

# AFFIRMATIVE ACTION IN HIGHER EDUCATION

The racial justice landscape after the *SFFA* cases





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# I. INTRODUCTION

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For decades, affirmative action has been a vital tool in advancing equal opportunity in higher education. But it was dealt a devastating blow in the United States Supreme Court’s recent decision in *Students for Fair Admissions, Inc. v. Harvard* and *Students for Fair Admissions, Inc. v. University of North Carolina*. Although it was never a panacea for the stark inequalities in our educational system, affirmative action helped countless women and people of color overcome barriers to entry and gain admission to higher education.<sup>1</sup> Then and now, the success of our multiracial democracy relies upon pathways to professional achievement that are open to all.

This report utilizes the expertise of leading civil rights organizations to provide a legal history of affirmative action in higher education, analyze the Supreme Court’s decision in the *Students for Fair Admissions (SFFA)* cases, discuss the racial justice consequences of upending 45 years of precedent, and offer recommendations for advancing educational equity in light of the decision.<sup>i</sup> This report is a resource for those furthering their commitment to pursuing racial equity and a diverse educational setting in the wake of this decision, including but not limited to a wide range of advocates and stakeholders, prospective and current college students and alumni, and education professionals. Despite the substantial setback from the Supreme Court’s decision on affirmative action, it is as vital now as ever before to ensure that all Americans—regardless of their backgrounds—have equitable access to resources and opportunities at all levels of our educational system.

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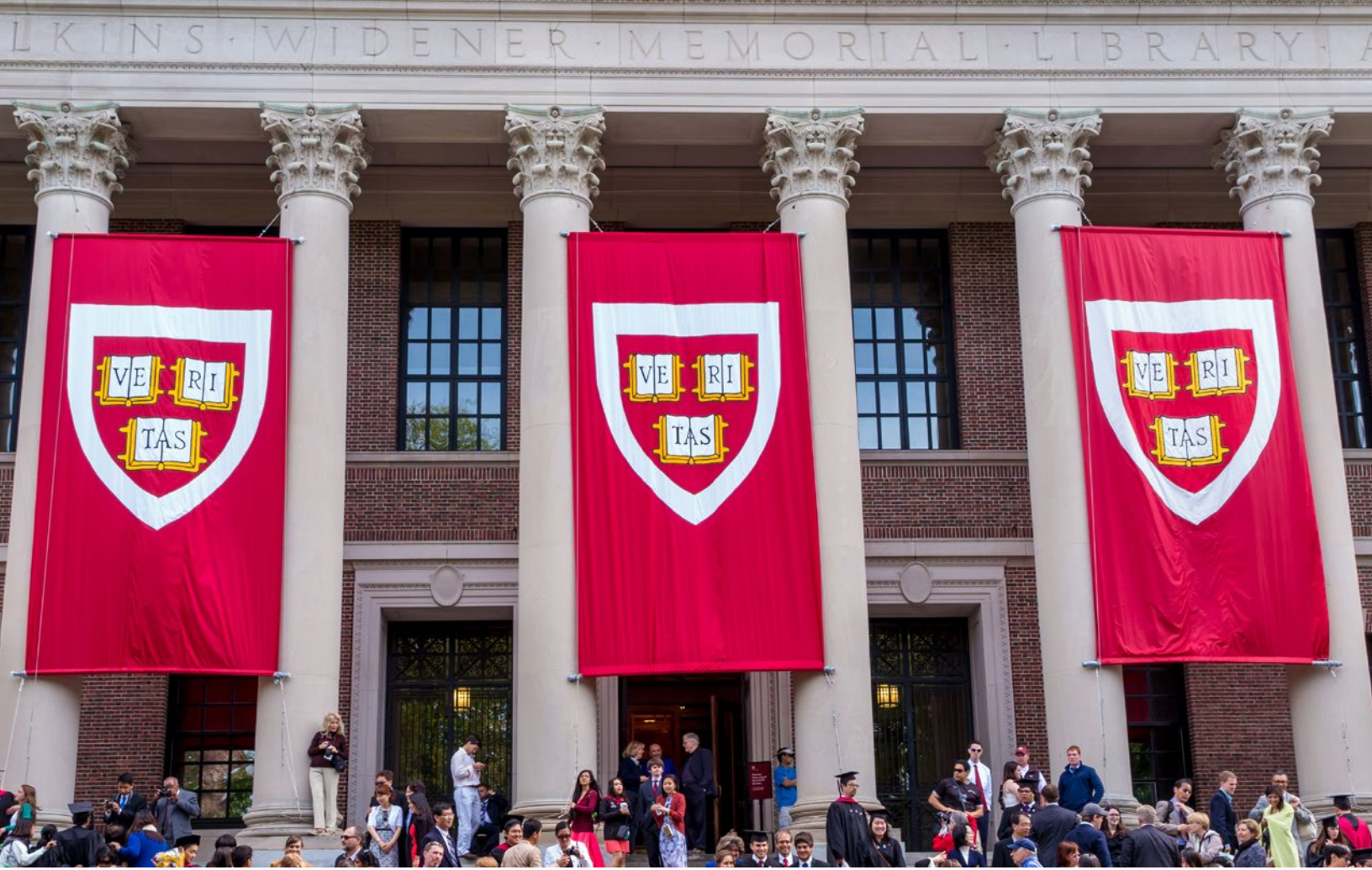
<sup>i</sup> This report is not intended to serve as legal advice. Should you require legal advice, please seek an attorney. Another available resource is the “Questions and Answers Regarding the Supreme Court’s Decision in *Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina*,” issued by the U.S. Department of Justice and U.S. Department of Education, available at [https://www.justice.gov/d9/2023-08/post-sffa\\_resource\\_faq\\_final\\_508.pdf](https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf).



DIVERSITY  
IS A  
NECESSITY









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## II. EXECUTIVE SUMMARY

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Beginning in the 1970s, affirmative action programs helped dismantle racial segregation and boost the enrollment of students of color in institutions of higher education, creating more integrated, diverse learning environments at the nation's colleges and universities. Decades of litigation watered down and narrowed these programs, beginning with the Supreme Court's decision in *Regents of the University of California v. Bakke* in 1978, which rejected the use of affirmative action as a remedy for societal discrimination. Still, as recently as 2016, the Supreme Court affirmed the constitutionality of considering race as one of many factors in admissions decisions to promote diversity on college campuses.

In 2014, SFFA, an organization founded by conservative activist Edward Blum, challenged the constitutionality of race-conscious admissions programs at Harvard and University of North Carolina at Chapel Hill (UNC).<sup>2</sup> With the support of conservative donors, Blum has long challenged civil rights and racial justice advancements, including spearheading *Shelby v. Holder*, which gutted key protections of the Voting Rights Act.<sup>3</sup>

SFFA argued that the consideration of race in admissions constitutes impermissible race discrimination. After trials in Massachusetts and North Carolina, both federal trial courts rejected all claims and concluded that the respective admissions programs were lawful under the legal standard affirmed by the Supreme Court in 2016. SFFA ultimately secured review by the Supreme Court, which issued its opinion in *SFFA v. Harvard* and *SFFA v. UNC* in June 2023. Writing for the majority, Chief Justice John Roberts reversed the trial court

findings and held that the admissions programs at Harvard and UNC violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Though devastating, the Court's decision nevertheless leaves colleges and universities with lawful avenues to advance educational equity. The Court explicitly preserved the ability of schools to consider an individual student's experiences with race and how those experiences affect their qualifications for admission. Schools may also continue to pursue race-neutral efforts to increase diversity in college admissions, such as those highlighted in this report. Finally, the Court held that colleges may consider race to remedy specific instances of past discrimination, and that its decision did not bar military academies from having race-conscious admissions policies.<sup>4</sup>

The Supreme Court’s weakening of affirmative action underscores the urgent need to promote equal educational opportunities and advance racial equity through other lawful means. To help in this endeavor, this report makes the following recommendations:



### **Diligently Comply with Anti-Discrimination Laws.**

Schools should take proactive measures to ensure that their policies and practices comply with federal and state anti-discrimination laws, including those that prohibit funding recipients from intentionally or unintentionally limiting opportunities for people on the basis of race or ethnicity.



### **Reimagine and Retool Admissions Policies in Higher Education.**

Schools should engage in holistic admissions processes that evaluate applicants’ demonstrated capacity and strength in light of resources and opportunities available to them in their K-12 community. Schools should also critically examine and revise admissions requirements, policies, and procedures to ensure that they do not create inequitable and unnecessary barriers to access.



### **Expand Recruitment Efforts and Build Robust Pipelines.**

Schools should develop innovative strategies to target recruitment efforts to underrepresented and underserved communities. This includes the creation of tailored programming for students who cannot visit campus, development of robust pipelines for students of all ages, and investment in and compensation for historically underrepresented students and alumni to serve as ambassadors for the institution in their communities.



### **Support Historically Marginalized and Underrepresented Students on Campus.**

A healthy, vibrant campus climate for all students is critical for ensuring equity in higher education. Schools should implement systems to address prejudice and discrimination on campus, and conduct institutional climate reviews. In addition to pre-college programming for first generation students, schools should provide holistic supports for basic needs like housing, nutrition, and health.

These efforts are especially critical in the context of the opposition’s continued attack on educational equity and attempts to drive a wedge between communities of color. Undoubtedly, some will seek to exploit the Supreme Court’s decision in order to slow or reverse the progress created through affirmative action. However, while the *SFFA* decision is greatly disappointing, it does not change the fact that our nation’s future depends on racial equity and diversity in higher education to achieve a thriving, multiracial democracy. To that end, colleges must engage with stakeholders and consider the range of lawful tools and policies to achieve these goals.



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# III. THE LEGAL HISTORY OF AFFIRMATIVE ACTION IN HIGHER EDUCATION

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Nettie Hunt and her daughter Nickie sit on the steps of the U.S. Supreme Court. Nettie explains to her daughter the meaning of the high court's ruling in the *Brown vs. Board of Education* case that segregation in public schools is unconstitutional. (Photo by Bettman/Getty Images)

Affirmative action is rooted in the Supreme Court’s 1954 decision, *Brown v. Board of Education*, which overturned decades of Supreme Court precedent upholding racially segregated schools. Following nearly 250 years of institutionalized slavery, Jim Crow laws further entrenched the legal, social, and economic subjugation of Black people. This racial segregation relegated Black people, including Black students, to dehumanization and second-class citizenship in all walks of life, including education. Other people of color were likewise subject to a racial caste system. For example, in the 1927 case *Gong Lum v. Rice*, Chinese American students in Mississippi “could not insist on being classed with the whites” and instead were forced to “attend the colored public schools of [their] district.”<sup>5</sup> *Brown* established that the Equal Protection Clause cannot tolerate racially segregated school systems and recognized that “education is perhaps the most important function of state and local governments [and] the very foundation of good citizenship.”<sup>6</sup> The *Brown* decision drew upon the reasoning of earlier Supreme Court cases, such as *Sweatt v. Painter*,<sup>7</sup> which struck down segregation in higher education and emphasized the importance of studying and exchanging views with other students, and decisions like *Mendez v. Westminster School District of Orange County*,<sup>8</sup> which held that the segregation of Mexican American children was unlawful.

Affirmative action was one way to help realize the promise of *Brown*. The term “affirmative action” first appeared in early government interventions to promote equal opportunity, focused primarily on stamping out intentional discrimination in government contracting and employment.<sup>9</sup> In 1961, responding to pressure from the civil rights movement and other activists, President John F. Kennedy signed Executive Order 10925, which required government contractors to “take affirmative action to ensure that applicants are

employed, and employees are treated during employment, without regard to their race, creed, color, or national origin.”<sup>10</sup> A few years later, President Lyndon B. Johnson built on this directive by signing Executive Order 11246.<sup>11</sup> The order required federal contractors, including public and private colleges and universities that contracted with the federal government, to implement and maintain affirmative action plans, including steps to improve recruitment, hiring, and promotion of members of historically marginalized racial groups and women.<sup>12</sup>

The assassination of Dr. Martin Luther King, Jr. in 1968 galvanized a push to recommit to diversifying institutions of higher education that had been, in large part, exclusively white.<sup>13</sup> In response, early affirmative action admissions programs facilitated a swift and significant boost in the enrollment of Black<sup>ii</sup> Americans in institutions of higher education.<sup>14</sup> The number of Black students admitted to Ivy League and peer universities rose sharply in 1969, often more than doubling.<sup>15</sup> Black college enrollment then continued to rise from about 522,000 to nearly a million between 1970 and 1980. By 1976, the enrollment share of Black college students caught up to the population share of Black college-aged Americans.<sup>16</sup> The same was true for other historically underrepresented groups. For example, Asian Americans constituted only 3% of Harvard’s Class of 1980 — now, Asian Americans make up 27.6% of the Class of 2026.<sup>17</sup>

Just as affirmative action policies began to succeed, however, challenges to those policies also started winding through the courts. Allan Bakke, a white man twice rejected by the University of California at Davis School of Medicine, challenged the school’s affirmative action system all the way to the Supreme Court. In 1978, the Court dealt the first blow to affirmative action in *Regents of the University of*

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ii Naming preferences for specific racial and ethnic groups differ across and within communities. While respecting and acknowledging these differences, this report and guidance utilizes the following terms for ease of reference: Black, Latinx, Indigenous, Asian American, and Pacific Islander.



*California v. Bakke*. The Supreme Court held that the university's affirmative action program, which reserved 16 seats for underrepresented applicants of color to redress longstanding racial exclusions from the medical profession, violated the Fourteenth Amendment by failing to satisfy the Court's strict scrutiny legal framework.<sup>18</sup>

The Supreme Court's reasoning in support of this decision, however, was fractured and made it difficult for schools to know if and how they could consider race in admissions programs. Four justices concluded that the medical school's use of set-aside seats, or quotas, violated Title VI. By contrast, four other justices concluded that the medical school's remedial program was permissible to address the effects of systemic discrimination. Justice Lewis F. Powell, Jr. cast the deciding vote, holding that racial quotas were impermissible, thus invalidating the medical school's admissions program. However, he asserted that the use of race in admissions programs could be constitutional if narrowly tailored to achieve a compelling interest. Notably, though the medical school had articulated several justifications for the use of race in its admissions programs, the only interest that Justice Powell recognized as "compelling" was the medical school's interest in the educational benefits of diversity.<sup>19</sup> As a result, *Bakke* signified a transition away from considering affirmative action as a remedy for societal discrimination and inequality and a shift toward the virtues of diverse learning environments as affirmative action's animating purpose and benefit—a change that Justice Thurgood Marshall recognized, in a separate opinion, as a tremendous loss for racial equity.<sup>20</sup>

Nearly 25 years later, the Supreme Court affirmed and clarified Justice Powell's reasoning in *Bakke* through its rulings in two companion cases, *Grutter v. Bollinger* and *Gratz v. Bollinger* (2003). White plaintiffs challenged the University of Michigan's use of race in law school (*Grutter*) and undergraduate (*Gratz*) admissions. A majority

## STRICT SCRUTINY

Courts apply "strict scrutiny" review under the Equal Protection Clause of the Fourteenth Amendment to governmental laws and policies that treat people differently on the basis of race. A provision subject to "strict scrutiny" is presumed unconstitutional unless a governmental entity can demonstrate that it has a compelling interest that can be achieved through narrowly tailored means. This is the most stringent level of review applied by courts and is, therefore, generally difficult to satisfy. Despite this, the Supreme Court has held that some explicitly race-conscious actions can satisfy this standard of review. Most laws and policies, including those that advance diversity and racial equity, do not use racial classifications and are not subject to strict scrutiny.

of the Supreme Court upheld the law school's consideration of race as one factor in the holistic review of individual applicants to further the compelling goal of reaping the educational benefits of diversity, but struck down the undergraduate admissions system that awarded applicants from underrepresented racial groups an automatic numerical bonus.<sup>21</sup>

In 2013, the Court considered a case funded by Edward Blum and brought by a white student who was denied admission to the University of Texas at Austin, *Fisher v. University of Texas at Austin* ("*Fisher I*").<sup>22</sup> The university considered race as one of many factors in evaluating candidates who were not automatically admitted as part of a policy accepting the "Top 10%" of each Texas

high school's graduating class.<sup>23</sup> The *Fisher I* Court affirmed the constitutionality of considering race in undergraduate admissions decisions, explaining that courts owe some deference to a university's judgment that diversity is essential to its educational mission. However, the Supreme Court clarified that—without getting this same deference from the Court—universities must prove that the means they choose to attain diversity are narrowly tailored. The Court sent the case back to the lower courts to analyze the facts with this clarification.<sup>24</sup> The U.S. Court of Appeals for the Fifth Circuit subsequently found that the admissions program at the University

of Texas was sufficiently narrowly tailored to comply with the Fourteenth Amendment, and in 2016, the Supreme Court upheld that ruling in *Fisher v. University of Texas* ("*Fisher II*").<sup>25</sup>

In both *Fisher I* and *Fisher II*, Justice Clarence Thomas and Justice Samuel A. Alito, Jr. placed the model minority myth about Asian Americans—which pits communities of color against each other—squarely in the affirmative action debate. Justice Thomas's concurring opinion in *Fisher I* made explicit and misleading comparisons between Black and Asian American students, noting that

## MODEL MINORITY MYTH

This false narrative celebrates Asian Americans for purportedly overcoming discrimination and succeeding in comparison to other people of color.<sup>135</sup> A 1966 *New York Times* story first popularized the myth, comparing Japanese Americans to Black Americans. The article noted that, despite being placed in internment camps during World War II, Japanese Americans are "better than any other group in our society, including native-born whites," and it went on to emphasize Japanese Americans' educational attainment.<sup>136</sup> As such, the model minority myth perpetuates the belief that Asian Americans have "earned" their place in American society—implicitly blaming other people of color for not doing the same.

This myth is problematic because it pits communities of color against each other and ignores how Asian Americans benefited from immigration policies that recruited highly educated immigrants.<sup>137</sup> It also renders invisible Asian Americans who are low-income, lack higher education, and are learning the English language. Finally, it erases the discrimination Asian Americans continue to face and reinforces the assumption of their "perpetual foreign[ness]."<sup>138</sup>

Disaggregated data is critical for challenging the model minority myth and revealing the diversity within the Asian American community—as well as the differences that exist between Asian American subgroups. These differences are especially stark with respect to socioeconomic background and educational attainment.<sup>139</sup> Prioritizing data disaggregation in education research and advocacy can help ensure that the most marginalized Asian Americans are made visible and have access to resources. Colleges and universities should collect disaggregated data by Asian American subgroups. Institutions and individuals can also support the Office of Management and Budget's efforts to improve data disaggregation and advocate for state level data disaggregation policies, such as those recently adopted by Massachusetts and New York.<sup>140</sup>

# DECADES OF LITIGATION RENDERED A WATERED-DOWN AFFIRMATIVE ACTION INTO A BARELY RECOGNIZABLE DESCENDANT OF THE ROBUST PROGRAMS OF THE 1960s AND 1970s.

Black students scored in the “52nd percentile of 2009 SAT takers nationwide” while Asians scored in the “93rd percentile,” and surmising that “[t]here can be no doubt that the University’s discrimination injures white and Asian applicants who are denied admission because of their race.”<sup>26</sup> However, as noted later in this report, test scores are a flawed metric to measure merit. One study from Georgetown University’s Center on Education and the Workforce concluded, “[f]amily class plays a greater role than high school test scores in college attainment.”<sup>27</sup> Justice Alito’s dissent in *Fisher II* further suggested that the University of Texas discriminated against Asian Americans because the university deemed the Asian American students “overrepresented” relative to state demographics even though another campus survey indicated Latinx students outnumbered Asian American students.<sup>28</sup> Both Justice Thomas and Justice Alito drew upon the model minority myth to justify their opposition to affirmative action, setting the stage for legal challenges to affirmative action based on the purported discrimination against Asian Americans.

Decades of litigation rendered a watered-down affirmative action into a barely recognizable

descendant of the robust programs of the 1960s and 1970s. As these legal attacks made their way through the courts, affirmative action in higher education was further hampered by state laws, ballot initiatives, and university policies in certain states. For example, in 1995, the Regents of the University of California voted to end affirmative action, and in 1996, California voters passed Proposition 209, prohibiting the use of affirmative action at all California public colleges and universities.<sup>29</sup> Over the next two decades, eight states followed suit.<sup>30</sup> These state and local policies exacerbated the gap in educational attainment for underrepresented communities of color.<sup>31</sup> Yet, despite these efforts to limit or abolish affirmative action, many Americans continue to support its use. For example, a May 2023 Associated Press-NORC poll found most respondents (63%) did not think the Supreme Court should prohibit the consideration of race and ethnicity in college admissions.<sup>32</sup> This included Asian Americans. According to the 2022 Asian American Voter Survey, 69% of Asian American voters supported affirmative action and better access to higher education for women and all communities of color.<sup>33</sup>



NOT YOUR  
*model*  
MINORITY!



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## IV. THE *SFFA* CASES

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After the failed affirmative action challenge in *Fisher I*, Blum explicitly stated that he “needed Asian plaintiffs”<sup>34</sup> to end race-conscious college admissions. Blum recruited Asian American students to join white students as members of SFFA, a nonprofit “membership group” that believes that “racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional.”<sup>35</sup> In 2014, SFFA filed a lawsuit against Harvard College (“Harvard”), the undergraduate liberal arts program at Harvard University—the nation’s oldest private institution of higher education—and a separate lawsuit against the University of North Carolina at Chapel Hill (“UNC”), considered by many to be the nation’s oldest public university.

### A. SFFA’s Challenge to Harvard’s Admissions Process

Harvard receives more than 60,000 applications for roughly 2,000 seats in its freshman class.<sup>36</sup> The college seeks diversity along many dimensions—including racial diversity—and identified various educational benefits it pursued through diversity on its campus, such as preparing graduates to “adapt to an increasingly pluralistic society” and “producing new knowledge stemming from diverse outlooks.”<sup>37</sup> Under the challenged admissions process, Harvard’s admissions committee evaluated student applications in a holistic review that considered more than 100 factors. Admissions officers could give a “tip” for factors “that do not lend themselves to quantifiable metrics,” including unusual intellectual ability; strong personal qualities; outstanding creative or athletic ability; backgrounds that expand the socioeconomic, geographic, racial, or ethnic

diversity of the class; or a student’s status as a recruited athlete, legacy applicant, member of the Dean’s or Admissions Director’s interest lists, or child of faculty or staff.<sup>38</sup> These “tips” could increase an applicant’s chance of admission.

In its lawsuit, SFFA alleged that Harvard engaged in impermissible racial balancing, used race as a predominant factor, and failed to use race-neutral alternatives to pursue student body diversity. SFFA also alleged that Harvard intentionally discriminated against Asian American applicants vis-à-vis white applicants, a novel claim compared to earlier challenges to affirmative action in higher education, which were brought by rejected white applicants.

In a three-week trial in October 2018, the trial court heard testimony from 18 current and former Harvard employees, four expert witnesses, and eight current or former Harvard College students.<sup>39</sup> The students and alumni testified about the importance of racial diversity in their college experience, the discrimination or racial barriers they faced before applying to Harvard, and how their racial identity influenced their college applications. Experts explained that considering race as part of the admissions process was a crucial part of constructing a diverse class. They testified that removing race from the admissions process, while keeping everything else the same, would cause Black representation at Harvard to decline from approximately 14% to 6% of the student population and Hispanic representation to decline from 14% to 9%.<sup>40</sup> The declines would concomitantly increase the white student population more than students of any other race, including Asian Americans.





**[S]tudents and alumni testified about the importance of racial diversity in their college experience, the discrimination or racial barriers they faced before applying to Harvard, and how their racial identity influenced their college applications. ... No members of SFFA nor any student testified in support of SFFA's claims.**

No members of SFFA nor any student testified in support of SFFA's claims. SFFA's case at trial focused on the analysis of their experts who presented statistical models, which they argued showed the effect of race in Harvard's admissions process and discrimination against Asian American applicants. By contrast, Harvard presented expert testimony and analysis countering SFFA's experts, focusing on the unreliability of the models used by SFFA and demonstrating how Harvard's program was not harming students on the basis of race.

In a detailed opinion, the trial court ruled that Harvard's race-conscious admissions program complied with Supreme Court precedent.<sup>41</sup> The trial court concluded that Harvard's race-conscious admissions policy was narrowly tailored to achieve the college's substantial and compelling interest in student body diversity. The trial court also found that Harvard did not intentionally discriminate



against Asian American applicants. This ruling was appealed to the U.S. Court of Appeals for the First Circuit, which affirmed the trial court’s decision.<sup>42</sup>

## B. SFFA’s Challenge to UNC’s Admissions Process

UNC’s mission is to educate a “diverse community” of students “to become the next generation of leaders.”<sup>43</sup> UNC was originally founded to educate the sons of white enslavers, and the university initially defied the Supreme Court’s mandate, set forth in *Brown v. Board of Education*, to desegregate.<sup>44</sup> Even after Black students sued and secured a court order requiring integration in 1955, UNC continued to resist desegregation efforts well into the 1980s by permitting racial hostility and racial discrimination against students of color.<sup>45</sup>

Today, UNC is an internationally renowned, highly selective school, with approximately 43,500 applicants vying for only 4,200 freshman seats.<sup>46</sup> The admissions program challenged by SFFA used a holistic process, whereby admissions officers reviewed a wide portfolio of students’ experiences and qualifications from sources such as the Common Application, essay questions, high school transcripts, standardized test scores, and letters of recommendation.<sup>47</sup> Race was one of the more than 40 criteria that UNC considered when deciding who to admit to its undergraduate college.<sup>48</sup> Like Harvard, UNC sought diversity across multiple dimensions, including race and ethnicity, to achieve educational benefits, such as “promoting the robust exchange of ideas” and “enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”<sup>49</sup>

Similar to its case against Harvard, SFFA alleged that UNC impermissibly used race as more than a “plus” factor and failed to use race-neutral alternatives to pursue student body diversity. Unlike its case against Harvard, SFFA did not claim that UNC engaged in improper racial balancing or that



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**Experts testified about UNC’s history of excluding Black and Indigenous students for nearly 200 years and the reverberating impacts of this exclusion to the present.**



the university intentionally discriminated against Asian American students vis-à-vis white students.

In a November 2020 trial, SFFA presented no student witnesses and no evidence or testimony suggesting that the benefits of diversity were not profound. In contrast, administrators, students, alumni, faculty, and several experts testified in support of UNC's race-conscious admissions program. Students and alumni testified about how the racial diversity on campuses, and lack thereof, impacted their experiences in classroom discussions and in campus life. Experts testified about UNC's history of excluding Black and Indigenous students for nearly 200 years and the reverberating impacts

of this exclusion to the present. They also explained that, without its race-conscious program, UNC's ability to build a diverse class would be significantly impeded.<sup>50</sup>

The trial court ruled that UNC's admissions program was permissible under Title VI and the Equal Protection Clause. The court found that UNC had a compelling interest in specific, measurable benefits of diversity and that the use of race as a plus factor was narrowly tailored to meet those goals.<sup>51</sup> Because the case was directly appealed to the Supreme Court, no intermediary appeals court reviewed the trial court's decision.

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# V. SUPREME COURT'S OPINION IN *SFFA* CASES

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The United States Supreme Court granted review in both *SFFA v. Harvard* and *SFFA v. UNC* and heard oral arguments on Oct. 31, 2022.<sup>iii</sup> The Court issued its consolidated opinion in both cases on June 29, 2023. Chief Justice Roberts wrote for the majority; Justice Thomas, Justice Neil M. Gorsuch, and Justice Brett M. Kavanaugh submitted concurrences; and Justice Sonia Sotomayor and Justice Ketanji Brown Jackson dissented.

In a 6-2 decision in *SFFA v. Harvard* and a 6-3 decision in *SFFA v. UNC*, the Supreme Court reversed the rulings of the lower courts and ruled in favor of SFFA.<sup>iv</sup> The Court found that Harvard and UNC's admissions programs violated the Equal Protection Clause and Title VI because they failed to satisfy strict scrutiny.<sup>52</sup> Though the majority maintained that its strict scrutiny analysis was consistent with its prior decisions in *Grutter* and *Fisher II*, the Court struck down affirmative action practices that appeared to fully comply with its prior reasoning in those cases.

**Per the Supreme Court, the educational benefits of diversity, as articulated by Harvard and UNC, were not sufficiently measurable to permit judicial review.** Both Harvard and UNC argued that they had an interest in pursuing

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iii Notably, *SFFA v. UNC* was appealed directly to the Supreme Court without review by the U.S. Court of Appeals for the Fourth Circuit on the argument that the legal issues were the same in both cases.


iv Justice Jackson recused herself from *SFFA v. Harvard* due to her prior role on Harvard's Board of Overseers.

## CONCURRENCES

Justices Thomas, Gorsuch, and Kavanaugh all wrote concurring opinions, which were not part of the Supreme Court's binding opinion and do not have the force of law, but instead highlighted information these individual justices believe to be important. **Justice Thomas**, in his concurrence, offered an extreme colorblind interpretation of the United States Constitution, arguing that the Fourteenth Amendment prohibits the government from using any race-based classifications, even when those classifications are used to help support communities of color who have been historically and systematically denied access to government resources.

**Justice Gorsuch's** concurrence stated that Title VI should be interpreted to mean that higher education institutions cannot use race in their admissions programs at all. This is different than the Equal Protection Clause, which, even under the Court's opinion in *SFFA*, allows the consideration of race if a school's admission program is able to satisfy strict scrutiny. Finally, **Justice Kavanaugh** wrote to emphasize the temporal limits of any use of race in admissions.





THE ROOT OF BIAS  
IN ADMISSIONS IS  
WHITE SUPREMACY,  
NOT AFFIRMATIVE ACTION.

the educational benefits of diversity, an interest recognized as compelling by the Supreme Court in previous cases. However, the Supreme Court found that while “these are commendable goals, they are not sufficiently coherent for the purposes of strict scrutiny.”<sup>53</sup> In the Court’s view, it was impossible to measure the universities’ interests because “the question [of] whether a particular mix of minority students produces ‘engaged and productive citizens,’ sufficiently ‘enhance[s] appreciation, respect, and empathy,’ or effectively ‘train[s] future leaders’ is standardless” and “inescapably imponderable.”<sup>54</sup>

**The Supreme Court concluded that the race-conscious admissions programs at Harvard and UNC were not tailored to achieve the educational benefits of diversity.** The Supreme

Court found that Harvard and UNC failed to articulate “a meaningful connection between the means they employ and the goals they pursue.”<sup>55</sup> In particular, the Court considered the racial categories used by the schools to be “imprecise” and “plainly overbroad.”<sup>56</sup> For example, the Court stated that the “Asian” race category was overbroad because it included, without distinguishing, East Asian and South Asian students; likewise, it was unclear what racial category students from the Middle East should choose.<sup>57</sup> However, as Justice Sotomayor pointed out in her dissent, “the racial categories that the Court finds troubling resemble those used across the Federal Government ... including, for example, by the U.S. Census Bureau,” where they do not raise constitutional concerns.<sup>58</sup>

# DISSENTS

Justices Sotomayor and Jackson each wrote dissenting opinions vigorously disagreeing with the majority's decision. Justice Elena Kagan signed on to both dissents. **Justice Sotomayor** grounded her dissent in history, noting that since the nation's founding—when enslavers sought to prolong slavery by making it illegal to educate Black people—access to education has never been equal.<sup>141</sup> Those inequalities persist today.<sup>142</sup> Justice Sotomayor also highlighted the majority's perversion of Equal Protection, stating that “the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.”<sup>143</sup> Finally, she criticized the majority for ignoring the careful factual findings of the lower courts and inappropriately crediting the factual assertions of SFFA that had been rejected by the courts below, noting that such actions undermine the Supreme Court's legitimacy.<sup>144</sup> According to **Justice Jackson**, “With let-them-eat-cake obliviousness, ... the majority pulls the ripcord and announces ‘colorblindness for all’ by legal fiat. But deeming race irrelevant in law does not make it so in life.”<sup>145</sup> Justice Jackson explained that “the origin of persistent race-linked gaps should be no mystery”—it is the “persistent and pernicious denial of the opportunities afforded to white people.”<sup>146</sup>



**The Supreme Court held that race must not be used as a “negative” or as a “stereotype.”** According to the Supreme Court, “the twin commands of the Equal Protection Clause” require “that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”<sup>59</sup> The Court concluded that both schools used race as a negative because, in the “zero-sum” environment of college admissions, “[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”<sup>60</sup> Moreover, the Court stated that “universities may not operate their admissions programs on the belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”<sup>61</sup> To do so would advance the “pernicious stereotype that a Black student can usually bring something that a white person cannot offer.”<sup>62</sup> The Court held that by admitting students on the basis of race alone, Harvard and UNC were impermissibly treating students of a particular race as if they are all alike, or “at the very least alike in the sense of being different from non-minority students.”<sup>63</sup> As Justice Jackson noted in her dissent, however, the Court’s conclusion that students were admitted on the basis of race alone was not supported by the record, which established that both Harvard and UNC considered race as a “plus factor”—rather than a negative—among many factors in the individualized evaluation of every applicant.<sup>64</sup>

**The Supreme Court emphasized the need for a logical end point in the use of race.** Drawing on a line in *Grutter*, where Justice Sandra Day O’Connor’s majority opinion expressed hope that race-conscious admissions would no longer be necessary in 25 years, the Court in *SFFA* stated that race-conscious admissions programs must have a “logical end point.”<sup>65</sup> Harvard and UNC had suggested that they would end race-conscious admissions when they achieved “meaningful representation and meaningful” diversity on their campuses, rather than a “strict numerical

benchmark.”<sup>66</sup> The Court rejected this proposed end point, accusing the schools of using impermissible racial balancing.<sup>67</sup>

**The Supreme Court made clear that student applicants may discuss how race affected their life experiences.** The Supreme Court’s decision does not require Harvard, UNC, or any other educational institution to be unaware of a student’s race in the admissions process. When SFFA initially filed its lawsuits against Harvard and UNC, it asked the courts to rule that the schools must “conduct all admissions in a manner that does not permit those engaged in the decision process to be aware of or learn the race or ethnicity of any applicant for admission.”<sup>68</sup> Ultimately, the Supreme Court’s decision did not go that far. Indeed, to the contrary, the Court advised 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.”<sup>69</sup> Thus, the decision does not ban students from disclosing and discussing their race and does not prohibit colleges from considering how race has shaped a student’s life experience or being aware of an applicant’s race. However, the Court cautioned that this consideration must be individualized and not operate as an end run of the prohibitions on the use of race expressed elsewhere in the opinion:

[U]niversities may not simply establish through application essays or other means the regime we hold unlawful today.... A benefit to a student who overcame racial discrimination, for example, must be tied to *that student’s* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute



# THE SUPREME COURT'S DECISION DOES NOT REQUIRE HARVARD, UNC, OR ANY OTHER EDUCATIONAL INSTITUTION TO BE UNAWARE OF A STUDENT'S RACE IN THE ADMISSIONS PROCESS.

to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.<sup>70</sup>

Thus, schools may not assign tips based on race simply because an applicant discloses their race in an essay or elsewhere in the application. But schools can continue to consider how race (or heritage or culture) has influenced an applicant's individual experiences in ways that make them a good candidate for admission.

**The Supreme Court maintained that race-conscious policies are still permissible in certain circumstances.** The Court indicated that universities may have other compelling interests that can justify race-conscious programs. The Court reiterated support for the interest articulated by the University of Texas at Austin in *Fisher II*, where the stated goal was “to enroll a ‘critical mass’ of certain minority students.”<sup>71</sup> The decision also confirmed that “remediating specific, identified instances of past discrimination that violated the Constitution

or a statute” remains a compelling interest that can justify race-conscious programs and policies.<sup>72</sup> Moreover, the Court explicitly noted that its ruling does not address the legality of race-conscious admissions policies at military academies, which may have “potentially distinct interests.”<sup>73</sup> Justice Jackson criticized the majority's military carve-out, noting that it is “particularly awkward” for the Court to conclude that “racial diversity in higher education is only worth preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom.”<sup>74</sup>

**Race-neutral efforts to increase diversity remain constitutional.** The *SFFA* decision did not bar race-neutral efforts, such as percentage or class-based plans, designed to increase diversity in college admissions. Justice Kavanaugh made explicit in his concurrence that “governments and universities still ‘can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.’”<sup>75</sup> Justice Thomas also acknowledged the use of race-neutral policies

in his concurrence, stating that “[r]ace-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.”<sup>76</sup> In a similar vein, Chief Justice Roberts reaffirmed in *Allen v. Milligan*, a voting rights case decided in the same term as *SFFA*, that government actions undertaken to ensure that opportunities are “equally open” to people of all races is a permissible practice consistent with the Equal Protection Clause.<sup>77</sup>

**The Court’s decision addressed only the unique practice of affirmative action in higher education.** The Court’s decision was limited to the consideration of race, as a tip, in college admissions as conducted by Harvard and UNC for the pursuit

of the educational benefits of diversity. The decision does not alter the standards for compliance with federal civil rights in other areas, such as employment, lending, housing, and contracting, which are covered by different federal statutes and distinct bodies of law.<sup>78</sup> Importantly, the decision does not alter the lawfulness of diversity, equity, inclusion, and accessibility (DEIA) measures. As U.S. Equal Employment Opportunity Commission Chair Charlotte A. Burrows confirmed, “the decision in [*SFFA*] ... does not address employer efforts to foster diverse and inclusive workforces to engage the talents of all qualified workers, regardless of their background.... It remains lawful ... to ensure that workers of all backgrounds are afforded equal opportunity in the workplace.”<sup>79</sup>

## RACE NEUTRAL EFFORTS IN K-12

Race-neutral efforts to achieve equal educational opportunity are as vital now as ever. Race-neutral policies designed to expand access to K-12 specialized programs have faced challenges that often rely on the same model minority tropes in the affirmative action debate. These challenges have been unsuccessful thus far.<sup>147</sup> One prominent example is the case challenging race-neutral changes to the admissions process for the Thomas Jefferson High School for Science and Technology (TJ) in Fairfax County, Virginia, as purportedly discriminatory against Asian American students. In late 2020, the Fairfax County School Board changed the eligibility and admissions criteria for TJ, eliminating the admissions test and \$100 application fee—barriers that impeded equal opportunity—and admitting the top performing 1.5% of eighth graders in each middle school who met rigorous eligibility criteria.<sup>148</sup> The changes led TJ’s class of 2025 to be the most inclusive freshman class in years, increasing the share of low income, Black, Latinx, and female students. The number of low-income Asian American students admitted also increased significantly from one student to 51 students, as did the number of Asian American students attending middle schools that were historically underrepresented at TJ.

The district court ruled in the plaintiff’s favor, but an appeals court reversed the ruling, reaffirming that “improv[ing] racial diversity and inclusion by way of race-neutral measures” is constitutionally permissible.<sup>149</sup> The plaintiff recently requested review by the Supreme Court, and the Court’s decision over whether it will hear the case is pending.<sup>150</sup>

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# VI. GUIDANCE ON ADVANCING EQUAL OPPORTUNITY AND DIVERSITY IN HIGHER EDUCATION IN THE CURRENT LANDSCAPE

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Affirmative action in college admissions has been an important tool, but it is not the only vehicle to ensure that educational opportunities are equally open to all. The Supreme Court’s *SFFA* decision underscores the urgent and critical need to eliminate barriers and pursue policies that advance racial equity. Following centuries of racial subjugation and exclusion, no single program or policy alone will deliver equal opportunity. More than ever, colleges and universities must double down on comprehensive efforts to attract, embrace, and educate talented students from all backgrounds. They must act immediately to ensure all students feel welcomed and valued and to prevent declines in applications from students of color in the aftermath of the Supreme Court’s *SFFA* decision. And they must support efforts to address structural inequality in the education system, from early childhood education through graduate school. The following guidance provides education professionals, community advocates, and other stakeholders with important suggestions on how to achieve these important goals. All schools have a responsibility to do everything in their power and means to foster diversity in and beyond their admissions process.

## A. Diligently Comply with Anti-Discrimination Laws

At a minimum, schools must continue to comply with federal and state civil rights laws requiring schools to provide educational opportunities on an equal basis to students of all races. This includes ensuring that students are not unfairly disadvantaged in applying to school. It also includes protecting students from discrimination while attending school and requiring that students of all races engage equally with their education, from course work through the full range of campus life. Title VI of the Civil Rights Act of 1964 and its implementing regulations prohibit recipients of federal financial assistance from discriminating based on race, color, or national origin.<sup>80</sup> This law applies to both K-12 schools and institutions of higher education that receive federal funds, including through federal student loans. For schools with a history of racial discrimination, including any involvement with slavery or enslavers, schools must take proactive efforts to overcome the effects of prior discrimination.<sup>81</sup> Even in the absence of prior discrimination, all schools must act to ensure that their policies and practices do not unnecessarily limit opportunities for people on the basis of race or ethnicity<sup>82</sup> or other protected characteristics, including disability,<sup>83</sup> sex, sexual orientation, and





# ALL SCHOOLS HAVE A RESPONSIBILITY TO DO EVERYTHING IN THEIR POWER AND MEANS TO FOSTER DIVERSITY IN AND BEYOND THEIR ADMISSIONS PROCESS.

gender identity.<sup>84</sup> In addition, schools must ensure that their climates enable all students to access and benefit from educational opportunities on an equal basis.<sup>85</sup> This responsibility extends to all aspects of a school's programs and activities, and to all of those who carry out the school's functions.<sup>86</sup>

Many state laws also mandate that schools ensure students are provided equal educational opportunities. This means that schools cannot discriminate against students based on a variety of factors, including race, ethnicity, nationality, and other protected characteristics.<sup>87</sup> Numerous states have made clear that schools must review their policies and practices to identify any disparate effect that they cause based on race, ethnicity, or disability, and take proactive measures to eliminate such disparities.<sup>88</sup> State laws may also prohibit

harassment of students on the basis of race, national origin, ethnic group, or other protected characteristics, and require schools to create policies and procedures intended to foster school environments free from harassment, bullying, and discrimination based on a variety of factors, including race.<sup>89</sup>

Ensuring educational opportunities are open to people of all races is not only the law—it serves the mission of higher education. Many schools, as well as the courts, recognize that diversity exposes students to new ideas and ways of thinking, prepares them to live and work with one another in a diverse society, and increases understanding and respect across differences.<sup>90</sup> Those findings have not changed.

## B. Reimagine and Retool Admissions Policies in Higher Education

Schools should engage in admissions processes that evaluate applicants' demonstrated capacity and strengths in light of the resources and opportunities available to them.<sup>91</sup> This form of review is particularly important given that American high schools are increasingly segregated and unequal.<sup>92</sup> Nearly 70 years since *Brown v. Board of Education*, students of all races face increasing segregation in their K-12 education.<sup>93</sup> This racial segregation also maps onto segregated educational opportunities. Black and Latinx<sup>v</sup> students are more likely to attend schools that are both racially segregated and have a far higher share of economic need.<sup>94</sup> And Black, Latinx, Indigenous, and Pacific Islander students are three to six times more likely than white students to attend a high-poverty K-12 school, where students are more likely to be taught by "out-of-field" teachers.<sup>95</sup>

In short, talent is everywhere, but opportunity is not. Given vastly unequal K-12 educational opportunities, traditional indicia of merit often under-predict and under-identify the potential of many talented applicants, including many applicants of color. The recommendations below are aimed at ensuring that admissions policies in higher education neutralize, as much as possible, the detrimental effect that societal inequalities have on the ability to fairly and accurately identify academic talent to avoid reinforcing and replicating those societal inequalities. The recommendations also seek to assist colleges and universities in creating a healthy campus environment in which all students can thrive.

Recommendations include:

### Admissions criteria and considerations

- Soliciting and considering each individual applicant's relevant experiences, including racial experiences. The Supreme Court was clear that, so long as the benefit is given on the basis of "experience as an individual," the *SFFA* decision should not be "construed as prohibiting universities from considering an applicant's discussion of how race affected their life, be it through discrimination, inspiration, or otherwise."<sup>96</sup>

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- Soliciting and considering how an individual applicant's unique heritage or cultural history, e.g., language ability or enrollment in a federally recognized Indian tribe, contributes to student body diversity. These factors are not the same as race.<sup>97</sup>

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- Soliciting and considering whether an applicant is the first in their family to attend college.<sup>98</sup>

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- Soliciting and considering whether an applicant comes from a socioeconomically disadvantaged background or a low-wealth family.<sup>99</sup>

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- Soliciting and considering whether an applicant is from a geographic area, neighborhood, or high school that is underrepresented in the college community.<sup>100</sup>

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- Adopting equitable guaranteed admissions or eligibility policies like percentage plans (i.e., Top 10%).<sup>101</sup>

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- Tracking and collecting racial demographic data throughout the admissions process to ensure unfair policies and practices are not disadvantaging or unduly excluding historically marginalized and underrepresented students. While some colleges and universities may have removed all racial demographic data from admissions, this drastic step was not required by the Supreme Court in the *SFFA* decision.

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<sup>v</sup> Importantly, these national findings were not able to address the experiences of Indigenous students or the unique experiences of students from communities included under the umbrella Asian American category.



## INCLUSIVE CLASSROOMS AND CURRICULUM

The drive for education equity extends beyond admissions processes. It includes bringing contemporary conversations about race and systemic racism onto campus and calling for curriculum and learning environments where students of color belong and can be equally engaged with their education.<sup>i</sup> In response, some opponents have endeavored to stifle discussions in college and K-12 classrooms, ban books<sup>151</sup>, and dramatically alter campus climates.<sup>152</sup> Beginning in 2021, a wave of states enacted legislation restricting what can be taught—and learned—in public classrooms. Some of these laws apply to colleges and universities, some to elementary and secondary schools, and some to both. They also restrict discussions of gender, sexual orientation, and race—or all three. These laws seek to suppress discussion and the acquisition of knowledge that has been central to civil rights and that affirms the experiences of many historically marginalized communities. Legal challenges to these laws in three states—Florida,<sup>153</sup> Oklahoma,<sup>154</sup> and New Hampshire<sup>155</sup>—have raised constitutional concerns under the First and Fourteenth Amendments, such as intentional racial discrimination; discrimination against certain viewpoints that politicians, as opposed to educational professionals, disfavor; and vagueness of terms that make it difficult, if not impossible, to know what has been prohibited.

<sup>i</sup> The U.S. Department of Education's guidance on these and related issues can be found at [https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230824.pdf?utm\\_content=&utm\\_name=&utm\\_term=](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230824.pdf?utm_content=&utm_name=&utm_term=).



## PROBLEMS WITH MERIT

In addition to the recommendations and guidance here, this report recognizes the limitations of equitably reforming admissions in higher education using a purported merit-based framework. There is a long history of using the concept of merit to justify the exclusion of people of color from educational, employment, and other opportunities.<sup>156</sup> Thus, a critical examination of what constitutes merit—and a real reckoning with the benefits and drawbacks of this method of allocating opportunity—is necessary to advance the goal of providing equitable educational opportunities to everyone. In the absence of this reckoning, progress towards this goal will remain incremental, at best.



### Barriers to access

- Eliminating reliance on standardized testing for admissions and scholarships, which has been shown to unfairly disadvantage people of color, English learners, women, and students from economically marginalized backgrounds.<sup>102</sup> For example, studies show that standardized tests like the SAT underpredict the potential of Black and Latinx students due to cultural biases in the makeup of test questions and methods of test validation.<sup>103</sup>
- Reforming primary and secondary admissions requirements particular to a major (like education, nursing, or engineering) that place undue weight on criteria such as completing advanced courses.<sup>104</sup> Schools with high Black, Latinx, and Indigenous enrollment are less likely to offer advanced courses,<sup>105</sup> and “only 38[%] of high schools with predominantly Black or Latinx enrollment offer calculus.”<sup>106</sup> Black, Latinx, Southeast Asian, and Indigenous students attending middle-class, racially integrated schools are also frequently tracked away from college preparatory coursework,<sup>107</sup> even though they are just as successful in those courses when given the opportunity.<sup>108</sup>
- Reforming selective admissions criteria that give weight to certain extracurriculars and internship experiences that are more readily available to students with greater wealth. Predominantly white, middle-class communities have greater access to the “sports-track-to-college pipeline.”<sup>109</sup> In contrast, schools with a higher percentage of students experiencing economic need have fewer extracurricular activities, sports teams, and service opportunities.<sup>110</sup> And where schools do offer extracurricular activities, students are often charged a “pay to play fee,” which excludes many students of color.<sup>111</sup>

- Eliminating programs that prioritize early applicants in admissions decisions and access to special programs. The binding nature of early decision admissions policies, for example, means that only students who can accept a spot in college before seeing a financial aid offer are able to benefit from these practices. Due to pervasive racial wealth gaps, early decision applicants are three times more likely to be white.<sup>112</sup>

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- Eliminating or significantly limiting preferences that create barriers to equal access, such as preferences for legacies, and the children of faculty, staff, or significant donors. Such preferences may operate to disproportionately give a preference to white, wealthy, and privileged applicants.<sup>113</sup>

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- Removing barriers for students impacted by the criminal legal system.<sup>114</sup> Such barriers disproportionately harm people of color, especially because of the dramatic racial disparities that exist in the United States criminal legal system due to over-policing and systemic bias.<sup>115</sup>

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- Improving access for transfers from community college to bachelor's degree institutions.<sup>116</sup>

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- Strengthening language access for students and families.<sup>117</sup>

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- Increasing support for Historically Black Colleges and Universities, Tribal Colleges and Universities, and Minority-Serving Institutions through grants that benefit Predominantly Black Institutions, Hispanic-Serving Institutions, Alaska Native-Serving Institutions and Native Hawaiian-Serving Institutions, Asian American and Native American Pacific Islander-Serving Institutions, and Native American-Serving Nontribal Institutions.<sup>118</sup>

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## Financial aid

- Increasing and expanding need-based financial aid and removing financial barriers to enrollment.<sup>119</sup> The financial burdens of higher education, including increasing student debt, fall disproportionately on people of color.<sup>120</sup>

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- Investing aggressively in need-based financial aid programs that assist in covering college costs beyond tuition.<sup>121</sup>

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## C. Expand Recruitment Efforts and Build Robust Pipelines

Efforts by colleges and universities to achieve racial equity must extend beyond the application process and include outreach and recruitment. Some of these strategies include:

- Building relationships and pipelines with high schools, middle schools, and even younger students in underrepresented communities surrounding the institution.<sup>122</sup>

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- Developing pre-college programs that provide exposure to campus and college preparatory opportunities, such as summer bridge programs for incoming first-generation, first-year students and summer seminars for middle and high school students.<sup>123</sup>

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- Providing a suite of non-traditional recruitment opportunities for students who cannot visit campus, like virtual meetings with admissions counselors and campus tours.<sup>124</sup>

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- Investing resources to reach and support historically underrepresented groups by deploying and compensating alumni in outreach and recruitment efforts in their communities.

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- Formalizing opportunities for current students to represent the educational institution in underrepresented communities.

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- Expanding efforts that engage families in the recruitment process to aid in recruiting diverse and first-generation, historically marginalized students.

## D. Support Historically Marginalized and Underrepresented Students on Campus

Ensuring a healthy, vibrant campus climate for all students plays a critical role in establishing a broader equity continuum in higher education. Healthy climates are often driven by institutional equity directives. It is imperative that such directives—which are often shouldered by enrollment management suites, diversity, equity, inclusion, and accessibility (DEIA) offices, and faculty of color—are shared across offices and departments, permeating every corner of campus. Some of these strategies include:

- Creating opportunities for more students of color to have their voices and perspectives heard by campus leadership. Creating a campus environment where students feel they belong is important to recruitment and to academic success once enrolled.<sup>125</sup>

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- Conducting institutional climate reviews using validated campus climate surveys and meaningfully addressing survey results.

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- Implementing easily accessible systems to report and address experiences of prejudice and discrimination on campus.

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- Considering alternatives to campus police departments that provide safety on campus without undue risk of criminalization.

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- Examining and mitigating any disparities in resources dedicated to historically Black and multicultural Greek organizations, along with other student organizations.

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- Ensuring classroom teaching methods are fair and inclusive.<sup>126</sup>

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- Providing curriculum, programming, and activities that speak to students' diverse interests and lived experiences.<sup>127</sup>

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- Building and strengthening initiatives related to hiring and retention of underrepresented faculty, including creating more tenure track positions and pathways to tenure track positions (like postdocs), revising policies and norms around pay equity, and ensuring the institutional culture supports underrepresented faculty—such as ensuring underrepresented faculty are compensated and supported for their service work.<sup>128</sup>

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- Pushing back against attempts to stifle speech and campus life most central to the college experiences of students of color.

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- Supporting student and alumni organizations that seek to address the needs of specific racial, ethnic, religious, and gender communities.

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Colleges and universities also have the responsibility to support students' physical, emotional, and mental health. As such, institutions must provide equitable access to holistic supports that meet basic needs.

Examples include:

- Investing in systems that make mental health services safe, culturally competent, and quickly and financially accessible.

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- Providing dining options that are nutritious, easily accessible, and affordable.

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- Expanding and streamlining assistance programs to address students' basic needs like housing,<sup>129</sup> nutrition,<sup>130</sup> and medical care, and supporting the needs of students with caregiving responsibilities.<sup>131</sup> This includes coordinating access to supports at the campus, state, and federal level, like SNAP benefits.<sup>132</sup>

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- Conducting systematic reviews of the quality of academic advising across colleges and departments, and making the necessary changes to bolster college completion.<sup>133</sup>

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- Developing emergency funds and safety net policies that cover small gaps in financial aid, emergency hardship, and administrative fees that prevent completion of degrees.

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## VII. CONCLUSION

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These recommendations are only a first step. More research on how to ensure educational equity is needed in light of the Court’s *SFFA* decision. Educational equity cannot be achieved by checking one or even a few boxes. As the Supreme Court recognized in *Brown*, education is a foundation of our democracy. And as Justice Sotomayor reminded us, equal educational opportunity is a prerequisite to racial equality.<sup>134</sup> Thus, opening educational opportunities equally to people of all backgrounds, at individual schools and across our educational systems, must remain a priority deserving of our highest attention and resources. While the Supreme Court’s recent decision limited the use of a crucial tool to advance educational equity, institutions that are committed to the principle of racial equity must take this opportunity to significantly expand and deepen their efforts. That must be a collective mandate for everyone.









## Endnotes

- 1 White women have been the primary beneficiaries of affirmative action. *See, e.g.* Sally Kohn, *Affirmative Action Has Helped White Women More Than Anyone*, Time (June 17, 2013), <https://time.com/4884132/affirmative-action-civil-rights-white-women>; African American Policy Forum, *Affirmative Action Mythbusters*, <https://www.acluok.org/sites/default/files/wp/wp-content/uploads/2011/04/Affirmative-Action-Mythbusters.pdf> (last visited Sept. 6, 2023). While we recognize the importance of intersectional analysis and encourage further intersectional research on affirmative action in higher education, this report focuses on race and does not address gender.
- 2 Students for Fair Admissions, <https://studentsforfairadmissions.org/about/> (last visited Sept. 6, 2023).
- 3 Jeannie Park and Kristin Penner, *The Absurd, Enduring Myth of the “One-Man” Campaign to Abolish Affirmative Action*, Slate (Oct. 25, 2022), <https://slate.com/news-and-politics/2022/10/supreme-court-edward-blum-unc-harvard-myth.html>.
- 4 Edward Blum has begun seeking plaintiffs to challenge any race-conscious admissions policies at the U.S. Military Academy, the U.S. Naval Academy, and the U.S. Air Force Academy. *See* Nick Anderson, *Military Academies Are Next Target for Affirmative Action Opponents*, Washington Post (Aug. 3, 2023), <https://www.washingtonpost.com/education/2023/08/03/military-service-academies-affirmative-action/>.
- 5 *Gong Lum v. Rice*, 275 U.S. 78, 82 (1927).
- 6 *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
- 7 *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).
- 8 *Mendez v. Westminster School District of Orange County*, 161 F.2d 774 (9th Cir. 1947).
- 9 U.S. Department of Labor, History of Executive Order 11246, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Sept. 6, 2023).
- 10 *Id.* (emphasis added).
- 11 *Id.*
- 12 *See* U.S. Department of Health, Education and Welfare, Higher Education Guidelines for Executive Order 11246 (Oct. 1, 1972), <https://files.eric.ed.gov/fulltext/ED074893.pdf>.
- 13 Anemona Hartocollis, *How the Term ‘Affirmative Action’ Came to Be*, New York Times (Oct. 31, 2022), <https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-history.html>.
- 14 Thurgood Marshall Institute, *The Legacy and Opportunity of Affirmative Action* (May 2023), <https://tminstituteldf.org/redressing-educational-inequality-the-legacy-and-opportunity-of-affirmative-action/>.
- 15 *Id.*
- 16 *Id.*
- 17 Legal Defense Fund, *SFFA v. Harvard and SFFA v. University of North Carolina FAQ*, <https://www.naacpldf.org/case-issue/sffa-v-harvard-faq/> (last visited Sept. 6, 2023).
- 18 *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

19 In this way, the decision aligned with Professor Derrick Bell’s interest convergence theory, where he argues that civil rights advancements are more likely to be possible when the interests of white and Black people aligned. See Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harvard Law Review. 518 (1980), <https://harvardlawreview.org/print/no-volume/brown-v-board-of-education-and-the-interest-convergence-dilemma/>.

20 *Bakke*, 438 U.S. at 402 (1978) ( Marshall, J., concurring in the judgment in part and dissenting in part) (“I fear that we have come full circle. After the Civil War our Government started several ‘affirmative action’ programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.”).

21 *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

22 *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (“*Fisher I*”).

23 The Texas legislature capped the number of students admitted under the “Top 10%” policy at 75% of total students admitted at University of Texas; thus, the remaining 25% of students admitted were evaluated under the race-conscious program. *Fisher I*, 579 U.S. at 370.

24 *Id.* at 314.

25 *Fisher v. University of Texas at Austin*, 579 U.S. 365, 388 (2016) (“*Fisher II*”).

26 *Fisher I*, 570 U.S. at 331 (Thomas, J., concurring).

27 Georgetown University Center on Education and the Workforce, *Born to Win, Schooled to Lose: Why Equally Talented Students Don’t Get Equal Chances to Be All They Can Be* (2019), <https://cew.georgetown.edu/cew-reports/schooled2lose/>; see also Raj Chetty et al., *Diversifying Society’s Leaders? The Causal Effects of Admission to Highly Selective Private Colleges* (National Bureau of Economic Research, Working Paper No. 31492, July 2023), [https://www.nber.org/system/files/working\\_papers/w31492/w31492.pdf](https://www.nber.org/system/files/working_papers/w31492/w31492.pdf) (finding students from the top 1% in household income are more than two times more likely to be admitted to highly selective schools than middle class students with comparable test scores).

28 *Fisher II*, 579 U.S. at 412 (Alito, J., dissenting).

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- 147 See *Boston Parent Coalition for Academic Excellence Corp. v. School Committee of the City of Boston*, 996 F.3d 37 (1st Cir. 2021); *Sargent v. School District of Philadelphia*, No. 22-cv-1509, 2022 WL 3155408 (E.D. Pa. Aug. 8, 2022); *Christa McAuliffe Intermediate School PTO, Inc. v. De Blasio*, No. 18 Civ. 11657 (ER), 2022 WL 4095906 (S.D.N.Y. Sept. 7, 2022); *Association for Education Fairness v. Montgomery County Board of Education*, 617 F. Supp. 3d 358 (D. Md. 2022).
- 148 *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864, 874-75 (4th Cir. 2023).
- 149 *Id.* at 885-86.
- 150 Matthew Barakat, *Virginia high school admissions case could be legal follow-up to affirmative action ruling*, AP News (June 30, 2023), <https://apnews.com/article/affirmative-action-virginia-race-schools-decea202c3220a9ec7ea68ce2a0768e6>.
- 151 See generally, PEN America, *Educational Censorship*, <https://pen.org/issue/educational-censorship/> (last accessed 7/11/2023) (compiling legislation). PEN America estimates that in the 2021–2022 school year, 100 book titles were banned each month; and the rate of loss increased by nearly a third in the first half of the 2022–2023 school year. PEN America, *Banned in the USA: State Laws Supercharge Book Suppression in Schools* (Apr. 20, 2023), <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/>.
- 152 At present, two states, Florida (Florida SB 266, available at <https://legiscan.com/FL/text/S0266/id/2798308>), and Texas (Texas SB 17, available at <https://legiscan.com/TX/bill/SB17/2023>), have enacted legislation that, among their terms, prohibits the use of diversity statements in hiring and restricts activities that promote diversity, equity and inclusion. Additional attacks on academic independence can also be seen as part of this trend. See, e.g., Patricia Mazzei, *DeSantis's Latest Target: A Small College of 'Free Thinkers,'* New York Times (Feb. 14, 2023), <https://www.nytimes.com/2023/02/14/us/ron-desantis-new-college-florida.html>.
- 153 See *Pernell v. Lamb*, No. 4:22-cv-304 (N.D. Fl. Aug. 8, 2022); ACLU, *Case Page: Pernell v. Lamb*, <https://www.aclu.org/cases/pernell-v-lamb#legal-documents> (last updated July 7, 2023) (compiling case filings); *Novoa v. Diaz*, No. 4:22-cv-324 (N.D. Florida Sept. 6, 2022); FIRE, *Case Page: Novoa v. Diaz*, <https://www.thefire.org/cases/novoa-v-diaz-florida-board-governors-florida-law-restricting-how-college-professors-students> (last visited July 11, 2023) (compiling case filings).
- 154 *BERT v. O'Connor*, No. CIV-21-1022 (W.D. Okla. Nov. 9, 2021); ACLU, *Case Page: BERT v. O'Connor*, <https://www.aclu.org/cases/bert-v-oconnor> (last updated Oct. 29, 2021) (compiling case filings).
- 155 *Mejia v. Edelblut*, No. 1:21-cv-01077 (D. N.H. Dec. 20, 2021); ACLU New Hampshire, *Case Page: Mejia v. Edelblut*, <https://www.aclu-nh.org/en/cases/philibottemejia-et-al-v-nh-commissioner-education-et-al> (last visited July 11, 2023) (compiling case filings).
- 156 John Carson, *The Measure of Merit: Talents, Intelligence, and Inequality in the French and American Republics, 1750-1940* Princeton University Press (2007); Lani Guinier, *The Tyranny of the Meritocracy: Democratizing Higher Education in America* Beacon Press (2015).





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