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HIGHER ED FUNDRAISING

## Can Donors Still Support Race-Conscious Programs? Supreme Court Ruling Leaves College Fundraisers in Uncharted Territory

By *Rasheeda Childress*

JULY 17, 2023



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The Supreme Court's recent ruling that upended the use of race in admissions decisions may also apply to scholarships and other efforts supported by donors, experts say.

The *Chronicle* spoke with lawyers and fundraisers about how the court's decision could impact university fundraising efforts and relationships with donors. While much is still up in the air, there was consensus on a few points. As colleges await further guidance, it will be important to have the institution's lawyers review scholarship programs and donor agreements that have race-conscious elements. The experts also said that major-gift officers may need to have tough conversations with donors and possibly lose out on some gifts, and that university staff, including those in advancement departments, will need to to mitigate the risk of lawsuits through policies and training.

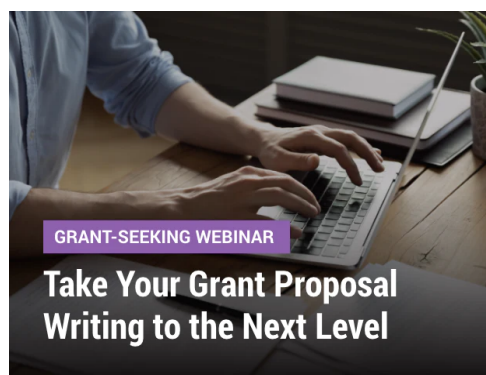
## What the Ruling Means

The ruling is most likely to affect college fundraisers as they seek money for and deal with donors who have given to scholarships that use race as a criterion. The court's ruling doesn't specifically address scholarships, but some experts think it will be applied to them.

"The Supreme Court decision did not directly address the consideration of race or ethnicity towards scholarships or financial aid," says Daniel Kaufman, a partner specializing in higher education at the law firm Michael Best. "But there are parallels, and the principles that apply to admissions also are relevant when we are considering whether scholarships are lawful. Because there are parallels, it is advisable for institutions to start analyzing their scholarships and financial aid under the framework that the Supreme Court provided."

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That framework says that while colleges can't consider race or ethnicity in deciding admissions, they can look at other factors, such as the adversity students have faced, which can be gleaned from what students write in their essays.

Some states and colleges already believe that the ruling applies to scholarships, with the Missouri attorney general telling colleges in the state to “[immediately cease](#)” using race in admission, scholarship, and employment decisions. The University of Kentucky also said [the ruling prohibits](#) it from considering race “with respect to admissions and scholarships.”



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More clarity from government officials will likely come in August. President Joe Biden [has told](#) the Department of Education and the Department of Justice to provide guidance on which practices and policies related to affirmative action “remain lawful” no later than 45 days after the June 29 ruling.

## What to Do Right Now

Karin George, a managing partner at the consulting firm Washburn and McGoldrick, says one of the lessons colleges and universities she works with have learned is that it’s important for advancement departments to be a part of this conversation. Initially many considered it to be just something for admissions to think about.

“They started to [realize] that we’ve got to think about this comprehensively throughout our institution,” George says. “What’s the impact on potential donors? What’s the impact on alumni relations? What’s the

impact on our pipeline of alumni? What does that mean for our current fundraising and engagement? What does that mean for our future fundraising engagement?”

Universities also need to consider how to update language to reflect their goals in alignment with the new rules, says Rob Henry, vice president of people, culture and talent at the Council for Advancement and Support of Education.

“We’ve got to ask the question of what are we trying to accomplish,” Henry says. “Our language sometimes in this space for diversity, equity, inclusion, and belonging is outdated. We have to help our institutions and our donors understand about equity and accessibility for students.”

Henry recommends a communications audit, looking at all the language about DEI at the institution to get a handle on where the organization stands and what changes it might need to make in light of the new ruling.

Jose Padilla, president of Valparaiso University, agrees, adding that a wholesale review of programming that might be affected is necessary. “They should be looking at every scholarship that they administer that focuses on race or ethnicity, and apply that to the light of the decision,” he says. “And they should be doing that now.”

When looking at the language of the scholarships, look for ways that get at diversity beyond race, such as challenges students might have faced, whether they are first-generation college students or even if they have experienced racism, says Kaufman, the higher-education lawyer. Race just can’t be the factor the college takes in to account.

“Justice Roberts said universities can consider factors to engage in a holistic review,” Kaufman says. So, if applying the same standards the court applied to admissions, universities “could look at scholarship programs that do not consider race itself but rather consider the effect or possible consequences of being of a certain race or ethnicity and how that’s affected someone’s life.”

George says some of her clients’ donor agreements use language that expresses a preference for scholarships to be awarded using some of the outlawed criteria but allows money to be awarded outside those preferences.

“The flexible language is included in those fund agreements so that the institution has maximum flexibility to apply those dollars where the donor has requested but also apply those dollars where it’s needed the most at that institution,” she says.

Her clients are also looking at how to support students whose existing scholarships might not meet the new terms of the law if the federal government or the courts decide scholarships and financial-aid packages must

comply with the ruling.

## **Tough Conversations With Donors**

Donors who have lots of money to give often want what they want, but under the new Supreme Court decision, that may not be possible. For example, basketball star Charles Barkley [made headlines](#) for saying he planned to bequeath money to his alma mater for scholarships available only to Black students.

Kaufman cautions colleges and universities against accepting gifts that fly in the face of the ruling. “Given the Supreme Court’s decision, I don’t think institutions would want to automatically accept that money,” he says. “If they were to accept that money, I think they face a serious risk of litigation.”

This means fundraisers may have to have to some uncomfortable conversations with donors explaining the current situation, says Padilla, president of Valparaiso.

“We would first tell the donor that we’re examining this issue,” he says. “We have to be very careful about whether or not this will end up being something that likewise would be violating that Supreme Court decision. So I think you have to be very frank with them about the challenge there, and how there’s a lot more work to do to re-examine this issue.”

CASE’s Henry says his organization is offering training on how to have those tough conversations with donors.

Henry recognizes that major-gift officers are going to be having conversations with donors on both sides of the spectrum — people who support the ruling and those who are vehemently against it — and they need advice on how to have those conversations, which CASE hopes to provide. “Part of our work on this is, first, helping people understand the philosophy and psychology behind this work,” he says. “Then, we can have those conversations. We’re moving people from one place to another. However, we need practice.”

He recommends role playing and practice to help gift officers be ready for those conversations. George, the consultant, adds that a key part of those tough conversations won’t involve talking at all.

“It’s so incredibly important that we listen to what our what our donors are trying to achieve,” she says.

## **DEI Donations Could Land Outside College Coffers**

What can be done to advance the goal of having a diverse student body while also complying with the ruling is uncharted territory at the moment? The decision came out less than a month ago, and with no guidance yet from government officials, institutions are trying to figure out what works.

Padilla, who, like, many others the *Chronicle* spoke with, says his goal is to comply with the law while also pursuing diversity, is looking at whether a solution at a previous institution he was affiliated with could work. In the early 2000s, Padilla served on the Board of Directors of the University of Michigan Alumni Association. At that time, the state passed a law that said race could not be considered in admissions decisions. The alumni association, which was a separate 501(c)(3), decided it still wanted to award scholarships under the old criteria.

“And that’s what it did,” Padilla says. “It could do that because it wasn’t an educational institution.”

He says many universities have separate foundations, and he thinks some may still award grants and scholarships based on the old criteria. “The foundations, if they’re separate, they arguably could step in and make financial-aid awards based on race or ethnicity, assuming they’re separate and apart,” Padilla says. “But it’s a question of how separate and apart they are.”

Kaufman, who notes his expertise is not in nonprofit law, isn’t sure that would be an effective workaround. “The Supreme Court has said, Be careful, because we don’t want you to try to do indirectly that which you can’t do directly,” he says. “We’d have to take a hard look at whether establishing a separate foundation could somehow be deemed to be lawful and not face a serious challenge.”

Whether that separate entity has a history of giving to the college or not, it is likely that more independent organizations and foundations will receive donations if they can no longer go to directly to colleges, says Cara Dickerson, a vice president at the fundraising software company GiveSmart.

“There’s probably going to be a lot more larger scholarships and things like that coming from the independent base, not so much from the school portion,” she says. She also thinks DEI organizations might band together and share resources and support more scholarships in the wake of the decision.

## **Be Ready for Challenges and to Mitigate Risk**

Despite the lack of guidance, colleges will need to have new policies in place by the fall to deal with new admissions and scholarship applicants. That means that there’s likely to be challenges and lawsuits as universities try to figure things out, Kaufman says.

“There is a tremendous impetus for institutions to develop these new policies and practices as quickly as possible,” he says. “But many of us are anticipating there still are going to be legal challenges once those new policies are rolled out. So this is going to be an evolving process.”

To help mitigate the risks associated with those challenges, he advises people to think how they communicate about their decisions on scholarships — whether via email or in person — so that they are

clear race is not a factor. He also suggests training for all staff.

“We’re also recommending training as these new policies and practices are rolled out,” Kauffman says. “When there are meetings to discuss decisions with the scholarships and financial aid, it would be helpful to make sure there’s a statement that is read at the meeting. So that is a reminder to everyone to make sure that they comply with the new policies and practices and don’t consider race or ethnicity itself.”

*We welcome your thoughts and questions about this article. Please [email the editors](#) or [submit a letter](#) for publication.*

DIVERSITY, EQUITY, AND INCLUSION

MAJOR-GIFT FUNDRAISING



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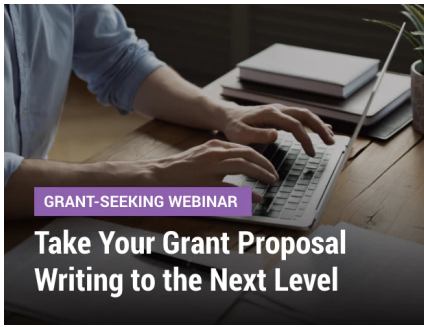
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