, in turn, are preferring or limiting participation in programs or activities only to certain racial groups?
3. How much legal risk is the organization comfortable taking in furthering a strategy that relies on race-exclusive or -conscious funding or a set of activities to address current systemic or historical racism?

Part C: Best Practices to Minimize Legal Risk

As noted, when considering funding work or operating in ways that prioritize or focus on historically marginalized groups or people of color, there will be risks that have to be navigated. Some steps⁵ to consider include the following:

Due Diligence

A foundation should make inquiries of its grantees regarding its proposed activities and, if there are problematic activities, require the prospective grantee to revise its actual grant proposal before entering into a grant agreement with the grantee. For a list of possible questions see the methodology section below.

Using Appropriate Language

Race-based language can be problematic but there are other ways to address the underlying concerns and interest that would be less objectionable from a legal standpoint. For example, in lieu of limiting programs, funding, benefits, or employment opportunities to individuals of a particular race, gender, national origin, religion, or sexual orientation, a foundation or its grantees *may* ask applicants or participants to describe barriers that they have faced within their relevant fields or communities due to their personal backgrounds. Accepting an applicant into a program based on the applicant's barriers, rather than their race, should significantly reduce the risk of a Section 1981 or Title VII claim.

Policy Approaches

A foundation can consider policies that require a diverse slate of applicants for such programs, funding, benefits, or employment opportunities instead of a particular race, gender, national origin, religion, or sexual orientation or make sure it invites diverse individuals to apply for its programs and activities. For example, a diverse slate policy might require that the organization ensure that at least some percentage of the candidates it interviews for a particular position or program are Black.

It is important to emphasize, however, that such a diverse slate policy is only lawful if the organization selects the most qualified individual(s) from the diverse slate for the position or benefit and that it does not make its ultimate hiring or acceptance decisions on the basis of race or other protected characteristics. Selecting a less-qualified member of a diverse slate over a more-qualified member for purposes of increasing diversity remains unlawful. In addition, organizations should also never remove White or male candidates from their slates to make room for candidates who are members of an under-represented group, but should instead expand their slates to include additional candidates who are diverse.

⁵ These suggestions are courtesy of experienced outside counsel but do not constitute legal advice to any party.

Language in a Grant Agreement

A foundation should consider including in its grant agreement language that prohibits the grantee from making any program, funding, benefit, or employment decisions on the basis of race, gender, national origin, religion, or sexual orientation. This approach would not necessarily protect a grantee or a foundation if the actual decisions or activities contravened this requirement, but it may serve to help confirm that the approach is intended to be lawful.

In particular cases, a foundation might also include language stating that the assistance it provides is a charitable gift and not a contract and/or state that the grant recipients will not provide anything of value or any type of service back to the Foundation. Reporting requirements in a grant agreement might be described as for assessment purposes only and do not provide any benefit to the Foundation.

Other Legal Defenses

Section 1981 only applies to contracts and for a claim to be successful under Section 1981 the use of race must be a "but for" determination. See Comcast Corp. v. National Association of African American-Owned Media, 140 S. Ct. 1009 (2020). A gift or other funding that does not involve the recipient providing "consideration" in the legal sense should not be subject to Section 1981 or Title VII arguments. In effect, the funding would be seen as "no strings attached". In such instances, the foundation can mitigate risk by confirming in writing that the organization does not receive any benefits from the individuals it supports. Similarly, a foundation may encourage organizations to eliminate existing, but unnecessary, "strings" attached to the programs and benefits they offer.

Seek Counsel

There may be circumstances in which a foundation determines that the social, moral, and public relations benefits of supporting a race-based organization outweigh the legal risk of a reverse discrimination claim. In such instances, a foundation would be well served to seek further guidance from internal and/or outside counsel regarding the specific legal risks and understand what steps it could take to minimize that legal risk.

One Possible Methodology

While conversations around issues of race or ethnicity can be uncomfortable, it is incumbent on foundations to ask the right questions of grantees if the activities being funded might involve race-conscious or race-exclusive considerations. The following are some possible questions to consider, which will then help determine the nature of the risks and what legal theories are most applicable:

- Does the project being funded in part by the award provide or limit eligibility for any activities or benefits to persons of only some races or ethnicities?

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- Does the project being funded give priority to persons of only some races or ethnicities when awarding funds or support, selecting participants, or providing other benefits?
- If you answered yes to either of the above questions, has your organization consulted with legal counsel regarding your eligibility criteria or selection process?
- Do the persons engaged with or served by the project provide any payment, equity, services, deliverables, or anything else of value, including publicity or advertisement of the project, to your organization in return for the benefits that you provide to them? If yes:
 - What items or services of value do you receive from your participants or beneficiaries?
 - Who specifically provides those items or services of value to your organization?
 - What is the average approximate value of the items or services you receive from your participants or beneficiaries?

The answers to these questions will help inform a foundation's analysis of whether the activities pose risk and whether there are any defenses available, such as an argument that the activity being funded is not a contract subject to Section 1981 or that the organization is an "expressive organization"⁶ whose restrictive activities might be protected by the First Amendment in that it should not be required to accept members who may impair the ability of a group to express only those views it intends to express. Boy Scouts of America v. Dale, 530 U.S. 640 (2000) at 648. This can be a complex legal analysis that requires careful consideration and consultation with counsel.

Conclusion

The tension between pursuit of social justice using some form of racial preferences and the anti-discrimination laws will only increase in the years ahead. Perhaps the Supreme Court or other courts will provide greater clarity of the ground rules to guide organizations. In the meantime, foundations and other not-for-profit organizations and their boards would be prudent to obtain good counsel and to understand the risks and opportunities under current law.

⁶ An expressive organization is one that (i) is rooted in a shared set of beliefs, values, or ideas (these can be political, social, economic, educational, religious, or cultural in nature) and/or (ii) it seeks to transmit a set of values, ideas, and beliefs, or a particular message (to constitute an "expressive association," an organization does not need to be engaged in advocacy or to exist for the specific purpose of disseminating a message.) Boy Scouts of America v. Dale.

EXHIBIT A

Georgetown University Law Center

Annual Representing and Managing Tax-Exempt Organization Conference

Considering Race: An Introduction to the Law

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Race-Focused Philanthropy and Anti-Discrimination Law

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Grant making and other philanthropic activities focused on race (and other legally protected characteristics) may implicate federal, state and local anti-discrimination laws. Whether and what anti-discrimination principles may apply typically depends on the nature of the grantee or recipient, such as whether it is a private or governmental entity, and the nature of the recipient's or grantee's proposed program or activity, such as whether it involves a student, employee or contractual/business relationship. This outline provides an overview of the federal statutes and provisions of the U.S. Constitution¹ that may govern race-focused philanthropy, including the circumstances under which grantees and other organizations may prioritize or limit opportunities based on race.

I. Employment Discrimination Law

A. Summary of Legal Principles

1. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers with 15 or more employees from discriminating in "compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."

2. In general, private and public sector employers may not consider race in hiring or other employment decisions like training and advancement.

¹ While this outline focuses on federal law, it is important to note that states and localities may have laws that are more restrictive than federal law.

3. An important first step for grant makers is to determine whether a proposed grantee program or activity involves an employment relationship (as opposed to a student or independent contractor relationship).

4. Several factors are relevant to determining if an employment relationship exists. According to the Supreme Court, the central focus is “the hiring party’s right to control the manner and means by which the product is accomplished.” *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

5. Limited term positions, internships (paid or unpaid), fellowships and other training and apprenticeship programs can, depending on the circumstances, create an employment relationship.

6. Subject to very limited exceptions, courts have not recognized the benefits of diversity as a valid compelling interest in employment, such that race may be considered in making employment decisions.

B. Exception Where Race May Be Considered—Voluntary Affirmative Action

1. Under Title VII, A private sector entity may engage in race-conscious employment decisions pursuant to an established affirmative action hiring plan only if the entity establishes all of the following: (a) There is a manifest underrepresentation of minorities in certain positions; (b) The employer’s plan does not “unnecessarily trammel” on the interests of white employees; (c) The employer’s plan is temporary; and (d) The employer’s plan is designed to bring minority representation up on par to that of the area’s workforce, rather than to maintain racial balance on a permanent basis. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275-76 (1986). Under these limited circumstances, a voluntary affirmative action plan may treat race as a “plus” factor.

2. In addition to meeting the Title VII requirements, state and federal entities (such as public universities and government-run institutions) seeking to engage in race-conscious employment decisions must also satisfy the requirements of “strict scrutiny” under the Equal Protection Clause of the U.S. Constitution by demonstrating a compelling interest and that its race-conscious plan is narrowly tailored to accomplish its goal (e.g., history of discrimination or “gross statistical disparities”). *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

II. Contract Law

A. Summary of Legal Principles

1. Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. Section 1981) (Section 1981) prohibits race discrimination by private parties and government actors in the making and enforcement of contracts and in the “enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”

2. Section 1981 may apply to certain grantee or other philanthropic programs or activities where an independent contractor, business or other (non-employment) contractual relationship exists. This may include, depending on the particular circumstances, fellowship, internship or training programs, and investments.

3. Not all contractual relationships will trigger the prohibitions of Section 1981. Courts have considered a number of factors to determine if Section 1981 applies, including the nature of the invitation to join (for example whether based on personal invitation or an open application process), the nature of the program and whether a *quid pro quo* exists, and whether compensation is involved.

4. Private scholarship or financial assistance programs that have no *quid pro quo*, and are seen as gifts, fall outside the scope of Section 1981

B. Case Law Finding a Contract Exists under Section 1981

1. Courts have held that athletic scholarships awarded by higher education institutions qualify as contracts within the meaning of Section 1981. *See, e.g., Jackson v. Drake Univ.*, 778 F. Supp. 1490, 1493 (S.D. Iowa 1991) (financial aid agreement between university and student athlete constituted valid contract for Section 1981 purposes).

2. *Runyon v. McCrary*, 427 U.S. 160 (1976): The Supreme Court held that a private secondary school’s racially exclusive admissions policy was subject to (and in violation of) Section 1981 as it involved the right of parents to enter into a contractual relationship with a school for educational services and the school advertised and offered its services to the general public.

C. Case Law Finding No Contract Exists under Section 1981

1. *Hollander v. Sears, Roebuck & Co.*, 450 F. Supp. 496 (D. Conn. 1978): Sears ran a summer internship program for minority students “to stimulate flow from minority groups to Sears’ regular management training programs and management positions.” *Id.* at 498. Students who participated in the eleven-week program received a weekly stipend of \$130 (\$1,430 total). Although the summer internship program was not a prerequisite to participation in the regular management training program or an offer of permanent managerial employment, there was no similar program for non-minority students. In finding that the program was not subject to Section 1981, the court noted that participants were paid a

“token salary” not to fill regular positions, but rather to observe the performance of such jobs, understand the relationship among them, and try them out. The court viewed the participants as “students” who would be provided with “assistance and counsel” rather than employees and found that there was no contract for services between an employer and an employee. *Id.* at 504-05.

2. *Adam v. Obama for Am.*, 210 F. Supp. 3d 979, 987 (N.D. Ill. 2016): The court held that an unpaid intern (volunteer) for the Obama campaign did not have contractual relationship as required by Section 1981 where she failed to demonstrate bargained-for exchange based on laptop and handbook provided to her.

3. *Marvelli v. Chaps Cmty. Health Ctr.*, 193 F. Supp. 2d 636, 659 (E.D.N.Y. 2002): The court held that an internship did not create a contractual relationship under Section 1981 where the interns did not receive any salary, benefits, or promise of future employment.

4. In dicta, Supreme Court Justice Lewis Powell wrote in *Runyon, supra*, that an individual’s decision to hire a babysitter or private tutor or a small kindergarten or music class operated on the basis of personal invitations to a limited number of pre-identified students are examples of personal contractual relationships that would fall outside the scope of Section 1981. *See Runyon*, 427 U.S. at 188-89 (Powell, J. concurring).

D. Exception Where Race May Be Considered under 1981

1. Similar to Title VII, to justify a racial preference under Section 1981, the entity must demonstrate that (a) specific, significant imbalances in achievement in the community presently affect the target population; (b) the race-conscious policy does not unnecessarily burden the rights of members of the non-preferred group or act as a complete bar to their advancement; and (c) the race-conscious policy is remedial in nature and does no more than is necessary to correct the imbalance identified by the entity. *See Doe v. Kamehameha Schools*, 470 F.3d 827, 834-35 (9th Cir. 2006) (en banc).

III. Higher Education Race-Conscious Student Admissions and Support

A. Overview of Legal Principles

1. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

2. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) prohibits discrimination on the basis of race, color, and national origin in programs and activities that receive federal funds, including public and private institutions that receive federal funds.

3. In the context of race-conscious admissions and financial or non-financial support for students at public universities and colleges, the Equal Protection Clause is interpreted coextensively with Title VI.

B. Student Admissions

1. Unlike in the employment context, the Supreme Court has held that enhancing the diversity of the student body and learning environment is a compelling interest.

a. The higher education institution must articulate precise goals and objectives with regard to student body diversity.

b. The higher education institution must engage in a holistic review of candidates through individualized evaluation and consideration of the institution's particular mission.

2. Notably, even where federal law might permit institutions to consider race and ethnicity in making admissions decisions, some states have laws or constitutional provisions that prohibit consideration of those factors in certain public institutions (*e.g.*, Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington).

C. Student Programs

1. Race-focused higher education programs and benefits supporting students such as fellowships, internships, outreach programs, travel stipends, and summer experiences are analyzed, like admissions, under the Equal Protection Clause and/or Title VI.

2. Race-focused programs are also permissible to remedy the effects of an institution's past discrimination if there is a strong basis in evidence of its discrimination, and the program is narrowly tailored to remedy those effects. *See Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

D. Student Admissions Case Law

1. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978): The Supreme Court found that a University of California medical school could, without violating the Equal Protection Clause, consider race as one of numerous factors in admissions decisions, based on a recognition that a diverse class has educational value. However, the Court rejected the use of specific racial or ethical quotas.

2. *Grutter v. Bollinger*, 539, U.S. 306 (2003): The Supreme Court found the University of Michigan Law School’s race-conscious admissions process to be lawful because it considered many criteria—of which race was only one “plus” factor—for every applicant on an individual basis.

3. *Gratz v. Bollinger*, 539 U.S. 244 (2003): The Supreme Court struck down the University of Michigan’s undergraduate admissions program because it used a point system that automatically awarded 20 points—one-fifth of the points required to guarantee admission—to every “underrepresented minority” applicant solely because of race.

4. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016): In the Supreme Court’s most recent decision regarding race-conscious admissions programs, the Court strongly emphasized the importance of narrow tailoring—the university should have considered workable race-neutral alternatives to achieve diversity, must provide for flexible and individualized review of applicants, must not unduly burden students of any racial group, should view any race-conscious program as of limited duration, and should subject the race-conscious program to periodic review.

a. The Supreme Court has agreed to hear two cases, which provide the Court with the opportunity to revisit its precedent. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d* 980 F.3d 157 (1st Cir. 2020); *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, Case No. 1:14CV954 (M.D. N.C. Nov. 4, 2021).

E. Student Programs Case Law

1. The Supreme Court has not to date addressed the permissibility of race-conscious support programs and other benefits that universities provide to students. However, the few lower courts that have addressed the issue have applied the Supreme Court’s framework for analyzing student admissions—rejecting programs that are race-exclusive and allowing race to be considered only in a limited way. *See, e.g., Podberesky, supra* (rejecting scholarship program for which only African American students were eligible); *Flanagan v. President & Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (rejecting financial aid policy that set aside 60% of financial aid dollars for 11% minority population in freshman class).

2. Federal guidance issued by the U.S. Department of Education applying Title VI permits “Financial Aid to Remedy Past Discrimination” and “Private Gifts Restricted by Race or National Origin.” *See Nondiscrimination in Federally Assisted Programs*, 59 Fed. Reg. 8756 (Dep’t of Educ. Feb. 23, 1994) (allowing “award of financial aid on the basis of race or national origin if the aid is a necessary and narrowly tailored means to accomplish a college’s goal to have a diverse student body that will enrich its academic environment” and allowing administration of “financial aid from private donors that is restricted on the basis of race or national origin” but “only if that aid is consistent with the other principles in th[e] policy guidance.”).

IV. First Amendment Considerations

A. Overview of the Expressive Association Exception/Defense

1. Even when Title VII, Section 1981, or Title VI apply, the First Amendment may provide a defense to limit the application of these laws in certain limited circumstances.

2. The Supreme Court has defined expressive association as “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition...and the exercise of religion.” *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Stated another way, expressive association is the freedom from being forced to accept members who may impair the ability of a group to express only those views it intends to express.

3. To establish that its activities are protected by the First Amendment, the organization must demonstrate that it is an expressive association, that requiring it to accept participants on a race-neutral basis would impede the message the organization seeks to express and that such concerns outweigh any governmental interest in prohibiting discrimination. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648-49 (2000).

4. This is a narrow defense.

a. The organization’s activities must be predominantly expressive rather than commercial, meaning the organization must show that it is rooted in a shared set of beliefs, values or ideas, which can be political, social, economic, educational, religious, or cultural in nature. *Roberts*, 468 U.S. at 622.

b. The organization must show that requiring the inclusion of unwanted participants significantly burdens the organization’s freedom of expressive association.

B. Case Law

1. The expressive association exception may apply to artistic expression where race is central to the entity’s expressive activity or mission, for example, considering race to fill certain artist or performer positions. *See, e.g., Claybrooks v. ABC*, 898 F. Supp.2d 986 (M.D. Tenn. 2012) (permitting race-based casting decisions for *The Bachelor/Bachelorette*).

2. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000): The Supreme Court held that the Boy Scouts were not required to accept a gay scout leader because it would violate their First Amendment right of expressive association, which included a hostility to homosexuality

3. *Roberts v. United States Jaycees*, 468 U.S. 609, 639 (1984): The Supreme Court held that compelling the Jaycees, a leadership training and civic organization for men, to accept women as

regular members did not violate the Jaycees' First Amendment right of expressive association in part because the Jaycees are a commercial organization.

4. *Apilado v. North American Gay Amateur Athletic Alliance*, 792 F. Supp. 2d 1151, 1160-63 (W.D. Wash. 2011): The district court found that even though the North American Gay Amateur Athletic Alliance (NAGAA), which sponsored an annual Gay Softball World Series, was a public accommodation, "admitting more than two heterosexual players per team would interfere with its chosen expressive purpose," because "NAGAA's efforts to promote an athletic, competitive, sportsmanlike gay identity, with a unique set of values, in response to a particular need, are protected by the First Amendment."

5. *Donaldson v. Farrakhan*, 762 N.E.2d 835 (Mass. 2002): The Supreme Judicial Court of Massachusetts held that even if a men's meeting featuring Minister Louis Farrakhan was a public accommodation, requiring that women be permitted to attend would infringe on the defendants' First Amendment expressive association rights. The court found that because the members of the defendant organization, The Nation of Islam, associated "for the explicit purpose of engaging in protected expressive activities" (religious activity) and the stated purpose of the men's meeting was "to expose male members of the community, especially those males participating in crime and violence, to [Minister Farrakhan's] message," that "[f]orcing the mosque and its leaders to include women in the meeting would change the message." *Id.* at 840-41.

EXHIBIT B

Examples of Recent Cases Challenging Diversity Programs

- In 2021, Pfizer launched a competitive Breakthrough Fellowship Program, which selects students during their junior year of college and provides a summer internship before senior year, a two-year analyst position upon graduation, a scholarship for certain two-year graduate programs, and an offer of a full-time manager-level position. In ***Do No Harm v. Pfizer (S.D.N.Y. 2022)***, the plaintiff asserted that, because applicants to the program must “[m]eet the program’s goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans,” the program impermissibly discriminates on the basis of race in violation of Section 1981 of the Civil Rights Act of 1866, Title VI of the Civil Rights Act of 1964, Section 1557 of the Affordable Care Act, the New York State Human Rights Law, and the New York City Human Rights Law. The district court dismissed Do No Harm’s action, finding that the organization failed to establish that it had standing to sue under the U.S. Constitution and under the specific statutes that Pfizer purportedly violated. On constitutional standing, the court held that anonymous declarations from two Do No Harm members, which stated that they were “able and ready” to apply to the fellowship “if Pfizer stops” discriminating on the basis of race, were insufficient. The court also held that: (i) associations like Do No Harm categorically lack standing under Section 1981; and (ii) Do No Harm failed to establish any of the federal funding requirements necessary to bring suit under Title VI or Section 1557 of the Affordable Care Act. Having dismissed the federal claims, the court held that it would be inappropriate to exercise jurisdiction over the remaining state law claims, so dismissed those as well. The case is now on appeal before the Second Circuit.
- In 2018, Amazon launched its Delivery Services Partners Program to help entrepreneurs secure a share of profits from online orders by setting up their own companies and employing their own drivers. As part of this program, Amazon offered \$10,000 grants to Black, Latinx, and Native American entrepreneurs who wished to contract with Amazon as delivery service partners. In ***Alexandre et al. v. Amazon.com Inc. (S.D. Cal. 2022)***, plaintiffs filed a proposed class-action alleging that Amazon’s grant program discriminates against Asian and white partners because it is provided only to Black, Latinx, and Native American entrepreneurs. Plaintiffs allege that, in deploying a race-conscious grant program, Amazon has violated California state civil rights laws.
- In ***National Center for Public Policy Research v. Schultz (E.D. Wash. 2022)***, a conservative organization and shareholder challenged seven policies adopted by Starbucks, including setting hiring goals for people of color, awarding contracts to diverse suppliers and advertisers, and tying executive pay to achievement on diversity metrics. These programs are being challenged under Section 1981 of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, and Washington state civil rights laws.
- Texas A&M launched a program, called the Accountability, Climate, Equity and Scholarship Fellows Program, to improve its hiring of diverse mid-level faculty. During the fall semester of 2021, about 60% of Texas A&M’s faculty were white; only 6% were Latino and less than 4% were Black. In ***Lowery v. Texas A&M (S.D. Tex. 2022)***, a white male finance professor at the University of Texas at Austin sued Texas A&M, alleging that the University’s hiring program impermissibly discriminates on the basis of race and sex, in violation of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Equal Protection Clause of the 14th Amendment.