**Action Alert**
**U.S. Supreme Court Agrees to Hear *SFFA v. Harvard* and *SFFA v. UNC* Cases: Background and Suggested Messaging**

***An Access & Diversity Collaborative Publication***

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## Overview

On January 24, 2022, the U.S. Supreme Court ["the Court"] agreed to consolidate and hear two federal cases separately initiated by Students for Fair Admission against Harvard and UNC [together, "the IHEs"]. In each of those cases, SFFA claims that the IHEs' undergraduate admissions policies and practices that involved the limited consideration of applicants' race and ethnicity as part of the IHEs' individualized holistic review of applicants are unlawful under existing Court authority. Separately, SFFA also claims that over 40 years of Court precedent that permits such consideration in appropriate cases was wrongly decided and should be categorically overruled.

This Action Alert provides relevant background information regarding the Court's action, as well as messaging points to consider when engaging with stakeholders and the media.

## The Cases and Court Action

***Legal Context.*** The Court's action to consolidate and hear these two cases comes amidst a long-standing effort by opponents of "affirmative action"[1] to eliminate any consideration of race or ethnicity in higher education admissions. In 1978 (*Bakke*), 2003 *(Grutter, Gratz*), 2013 (*Fisher I*), and 2016 (*Fisher II*), the Court considered challenges to race-conscious admissions policies. In each instance, the Court affirmed the now long-standing doctrine that the limited consideration of race/ethnicity in higher education admissions decisions (as part of individualized holistic review) is permissible where supported by necessary evidence. In short, over 40 years of precedent establishes the legitimacy of postsecondary institutions considering

[1] Despite its prevalence (including in some court opinions), "affirmative action" is an inappropriate term to use when characterizing a policy designed to achieve forward-looking, educational diversity aims associated with beneficial educational experiences and outcomes for all students. "Affirmative action" is a term that has historically (and correctly) characterized remedial policies designed to correct for an institution's past discrimination and/or failure to provide equal opportunities. By contrast, the consideration of race/ethnicity to achieve mission-aligned diversity interests (as in these cases) is more appropriately characterized as race-/ethnicity-conscious (or -aware), with clarity describing relevant educational diversity aims. See *Engaging Campus Stakeholders on Enrollment Issues Associated with Student Diversity: A Communications Primer* (2020).

race/ethnicity in admissions (and other enrollment realms) to advance the mission-driven, research-based educational benefits of diversity for all students.

***The Facts of the Cases.*** The facts of the Harvard and UNC cases are explained, respectively, in Access & Diversity Collaborative [ADC] district court opinion summaries here and here. In all decisions, based on an exhaustive record, relevant federal courts found in favor of the IHEs on each of the following issues:

- Whether institutional interests in achieving the educational benefits of diversity were sufficiently compelling to justify the limited consideration of race/ethnicity in undergraduate admissions;
- Whether the relevant policy design and process was "narrowly tailored" to satisfy those interests (i.e., was the consideration of race/ethnicity necessary to achieve articulated goals, with ample consideration and use of workable race-neutral strategies; was the consideration of race/ethnicity as part of the admissions process appropriately limited and integrated within a holistic review process; and did the record establish supporting evidence and a process of review/evaluation over time); and
- Whether there was any racial animus or intentional discrimination against any applicant.

SFFA seeks to have the Court reverse those decisions on two grounds:

- That the 40-year precedent on which those court decisions relied is fundamentally flawed and should be categorically reversed, so that the consideration of race/ethnicity is no longer permissible;[2] and
- If the Court's precedent is upheld, each of the IHEs should lose based on their policies' and practices' failure to comply with that precedent, based on evidence in the record.

***Court Action.*** The Court's decision to hear a case like this is discretionary and depends on an affirmative vote by four of nine Justices. The Court takes very few cases among the number of petitions filed by litigants requesting Court review. Moreover, to take the action in the UNC case that it did—granting review of a case "before judgment" of a Court of Appeals—is exceptionally rare.[3]

The importance of the consolidation of the cases is that it allows the Court to address the array of issues surrounding the consideration of race/ethnicity in admissions under the Equal

[2] Among other things, SFFA asserts that the real aim of colleges and universities is not educational diversity; and that there is no practical way to assure adherence to the required court standards. In corresponding fashion, SFFA in each case seeks to bar the IHEs from being aware of or learning of the race and ethnicity of any applicant.

[3] From August 2004 to January 2018, no such petitions were granted. Since January 18, 15 such petitions have been granted, inclusive of SFFA's request that the Court allow it to bypass the Court of Appeals. Under current federal rules governing such action, a case must be "of such imperative public importance" so as to require bypassing a court of appeals with the corresponding "immediate determination" by the Supreme Court.

Protection Clause of the United States Constitution (applicable only to public institutions of higher education; and central to the UNC litigation) and Title VI of the Civil Rights Act of 1966 (applicable to both public to private institutions that are recipients of federal funds; and central in both UNC and Harvard cases).[4]

***Anticipated Timeline.*** The Court has not yet announced a briefing and oral argument schedule. Theoretically, the cases could be set for argument in the spring of 2022, but leading Court watchers believe that it is more likely that they will be set for argument in the 2022-23 Court term (which begins in October 2022). If those expectations hold, a Court decision in the two cases could be rendered as late as the end of June/early July of 2023.

***The Law Now.*** The law has not changed at this time. Institutions need not change policies and practices that adhere to the requirements of existing law unless and until the Court rules otherwise.

**Messaging Points to Consider**

1. The U.S. Supreme Court has for over 40 years affirmed the lawfulness of considering race/ethnicity in higher education admissions decisions. That long-standing precedent, on which colleges and universities have relied when developing their policies and practices, should not be overturned.

2. Indeed, through many national initiatives specifically designed to assure fidelity to Court rulings,[5] colleges and universities have integrated legal principles and standards into the design and implementation of mission-aligned admissions and broader enrollment policies.

3. Correspondingly, colleges and universities have relied on a robust collection of wide-ranging and in-depth research[6] (including their own institutional research) to ground mission-aligned policy development and support their diversity efforts consistent with Court precedent.

4. In addition, the diversity interests that have been affirmed by the Court over the course of decades have been fully (and repeatedly) endorsed by leading corporations; high-ranking

[4] The Court has in past cases considered the legal standards relevant to the Equal Protection Clause of 14th Amendment to the United States Constitution and Title VI to be "coextensive." A meaningful difference in the relevant legal analysis associated with public and private institutions in this context is, therefore, unlikely.

[5] Those initiatives include the College Board Access and Diversity Collaborative, established in 2004 in the wake of *Grutter v. Bollinger* and *Gratz v. Bollinger*, cited in the *SFFA v. UNC* decision; and the American Association for the Advancement of Science Diversity and the Law project, which in 2010 and in 2021 provided foundational legal and policy guidance to the field.

[6] See, e.g., *Bridging the Research to Practice Gap: Achieving Mission-Driven Diversity and Inclusion Goals (2016)*; *Diversity and the Law: 2021—Overview of Resources for Lawyers and Policymakers (2021)*.

military and defense officials; major religious denominations; and hundreds of colleges, universities and educational associations, among others.

5. At a time where issues associated with assuring equal opportunity and equity for all students regardless of background is both an institutional priority and national imperative, any curtailment of existing legal authorities that permit the limited consideration of race/ethnicity in admissions is unwarranted and unwise.

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