THE ABSURD REACH OF A "COLORBLIND" CONSTITUTION

DAVID HINOJOSA* AND GENEVIEVE BONADIES TORRES**

Affirmative action has long spurred debates over whether the Equal Protection Clause and subsequent civil rights legislation were intended to permit policies aimed at disrupting racial hierarchies, dismantling systemic discrimination, and ensuring equal opportunity for Black people and other historically marginalized groups. The current lawsuits pending before the Supreme Court challenging affirmative action admissions programs at the University of North Carolina at Chapel Hill (UNC) and Harvard College are no exception. Like prior lawsuits, the plaintiff in both cases—Students for Fair Admissions ("SFFA")—and its amici seek to turn back the clock on racial diversity at selective universities by urging the Supreme Court to upend over forty years of precedent and outlaw affirmative action admissions altogether. Ratcheting up the constitutional threat even further, SFFA has argued, in part, that the Equal Protection Clause, and in turn Title VI of the Civil Rights Act of 1964, prohibit any distinctions based on race because the provisions are "colorblind."

SFFA's theory of strict constitutional colorblindness did not receive much attention by the Justices at oral argument, perhaps because SFFA did not provide

---

* J.D., *University of Texas at Austin School of Law*, 2000; B.A., *New Mexico State University*, 1997.

** J.D., *Harvard School of Law*, 2013; M. Ed., *Arizona State University*, 2010; B.A., *Harvard University*, 2008.

The authors are counsel with the Lawyers' Committee for Civil Rights Under Law and represent a multiracial group of student and alumni intervenors and amici in three current affirmative action cases, two pending before the Supreme Court and one stayed in the Western District of Texas: Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199 (U.S.); Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S.); Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin, No. 120-cv-763 (W.D. Tex.). Opinions expressed by the authors represent their own opinions and not that of their clients or the organization.

much briefing in support. Nevertheless, the extremity of SFFA's colorblind regime warrants serious attention by legal advocates, universities, scholars, policymakers, and other stakeholders. While it is unlikely that a majority of Justices will endorse such a far-reaching constitutional interpretation in the Court's forthcoming decision, SFFA and its amici have advanced arguments that could lay a dangerous foundation for future legal challenges. Proponents of racial progress and equity must be prepared to fend off such attacks, some of which have already been launched by SFFA's amici and allies.

To this end, this Article vigorously contends with SFFA's colorblind regime to expose its legal and practical infirmities. We begin by summarizing the doctrinal framework that currently governs affirmative action in higher education, describing the seminal cases and emphasizing the pending cases before the Supreme Court. We then turn to demonstrating how SFFA's colorblind arguments are constitutionally defective and practically undesirable. First, we highlight how SFFA's proposition that the Fourteenth Amendment is colorblind runs contrary to the Equal Protection Clause's original purpose and legislative history. Such an interpretation perversely interferes with the Fourteenth Amendment's anti-subjugation and equality-based goals, and it would gut the strict scrutiny framework that has reliably guided courts for decades. Next, we trace how SFFA and its amici have articulated a colorblind legal framework that—in its most extreme forms—entrenches today's racial hierarchies by systematically privileging predominantly white experiences while devaluing the lived reality of many historically marginalized people of color. The net effect of the differing treatment raises serious concerns with equal protection violations. Finally, we map out how SFFA's more drastic colorblind assertions—such as its request that admissions officers be banned from learning an applicant's race—could run afoul of the First Amendment by unjustifiably censoring certain students' application essays merely because they ascribe some meaning to their race or ethnicity. Through legal analysis and specific examples drawn from the UNC and Harvard case records, this Article underscores how the unfounded, extremist colorblind regime invoked by SFFA and its amici poses a severe threat to core constitutional principles and the proper functioning of our multi-racial democracy.

TABLE OF CONTENTS

INTRODUCTION

On October 31, 2022, the Supreme Court heard more than five hours of argument in two separate cases challenging the affirmative action[1] admissions programs at the University of North Carolina at Chapel Hill (UNC) and Harvard College.[2] The plaintiff in both cases—Students for Fair Admissions ("SFFA")—questions not only whether the universities' admissions programs satisfy strict scrutiny, but also swings for the fences by seeking to undo over forty years of precedent and outlaw affirmative action admissions.[3] But SFFA and its amici do not stop there. They further argue, in part, that the Equal Protection

1. The authors use "affirmative action" and "race-conscious admissions" interchangeably to streamline the argument. However, they understand that these terms have been contrasted by others in the field.

2. Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, N.Y. TIMES (Nov. 1, 2022), https://www.nytimes.com/2022/10/31/us/supreme-court-harvard-unc-affirmative-action.html [https://perma.cc/3ZW8-HXV3].

3. *See, e.g.*, Petition for a Writ of Certiorari Before Judgment at 2–4, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Nov. 11, 2021) [hereinafter UNC Petition for Certiorari].

Clause, and in turn Title VI of the Civil Rights Act of 1964,[4] prohibit any distinctions based on race because the provisions are "colorblind."[5]

But how far does this argument sway from the purpose and meaning of the Fourteenth Amendment, which was enacted just three years following a bloody civil war over the subjugation and enslavement of Black people in the South? And perhaps worse, what are the potential implications for such a far-reaching interpretation? Does a "colorblind" ruling simply mean that race cannot be considered as a factor in admissions but would not reach into censoring students' applications or other areas? Or could such a decision be used, and abused, by SFFA or any of its amici to attempt to imperil how students represent themselves in their applications and how universities consider their racialized experiences in assessing their qualification for admission or scholarship? And could such an opinion be interpreted to prohibit public school districts from reforming admissions policies even in race-neutral[6] ways to address current barriers, whether purposeful or not, for historically marginalized students of color[7] in accessing specialty schools and magnet schools?

To be clear, many of these possibilities are not relevant to the issues before the Court and seem out of realm for even the most conservative leaning court; but so too have other recent decisions like *Dobbs v. Jackson Women's Health Organization*[8] where the Supreme Court overturned *Roe v. Wade*,[9] drawing into question further constitutional protection for abortions.[10] And even if the Court dismisses such assertions—as it should—other extremist groups are likely to pick up those same arguments in future cases. In fact, as discussed in Part IV

---

4. Pub. L. No. 88-352, 79 Stat. 241; UNC Petition for Certiorari, *supra* note 3, at 2–3.

5. UNC Petition for Certiorari, *supra* note 3, at 2–3.

6. This Article uses the terms "nonracial" and "race-neutral" interchangeably to refer to policies that do not explicitly consider race.

7. For purposes of this Article, the authors define "historically marginalized students of color" as those racial and ethnic groups who have been disproportionately denied access to higher education, including Black/African American, Hispanic/Latino/a/x, Native American/American Indian, Alaskan, Pacific Islander, and various Asian American subgroups. The authors fully recognize that various governments, including the United States, have historically impeded and undermined the progress of other groups, including Asian Americans from East and South Asia and staunchly oppose discrimination against any racial group.

8. 142 S. Ct. 2228 (2022).

9. 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

10. *Dobbs*, 142 S. Ct. at 2242.

below, some of SFFA's amici already have adopted similar positions in pending litigation.[11]

This Article attempts to address these critical issues ahead of the decisions expected in June 2023. First, we provide a brief overview of the current legal landscape surrounding affirmative action in admissions over the past five decades, emphasizing the pending cases. Next, we trace how SFFA has advanced an extremist "colorblind" constitutional framework. We then unpack the constitutional flaws and shortcomings of SFFA's arguments. To begin, SFFA's constitutional views conflict with the Fourteenth Amendment's equality mission and the anti-subjugation interventions that it was designed to support. SFFA's far-reaching argument would turn equal protection on its head. Additionally, it could virtually render useless the highest court's strict scrutiny framework, as applied to racial classifications, developed over the past eighty years that helps ensure governmental entities, among others, can consider race when they identify a compelling interest and can achieve that interest through narrowly tailored means.

This Article then discusses how SFFA's colorblind regime, in its most extreme application, could be used by proponents to solidify white privilege while simultaneously placing many Black students and other students of color on unequal footing, giving rise to a host of potential equal protection violations. During oral argument, Justice Jackson asked SFFA whether, under its proffered colorblind standard, UNC could consider a white student's admissions essay, describing how the student is a fifth generation UNC alumni; and contrasted that review to UNC's consideration of a Black student's essay describing how the student is a fifth-generation descendant of enslaved peoples and will be the first in the family to attend UNC due to the past exclusionary practices of the university.[12] Quite remarkably, SFFA responded that the former would be appropriate under the Equal Protection Clause but the latter would not.[13]

The Article concludes with a discussion on how SFFA's colorblind regime raises serious First Amendment concerns. According to SFFA's complaint and its contradictory arguments presented to the Court,

---

11. *See infra* Part IV; *see, e.g.*, Brief of Amicus Curiae Southeastern Legal Foundation in Support of Plaintiff-Appellee and Affirmance at 2, 5, Coal. for T.J. v. Fairfax Cnty. Sch. Bd., No. 22-1280 (4th Cir. June 20, 2022).

12. Transcript of Oral Argument at 65–66, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S 2022) [hereinafter Supreme Court Oral Argument].

13. *Id.* at 68–69.

universities may need to gag students' reflections on race or otherwise censor admissions officers from merely becoming aware of a student's race in their application.[14] There were at least a couple questions asked during oral argument, including one by Justice Coney Barrett, indicating concerns with how censoring student essays could run afoul of free speech rights under the First Amendment.[15] By discriminating against certain viewpoints that ascribe some meaning to race and its impact on lived experiences, a restriction imposed by SFFA's most extreme colorblind interpretation would likely succumb to a challenge under the First Amendment.[16]

It is imperative that universities, communities, advocates, scholars, law firms, policymakers, and our judiciary, among other stakeholders, fully understand the serious implications and problems that could arise from a colorblind interpretation of the Equal Protection Clause; but also, that they do not overstate the implications and contribute to rollbacks in advancing equal opportunity.[17] Racial inequities and disparate access in higher education continue to pose a monumental barrier for historically marginalized people of color.[18] As the Supreme Court held in *Grutter v. Bollinger*,[19] "[b]y virtue of our Nation's struggle with racial inequality, [underrepresented] students are both likely to have experiences of particular importance to the [school's] mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."[20] Affirmative action was never intended to be the silver bullet that resolved all racial equity issues in higher education.[21] But its loss, especially through an opinion invoking an

14. *See id.* at 41–45 (discussing potential issues with considering students' experiences and backgrounds that are highly correlated with race); *infra* Part VI (discussing concerns with censorship and students' First Amendment rights).

15. Supreme Court Oral Argument, *supra* note 12, at 60; *infra* notes 265–267 and accompanying text.

16. *Infra* notes 265–267 and accompanying text.

17. *What You Need to Know About Affirmative Action at the Supreme Court*, ACLU (Oct. 31, 2022), https://www.aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court [https://perma.cc/JR9N-9QCU].

18. *Id.*

19. 539 U.S. 306 (2003).

20. *Id.* at 338.

21. *See, e.g.*, Editorial Board, *Editorial: The Future of Affirmative Action in Brown*, BROWN DAILY HERALD (Dec. 7, 2022), https://www.browndailyherald.com/article/2022/12/editorial-the-future-of-affirmative-action-at-brown [https://perma.cc/4H79-3G83] (noting that while affirmative action is a necessary tool to address societal

extremist colorblind regime as advocated by SFFA and its amici, could spell drastic, far-reaching consequences, further endangering this nation's future and its democracy, a democracy that "'depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[22]

I. AFFIRMATIVE ACTION IN HIGHER EDUCATION: LEGAL LANDSCAPE[23]

As the nation started climbing out of the civil rights struggle in the 1960s, leaders sought to open pathways to prosperity and economic mobility for historically marginalized people of color—especially Black people—in meaningful ways that ushered in changes to the status quo.[24] Leaders understood that mere enforcement of anti-discrimination laws like the Civil Rights Act of 1964 would not be enough after more than three centuries of subjugating Black people to slavery, then to segregation and second-class citizenship, and finally to a series of Jim Crow laws intent on maintaining white power and privilege.[25] Something more was needed, and part of that "something more" was affirmative action.[26]

---

implications of racism, "[i]t is no silver bullet—and conversations about diversity should not end with affirmative action").

22. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (quoting Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967)).

23. Many of these cases, save for the two now pending before the Supreme Court, have been discussed in-depth by several scholars. *See, e.g.*, Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 340–49 (2022). Below follows a peripheral overview of the cases for context.

24. Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and Economic Opportunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/article/systematic-inequality-economic-opportunity [https://perma.cc/DC6M-KC52].

25. *See id.*

26. In 1965, President Lyndon B. Johnson issued Executive Order No. 11,246, which originally required affirmative action and prohibited federal contractors from discriminating on the basis of "race, color, religion, sex, sexual orientation, gender identity, or national origin." Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965). "Contractors also are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations." *Executive Order 11246*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ofccp/executive-order-11246 [https://perma.cc/6UM5-KUYN]. EO 11246 has been subsequently amended. *Executive Order 11246, As*

Higher education institutions took note, in large part due to pressure from student and civil rights activists, and began modifying their admission policies to help ensure they welcomed well-qualified students of color who had long been excluded.[27] One of those universities was the medical school at the University of California at Davis (UC-Davis).[28] The school had struggled to identify and enroll underrepresented students of color, including Black, Latinx, and Native American students.[29] Consequently, the medical school created a special admissions program for applicants who identified as economically disadvantaged and "disadvantaged minority" students,[30] setting aside sixteen of the one hundred seats in the class for special admissions.[31]

Allan Bakke, a white applicant who was denied admission in 1973 and 1974, filed suit claiming violations of equal protection under federal and state constitutions and under Title VI of the Civil Rights Act of 1964.[32] The Supreme Court issued a fractured opinion.[33] Four justices would have upheld the admissions program and four justices would have struck down the consideration of race in admissions under Title VI.[34] Justice Powell wrote a separate opinion that provided the fifth, deciding vote.[35] He held that universities that consider race when

---

Amended, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended [https://perma.cc/8VBZ-EXFP].

27. Lisa M. Stulberg & Anthony S. Chen, *The Origins of Race-conscious Affirmative Action in Undergraduate Admissions: A Comparative Analysis of Institutional Change in Higher Education*, 87 AM. SOCIO. ASS'N 36, 39–40 (2013).

28. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269–70 (1978). *Bakke* was the first challenge to affirmative action in college admissions decided on its merits in the Supreme Court. *See* Becky Sullivan, *How the Supreme Court Has Ruled in the Past About Affirmative Action*, NPR (Nov. 1, 2022, 5:01 AM), https://www.npr.org/2022/11/01/1132935433/supreme-court-affirmative-action-history-harvard-admissions-university-carolina [https://perma.cc/3DT5-P8M9] (outlining the history of the Supreme Court's affirmative action decisions). However, *DeFunis v. Odegaard* was the first case to reach the high court, only to have been declared moot before a merits opinion was issued when the plaintiff (DeFunis) registered for his final quarter at another school. 416 U.S. 312, 316–17, 319–20 (1974) (per curiam).

29. *See Bakke*, 438 U.S. at 272.

30. The medical school identified Black, Chicano, Asian, and American Indian applicants as disadvantaged members of a "minority group." *Id.* at 274.

31. *Id.* at 265.

32. *Id.* at 276–78.

33. *See id.* at 271–72.

34. *Id.*

35. *Id.*

seeking to obtain the educational benefits that flow from a racially and ethnically diverse student body satisfy the compelling interest prong of strict scrutiny.[36] In holding so, Justice Powell recognized the critically important role that the nation's diversity plays in developing future leaders.[37]

However, Justice Powell concluded that the special admissions track and set-aside seats were not narrowly tailored to achieve that interest, blocking UC-Davis's admissions program.[38] Nevertheless, he did favorably reference holistic admissions plans where "race or ethnic background may be deemed a 'plus' in a particular applicant's file" so long at it "does not insulate the individual from comparison with all other candidates for the available seats."[39]

Justice Powell also emphatically rejected the proposition that Title VI was enacted as a "purely color-blind scheme" and should be read distinctly from the right to equal treatment under the Equal Protection Clause.[40] In doing so, he noted how Congress, in enacting Title VI, was confronting "discrimination against [Black] citizens at the hands of recipients of federal moneys" and how "[o]ver and over again, proponents of the bill detailed the plight of [Black people] seeking equal treatment in such programs."[41] This contrasted with Justice

---

36. *Id.* at 311–15.

37. *See id.* at 313. Citing *Sweatt v. Painter*, 339 U.S. 629 (1950), which challenged the University of Texas at Austin's dual law school system, he further noted how

> [t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Bakke, 438 U.S. at 314 (quoting *Sweatt*, 339 U.S. at 634).

38. *Id.* at 315–20. Justice Powell acknowledged that state entities, including universities, do have a compelling interest in ameliorating and eliminating the ongoing effects of discrimination. *Id.* at 307. However, he distinguished such active, proven discrimination from broader "societal discrimination," rejecting the latter as compelling because "innocent individuals" could be swept up by a remedy. *Id.* (citations omitted). He further rejected interests intended to assure a specified percentage of a particular historically disfavored group in the medical profession as facially invalid, *id.*, and held that while improving the delivery of health care services to underserved communities may be compelling, there was no supporting evidence finding such interest and the special admissions program was not narrowly tied to such interest. *Id.* at 310–11.

39. *Id.* at 317.

40. *Id.* at 284–85, 287.

41. *Id.* at 285.

Stevens' concurring/dissenting opinion, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist.[42] Justice Stevens acknowledged that when enacting Title VI, Congress focused on addressing the "glaring . . . discrimination against [Black people] which exists throughout Nation," and, more specifically, the federal funding of segregated facilities.[43] Nevertheless, Justice Stevens surmised that the proponents of Title VI considered the legislation race-blind in light of the view that the Fourteenth Amendment assumed a "colorblind standard."[44]

Without a clear majority opinion, and with four justices joining Justice Powell's view on the educational benefits of diversity being a compelling interest that universities may pursue, colleges continued to implement and pursue affirmative action programs.[45]

In 2003, the Supreme Court considered two separate federal cases challenging race-conscious programs: *Grutter v. Bollinger*,[46] challenging the University of Michigan's Law School ("UMLS") admissions;[47] and *Gratz v. Bollinger*,[48] challenging the University of Michigan's College of Literature, Science and the Art ("UMLSA") admissions.[49]

Writing for a 5-4 majority in *Grutter*, Justice O'Connor noted that the Equal Protection Clause did not unilaterally prohibit all racial classifications and that each classification must be subjected to strict scrutiny.[50] She further noted that "[c]ontext matters" and, here, that context included assessing race-conscious admissions in light of the

---

42. *Id.* at 413 (Stevens, J., concurring and dissenting in part).

43. *Id.* (stating that "Title VI stands for 'the general principle that no person . . . be excluded from participation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance'" (alteration in original) (emphasis omitted) (citation omitted)).

44. *Id.* at 416 (stating that proponents of Title VI considered it consistent with their view of the Constitution).

45. *See* Grutter v. Bollinger, 539 U.S. 306, 323 (2003) (noting that the *Bakke* opinion served as the "touchstone for constitutional analysis of race-conscious admissions policies" and that universities across the nation had modeled their admissions programs based on Justice Powell's opinion).

46. 539 U.S. 306 (2003).

47. *Id.* at 311.

48. 539 U.S. 244 (2003).

49. *Id.* at 249–51 (describing plaintiffs' argument that the University's manner of considering race in admissions is in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964).

50. *Grutter*, 539 U.S. at 326 (citations omitted) (noting that under strict scrutiny classifications must be narrowly tailored to further compelling governmental interests).

university's strong First Amendment interest in selecting a student body best suited to achieve its legitimate interest.[51] Justice O'Connor affirmed Justice Powell's opinion in *Bakke*, holding that UMLS had a compelling interest in the educational benefits[52] of a diverse student body, and the holistic admissions program was narrowly tailored to achieve those benefits.[53] Ultimately, Justice O'Connor concluded: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[54]

In Justice Thomas's dissent, he argued that there were only two exceptions to the use of racial classifications—national security and remedying past discrimination—and neither was before the Court.[55] He further declared that the majority opinion put at risk the principle of equality embedded in the Declaration of Independence and the Constitution's Equal Protection clause, quoting Justice Harlan's dissent in *Plessy v. Ferguson*:[56] "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[57]

Just five years later, another attack on affirmative action ensued in *Fisher v. University of Texas at Austin* (*Fisher I*).[58] There, Plaintiff Abigail Fisher—whose litigation was funded by Edward Blum who, in turn, later created SFFA—alleged that her equal protection rights were violated.[59] More specifically, Ms. Fisher claimed that the University of Texas at Austin's ("UT") race-conscious admissions program was not

---

51. *Id.* at 327–30.

52. *Id.* at 330. Among the cited social and academic benefits of diversity are: promoting cross racial understanding, breaking down stereotypes, improving learning, better preparing students to participate in diverse workforce, sharing of varied perspectives and viewpoints, and training racially diverse officer corps to provide better national security. *Id.* at 330–31.

53. *Id.* at 315 (describing the holistic admissions program as one where racial diversity was one part of broader diversity sought and race was only a factor among several others assessed in a flexible manner on an individual basis). The policy further provided that the law school committed itself to the inclusion of "groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.* at 316.

54. *Id.* at 332.

55. *Id.* at 351–52 (Thomas, J., dissenting).

56. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

57. *See Grutter*, 539 U.S. at 378 (Thomas, J., dissenting) (quoting *Plessy*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

58. 570 U.S. 297 (2013).

59. *See id.* at 301–02.

narrowly tailored and failed to consider race-neutral alternatives.[60] In 2012, the Court reviewed the Fifth Circuit's affirmance of summary judgment in favor of UT. In the Court's remand decision, it tightened the belt straps on the strict scrutiny standard, ensuring that the courts did not defer to universities on the narrow tailoring prong.[61] Following the Fifth Circuit's affirmance of the lawfulness of UT's admissions program under the new standard, the Court upheld UT's admissions program in a 5-4 decision handed down in 2016.[62] Although plaintiff Fisher did not challenge the permissibility of affirmative action in higher education, a dissent by Justice Thomas argued, once again, that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."[63]

II. THE CASES PENDING BEFORE THE SUPREME COURT: *HARVARD* AND *UNC*

In 2014, while *Fisher* worked its way back through the Fifth Circuit and the Supreme Court for a second time, Ed Blum and his well-funded organization—SFFA—filed two lawsuits on the same day: one against the nation's oldest private university, Harvard College; and one against the oldest public university, UNC.[64] In both cases, SFFA seeks to upend *Bakke* and *Grutter*, urging the courts to enjoin the consideration of race in admissions altogether.[65]

---

60. *See* Amended Complaint at 32–33, Fisher v. Texas, 645 F. Supp. 2d 587 (W.D. Tex. 2008) (No. 1:08-cv-00263) (stating how UT failed to take advantage of numerous race-neutral means to achieve diversity, such as expanding the Top Ten Percent law).

61. *See* Elise C. Boddie, Response, *The Future of Affirmative Action*, 130 HARV. L. REV. F. 38, 40–41 (2016).

62. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 387–88 (2016) (finding that the University met its burden of proving that the admissions policy was narrowly tailored).

63. *See id.* at 389 (Thomas, J., dissenting) (quoting *Fisher I*, 570 U.S. at 315 (Thomas, J., concurring)).

64. *See* Nia L. Orakwue & Leah J. Teichholtz, *SFFA Funded by Large Conservative Trusts, Public Filings Show*, HARV. CRIMSON (Oct. 28, 2022), https://www.thecrimson.com/article/2022/10/28/donors-sffa-conservative-trusts [https://perma.cc/8PMZ-5FJB] (discussing several conservative trusts supporting both lawsuits).

65. Brief for Petitioner at 17, 38, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (May 2, 2022) [hereinafter Brief of Petitioner].

A. *Harvard College*

In its case against Harvard, SFFA claimed that the university's admissions program violated Title VI and the Court's strict scrutiny framework by: 1) considering race as more than a plus factor; 2) racial balancing student groups; 3) failing to use race only to fill the last few places in the incoming class; and 4) failing to adequately consider race-neutral alternatives.[66] In addition, SFFA alleged Harvard intentionally discriminated against Asian American students vis-à-vis white students in admissions.[67]

In 2015, a group of multiracial prospective and current students attending Harvard attempted to intervene as defendants in the lawsuit to help make critical arguments from a student perspective.[68] While the district court denied intervention,[69] the court did grant the students enhanced amici participation, which ultimately permitted them to submit declarations, substantive briefs, present witnesses and submit evidence at trial, and participate in oral argument, among other activities.[70]

The district court granted Harvard's pretrial motion for judgment on the pleadings and dismissed SFFA's claim seeking to overturn the consideration of race in admissions, citing Supreme Court

---

66. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 183 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *and cert. granted*, 142 S. Ct. 895 (2022).

67. *Id.* at 132; *see also id.* at 190 n.56 (describing intentional discrimination claim as a preference of white students over Asian American students, which was not part of Harvard's race-conscious program).

68. *Id.* at 132. The students were initially represented by the Lawyers' Committee for Civil Rights Under Law, Lawyers for Civil Rights, and Arnold & Porter and were later joined by other students represented by the Asian Americans Advancing Justice.

69. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 308 F.R.D. 39, 51–52 (D. Mass. June 15, 2015), *aff'd*, 807 F.3d 472 (1st Cir. 2015).

70. *See id.* at 52. The court also later permitted eight student amici to testify. *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 132. Four of the eight students were among the original group of proposed intervenors ("Harvard Student-Amici"). Amici Curiae Students Proposed Findings of Fact and Conclusions of Law at 1 & n. 1, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. Jan. 9, 2019). The other four students who testified were amici from Harvard student organizations and cultural houses who sought and obtained court permission to participate as amici and are represented by the NAACP-Legal Defense Fund. *Id.*

precedent.[71] In 2018, the district court held a three-week trial, receiving testimony from over two dozen witnesses, including eighteen current and former Harvard employees and four expert witnesses.[72]

On September 30, 2019, the court issued its findings of fact and conclusions of law, rejecting each remaining claim of SFFA.[73] The First Circuit affirmed on all counts.[74] The First Circuit found that Harvard's interest in diversity was definite and precise and matched its institutional goals, including "(1) training future leaders in public and private sectors . . . ; (2) equipping Harvard's graduates and Harvard itself to adapt to an increasingly pluralistic society; (3) better educating Harvard's students through diversity; and (4) producing new knowledge stemming from diverse outlooks."[75]

On the racial balancing claim, the court concluded that Harvard was not engaging in racial balancing and that the share of admitted Asian American, Hispanic, and African American students fluctuated in an amount even greater than the amount by which respective applicants fluctuated.[76] The court also determined that Harvard did not use race mechanically, did not consider race as more than a plus factor, and never treated race as a decisive factor for any applicant.[77] Indeed, such would be difficult to establish given the highly competitive admission process involving many highly qualified candidates.[78] Furthermore, the First Circuit noted how the record demonstrated that Harvard's consideration of race could also help Asian American students who discussed their racial identity in their narrative.[79]

The First Circuit also ruled that Harvard had considered in good faith race-neutral alternatives and found that none were workable.[80] The court noted how Harvard had engaged in some race-neutral strategies, including increasing outreach and financial aid to low-

---

71. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 14-cv-14176, 2017 WL 2407254, at *1 (D. Mass. June 2, 2017). The district court also dismissed the claim alleging that Harvard failed to use race only to fill the last few places in the incoming class, which was unsupported by precedent. *Id.*

72. *Id.*

73. *Id.* at 126.

74. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157, 204 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

75. *Id.* at 186.

76. *Id.* at 188.

77. *Id.* at 189–92.

78. *Id.* at 191.

79. *Id.*

80. *Id.* at 192–95.

income applicants, and that the race-neutral alternatives proposed by SFFA would likely lead to substantial decreases in racial diversity.[81]

Finally, the First Circuit closely examined the record related to SFFA's claim that Harvard intentionally discriminated against Asian American applicants.[82] The court held that there was no evidence of systemic reliance on racial stereotypes.[83] While the court observed that there were isolated incidents of admissions officers describing some Asian American students as "quiet" or "shy," it also noted how admissions officers used similar descriptors to describe students of all races, and there was no indication such descriptors were inaccurate or tied to race.[84] The court also affirmed the lower court's rejection of SFFA's statistical evidence, finding, in part, that its models failed to control for many non-quantifiable aspects of applicants' personal statements.[85] As an example, the court noted how student testimony demonstrated how applicants "write about how 'their racial identities have shaped their pre-college experiences' and admissions officers might read these essays as evidence of an applicant's 'abilit[y] to

81. *Id.* at 193–94.

82. *Id.* at 195–196. On this claim, SFFA alleged that Harvard treated Asian American applicants in a discriminatory manner, including preferring white students over Asian American applicants. *Id.* at 195. But Harvard's race-conscious plan did not include white students as an underrepresented group. *See id.* at 165 (explaining that Harvard specifically recruits minority students, including African American, Hispanic, and Asian-American students). Hence, because the intentional discrimination claim was distinct from the other claims challenging Harvard's race-conscious plan, SFFA should have borne the burden of demonstrating intentional discrimination. *See, e.g.*, Brief for Students and Alumni of Harvard College as Amici Curiae in Support of Respondent at 25–26, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199 (U.S. Aug. 1, 2022) [hereinafter Harvard Students and Alumni Amicus] (stating that "[i]t was Petitioner's burden to prove . . . that Harvard intentionally discriminated against Asian-American applicants" (citation omitted)). However, the lower courts placed the burden on Harvard to *disprove* intentional discrimination. *Students for Fair Admissions*, 980 F.3d at 196. Even under that burden-shifting framework, both courts found Harvard did not intentionally discriminate against Asian American students. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 204 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *and cert. granted*, 142 S. Ct. 895 (2022); *Students for Fair Admissions, Inc.*, 980 F.3d at 196.

83. *Students for Fair Admissions*, 980 F.3d at 197.

84. *Id.*

85. *Id.* at 200.

overcome obstacles' and therefore infer their 'leadership ability or other personal strengths.'"[86]

Dissatisfied, SFFA next petitioned the Supreme Court for certiorari.[87] Over Harvard's opposition, the Supreme Court granted SFFA's petition at the same time that it granted SFFA's petition for certiorari in the UNC case.[88]

B. *University of North Carolina*

While the press has often conflated the facts and claims in SFFA's cases against Harvard and UNC,[89] its case against UNC differs in significant ways from the Harvard case. To begin, SFFA's associational member for which it claimed standing in its complaint was white, not Asian American.[90] SFFA also did not allege that UNC had intentionally discriminated against Asian American applicants, nor did it include a claim of racial balancing.[91] The only claims against UNC were: 1) the consideration of race in admissions is illegal; 2) the use of race was more than a plus factor; and 3) the failure to adequately consider race-neutral alternatives.[92]

As in Harvard, a multiracial group of current and prospective UNC students attempted to intervene but this time they were successful.[93]

---

86. *Id.* at 200–01 (alteration in original) (quoting *Students for Fair Admissions*, 397 F. Supp. 3d at 169–70 & n.48).

87. Petition for Writ of Certiorari at 2, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199 (U.S. Feb. 25, 2021).

88. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 142 S. Ct. 895, 895 (2022) (granting certiorari on January 24, 2022); Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896, 896 (2022) (same).

89. *See, e.g.*, Alia Wong, *Affirmative Action Critics Paint Asian Americans as the 'Model Minority.' Why That's False*, USA TODAY (Nov. 9, 2022, 8:47 AM), https://www.usatoday.com/story/news/education/2022/11/06/affirmative-action-case-harvard-admissions-asian-americans/10599572002 [https://perma.cc/H5WG-LF9X] (stating that both cases argue "race-conscious admissions penalize Asian American students").

90. Complaint at 8, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-954) [hereinafter UNC Complaint].

91. *See id.* at 56–63 (detailing the claims against UNC).

92. *Id.*

93. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 587 (M.D.N.C. 2021) (explaining that the Court granted the Student-Intervenors permissive intervention), *cert. granted*, 142 S. Ct. 896 (2022). The Student-Intervenors were represented at trial and on appeal by the Lawyers' Committee for Civil Rights Under Law, the North Carolina Justice Center, and Relman Dane & Colfax.

The district court granted them intervention as defendants, permitting them to present evidence and argument on two issues: "(1) the effect of UNC's existing, and SFFA's proposed, admissions processes on the critical mass of underrepresented students at the school; and (2) the history of segregation and discrimination at UNC and in North Carolina."[94]

As in Harvard, the district court in the UNC case dismissed the claim seeking to reverse the lawfulness of race-conscious admissions in a pretrial motion.[95] In November 2020, after denying cross motions for summary judgment, the court held an eight-day trial.[96]

At trial, SFFA only called three witnesses in its case in chief: a UNC administrator and two experts.[97] As in Harvard, SFFA called no students nor did Mr. Blum or any other member of SFFA testify.[98] In contrast, UNC called seven witnesses, including UNC administrators, three experts (one by submission of report), and several students and alumni by declaration.[99] Student-Intervenors called eight students and alumni to testify in-person, two experts by submission of reports, and several other students and alumni by declaration.[100]

On October 18, 2021, the federal district court issued its 155-page opinion rejecting each of SFFA's claims.[101] In a resounding opinion, the court held that "UNC has met its burden of demonstrating with clarity that its undergraduate admissions program withstands strict scrutiny and is therefore constitutionally permissible."[102] The court further found that UNC's pursuit of the educational benefits of diversity was based on a principled, well-reasoned explanation and that

---

Defendant-Intervenors' Brief at 25–26, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-954).

94. *Students for Fair Admissions*, 567 F. Supp. 3d at 587.

95. *Id.* at 588.

96. *Id.* As the court noted, the record was much larger as the parties agreed to reduce the number of trial days and streamline the presentation of evidence through the submission of expert briefs and other evidence. *Id.*

97. Transcript of Trial at 67–68, 141–42, 399, 410, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-954).

98. *See id.*

99. *See Students for Fair Admissions, Inc.*, 567 F. Supp. 3d at 604–05, 607 (discussing UNC's witnesses at trial).

100. *See, e.g.*, Transcript of Trial at 1254–372, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-954) (providing testimony of students and alumni as witnesses for the Student-Intervenors).

101. *Students for Fair Admissions*, 567 F. Supp. 3d at 666.

102. *Id.*

the benefits were sufficiently measurable.[103] Citing faculty, staff and student testimony, the court concluded that the benefits UNC seeks are being experienced. These benefits include: improving the capacity to work well with other students, breaking down stereotypes, creating common understanding, encouraging empathy, enriching the educational experience, and preparing future leaders for their careers.[104] In rejecting SFFA's claim that UNC considered race as more than a plus factor for admissions, the court noted UNC's holistic admissions process where race was only one of over forty factors considered flexibly across other diversity factors and only on an individual basis.[105] The court considered both statistical and non-statistical evidence but found no evidence that race was a predominant factor.[106] Instead, the court noted how SFFA's expert analysis suffered from methodological flaws, compounded by deficient data.[107] Putting aside those errors, the court found that SFFA's own data showed how students of all races at all academic performance levels were admitted and denied.[108] As the court noted, such evidence "strongly implies that a holistic admissions process is taking into account a number of factors in addition to [the academic performance criteria]."[109] Ultimately, the court determined that race may have played a role in a small but meaningful number of applicants' admissions, consistent with the holding in *Fisher II* that reflected favorably upon the reduced influence of race.[110]

The court also received evidence of how UNC's own sordid history of racial exclusion and segregation had manifested into present-day effects.[111] As detailed by Student-Intervenors' expert historian Dr. Cecelski, UNC has been a "strong and active promoter of [racial subjugation and] white supremacy . . . for most of its history."[112] From its founding in 1789 through much of the twentieth century, UNC

103. *Id.* at 589–92.
104. *Id.* at 592–93.
105. *Id.* at 601.
106. *See id.* at 605–34.
107. *E.g.*, *id.* at 623–25 (stating that Professor Arcidiacono computed some variables in ways that undermined his conclusions).
108. *Id.* at 619. In fact, African American students with the highest computed grade-point and standardized test averages (as calculated by SFFA) were rejected at twice the rate of white students in the same academic index. *Id.*
109. *Id.*
110. *Id.* at 634 (citing *Fisher II*, 136 S. Ct. 2198, 2212 (2015)).
111. *Id.* at 590.
112. *Id.* at 590 n.5.

excluded all people of color from its faculty and student body.[113] Even after a court order forced UNC to admit students of color in 1955, the university and the state continued to fight integration well into the 1980s.[114]

This history is not isolated from the present, further affecting UNC's ability to admit and enroll Black, Latinx, and Native American students.[115] Respondent-Students described how the numerous confederate relics[116] strewn across UNC's campus made students of color feel less "safe and supported by the university."[117] These effects compound UNC's problems in recruiting sufficient diversity and attaining the full benefits of a more racially diverse student body.[118]

The court also rejected SFFA's claim that UNC had failed to consider in good faith race-neutral alternatives, finding that "UNC has satisfied its burden of demonstrating that there is no non-racial approach that would promote such benefits about as well as its race-conscious approach at tolerable expense."[119] SFFA proffered several nonracial models, including percentage plans and socio-economic plans, but the court concluded that none would promote the interests of diversity about as well as its race-conscious process.[120] The court further found that UNC had implemented several race-neutral programs and services and considered, in good-faith, nonracial approaches for nearly two decades.[121]

SFFA appealed the decision to the Fourth Circuit.[122] But just after filing that appeal, SFFA filed in the Supreme Court its petition for certiorari before the Fourth Circuit could issue a judgment.[123] Both UNC and Respondent-Students vigorously opposed the extraordinary review, citing how there was no split among the circuits and no urgency

---

113. Joint Appendix at 1681, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. May 2, 2022) [hereinafter UNC Joint Appendix].

114. *Id.* at 1685–90.

115. *Students for Fair Admissions*, 567 F. Supp. 3d at 593.

116. UNC Joint Appendix, *supra* note 113, at 1683. As of January 2018, more than half a dozen buildings on campus bore the names of leaders of the Ku Klux Klan and white supremacy campaigns. *Id.*

117. *Id.* at 765.

118. *Students for Fair Admissions*, 567 F. Supp. 3d at 593–94.

119. *Id.* at 635.

120. *Id.* at 662–64.

121. *Id.* at 663–65.

122. Case Docket, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-2263 (4th Cir. Nov. 10, 2021).

123. UNC Petition for Certiorari, *supra* note 3.

requiring review as both cases had been in the courts for over seven years, among other reasons.[124] Nevertheless, as noted above, the Court granted certiorari in both the Harvard and UNC cases.[125] Oral argument followed on October 31, 2022, and a decision is expected in June 2023.[126]

While much attention has focused on the potentially inevitable end of affirmative action by the conservative-led Court,[127] many onlookers will be examining the underbelly of the ruling.[128] If the Court does strike down affirmative action in admissions altogether, is there a clear majority opinion? What is the basis for striking down affirmative action? At one end, the Court could hold, for example, that strict scrutiny is not satisfied because the educational benefits of diversity are too imprecise to objectively measure.[129] At the other end, the Court could strike down affirmative action on the basis that the Equal Protection Clause and Title VI are "colorblind," thus potentially prohibiting any consideration of race.[130] At oral arguments, the Court

---

124. *See, e.g.*, Brief in Opposition by University Respondents at 25–26, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Dec. 20, 2021) (stating that the Supreme Court rarely grants certiorari to review settled law); Brief in Opposition to Petitioner's Writ of Certiorari Before Judgment at 2, 14, 26, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Dec. 20, 2021).

125. *Supra* note 88.

126. *See* Lesley Salafia & Alexandra Quental, *Supreme Court Considers Race in Admissions: SFFA v Harvard UNC*, UNIV. CONN.: OFF. GEN. COUNS. (Oct. 24, 2022), https://generalcounsel.uconn.edu/2022/10/24/supreme-crt-considers-race-in-admissions-sffa-v-harvard-unc [https://perma.cc/W7QV-7SQ5].

127. *See, e.g.*, Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 852 (2022) (predicting the Supreme Court will strike down affirmative action with six votes).

128. *E.g.*, Natasha Varyani, *Students for Fair Admissions v. Harvard: Affirmative Action, Race-Based Policies, and Preference Falsification*, 65 BOS. BAR J. 15, 15–16 (2021) (noting that the "First Circuit's decision in the *Harvard* case . . . [was] unlikely to be the last word on the subject"). For the record, the authors believe that the constitution, precedent, and the strong factual basis in the lower court opinions all warrant affirmance of the lawfulness of Harvard and UNC's admissions programs.

129. *See* Salafia & Quental, *supra* note 126.

130. *See* Brief for Petitioner, *supra* note 65, at 51 ("As Justice Harlan recognized in *Plessy*, 'Our constitution is color-blind, and neither knows nor tolerates classes among citizens.' His dissent was ultimately vindicated in *Brown* . . . . Because *Brown* is right, *Grutter* is wrong." (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

did not seem to entertain the colorblind theory much,[131] nor has the argument garnered considerable media attention. Regardless, it is an argument clearly before the Court in the briefs of SFFA and its supporting amici.[132] Such a ruling may have seemed far-fetched in years past, but its potential implications beyond higher education admissions are most concerning to stakeholders across the spectrum in business, k-12 schools, state and local governments, and racial justice advocates.[133] In the next Part, we follow with a more thorough discussion of the potential implications and concerns raised by this extremist approach.

III. ARGUMENTS PRESENTED ON THE ORIGINAL PURPOSE OF THE FOURTEENTH AMENDMENT

When the Supreme Court affirmed the lawfulness of affirmative action in college admissions in its 2003 *Grutter* decision, the Court did not ground its decision in the original intent[134] of the Fourteenth

131. *See, e.g.,* Transcript of Oral Argument at 123, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199 (U.S. Oct. 31, 2022) (Index showing only one reference to "color-blind").

132. *See, e.g.*, *id.*; Amicus Brief of the American Center for Law and Justice and Devon Westhill in Support of Petitioner at 3, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. May 9, 2022) ("[W]hen [educational] institutions undertake to treat people differentially on the basis of racial labels, they run afoul of the norm of color-blindness embraced by the Equal Protection Clause of the Fourteenth Amendment and laws against race discrimination, such as Title VI of the Civil Rights Act of 1964."); Brief of *Amicus Curiae* Defense of Freedom Institute for Policy Studies in Support of Petitioner at 1, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. May 9, 2022) ("[Amicus] desires to see that students seeking admission . . . enjoy the timeless guarantee that '[o]ur constitution is color-blind.'" (quoting *Plessy*, 163 U.S. at 537 (Harlan, J., dissenting))).

133. *See* Jerome Karabel, *The Effects of Color-Blind Admissions: The Case of California and Implications for the Nation* 3 (UC Berkeley Inst. for the Stud. of Soc. Change, Working Paper No. 1, 1997), https://escholarship.org/uc/item/2cq5648v [https://perma.cc/ D8TQ-8E59] (concluding that colorblind policies are likely to lead to substantial resegregation of American higher education, and class-conscious policies are likely to prove insufficient to prevent resegregation of higher education).

134. "Originalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors." Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019). In contrast, "[l]iving constitutionalists contend that constitutional law can and should evolve in response to changing circumstances and values." *Id.* While

Amendment's Equal Protection Clause. Instead, the Court followed sixty years of precedent[135] and applied its strict scrutiny framework to the University of Michigan's admissions program. The Court ultimately concluded that the educational benefits of diversity are compelling and may be pursued so long as the means adopted are narrowly tailored to that interest.[136] In so holding, the Court noted how not every race-based classification is equally objectionable and how context matters when reviewing governmental action under the Equal Protection Clause.[137] The Court reasoned that applying strict scrutiny to all race-based classifications, however, would help ensure that any illegitimate uses of race would be "smoke[d] out."[138]

Nevertheless, SFFA argued to the Supreme Court that not only did affirmative action fail to satisfy the components of strict scrutiny, but also that the Equal Protection Clause forbids any consideration of race.[139] In asking the Court to overrule *Grutter v. Bollinger*, SFFA argued, in part, that *Grutter*'s holding "departs from the Constitution's original meaning."[140] In its opening merits brief, SFFA committed only one paragraph to its originalist argument, citing scant and disputed history of the Fourteenth Amendment, including a single statement in the congressional record that "free government demands the abolition of all distinctions found on color and race."[141] SFFA also invoked arguments presented in *Brown v. Board of Education*[142] to suggest the same.[143]

---

the authors certainly advocate for the latter approach as it is more reasonable in light of the passage of time and progress as a nation, they primarily address the former in the discussion below.

135. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978).

136. Grutter v. Bollinger, 539 U.S. 306, 326, 328, 333–34 (2003).

137. *Id.* at 326–27.

138. *Id.* at 326 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

139. *See* Brief for Petitioner, *supra* note 65, at 50–51.

140. *Id.* at 50.

141. *Id.* at 50–51 (quoting 2 CONG. REC. 4083 (1874)).

142. 347 U.S. 483 (1954).

143. Brief of Petitioner, *supra* note 65, at 1, 2, 51.

Harvard, UNC, and Respondent-Students,[144] as well as the United States and several amici,[145] hotly disputed SFFA's contention that Congress intended for the Equal Protection Clause to operate with racial blinders and forbid any consideration of race. "Black Codes" enacted across the South at the conclusion of the Civil War targeted formerly enslaved people "intended to 'confin[e] [Black people] to the bottom rung of the social ladder."[146] The respondents and amici argued that Congress intended to enact the Equal Protection Clause to address the Black Codes and to both end racial subjugation and ensure equality's promise would be realized for Black Americans.[147] The parties presented substantial and convincing historical accounts demonstrating an intent to prevent and stop racially discriminatory laws and to allow for race-conscious measures to ensure Black people and other marginalized people were not deprived of equal opportunities.[148] They further demonstrated how the extant

144. Brief for Respondent at 27–28, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199 (U.S July 25, 2022); Brief by University Respondents at 28–33, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. July 25, 2022); Brief for Respondent-Students at 19–24, 32–34, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. July 25, 2022).

145. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at 26–28, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Aug. 1, 2022) [hereinafter Brief of the United States] (expressing that limited consideration of race is consistent with prior Court precedents); Brief of Professors of History and Law as *Amici Curiae* in Support of Respondents at 29, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Aug. 1, 2022) [hereinafter History Professor Amicus] (discussing how the framers of the Fourteenth Amendment created the amendment to help Black persons, Chinese immigrants, and white Union sympathizers); Brief of Constitutional Accountability Center as *Amicus Curiae* in Support of Respondents at 5, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Aug. 1, 2022) (describing the Fourteenth Amendment as an "all-encompassing guarantee of equality under the law").

146. History Professor Amicus, *supra* note 145, at 4 (alteration in original) (quoting Daniel C. Thompson, *The Role of the Federal Courts in the Changing Status of Negroes Since World War II*, 30 J. NEGRO EDUC. 94, 95 (1961)).

147. *See, e.g.*, *id.* at 5 (citing Joseph H. Taylor, *The Fourteenth Amendment, the Negro, and the Spirit of the Times*, 45 J. NEGRO HIST. 1, 27 (1960)); Brief for Respondent-Students, *supra* note 144, at 19 (citing U.S. CONST. amend. XIV, § 1; Evan Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 4 (2021)).

148. *See, e.g.*, Brief for Respondent-Students, *supra* note 144, at 19–20 (citing Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71

congressional record on the Fourteenth Amendment rejected language that would have imposed a race-blind approach.[149]

The respondents and amici also presented to the Supreme Court a robust historical record showing congressional and state support of race-conscious programs.[150] For example, Congress passed legislation authorizing aid to Black Americans through the Freedmen's Bureau Act,[151] over the objection of opponents and vetoes by President Johnson suggesting that the Act violated the principal of equality.[152] The work of the Freedmen's Bureau included providing financial support for Berea College, a higher education institution in Kentucky that sought integration and explicitly enumerated race-conscious goals for Black and white student enrollment.[153]

The respondents and several amici also vigorously rebuked any connection between *Brown v. Board of Education* and the motives and goals of SFFA and its colorblind argument.[154] *Brown*, of course, never adopted a colorblind approach to the Fourteenth Amendment's Equal Protection Clause, despite similar arguments being raised in the briefs.[155] As Respondent-Students explained, the *Brown* Court struck down racial segregation in schools because it "systematically

---

VA. L. REV. 753, 754 (1985); CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)); *see also* Randy E. Barnett & Evan D. Bernick, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 330 (2021); History Professor Amicus, *supra* note 145, at 8.

149. *See, e.g.*, Brief for Respondent-Students, *supra* note 144, at 20 ("7 yeas, 38 nays in Senate vote defeating proposed language providing that 'no State . . . shall . . . recognize any distinction between citizens . . . on account of race or color or previous condition of slavery.'" (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866))).

150. *See, e.g.*, Brief for Respondent, *supra* note 144, at 23–24; Brief by University Respondents, *supra* at 144, at 28; History Professor Amicus, *supra* note 145, at 8.

151. 38 Stat. 507 (1865).

152. *See* Brief for Respondent, *supra* note 144, at 23.

153. Brief by University Respondents, *supra* note 144, at 32 (citing Paul Nelson, *Experiment in Interracial Education at Berea College, 1858–1908*, 59 J. NEGRO HIST. 13, 13 (1974); RICHARD SEARS, A UTOPIAN EXPERIMENT IN KENTUCKY: INTEGRATION AND SOCIAL EQUALITY AT BEREA, 1866–1904, at 44 (1996)).

154. *See* Brief for Respondent, *supra* note 144, at 3 ("The laws in *Plessy* and *Brown* . . . relegat[ed] [African Americans] to an inferior caste for no reason other than race. This Court has had no difficulty distinguishing those laws from a university admissions program . . . ."); Brief by University Respondents, *supra* note 144, at 21 ("*Brown* held that the arbitrary *separation* of students based on race violates equal protection. Institutions like UNC that seek to bring students of diverse backgrounds *together* are the rightful heirs to *Brown*'s legacy.").

155. *See* Brief for Petitioner, *supra* note 65, at 51.

subordinated Black children based on their race. . . . But it also recognizes how ignoring intangible factors—such as negating students' ability to dialogue across differences—causes learning to suffer and undercuts the Equal Protection Clause's guarantees."[156] The holdings of *Brown* and *Grutter*, they argued, demonstrated how race-conscious plans—similar to Harvard's and UNC's—advance *Brown*'s promise of equal opportunities by seeking to achieve racial diversity that ensures a functional democracy through integration and meaningful cross-racial dialogue.[157]

SFFA did not seriously dispute these contentions. As the United States asserted in its brief, "Petitioner makes no serious attempt . . . to ground its position in the Fourteenth Amendment's 'original meaning.'"[158] In fact, SFFA's lone reference to the framers' intent noted above[159] came from Senator Jacob Howard on another issue *after* the congressional hearings on the Fourteenth Amendment; he did not even hold office at the time of those hearings.[160]

Nevertheless, SFFA held steadfast to its positions at oral argument. It asserted that the Court should not only strike down affirmative action as violating the Court's longstanding strict scrutiny framework, but that the framework itself should be abandoned as the Equal Protection Clause and Title VI demand a colorblind approach and outright prohibit any consideration of race in admissions.[161] As discussed further below, SFFA's extremist approach threatens to not only end affirmative action but to throw out over 150 years of equal protection jurisprudence. Such a ruling would likely cast precedent into a dysfunctional, chaotic state, risking unreasonable, harmful practices that run afoul of constitutional guarantees.

IV. SFFA HAS ADVANCED AN EXTREMIST, COLORBLIND

156. Brief for Respondent-Students, *supra* note 144, at 22.
157. *Id.* at 23.
158. Brief of the United States, *supra* note 145, at 27.
159. *See supra* note 141 and accompanying text.
160. Brief of the United States, *supra* note 145, at 27.
161. *See, e.g.,* Supreme Court Oral Argument, *supra* note 12, at 4 ("Racial classifications are wrong. That principle was enshrined in our law at great cost following the Civil War.").

FRAMEWORK THAT TRIES TO REINFORCE TODAY'S RACIAL HIERARCHIES

The colorblind regime that Mr. Blum and his network of conservative allies are selectively[162] pushing would have drastic practical consequences for students, communities, schools, and critical sectors that are trying to take long overdue steps to broaden access and opportunity for historically marginalized groups.[163] While the media has often glossed over the extremist positions advanced by SFFA and its amici,[164] the legal pleadings and oral arguments in *UNC* and *Harvard* starkly depict the substantial threats posed by SFFA and its supporting amici.[165]

---

162. *See e.g.*, Brief for Petitioner, *supra* note 65, at 52. SFFA's position on colorblindness is not without contradiction as it has inconsistently articulated its approach on how far-reaching its demands for colorblindness would go. On one hand, SFFA seems to concede in its briefing that students sharing their racialized experiences in the application process is legally permissible. *See, e.g., id.* ("If a university wants to admit students with certain experiences (say, overcoming discrimination), then it can evaluate whether individual applicants have that experience. It cannot simply use 'race as a proxy' for their experiences or views." *Id.* (quoting Miller v. Johnson, 515 U.S. 900, 914 (1995)). Even in questioning from Chief Justice Roberts, counsel for SFFA conceded that African American applicants, for example, could highlight aspects of their racial experiences and that admissions officers could take that into account. Supreme Court Oral Argument, *supra* note 12, at 29–30. On the other hand, later in the argument, and as discussed further below, SFFA argued that admissions officers could not consider a Black applicant's narrative as a fifth-generation descendant of enslaved people in North Carolina and the first person in their family to attend UNC; but admissions officers could consider a white applicant's narrative discussing their pride in being a prospective fifth-generation UNC alumni. *Id.* at 64–67.

163. *See* Kelsey Butler & Patricia Hurtado, *Affirmative Action End Will Crush the Diversity Talent Pipeline*, BLOOMBERG L. (Oct. 30, 2022, 7:00 PM), https://news.bloomberglaw.com/us-law-week/affirmative-action-end-will-crush-the-diversity-talent-pipeline [https://perma.cc/D4A8-4KMQ].

164. *See, e.g.*, Robert Barnes, *How One Man Brought Affirmative Action to the Supreme Court. Again and Again.*, WASH. POST (Oct. 24, 2022, 2:00 PM), https://www.washingtonpost.com/politics/2022/10/24/edward-blum-supreme-court-harvard-unc [https://perma.cc/PA4Q-N4WH]. For example, the Washington Post article reflects common trends across the media: it spends very little time unpacking SFFA's legal arguments and desired remedy. *Id.* Instead, the bulk of the article provides an extended profile on Ed Blum that includes many sympathetic portrayals of Mr. Blum as spearheading "a different front in the nation's civil rights battle," having "an extraordinary track record" of bringing cases to the Supreme Court, and exhibiting a "soft-spoken and unfailingly polite demeanor." *Id.*

165. *See, e.g.*, Complaint at 119, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176) [hereinafter Harvard Complaint] (asking the court to hold that any use of race or

To begin, one of the remedies that SFFA has proposed in the pending affirmative action cases urges the courts to not only prohibit "any use of race or ethnicity in the educational setting," but also to ban admissions officers from being "aware of or learn[ing] the race or ethnicity of any applicant."[166] Taken to its extremist end point, such relief could substantially censor and disadvantage students whose lives have been impacted, in part, by their racial identity and experiences.[167] Attempts to purge all "awareness" of race could jeopardize applicants' ability to submit essays and recommendations discussing how race or ethnicity has impacted their lives; list awards and activities indicating their race or ethnicity; or write about their immigrant stories or countries of origin.[168] In effect, it could perversely penalize applicants who wish to reference their race to fully express their prior experiences, talents, and potential contributions in college and post-graduation, with particularized harms for Black students and other students of color who disproportionately face racial barriers[169] and frequently view their race or ethnicity as central to their identities and experiences.[170]

SFFA's Supreme Court briefs further reveal the far-reaching implications of their colorblind framework. In its reply brief, SFFA

---

ethnicity in the educational setting constitutes a violation of the Fourteenth Amendment); Reply Brief for Petitioner at 14–17, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Aug. 24, 2022) (implying that DEI practices beyond admissions raise constitutional concerns, including courses that discuss "antiracism" and employers' efforts to diversify their staff, among other activities).

166. *See* Harvard Complaint, *supra* note 165, at 119; UNC Complaint, *supra* note 900, at 64; Amended Complaint at 49, Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin, No. 1:20-cv-763, 2021 WL 3145667 (W.D. Tex. Nov. 16, 2020) [hereinafter Texas Complaint]; Complaint at 38, Students for Fair Admissions, Inc. v. Yale Univ., No. 3:21-cv-00241 (D. Conn. Feb. 25, 2021) [hereinafter Yale Complaint].

167. *Infra* notes 238, 244.

168. *See* Trial Findings of Fact and Conclusions of Law at 57–58, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-954); Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 194–95 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *and cert. granted*, 142 S. Ct. 895 (2022); *see also infra* Part VI.

169. *See, e.g.*, *id.* at 57 (describing how many of North Carolina's Black and Hispanic students continue to lack equal access to college preparatory resources).

170. *See, e.g.*, Kiana Cox & Christine Tamir, *Race is Central to Identity for Black Americans and Affects How They Connect with Each Other*, PEW RSCH. CTR. (Apr. 14, 2022), https://www.pewresearch.org/race-ethnicity/2022/04/14/race-is-central-to-identity-for-black-americans-and-affects-how-they-connect-with-each-other [https://perma.cc/XK8V-WP8V] ("[S]ignificant majorities of Black Americans say being Black is extremely or very important to how they think about themselves.").

expounds upon what it views as the "significant negative consequences" that stem from *Grutter* and the longstanding precedent that permits modest race-conscious policies to promote diversity's benefits.[171] SFFA explicitly attacks the investments that colleges have recently made in "diversity, equity, and inclusion" (DEI) programs, baldly asserting such DEI programs "use race" and promote racial exclusion.[172] SFFA also demonizes university coursework that teaches concepts related to "antiracism," faulting the approach for suggesting remedying past discrimination requires some attention to race today.[173] SFFA crudely accuses both DEI and anti-racist teaching as openly "embrac[ing] . . . racial classifications,"[174] but provides no credible proof for the assertion.[175] Indeed, overwhelming evidence indicates the opposite. For example, UNC's Diversity and Inclusion program "aspires to have all community members feel respected, valued, and visible with the ability to thrive," and hosts various events on race-related topics that are open to students and researchers from all racial backgrounds.[176] Being "anti-racist" conveys "fighting against racism" through a "conscious decision to make frequent, consistent, equitable choices daily" that "require ongoing self-awareness and self-reflection as we move through life."[177] Neither approach involves racial classification or exclusion but they do entail an acknowledgment of existing racial disparities and a desire to ensure people of all racial backgrounds can enjoy equal opportunities.[178] SFFA's articulated culture war on DEI and anti-racist teaching exposes how its broader

171. Reply Brief for Petitioner, *supra* note 165, at 14–17.

172. *Id.* at 15–16.

173. *Id.* at 16.

174. *Id.*

175. *Id.* (claiming that "disturbing results" are caused by the teachings).

176. *Meet the Team*, UNIV. OF N.C.: OFF. OF THE PROVOST, https://diversity.unc.edu/about-us [https://perma.cc/PB4Q-GQKU]. For example, the Diversity and Inclusion program has hosted events focusing on discussing "Race, Racism & Racial Equity," and "developing the skills needed to facilitate difficult conversations in their communities," among other activities. *See Carolina Dialogue Across Difference Program (CDADP)*, UNIV. OF N.C.: OFF. OF THE PROVOST, https://diversity.unc.edu/events-programs/carolina-dialogue-across-difference-program-cdadp [https://perma.cc/VS7D-KZQ8]; *Race, Racism and Racial Equity (R3) Symposium*, UNIV. OF N.C.: OFF, OF THE PROVOST, https://diversity.unc.edu/race-racism-and-racial-equity-r3-symposium [https://perma.cc/4SB7-D3DR].

177. *Being Antiracist*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist [https://perma.cc/V6ZW-G9SG].

178. *See id.*

"colorblind" agenda aggressively takes aim at—and seeks to outlaw—efforts intended to dismantle racial inequities and discrimination, including those efforts that take nonracial steps to counteract such barriers.

SFFA's reply brief similarly shows how its colorblind assault extends beyond the university setting and seeks to eliminate efforts across the professional sector that promote diversity and recognize ongoing racial inequity.[179] SFFA disparages initiatives by corporations to diversify their ranks through "diversity fellowships," and criticizes policies enacted by medical professionals to holistically address the racially disparate outcomes of COVID-19.[180] Through such denunciations, SFFA lays the foundation for its "colorblind" legal framework to reach into all sectors and prohibit racially equitable practices not just in education but in employment, healthcare, and other vital industries.[181] Curiously, SFFA's averments are without any citations to the record in either case because they proffered no such testimony or evidence at trial.[182] Instead, they refer to self-serving reports and other questionable secondary sources in support.[183]

---

179. *See* Reply Brief for Petitioner, *supra* note 165, at 16–17.

180. *Id.*

181. *See, e.g.*, Fidan Ana Kurtulus, *The Impact of Eliminating Affirmative Action on Minority and Female Employment: A Natural Experiment Approach Using State-Level Affirmative Action Laws and EEO-4 Data*, GENDER ACTION PORTAL (Oct. 2013), https://gap.hks.harvard.edu/impact-eliminating-affirmative-action-minority-and-female-employment-natural-experiment-approach [https://perma.cc/U74H-JFZK].

182. *See generally* Reply Brief for Petitioner, *supra* note 165.

183. *See generally id.* For example, SFFA asserts that universities' pursuit of racial diversity has become an "obsession" that stymies a "diversity of viewpoints." Brief for Petitioner, *supra* note 65, at 65. But SFFA's cited authorities include an online blog post and a "ranking report" by ideological think tanks, both of which fail to make any direct connection between viewpoint diversity on college campuses and *Grutter*'s holding on race-conscious admissions. *See id.* By contrast, ample research shows greater racial diversity increases the airing of different viewpoints and improved learning outcomes. *See* Brief of American Educational Research Association, et al. as *Amici Curiae* in Support of Respondents at 10–13, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. July 29, 2022) (summarizing and citing research). Similarly, the student and alumni witnesses in the Harvard and UNC trials also uniformly testified that greater racial diversity increased their exposure to diverse perspectives and enriched learning experiences. *See* Defendant-Intervenors' Proposed Findings of Fact & Conclusions of Law at 23–24, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-CV-954) [hereinafter UNC Defendant-Intervenors' Proposed Facts].

SFFA's amici are equally, if not more, explicit in asserting that a so-called colorblind constitution could prohibit nonracial efforts that merely acknowledge and address racial disparities perpetuated by the status quo and past disparate practices.[184] Indeed, SFFA's amici denounce DEI programs;[185] the formation of cultural associations and centers such as student affinity groups;[186] and even efforts to create an African American Studies major.[187] SFFA's amici decry these efforts on the grounds that they allegedly increase "racial separatism,"[188] stifle robust dialogue, and impede cross-racial interactions.[189] But SFFA and its amici fail to offer credible proof that any of the aforementioned efforts have such adverse effects.[190] To the contrary, research along

184. *See, e.g.*, Brief of Freedom X as *Amicus Curiae* in Support of Petitioner at 9–10, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. May 9, 2022) (arguing any program that pursues the forbidden goal of "address[ing] the consequences of a long history of prejudice and discriminatory treatment" must be deemed unconstitutional (citation omitted)).

185. *See, e.g.*, *id.* at 8 (arguing that DEI programs are counterproductive to the exchange of ideas); Brief of *Amicus Curiae* Legal Insurrection Foundation in Support of Petitioner at 21, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. May 9, 2022).

186. *See e.g.*, Brief *Amicus Curiae* of Gail Heriot and Peter N. Kirsanow, Members of the United States Commission on Civil Rights, in their Capacities as Private Citizens, in Support of Petitioner at 9, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. May 9, 2022) [hereinafter Heriot & Kirsanow Brief] (disparaging cultural centers, among other activities, as "racially segregated" programs); Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners at 6, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. May 9, 2022) (criticizing cultural houses on college campuses by alleging they wrongly promote "ethnic solidarity").

187. *See, e.g.*, Heriot & Kirsanow Brief, *supra* note 186, at 11.

188. *Id.* at 5, 11.

189. *Cf., e.g.*, UNC Joint Appendix, *supra* note 113, at 763 (Ms. Polanco explaining affinity spaces on campus provided underrepresented students of color with a sense of "community"—a place that "remind[s] [them] of home"—and enables students of color to "go back out into some of these other spaces where we sometimes feel – were made to feel foreign, made to feel other or like an outsider").

190. *See, e.g.*, Reply Brief for Petitioner, *supra* note 165, 16–17 (criticizing antiracist and DEI efforts by colleges and other sectors but citing to no social science reports or other published research showing such efforts harm the learning environment or other sectors). *Compare id., with* UNC Joint Appendix, *supra* note 113, at 1482 (Expert

with expert and student testimony submitted in the *UNC* and *Harvard's* case records indicate that DEI programs, affinity groups, and multicultural curricula foster cross-racial dialogue and the associated benefits for all students.[191] For example, affinity groups often host and sponsor cultural events that are open to the entire student body, thereby increasing opportunities for cross-racial engagement.[192] Research and student testimony also confirm that spaces with same-race peers, such as affinity groups, can serve an important function by increasing the confidence of students of color, which in turn causes students of color to participate more in predominantly white spaces and enhances cross-racial interactions.[193] For example, Ms. Hanna Watson, a Black UNC alumnus, shared that having spaces with more students of color "made [her] more confident as a person," and enabled her "to share what [she] thought was important to the course discussion regardless of who else was in the room."[194]

SFFA's amici also target race-neutral programs in K-12 schools that do not explicitly consider race but rather use nonracial means to expand access for talented students from underrepresented backgrounds who have been excluded as a result of existing disparate

---

Report of Mitchell J. Chang), *and* UNC Joint Appendix, *supra* note 113, at 1628–29, 1633–34, 1640 (Expert Report of Dr. Uma Jayakumar).

191. *See* UNC Joint Appendix, *supra* note 113, at 1482 (Expert Report of Mitchell J. Chang); *id.* at 1628–29, 1633–34, 1640 (Expert Report of Dr. Uma Jayakumar).

192. *See, e.g.*, Amici Curiae Harvard Student and Alumni Organizations' Proposed Findings of Fact and Conclusions of Law ¶ 33, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176); UNC Joint Appendix, *supra* note 113, at 1634 (Expert Report of Dr. Uma Jayakumar) ("Multicultural programming and well-facilitated intergroup dialogues are associated with higher retention rates and more positive racial experiences for both white students and students of color."); Declaration of Crystal King at 4, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-954) ("Through formal workshops, discussion series, and guest speakers, student organizations provide information and experiences to community members to which they might not have had access otherwise.").

193. UNC Joint Appendix, *supra* note 113, at 1628–29 (Expert Report of Dr. Uma Jayakumar).

194. UNC Joint Appendix, *supra* note 113, at 1010 (Direct Examination of Ms. Hannah Watson) 2022 WL 2962725; *see also* Vinay Harpalani, *"Safe Spaces" and the Educational Benefits of Diversity*, 13 DUKE J. CONST. L. & PUB. POL'Y 117, 154 (2017) (discussing how affinity spaces provide underrepresented minority students with "greater freedom to express themselves," and the ability to "raise specific issues and perspectives that would likely not arise in other spaces").

policies and practices.[195] Such students include students of color, but also low-income students, English learner students, and students with disabilities, among others.[196] For example, the Pacific Legal Foundation's ("PLF") amicus brief criticizes the revised admissions policies implemented by selective high schools in Virginia, Maryland, Connecticut, and New York.[197] PLF contends that such policies are unconstitutional simply because they may have been influenced "by an interest in increasing racial diversity at the schools."[198] The school boards at issue may have acknowledged, in part, that the prior policies disproportionately—and unnecessarily—excluded talented students from historically marginalized groups.[199] But their revised policies were "race-neutral:" they do not classify or exclude students based on race.[200] Thomas Jefferson High School's revised policy is illustrative: the school board overhauled the admissions policy by, among other changes, eliminating the application fee and removing the standardized testing

195. Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 12–13, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. May 9, 2022) [hereinafter PLF Amici].

196. *Cf.* Brief of Amici Curiae TJ Alumni for Racial Justice et al. at 5–6, Coal. for T.J. v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296, 2022 WL 579809 (E.D. Va. Feb. 25, 2022) [hereinafter TJ Alumni Amici] (citing Supreme Court precedent describing diversity as a compelling interest as not only including race "but other demographic factors, plus special talents and needs" (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783, 797–98 (2007) (Kennedy, J., concurring in part and concurring in judgment))).

197. PLF Amici, *supra* note 195, at 13.

198. *Id.*

199. *See* Opening Brief of Appellant at 1, Coal. for T.J. v. Fairfax Cnty. Sch. Bd., No. 22-1280 (4th Cir. May 6, 2022) [hereinafter T.J. Opening Brief of Appellant] (explaining the objective behind T.J.'s new admission policy); Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, No. 18-cv-11657, 2022 WL 4095906, at *1 (S.D.N.Y. Sept. 7, 2022); Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., 617 F. Supp. 3d 358, 360 (D. Md. 2022); *A Lawsuit in Hartford, Connecticut Seeks to Undermine the State's Landmark Desegregation Case*, HARV. C.R. & C.L. L. REV. (Oct. 24, 2018), https://harvardcrcl.org/a-lawsuit-in-hartford-connecticut-seeks-to-undermine-states-landmark-desegregation-case [https://perma.cc/3ZGN-ALW9] [hereinafter *A Lawsuit in Hartford*].

200. *See* T.J. Opening Brief of Appellant, *supra* note 199, at 1–2 (explaining that the new admissions policy "is race-neutral and race-blind," "sets no racial quotas, goals, or targets," "forb[ids] consideration of race . . . , and all applications are anonymized"); *De Blasio*, 2022 WL 4095906, at *2–3; *Montgomery Cnty. Bd. of Educ.*, 617 F. Supp. 3d at 361–62; *A Lawsuit in Hartford*, *supra* note 199.

requirement,[201] both of which were shown to systematically disadvantage equally talented low-income students and students of color who had fewer financial resources to pay the fee and for test preparation courses.[202] Simultaneously, the policy increased the required minimum GPA, the number of required advanced courses, and instituted a percentage plan that admitted the highest evaluated applicants from each middle school.[203] The new admissions process also increased the average GPA of admitted students, increased geographic diversity, and increased the share of various underrepresented groups, including low-income students, English Learner students, and Black and Latinx students.[204] Despite these benefits, PLF suggests that a colorblind constitution should invalidate Thomas Jefferson's policy because it was "undertaken against the backdrop of George Floyd's murder; a Virginia diversity, equity, and inclusion reporting requirement; and a low number of [B]lack students" obtaining admission.[205]

In essence, this stringent colorblind regime could radically prohibit educational institutions from merely recognizing racial inequities or disparities, irrespective of whether the solution adopted explicitly considers race. Such an interpretation would upend and undermine current equal protection law, which establishes that proving racial discrimination requires more than showing "intent as awareness of consequences."[206] In fact, citing Supreme Court precedent, SFFA contradicts itself in its opening brief, conceding that "[m]ere

---

201. T.J. Opening Brief of Appellant, *supra* note 199, at 8.

202. TJ Alumni Amici, *supra* note 196, at 5–6; Letter from Dale Rhines, Program Manager, Dep't of Educ., Off. for C.R., to Martina Hone, Founder & Bd. Chair, Coal. of The Silence & Charisse Espy Glassman, Educ. Chair, NAACP-Fairfax (Sept. 25, 2012), https://coalitionofthesilence.files.wordpress.com/2012/10/ cp-tj-notif-letter-pdf.pdf [https://perma.cc/GM49-UNNR] (providing OCR with jurisdiction over complainants' race-based allegations).

203. T.J. Opening Brief of Appellant, *supra* note 199, at 8–9.

204. *See TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM*, FAIRFAX CNTY. PUB. SCHS. (June 23, 2021), https://www.fcps.edu/news/tjhsst-offers-admission-550-students-broadens-access-students-who-have-aptitude-stem [https://perma.cc/KGN9-TGV8]; *Debunking the Lie*, TJ ALUMNI ACTION GRP., https://www.tjaag.org/debunking-the-lie [https://perma.cc/C4D6-M3S7]; VA DEP'T OF EDUC., 2019–20 FALL MEMBERSHIP REPORTS (2020), https://p1pe.doe.virginia.gov/buildatable/fallmembership (last visited May 4, 2023).

205. PLF Amici, *supra* note 195, at 14–15.

206. *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

awareness of racially disparate impacts is not evidence of racially discriminatory intent."[207]

Moreover, current precedent establishes that school district decision-makers may take race-neutral affirmative measures to equalize educational opportunities and foster diversity without triggering strict scrutiny.[208] SFFA and its amici's push for a stringent colorblind framework unabashedly tries to extinguish any permissible space for recognizing the racial inequalities that are inherent to the status quo. Such a prohibition could likely bar policymakers and administrators from taking a necessary first step to formulate solutions that help to level the playing field.

These colorblind arguments are part of a broader attack driven by a powerful infrastructure of far right-wing funders, think tanks, and lawyers to silence discussions of race and eliminate diversity programs.[209] Indeed, in the past five years, a slew of legal challenges and executive actions have sought to strike down policies and programs that address racial inequities on the premise that federal and state anti-discrimination laws require colorblindness.[210] To name just a

---

207. Brief for Petitioner, *supra* note 65, at 57 (citing *Feeney*, 442 U.S. at 279). SFFA further acknowledges that racially motivated policies are constitutional if they would have been passed regardless for nonracial reasons. *Id.* (citing Hunter v. Underwood, 471 U.S. 222, 228 (1985)).

208. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring in part and concurring in judgment) (describing race-neutral measures schools can implement to further diversity initiatives); *see also* Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998) ("[P]laintiffs are mistaken in treating 'racial motive' as a synonym for a constitutional violation. Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause."); Spurlock v. Fox, 716 F.3d 383, 394 (6th Cir. 2013) ("If consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required to blind themselves to the demographic realities of their jurisdictions and the potential demographic consequences of their decisions."); Lewis v. Ascension Par. Sch. Bd., 806 F.3d 344, 358 (5th Cir. 2015) ("[T]he district court's legal conclusion that the Board's consideration of demographic data . . . 'does not amount to [adopting] a rezoning plan that assigns students on the basis of race' conforms to Supreme Court case law." (second alteration in original) (citation omitted)).

209. *See, e.g.*, Jeannie Park & Kristin Penner, *The Absurd, Enduring Myth of the "One-Man" Campaign to Abolish Affirmative Action*, SLATE (Oct. 25, 2022, 2:48 PM), https://slate.com/news-and-politics/2022/10/supreme-court-edward-blum-unc-harvard-myth.html [https://perma.cc/G4CZ-TPTT].

210. *See infra* notes 211–213.

few examples: conservative groups have challenged Nasdaq's flexible policy that aims to increase racial diversity on corporate boards;[211] groups such as America Legal First, run by Trump's former advisor Stephen Miller, filed complaints against Starbucks' mentorship and coaching initiatives to increase "diverse representation in the leadership pipeline at Starbucks;"[212] and the Biden administration has fended off lawsuits trying to strike down their proposed debt relief plan under the Fourteenth Amendment because, while the plan provides relief to borrowers of all racial backgrounds, the plaintiffs in those cases complain that the plan disproportionately relieves Black students' debt due to inequities in wealth and debt loads.[213]

Thus, the far-reaching colorblind constitutional arguments advanced by SFFA and its amici—unsubstantiated by legal precedent—are not isolated but appear to be part of a broader, long-term strategy to roll back hard-won civil rights gains that secure greater equality for Black people and other people of color; and simultaneously, preserve power and privilege for white male Americans. They deserve serious attention; not for their merits but for their enticing threat for judicial activists, and they must be vigorously contested to prevent the erosion of civil rights law and to ward off the practical harms resulting from a colorblind interpretation.

V. SFFA'S EXTREMIST COLORBLIND FRAMEWORK COULD GIVE RISE TO EQUAL PROTECTION VIOLATIONS BY ATTRIBUTING LESSER VALUE TO THE EXPERIENCES OF HISTORICALLY MARGINALIZED STUDENTS OF

---

211. Jonathan D. Uslaner & Thomas Sperber, *Nasdaq's Board Diversity Rules: Inclusivity is Good Business*, REUTERS (Feb. 15, 2022, 10:58 AM), https://www.reuters.com/legal/legalindustry/nasdaqs-board-diversity-rules-inclusivity-is-good-business-2022-02-15 [https://perma.cc/4KHE-P3YT]; *see also* Darren Rosenblum, John Livingstone, Anat Alon-Beck & Michal Agmon-Gonnen, *The Attack on Nasdaq's Board Diversity Rule*, COLUM. L. SCH.: BLUE SKY BLOG (Sept. 13, 2022), https://clsbluesky.law.columbia.edu/2022/09/13/the-attack-on-nasdaqs-board-diversity-rule [https://perma.cc/S6FC-62U9].

212. *AFL Files Federal Civil Rights Complaint Against Starbucks for Illegal, Destructive, Racially Discriminatory Hiring Practices*, AM. FIRST LEGAL (Oct. 18, 2022), https://aflegal.org/afl-files-federal-civil-rights-complaint-against-starbucks-for-illegal-destructive-racially-discriminatory-hiring-practices [https://perma.cc/PE62-LK6P].

213. Danielle Douglas-Gabriel, *Wisconsin Group Says Biden's Student Debt Plan Has "Improper Racial Motive"*, WASH. POST (Oct. 4, 2022, 5:58 PM), https://www.washingtonpost.com/education/2022/10/04/student-loan-forgiveness-black-borrowers [https://perma.cc/5GF8-VXF3].

COLOR

In addition to undermining the original meaning and purpose of the Equal Protection Clause, there is also a strong argument that the colorblind framework that SFFA advances would violate the equal protection rights of many students of color.[214] The oral arguments in the UNC and Harvard case exposed how SFFA's endorsed, most extreme colorblind admissions system could systemically disadvantage Black people and other people of color by undervaluing their experiences and potential contributions because of their race.[215]

Justice Jackson captured these constitutional concerns when she observed how SFFA's proposed admissions system seems "to have the potential of causing more of an equal protection problem than it's actually solving."[216] To illustrate this point, she proceeded to provide an example of two applicants.

The first applicant is a white student from North Carolina who shares that he is interested in attending UNC because he will be the "fifth generation to graduate" from the state flagship.[217] This family history strengthens the applicant's strong interest in UNC and motivates him to "honor my family's legacy" by going to the venerable institution.[218]

The second applicant is an African American student from North Carolina. This applicant shares he is interested in attending UNC because his family has lived in North Carolina for generations, since before the Civil War, but his ancestors were enslaved and did not have the opportunity to attend the school.[219] This family history strengthens the applicant's strong interest in UNC and motivates him to "honor my family legacy" by going to the venerable institution. [220]

---

214. For further discussion on how colorblind regimes raise equal protection concerns, see Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1161–62 (2008); Thomas P. Crocker, *Equal Dignity, Colorblindness, and the Future of Affirmative Action Beyond* Grutter v. Bollinger, 64 WM. & MARY L. REV. 1, 35–37 (2022) (arguing strict colorblindness would deny applicants the equal dignity guaranteed by due process and equal protection).

215. *See* Supreme Court Oral Argument, *supra* note 12, at 67–68 (providing an example of how legacy-based admissions programs advantage white applicants).

216. *Id.* at 64.

217. *Id.* at 65.

218. *Id.*

219. *Id.*

220. *Id.*

Justice Jackson points out that under SFFA's admissions regime, these two applicants would have "a dramatically different opportunity to tell their family stories and to have them count."[221] Namely, the first white applicant would be able to have their family background considered and valued, simply because the applicant never explicitly mentions race.[222] Yet, only white students could enjoy this privilege of fifth-generation legacy status: UNC was founded as an institution of higher learning for the slaveholding class, with a mission to "make young men into masters,"[223] and as noted earlier, UNC continued to fight integration well past *Brown v. Board of Education*.[224] By contrast, Justice Jackson noted how SFFA's endorsed constitutional framework would bar UNC from considering the family background of the Black applicant simply because "his story is in many ways bound up with his race and with the race of his ancestors."[225]

In response to Justice Jackson's questions, SFFA's counsel confirmed that—under their view of constitutional colorblindness—overcoming slavery cannot be a factor in admissions even though a white applicant's fifth-generation legacy status can be considered.[226] Stated differently, SFFA's proposed, extreme colorblind admissions process would have to ignore many experiences of many Black Americans but could reward experiences that were exclusive to white Americans.[227]

Justice Jackson's hypothetical vividly illustrates how SFFA's colorblind system would cause two otherwise similar applicants to receive different treatment because of their race, to the disadvantage of certain Black applicants and to the advantage of certain white applicants, raising serious equal protection and Title VI violations.[228]

The testimony and application files that the UNC Student-Intervenors and the Harvard Student-Amici admitted into the trial record further illustrate the unequal treatment that could arise from a colorblind admissions system as proffered by SFFA and several of its

---

221. *Id.* at 66.
222. *Id.*
223. *See generally* Expert Report of Dr. David Cecelski at 8–19, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-954).
224. *Id.* at 13; *supra* note 114 and accompanying text.
225. Supreme Court Oral Argument, *supra* note 12, at 66.
226. *Id.* at 68–69.
227. *Infra* notes 231–246 and accompanying text.
228. *Infra* notes 231–246 and accompanying text.

amici.[229] Specifically, the student and alumni testimony and files confirm that many applicants of color felt that they must express their racialized experiences to convey the full breadth of their achievements, their contributions to the college community, and their future potential as leaders.[230] As the district court in the Harvard case observed: "race can profoundly influence applicants' sense of self and outward perspective" and, consequently, "[r]emoving considerations of race and ethnicity . . . would deprive applicants . . . of their right to advocate the value of their unique background, heritage, and perspective."[231] In effect, barring admissions officers from being aware of such experiences would systemically undervalue the strengths of countless students of color like the UNC Student-Intervenors and Harvard Student-Amici—including Asian American applicants—and disadvantage such students in the admissions process.[232]

For example, Ms. Cecilia Polanco wrote her personal essay to UNC about being a "first-generation Salvadorean American" who faced prejudice from an early age as educators routinely stereotyped her as lacking English proficiency.[233] Ms. Polanco shared with UNC that she "excelled [in advanced placement courses] despite being the only Latina in a predominantly white environment."[234] "Ultimately, these encounters with prejudice gave her a 'tough skin' that made her 'strong[er] and prepared for life after high school.'"[235] Ms. Polanco expressed that "it was important to share her Salvadoran heritage with UNC because it was 'formative' to her perspective, values, and 'how

229. *Infra* notes 231–246 and accompanying text.

230. *Infra* notes 231–246 and accompanying text.

231. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 194–95 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *and cert. granted*, 142 S. Ct. 895 (2022); *see also* Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 651 (M.D.N.C. 2021) (agreeing with *Grutter*'s observation that it is an "impossible task" to "attempt[] to separate the race of an applicant from the effect that race has had on his or her life experience"), *cert. granted*, 142 S. Ct. 896 (2022).

232. *See supra* note 231.

233. For a description of Ms. Polanco's testimony and application file with cites to the trial transcript and sealed testimony, see UNC Defendant-Intervenors' Proposed Facts, *supra* note 235, at 13–14.

234. *Id.*

235. *Id.* at 14 (alteration in original) (citation omitted).

[she] walk[s] through the world.'"[236] Altogether, "[i]t allowed UNC to 'hear [her] voice' and 'see [her] and get to know [her] a bit better.'"[237]

Mr. Andrew Brennen similarly needed to reference his race to authentically portray himself in UNC's application process and "fully capture" his perspective.[238] Mr. Brennen responded to UNC's essay prompt about personal motivation by describing the stereotypes that he often faced as a Black man.[239] He recounted how "classmates questioned his Blackness because of his academic ambition and wide-ranging interests beyond 'rap music' and 'the hood.'"[240] He shared how he was committed to combatting these types of racial stereotypes by succinctly stating: "I do what I do because people do not expect it from me, [and] because others who look like me are not able to do it . . . I am Black and I am proud."[241] At trial, Mr. Brennen testified that discussing his racialized experiences in his essay was "the only option" because "every experience that I had prior to college was informed by the color of my skin, and so my perspective going into college was similarly so."[242]

Many Asian American applicants would also be disadvantaged by an application process that censored experiences tied to race and ethnicity. For Mr. Thang Diep, ethnic identity was central to his personal essay to Harvard.[243] Mr. Diep's essay "explained that his name and accent caused him to be bullied as a child, but also motivated him to succeed."[244] Mr. Diep "recalled perfecting his pronunciation by reading with 'pencil[s] between [his] teeth,' pursuing a rigorous linguistics curriculum, and learning to embrace his ethnic identity."[245]

---

236. *Id.*

237. *Id.* (alteration in original).

238. *Id.* For a description of Mr. Brennen's testimony and application file with cites to the trial transcript and sealed testimony, see *id.*

239. *Id.*

240. *Id.*

241. *Id.* (alteration in original).

242. *Id.*

243. *See* Amici Curiae Students Proposed Findings of Fact & Conclusions of Law at 7–8, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176) [hereinafter District Court Harvard Brief of Amici Curiae Students] (summarizing Thang Diep's personal essay).

244. *Id.* at 7; Harvard Students and Alumni Amicus, *supra* note 82, at 7.

245. Brief of Amici Curiae Students, Alumni, and Prospective Students of Harvard College Supporting Defendant-Appellee and Supporting Affirmance at 7, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) (alteration in original); *see also* District Court Harvard Brief of Amici Curiae Students, *supra* note 243, at 34.

Likewise, Sally Chen testified that she "wrote very directly about how being the daughter of Chinese immigrants and being a kind of translator and advocate for them across barriers of cultural and linguistic difference . . . shaped [her] views on social responsibility."[246]

Ms. Polanco, Mr. Brennen, Mr. Diep, and Ms. Chen are illustrative examples of the lived experience of many students: all UNC Student-Intervenors and Harvard Student-Amici witnesses confirmed at trial that their racial identities were integral to forming their perspectives and ability to contribute to a college learning environment.[247] Unsurprisingly, references to their race and ethnicity arose throughout their application files and helped to convey the full breadth of their viewpoints, interests, and future ambitions.[248]

The experiences of the UNC Student-Intervenors and Harvard Student-Amici demonstrate that SFFA's proposed "colorblind" admissions policy, which could go as far as forbidding admissions officers from "be[ing] aware of or learn[ing] the race or ethnicity of any applicant for admission,"[249] is unnecessary, unworkable, and deeply misguided. Had the UNC Student-Intervenors and Harvard Student-Amici been forced to remove race entirely from their applications, their applications would have been conspicuously incomplete.[250] Taking SFFA's colorblind interpretation to its most extreme, the students may have needed to excise references to important extracurricular activities (e.g., Latino Club), academic distinctions (e.g., National Hispanic Scholar), and potentially even

246. Transcript of Bench Trial at 195, 200, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176); *see also* Valerie Strauss, *Of Course Race Should Matter in College Admissions—as Explained by Students of Color at Harvard Trial*, WASH. POST (Oct. 30, 2018, 1:21 PM), https://www.washingtonpost.com/education/2018/10/30/course-race-should-matter-college-admissions-explained-by-students-color-harvard-trial [https://perma.cc/3SB8-29G3] (discussing the Harvard students' testimonies).

247. UNC Defendant-Intervenors' Proposed Facts, *supra* note 235, at 15; *see also* District Court Harvard Brief of Amici Curiae Students, *supra* note 243, at 6 (citing testimony showing all students and alumni at trial shared their "ethno-racial identities are inextricably tied to their experiences, viewpoints, interests, and ambitions for the future").

248. *See supra* notes 233–243 and accompanying text.

249. *See* Harvard Complaint, *supra* 165, at 119; UNC Complaint, *supra* note 166, at 64; *see also* Texas Complaint, *supra* note 166, at 49; Yale Complaint, *supra* note 166, at 38.

250. *See supra* notes 233–243 and accompanying text.

surnames. As the Native American Alumni at Harvard University explained, "[i]f students cannot even discuss their home reservation (since that would likely identify their race), how can they possibly expect to give the Harvard Admissions Office a reasonably full picture of who they are in their admissions essays?"[251] Precluding applicants from mentioning such activities, or from discussing their race or heritage in their essays and interviews in any way, would make it difficult, if not impossible, for universities such as UNC and Harvard to accurately evaluate applicants' present and future potential in line with these universities' missions.

In doing so, SFFA's proposed colorblind admissions process would erect a two-tier system that poses serious equal protection concerns because it systematically undervalues and ignores the talents of applicants who wish to or feel the need to discuss their race (who are often Black or other students of color), while fully considering and valuing the information provided by applicants who do not need to reference their race (who are often white).[252] By contrast, an admissions process that permits colleges and universities to consider and value the breadth of information that an applicant voluntarily chooses to self-disclose, including the applicant's choice to reference (or not reference) what importance race holds in their life, better aligns with equal protection principles.[253]

VI. SFFA'S EXTREMIST COLORBLIND FRAMEWORK POSES SERIOUS FIRST AMENDMENT CONCERNS

Beyond equal protection concerns, SFFA's far-reaching colorblind framework raises potential First Amendment violations. The parties and their amici have generally focused on the interrelated First Amendment rights of universities supporting race-conscious

---

251. Declaration of Emily Van Dyke at 5, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176).

252. *See* Carbado & Harris, *supra* note 214, at 1161–62 (discussing difficulty for college applicants who racially identify to "come up with a meaningful account of [their] life without referencing race" and without "captur[ing] who [they] imagine[] [themselves] to be").

253. *See id.* at 1168, 1212–13 (analyzing how "colorblind," anti-affirmative initiatives often confer "a preference for applicants for whom race does not matter," while a "race aware" process prevents colleges from "imposing racialized burdens").

admissions.[254] Consistent with *Grutter*, both Harvard and UNC have emphasized that universities have long "occup[ied] a special niche in our constitutional tradition,"[255] imbued with a First Amendment freedom to make academic decisions and select student bodies that best realize their goals.[256]

But SFFA's most extreme proposed colorblind framework seeking to censor admissions officers from learning an applicant's race could very well implicate students' First Amendment rights. There are viable arguments that SFFA's colorblind regime would discriminate against students based on viewpoint in violation of the First Amendment. While current case law has not defined the exact contours of students' First Amendment rights in the context of college admissions, several seminal cases suggest that students retain some First Amendment protections when applying to public universities.[257]

To begin, it is axiomatic that "students do not 'shed their constitutional rights to freedom of speech or expression at the

254. *See e.g.*, Brief for Massachusetts Institute of Technology et al. as Amici Curiae in Support of Respondents at 23, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Aug. 1, 2022) (discussing the discretion institutions have when it comes to "academic decisionmaking" under the First Amendment, including the consideration of race); Brief of Georgetown University et al. as *Amici Curiae* in Support of Respondents at 29, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Aug. 1, 2022) ("The First Amendment freedom of speech protects the academic freedom of colleges and universities . . . to consider racial diversity in deciding who they shall admit to study.").

255. Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

256. *See* Brief in Opposition at 30, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199 (U.S. May 17, 2021) (analyzing past precedent related to universities' First Amendment freedoms to select student bodies that realize their goals including the benefits of student body diversity); Brief by University Respondents, *supra* note 144, at 39–40 (discussing precedent affording universities "deference" in pursuing their stated goal of diversity's benefits); Brief of *Amicus Curiae* the American Civil Liberties Union et al. in Support of Respondents at 7–8, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., No. 20-1199, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Aug. 1, 2022) ("A university's prerogative to determine 'who may be admitted to study' is one of the 'four essential freedoms of a university' . . . ." (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

257. *See* cases cited *infra* note 258 (discussing current case law).

schoolhouse gate,'" including in higher education.[258] However, courts have applied different standards to student speech depending on the surrounding context. For example, the Tenth Circuit has explained that "student speech that 'happens to occur on the school premises,' such as the black armbands worn by the students in *Tinker*," must be tolerated "unless it can reasonably [be] forecast that the expression will lead to 'substantial disruption of or material interference with school activities.'"[259] However, students' speech rights are generally more restricted when they occur in nonpublic forums, or contexts that "might reasonably [be] perceive[d] to bear the imprimatur of the school."[260] In such circumstances, "school[s] may exercise editorial control" but these restrictions must still be "reasonably related to legitimate pedagogical concerns."[261] Circuits such as the Eleventh Circuit have held that "viewpoint-based discrimination" is not a reasonable restriction even in nonpublic forums where schools retain some editorial authority.[262] Rather, "viewpoint-based discrimination . . . is prohibited by the First Amendment regardless of the type of forum."[263] Accordingly, once school authorities open discussion about particular subject matter, they "may not distinguish between particular speakers based on their view of the approved subject matter."[264]

During oral argument, Justice Coney Barrett expressed particular concern that viewpoint discrimination may ensue under SFFA's proposed admissions process.[265] She observed that if a university no longer explicitly considers an applicant's race but still seeks diversity, this "puts a lot of pressure on the essay writing and the holistic review process. You could have viewpoint discrimination issues . . . depending on how admissions officers treat essays."[266] Justice Coney Barrett raised a valid point, although she never articulated the most likely viewpoint

---

258. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *see also, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1284 (10th Cir. 2004) (applying *Tinker* to higher education context); Meriwether v. Hartop, 992 F.3d 492, 503 (6th Cir. 2021) (same).

259. *Axson-Flynn*, 356 F.3d at 1285.

260. *Id.* (citation omitted).

261. *Id.* (citation omitted); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 273 (1988).

262. Searcey v. Harris, 888 F.2d 1314, 1324 (11th Cir. 1989).

263. *Id.*

264. *See id.*

265. Supreme Court Oral Argument, *supra* note 12, at 60.

266. *Id.*

discrimination claim that would occur under SFFA's colorblind regime: universities would selectively censor valuable information offered by applicants who reference and express their racialized experiences, while considering the full experiences expressed by other applicants who do not mention race.[267]

The likelihood of such viewpoint discrimination stems from the fact that universities typically invite applicants to submit essays discussing their identities, experiences, and beliefs, and how those qualities might contribute to the college environment. For example, one of UNC's recent essay prompts included the question: "Describe an aspect of your identity and how this has shaped your life experiences or impacted your daily interactions with others?"[268] Another essay prompt from Harvard asked students to reflect on "distinctive aspects of your background, personal development or the intellectual interests you might bring to your Harvard classmates."[269]

As described above, many of the UNC Student-Intervenors and Harvard Student-Amici chose to respond to similar prompts by writing about experiences that were inextricably intertwined with their racial and ethnic identities.[270] They further testified that it would have been impossible to share their perspectives or aspirations without any reference to their race.[271] As Mr. Luis Acosta explained: "eliminating race and ethnicity from [his application] 'would have taken out a majority of what I would have talked about . . . it would have disrupted a lot.'"[272] Ms. Laura Ornelas similarly shared that if she could not have her ethnicity considered, she would not "have been able to portray a complete picture of the person I was and am to the admissions committee."[273]

---

267. See *id.* at 60–61 for Justice Coney Barrett's line of questioning.

268. Hayley Milliman, *3 Tips for Writing Stellar UNC Chapel Hill Supplement Essays*, PREPSCHOLAR (Sept. 18, 2022, 1:00 PM), https://blog.prepscholar.com/unc-chapel-hill-essays-prompt [https://perma.cc/J8VT-U2VP].

269. *Harvard University 2022–23 Application Essay Question Explanations*, COLL. ESSAY ADVISORS, https://www.collegeessayadvisors.com/supplemental-essay/harvard-university-2022-23-supplemental-essay-prompt-guide [https://perma.cc/7QM7-7NVS].

270. *See supra* notes 233–243 and accompanying text for a discussion of the importance race and ethnicity had in students' personal essays.

271. *See supra* notes 233–243 and accompanying text for student testimony regarding the importance of race in their personal essays.

272. UNC Defendant-Intervenors' Proposed Facts, *supra* note 235, at 16 (second alteration in original).

273. *Id.*

As such testimony illustrates, SFFA's extraordinary efforts to silence references to race in admissions would effectively cause universities to discriminate against applicants whose expressed viewpoints include a racial lens, while applicants without a racial lens would be able to fully express their views and have such views fully considered.[274] By treating speakers differently based solely on their perspective related to a solicited topic, SFFA's endorsed colorblind regime epitomizes the type of "'façade for viewpoint-based discrimination'" that very likely runs afoul of the First Amendment.[275] It also prevents colleges from assembling a class of students whose differing vantage points—including race—ensure that the Nation's future leaders are "trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[276] As classrooms remain "the nurseries of democracy,"[277] the rampant viewpoint discrimination invited by SFFA's colorblind regime not only threatens First Amendment rights, but also the health and future of our multi-racial democracy.

274. *See* Supreme Court Oral Argument, *supra* note 12, 65–66.

275. *See* Searcey v. Harris, 888 F.2d 1314, 1324 (11th Cir. 1989).

276. Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) (citation omitted).

277. *See* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2046 (2021).