



# Implications for Philanthropy:



## U.S. SUPREME COURT RULING ON AFFIRMATIVE ACTION IN HIGHER EDUCATION

BY JONATHAN BERRY

With Executive Summary by Elizabeth McGuigan

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# Executive Summary

BY ELIZABETH MCGUIGAN

The U.S. Supreme Court's recent ruling against race-based admission policies at Harvard and University of North Carolina ends affirmative action in higher education as we know it. In the cases *Students for Fair Admissions, Inc. ("SFFA") v. University of North Carolina* and *SFFA v. President and Fellows of Harvard College*, the Court ruled that such race-based affirmative action in higher education violates the 14th Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964.

The implications of this decision are raising questions around diversity, equity and inclusion (DEI) practices of private businesses and philanthropy. The questions to consider are complex, and there is plenty of gray area. As charitable organizations begin to think through these questions, the Roundtable asked Boyden Gray PLLC to analyze the decision's potential implications beyond higher education. As a general summary, there are differing levels of impact in three categories of organizations.

## CLEAR IMPACT FOR GROUPS RECEIVING FEDERAL FUNDS

At the center of the discussion are entities that receive federal financial assistance and are therefore subject to Title VI of the Civil Rights Act. The analysis suggests that if you are a nonprofit that receives direct aid from the government, it's time to take a careful look at your DEI practices and evaluate where they may conflict with our nation's civil rights laws and protections.

Farther out, with less clear implications, are private employers who are prohibited from race-based discrimination by Title VII of the Civil Rights Act. While the Supreme Court focused on Title VI and not on Title VII for this decision, courts have sometimes looked to Title VI cases in the Title VII context. This

means that employers who may have been using similar practices to higher education, where policies resulted in decisions being made on the basis of an individual's race, may be open to legal scrutiny and liability for violating anti-discrimination law.

Of course, the Court noted valid exemptions to these protections under Title VI, such as a prison's decision to separate inmates by race to address race riots or an employer taking action to address prior specific discriminatory actions they took against a group. And the Court has previously recognized other narrow grounds for affirmative action unique to Title VII.

The U.S. Equal Employment Opportunity Commission's chair has **issued a statement** that suggests it will not begin investigating DEI practices of private employers as unlawful. At the same time, another EEOC commissioner **took a different approach**. She warned employers that, "Poorly structured voluntary diversity programs pose both legal and practical risks for companies. Those risks existed before the Supreme Court's decision today. Now they may be even higher." It is worth remembering that the EEOC is comprised of presidential appointees and changes over time and with subsequent administrations.

## LESS CLEAR: WHAT DOES THIS MEAN FOR PHILANTHROPY?

At the edge of the potential implication universe are philanthropic entities—like private foundations and charities—that do not receive federal funds and do not use race as a factor in employment practices. The jury is still out on what this means for racial quotas for voluntary boards and what the impact will be on grantmaking to groups primarily focused on race-based work or for racial equity programs. However, there appears to be **consensus** that these types of

practices, while not directly impacted by the decision, may be subject to future litigation in the wake of the *SFFA* ruling.

When it comes to grantmaking, there are outstanding questions of how DEI practices may be examined when making contracts. Given the prohibition on race-based actions (42 U.S.C. § 1981) in the making and enforcement of contracts, at least **one lawsuit** has already been filed to clarify this legal question.

Throughout the philanthropic landscape, the clear

takeaway is that the Supreme Court has sent a strong signal: stop discriminating based on race. Nondiscrimination provisions in statute and the Constitution are likely to be enforced. While time will tell how this plays out in practice and future litigation, all race-based practices should be evaluated.

More importantly, the Court's decision highlighted the need to treat individuals as unique people with unique perspectives, values and experiences.



# Implications for Philanthropy:

## U.S. SUPREME COURT RULING ON AFFIRMATIVE ACTION IN HIGHER EDUCATION

BY JONATHAN BERRY

### Introduction

In *Students for Fair Admissions, Inc. (“SFFA”) v. President and Fellows of Harvard College*,<sup>1</sup> the Supreme Court ruled that race-based affirmative action programs at the University of North Carolina (UNC) and Harvard violate the Fourteenth Amendment’s Equal Protection Clause and Title VI of the Civil Rights Act of 1964, respectively.

This decision could have significant implications for philanthropy. While focused on higher education, the underlying principles in *SFFA* can apply more broadly—including to other entities and programs that receive federal funding under Title VI, employment discrimination under Title VII of the Civil Rights Act of 1964, and interference with making and enforcing contracts under 42 U.S.C. § 1981. Indeed, *SFFA* regularly cites cases from outside the context of higher education, and courts have similarly relied on higher-education cases elsewhere. One federal court has already extended the reasoning in *SFFA* to government contracting.<sup>2</sup>

In many ways, higher education had long been a notable exception to the otherwise-stringent prohibitions in the Fourteenth Amendment and Title VI against racial discrimination. *SFFA* largely foreclosed that special treatment and clarified that the same standards apply. The Supreme Court’s emphatic rejection of the racial classifications at issue strongly indicates skepticism about similar arguments in other contexts and instead endorses strict adherence to the non-discrimination promises of the U.S. Constitution and civil rights laws.

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1 143 S. Ct. 2141 (2023).

2 See *Ultima Servs. Corp. v. U.S. Dep’t of Agric.*, 2:20-CV-00041, 2023 WL 4633481 (E.D. Tenn. July 19, 2023).

# I. SFFA v. President and Fellows of Harvard College

In 2014, SFFA sued UNC—a public university—arguing its admissions process violated the non-discrimination guarantees of the Fourteenth Amendment. SFFA also sued Harvard—a private institution—arguing its admissions process similarly violated Title VI. Both used affirmative action programs that considered race in admissions decisions and justified their policies as necessary to support alleged benefits they attributed to racial diversity in the student body.

On June 29, 2023, the Supreme Court held the affirmative action policies were inconsistent with the Fourteenth Amendment’s prohibition against racial discrimination. The Court explained that “[e]liminating racial discrimination means eliminating all of it,”<sup>3</sup> and “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”<sup>4</sup> Any exceptions to this rule “must survive a daunting two-step examination” referred to as “strict scrutiny,” whereby the classification must be “narrowly tailored” (i.e., “necessary”) to “further compelling governmental interests.”<sup>5</sup>

The Court continued that the justifications provided by UNC and Harvard—such as the need to train future leaders, prepare graduates for a pluralistic society, better educate students through diversity, produce new knowledge from diverse outlooks, promote the robust exchange of ideas, enhance cross-racial

appreciation, respect, empathy, and understanding, and break down stereotypes—were too amorphous and unmeasurable to satisfy that standard.<sup>6</sup> The Court was also clear that universities “may never use race as a stereotype or negative” (including to benefit some applicants over others), adopt race-based policies with no discernible end, or justify racial discrimination as necessary to remedy societal discrimination.<sup>7</sup> The Court chastised the schools for “conclud[ing], wrongly, that the touchstone of an individual’s identity is not challenges bested, skills built, or lessons learned but the color of their skin.”<sup>8</sup>

The Court added that outside of higher education, it has only recognized two compelling interests that satisfy strict scrutiny, which are “remediating specific, identified instances of past discrimination that violated the Constitution or statute” and “avoiding imminent and serious risks to human safety in prisons, such as a race riot.”<sup>9</sup> These examples demonstrate the “elusive nature” of compelling interests, and the goals articulated by the universities didn’t compare.<sup>10</sup>

Finally, the Court noted its previous determination that “discrimination that violates the Equal Protection Clause . . . also constitutes a violation of Title VI,” which prohibits racial discrimination under any program or activity receiving federal financial assistance.<sup>11</sup> No party asked the Court to revisit that conclusion.

3 SFFA, 143 S. Ct. at 2161.

4 *Id.* at 2162 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290 (1978) (opinion of Powell, J)).

5 *Id.* (internal quotation marks omitted).

6 *Id.* at 2166–70.

7 *Id.* at 2166, 2172–75.

8 *Id.* at 2176.

9 *Id.* at 2162.

10 *Id.* at 2167.

11 *Id.* at 2156 n.2 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003)); see also *id.* at 2208 (Gorsuch, J., concurring). Title VI stipulates that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.



## II. Implications for Philanthropy

The impact of *SFFA* will likely extend far beyond higher education. The decision is at minimum a clear warning that simply reciting “diversity” is no excuse for racial discrimination. Numerous entities are already facing demands and lawsuits to end racial discrimination arising from diversity, equity, and inclusion (DEI) programs and other practices.<sup>12</sup> Multiple law firms have publicly signaled to clients an increased risk of liability.<sup>13</sup> And the Supreme Court has previously concluded that racial discrimination is contrary to the common law standards for a charity entitled to tax-exempt status under section 501(c)(3) of the Internal Revenue Code.<sup>14</sup> It is thus reasonable to presume this decision could have a far-reaching impact.

### TITLE VI – FEDERAL FUNDING

Title VI prohibits racial discrimination under any program or activity receiving federal financial assistance.<sup>15</sup> The Court in *SFFA* was clear that universities cannot cite generic benefits attributed to diversity or seeking to remedy societal discrimination to justify such discrimination. Accordingly, organizations likely cannot use race-based considerations seeking those same objectives in other programs or activities associated with the use of federal funds, especially in a manner that relies on racial stereotypes or benefits one group over another.



Dunster House, Harvard University

Organizations that receive targeted funds for specific programs could be liable under Title VI for racial considerations in how those programs are implemented.<sup>16</sup> Organizations receiving federal funds “as a whole” or that are “principally engaged

12 See, e.g., Letter from 13 State Attorneys General to Fortune 100 CEOs (July 13, 2023), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf>; Noam Scheiber, *Affirmative Action Ruling May Upend Hiring Policies, Too*, *N.Y. Times* (June 30, 2023).

13 See, e.g., Sohan Dasgupta & Andrew S. Murphy, *Business Ramifications of the Supreme Court’s Affirmative Action Decision*, Taft (July 21, 2023), available at <https://www.taftlaw.com/news-events/law-bulletins/business-ramifications-of-the-supreme-courts-affirmative-action-decision>; *The Supreme Court Limits the Use of Race in College Admissions: Potential Impact on Workplace Diversity Programs*, Gibson Dunn (June 29, 2023), <https://www.gibsondunn.com/wp-content/uploads/2023/06/supreme-court-limits-the-use-of-race-in-college-admissions-potential-impact-on-workplace-diversity-programs.pdf>; Emily Cuneo Desmedt et al., *US Supreme Court: Affirmative Action in College Admissions Must Come to An End*, Morgan Lewis (June 29, 2023), <https://www.morganlewis.com/pubs/2023/06/us-supreme-court-affirmative-action-in-college-admissions-must-come-to-an-end>.

14 *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); see also *Perin v. Carey*, 65 U.S. (24 How.) 465, 501 (1860) (“[I]t has now become an established principle of American law, that courts of chancery will sustain and protect such a gift, devise, or bequest, or dedication of property to public charitable uses, provided the same is consistent with local laws and public policy[.]”).

15 42 U.S.C. § 2000d.

16 See, e.g., 28 C.F.R. § 42.104; *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 97 (5th Cir. 1992).



## TITLE VII – EMPLOYMENT DISCRIMINATION

Although not at issue in *SFFA*, Title VII of the Civil Rights Act of 1964 applies to employment decisions and similarly prohibits discrimination “because of such individual’s race, color, . . . or national origin.”<sup>18</sup> While the Supreme Court has stated that Title VI and Title VII do not require parallel interpretations,<sup>19</sup> courts have looked to Title VI cases in Title VII cases.<sup>20</sup> In addition, the non-discrimination provisions were enacted at the same time, as part of the same statute, and using functionally equivalent language, creating a strong argument that the Title VII prohibition on discrimination should be interpreted consistent with the limitations imposed by Title VI.<sup>21</sup> Justice Gorsuch’s concurrence in *SFFA* even noted that “everything said here about the meaning of Title VI tracks this Court’s precedent in *Bostock* [*v. Clayton County*, 140 S. Ct. 1731 (2020),] interpreting materially identical language in Title VII.”<sup>22</sup>

in the business of providing education, health care, housing, social services, or parks and recreation” could also face broader liability for racial preferences by the organization in its operations.<sup>17</sup>

17 42 U.S.C. § 2000d-4a(3)(A); see *City of Providence v. Barr*, 954 F.3d 23, 33 n.3 (1st Cir. 2020). But see 42 U.S.C. § 2000d-3 (“Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.”).

18 42 U.S.C. § 2000e-2.

19 *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 206 n.6 (1979); *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 627 n.6 (1987).

20 See, e.g., *Alexander v. City of Milwaukee*, 474 F.3d 437, 445 (7th Cir. 2007); *Lomack v. City of Newark*, 463 F.3d 303, 308–10 (3d Cir. 2006). The Court has also looked to Title VII in Title IX cases, which like Title VI is premised on the receipt of federal funds. See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); see also *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting).

21 See, e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) (“[A] legislative body generally uses a particular word with a consistent meaning in a given context. . . . The rule is but a logical extension of the principle that individual sections of a single statute should be construed together. . . . [T]he rule’s application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time.”); see also *Johnson*, 480 U.S. at 665–66 (Scalia, J., dissenting) (“There is no good reason to think that Title VII, in this regard, is any different from Title VI.”).

22 *SFFA*, 143 S. Ct. at 2216 (Gorsuch J., concurring).





To be sure, the Court has held that Title VII allows for temporary affirmative action to “eliminate manifest racial imbalances in traditionally segregated job categories.”<sup>23</sup> But outside this narrow exception, *SFFA* suggests race-based affirmative action—including to achieve diversity or remedy societal discrimination—is prohibited.

In response to *SFFA*, Charlotte A. Burrows, Chair of the U.S. Equal Employment Opportunity Commission, emphasized that the decision “does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background,” and said

“[i]t remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”<sup>24</sup> But Commissioner Andrea R. Lucas simultaneously penned an article observing the decision “brings the rules governing higher education into closer parallel with the more restrictive standards of federal employment law.”<sup>25</sup> She warned: “Poorly structured voluntary diversity programs pose both legal and practical risks for companies. Those risks existed before the Supreme Court’s decision today. Now they may be even higher.”<sup>26</sup> She also noted that

**Organizations receiving federal funds “as a whole” or that are “principally engaged in the business of providing education, health care, housing, social services, or parks and recreation” could also face broader liability for racial preferences by the organization in its operations.**

<sup>23</sup> *Weber*, 443 U.S. at 197; see also Civil Rights Act of 1991, Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079.

<sup>24</sup> Press Release, *Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs* (June 29, 2023), <https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action>.

<sup>25</sup> Andrea R. Lucas, *With Supreme Court Affirmative Action Ruling, It’s Time for Companies to Take a Hard Look at their Corporate Diversity Programs*, Reuters (June 29, 2023), <https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/> (emphasis added).

<sup>26</sup> *Id.*

“[t]he Court never has blessed employers taking race-conscious employment actions based on interests in workforce diversity.”<sup>27</sup>

## 42 U.S.C. § 1981 – INTERFERENCE WITH CONTRACTING

Organizations and individuals making race-based decisions further risk liability under 42 U.S.C. § 1981, which prohibits interference on the basis of race in the making and enforcement of contracts.<sup>28</sup> This could extend from contractual grantmaking to hiring and employment. Like Title VI, § 1981 has roots in the Fourteenth Amendment,<sup>29</sup> and the Court has been clear that “purposeful discrimination that violates

the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981.”<sup>30</sup> This supports extending the reasoning from *SFFA* to that context.

Again, some courts have held that § 1981 permits affirmative action plans consistent with Title VII.<sup>31</sup> However, because conduct must comply with the Equal Protection Clause of the Fourteenth Amendment to satisfy § 1981,<sup>32</sup> this conclusion is suspect. Whether the Court will recognize affirmative action to “eliminate manifest racial imbalances in traditionally segregated job categories” only when it’s sufficiently remedial to be consistent with the Fourteenth Amendment, or instead decouple Title VII and § 1981, is unclear.

27 *Id.*

28 42 U.S.C. § 1981 (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens[.]”); see, e.g., *Runyon v. McCrary*, 427 U.S. 160, 168–75 (1976); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975).

29 *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 389–90 & n.17 (1982); see also *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

30 *Gratz*, 539 U.S. at 276 n.23.

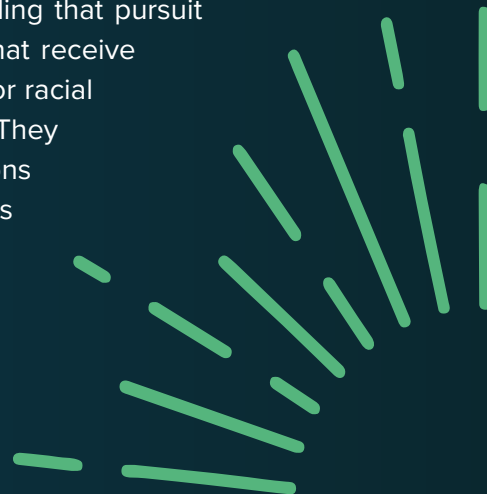
31 See, e.g., *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est.*, 470 F.3d 827, 837–38 (9th Cir. 2006); *Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 498–99 (3d Cir. 1999); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 966–67 (8th Cir. 1981) (en banc); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (adopting the Title VII framework for § 1981).

32 See *Gratz*, 539 U.S. at 276 n.23.

## Conclusion

The Supreme Court’s emphatic rejection of the racial classifications at issue in *SFFA* could have significant implications for philanthropy, including that pursuit of similar diversity objectives is unlawful. Organizations that receive federal financial assistance could be liable under Title VI for racial considerations in the implementation of their programs. They could face similar liability under Title VII for racial considerations in employment decisions. And organizations and individuals could also be liable under § 1981 for interference on the basis of race in the making and enforcement of contracts.

At the very least, *SFFA* signals that the Supreme Court looks skeptically on racial discrimination of any form and instead endorses strict adherence to the non-discrimination promises of the U.S. Constitution and civil rights laws.



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## About True Diversity

Philanthropy Roundtable's True Diversity initiative provides an equality-based and holistic framework for embracing diversity. It values every person as a unique individual and empowers charitable organizations with the freedom and flexibility to advance their missions and help those in need. Learn more at [TrueDiversity.org](https://www.TrueDiversity.org).



# About Philanthropy Roundtable

Philanthropy Roundtable is a nonprofit organization dedicated to building and sustaining a vibrant American philanthropic movement that strengthens our free society. To achieve this vision, the Roundtable pursues a mission to foster excellence in philanthropy, protect philanthropic freedom and help donors to advance liberty, opportunity and personal responsibility.



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