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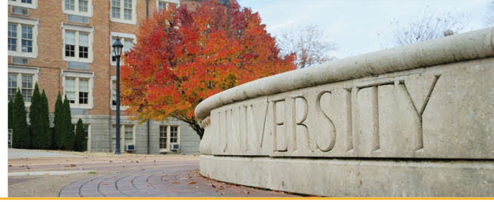
Client Alert | Education, Nonprofit and Religious Organizations



Affirmative Action Is a Matter of Faith for Religious Institutions

Religious groups and their associated nonprofit community charities and schools have historically been on the front line of serving ethnic and racial minorities. Motivated by religious beliefs, they advance their missions in tangible ways, not merely through donations and fundraising but through programming, schools, services and grantmaking. Yet in the wake of the recent U.S. Supreme Court decision in *Students for Fair Admissions v. President and Fellows of Harvard College*,[1] in which a majority of the justices found well-intentioned minority inclusion efforts unconstitutional, questions have been raised about whether a religious nonprofit or school can continue to demonstrate their commitment to serving underrepresented groups and minorities without facing adverse judicial scrutiny. Given the Supreme Court's treatment of religious issues in the last few terms, the answer could be yes.

The decision — in which the group Students for Fair Admissions (SFFA) challenged admissions programs at Harvard University and the University of North Carolina — has been read in some quarters as a fundamental overhaul of affirmative action in the United States through the application of the Equal Protection Clause. The Equal Protection Clause was included in the Fourteenth Amendment following the Civil War to ensure that laws apply equally to all citizens regardless of race. The Supreme Court majority in *SFFA* specifically found that the college affirmative-action programs were riddled with racial stereotypes that could not be justified under a strict-scrutiny standard, and the court held that decision-makers could not apply racial preferences in administering programs.

Some groups across the country have now challenged various grant and scholarship programs targeted at improving educational or economic conditions for underrepresented groups and minorities. The challengers argue that racial qualifications for grant and program applications violate the decision in *SFFA* on both constitutional and statutory grounds.

As an example, for years, Fearless Fund — a nonprofit created by Black women — has offered targeted assistance to businesses led by women of color. The U.S. Court of Appeals for the Eleventh Circuit recently granted a preliminary injunction to prohibit Fearless Fund from operating its grant program.[2] In *American Alliance for Equal Rights v. Fearless Fund Management*, the American Alliance for Equal Rights (AAER) alleged that Fearless Fund's grant

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1 No. 20-1199, slip op. (U.S. June 29, 2023)

2 No. 1:23-cv-03424 – Document 115 (N.D. Ga. September 27, 2023); No. 23-13138, Dkt. No. 8-2 (11th Cir. September 30, 2023). The court reversed a favorable decision on expressive association grounds for Fearless Fund.

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program violated Section 1981 of the Civil Rights Act of 1866.[3] Fearless Fund's status as a nonprofit committed to supporting women of color in business was not a sufficient basis to defeat the lawsuit.

Historically, Section 1981 was intended to ensure that contractors could not exclude certain groups based on racial animus. Under the statute, Black people historically asserted rights to block refusals of service and the sale of real estate, and to attack discriminatory admissions practices at private schools. Section 1981 has thus functioned to ensure the ability of Black people to overcome overt racial discrimination in the making and enforcing of contracts in every context.

In *General Building Contractors Association v. Pennsylvania* in 1982, the Supreme Court noted that the "principal object of the [Section 1981] legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen."[4] The Supreme Court had previously described Section 1981 in race-neutral terms, stating in *McDonald v. Santa Fe Trail Transportation* in 1976 that the "act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race."[5] Thus, notwithstanding its historical origins, Section 1981 is being used to open, block or rewrite programs reserved for minority businesses by design.

Fearless Fund in *SFFA* argued that using Section 1981 to block its grant program would violate its rights of expressive association assured by the First Amendment by compelling a community-serving entity or school to abandon its historic mission. The decision whether to grant a preliminary injunction ultimately turned on whether Fearless Fund had First Amendment protection to maintain its grant program with an application pool limited to persons of a specific race and sex. The Eleventh Circuit and the U.S. District Court for the Northern District of Georgia ultimately disagreed on the likelihood that such First Amendment protection would be recognized.

The next chapter remains to be written. Certainly, any group thinking about protecting its historic mission from attacks should actively examine how that mission is expressed and why that mission is important — and, considering the rise in Section 1981 cases, groups should also consider whether their missions can be expressed in race-neutral terms. With a well-defined embrace of mission, nonprofits can examine their grantmaking, admissions, scholarship and other programs and better position themselves to protect those efforts. For religious nonprofits and schools, however, the religion clauses of the First Amendment and federal and state statutory protections for religiously motivated conduct place the evaluation squarely within well-established protections for religious exercise.

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3 Section 1981 (42 U.S.C. § 1981) states that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts … as is enjoyed by white citizens."

4 485 U.S. 375, 386 (1982).

5 427 U.S. 273, 295 (1976).

The First Amendment allows religious organizations to exercise their beliefs in ways the entities find authentic without subjecting those views to judicial second-guessing.[6] Those entities act upon their religious beliefs regarding solidarity, justice and inclusion with the broader community by targeting programs for underrepresented and minority communities in programming, grantmaking and admissions. Religious groups and leaders were in the vanguard of the abolitionist movement in the 1800s and the civil rights movement a century later. That leadership persists. Examples of religious groups that clearly outline their support for minority groups include United Women in Faith, which publicly lists not only the specific beliefs it holds supporting its mission to serve underrepresented and minority groups, but also outlines clear goals for its grantmaking programs. United Women in Faith's explicit beliefs and ways in which the group intends to act to support those beliefs clearly explain its mission to support underrepresented groups. Other examples include the Jews of Color Initiative, The Jethsuby Scholarship Fund of The Catholic Foundation and the Catholic Campaign for Human Development.

The Church of Jesus Christ of Latter-day Saints partnered with the UNCF in 2021 to establish a $3 million scholarship program for Black college-bound students. In addition to those scholarship funds, the church announced a $6 million donation in humanitarian aid over three years to inner cities in the United States, as well as a fellowship that would send students to Ghana to learn about Black American and African history. The church explains on its website that its commitment to diversity stems from its worldwide membership and biblical text, as the "diversity of the church's worldwide membership is a notable characteristic of Latter-day Saints because the gospel of Jesus Christ transcends every culture, race, nationality and language."

Similarly, Pepperdine University, a Christian school based in California, demonstrates its commitment to supporting graduate education for racial minorities and underrepresented groups through its Graduate School of Education and Psychology (GSEP) Diversity Scholarship, a need-based grant awarded annually to two students of academic merit and achievement who contribute to the school's ethnic diversity. Within their diversity statement, Pepperdine — like United Women in Faith and the Church of Jesus Christ of Latter-day Saints — explains its "Christian rationale for diversity" through references to biblical text and noting its "faith cherishes the sacred dignity of every human being and celebrates diversity as a true representation of God's love and creative expression."

The key consideration is that religious nonprofits and schools must demonstrate that their efforts to support underrepresented and minority groups are an exercise of their religious beliefs. Should challenges arise, courts will look to mission statements to determine whether the program fits within the religious nonprofit or school's religious beliefs.[7] Therefore, a specific mission statement is essential. It is also the case that without such specificity, the success of a First Amendment defense decreases. Efforts to redefine the public ministry of religion, expressed in community-serving and educational activities, through litigation directed at those

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[6] *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 724 (2014) ("HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step"). See also *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1910 (2021); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); and *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969).

[7] In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020), the Supreme Court relied extensively on mission statements, policies and handbooks to determine that the First Amendment ministerial exception applied.

efforts, would present the same set of compelled choices the court condemned in a series of decisions, including in recent terms.[8]

If you are a religious educator or grantmaker concerned about whether your efforts to support underrepresented and minority groups are defensible, start by looking at your mission statement. Sharpen why you seek to support these groups, tie the statement to the specific religious beliefs that call you to action and seek advice on ways in which to best express those beliefs. The world of religious grantmaking and programming to support diversity, equity and inclusion is vital for promoting the common good.

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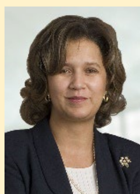

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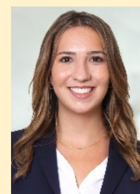

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[8] *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2433 (2022). Certainly, it will be argued that the decision in *Bob Jones University v. United States* 40 years ago limits the scope of a religious freedom argument. However, it is important to note that the overriding governmental interest in *Bob Jones University* was combatting racism in schools, which is a dual aim for religious schools with scholarships for racial minorities and underrepresented populations.

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