The U.S. Supreme Court and Affirmative Action in Education

Implications of the *Students for Fair Admissions, Inc. (SFFA) v. President and Fellows of Harvard College* and *Students for Fair Admissions (SFFA) v. University of North Carolina (UNC)* 2023 Decisions

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SECTION ONE

The Supreme Court's Affirmative Action Decision, Explained

By Staff (NAACP Legal Defense Fund)

Source: https://www.naacpldf.org/case-issue/sffa-v-harvard-faq/ and https://www.naacpldf.org/press-release/in-an-alarming-departure-from-long-settled-precedent-u-s-supreme-court-holds-harvard-and-uncs-admissions-practices/

On June 29, 2023, the U.S. Supreme Court issued its ruling in SFFA v. Harvard and SFFA v. UNC and found that Harvard and the University of North Carolina's affirmative action programs violate the Equal Protection Clause of the Fourteenth Amendment. This devastating decision overrules 45 years of precedent established in prior Supreme Court decisions, including Regents of the University of California v. Bakke, Grutter v. Bollinger, and Fisher v. University of Texas.

On October 31, 2022, the U.S. Supreme Court heard oral arguments in the cases Students for Fair Admissions (SFFA) v. Harvard and Students for Fair Admissions (SFFA) v. University of North Carolina (UNC), two landmark cases involving affirmative action. SFFA, an organization created by Edward Blum, filed the lawsuits in 2014 as part of a relentless crusade to overturn 40+ years of precedent and eliminate the consideration of race in college admissions. Blum is also responsible for the litigation in Shelby County v. Holder.

LDF has long represented twenty-five Harvard student and alumni organizations of thousands of Black, Latinx, Asian American, Native American, and white students and alumni as amici curiae, or "friends of the court," in the Harvard lawsuit. You can find SFFA v. Harvard briefs and case documents here. LDF presented members of its client organizations as witnesses at the 2018 trial and submitted declarations, other evidence, briefs and oral argument on their behalf. LDF filed an amicus brief in the Supreme Court of the United States in SFFA v. UNC on behalf of LDF and the NAACP in support of UNC's race-conscious admissions process.

In An Alarming Departure from Long-Settled Precedent, U.S. Supreme Court Holds Harvard and UNC's Admissions Practices Unconstitutional

Today, the Supreme Court bowed to pressure from anti-civil rights activists, finding that Harvard and the University of North Carolina's affirmative action programs violate the Equal Protection Clause of the Fourteenth Amendment. This radical decision comes at a time when efforts to advance opportunity in education have been under attack across the country, and the need for such programs remains acute. The Court's decision is contrary to 45 years of precedent established in prior Supreme Court decisions, including Regents of the University of California v. Bakke, Grutter v. Bollinger, and Fisher v. University of Texas. However, the Court's ruling still allows colleges to consider how race has affected a student's life and their ability to contribute to the educational institution.

The Legal Defense Fund (LDF) represents twenty-five Harvard student and alumni organizations of thousands of Black, Latinx, Asian American, Native American, and white students and alumni as amici curiae, or "friends of the court," in the Harvard lawsuit. LDF presented members of its client organizations as witnesses at the 2018 Harvard trial and submitted briefs and oral argument on their behalf to the federal district and appeals courts which upheld the legality of Harvard's admissions process. LDF also represents the NAACP as amicus curiae in the UNC lawsuit.

"We roundly condemn and regard with alarm the Supreme Court's decision to strike down Harvard and UNC's affirmative action programs, ignoring its own long-standing precedent, and distorting the legacy of the seminal decision in Brown v. Board of Education — which held that society must not turn a blind eye to racial inequality and can take necessary measures to address it. We know that race still unquestionably matters in our society — particularly for Black people and others whose race has shaped their lived experiences in a country rooted in a history and current reality of

racial injustice." said Janai Nelson, LDF President and Director-Counsel. "Despite the Supreme Court's opinion today, colleges and universities still have a moral imperative and the legal ability to ensure that their doors are open equally to all students, including Black, Latinx, Native American, Hawaiian, Pacific Islander, and Asian American applicants. Even under the terms of this unfortunate decision, all students continue to have the freedom and opportunity to have their full identities, including the impact of race on their lived experiences, considered when seeking admissions to institutions of higher education.

As Justice Sotomayor wrote in her dissent, which lifted up LDF's brief in the UNC case, "The Court's recharacterization of Brown is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about color blindness."

"The Supreme Court chose to ignore well-established social science, pedagogy, and the lived experience of many Americans who know that bringing together people of different backgrounds makes our classrooms better and our nation stronger," added Nelson. "We stand firmly with our clients — the Harvard student and alumni organizations that are directly affected by this decision and the NAACP — as they continue to demand admissions policies that foster opportunity for all."

The following are statements from the amici curiae:

"Asian American students have long been used as a pawn in the conversation against affirmative action, and we refuse to feed into that false narrative, " Michelle Jiang, Class of 2026, Co-Educational/Political Chair, Harvard-Radcliffe Chinese Students Association. "Asian students come from a multitude of ethnic backgrounds and experiences, many of which are underrepresented in higher education and benefit from affirmative action. All students benefit from a diverse and representative student body. We firmly believe in the necessity of affirmative action in higher education and are extremely disappointed in the Supreme Court's ruling today. We will continue to work together with other organizations to advocate for racial equity in higher education. The fight does not end here."

"Higher education is one way historically underrepresented and segregated communities attain the knowledge and resources they can use to uplift their communities," said Gilberto Lopez-Jimenez, Class of 2025, Co-President, Fuerza Latina. "Often, those who are part of cultural affinity groups in higher ed advocate and

seek to close the equity gap. Currently, student life at Harvard is vibrant thanks to the students from all walks of life who contribute to it. Despite the Supreme Court's ruling, organizations like Fuerza Latina will keep fighting to advocate for underrepresented communities. My biggest concern, however, is how sustainable this would be in the long run when there is less minority representation on campus, and it is thus more challenging to maintain and find people who would be part of these groups."

"This detrimental decision not only compromises the integrity of the admissions process but also poses a significant threat to the future of the Black community on and beyond our campus. This case will impact not only Harvard and UNC, but will require a national review of college admissions," said Elyse Martin-Smith, Political Action Chair, Harvard Black Students Association. "It is evident that the college application system cannot maintain holistic evaluation without taking into consideration how race profoundly influences our experiences, perspectives, and identities in multifaceted ways – considerations that are still permitted by the Supreme Court's decision and must continue to avoid complete erasure of our stories, contributions, and selves.

Jane Sujen Bock ('81), Board Member, Coalition for a Diverse Harvard

"This case was never just about who goes to Harvard. It's about who has the freedom to learn and to thrive in our multiracial democracy. Regardless of the Supreme Court's ruling, we will continue to fight for educational equity and diverse and inclusive American institutions. Since this case was brought eight years ago, it has been inspiring to see unity and determination growing nationally in the face of conservative attacks. There will be no going back for the thoughtful and brilliant student leaders we work with, and we will be with them every step of the way."

Lena Tinker ('25) & Kira Fagerstrom ('24), Co-Presidents, Natives at Harvard College

"Native people have been forcibly placed on the bottom of the American social order since their land was first stolen in the 1400s. Globally, Indigenous peoples face similar realities, and we have been fighting to gain our rights and opportunities ever since. It is imperative that colleges and universities be allowed to consider Indigenous realities when determining admissions. Affirmative action is nowhere near enough to right the wrongs of the past, but it provides an opportunity to help Indigenous peoples build success for themselves and their communities by gaining access to higher education institutions."

Hiren Lami '24, President, Phillips Brooks House Association

"Race-conscious admissions policies give students the opportunity to present their full selves in college applications and are necessary to counter the historical structural inequities that have limited the potential of young learners for far too long. As service leaders, we have a responsibility to hold the door open for the advocates and organizers of tomorrow. PBHA holds diversity and justice as core values that ground the work we do in Greater Boston. We will continue to advocate for the space to celebrate, uplift, and respect the diversity of our campus community."

Sneha Shenoy '25 and Srija Vem '25, Co-Presidents, Harvard South Asian Association

"On behalf of the Harvard South Asian Association, we emphasize the importance of race-conscious policies in holistic admissions. Affirmative action allows for substantial aspects of a student's identity to be valued alongside quantitative (and often inequitable) measures of their success. Moreso, these policies help build diverse learning environments, fostering thought-provoking conversation and the inception of new initiatives. Thus, we are fearful that the Supreme Court's ruling in favor of SFFA will not only deprive historically disadvantaged students of just opportunities, but also other students, colleges, and the greater community of their contributions."

Chelsea Wang ('25) and Kylan Tatum ('25), Co-Presidents of the Harvard-Radcliffe Asian American Association; Kashish Bastola ('26) and Kawsar Yasin ('26), Co-Education and Political Chairs of the Harvard-Radcliffe Asian American Association

"The Court's decision today to abandon race-conscious admissions will restrict educational opportunities for students of color and reverse generations of progress. Individuals will lose access to the educational institutions that facilitate social mobility and break cycles of poverty; families will lose the support, pride, and hope that comes from sending students to college; communities will lose the role models that show us change is possible, that we can make it out, that people that look like us can exist in spaces built to keep us out. This ruling does not mark the end of our efforts to ensure racial equity in higher education. The Harvard-Radcliffe Asian American Association will, now and always, advocate for diversity and cross-racial solidarity. In doing so, we hope to honor the culture of collectivism and care that defines our heritage. We stand with all students of color, united against injustice."

LDF has been part of every Supreme Court case defending affirmative action in higher education and is a leading voice in the decades-long struggle for equitable college admissions policies, from its early efforts to desegregate colleges and universities throughout the Jim Crow South to its ongoing advocacy for advancing equal opportunity in higher education. Visit www.defenddiversity.org to learn more about LDF's efforts.

The 25 Harvard student and alumni organizations serving as *amici curiae* are listed below:

- Association of Black Harvard Women ("ABHW")
- Coalition for a Diverse Harvard ("Diverse Harvard")
- First Generation Harvard Alumni ("FGHA")
- Fuerza Latina of Harvard ("Fuerza Latina")
- Harvard Asian American Alumni Alliance ("H4A")
- Harvard Asian American Brotherhood ("AAB")
- Harvard Black Alumni Society ("HBAS")
- Harvard Islamic Society ("HIS")
- Harvard Japan Society ("HJS")
- Harvard Korean Association ("HKA")
- Harvard Latino Alumni Alliance ("HLAA")
- Harvard Minority Association of Pre-medical Students ("MAPS")
- Harvard Phillips Brooks House Association ("PBHA")
- Harvard Progressive Jewish Alumni ("HPJA")
- Harvard South Asian Association ("SAA")
- Harvard University Muslim Alumni ("HUMA")
- Harvard Vietnamese Association ("HVA")
- Harvard-Radcliffe Asian American Association ("AAA")

- Harvard-Radcliffe Asian American Women's Association ("AAWA")
- Harvard-Radcliffe Black Students Association ("BSA")
- Harvard-Radcliffe Chinese Students Association ("CSA")
- Kuumba Singers of Harvard College ("Kuumba")
- Native American Alumni of Harvard University ("NAAHU")
- Native Americans at Harvard College ("NAHC")
- Task Force on Asian and Pacific American Studies at Harvard College ("TAPAS")

Who will be impacted by this decision?

This decision will undoubtedly impact students of color, but all students will be impacted. The decision will restrict educational opportunities for students of color and roll back decades of progress. Race-conscious admissions policies are crucial to mitigating the structural inequalities that have historically limited the potential and educational opportunities for students of color.

All students deserve the freedom and opportunity to have their full identities and lived experiences considered when seeking admissions to institutions of higher education. Abandoning race-conscious admissions policies will unfairly disadvantage applicants of color since universities would no longer be able to fully consider their personal statements, leadership experiences, recommendation letters, and activities to the extent these aspects of their application revealed their race.
Striking down race-conscious admissions will further cement racial inequalities in our education system, and severely decrease diversity on college campuses. Based on modeling from the Class of 2019, if Harvard stops considering race, the number of Black, Latino, Native, Hawaiian, and Pacific Islander students would drop by nearly 50%. Most of these students would be replaced by white students. Without the fair shot that holistic admissions enables, an entire generation (or more) of promising, hard-working Black, Latino, Native American, and Asian American and Pacific Islander (AAPI) students will be shut out of selective colleges and universities, through no fault of their own.

How will these decisions impact diversity on campuses?

It has been proven time and time again that diversity benefits all students. Research shows that diverse learning environments help all students build skills associated with academic success, including critical thinking, problem solving ability, student satisfaction and motivation, general knowledge, and intellectual self-confidence. In addition, cross-racial interactions can reduce prejudice and stereotypes, enhance empathy, and open minds. Students of all racial backgrounds benefit from racially diverse learning environments and are better equipped to succeed in today's workplaces and serve today's clientele.

Despite the Supreme Court's opinion today, colleges, universities, and our nation still have a moral imperative and the legal ability to ensure that their doors are open equally to all students, including Black, Latinx, Native American, Hawaiian, Pacific Islander, and Asian American applicants. Even under the terms of this unfortunate decision, all students continue to have the freedom and opportunity to have their full identities, including the impact of race on their lived experiences, considered when seeking admissions to institutions of higher education.

Was it a Bad Decision?

Yes. The Court's decision to strike down UNC and Harvard's affirmative action policies ignores longstanding precedent and will have a devastating impact on diversity in higher education and rolls back decades of progress toward educational equity. It is a disastrous blow to fairness in education and to opportunity for students of color. The decision is a rejection of the spirit and intent of Brown v. Board of Education – the case that ruled that racial segregation in public schools was unconstitutional and recognized that fair access to education is vital to our entire society.

Despite how alarming this decision is, it is important to know exactly what the Supreme Court did and did not decide in these cases. The court's decision is limited to the consideration of race, as a tip, in college admissions as conducted by Harvard and UNC. It is not about outreach, recruitment, affinity groups, employment, contracting, race-neutral policies governing K-12 selective admissions, diversity, equity, and inclusion (DEI) programs, or Critical Race Theory. In fact, these efforts are even more important after the Court's ruling.

How long has affirmative action been around and why was it created?

Affirmative action arose at the height of the civil rights movement when President John F. Kennedy's 1961 Executive Order 10925 and President Lyndon B. Johnson's 1965 Executive Order 11246 mandated that federal government contractors "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin."

When affirmative action came into practice in 1965, the federal government intended for the policies to do more than simply bar racial discrimination. Rather, affirmative action was created to level the playing field by neutralizing the effect of years of systemic racial discrimination and oppression.

Have there been challenges to race-conscious admissions policies before?

Yes. Since affirmative action policies were established in 1965, opponents of diversity and race-conscious admissions have repeatedly mounted legal challenges to dismantle and eliminate the consideration of race in admissions. For the past 40 years, the Supreme Court has upheld race-conscious admissions policies and ruled that it is legally permissible for colleges and universities to consider race, as one of many factors, in admissions in order to assemble a diverse student body, so students can reap the benefits of learning in a diverse environment.

Do race-conscious admissions put white and Asian students at a disadvantage?

No. Holistic, race-conscious admissions processes and diverse educational experiences benefit all students. The attacks on affirmative action are attempts to strip away the progress that communities of color have made and make educational opportunities the exclusive domain of the white and privileged. After losing multiple cases challenging affirmative action using white plaintiffs, SFFA and similar groups sought out Asian Americans to draw a racial wedge between communities of color and dismantle more than 40 years of legal precedent.

With affirmative action, Asian Americans rose from 3% of the class of 1980 to 27.6% of the class of 2026. Asian Americans are an extremely economically diverse group. Many Asian Americans face great adversity and have fewer educational opportunities before applying to college. If admissions were based

strictly on test scores, about 20% of Asian Americans attending elite colleges wouldn't be admitted.

The trial court found no evidence of racial discrimination toward Asian American applicants. After analyzing 480 admissions files and data from over 150,000 applicants, SFFA did not present a single application showing Asian American ethnicity was viewed negatively. SFFA did not present even a single admissions file or application that it contended reflected an applicant who would have been admitted absent discrimination.

How do race-conscious admissions policies impact educational outcomes for students of color?

Due to persistent racial inequalities in PK-12 educational systems, most students of color — and Black students in particular — do not have an equal opportunity to earn the credentials that would give them a competitive edge in college admissions, regardless of their talent and hard work. Affirmative action and holistic, race-conscious admissions policies help break down the barriers that prevent many students of color from gaining admission to the most selective schools.
Race is among more than 100 factors in consideration during the admissions process and the reality is there are a lot of highly qualified students of all backgrounds. Inclusive admissions practices expand educational opportunities and take into account the lived experiences of students of color. It is impossible for colleges and universities to have a fair admissions process that completely ignores race and its real-life impact on students' lives. Regardless of their income, where they grew up, or their racial and ethnic background, students deserve a fair shot at going to college.

I'm not in college. Why should I care about this case and race-conscious admissions policies?

Race–conscious admissions policies and diversity in higher education have a major impact beyond the classroom. Diverse learning environments enrich the college experience for everyone and better prepare students of all backgrounds for success in the multiracial workplace and the society we live in. There are direct economic benefits to a well-educated and diverse workforce, and race-conscious admissions programs in higher education make that possible. As noted

in approximately 60 amicus briefs filed in support of race-conscious admissions, having a pipeline of diverse graduates is an economic, medical, military, and scientific imperative. Diversity in higher education is vital to assembling a diverse workforce to serve our communities.

Who is LDF?

Founded in 1940, the Legal Defense Fund (LDF) is the nation's first civil rights law organization. LDF's Thurgood Marshall Institute is a multi-disciplinary and collaborative hub within LDF that launches targeted campaigns and undertakes innovative research to shape the civil rights narrative. In media attributions, please refer to us as the Legal Defense Fund or LDF. Please note that LDF has been completely separate from the National Association for the Advancement of Colored People (NAACP) since 1957—although LDF was originally founded by the NAACP and shares its commitment to equal rights.

SECTION TWO

Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions

By Nina Totenberg (Updated June 29, 2023)

SOURCE: https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision

In a historic decision, the U.S. Supreme Court on Thursday effectively ended race-conscious admission programs at colleges and universities across the country. In a decision divided along ideological lines, the six-justice conservative supermajority invalidated admissions programs at Harvard and the University of North Carolina.

The decision reverses decades of precedent upheld over the years by narrow Supreme Court majorities that included Republican-appointed justices. It ends the

ability of colleges and universities — public and private — to do what most say they still need to do: consider race as one of many factors in deciding which of the qualified applicants is to be admitted.

Chief Justice John Roberts, a longtime critic of affirmative action programs, wrote the decision for the court majority, saying that the nation's colleges and universities must use colorblind criteria in admissions.
Majority opinion

"Many universities have for too long...concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin," he wrote. "Our constitutional history does not tolerate that choice."

Justice Clarence Thomas [African American Justice] took the unusual step of reading from the bench parts of his lengthy concurring opinion.

Thursday's decision, he wrote, "sees the universities' admissions policies for what they are: rudderless, race-based preferences. ... Those policies fly in the face of our colorblind Constitution."

As he has done before, Thomas, the second black justice appointed to the court, reiterated his long-held view that affirmative action imposes a stigma on minorities. "While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold our enduring hope that this country will live up to its principles that ... all men are created equal, are equal citizens, and must be treated equally before the law."

Roberts, for his part, pointed to the court's 2003 decision reaffirming the constitutionality of affirmative action programs, noting that Justice Sandra Day O'Connor, writing for the court at the time, had suggested that there would have to be an end at some future point. That time has now come, Roberts said.
Opposing view

"It feels tragic," said Columbia University President Bollinger, who has for 30 years been a leading proponent of affirmative action programs.

"It feels like the country has been on a course of choosing between a continuation of the great era of civil rights, and another view of 'We've done this long enough, and we need a whole new approach.' It's now the second choice."

That sentiment echoed Justice Sonia Sotomayor's dissent. [Latina Justice]

"The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society," she wrote.

Justice Ketanji Brown Jackson [African American Justice], the court's first Black female justice, also chimed in, saying: "With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life."

Indeed, the reality is that in those places where affirmative action has been eliminated, there has been a severe drop in minority, and particularly, African American, admissions. NYU law professor Melissa Murray was the acting dean at the University of California Berkeley in 2016 and 2017 when a state referendum barred the use of race in college admission decisions.

"There was an immediate drop off in the number of African American students that was both a confluence of the change in the admissions policy, but also African American students not wanting to go [to Berkeley] under those conditions," she said. "People don't want to be spotlighted. There is a kind of comfort in numbers, and it was very difficult for a very long time to recruit under those conditions."

Indeed, the situation got so bad, she says, that she had to go to the president of the state university system to get permission to place clusters of African American students in classes, instead of "sprinkling them around," leaving minority students alone to speak their mind when subjects of race were discussed.

Door is left slightly open

Now every school will be in that situation, or so it may seem.

The court did not entirely close the door to racial considerations in college admissions. As Roberts put it, "Nothing in this opinion should be construed as prohibiting universities from considering an applicants discussion of how race

affected his or her life." Nor did the court address the tactic of clustering minority students in classes.

What's more, the court specifically left open the possibility that the nation's military academies, because of their "distinct interests," may be able to continue with their successful affirmative action programs, which have resulted in a very diverse officer corps.

"That issue is so sensitive because it raises the question of national security that the court has backed away from following its own logic," said University of California Berkeley professor Jerome Karabel.

He notes that a similar logic might apply to police forces seeking to recruit minorities so as to ensure that a virtually all white force would not be policing a majority Black town.

For the nation's colleges and universities, however, diversity will no longer be an acceptable rationale for taking race into account.

Broader impact

Thursday's decisions are likely to cause ripples throughout the country, and not just in higher education, but in selective primary and secondary schools like Boston Latin in Massachusetts, Thomas Jefferson high school in Virginia, and Bronx High School of Science in New York.

Ultimately, effects will be felt in every aspect of the nation's economic, educational, and social life--from the Rooney rule that requires a minority applicant be considered in all NFL coach hiring decisions to employment and promotion decisions, DEI programs in schools and workplaces, and much more.

"We're going to be fighting about this for the next 30 years," said Harvard law professor Randall Kennedy.

Edward Blum, who for decades has been a one-man crusader against everything from the landmark 1965 Voting Rights Act to affirmative action in higher education, plans to challenge some corporate boards on racial preference

grounds, and he says he knows of other plans to challenge minority scholarship and fellowship programs.