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MEMORANDUM

July 11, 2023

To: Council on Foundations
Independent Sector

From: Elizabeth Cassady, Elinor Ramey, Khris Johnson-DeLoatch,
Steptoe & Johnson LLP

Re: U.S. Supreme Court’s Decision in *Students for Fair Admissions* (“SFFA”) and
Potential Implications

I. Introduction

This memorandum analyzes the Supreme Court’s June 29, 2023 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College & Students for Fair Admissions, Inc. v. University of North Carolina*, Nos. 20-1199 & 21-707, 2023 WL 4239254 (June 29, 2023) (collectively, “SFFA”), and the potential direct or indirect impact of SFFA on foundations and other nonprofit organizations.¹

The full impact of SFFA has yet to be discovered, and we do not attempt to address every conceivable consequence of the decision. As discussed herein, while the direct legal impact of the Supreme Court’s decision is, in our view, limited to admissions programs in higher education administered by public institutions or by those that receive federal funds, it is conceivable that SFFA’s framework may be applied to other contexts in the future. Thus, we identify certain areas warranting consideration, including race-conscious decisions relating to scholarships, grant-making, fellowships, and the collection of demographic data, in order to assist member organizations in thinking about potential litigation risks and implications should SFFA’s framework be applied more broadly.²

¹ References to nonprofits throughout this memorandum means those nonprofit organizations that do not themselves make college or university admissions decisions.

² This memorandum is provided for informational purposes only and does not constitute legal advice for any particular matter.

II. Analysis of Supreme Court’s Decision in *SFFA*

A. Background

In 2014, Students for Fair Admissions, Inc. brought two lawsuits, one against Harvard College (“Harvard”) and the other against the University of North Carolina (“UNC”). SFFA—a nonprofit group opposed to racial preferences in college admissions—alleged that Harvard and UNC violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964 by, among other things, intentionally discriminating against Asian-American applicants, employing “racial balancing,” and failing to utilize race-neutral alternatives. As a state university, UNC is subject to the Equal Protection Clause. As a private institution, Harvard is not directly subject to the Equal Protection Clause, but because it receives federal financial assistance, it is subject to Title VI. The trial courts in both cases upheld Harvard’s and UNC’s respective race-conscious admissions policies, and the First Circuit affirmed the trial court’s decision in Harvard’s case³.

SFFA appealed and asked the Supreme Court to overrule *Grutter v. Bollinger*⁴, the landmark case in which the Court held that “the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”⁵ In January 2022, the Supreme Court accepted an appeal from the First Circuit in Harvard’s case and agreed to hear SFFA’s case against UNC. The Court heard oral arguments in both cases on October 31, 2022.

On June 29, 2023, the Supreme Court held that the race-conscious admissions programs at Harvard and UNC violate the Equal Protection Clause of the Fourteenth Amendment and Title VI⁶ and, therefore, are unconstitutional.

B. Majority Opinion

Chief Justice John Roberts wrote the majority opinion, which was joined by Justices Alito, Gorsuch, Kavanaugh, Barrett, and Thomas.⁷ The majority carefully avoided explicitly overruling *Grutter*.⁸ Rather, the Court stated that *Grutter* established limits on race-based admissions programs: (i) they must survive a “daunting” strict scrutiny examination, (ii) they

³ The Supreme Court grant certiorari before the Fourth Circuit’s ruling in UNC’s case.

⁴ 539 U.S. 306 (2003).

⁵ *Id.* at 343.

⁶ The Court addressed the application of Title VI in a footnote, stating that “discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI” of the Civil Rights Act of 1964. Justice Gorsuch’s concurring opinion delved more thoroughly into the Title VI analysis.

⁷ Justices Thomas, Gorsuch, and Kavanaugh issued concurring opinions in addition to joining the majority. Justices Sotomayor and Jackson each dissented (the latter only with respect to the UNC case, as she recused herself from the Harvard case), joined by Justice Kagan.

⁸ However, Justice Thomas’ concurring opinion explicitly stated that “*Grutter* is, for all intents and purposes, overruled.” *SFAA*, 2023 WL 4239254, at *75 (Thomas, J., concurring).

must not lead to “illegitimate stereotyping,” and race cannot be used as a negative factor for admission, and (iii) they must have a logical end. The Court found that both Harvard’s and UNC’s admissions programs violate each one of these limitations. “Eliminating racial discrimination means eliminating all of it,” stated the majority opinion.⁹

First, the Court found that Harvard’s and UNC’s admissions programs failed both requisite prongs of a strict scrutiny analysis. That is, they failed to show a compelling state interest and a narrowly tailored or necessary approach to achieve the compelling state interest. According to the Court, the interests identified by Harvard and UNC, which included “training future leaders,” “better educating students through diversity,” “broadening and refining understanding,” and “promoting the robust exchange of ideas,” were “not sufficiently coherent for the purposes of strict scrutiny.”¹⁰ Further, Harvard’s and UNC’s use of racial categories was “overbroad,” “imprecise,” and “underinclusive,” which the Court found to undermine rather than promote the universities’ goals.¹¹

Second, the Court rejected the schools’ contention that race is never used as a negative factor in their admissions programs, stating that college admissions are zero-sum. “A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”¹² In addition, the Court found that race-based admissions programs lead to impermissible stereotyping by assuming that race is linked to viewpoint.

Third, the Court found that Harvard’s and UNC’s admission programs lack a “logical end point,” relying heavily on Justice O’Connor’s statement in *Grutter* that, “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary.”¹³ The Court also emphasized that outright racial balancing is unconstitutional and criticized Harvard’s and UNC’s admissions programs for tracking and focusing on numerical commitments year-over-year – thus “flipping that principle on its head.” While recognizing that only 20 years have passed since *Grutter* was decided, the Court did not agree that race-conscious admissions programs must be allowed to continue for five more years, stating that the 25-year mark reflected only the Court’s view that the use of racial preferences would no longer be necessary at that point. And while the Court recognized a “tradition of giving a degree of deference to a university’s academic decisions,” it stated that such deference is limited and insufficient to justify upholding the universities’ policies under the strict scrutiny standard.

Notably, while the Court found that Harvard’s and UNC’s use of race-conscious admissions programs exceeded the limits of *Grutter*, it did leave open a window: “Nothing in this 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.”¹⁴ The Court cautioned, however, that universities “may not simply establish

⁹ *SFAA*, 2023 WL 4239254, at *12 (majority opinion).

¹⁰ *Id.* at *16 (majority opinion).

¹¹ *Id.* at *17.

¹² *Id.* at *18.

¹³ *Id.* at *15.

¹⁴ *Id.* at *23.

through application essays or other means the regime we hold unlawful today.” The consideration of race must be tied to a student’s individual experiences, “quality of character,” or “unique ability.”

C. Dissenting Opinions

In their dissents, Justices Sotomayor and Jackson criticize the majority’s race-neutral reading of the Fourteenth Amendment and predict that the Court’s decision will only exacerbate racial disparities in higher education so long as race is ignored. Justice Jackson’s dissent in *UNC* states: “[w]ith 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.”¹⁵ Justice Jackson continues, “[t]he takeaway is that those who demand that no one think about race (a classic pink-elephant paradox) refuse to see, much less solve for, the elephant in the room—the race-linked disparities that continue to impede achievement of our great Nation’s full potential.”¹⁶ Justice Sotomayor conducts a detailed discussion of how de facto and de jure racial discrimination in the U.S. necessitates affirmative action before declaring that, “[a]t its core, today’s decision exacerbates segregation and diminishes the inclusivity of our Nation’s institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.”¹⁷

III. Potential Implications of *SFFA* for Nonprofits and Foundations

A. Direct Impact

In our view, the *SFFA* decision does not directly impact foundations or other nonprofit organizations that do not themselves make college or university admissions decisions. The question before the Court was limited to whether race-conscious admissions programs in higher education violate the Equal Protection Clause or Title VI. Before the *SFFA* decision, colleges and universities were permitted a very narrow exception to the general rule that race could not play a part in decisions made by state institutions or organizations accepting federal funds. Specifically, under *Grutter*, they were permitted to “consider race or ethnicity only as a ‘plus’ in a particular applicant’s file,” without “insulat[ing] each category of applicants with certain desired qualifications from competition with all other applicants”¹⁸ The majority opinion in *SFFA* focuses solely on that narrow exception.

Indeed, the Court expressly declined to go beyond the question presented and excluded military academies from its decision, stating that “[t]his opinion [] does not address the . . . issue in light of the potentially distinct interests that military academies may present.” The majority also noted that a “compelling interest” in diversity is different in education than it is in the workplace or in prisons, for example.¹⁹ Nor does the majority opinion address the consideration of race in financial aid decisions. Financial aid was mentioned only once in the

¹⁵ *Id.* at *107 n.103 (Jackson, J., dissenting).

¹⁶ *Id.* at *107.

¹⁷ *Id.* at *95 (Sotomayor, J., dissenting).

¹⁸ *Grutter*, 539 U.S. at 334.

¹⁹ *SFFA*, 2023 WL 4239254, at *70-71 (majority opinion).

majority opinion, and only then in cursory fashion to describe Harvard’s admissions process. The Court implicitly left open the possibility that considerations of race may be acceptable when addressing interests other than diversity in education.

With respect to employment, it is Title VII of the Civil Rights Act of 1964—not Title VI—that is applicable, and the Fourteenth Amendment does not apply to private entities, which would include foundations and most nonprofit organizations. Title VII has a different legal framework, and the term “affirmative action” has a different meaning in the employment context. Following the *SFFA* decision, the Chair of the U.S. Equal Employment Opportunity Commission (“EEOC”), Charlotte Burrow, stated 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. It 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.”²⁰

Despite the lack of a direct legal impact, foundations and other nonprofit organizations should evaluate their relationships with higher education institutions that *SFFA* directly impacts to ensure that conduct inconsistent with *SFFA* will not be imputed to the organization.

B. Potential Indirect, Future Impact

Although not directly applicable to employment, Justice Gorsuch signaled in his concurrence that *SFFA*’s framework might be applied to Title VII in the future, writing, “[i]f this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it ‘unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.’” There is already significant case law relating to employment discrimination, so it is unclear how the framework would apply in an employment context.

The more immediate future impact was seen in a letter the Attorney General of Missouri released the same day the *SFFA* decision was handed down.²¹ While the letter recognizes that *SFFA* concerned admissions programs in higher education, it makes the sweeping statement that “institutions subject to the U.S. Constitution or Title VI must immediately cease their practice of using race-based standards to make decisions about things like admissions, scholarships, programs, and employment.”²² In addition, following the decision, *SFFA*’s president, Edward Blum, stated that he will “continue to bring challenges to other areas of our public policies that are racially discriminatory” and “[t]hese cases mark the

²⁰ EEOC, 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>.

²¹ Andrew Bailey, Missouri Attorney General, News, Attorney General Bailey Warns Universities and Municipalities About Illegal Affirmative Action Policies (June 29, 2023), <https://ago.mo.gov/home/news/2023/06/29/attorney-general-bailey-warns-universities-and-municipalities-about-illegal-affirmative-action-policies>.

²² *Id.*

end of the beginning, not the beginning of the end.”²³ Mr. Blum has identified financial aid and scholarship programs as among the areas on which he is focused.

Given likely future legal challenges and increased scrutiny based on *SFFA*, we address below certain areas of increased litigation risk and areas where courts or legislators may extend *SFFA*'s framework in the future (and this list is by no means exhaustive). Any preemptive changes to existing programs should be done carefully and in consultation with legal counsel based on the specific facts and circumstances and in recognition of the potential costs to the organization's charitable goals and donor intent for the use of funds. It is critical for organizations to continue to monitor legal developments.

1. Scholarship, Grant & Fellowship Programs

A threshold question in assessing the potential application of *SFFA* outside the context of admissions in higher education is whether the organization is a state actor or a recipient of federal financial assistance. As stated above, the Fourteenth Amendment's Equal Protection Clause applies only to state actors, not to private companies. Generally speaking, the more intertwined the organization is with public institutions, public officials, and public funding, the more likely it is that a court will deem the organization to be a state actor. Title VI prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.²⁴ If an organization does not receive any federal financial assistance, it is not subject to Title VI.²⁵ If an organization (i) receives federal funding that is extended to the organization “as a whole” or (ii) is “principally engaged in the business of providing education, health care, housing, social services, or parks and recreation,” then Title VI prohibits discrimination in all operations of the organization.²⁶ If an organization receives federal funds for a specific program and is not “principally engaged in the business of providing education, health care, housing, social services, or parks and recreation,” then Title VI applies to the specific program receiving the federal funds.²⁷

The majority of private foundations and nonprofit organizations are not state actors and do not receive federal financial assistance and would therefore continue to be outside of specific rulings under the Equal Protection Clause and Title VI.

Moreover, even if an organization is subject to Title VI, *SFFA* does not prohibit *any* consideration of race in assessing applicants for admission. Instead, *SFFA* holds that consideration of race is permissible if it is tied to “an applicant's discussion of how race

²³ William McGurn, *Edward Blum, the Man Who Killed Affirmative Action*, WALL ST. J., July 3, 2023, <https://www.wsj.com/articles/the-man-who-killed-affirmative-action-ed-blum-sffa-harvard-court-race-36143530>.

²⁴ See 42 U.S.C. § 2000d; see also “Overview of the Title VI of the Civil Rights Act of 1964,” Civil Rights Division, U.S. Dep't of Justice, <https://www.justice.gov/crt/fcs/TitleVI-Overview#:~:text=Title%20VI%2C%2042%20U.S.C.,activities%20receiving%20federal%20financial%20assistance>.

²⁵ We note that a tax exemption under section 501(c)(3) is not considered federal financial assistance.

²⁶ 42 U.S.C. § 2000d-4a(3)(A).

²⁷ 42 U.S.C. § 2000d-4a(4).

affected his or her life.”²⁸ The window provided by the majority in *SFFA*—while likely to generate litigation over its precise meaning and contours—is important because, should *SFFA*’s framework be extended outside of admission programs in higher education to scholarships, grants, or fellowships, it permits applicants to discuss or describe as part of the application process things specific to their life experience that may intersect with their race. In other words, holistic processes can still be used within the *SFFA* framework. Additionally, *SFFA* did not prohibit the use of race-neutral alternatives such as zip codes and socio-economic status, so long as they are not used as proxies to circumvent the Court’s holding.

2. Section 1981

Another possible area where *SFFA*’s framework could be applied in the future and potentially impact nonprofits and foundations is in the context of 42 U.S.C. 1981. Section 1981 prohibits discrimination on the basis of race in any contractual activities.²⁹ Lower courts have previously looked to the Supreme Court’s Equal Protection Clause cases in analyzing Section 1981 claims, and thus they may look to the Court’s decision in *SFFA* in the future.

At this juncture, the extension of *SFFA* to Section 1981 claims—and more specifically, to the award of grants and fellowships—is, in our view, theoretical and does not necessitate immediate action on the part of nonprofits and foundations. However, we do believe that *SFFA* increases the likelihood of a various legal challenges, including claims brought pursuant to Section 1981.

Further, the fact that Section 1981 claims may be brought to challenge scholarships and grant-making does not mean that claims will ultimately be successful. The claim’s merits will likely depend on the specific facts and circumstances at issue. To succeed on a Section 1981 claim, a plaintiff must prove (1) that the defendant intended to discriminate on the basis of race; (2) that the defendant’s activities concerned the making, performance, modification, termination, conditions, or benefits of a contract; and (3) that the defendant’s actions interfered with the plaintiff’s ability to engage in the activities enumerated in section 1981. In other words, a plaintiff bringing a Section 1981 claim will have to show intentional discrimination, contractual activity (*e.g.*, that the scholarship or grant is a contract), and that the alleged intentional discrimination was the reason the plaintiff did not receive the contract. Should challenges be brought under Section 1981, organizations will have several available defenses, which, again, will likely hinge on the specific facts and circumstances.

3. Collection of Demographic Information

The collection of racial demographic information is not addressed in the *SFFA* opinion, and there is no basis for concluding that an organization’s collection of demographic information on its own runs afoul of the decision.

²⁸ See *supra* note 13.

²⁹ See 41 U.S.C. § 1981(a).

During the oral argument, Justice Jackson inquired about the “checked box” on the Common Application, which UNC uses for its admission. Justice Jackson indicated that the issue was not the collection of the information but instead, how the collected demographic information was being used.³⁰ While the Common Application has no plans to remove the optional race and ethnicity questions that are currently on its application, it will allow its members to suppress that information beginning August 1, 2023.

Should the *SFFA* framework be extended outside the context of admissions in higher education in the future, the key issue will remain *how* demographic information is being used, not the data collection itself. Organizations need to be thoughtful about who has access to demographic data, how it is kept, and for what purpose.

³⁰ Citing *UNC’s Oral Argument Tr. at 110-14.*