LEGAL MEMORANDUM

To: Metro Human Relations Commission

From: Melody Fowler-Green
Yezbak Law Offices

Date: March 4, 2024

Alleged Equal Protection Violation

Question: Did the Metro Nashville Arts Commission violate the Equal Protection Clause of the United States Constitution in its July 20, 2023 funding allocation decision?

As I understand the facts, the Metro Nashville Arts Commission ("MNAC") engaged in a thorough process for its various grant categories that culminated in the adoption of changes to MNAC's granting model in December 2022. Nothing in that decision or the process has been deemed legally suspect by Metro Legal. In April 2023, grant review panels were held for the various MNAC grants to establish eligibility for applicants using a rubric that has also not raised legal concerns. When MNAC's desired budget request (which would have funded all eligible applicants at 100%) fell short in mid-2023, MNAC met on July 20, 2023, to decide on an allocation method to account for the budget shortfall. Prior to the July meeting, MNAC staff developed various race-neutral scenarios for allocation between the eligible grantees. Included in the informational materials and Commission deliberation were data on the dollar amounts that would go to "BIPOC artists" or "BIPOC-led organizations" as well as "White artists" and White-led organizations." On July 20, 2023, MNAC approved a funding allocation scenario based on the size of the organization. However, the inclusion of the race-conscious data and the discussion about that data led Metro Legal to advise MNAC that their actions violated the Equal Protection Clause and, therefore, were unconstitutional.

I believe Metro Legal's analysis is flawed. While Metro Legal has not clearly articulated to the Metro Human Relations Commission or to the public exactly why it believes the July 20 decision constitutes an explicit racial classification subject to strict scrutiny despite the race-neutral criteria used or why that decision violates the Equal Protection Clause, it is evident from the available communications that they have determined that the consideration and discussion about race-conscious data triggers strict scrutiny. However, nothing in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023), or in other Supreme Court cases renders MNAC's July 20, 2023, decision unconstitutional. MNAC considered a variety of allocation options based on race-neutral criteria. The decision was based on a race-

neutral factor – organizational size. The fact that MNAC Commissioners were informed about and discussed the financial *impacts* of the race-neutral criteria on various racial groups does not render the action unconstitutional.

The Supreme Court has stated multiple times, in diverse contexts, over many decades that race may be constitutionally considered in certain circumstances and in a proper fashion without triggering the application of strict scrutiny review. The "mere awareness" or consideration of race in efforts to remedy discrimination and its effects does not automatically equate to a racial classification. *Texas Dep't of Hous. & Comm. Affairs v. Inclusive Comms. Project, Inc.*, 576 U.S. 519, 545 (2015).

One such statement comes from *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). As the Supreme Court explained in that case,

> Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.

Id. at 509–10. Another example comes from former Justice Kennedy's concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007):

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. See *Bush* v. *Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (plurality opinion) ("Strict

> scrutiny does not apply merely because redistricting is performed with consciousness of race. . . Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race[.]'"). **Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.** Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

Id. at 789 (Kennedy, J., concurring in part and concurring in judgment) (cleaned up and emphasis added). And the Supreme Court recently reaffirmed this principle in *Inclusive Communities*, 576 U.S. at 545, stating that, "When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."

It appears from the available information that Metro Legal believes that *Students for Fair Admissions* has overturned or fatally undermined this earlier precedent. However, the Supreme Court does not overturn precedent by implication. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). It is arguably the earlier Supreme Court precent that has "direct application" to the granting process used by MNAC, a facially race-neutral decision made by a governmental entity in disbursing federal financial assistance through a grant program. The Supreme Court did not expressly overrule any of these cases in *Students for Fair Admissions*.

Simply put, public entities can undertake efforts to eliminate racial disparities through a variety of race-neutral means (while considering racial impacts) without triggering strict scrutiny. *Students for Fair Admissions* does not say otherwise.

Furthermore, in weighing and implementing these race-neutral means, acknowledging historical and existing racial disparities and tracking data by race is not forbidden. Ensuring that public entities avoid racially disparate impacts requires some measure of data tracking and analysis by race. It is considered best practice to collect and analyze demographic information in managing

and disbursing federal financial assistance. Title VI regulations provide federal agencies with a clear mandate to collect the data necessary to ensure compliance with their Title VI disparate impact regulations.[1] The Department of Justice Title VI coordination regulation states that "[e]xcept as determined to be inappropriate … federal agencies … shall in regard to each assisted program provide for the collection of data and information from applicants for and recipients of federal assistance sufficient to permit effective enforcement of Title VI." 28 C.F.R. § 42.406(a). The coordination regulation also contemplates that agencies will collect "demographic maps, [and] the racial composition of affected neighborhoods or census data" where they are necessary to understand the considerations above, but "only to the extent that it is readily available or can be compiled with reasonable effort." *Id.* § 42.406(c). According to its latest available version of the Title VI Compliance Report and Implementation Plan, the Tennessee Arts Commission collects racial and ethnic information on its subrecipient organizations and beneficiaries (including from local governments) and reports it annually to the National Endowment for the Arts. It is therefore not at all surprising that the MNAC would collect racial and ethnic demographic data and analyze it to establish that their granting decisions do not violate Title VI.[2]

Here, MNAC has not implemented a grant program that provides preferences, goals, or advantages *based on race*. The kinds of decisions based on racial classifications that are forbidden by the constitution are easily distinguishable from the actions undertaken by MNAC. For example, **the admissions programs that were struck down as unconstitutional in *Students for Fair Admissions* considered race at every step of the decision-making process, and the universities admitted that race was a determinative factor in many admission decisions**. 143 S. Ct. at 2154–56, 2169. None of the underlying facts here suggest that race was a part of the earlier eligibility determinations and was not determinative at any point. On the contrary, the factors and process used for establishing the granting model was race-neutral, as was the rubric used for determining eligibility for the grants. When the Commission had to decide how to allocate the available funds, in providing the Commissioners with data related to race, MNAC staff clearly communicated to the Commissioners that the decision should not be made based on or determined by the racial impacts. Based on the investigation conducted by the Metro Human Relations Commission, MNAC Commissioners did not, in fact, base their decision on race.

[1] While there is no private cause of action for violations of Title VI based on a disparate impact theory, *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001), private parties may file administrative complaints under any theory of liability, including disparate impact, pursuant to agency regulations. The Supreme Court has repeatedly held that Title VI regulations validly prohibit practices having a discriminatory *effect* on protected groups. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 643 (1983) (Stevens, J., dissenting) (citing *Lau v. Nichols*, 414 U.S. 563, 571 (1974) and *Fullilove v. Klutznick*, 448 U.S. 448, 479 (1980)); *Alexander v. Choate*, 469 U.S. 287, 293 (1985)).
[2] https://tnartscommission.org/wp-content/uploads/2021/10/FY21-Title-VI-Implementation-Plan.pdf

MNAC also did not make race-based presumptions of disadvantage in its grant-making decisions. In *Vitolo v. Guzman*, the Sixth Circuit Court of Appeals struck down a federal restaurant relief aid program prompted by COVID-19 economic challenges which determined priority for funding using the race-based presumption of disadvantage. 999 F.3d 353, 358 (6th Cir. 2021) ("[T]he agency presumes certain applicants are socially disadvantaged based solely on their race or ethnicity. Groups that presumptively qualify as socially disadvantaged—and thus get to jump to the front of the line for priority consideration—include "Black Americans," "Hispanic Americans," "Asian Pacific Americans," "Native Americans," and "Subcontinent Asian Americans."). To the extent that MNAC was making a presumption about which grantees are socially disadvantaged (and presumably favored), that presumption was rooted in organizational size, not race.

Additionally, the record here does not suggest that there was a threat of litigation from a party with standing to challenge the constitutionality of the June 20 decision. Even if did, to demonstrate that an evenhanded, facially race-neutral policy like that challenged here is constitutionally suspect, the plaintiff pursuing an Equal Protection challenge must show (1) that the policy exacts a disproportionate impact on a certain racial group, and (2) that such impact is traceable to an "invidious" discriminatory intent. See in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977).

> Only then will such a policy be subject to strict scrutiny review, in which event the state entity defending the challenged policy bears the burden of showing that its policy is "narrowly tailored to serve a compelling interest." *See Hunt v. Cromartie*, 526 U.S. 541, 543, 546, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999). Otherwise**, if the plaintiff is unable to demonstrate purposeful racial discrimination, the rational basis standard of review applies, where the plaintiff must establish that the challenged policy is not "rationally related to legitimate government interests."**

Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 879 (2022) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added).[3] There is no evidence that the July 20 decision exacts a disproportionate impact on a certain racial group or that the decision was traceable to an "invidious" discriminatory intent.

Finally, the Supreme Court has explicitly held that Title VII of the Civil Rights Act of 1964, which contains the same basic prohibitions as Title VI, prevents a municipality from rescinding a defensible decision that allegedly has a disparate impact based on race unless there is a "strong basis in evidence" that the original decision was unlawful, meaning that the municipality is all-

[3] It bears noting that the Supreme Court recently declined to review the ruling in *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (2022).

but certain to lose the threatened litigation considering its defenses and all the relevant legal issues in detail. *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009). Here, there is no evidence that Metro Legal's analysis considered at all the question of whether MNAC's decision would actually be considered a racial classification in any litigation or any potential defenses to such an allegation. Metro Legal simply assumed that the decision was race-based without a full investigation into the underlying facts, but there is significant evidence to the contrary. The fact investigation undertaken by the Metro Human Relations Commission shows a strong basis in evidence that the July 20 decision was lawful. **Under *Ricci*, then, the decision to rescind the July 20 decision likely creates a greater risk of liability for the city than it would have faced had MNAC proceeded with the grants as decided on July 20.**

Title VI Application

Question: Does the Metro Legal Department have an obligation to comply with Title VI; or can the Metro Legal Department be properly named or held liable in a Title VI complaint?

Title VI states that no program or activity receiving "Federal financial assistance" shall discriminate against individuals based on their race, color, or national origin. The clearest example of Title VI-covered federal financial assistance is money provided through federal grants, cooperative agreements, and loans. An agency also might provide federal financial assistance in nonmonetary form; that is, "whatever thing of value is extended by the grant statute." See *United States Dep't of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 607 n.11 (1986) ("Although the word 'financial' usually indicates 'money,' federal financial assistance may take nonmoney form," citing *Grove City Coll. v. Bell*, 465 U.S 555, 564–65 (1984)).[4] An entity may receive grant money directly from an agency or indirectly through another entity. In either case, the direct recipient as well as the subrecipient are considered to have received federal funds. In other instances, the funding may be directed to the funding beneficiaries but another entity ultimately receives the funding.

Under Title VI, it is the recipient who is barred from discriminating against persons because of race, color, or national origin with respect to the operation of covered programs or activities. A "recipient" is an entity or person that receives federal financial assistance.

[4] Federal financial assistance does not include contracts of guaranty or insurance, regulated programs, licenses, procurement contracts by the federal government at market value, or programs that provide direct benefits. Although federal financial assistance is contractual in the sense that the recipient agrees to use the assistance in a manner consistent with the terms of the award and, in most instances, agencies will have signed an assurance agreement binding it to comply with certain terms and conditions.

All agency Title VI regulations use a similar if not identical definition of "recipient," as follows:

> (f) The term recipient means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign [sic], or transferee thereof, but such term does not include any ultimate beneficiary.
> (g) The term primary recipient means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

28 C.F.R. §§ 42.102(f), (g).

Title VI prohibits discrimination in "any program or activity," any part of which receives Federal financial assistance. *See* 42 U.S.C. §§ 2000d, 2000d-4(a). When enacted in 1964, Title VI did not include a definition of "program or activity." Congress had made its intentions clear, however: Title VI's prohibitions were meant to be applied institution-wide, and as broadly as necessary to eradicate discriminatory practices in programs that federal funds supported. 110 Cong. Rec. 6544 (statement of Sen. Humphrey); *see* S. Rep. No. 64, 100th Cong., 2d Sess. 5–7 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 7–9. Consistent with congressional intent, courts initially interpreted "program or activity" broadly to encompass the entire institution in question. For example, Title VI covered all the services and activities of a university even where the only federal assistance was federal financial aid to students. *See, e.g., Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975). In 1984, the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 571 (1984), severely narrowed the interpretation of "program or activity," ruling that Title IX's prohibitions against discrimination applied only to the specific office of an institution's operations that received the federal funding. Because the college received federal funds because of federal financial aid to students, the Court found that the "program or activity" was the college's financial aid program. *Id.* at 574.

In response to the ruling in *Grove City*, Congress passed the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) ("CRRA"). The CRRA includes virtually identical amendments to broadly define "program or activity" (for coverage purposes) in four civil rights statutes: Title VI, Title IX, Section 504, and the Age Discrimination Act.

Regarding state and local governments, the following instrumentalities may constitute a "program or activity" under Title VI:

> [A]ll of the operations of
>
> (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; …any part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a(1).

Congress intended a broad application to state and local governments:

> [W]hen any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered. If a unit of a state or local government is extended federal aid and distributes such aid to another governmental entity, all of the operations of the entity which distributes the funds and all of the operations of the department or agency to which the funds are distributed are covered.

S. Rep. No. 100-64, at 16 (1988), reprinted in 1988 U.S.C.C.A.N. 18. Therefore, when an office or operation is part of a larger department or entity, the relevant "program or activity" is the larger entity.

An entire state or local government generally is not considered a "program or activity" where the funding goes to an agency or department within the entity and not to the state or local government specifically. *See Lovell v. Chandler,* 303 F.3d 1039, 1051 (9th Cir. 2002) ("The term 'program or activity' … does not encompass all the activities of the State. Instead, it only covers all the activities of the department or the agency receiving federal funds."); *see also Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991).

An entire state or local government may, however, be liable for Title VI violations if it is partially responsible for the discriminatory conduct or if it is contractually obligated to comply with Title VI.

In *United States v. City of Yonkers*, a New York federal district court rejected the state's argument that sovereign immunity applied because it is not a "program or activity." 880 F. Supp. 212, 232 (S.D.N.Y. 1995), *vacated and remanded on other grounds*, 96 F.3d 600 (2d Cir. 1996). The court stated that, not only does the plain language of § 2000d-7 defeat the state's argument, but also

> [N]othing in the legislative history of Title VI compels the conclusion that an entity must be a 'program' or 'activity' to be a Title VI defendant…. We therefore hold that the State of New York can be sued under Title VI as long as it, along with those of its agencies receiving federal financial assistance, is alleged to have been responsible for a Title VI violation.

Id. (note omitted). *See also N.Y. Urban League v. Metro. Transp. Auth*., 905 F. Supp. 1266, 1273 (S.D.N.Y.), *vacated on other grounds*, 71 F.3d 1031 (2d Cir. 1995).

Rejecting the argument that a state cannot be a proper defendant in a case alleging Title VI violations, a federal district court in California stated:

> There is nothing in the language of Title VI, including the Restoration Act, to indicate that an entity must be a "program or activity" if it is to be sued for a violation of Title VI. Indeed, the accepted practice, both before and after the Restoration Act's passage, has been that a state may be sued so long as it is responsible for the Title VI violation. . . . The facts as they develop in the future may or may not support a finding that the State's actions violate Title VI. The State may not escape Title VI liability, however, simply because it is not a "program or activity."

Assoc. of Mex.-Am. Educators v. Calif., 836 F. Supp. 1534, 1543 (N.D.Cal 1993).

When accepting federal financial assistance, state and local governments are usually required to obligate themselves to comply with Title VI by a separate contract of assurance. Even absent a written contract, the state or local government obligates itself to comply with Title VI if the entire governmental unit accepts federal financial assistance. *See Paralyzed Veterans*, 477 U.S. at 605 (noting that "the recipient's acceptance of the funds triggers [contractual] coverage under the nondiscrimination provision" and citing *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983)).

Therefore, it is my opinion that the Metro Legal Department may be properly named or held liable in a Title VI complaint under the following three scenarios:

1. Metro Legal is determined to be part of the "operations" of the department or agency to which the federal funds are distributed.
    - Given the integral role Metro Legal plays in the various departments, particularly with regard to the acceptance of federal financial assistance and in the policies governing the distribution of the funds, this is a possibility.
2. Metro Legal is partially responsible for the discriminatory conduct.

3. The Metropolitan Government of Nashville & Davidson County as a whole is obligated to comply with Title VI as a result of a contractual assurance or by having accepted federal fund.
    - While I have not done an extensive search, Metro Government has likely obligated itself to comply with Title VI by accepting funds through the Department of the Treasury (particularly during the COVID pandemic), or through formula and block grants awarded to the city to support activities across departments.

Confidentiality in Title VI Investigations

Question: Can the Metro Human Relations Commission keep the identity of Title VI complainants confidential?

The Department of Justice regulations implementing Title VI are instructive, though not binding on the Metro Human Relations Commission ("MHRC"). The regulations provide instruction to the federal agency or department that has provided the grant on how to conduct investigations into alleged or suspected Title VI violations (whether through periodic compliance reviews, resolution of individual complaints, or as a result of other credible information). The regulations provide guidance to "responsible Department official[s]," The term responsible Department official with respect to any program receiving Federal financial assistance means the Attorney General, or Deputy Attorney General, or such other official of the Department as has been assigned the principal responsibility within the Department for the administration of the law extending such assistance.

> "The identity of complainants shall be kept confidential except to the extent necessary to carry out the purpose of this subpart, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder."

28 C.F.R. § 42.107.

The Offices of Civil Rights in federal agencies generally state they that keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the civil rights laws, or unless disclosure is required under the Freedom of Information Act, the Privacy Act or otherwise required by law.

Tennessee has a state public records law, Tennessee Code Annotated § 10-7-501 *et seq.*, the Tennessee Public Records Act ("TPRA"). It applies generally to the records of Metro government, including MHRC:

> All state, county and municipal records shall at all times, during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Tenn. Code Ann. § 10-7-503(a)(2)(A).

"'Public record or records' or 'state record or records' means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-301(6). The test for determining whether a record is public is "whether it was made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." *Griffin v. City of Knoxville*, 821 S.W. 2d 921, 924 (Tenn. 1991).

Under the section 10-7-505(d), the General Assembly directs the courts to interpret the provisions of the TPRA "broadly…so as to give the fullest possible public access to public records." Tennessee Courts have found that even in the face of serious countervailing considerations, unless there is an express exemption within the law, a record and/or information must be released. There is no express exemption for records related to investigations of Title VI complaints, either in state or federal law.

It is my opinion that MHRC can take reasonable efforts to keep the identity of complainants confidential, with the understanding that disclosure of that information may be necessary to conduct an investigation or hearing. Further if identifying information is contained on any public records, it must be disclosed in response to a public records request.

In rendering these opinions, I have reviewed the following documentation:

1. Title VI Complaint to the Metro Human Relations Commission ("MHRC") dated October 23, 2023.
2. Drafts of the MHRC Title VI Fact Finding Report.
3. Letters dated January 19 and February 22, 2024 from Metro Legal to MHRC Director Davie Tucker.
4. 20-minute video titled "Video: Grant Allocations" by Dana Parson that explains each scenarios. Video was received from Metro Arts staff member via July 5, 2023 email.]
5. Rough transcript of the July 20, 2023 meeting of the Metro Arts Commission.
6. Memo from Griffin & Strong, P.C. to the Metro Arts Commission dated January 8, 2024; "Re: Recent Questions to Griffin & Strong regarding Grant Program – Expanded."
7. Email from Metro Legal to MHRC Director Davie Tucker dated January 8, 2024; subject "Arts Commission Title VI Complaint."
8. Memo from Metro Legal to the Metro Arts Commission dated July 25; "Subject: The U.S. Supreme Court Ruling in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*"