

*Students for Fair Admissions v.
Harvard &
Students for Fair Admissions v.
University of North Carolina*

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Introduction

In 2023, the U.S. Supreme Court issued a landmark ruling in two challenges to affirmative action programs. In *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina, et al.*,¹ the Court struck down race-conscious admissions policies in higher education. The majority opinion, written by Chief Justice Roberts, rules that race-conscious admissions programs fail strict scrutiny, impermissibly use race as a negative factor for some applicants, perpetuate stereotypes, and lack a logical endpoint. Justice Thomas filed a concurring opinion outlining the strong historical support for the majority opinion. Justice Gorsuch, joined by Justice Thomas, wrote a concurrence explaining that the challenged admissions programs also violate Title VI of the Civil Rights Act of 1964. Lastly, Justice Kavanaugh filed a concurrence emphasizing that the majority opinion comports with past precedent.

Justices Sotomayor and Justice Jackson² filed dis-

1 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) [hereinafter *SFFA*].

2 Justice Jackson did not participate in *Students for Fair Admissions v. Harvard* because she previously served on Harvard's board of

sents. Joined by Justice Kagan and Justice Jackson, Justice Sotomayor's dissent rejects the Equal Protection's color-blindness standard, arguing instead that striking race-conscious admissions programs "subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education[.]"³ In her view, "the Fourteenth Amendment is properly interpreted to allow the government to use racial classification to redress the exclusion of underrepresented minorities[.]"⁴ In her dissent, Justice Jackson, joined by Justice Kagan and Justice Sotomayor, explains what she views as the "universal benefits of considering race" in college admissions from a practical lens.

The fundamental disagreement between the majority and dissents is whether the Equal Protection Clause has an exception that allows institutions to consider race to redress past wrongs to minorities. Yet the majority affirmed that the Constitution protects the right of every person to be treated equally because the "Constitution is color-blind, and oversees. Her participation and dissent was limited to the case against the University of North Carolina.

3 *SFFA II*, 600 U.S., at 318 (per Sotomayor, J., dissenting).

4 David E. Bernstein, *Students for Fair Admissions and the End of Racial Classification as We Know It*, 2023 CATO SUP. CT. REV. 143, 152 (2022–23).

neither knows nor tolerates classes among citizens.”⁵

I. Factual Background

a. *The Challenged Admissions Programs*

In 2022, Harvard received 60,000 applications, admitting fewer than 2,000 students.⁶ The University of North Carolina (UNC) reports receiving around 43,500 applications annually for 4,200 spots in each undergrad freshman class.⁷ Both schools review and rate each application they receive. At Harvard, the initial review yields a rating between 1–6, where 1 is the best and 6 is the worst.⁸ Once each application is rated, admissions subcommittees meet for three to five days to evaluate applications by geographic region.⁹ The full committee then reviews the subcommittees’ recommendations.¹⁰ It has 40 members and votes on every application to create a list of tentatively admitted students.¹¹ An applicant’s race is considered each step of the

5 *SFFA II*, 600 U.S., at 230 (per Thomas, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

6 *See id.*, at 192–93.

7 *Id.*, at 195.

8 *Id.*, at 194.

9 *Id.*

10 *Id.*

11 *Id.*, at 194–95.

way.¹² At the final step, the committee must review some applications a second time to narrow the list.¹³ In deciding which applicants to cut, the committee considers only “legacy status, recruited athlete status, financial aid eligibility, and race.”¹⁴

At UNC, admissions office readers review applications and rate them under four categories: academic, extracurricular, personal, and essay.¹⁵ Based on these ratings, the initial reader recommends whether an applicant should be admitted or denied.¹⁶ Race is a consideration and may be a “significant... plus.”¹⁷ Next, a review committee approves or rejects each initial reader’s decisions.¹⁸ The review committee is also permitted to consider an applicant’s race.¹⁹

b. Petitioners

Students for Fair Admissions (SFFA) is a voluntary membership 501(c)(3) organization formed to “defend human and civil rights secured by law, including the rights

12 *Id.*

13 *Id.*, at 195.

14 *Id.*

15 *Id.*, at 195–96.

16 *Id.*, at 196.

17 *Id.*

18 *Id.*

19 *Id.*

of individuals to equal protection under the law, through litigation and other lawful means.”²⁰ Its members include Asian Americans who applied to and were rejected by Harvard or UNC (collectively “universities”).²¹

II. Procedural History

In November 2014, SFFA filed separate actions against the universities with claims under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.²² Both cases went to trial.²³ The district courts upheld the admissions programs in both cases.²⁴ The First Circuit affirmed the holding as to Harvard’s admissions program.²⁵ The Supreme Court granted certiorari to review the First Circuit’s decision and granted certiorari before judgment, allowing it to consider the case against UNC without waiting for an appellate ruling from the Fourth Circuit.²⁶

20 *SFFA v. President and Fellows of Harvard*, 980 F.3d 157, 164 (1st Cir. 2020) (*SFFA I*).

21 *See id.*; *SFFA II*, 600 U.S., at 201.

22 *SFFA II*, 600 U.S., at 197–98.

23 *Id.*, at 198.

24 *Id.*

25 *See SFFA I*, 980 F.3d, at 204.

26 *SFFA II*, 600 U.S., at 198.

III. Decision

In a 6-3 decision, the Court reversed the lower courts' decisions, striking down the universities' race-conscious admissions programs under the Equal Protection Clause.²⁷ Adopted at the end of the Civil War, the "core purpose" of the Equal Protection Clause is to end "all governmentally imposed discrimination based on race."²⁸ Further, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."²⁹

The Court previously upheld certain race-conscious

27 The Court also affirmed that SFFA had organizational standing, distinguishing SFFA, a voluntary membership organization, from the state agency plaintiff in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *SFFA II*, 600 U.S. at 198–201. In *Hunt*, the Court was forced to question the Commission's structure because it was a state agency, not a traditional membership organization. *Id.*, at 200. The Commission did not have members in a technical sense, but the Court ruled "the apple growers and dealers it represented were *effectively* members of the Commission." *Id.* (emphasis in original) (citation omitted). In contrast, SFFA was a validly incorporated nonprofit with 47 members when it filed suit, thus an inquiry into how the organization operates is unnecessary. *Id.*, at 201. Moving forward, this may make it simpler for other membership organizations to satisfy organizational standing.

28 *SFFA II*, 600 U.S., at 206.

29 *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943).

admissions programs, but with “narrow restrictions.”³⁰ The history is as follows.

In *Regents of University of California v. Bakke*, Justice Powell ruled that an educational interest in having a diverse student body is a compelling interest for purposes of a strict scrutiny review.³¹ No other justice joined Justice Powell’s opinion, and lower courts spent decades grappling with whether Justice Powell’s opinion was binding since it was not joined by any other members of the Court.

In 2003, the Court decided *Grutter v. Bollinger*, officially adopting Justice Powell’s holding and ruling that a university may assert a compelling interest in obtaining a diverse student body.³² This interest, however, had limits: schools could not establish quotas, insulate students of certain races or ethnicities from competition, or desire a specific “percentage of a particular group merely because of its race or ethnic origin.”³³ *Grutter* also imposed a time limit or “termination point” on race-conscious admissions

30 *SFFA II*, at 213.

31 *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978)

32 *Grutter v. Bollinger*, 539 U.S. 306 (2003)

33 *SFFA II*, 600 U.S., at 211 (citing *Grutter*, 539 U.S. at 329–30) (internal quotations omitted).

programs, providing that such programs must be “temporary.”³⁴

IV. Standard of Review

Challenges to race-conscious admissions programs are reviewed under strict scrutiny.³⁵ To pass strict scrutiny, the Court must be satisfied that: (1) racial classification is necessary to “further compelling government interests[,]”³⁶ and (2) the consideration of race is “narrowly tailored” or otherwise “necessary” to fulfill the compelling interests.³⁷ Importantly, race-conscious admissions programs must operate “in a manner that is sufficiently measurable to permit judicial review under the rubric of strict scrutiny.”³⁸

V. Analysis

a. The Universities’ Admissions Programs Fail Strict Scrutiny

The universities asserted compelling interests in preserving the “educational benefits that flow from a racial-

34 *Id.*, at 212 (quoting *Grutter*, 539 U.S. at 342–43).

35 *Id.*, at 206.

36 *Id.*, at 207 (quoting *Grutter*, 539 U.S. 306, 326 (2003)).

37 *Id.*, at 207 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12 (2013)).

38 *Id.*, at 214 (quoting *Fisher*, 579 U.S. at 381) (internal quotations omitted).

ly diverse student body.”³⁹ Specifically, they asserted their race-conscious admissions programs provided compelling educational benefits including, *inter alia*: (1) training future leaders; (2) preparing graduates to “adapt to an increasingly pluralistic society”; (3) educating students through diversity; (4) fostering innovation and problem solving; and (5) “enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”⁴⁰ The Court rejected these interests as compelling because they are not sufficiently measurable.⁴¹ The Court was uncomfortable abdicating its judicial duty to review race-conscious admissions programs narrowly without knowing when or how the universities would accomplish these amorphous educational goals.⁴²

Even if these goals were compelling,⁴³ they fail

39 *See id.*, at 209, 214.

40 *Id.*, at 214 (internal quotations omitted).

41 *Id.*, at 214–15.

42 *See id.*, at 217 (“Universities may define their missions as they see fit. The Constitution defines ours. 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.”).

43 The Court left open the possibility that military academies may have a “distinct” and potentially compelling interest in using race-based admissions programs. *See id.*, at 213, n.4. The Court may have the opportunity to decide this issue in the coming years. *See* SFFA

strict scrutiny analysis for a second reason. These admissions programs lack a means-ends fit because they are not narrowly tailored to achieving the stated goals.⁴⁴ As the Court points out, it is unclear how broadly categorizing people as “Asian,” which includes all applicants from South Asia and East Asia, or “Hispanic,” which is largely undefined, ensures sufficient diversity. In fact, the current admissions programs would favor an incoming class with 15% of students from Mexico versus a class with 10% of students from several Latin American countries.⁴⁵ Because the admissions programs lacked an “exact connection between justification and classification,” the Court found they failed strict scrutiny.⁴⁶

b. Race-Conscious Admissions Programs Run Afoul of the Equal Protection Clause

Although the Court had previously upheld some race-conscious admissions programs, it has been clear that the Equal Protection Clause prohibits universities from us-
v. U.S. Military Academy at West Point, No. 23-cv-08262 (PMH) (S.D.N.Y. filed Sept. 19, 2023).

⁴⁴ See *SFFA II*, at 215–217.

⁴⁵ *Id.*, at 217.

⁴⁶ *Id.*, at 217–18 (quoting *Gratz v. Bollinger*, 539 U.S. 244 at 270 (2003)).

ing race as a negative factor and or using race to stereotype students. Particularly, race-conscious admissions programs cannot “discriminate *against* groups that were not beneficiaries of the race-based preference.”⁴⁷ Nor can they rely on the assumption that “minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”⁴⁸ Finally, race-conscious admissions programs must have a logical end point.⁴⁹

First, the Court considered whether race was a negative factor for some applicants. The universities argued that the fact that race is a positive quality for some applicants does not make it a negative quality for others.⁵⁰ The Court rejected this argument, writing that “[c]ollege admissions are zero-sum.”⁵¹ In other words, if race is a “plus” factor for some applicants, it is necessarily a negative factor for the applicants who will never be able to assert it.

47 *Id.*, at 212 (emphasis in original).

48 *Id.*, at 211–12 (quoting *Grutter*, 539 U.S. at 333).

49 *Id.*, at 221 (quoting *Grutter*, 539 U.S. at 342); *Grutter*, 539 U.S. at 343 (predicting that race-conscious admissions programs will not be necessary in 25 years); *see also SFFA II*, 600 U.S. at 312–15 (Kavanaugh, J. concurring) (emphasizing the importance of the end point in *Grutter*).

50 *Id.*, at 218.

51 *Id.*

Second, the use of race in these particular admissions programs necessarily relies on stereotyping, thereby “demean[ing] the dignity and worth of a person to be judged by ancestry instead of by his or her merit and essential qualities.”⁵² Instead of remedying past wrongs, “such stereotyping can only cause continued hurt and injury.”⁵³

Third, the race-conscious admissions programs lacked a “logical end point.”⁵⁴ The universities argued they would stop using race-conscious admissions programs when there is “meaningful representation and meaningful diversity” on their campuses.⁵⁵ But the Court noted that to achieve this goal, Harvard has kept the share of black students admitted to each class from 2009 to 2018 between 10%– 11.7%.⁵⁶ Likewise, UNC argued it had not yet achieved its diversity-related goals because its percentage of enrolled minority students is lower than the percentage

52 *Id.*, at 220 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

53 *Id.*, at 221 (internal quotations omitted).
omitted) (cleaned up).

54 *Id.*, at 221 (quoting *Grutter*, 539 U.S., at 342).

55 *Id.*, at 221 (internal quotations omitted).

56 *Id.*, at 222.

of minorities within the general population.⁵⁷

Both approaches are impermissible under the Equal Protection Clause, which requires government to “treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class.”⁵⁸ The Court previously held that “outright racial balancing [] is patently unconstitutional.”⁵⁹ Yet the challenged admissions programs “effectively assure that race will always be relevant” thereby thwarting the ultimate goal of eliminating the use of race in admissions programs.⁶⁰ Given the foregoing, the majority struck down the universities’ use of race-conscious admissions programs.

Conclusion

Some view *SFFA II* as sweeping in a new era of higher-education admissions programs, but the majority opinion takes pains to show that its ruling is consistent with previous affirmative action cases. Past cases may have allowed the use of race in some admissions programs, but with limits. The majority’s parting words explain that

57 *Id.*, at 223.

58 *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

59 *Fisher*, 570 U.S., at 311.

60 *Id.*, at 224 (internal quotation omitted) (cleaned up).

universities are not prohibited from considering “how race affected [an applicant’s] life, be it through discrimination, inspiration, or otherwise.”⁶¹ They may not, however, assume that an individual has had a certain experience or viewpoint based on race. Put simply, the Court commands universities to review every application on its own merit and to stop weighing race over individual “challenges bested, skills built, or lessons learned.”⁶²

61 *Id.*, at 230.

62 *Id.*

