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CRUCIAL CASE SUMMARY

TOPIC:

The *Students for Fair Admissions* Decision: The Gutting of *Grutter*

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INTRODUCTION:

On June 29, 2023, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (the “SFFA Decision”),^[2] the U.S. Supreme Court struck down the undergraduate admissions policies of Harvard College and the University of North Carolina.^[3] Although the Court purported to apply the standards set forth in *Grutter v. Bollinger*^[4] to reach its conclusion, it is difficult to see the decision as anything but a repudiation of those standards.^[5] This NACUANOTE summarizes the majority opinion, three concurrences, and two dissents. It then discusses the potential implications for higher education, not only in the context of admissions but also with respect to financial aid and outreach and recruitment programs.

DISCUSSION:

A. BACKGROUND

In November 2014, Students for Fair Admissions (“SFFA”) filed suit against Harvard College, the oldest private college in the United States, and the University of North Carolina, the nation’s oldest public university. SFFA alleged that the undergraduate admissions programs at each institution unlawfully discriminated on the basis of race, in violation of the Equal Protection

Clause (in the UNC case) and Title VI of the Civil Rights Act of 1964 (in both cases). In each case, the federal district court held bench trials and upheld the admissions programs at issue under the standards delineated in *Grutter*,^[6] in the Harvard case, the First Circuit affirmed that determination. SFFA sought review by the Supreme Court, which “granted certiorari in the Harvard case and certiorari before judgment in the UNC case.”^[7] The Court ruled – 6-3 in the UNC case and 6-2 in the Harvard case, with Justice Jackson recusing herself in the latter case due to her prior position on the Harvard Board of Overseers – that both admissions programs were unlawful.^[8]

B. MAJORITY OPINION

The Chief Justice, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, delivered the opinion of the Court.^[9] Central to the opinion is a historical analysis that concluded that the Fourteenth Amendment’s guarantee of equal protection “reflect[ed] the ‘core purpose’ of ‘do[ing] away with all governmentally imposed discrimination based on race.’”^[10] According to the Court, “[e]liminating racial discrimination means eliminating *all of it*.”^[11] Through that lens, the Court summarized its jurisprudence in the context of postsecondary admissions, from the *University of California v. Bakke*^[12] through *Grutter* and beyond.

According to the Court, *Grutter* established that “[u]niversity programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and – at some point – they must end. [Harvard and UNC’s] admissions systems – however well intentioned and implemented in good faith – fail[ed] each of these criteria” and “must therefore be invalidated.”^[13] In applying strict scrutiny to the admissions policies at issue, however, the Court heightened the standards beyond those enunciated in *Grutter*, as the next sections make clear.

1. Compelling Interests Must Be Capable of Meaningful Judicial Review

One key change from the Court’s analysis in *Grutter* related to the “compelling interest” prong of the strict scrutiny standard. Although the Court stopped short of declaring that the educational benefits of diversity did *not* constitute a compelling interest, it likewise did not affirm its prior holding to that effect, instead referring to “the interests [the universities] view as compelling.”^[14] The Court found those interests – which included training future leaders for “an increasingly pluralistic society,” “promoting the robust exchange of ideas,” “enhancing appreciation, respect, and empathy,” and developing “cross-racial understanding, and breaking down stereotypes”^[15] – to be incapable of “meaningful judicial review,” “not sufficiently coherent for purposes of strict scrutiny,” and of an “elusive nature.”^[16] According to the Court, “the question whether a particular mix of minority students produces “engaged and productive citizens,” sufficiently “enhance[s] appreciation, respect, and empathy,” or effectively “train[s] future leaders” is “stand-ardless” and “inescapably imponderable.”^[17]

Moreover, the Court concluded that the admissions programs at issue in any event “fail[ed] to articulate a meaningful connection between the means they employ and the goals they pursue.”^[18] In particular, the Court noted, the universities here used six racial categories – which the Court found to be “imprecise,” “overbroad,” and “underinclusive” – to measure the racial composition of their enrollments, but it was “far from evident . . . how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.”^[19] Although the Court did acknowledge that “[u]niversities may define their missions as they see fit,” it maintained that any deference to university decisions “must exist ‘within constitutionally prescribed limits.’”^[20]

2. The “Twin Commands” of the Equal Protection Clause

Whereas the strict scrutiny inquiry in *Grutter* permitted some discretion in narrowly tailored measures to achieve the educational benefits of diversity, the Court in the *SFFA* Decision posits “twin commands of the Equal Protection Clause that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”^[21] According to the Court, “[c]ollege admissions are zero-sum,” so a “benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”^[22] Moreover, the Court found – and contended that the institutions had admitted – that their admissions programs favored “race for race’s sake,” in contravention of the “entire point of the Equal Protection Clause,” which recognized that “treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.”^[23]

3. No Logical End Point

Finally, “[i]f all this were not enough,” the Court expressed concern that the admissions programs at issue “lack[ed] a ‘logical end point.’”^[24] Although both *Grutter* and *Bakke* had acknowledged that “[s]ome attention to numbers” did not transform an individualized, holistic process into a “quota” or “racial balancing,”^[25] the Court here found that, “[b]y promising to terminate their use of race only when some rough percentage of various racial groups is admitted, [the universities] turn[ed] that principle on its head.”^[26] The Court also rejected the notion – previously articulated in *Grutter*– that periodic review could satisfy the narrow tailoring requirement that institutions use race only for as long as necessary,^[27] instead asserting that “*Grutter* never suggested that periodic review could make unconstitutional conduct constitutional.”^[28]

The Court concluded that it had “never permitted admission programs to work in [the] way” that the two programs at issue did and would “not do so today.”^[29]

4. The View Forward

The Court did, however, leave some potential avenues open to institutions.

First, the Court specifically noted that its opinion did “not address the issue [of the permissibility of race-conscious admissions policies at the Nation’s military academies] in light of the potentially distinct interests that military academies may present.”^[30] And with respect to universities more generally, the Court acknowledged that “nothing in [its] opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise,” provided that any such consideration be tied to that specific applicant alone: “In other words, the student must be treated based on his or her experiences as an individual – not on the basis of race.”^[31] The Court cautioned that “universities may not simply establish through application essays or other means the regime we hold unlawful today” and admonished that a “dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.”^[32]

C. CONCURRING OPINIONS

Three Justices wrote concurring opinions.

1. Justice Thomas's Concurrence

Justice Thomas, writing for himself,^[33] questioned “exactly how racial diversity yields *educational* benefits,”^[34] equating such benefits primarily with increased test scores and the like, and contending that “an interest in training students to ‘live together in a diverse society’ . . . is a *social* goal, not an educational one.”^[35] Justice Thomas further concluded that “[u]niversities’ self-proclaimed righteousness does not afford them license to discriminate on the basis of race,” and that, “[i]n fact, it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination.”^[36]

Justice Thomas acknowledged that “universities may offer admissions preferences to students from disadvantaged backgrounds, and . . . need not withhold those preferences from students who happen to be members of racial minorities,” but “may not . . . assume that all members of certain racial minorities are disadvantaged.”^[37] Citing the experiences of universities prohibited from engaging in racial discrimination by state law, Justice Thomas contended that “[r]ace-neutral policies may . . . achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.”^[38] Justice Thomas also referenced other forms of what the late Justice Scalia had termed “tribalism and racial segregation” on campuses, including “minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”^[39] In this way, although the cases before the Court related solely to university admissions, Justice Thomas raised the specter that this decision could have repercussions in those contexts as well.^[40]

2. Justice Gorsuch's Concurrence

Justice Gorsuch wrote a concurring opinion, in which Justice Thomas joined,^[41] to “emphasize that Title VI . . . does not” “tolerate [the universities’] practice” any more than the Equal Protection Clause did.^[42] Indeed, Justice Gorsuch’s concurrence stated unequivocally that “Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin,” and that it did “not matter if the recipient can point to ‘some other . . . factor’ that contributed to its decision to disfavor that individual.”^[43] This language, which Justice Gorsuch said comported with the Court’s interpretation of the “essentially identical terms” in Title VII “[j]ust next door,”^[44] could suggest that at least two Justices may believe that even facially “race-neutral” policies adopted in part to promote racial diversity might themselves be subject to, and might even fail under, such an analysis.^[45] According to Justice Gorsuch, “[u]nder Title VI, it is *always* unlawful to discriminate among persons *even in part* because of race, color, or national origin.”^[46]

3. Justice Kavanaugh's Concurrence

Justice Kavanaugh wrote a concurring opinion to emphasize his view that the Court in *Grutter* had “specifically indicated . . . that race-based affirmative action in higher education would *not* be constitutionally justified after another 25 years, at least absent something not ‘expect[ed].”^[47] According to Justice Kavanaugh, the *Grutter* Court had “ruled that race-based affirmative action in higher education could continue *only* for another generation.”^[48]

D. DISSENTING OPINIONS

Justice Sotomayor dissented, in an opinion that Justices Kagan and Jackson joined, and Justice Jackson likewise dissented, in an opinion that Justices Sotomayor and Kagan joined.^[49]

1. Justice Sotomayor's Dissent

In her dissent, Justice Sotomayor took issue with the Court's characterization of the purpose of the Equal Protection Clause, concluding instead that it "enshrines a guarantee of racial equality," not of colorblindness.^[50] According to Justice Sotomayor, the Court's decision in this case "cement[ed] a superficial rule of colorblindness . . . in an endemically segregated society where race has always mattered and continues to matter," thereby "subvert[ing] the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society."^[51] Justice Sotomayor explained that the "desegregation cases that followed *Brown* confirm[ed] that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness."^[52] Justice Sotomayor called the "Court's recharacterization of *Brown* . . . nothing but revisionist history and an affront to the legendary life of Justice Marshall."^[53] According to Justice Sotomayor, the Court's decision to invalidate the admissions policies at issue was "not only contrary to precedent and the entire teachings of our history," but "grounded in . . . illusion."^[54] Justice Sotomayor cataloged the ongoing effects of segregation in American society, as well as the "sordid legacies of racial exclusion" at both Harvard and UNC^[55] before concluding that the Court here "simply move[d] the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil."^[56] According to Justice Sotomayor, the admissions policies at issue were clearly lawful under Court precedent, and the Court's decision to the contrary was nothing but an overruling in "disguise."^[57] As Justice Sotomayor noted, "[l]ost arguments are not grounds to overrule a case," and yet "[e]very one of the arguments made by the majority can be found in the dissenting opinions filed in [the] cases' the majority now overrules."^[58]

Justice Sotomayor contended that the Court did "not dispute that some uses of race are constitutionally permissible," even in "some college admissions programs."^[59] Justice Sotomayor interpreted the Court as affirmatively "exempt[ing] military academies from its ruling," though she argued that any "national security interests" that might support such an exemption are also "implicated at civilian universities."^[60] She also questioned the Court's "seek[ing] cover behind a unique measurability requirement of its own creation," noting that no prior precedents require "that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling."^[61] According to Justice Sotomayor, "[b]y singling out race, the Court imposes a special burden on racial minorities for whom race is a crucial component of their identity."^[62] Moreover, the "single paragraph at the end of its lengthy opinion" that universities "can, in some situations, consider race in application essays, is nothing but an attempt to put lipstick on a pig," a "false promise to save face and appear attuned to reality."^[63] According to Justice Sotomayor, "[n]o one is fooled."^[64] Justice Sotomayor concluded that it "is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters."^[65] She contended that it is the absence of racial diversity – not a holistic, race-conscious admissions process – that "actually contributes to stereotyping."^[66] Justice Sotomayor encouraged universities to continue to use race-neutral "tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch," like socioeconomic status, first-generation to attend college, and proficiency in multiple languages.^[67] Although she argued

that the “devastating impact of this decision cannot be overstated,” Justice Sotomayor ended by noting that “[d]iversity is now a fundamental American value,” and that the “pursuit of racial diversity will go on,” as the Court’s “opinion today will serve only to highlight the Court’s own impotence in the face of an America whose cries for equality resound.”^[68]

2. Justice Jackson’s Dissent

Justice Jackson dissented “separately to expound upon the universal benefits of considering race” in the context of university admissions.^[69] Justice Jackson used the experiences of two hypothetical UNC applicants, John and James, both of whose families had roots in North Carolina dating back to UNC’s founding, but only one of whom – John, who is white – has had family members who have actually been able to attend UNC, while James – who is Black – would be the first in his family to do so.^[70] According to Justice Jackson, “[i]t is hardly John’s fault that he is the seventh generation to graduate from UNC,” and “UNC should permit him to honor that legacy,” but “[n]either . . . was it James’s (or his family’s) fault that he should be the first[, a]nd UNC ought to be able to consider why.”^[71] Justice Jackson noted that the Court’s decision misconstrues how the UNC admissions policy actually works, and “fail[s] to apprehend . . . that everyone, no matter their race, is eligible for a diversity-linked plus.”^[72] As she put it, “[u]nderstood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth plus all that has happened to them since.”^[73] In other words, this is not a case of “race *qua* race” but rather an example of the very type of individualized consideration that the Court recognizes as permissible in its closing paragraphs.

Justice Jackson noted the “[u]niversal benefits” that “ensue from holistic admissions programs that allow consideration of *all* factors material to merit (including race),” and questioned the majority’s “let-them-eat-cake obliviousness” in “pull[ing] the ripcord and announc[ing] ‘colorblindness for all’ by legal fiat.”^[74] As Justice Jackson argued, “deeming race irrelevant in law does not make it so in life,” and the Court’s decision would actually “forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.”^[75] Referring to the decision as “truly a tragedy for us all,” Justice Jackson lamented that the Court here “has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom.”^[76]

IMPLICATIONS AND NEXT STEPS:

Given the sea change in the strict scrutiny analysis reflected in the *SFFA* Decision, colleges and universities will need to carefully assess their policies and practices to determine whether they comport with the Court’s newly enunciated strict scrutiny standards. The next section of this NACUANOTE addresses potential implications of the *SFFA* Decision in various contexts, although the scope of the decision and its implications will certainly be tested and refined through further litigation, particularly with respect to the meaning of “race-neutrality.” Given that, institutions generally will be wise to be thoughtful about their internal and external messaging regarding their proposed and ultimate actions in response to the decision, and to be clear about how those actions link to the institution’s longstanding mission and commitments.

A. ADMISSIONS

After the *SFFA* Decision, it will be exceedingly difficult, if not impossible, for colleges and universities to establish the lawfulness of a race-*conscious* admissions policy under the standards newly enunciated by the Court, particularly given the Court's characterization of university admissions as inherently a "zero sum" game.^[77] Indeed, per Justice Sotomayor in dissent, the majority opinion was arguably "*designed* to render strict scrutiny 'fatal in fact.'"^[78]

At the same time, however, the Court did at least recognize that institutions of higher education can establish their own missions, and thus, it remains generally permissible for colleges and universities to seek – and to state that they seek – to pursue the educational benefits of diversity; it is only the *means* by which they may do so that has changed under the Court's ruling. That is, race-*neutral* efforts should still be permissible, provided they can be tied to the institution's stated mission.^[79]

The difficulty, however, will lie in discerning what is or is not race-neutral. For example, the Court acknowledged that institutions can consider how race may have affected an *individual* applicant's own experiences without running afoul of the Court's ruling – provided that they are able to thread the needle of not doing so in a way that could be seen as "establish[ing] through application essays or other means the regime [the Court] h[e]ld unlawful."^[80]

The Biden Administration seems to view such efforts as not just permissible, but strongly encouraged. A Dear Colleague Letter jointly issued by the U.S. Departments of Education and Justice urged institutions to "continue to pursue campuses that are racially diverse and that include students with a range of viewpoints, talents, backgrounds, and experiences" and indicated that the Departments "stand ready to support institutions that recognize that such diversity is core to their commitment to excellence, and that pursue lawful steps to promote diversity and full inclusion."^[81] Accordingly, the Dear Colleague Letter "encourage[s] colleges and universities to review their policies to ensure they identify and reward those attributes that they most value, such as hard work, achievement, intellectual curiosity, potential, and determination," and to "consider the ways that a student's background, including experiences linked to their race, have shaped their lives and the unique contributions they can make to campus" since "information about an individual student's perseverance, especially when faced with adversity or disadvantage, can be a powerful measure of that student's potential."^[82] The Q&A accompanying the Dear Colleague Letter^[83] gave examples of permissible considerations:

For example, a university could consider an applicant's explanation about what it means to him to be the first Black violinist in his city's youth orchestra or an applicant's account of overcoming prejudice when she transferred to a rural high school where she was the only student of South Asian descent. An institution could likewise consider a guidance counselor or other recommender's description of how an applicant conquered her feelings of isolation as a Latina student at an overwhelmingly white high school to join the debate team. Similarly, an institution could consider an applicant's discussion of how learning to cook traditional Hmong dishes from her grandmother sparked her passion for food and nurtured her sense of self by connecting her to past generations of her family.^[84]

Although the issue of what is or is not permissible for institutions to consider in their admissions policies is likely one that will be refined via further legal challenges, at the very least, the fact that the Court did not suggest that all references to race must be excised from an application

suggests that it is not *per se* unlawful for an institution to continue to include demographic questions on their application.^[85] Indeed, the Joint Guidance seems to encourage use of those data – not for admissions decisions, which it acknowledges would be unlawful – but as useful guides to assess and refine the institution’s efforts to promote diversity:

[A]n institution’s review of the demographic breakdown of student applicants can be used to help the institution develop, review, and refine outreach, recruitment, and pathway programs targeted to the institution’s needs. Likewise, reviewing demographic data related to student admissions outcomes can aid institutions in ensuring that their admissions practices do not discriminate based on any protected characteristics or create other artificial barriers to admission. Finally, an institution’s understanding of the demographic breakdown of the students who ultimately enroll and graduate (and those who do not) may provide useful context for its development, review, and assessment of student programming needs (whether academic, co-curricular, social, or financial).^[86]

It will behoove institutions, though, to be sure that their admissions staff are appropriately trained *not* to consider such demographic responses in assessing an applicant.

Similarly, the Court’s opinion does not provide clarity on (and indeed, may leave open the question of) the permissibility of adopting *facially* neutral policies that nevertheless may have (or that are expressly known/intended to have) correlations with race.^[87] Although SFFA counsel seemed to concede at oral argument the race-neutrality (and thus the permissibility) of various such efforts at least where they promote otherwise legitimate educational benefits,^[88] those concessions would not bind other litigants or the Court itself.^[89] For what it is worth, though, and at least with respect to the Biden Administration’s enforcement views under Title VI,^[90] the Joint Guidance characterizes as “race-neutral” and thus, permissible, admissions policies “that offer admission to students based on attendance at certain secondary or post-secondary institutions,” such as “community colleges and other institutions that are more likely to enroll students from economically or educationally disadvantaged backgrounds,” as well as policies that offer admission to “all students who graduate in the top portion of their high school class.”^[91]

Moreover, the use of facially neutral factors that could be perceived as *hindering* (as opposed to helping) institutions’ pursuit of racial diversity, or of preferencing white applicants over underrepresented minority applicants, might likewise be subject to challenge. Indeed, since the Court’s decision, Harvard itself has already been challenged by civil rights groups alleging that its “tip” for legacy applicants constitutes unlawful discrimination, since the record in the *SFFA* Decision established “that 70% of Harvard’s donor-related and legacy applicants are white, and being a legacy student makes an applicant roughly six times more likely to be admitted.”^[92] Although OCR has not yet issued a determination in that challenge, the Joint Guidance states that “nothing in the decision prevents an institution from determining whether preferences for legacy students or children of donors, for example, run counter to efforts to promote equal opportunities for all students in the context of college admissions.”^[93] Notably, the Joint Guidance referred to “admission preferences . . . based on legacy status or donor affiliation” as “unrelated to a prospective applicant’s individual merit or potential” and as “further benefit[ing] privileged students” and “reduc[ing] opportunities for others who have been foreclosed from such advantages.”^[94]

The ambiguity regarding what is or is not race-neutral may foretell an increase in scrutiny, and potentially litigation,^[95] as challengers – on *both* sides of the affirmative action debate –

contend that colleges and universities are doing “indirectly” what “cannot be done directly.”^[96] And this uncertainty, and the threat of litigation, may unfortunately serve to deter some institutions from pursuing their diversity objectives, particularly in states where such objectives are already under attack.^[97]

Still, the recent Joint Guidance may help institutions assess what will or will not satisfy Title VI, at least in the eyes of the Office for Civil Rights under this Administration. Additional guidance may potentially come from the Court as well, should it choose to take up the Thomas Jefferson High School admissions case.^[98]

B. FINANCIAL AID

Although the Court’s decision related only to admissions, it is likely that it will be applied in other university contexts as well. Indeed, *Grutter*, which, at least in principle, was not formally overruled, admonished that “context matters” when evaluating race-conscious approaches.^[99] If so, the *SFFA* Decision will be even more far-reaching in its effects, since many institutions do *not* consider race in admissions,^[100] but *do* have race-conscious programs in other contexts.^[101]

The most likely extension of the scope of the Court’s decision relates to financial aid,^[102] particularly with respect to race-conscious programs that could arguably be viewed, in the Court’s parlance, as “zero-sum” (in that one student is selected to receive the aid, while others by implication are not) or as “stereotyping” (in that the focus is on membership in broad racial categories, rather than on *individual experiences* that may (or may not) have been influenced by race). Institutions may therefore want to consider ways in which they might reframe their financial aid programs as race-neutral – for example, by considering factors such as demonstrated commitment to diversity, equity, and inclusion; prior attendance at demographically diverse high schools or undergraduate institutions; or socioeconomic factors^[103] – or as not being “zero-sum” at all. For the latter argument, an institution would need to demonstrate that their financial aid approach is best analyzed comprehensively, rather than on a program-by-program basis, particularly if they use a “pool and match” approach to distribute funds.^[104]

The Department of Education’s Office for Civil Rights had previously recognized distinctions between the financial aid and admissions contexts that would be helpful in challenging a characterization of financial aid as “zero sum,” albeit in guidance that is currently under review:

[I]n contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed. For example, a college’s receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid in a situation in which, absent the ability to impose such a limitation, the donor might not provide any aid at all.

Even in the case of a college’s own funds, a decision to bar the award of race-targeted financial aid will not necessarily translate into increased resources for students from non-targeted groups. Funds for financial aid restricted by race or national origin that are viewed as a recruitment device might be rechanneled into other methods of recruitment if restricted financial aid is barred. In other words, unlike admission to a class with a fixed number of places, the amount of financial aid may increase or decrease based on the functions it is perceived to promote.^[105]

This earlier guidance has not been reinstated, however, and the Joint Guidance did not address financial aid (much to the chagrin of many institutions), so this area remains murky.

C. OUTREACH, RECRUITMENT, AND SUPPORT

In the outreach and recruitment context, institutions are likely to have the most flexibility with respect to efforts to build a diverse applicant pool, particularly if such efforts are purely informational in nature. That is, if an institution is merely encouraging students to apply, or sharing generally available information about the undergraduate, graduate, and professional programs that the institution offers, it arguably should not matter whether the institution is particularly seeking out prospective underrepresented minority applicants, since all potential applicants are receiving the same information, and all applicants will ultimately be assessed using permissible criteria.^[106] According to the Joint Guidance:

The Court's decision in *SFFA* does not require institutions to ignore race when identifying prospective students for outreach and recruitment, provided that their outreach and recruitment programs do not provide targeted groups of prospective students preference in the admissions process, and provided that all students—whether part of a specifically targeted group or not—enjoy the same opportunity to apply and compete for admission. Such outreach and recruitment efforts can remove barriers and promote opportunity for all, and institutions remain able to permissibly consider students' race when engaged in those efforts.

An^[107] institution will likely have similar flexibility with respect to post-admission efforts to *yield* a diverse student body, again assuming that such efforts are purely informational in nature. For example, call-outs to specific admitted students to encourage them to accept their offers of admission would not advantage or disadvantage any individual, regardless whether they themselves received a call-out, as the institution would need to stand by its offers of admissions for all admitted students regardless. By contrast, tying specific benefits to such efforts – for example, waiving application fees for underrepresented minority applicants or offering additional funding or invitations to paid campus fly-out programs for underrepresented minority admits – could render even such efforts more likely to be challenged, particularly if institutions are providing such benefits *only* to members of particular racial or ethnic groups.

With respect to other outreach and pipeline programs, such as college preparatory programs or summer research opportunities, or post-enrollment support programs (such as mentoring programs, affinity housing, or the like) it is possible that race-consciousness could be subject to challenge, on the basis of the Court's determination that race cannot be used as a "negative" in the context of a "zero-sum" process. That is, if race is an eligibility factor for such programs, and space is limited, a challenger could argue that the program would fail under the heightened strict scrutiny standards elucidated by the Court in the *SFFA* Decision. The Joint Guidance supports the view that strict scrutiny would apply to such programs if race is a factor in selecting participants.^[108]

If, by contrast, a university used race-neutral eligibility criteria – for example, by making these programs and opportunities available to all students at demographically diverse high schools or to students who attend Minority-Serving Institutions^[109] – those programs may be more likely to withstand legal review. As noted above, though, the question of what is or is not race-neutral may itself be subject to additional debate – and litigation – in the days to come. At least with

respect to Title VI, and the enforcement thereof, though,^[110] the Joint Guidance characterizes such efforts as squarely permissible:

[I]n seeking a diverse student applicant pool, institutions may direct outreach and recruitment efforts toward schools and school districts that serve predominantly students of color and students of limited financial means. Institutions may also target school districts or high schools that are underrepresented in the institution’s applicant pool by focusing on geographic location (e.g., schools in the Midwest, or urban or rural communities) or other characteristics (e.g., low-performing schools or schools with high dropout rates, large percentages of students receiving free or reduced-price lunch, or historically low numbers of graduates being admitted to the institution).

In addition to outreach and recruitment programs, institutions may offer pathway programs that focus on increasing the pool of particular groups of college-ready applicants in high school and career and technical education programs. The structure and scope of pathway programs vary significantly across institutions. An institution may partner with a particular school or student-centered organization and offer mentoring or other programming throughout the school year to enhance students’ academic exposure. It may also host summer enrichment camps for students attending nearby public schools.

CONCLUSION:

The^[111] Supreme Court’s decision in *SFFA*, although not acknowledged as such by the Court majority, nevertheless represented a gutting of *Grutter* and that case’s endorsement of the limited, individualized, and holistic consideration of race to promote the educational benefits of diversity. Nevertheless, those educational benefits – well-supported by decades of social science research – continue to exist, and for those institutions that center those benefits as integral to their academic missions, it will be more important than ever to find lawful ways to promote their attainment.

END NOTES:

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^[2] 143 S. Ct. 2141 (2023). In its decision, the Court combined two cases on its docket: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (No. 20-1199) and *Students for Fair Admissions, Inc. v. University of North Carolina* (No. 21-707).

^[3] *Id.* at 2176.

^[4] 539 U.S. 306 (2003).

^[5] Indeed, both Justice Thomas in concurrence, see *SFFA*, 143 S. Ct. at 2207 (Thomas, J., concurring), and Justice Sotomayor in dissent, see *id.* at 2239 (Sotomayor, J., dissenting), acknowledged the decision as an implicit overruling of *Grutter*.

^[6] *Id.* at 2157. For a fuller discussion of the underlying federal district court ruling in the Harvard case, see Arthur L. Coleman and Jamie Lewis Keith’s Crucial Case Summary, “[Students for Fair Admissions v.](#)

[President and Fellows of Harvard College: Major Takeaways from a Federal District Court Opinion Regarding the Consideration of Race in Admissions,](#) (NACUANOTE Oct. 28, 2019).

[7] *SFFA*, 143 S. Ct. at 2157.

[8] *Id.* Although Harvard, as a private institution, is not subject to the Fourteenth Amendment, the Court noted that it had previously opined “that discrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds also constitutes a violation of Title VI,” and therefore “evaluate[d] Harvard’s admissions program under the standards of the Equal Protection Clause itself.” *Id.* at 2156 n.2 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276, n.23 (2003)). Accordingly, the Court referred only to the Equal Protection Clause throughout, with respect to both institutions. *Id.* at 2154.

[9] “Before turning to the merits,” the Court confirmed that *SFFA* had standing to bring its claims. The Court rejected the institutions’ arguments that “groups qualify as genuine membership organizations only if they are controlled and funded by its members,” instead concluding that, “[w]here, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates.” *Id.* at 2158.

[10] *Id.* at 2161 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)) (second alteration in original).

[11] *Id.* (emphasis added).

[12] 438 U.S. 265 (1978).

[13] *SFFA*, 143 S. Ct. at 2166. Interestingly, the last three points cited by the Court have traditionally been understood as forming part of the strict scrutiny analysis – specifically, of the narrow tailoring prong – but the Court here frames them as separate criteria that institutions must meet.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 2166-2167.

[17] *Id.* at 2167.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 2168 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 240 (2003)).

[21] *Id.*

[22] *Id.* at 2169.

[23] *Id.* at 2170.

[24] *Id.* (quoting *Grutter*, 539 U.S. at 342).

[25] *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323 (Opinion of Powell, J.) (alteration in original)).

[26] *SFFA*, 143 S. Ct. at 2172. In dissent, Justice Sotomayor noted that the Court here put “schools in an untenable position” by creating “a legal framework where race-conscious plans *must* be measured with precision but also *must not* be measured with precision.” *Id.* at 2253 (Sotomayor, J., dissenting).

[27] *Grutter*, 539 U.S. at 342 (“In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”).

[28] *SFFA*, 143 S. Ct. at 2173.

[29] *Id.* at 2175.

[30] *Id.* at 2166 n.4.

[31] *Id.* at 2176.

[32] *Id.*

[33] Although Justice Thomas “join[ed] the majority opinion in full,” he “wr[ote] separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court’s *Grutter* jurisprudence; to clarify that all forms of discrimination based on race – including so-called affirmative action – are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.” *Id.* at 2177 (Thomas, J. concurring).

[34] *Id.* at 2189 (Thomas, J., concurring) (emphasis in original).

[35] *Id.* (quoting Brief for University Respondents in No. 21-707, at 39).

[36] *Id.* at 2190.

[37] *Id.* at 2205 n.11.

[38] *Id.* at 2206.

[39] *Id.* at 2201 (quoting *Grutter*, 539 U.S. at 349) (Scalia, J., concurring in part and dissenting in part) (internal quotation marks omitted).

[40] At the same time, however, Justice Thomas cited Historically Black Colleges and Universities with approval, noting that although they “do not have a large amount of racial diversity . . . they demonstrate a marked ability to improve the lives of their students,” *id.* at 2206, and that “[s]uch black achievement in ‘racially isolated’ environments is neither new nor isolated to higher education,” *id.* at 2207 n.12.

[41] Justice Thomas noted that the “plain text of Title VI reinforces the colorblind view of the Fourteenth Amendment.” *Id.* at 2188 n.4.

[42] *Id.* at 2208 (Gorsuch, J., concurring).

[43] *Id.* at 2209 (quoting *Bostock v. Clayton County*, 590 U.S. ___, slip op. at 14-15 (2020)). According to Justice Gorsuch, Title VI “does not scrutinize a recipient’s reasons or motives for discriminating.” *Id.* at 2215-2216.

[44] *Id.* at 2209; see also *id.* at 2216 (“The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next.”).

[45] See, e.g., Transcript of Oral Argument at 12-16, *SFFA*, 143 S. Ct. 2141 (2023) (No. 21-707).

[46] *SFFA*, 143 S. Ct. at 2220 (Gorsuch, J., concurring) (second emphasis added). Like the majority, see *id.* at 2167-2168 (questioning the racial/ethnic categories used by the institutions – categories delineated by the U.S. Census Bureau and adopted as required by the U.S. Department of Education – as “arbitrary,” “overbroad,” “imprecise,” “undefined,” “underinclusive,” and “opaque”), Justice Gorsuch found that these federally mandated racial/ethnic categories relied on “incoherent” and “irrational stereotypes,” *id.* at 2210 (Gorsuch, J., concurring). Moreover, even if the institutions at issue took advantage of the ability to further subdivide the racial/ethnic categories in their holistic reviews, it would not, in Justice Gorsuch’s view, “make a difference. Title VI no more tolerates discrimination based on 60 racial categories than it does 6.” *Id.* at 2212 n.2.

[47] *Id.* at 2222 (Kavanaugh, J., concurring) (quoting *Grutter*, 539 U.S. at 343 (second alteration in original)).

[48] *Id.* at 2225. Justice Kavanaugh did acknowledge that “racial discrimination still occurs and the effects of past racial discrimination still exist,” but believed that “[f]ederal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination.” *Id.*

[49] Justice Jackson participated in the Court’s review only with respect to the UNC challenge. *Id.* at 2176.

[50] *Id.* at 2225 (Sotomayor, J., dissenting).

[51] *Id.* at 2226.

[52] *Id.* at 2231.

[53] *Id.* at 2232.

[54] *Id.* at 2234.

[55] *Id.* at 2237. According to the majority opinion, however, institutions with such histories “should perhaps be the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so.” *Id.* at 2178 n.8.

[56] *Id.* at 2239 (Sotomayor, J., dissenting). Justice Sotomayor noted the “important reliance interests that this Court’s precedents have generated” as another reason in favor of *stare decisis*. *Id.* at 2259. The Court, however, contended that “*Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time.” *Id.* at 2175 n.9.

[57] *Id.* at 2239 (Sotomayor, J., dissenting) (internal quotation marks omitted).

[58] *Id.* at 2245 (quoting *Payne v. Tennessee*, 501 U.S. 808, 846 (1991) (Marshall, J., dissenting) (third alteration in original)).

[59] *Id.* at 2247.

[60] *Id.* Indeed, many members of the military attend ROTC programs at non-military institutions. See, e.g., [“The Supreme Court’s Ruling on Admissions Exempts Military Academies. What’s Up With That?”](#) *Chronicle of Higher Education* (June 30, 2023) (citing General Thomas P. Bostick, one of the signatories of the amicus brief filed by the military in the *SFFA* Decision, as indicating that “even more officers come from ROTC programs than they do from military academies”). Justice Sotomayor also questioned the lack of an exemption for religious universities, which likewise were not parties to the case, but “which the Court [did] not similarly exempt from its sweeping opinion.” *SFFA*, 143 S. Ct. at 2247 (Sotomayor, J., dissenting).

[61] *Id.* at 2248.

[62] *Id.* at 2251.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 2252.

[66] *Id.*

[67] *Id.* at 2252.

[68] *Id.* at 2263.

[69] *Id.* at 2264 (Jackson, J., dissenting).

[70] *Id.*

[71] *Id.* at 2270.

[72] *Id.* at 2273 n.91.

[73] *Id.* at 2273.

[74] *Id.* at 2277.

[75] *Id.*

[76] *Id.* at 2279.

[77] *Cf. id.* at 2191 (Thomas, J., concurring) (“The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so.”).

[78] *Id.* at 2253-2254 (2023). (Sotomayor, J., dissenting) (emphasis added) (internal citations and quotation marks omitted).

[79] Indeed, the joint Department of Education/Department of Justice Guidance, discussed further *infra*, specifically states that “institutions of higher education may continue to articulate missions and goals tied to student body diversity and may use all legally permissible methods to achieve that diversity” and notes that “seeking to enroll diverse student bodies can further the values of equality of opportunity embedded in the Fourteenth Amendment and other federal civil rights laws.” [Questions and Answers Regarding the Supreme Court’s Decision in *Students For Fair Admissions, Inc. v. Harvard College and University of North Carolina*](#) (Aug. 14, 2023) (hereinafter, “Q&A”).

[80] *SFFA*, 143 S. Ct. at 2176. It is not altogether clear, though, whether the Court viewed this type of consideration as race-conscious or race-neutral in the first instance. If the former, then presumably the same (new, heightened) standards of strict scrutiny could apply in any challenge to such a practice.

[81] U.S. Dep’t of Justice and U.S. Dep’t of Educ., [Dear Colleague Letter](#) (Aug. 14, 2023) (hereinafter, “Dear Colleague Letter”).

[82] *Id.*

[83] This Note will refer to the Dear Colleague Letter and accompanying Q&A either by reference to the specific document or collectively as the “Joint Guidance.”

[84] Q&A.

[85] The Common App now offers to hide applicants’ responses to check boxes on race and ethnicity from institutions upon request, and at least some institutions (including Harvard) have reportedly decided to exercise that option. [“An Early Peek at How Admissions Applications Are Changing After the Supreme Court Ruling,”](#) *Chronicle of Higher Education* (Aug. 1, 2023).

[86] Q&A.

[87] Consider, for instance, the Court’s admonition that “the prohibition against racial discrimination is ‘levelled at the thing, not the name.’” *SFFA*, 143 S. Ct. at 2176 (citations omitted).

[88] See, e.g., Transcript of Oral Argument at 12-16, *SFFA*, 143 S. Ct. 2141 (2023) (No. 21-707).

[89] Indeed, Justice Gorsuch in his concurrence expressed his view that under Title VI, “[i]t does not matter if the recipient can point to ‘some other . . . factor’ that contributed to its decision to disfavor that individual.” *SFFA*, 143 S. Ct. at 2209 (Gorsuch, J., concurring). And of course, although Justice Sotomayor referenced the personal rating as race-neutral, the majority cautioned against any reliance on dissenting opinions for ways to meet its requirements. *Id.* at 2247.

[90] It is worth noting that OCR guidance could change under subsequent administrations, and that in any event, it would not necessarily bind litigants, or courts, in evaluating claims brought following the *SFFA* Decision.

[91] Q&A.

[92] [“Activists sue Harvard over legacy admissions after affirmative action ruling,”](#) CBSnews.com (July 3, 2023). Justice Gorsuch discussed Harvard’s legacy preferences in his concurrence as well: “While race-neutral on their face, . . . these preferences undoubtedly benefit white and wealthy applicants the most. Still, Harvard stands by them. As a result, athletes and the children of donors, alumni, and faculty—groups that together ‘make up less than 5% of applicants to Harvard’—constitute ‘around 30% of the applicants admitted each year.’” *SFFA*, 143 S. Ct. at 2215 (Gorsuch, J., concurring) (internal citations omitted).

[93] Q&A.

[94] Dear Colleague Letter (stating that “colleges and universities can also work proactively to identify potential barriers posed by existing metrics that may reflect and amplify inequality, disadvantage, or bias”).

[95] Indeed, it may well be that the Court’s ruling in the *SFFA* Decision will embolden such challenges.

[96] *SFFA*, 143 S. Ct. at 2176 (internal quotation marks and citations omitted).

[97] See, e.g., “[DEI Legislation Tracker](#),” *Chronicle of Higher Education* (July 14, 2023).

[98] See *Coalition for TJ v. Fairfax County School Board*, No. 22-1280 (4th []Cir. May 23, 2023) (upholding a race-neutral and race-blind admissions policy adopted by Virginia’s Fairfax County School Board for the Thomas Jefferson High School for Science & Technology); see also [Petition for Writ of Certiorari, Coalition for TJ v. Fairfax County School Board, No. 23-170](#) (requesting that the Court review whether the admissions policy adopted for the Thomas Jefferson High School violates the Equal Protection Clause).

And of course, military academies, and potentially religious institutions, may want to consider whether they can garner the evidence needed to make their case under the Court’s heightened strict scrutiny standards.

[99] *Grutter*, 539 U.S. at 308.

[100] See, e.g., *SFFA*, 143 S. Ct. 2175 n.9 (“Three out of every five American universities do *not* consider race in their admissions decisions.”).

[101] See, e.g., *id.* at 2201 (Thomas, J., concurring).

[102] Indeed, a few institutions have reportedly already determined to end consideration of race in their financial aid and scholarship programs since the decision in the *SFFA* Decision. See “[Some Colleges Will No Longer Consider Race in Awarding Student Scholarships](#),” *Chronicle of Higher Education* (June 30, 2023) (citing a statement from the University of Kentucky’s president and a directive from the Missouri attorney general to the state’s public universities requiring that they “immediately cease their practice of using race-based standards to make decisions about things like admissions, scholarships, programs, and employment” (internal quotation marks omitted)).

[103] See discussion *supra* notes 78-84 (relating to facially neutral policies).

[104] See, e.g., Donna J. Snyder and Maya R. Kobersy, “[Scholarship Restrictions](#),” (NACUANOTE Apr. 20, 2017).

[105] U.S. Department of Education, Office for Civil Rights, [Nondiscrimination in Federally Assisted Programs](#) (Feb. 23, 1994).

[106] Of course, if the institution’s admissions process is *not* permissible, or if the steps the institution takes to diversify its applicant pool are viewed as *too* racially targeted, the institution could nonetheless face challenge for even such efforts.

[107] Q&A.

[108] *Id.* (“As with college and university admissions, institutions may not award slots in pathway programs based on an individual student’s race without triggering the strict scrutiny that *SFFA* applied (though institutions may permissibly consider how race has shaped the applicant’s lived experience in selecting participants).”). See also U.S. Department of Education, Office for Civil Rights, [Race and School Programming](#) (Aug. 24, 2023).

[109] For what it is worth, counsel for *SFFA* argued that all of these approaches “can be justified on race-neutral means” in that “they increase socioeconomic diversity, they . . . ensure that people at underresourced schools have an opportunity to attend the university, [and] they create geographic diversity.” Transcript of Oral Argument at 13, *SFFA*, 143 S. Ct. 2141 (2023) (No. 21-707).

[110] *But see supra* note 89.

[111] Q&A.

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