
*The First of a Two-Part Series
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Panelists

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Introductions & Overview

Navigating Stormy Waters: Anchors, Sails & Maps

<table>
<thead>
<tr>
<th>Segment</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introductions &amp; Overview</td>
<td>10’</td>
</tr>
<tr>
<td>Anchors: A Recap of Legal and Policy Basics from Webinar One</td>
<td>10’</td>
</tr>
<tr>
<td>Winds: Takeaways from SFFA v. Harvard/UNC Oral Arguments</td>
<td>20’</td>
</tr>
<tr>
<td>Maps: Charting Your Course with Strategy Development and Action Steps</td>
<td>20’</td>
</tr>
<tr>
<td>Engagement/Q &amp; A</td>
<td>25’</td>
</tr>
<tr>
<td>Port of Call: Wrap-Up</td>
<td>5’</td>
</tr>
</tbody>
</table>
More than Admission: The Role of the CDO

**Systems Design and Influence**
- Enrollment policy/practice & programs
- Student affairs policy/practice & programs
- Curricular and program offerings

**Communications and Stakeholder Engagement**
- Mission-related DEIJ goals and objectives
- Your IHE story—successes, challenges, future aims

**Strategy Development and Leadership**
- Readiness for decision-day
- Readiness for summer of 2023—planning, engagement, action
Part 1—
Anchors: Legal Realities to Ground You
Over Four Decades: Aligned Supreme Court Precedent

1978: Bakke
- J. Powell
- EBD = Compelling Interest Concept

1980: USED Title VI Aid Regulations

1994: USED Title VI Aid Policy
- Rescinded in 2020, under review

2003: Grutter/Gratz
- Majority
- EBD=
- Compelling Interest
- Strict Scrutiny Framework

2013: Fisher I
- Majority
- Rigor on Inquiry/Evidence re Necessity/Race-Neutral Strategies

2016: Fisher II
- 4-3 Majority
- Emphasis on Evidence
The Theory of Action Behind the Educational Benefits of Diversity Aims

Compositional Diversity
- Numbers focus only in the context of educational aims

Student Experience
- Feelings of welcome, inclusive climate, culture
- Broadened perspectives, new ideas, creativity

Outcomes
- Student success educationally and professionally
- Enriched learning to advance civic engagement
The SFFA Cases: Questions on Appeal

**Both Cases**

Whether the Supreme Court should overrule Grutter v. Bollinger and **hold that institutions of higher education cannot use race as a factor in admissions.**

**Harvard**

Whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.

**UNC**

Whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.
2022 U.S. Supreme Court: The Compositional Shift (vs. 2016) is Stark
## The SFFA Cases: Possible Outcomes

<table>
<thead>
<tr>
<th>Outcome</th>
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</tr>
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<tbody>
<tr>
<td>Harvard &amp; UNC Win</td>
<td>• Harvard/UNC prevail on all substantive issues</td>
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<td>A Split Decision</td>
<td>• Echoes of <em>Grutter/Gratz</em>, SFFA wins one, loses one</td>
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<td>SFFA Wins</td>
<td>• Court decides cases on narrow or procedural grounds—e.g. specific neutral strategy, process issue</td>
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<td>• Court significantly limits precedent but permits consideration of race tied to individual identity/lived experience (vs. assumptions based on racial status)</td>
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</tbody>
</table>
The SFFA Cases: Possible Outcomes

SFFA Wins

- Court significantly limits precedent but permits consideration of race tied to individual identity/lived experience (vs. assumptions based on racial status)

SFFA Wins

- Court fully sides with SFFA and any consideration of race is prohibited
Potential Implications?

- Other Program Design
- Enrollment
- Admissions
- Financial Aid, Scholarships, Recruitment & Outreach Programs
- Student Support Programs & Activities

Expected Reach:
Undergraduate, Graduate and Professional Schools
Selective and Open Admission Institutions
Nine states ban the consideration of race, ethnicity, and sex in public education, employment and contracting. The *exceptions* to these prohibitions in most state bans are if the consideration of any of these factors is:

- *required* by federal law or to qualify for federal funding;
- to comply with a court order existing before the ban; or
- to address limited legally recognized bona fide sex differences.
Federal Law—What’s At Issue

Federal non-discrimination law applies to public IHEs and all IHEs that are recipients of federal funding

- Differential treatment of *individual* applicants based on their race or ethnicity when conferring benefits and opportunities
- The aim is to achieve the educational benefits of diversity for all students, which may justify race-/ethnicity-conscious action

Distinctions in standards of review

- **Race, Ethnicity**
  - Strict Scrutiny

- **Gender, Sex, LGBTQ+**
  - Intermediate/Heightened Scrutiny

- **Most Other Bases**
  - Rational Basis Scrutiny
Race-Conscious vs. Race-Neutral

Race-, Ethnicity-Conscious: 
*Triggers Strict Legal Standards*

- Consideration of individual’s race or ethnicity when conferring an individual benefit or opportunity (facial or in practice)

Race-, Ethnicity-“Neutral”: 
*Doesn’t Trigger Strict Legal Standards*

- No consideration of individual’s race or ethnicity when conferring benefits/opportunities
- Authentic aim other than increasing compositional diversity, but also has that known/welcome effect (e.g., socio-economic access/diversity)
- May target race and ethnicity with an inclusive design (e.g., outreach for effectively communicating same consequential info. to all)
Part 2—
Winds: Takeaways from the SFFA v. Harvard/UNC Oral Arguments
After 5 Hours: Impressions

- You can’t make firm predictions about case outcomes based on oral arguments. They are not necessarily predictive of decisions.

- Court addressed broad range of issues
- Many evident Court concerns about the consideration of race in admissions
- But, Court notably did not focus on key issues it must address if it is to fully overturn 40 years of precedent. E.g. Reliance of the field on Court precedent
Racial Classifications (Status) vs. Holistic Review Consideration (Identity)

“Check the box” associated with race

- “Racial classifications” are the target of SFFA’s advocacy
- Surfaces the concern about making assumptions (stereotypes) about race.

Actual racial identity/experience

- Conceded by SFFA as permissible—typically evident in, e.g., student application essays
Is There Ever an Endpoint?

“We expect that in 25 years...”

Is there a categorical end point?

• Suggestions that Justice O’Connor’s timeline operates like a light switch

The counter: Strict scrutiny provides that limitation

• There’s no categorical end point for all institutions
• Institution-specific data/analysis should be driver [See Solicitor General argument]
Race-Neutral Strategies: When Is Enough Enough?

Ultimately, a highly fact-based judgment

- Institutional mission, context, data projections are key
- Fisher I (2013) provides the current, rigorous framework
- See The Playbook (2d ed. 2019)

What factors should influence decision about viability and sufficiency?

- What sacrifices in overall aims can be required?
- Targeted inquiries regarding squash players and legacies, as illustrative
Should Grutter Be Overruled?
Rhetoric vs. Reality

What are we talking about? I don’t understand. -- Thomas

Court focus: Discrete issues that could suggest reticence to overrule Grutter in entirety

- What do we mean by diversity?
- What are the benefits of diversity?

- Check-the-box vs. holistic
- Timelines
- Race-neutral strategies
- MIA: Reliance
Equity implications of SFFA’s position

- Consider all background factors regarding an applicant except interests/experience associated with race??
- Raises equal protection concerns of a different ilk
Check-in: Points of Clarification
Part 3—
Maps:
Developing Navigation Strategies for Stormy Waters

Setting the Stage for the Months Ahead
Tools and Resources

**College Board Access & Diversity Collaborative Website**

https://professionals.collegeboard.org/higher-ed/access-and-diversity-collaborative

**NACAC, NASFAA: Toward a More Equitable Future**

https://www.nacacnet.org/about/toward-a-more-equitable-future-for-postsecondary-access/

**AAAS Diversity and the Law Website**

https://www(aaas.org)/programs/diversity-and-law
College Board Access & Diversity Collaborative

New Digital Resource contains information on and links to:

- ADC Key Action Guide
- Webinars and Events
- Key Resources for Higher Education
- Court Cases and Analyses

https://collegeboard.org/race-in-admissions
# Meeting the Moment

<table>
<thead>
<tr>
<th>Policy Design &amp; Compliance</th>
<th>Community Engagement &amp; Support</th>
<th>Leadership &amp; Investment</th>
</tr>
</thead>
</table>

This slide highlights the key areas of focus for effectively addressing the moment at hand, which align with the themes of policy, design, compliance, community engagement, and support, as well as leadership and investment.
Key Areas of Focus

1. Clarity on Aims
2. Core Messaging
3. Policy & Practice Evaluation:
   - Inventory
   - Research
4. Inclusive Stakeholder Engagement & Education
5. Process Management
Clarity on Aims

Understand context

- Institutional position with respect to issues before the court
  - Diversity as mission-related interest
  - Prevalence of consideration of race in policies/programs

Establish relevance

- Shared goals and objectives
- Common policy design implications re student diversity
- Community values
Illustrative Core Messaging

- **We will comply**
  - We will comply with the Court’s ruling
  - We will undertake a careful review of the Court’s opinion with respect to policies that may be affected...

- **We are pleased.../disappointed...**
  - We are pleased that the Court recognized... [based on research, institutional experience]
  - We are disappointed that the Court failed to recognize... Our experience is ...

- **Our commitment**
  - Nothing in the Court’s opinion detracts from our commitment...
  - In fact, as we continue to address important DEI issues, here’s what we plan [program, investment, etc.]
Policy and Practice Evaluation

Inventory
- All DEI policies & programs, including public statements
- All policies & programs that involve consideration of race, ethnicity, sex, gender re students

Research
- Institutional research re DEI interests, policy/program impact & gaps, etc.
- External research that may bear on policy/program design

Options Development
- Assessment of policies/programs under current law
- Scenario planning based on prospective changes in the law...
Inclusive Stakeholder Engagement

**Education**

- Clarity re core concepts
- Relevance to mission/aims

**Readiness**

- Implications of what Court decision *could* mean re policy/practice
- Diligence in preparedness & strategic focus around impact
Process Management

**Overall Strategy/Direction**
- One overarching committee/task force to set direction/address big issues
- Research-focused group aligned with this effort?

**Policy Evaluation**
- Clear charge re inventory, aims, design issues
- Possible segmentation around: enrollment, student programs, faculty issues & more

**Communications**
- Development of authentic messaging platform to inform communications by many
- Crisp talking points, particularly in development now, toward decision day
Timeline

Fall/Winter 2022
- Establish working groups
- Beginning campus conversations
- Begin inventory

Winter/Spring 2023
- Inventory and policy options development
- Stakeholder engagement
- Communications planning

Decision Day
- Decisions expected by June 30, 2023
- Could be rendered sooner—spring, 2023?

Summer 2023
- Policy/practice evaluation based on Court opinions
- Decisions on institutional DEI policy/program issues and potential changes implicated by Court decisions
  - Dual focus: Impact and compliance
  - Stakeholder engagement, including plans for fall
Our Current Port of Call: Assess, Strategize, Engage & Wait...
Reflections and Questions