



As the Nation Awaits a Decision in Affirmative Action Cases, Four Key Points Stakeholders Must Consider to Ensure Educational Opportunity for All¹

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On October 31, 2022, the Supreme Court heard oral arguments in two important cases involving race-conscious admissions policies: *Students for Fair Admissions (SFFA) v. University of North Carolina* and *SFFA v. Harvard College*. In each of these cases, SFFA challenges not only whether the universities' policies comport with the Supreme Court's 45-year precedent authorizing affirmative action in admissions, but whether that precedent should be overturned. The challenges have created great turmoil in the higher education community and beyond as the opposition seeks to engender fear on matters well beyond admissions. Unfortunately, this fear is not only stoked by the opposition, but also well-intentioned yet ill-informed allies.

The Lawyers' Committee for Civil Rights Under Law, Asian Americans Advancing Justice | AAJC, and Legal Defense Fund have helped multiracial groups of students and alumni secure a strong voice in the courts and in the court of public opinion. Together, we have defended against attacks by those who wish to turn back the clock on progress, opportunity, and any meaningful effort to address our nation's awful legacy of racial discrimination.

While affirmative action should be preserved based on the law and the Constitution, many misconceptions have reverberated across several stakeholder groups about what will happen if the Court decides to upend precedent. This public letter is intended to help clarify what is at stake, and what is not.

Below we provide "Four Key Points" for stakeholders to keep in mind as the decisions come closer. Once the decisions are released, we plan to share more in-depth analysis and guidance to ensure all lawful efforts are engaged to not only preserve, but to advance racial equity, access, and justice for all students.

Key Point #1: These cases address race-conscious college admissions, nothing else.

SFFA has asked that the Supreme Court no longer permit universities to consider race as a plus factor among several other factors for underrepresented students of color. If the Court agrees with SFFA, universities will need to use other alternative admissions policies that do not directly implicate race ("race-neutral alternatives," i.e., top percentage plans and revisions to normative admission criteria). But negative predictions about other matters not even at issue in these cases are both unnecessary and harmful. These decisions will not impact other university activities, such as support for student affinity groups, anti-bias training for students and faculty, and other critical supports to ensure all students grow and learn. Moreover, suggestions that these decisions will require changes to facially race-neutral admissions policies, or even changes in other contexts not

¹ This letter does not constitute legal advice. Should readers require legal advice, they should seek out legal assistance in their jurisdiction.

at issue in this case (e.g., employment, government contracting, and philanthropic strategy) are not only premature—they are also wrong.

Key Point #2: The upcoming decisions, even if negative, should not prevent students from uplifting their racialized experiences, nor should they prevent colleges and universities from inquiring about such experiences that lend well to their university missions.

Speaking and writing about one's own experiences and identity, whether in an admissions application or in the public square, is a matter of self-determination. Whether it be describing one's lineage as the descendant of once-enslaved people, uplifting positive racialized experiences, or even conveying personal encounters with racial discrimination, such as anti-Asian violence, ensuring students have the freedom to share their own lived experiences in their college applications is important and appropriate. Nothing in the Court's decisions in these cases should prevent that.

In their briefing and during oral argument, SFFA's counsel backed away from any suggestion that students' accounts of their racialized experiences in their applications should be censored if the Court bans affirmative action. The justices seemed *highly skeptical* of such an outcome and SFFA's counsel conceded it was not seeking such relief. It is critical that universities continue to allow, and *encourage*, all students to fully represent their lived experiences in their application.

Key Point #3: The opposition will likely seek to expand the parameters of whatever decision the Court reaches to support its anti-civil rights agenda. Stakeholders concerned about educational opportunity, and equal opportunity more broadly, should not do the opposition's work for them by adding fuel to the fire.

The decisions are expected to be quite complex. Remember, at issue are two separate cases involving two different admissions policies with two different bodies of evidence, presented before two separate Supreme Court panels (Justice Ketanji Brown Jackson recused herself from the Harvard case). The decisions in each case may include several different concurring or dissenting opinions of individual justices, and it may be difficult to determine not only *what* the majority decision is but also *why* justices support that decision. Thus, even a decision that overturns the precedent supporting affirmative action could be based on wide-ranging rationale among justices who agree with the central position but not the reasoning. It is imperative that reviewers be very careful not to expand a bad ruling that could have far-reaching implications.

Some have suggested, for example, that the decision could prohibit certain race-neutral admissions programs, not only in higher education but also in K-12 schools (and although court challenges to these race-neutral measures proceed in specialized/magnet school admissions policies, to date they remain unsuccessful and are not implicated here). But SFFA never challenged race-neutral alternatives; in fact, SFFA advocated for them. Others have suggested that the decision will impact diversity, equity and inclusion (DEI) initiatives in the workplace, and even foundations' efforts to ensure they are granting resources to a competitive, diverse group of grantees. But none of these issues are before the Court.

It is highly unlikely that five justices would agree with an *extremist colorblind* ruling that prohibits any consideration of race under any circumstances, except under remedial programs and/or for national security. Certainly, the opposition will try to use any language in any opinion to thwart advances in racial equity and justice for all students, even dicta in a narrow concurrence.

That type of “spin” is part and parcel of their anti-civil rights agenda. We need not further their agenda. Instead, faithfully and thoughtfully interpreting the decision is the best way forward. We must all separate fact from fiction and holding from dictum.

Key Point #4: No matter how the Court rules, promoting educational opportunity and racial equity will remain a national imperative that must not only be preserved, but advanced, through all legal means. Retreat is not an option.

The perennial mission of civil rights organizations and educational institutions is to make educational opportunities more equitable and to ensure that no student groups are excluded. This was true during the days of de jure segregation before *Brown v. Board of Education*, through *Bakke v. Regents of California* and *Grutter v. Bollinger*, and remains true today. So, regardless how the Supreme Court rules on race-conscious admissions policies, educational institutions have a moral, ethical, and legal duty to promote equal opportunity.

Especially in the case of a negative ruling, higher education institutions must act immediately to ensure all students feel welcomed and valued. Higher education institutions must, for example, deploy substantial and effective outreach to underrepresented communities to ensure declines of students of color do not follow. In a multiracial democracy, all people deserve to be valued, to pursue their dreams, and to advance progress together. Colleges and universities must prioritize their communications work to ensure students, particularly students of color, do not receive any mixed messages.

They must also advance opportunity for all students through all permissible means. As noted above, a decision overturning precedent will likely focus only on the consideration of race in admissions, but not other areas. Accordingly, universities may engage in many policy and practice reforms, such as expanding targeted recruitment to underserved communities, developing robust middle school and high school pipelines, increasing need-based supports, and improving campus climate. Colleges and universities should also partner with multisector stakeholders, including community and civil rights groups and students and alumni of color, to ensure the progress made through affirmative action is not lost.

In addition, consistent with federal civil rights laws, universities must ensure their own policies and practices are not creating artificial barriers excluding certain students. They should examine and revise policies and practices that may hinder admissions, such as limited recruitment in communities of color and high schools in those areas, and consideration of standardized test scores, legacy admissions programs, and course requirements that are irrelevant for entry into certain degree programs. All students must be free from discrimination.

There is no silver bullet to assuring racial equity, access, and justice in higher education, but our nation’s future as a thriving, multiracial democracy for all depends on it.

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For additional information on the points above, please contact eop@lawyerscommittee.org; or nshah@advancingjustice-aajc.org.

For more case information, please visit the [Lawyers’ Committee Affirmative Action page](#); or www.defenddiversity.org.