



# *STUDENTS FOR FAIR ADMISSIONS FAQ*

In June 2023, the U.S. Supreme Court struck down race-based affirmative action in college admissions. The landmark ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* triggered a flurry of changes in admissions practices at universities across the U.S. and has caused uncertainty and confusion among students applying to college this year. The decision also sparked widespread debate and scrutiny over affirmative action policies, and more broadly, diversity programs and initiatives. The information in this FAQ aims to provide clarity on the key issues, legal arguments, and implications of the case for various stakeholders, including universities, students, and entities beyond higher education.



## STUDENTS FOR FAIR ADMISSIONS FAQ

### WHAT WAS STUDENTS FOR FAIR ADMISSIONS ABOUT?

*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina et al.* (“SFFA”) are a pair of Supreme Court cases that addressed the constitutionality of race-based affirmative action at private and public universities. The plaintiff, Students for Fair Admissions (“SFFA”), alleged that Harvard College and the University of North Carolina (“UNC”) violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 because their admissions process intentionally discriminated against Asian American applicants based on their race and ethnicity. For 45 years, the Supreme Court had accepted an applicant’s race as one of many factors that colleges and universities could consider in making admissions decisions, particularly to help it realize the educational benefits of diversity. However, SFFA claimed that under Harvard’s and UNC’s admissions scheme, despite Asian American applicants having stronger academic qualifications than other racial groups, they were admitted at lower rates. According to SFFA, this combination of factors served as evidence that the schools’ affirmative action policies discriminated against them. SFFA asked the Court to prohibit the universities “from using race as a factor in future undergraduate admissions decisions” and require them to “conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission.” Complaint at 119, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 U.S. 2141 (2014) (No. 1:14-cv-14176).

### WHO WAS THE PLAINTIFF?

The plaintiff in each case was the non-profit legal advocacy organization Students for Fair Admissions. Founded in 2014 by conservative legal activist Edward Blum, SFFA is an offshoot of another organization—the Project on Fair Representation—

and represents students, parents, and others with a singular mission of eliminating racial preferences in college admissions. For Blum, SFFA is part of a broader project to eliminate race-based policies from American law.

In a 2023 interview with the New York Times he said, “I believe that an individual’s race and ethnicity should not be used to help them or harm them in their life’s endeavors.” Since the 1990s, Blum has brought eight cases related to race to the Supreme Court.

### WHAT WAS THE SUPREME COURT’S HOLDING?

On June 29, 2023, the Supreme Court held that race-conscious affirmative action, that is, the consideration of an applicant’s race as one factor in making an admissions decision particularly to realize the educational benefits of diversity, is unconstitutional. The decision overturned 45 years of legal precedent.

In Chief Justice John Roberts’ opinion, he laid out the three reasons why affirmative action policies at Harvard and UNC violated federal non-discrimination law, specifically the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964: (1) the policies lack coherent, focused objectives to legally warrant the consideration of race; (2) universities used an applicant’s race in a “negative manner”; and (3) the absence of “meaningful end points” for the policies. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 U.S. 2141, 2175 (2023).

Roberts writes, “Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.” *Id.* at 2168. Additionally, the Court made clear that universities may not try to circumvent the ruling by “establish[ing] through application essays or other means the regime we hold unlawful today.” *Id.* at 2176.



While the Court conceded that the affirmative action goals articulated by Harvard and UNC (e.g., “training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens”) were “commendable,” they were not “sufficiently coherent for the purposes of strict scrutiny.” *Id.* at 2154. Chief Justice Roberts stated emphatically, “Eliminating racial discrimination means eliminating all of it.” *Id.* at 2161.

## HOW DOES THIS IMPACT THE UPCOMING ADMISSIONS CYCLE?

The Supreme Court’s decision in *SFFA* requires colleges and universities to stop using race as a factor in their admissions process. In light of this holding, schools that may have once relied on race-conscious admissions policies must now find other ways to pursue their diversity goals. For example, Harvard adjusted its application by requiring five separate short-answer questions asking students how they will contribute to a diverse student body. Previously, Harvard included a long-form optional essay that allowed applicants to write about any topic of their choice.

Nonetheless, Chief Justice Roberts opined 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.” *Students for Fair Admissions*, 143 U.S. at 2176. Therefore, it is important to highlight that while race cannot be considered in making an admissions decision, an applicant’s experience with racism and how it shaped their journey to university can. Still, the Court is clear: consideration of a student’s race, culture, or heritage must be limited to how a particular student’s background has impacted their “experiences as an individual.” *Id.*

The Court did note that its opinion does not address whether race-based admissions programs are constitutional at military academies “in light of the potentially distinct interests that military academies may present.” *Id.* at 2166, n.4. However, *Students for Fair Admissions* has filed a lawsuit against the U.S. Military Academy at West Point challenging its admissions process, which “considers race and ethnicity flexibly as a plus factor in an individualized, holistic assessment” of diverse candidates. Defendants’ Memorandum of Law at 16, *Students for Fair Admissions v. United States Military Academy at West Point et al.*, No. 7:23-cv-08262 (S.D.N.Y. Nov. 22, 2023). It is likely that any decision in the case will also apply to other military academies that utilize a similar admissions practice.

**“... 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.” -Chief Justice Roberts**



## HOW CAN UNIVERSITIES STILL PURSUE RACIAL DIVERSITY IN COLLEGE ADMISSIONS?

In the opinion, the Court states that universities may “define their missions as they see fit,” leaving the door open for institutions to nevertheless prioritize racial diversity so long as the means in which they pursue that diversity remains within constitutional limits. *Id.* at 2168. Specifically, as Chief Justice Roberts points out, “universities may not simply establish through application essays or other means the regime we hold unlawful today,” emphasizing that what “cannot be done directly cannot be done indirectly.” *Id.* at 2176 (quoting *Cummings v. Missouri*, 71 U.S. 277, 325 (1867)). There are a variety of practices that universities can still legally employ to improve access and opportunity for all students, but “the student must be treated based on his or her experiences as an individual—not on the basis of race.” *Id.* These practices include but are not limited to:

- Increasing resources for community college transfers.
- Implementing test-optional policies.
- Recruiting from rural or urban high schools.
- Notifying low-income students about institutional aid early in the admissions process.
- Guaranteeing public university admission to students who graduated in the top % of their class.
- Creating non-traditional student programs for those who entered the workforce after high school.

Universities may also consider looking to other schools that have already stopped using affirmative action, such as public universities in California which have not used race as a factor in admissions since 1996.

## WHAT SHOULD HIGH SCHOOL STUDENTS KNOW ABOUT *SFFA*?

### HOW SHOULD I APPROACH THE ADMISSIONS PROCESS?

Students, particularly those who are historically underrepresented in our nation's colleges and universities, may feel understandably confused and concerned about the Court's ruling in *SFFA*. Students who are specifically targeting elite universities like Harvard and UNC may wonder how application requirements will change as a result. As students approach the admissions process, they should pay close attention to how universities may reword essay questions or shift requirements for application materials, such as test scores or writing samples. Students may also inquire about a university's admissions policy post-*SFFA* by emailing or calling the university's admissions office to learn more about what adjustments they have made to their admissions process. Some schools, such as Yale College, have published this information on their website.

### IF I MENTION RACE IN MY APPLICATION, WILL IT HURT MY CHANCE OF ADMISSION?

No. Under the Court's decision, colleges and universities are still allowed to consider an "applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." This means that a student can talk about race in their application without hurting their chance of admission—in fact, it may very well improve their chance of admission. Some colleges have already made changes to their essay prompts reflecting the Court's opinion. Brown University, for example, requires applicants to submit an essay reflecting "on where they came from" and sharing "how an aspect of your growing up has inspired or challenged you." As a New York Times article suggests, this type of prompt may nudge "students toward responses that the school may be able to consider safely by asking them to reflect on a part of their identity and—if they choose to talk about their race—to link it to an inspiration or challenge."



## DOES THE COURT'S DECISION APPLY BEYOND HIGHER EDUCATION?

Strictly speaking, no. *SFFA* only directly applies to college admissions.

However, it is important to consider the legal grounds under which *SFFA* was decided to understand how it may influence future litigation. In *SFFA*, the Court based their ruling on the Equal Protection Clause, but also interpreted Title VI of the 1964 Civil Rights Act—a federal statute that applies to institutions receiving federal funds—to embody the same prohibition as the Equal Protection Clause. This raises a question as to whether similar claims can be successfully brought under similar statutes, specifically Title VII of the 1964 Civil Rights Act ("Title VII"), which deals with employment discrimination. There's also 42 U.S.C. § 1981 ("Section 1981"), which derives from the post-Civil War 1866 Civil Rights Act that guaranteed certain rights held only by white people to all citizens of the United States, particularly to make contracts and hold property. It is sensible to assume the Court will interpret these statutes in the same way it interpreted the Equal Protection Clause in *SFFA*. This has emboldened litigants who previously targeted affirmative action to extend their efforts to more recent diversity, equity, and inclusion ("DEI") programs and initiatives.

### WHAT ABOUT HIRING PRACTICES IN BUSINESSES AND CORPORATIONS?

***... under certain circumstances, considering an applicant's race in hiring decisions is a constitutional practice under Title VII of the Civil Rights Act of 1964 ...***

The Supreme Court has long held that under certain circumstances, considering an applicant's race in hiring decisions is a constitutional practice under Title VII of the Civil Rights Act of 1964, and the *SFFA* decision has no bearing on this precedent. Under Title VII, private sector employers are allowed to voluntarily adopt race-conscious affirmative action programs "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories," so long as it does not "unnecessarily trammel the interests of white employees, neither requiring the discharge of white workers and their replacement with new black hires, nor creating an absolute bar to the advancement of white employees." *United Steelworkers v. Weber*, 443 U.S. 193, 197, 209 (1979). Additionally, any affirmative action program an employer implements must be "temporary in measure, not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.* at 197. The Supreme Court may reexamine whether affirmative action in the employment context is constitutional.



## WHAT ABOUT HIRING PRACTICES IN FOUNDATIONS AND NONPROFITS?

The *SFFA* decision did not mention foundations or other nonprofit organizations. In general, most philanthropic foundations, charities, and nonprofits do not receive federal financial assistance and therefore are not subject to rulings under Title VI of the 1964 Civil Rights Act. Yet, like businesses and corporations, these private and public entities may face similar concerns that litigious plaintiffs will sue under Title VII for reverse discrimination in race-based hiring or board diversity practices. As stated previously, under certain circumstances affirmative action in employment decisions is constitutional under Title VII. However, it is still important for organizations to review the applicable federal, state, and local employment laws to ensure their practices are compliant. Section 1981 may also provide a basis for litigation concerning any contracts that foundations or other nonprofits enter.

## WHAT ABOUT DEI PROGRAMS AND INITIATIVES?

*SFFA* applies solely to affirmative action in college admissions and does not directly impact DEI programs and initiatives. DEI programs and initiatives remain legal so long as they are compliant with existing employment and anti-discrimination law. However, the *SFFA* decision has emboldened various groups and individuals to bring claims challenging the legality of DEI programs and initiatives across various sectors, including those in public corporations, private businesses, foundations, and other nonprofits.

In *American Alliance for Equal Rights v. Fearless Fund*, Edward Blum, the conservative activist who founded Students for Fair Admissions and the American Alliance for Equal Rights, sued Fearless Fund, a venture capital fund that invests in women of color led businesses. Blum claims that Fearless Fund violates 42 U.S.C. § 1981 because at least one of their grant competitions awards money only to Black women. Section 1981 allows for suits against any individual in the private sector who racially discriminates in the making and enforcing of contracts, and many other plaintiffs similar to the American Alliance for Equal Rights believe grant programs that give money to non-white business owners discriminate against white business owners. On September 30, 2023, the Court of Appeals for the Eleventh Circuit issued a temporary injunction against Fearless Fund, finding that the grant program was “racially exclusionary” and “substantially likely” to violate Section 1981.

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The American Alliance for Equal Rights also sued Perkins Coie, Morrison Foerster, and Winston and Strawn, targeting the law firms’ “diversity fellowships” that honor diverse law students with stipends and scholarships after being hired to work for the law firms. They argue that these fellowships—which are contracts between students and the law firms—violate Section 1981 because the eligibility criteria excluded white and Asian applicants, specifically requiring applicants be “in a historically underrepresented group in the legal profession, including racial/ethnic minority groups” such as “African American/Black, Latinx, Native Americans/Native Alaskans.” In response to pending litigation, the law firms Morrison Foerster and Gibson, Dunn & Crutcher have opened up their fellowship programs to all applicants and eliminated language referencing “historical underrepresentation” from their applications.

While many large and influential employers seem to remain committed to diversity practices, complaints challenging DEI programs and initiatives have grown increasingly common since the *SFFA* decision. As a result, businesses and other organizations will likely continue to modify their policies, settle lawsuits, and/or risk injunctions in the face of anti-DEI litigation.



# ADDITIONAL RESOURCES

## OTHER FAQs AND USEFUL DOCUMENTS

- U.S. Department of Education and U.S. Department of Justice Resources: [Justice and Education Departments Release Resources to Advance Diversity and Opportunity in Higher Education](#)
- Urban Institute Report: [How to Achieve Diverse Access to College in a Post-Affirmative Action World](#)
- Civil Rights Groups Report: [Affirmative Action in Higher Education: The Racial Justice Landscape After the SFFA Cases](#)
- Anti-DEI Litigation Tracker: [Gibson Dunn DEI Task Force Update](#)
- U.S. Equal Employment Opportunity Commission Affirmative Action Guidance: [CM-607 Affirmative Action](#)
- Philanthropy Roundtable Brief: [Implications for Philanthropy: U.S. Supreme Court Ruling on Affirmative Action in Higher Education](#)
- Council on Foundations [SFFA FAQ](#)
- NAACP Legal Defense Fund [SFFA FAQ](#)
- Pacific Legal Foundation [Racial Preferences in Education FAQ](#)

## STUDENTS FOR FAIR ADMISSIONS COMPLAINTS

- [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College et al. \(2014\)](#)
- [Students for Fair Admissions, Inc. v. University of North Carolina et al. \(2014\)](#)
- [Students for Fair Admissions v. United States Military Academy at West Point et al. \(2023\)](#)

## RELEVANT CASES AND STATUTES

- [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College \(2023\)](#)
  - [Regents of the University of California v. Bakke \(1978\)](#)
  - [Gratz v. Bollinger \(2003\)](#)
  - [Grutter v. Bollinger \(2003\)](#)
  - [Fisher v. University of Texas I \(2013\)](#)
  - [Fisher v. University of Texas II \(2016\)](#)
- Fourteenth Amendment
- Title VI of the Civil Rights Act of 1964
- Title VII of the Civil Rights Act of 1964
  - [United Steelworkers v. Weber \(1979\)](#)
  - [Johnson v. Transportation Agency, Santa Clara Cty. \(1987\)](#)
- [42 U.S.C. § 1981](#)
  - [Jones v. Alfred H. Mayer Company \(1968\)](#)
  - [Johnson v. Railway Express Agency, Inc. \(1975\)](#)
  - [Comcast Corp. v. National Association of African American-Owned Media \(2020\)](#)

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