

# Affirmative Action Q&A

## EXPERT ANSWERS TO THE MOST PRESSING QUESTIONS ON **SUPREME COURT DECISIONS IN *SFFA v HARVARD/UNC***

**ON JUNE 29, 2023**, the Supreme Court issued its [decisions](#) in two cases challenging affirmative action admissions programs in *Students for Fair Admissions (SFFA) v. Harvard* and *SFFA v. University of N. Carolina*. While the Court did not ban affirmative action admissions (also known for purposes here as “race-conscious admissions” where race is explicitly considered as a factor for admissions), the Court’s decisions do undermine precedent, making it more difficult for universities to pursue race-conscious admissions. The decisions are complex as are the slew of questions stemming from the decisions.<sup>1</sup> To best clarify the actual impact of the SCOTUS ruling, the Lawyers’ Committee has developed this page as a resource to help answer questions for communities and advocates to better understand the decisions and to answer questions on how to move forward to ensure racial equity and access to opportunity in higher education.

With co-counsel, the Lawyers’ Committee for Civil Rights Under Law<sup>2</sup> represents a multiracial group of student-intervenors in the *UNC* case and argued that case before the Supreme Court helping to defend affirmative action; and we represent student-amici in the *Harvard* case and student and organizational intervenors in another affirmative action case pending in the Western District of Texas, *SFFA v. University of Texas at Austin*.

Should you need legal advice, please consult with an attorney.

### THE DECISIONS

**Q Did the Supreme Court overrule *Grutter v. Bollinger* (2003) and ban all race-conscious admissions?**

No. Many of the national headlines proclaiming such were wrong. The Court struck down the lawfulness of

Harvard’s and UNC’s programs and made it more difficult for universities to engage in voluntary race-conscious admissions (see further below), but it did not outright ban race-conscious admissions. In fact, the Court acknowledged the lawful use of race-conscious admissions programs for military academies and to remedy past and ongoing discrimination.

**Q May universities still include diversity as a goal and/or as part of their missions?**

Yes, institutions of higher education may continue to include, and pursue, diversity as a goal and as part of their missions. The Court circumscribed how universities may consider race as a plus factor in admissions but it did not hold that universities must abandon their own diversity goals and missions, including racial diversity among broader diversity. Such aspirations remain a bedrock principle for creating a thriving multiracial democracy. And nothing in the opinion suggests that diversity, equity, inclusion, and access (DEIA) campus programs are at-risk.

**Q Do these decisions affect the Court’s interpretation of Title VI?**

No, the decisions did not alter the Court’s interpretation of Title VI of the Civil Rights Act of 1964. Like in prior Supreme Court decisions, the Court interpreted Title VI’s prohibitions against the use of race as coextensive with the prohibitions outlined in the Fourteenth Amendment’s Equal Protection Clause. Essentially, this means that Title VI does not place greater restrictions on universities in pursuing diverse student bodies.

**Q Under what circumstances may a university consider race in its admissions program?**

Institutions of higher education can continue considering

<sup>1</sup> See our summary analysis of the decisions, “[Navigating the Affirmative Action Rulings: An In-Depth Analysis.](#)” For additional resources from the U.S. Departments of Education and Justice, please see: [Dear Colleague Letter](#) and [a Questions and Answers.](#)

<sup>2</sup> The UNC student-intervenors are also represented by the North Carolina Justice Center and Relman Colfax. Harvard Student-Amici are represented with co-counsel Asian Americans Advancing Justice | AAJC and Arnold & Porter. In the UT-Austin case, our pro bono counsel are from Hunton Andrews Kurth. The statements in this document do not reflect the opinions of co-counsel or our clients.

race as a plus factor in its admissions programs so long as those programs satisfy strict scrutiny (i.e., are narrowly tailored to achieve a compelling government interest). In these decisions, the Court found that Harvard's and UNC's programs did not meet that high burden because: 1) they did not have a stated endpoint; 2) the objectives were not measurable; 3) they used race as a negative factor, and 4) they used race to stereotype applicants.

The Court's decisions also left open the possibility that race-conscious admissions programs could be upheld under a different compelling interest. This could include, for example, remedying specific acts of an institution's past and present discrimination, or potentially addressing pervasive racial harassment on campus caused in part by the reduced number of students of color on campus.

Critically, and as further discussed below, the Court emphasized these decisions do not prevent institutions of higher education from considering an applicant's racial experiences in the admissions process, so long as those lived experiences are linked to what a particular student can uniquely contribute to the institution.

### **Q Can colleges still engage in race-neutral plans to pursue the benefits of diverse student bodies, where race is not a plus factor in admissions?**

Yes, colleges can continue to use race-neutral admissions plans that consider nonracial factors. This includes, for example, race-neutral admissions policies that consider an applicant's socio-economic status and family wealth, first generation college student, high school class rank, and language.

### **Q How does this case distort the history and legacy of *Brown v. Board of Education*?**

In its decisions, the Court turns *Brown v. Board of Education* on its head by suggesting that *Brown* supports a colorblind reading of the Constitution's Equal Protection Clause rather than a race-conscious interpretation. The *Brown* Court did not invoke a colorblind ruling. In fact, the Court rejected those same arguments raised 1954 and again in 2003 when *Grutter* was decided. Indeed, *Brown* and *Harvard/UNC* all sought to address the exclusion of students of color and to bring together students across races and ethnicities to learn and grow together. Given the gross misapplication of *Brown* and the grander history behind the Equal Protection Clause showing an intent both to advance opportunity and end the subjugation of Black and other people of color, it is possible that the ruling in this case could be overturned as egregiously wrong by a future court. Nevertheless, the opinion remains the law, but again, it does not require institutions to operate with blinders.

### **Q Do the decisions apply to military institutions? Why not?**

No, the decisions do not apply to military academies. In footnote 4, the Court provided an exception for military institutions because those institutions were not parties to the case and may have "potentially distinct interests" from non-military institutions. Thus, military institutions may continue to consider race as a factor among others for admissions.

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### **Q What happens to the *UNC* and *Harvard* cases now?**

Following the decisions, the cases are being remanded to the respective district courts, and UNC and Harvard will be required to redesign their admissions policies to comply with the Court's decisions. Among other options, the institutions could craft new admissions plans that satisfy strict scrutiny by adding a time limit, eliminating the use of race as a negative factor and stereotype, and defining measurable objectives. Or, the institutions could stop considering race as a factor in admissions and adopt a race-neutral admissions program. It is imperative that universities not over-correct and deny highly talented students of color in the process. Instead, they should work in partnership with their students, faculty and communities to ensure comprehensive admissions plans are adopted and implemented to make certain that students across races and ethnicities can access their universities and be supported in meaningful ways.

## **Q Do the Supreme Court's affirmative action decisions affect the employment realm?**

No, the Supreme Court's decisions in *UNC* and *Harvard* do not affect the employment sector, as the decisions were limited to the use of race as a plus factor in the higher education admissions context and employment law is typically governed under other laws. For more information on the decisions and employment, please see [this resource](#) from our Economic Justice Project.

## **STUDENTS**

### **Q What role did students play in these cases?**

Students played a critical role in both the *UNC* and *Harvard* cases, demonstrating to the Court why race and racial experiences are relevant to consider in a holistic admissions plan. In *UNC*, a diverse coalition of students served as parties to the case as "Respondent-Students," and in *Harvard*, a multi-racial group of students and student organizations served as "Amici" ("friends of the court" who were not parties but were allowed to participate in the proceedings). Collectively, these students challenged SFFA's assertions by testifying in court and submitting briefs and arguments in support of race-conscious admissions.

Student testimony and advocacy, along with immense support from other amici filing briefs with the Court, can be fairly credited with the majority's express acknowledgement that universities may continue to consider a student's racial experience when raised in their applications. Student testimony and their briefs were also cited several times in the dissents, highlighting the importance of racial identity in the college admissions process.

### **Q May students discuss their race and the role it has played in their life in their college applications?**

Yes, students can and should continue to discuss their race and its impact in their lives as relevant in their undergraduate and graduate admissions applications. The Court clearly stated that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." For example, this could be raised in response to essay questions or in identifying their extra- and co-curricular participation and involvement in affinity groups and cultural organizations in their admissions application. Should universities attempt to censor, penalize, or otherwise exercise bias against students expressing their

racial experiences in their applications, they should be aware that they could be subjecting themselves to liability under the First and Fourteenth Amendments and should consult an attorney.

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### **Q Can students still apply for scholarships that may be targeted to their race or ethnicity?**

Nothing in the decisions suggests that students may not continue to apply for and receive such scholarships. Students are encouraged to continue to apply for all resources available to them to help pay for college. This is especially important for students of color who particularly experience higher levels of debt after graduation.

## **UNIVERSITIES**

### **Q May universities consider racial experiences, among other experiences and qualifications, in making admissions decisions?**

Yes, universities can continue to favorably consider a student's racial experiences among other factors and experiences when their consideration of such experiences are "tied to that student's unique ability to contribute to the university." In other words, universities can continue to consider applicants for a broad range of characteristics that may be informed by their racial experiences, like resilience, openness, or bravery.

### **Q May universities request that students applying for admission indicate their race for the purposes of gathering demographic data?**

Yes, universities can continue to gather racial demographic information for applicants applying for admission, so long as they do not use that information to award a plus

as a direct result of any applicant's race. In fact, many universities may want to collect and analyze this data to ensure their admissions officers are not being biased against any racial or ethnic groups following the decisions and any revisions made to admissions policies.

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**Q May colleges and universities continue to ask students to respond to a diversity prompt?**

Yes, colleges can continue to ask students to respond to a diversity prompt commensurate with their mission and goals and should assess responses on an individualized basis.

**Q May universities continue to conduct targeted outreach for admissions (i.e., by zip code, school, neighborhood, county, etc.)?**

Yes, universities should be able to continue to conduct targeted outreach to underserved communities by including factors like zip code, school, or county. This Court's decisions concerned only the use of race as a plus factor in admissions programs and do not extend to the use of regional-based recruitment and outreach efforts.

**Q Can universities continue to support affinity groups on campus?**

Yes, universities can and should continue to support affinity groups on campus, as the decisions are limited to the use of race as a plus factor in the admissions context. As Justice Sotomayor pointed out in her dissent, citing student-intervenor testimony, affinity groups have tangible benefits that help decrease tokenization, isolation, and the effects of racial stigma.

**Q Are there any other cases challenging race-conscious admissions at other universities?**

Yes, SFFA has filed a case challenging race-conscious admissions programs at the University of Texas at Austin. The district court recently lifted a stay in that case following the decisions in *Harvard* and *UNC*. The Lawyers' Committee represents multiracial students and organizations in the

UT-Austin case. UT-Austin revised its policy and guidance to drop race as a factor in admissions. As of September 2023, the parties disagree on whether UT-Austin should be forced to do more and will be briefing this and other issues in court.

**Q Won't switching from a race-conscious to a class-based admissions program have the same effect?**

No, research shows that class-based plans (like socioeconomic plans) are not as successful in diversifying student bodies as race-conscious admissions. This occurs for various reasons including the fact that race and class are not synonymous with one another and that there are still far greater numbers of lower socioeconomic white families than Black and other families of color. Accordingly, it's imperative as with all admissions plans that they are comprehensive in scope.

**Q What sort of measures should universities consider instituting to ensure that students of all backgrounds feel welcomed, comfortable, and prepared to succeed on campus?**

Among other options, universities should consider engaging in significant, meaningful outreach to underrepresented communities; increasing support for student clubs and organizations, including affinity groups; increasing the number of faculty and staff from underrepresented communities, including counselors, administrators, and mental health professionals, through lawful means; providing opportunities for cross-cultural communication and celebrating multiculturalism; and reaffirming their institutions commitment to employing and graduating professionals who serve diverse populations.

**Q What if my state has passed an anti-DEIA law? How does that factor in?**

You should consult legal counsel. While the decisions in the *Harvard/UNC* cases should not impact DEIA measures, anti-DEIA state laws and policies could have an impact and you should consult an attorney should you have questions. Depending on their language and enforcement, anti-DEIA laws also could violate civil rights and civil liberties and universities should be mindful in their implementation of such laws and policies.

**Q What considerations should universities account for to help ensure they are not creating barriers to equal educational opportunity?**

Colleges and universities receiving federal funds have

affirmative obligations under Title VI of the Civil Rights Act of 1964—and possibly state laws—to deconstruct racial barriers to equal educational opportunity. Among other measures, universities should consider: eliminating consideration of SAT/ACT scores for admissions and scholarships, as well as donor and legacy preferences and early decisions; reviewing and revising arbitrary course degree requirements; removing community college credit transfer restrictions; revising existing financial and language barriers for their admissions processes; refining high school recruitment and pipeline policies to ensure students in underserved communities are not overlooked; and redefining “merit” to decenter emphasis on test scores.

**Q Why is there pressure to end legacy and donor admissions as a result of this case?**

There is pressure to end these preferences because these programs have historically prioritized white and wealthy communities, especially in traditionally white institutions, and serve as additional barriers to equal access to higher education, across race and class lines.

## K-12 SCHOOLS

**Q How do the decisions affect integration efforts in K-12 schools?**

These decisions do not impact K-12 integration efforts, as they only concern higher education admissions. Outside of active school desegregation cases, K-12 schools do not typically engage in affirmative action.

**Q May K-12 schools use race-neutral plans to ensure schools are diverse across backgrounds?**

Yes, K-12 schools are free to consider race-neutral plans to ensure greater student body diversity so long as the admissions plans do not intentionally seek to exclude any group of students on the basis of their race or national origin. Many of the K-12 race-neutral plans are attempting to bring together students together across backgrounds, including those who are English learners, who are from lower socioeconomic status, those with disabilities, and those from different racial backgrounds. But they are not treating and excluding any individual students based on their race. Thus, such plans should not run afoul of the Equal Protection Clause.

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**Q I've heard there are cases challenging race-neutral plans and that such decisions could impact both higher education and K-12 schools. Should I be concerned?**

There are current cases being litigated in Virginia, Maryland, Massachusetts, Pennsylvania, and New York. In these cases, school districts were essentially responding to community concerns that historically marginalized students of color, low-income, English learner, and/or students with disabilities were being excluded from highly coveted, specialty public high schools. The districts revised their policies to ensure that they were not excluding such students, thus making them more accessible. Other students represented by far right-wing legal groups sued, alleging they were being excluded even though they still constituted large majorities or pluralities in the schools. Thus far, none has been successful in challenging race-neutral admissions plans.