

Indiana Health Law Review

Volume XX

2023

Number 1

ARTICLES

GUTTING *GRUTTER*: THE EFFECT OF THE LOSS OF AFFIRMATIVE ACTION ON DIVERSITY AMONG PHYSICIANS

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ABSTRACT

Over the last four decades, race-conscious admission policies have been the subject of heated judicial and social controversy. In 1978, in the case *Regents of the University of California v. Bakke*, the consideration of race was held to be permissible to serve the compelling interest of promoting diversity in higher education. Since then, this issue has come up before the Supreme Court several times.

In October 2022, the Supreme Court of the United States heard oral arguments in two cases—*Students for Fair Admissions v. President & Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*. In the Harvard case, Students for Fair Admissions (“SFFA”), a conservative organization led by Edward Blum, argues that Harvard discriminates against Asian American applicants, thereby violating Title VI of the Civil Rights Act of 1964. In both the Harvard College and University of North Carolina cases, SFFA argues that the Supreme Court should overrule *Grutter v. Bollinger*, a case that cemented the proposition that narrowly tailored admission policies that consider race to achieve diversity are constitutional. On a second level, SFFA argues that both Harvard’s and UNC’s policies are not narrowly tailored due to their rejection of workable race-neutral alternatives.

Part I of this Article provides an overview of past litigation concerning affirmative action policies. Part II discusses the two cases *Students for Fair Admissions v. President & Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina* that are up for consideration before the Supreme Court. Part III discusses the importance of diversity in the medical workforce, and the potential impact of the SFFA lawsuits on medical practice. Part IV discusses arguments that may become important in these cases, potential outcomes of this litigation, and what the future of higher education looks like if

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race is prohibited from being considered in university admissions.

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INTRODUCTION

In 1978, a polarizing question appeared before the Supreme Court in *Regents of the University of California v. Bakke*—are universities permitted to consider race as a factor in admissions? Justice Powell’s controlling opinion found that it could be constitutionally permissible *if* serving the compelling interest of promoting diversity in higher education. Since this decision, over the last four decades, race-conscious admissions policies have been the subject of social, political, and judicial controversy, and have raised questions about the scope of the Fourteenth Amendment. The admissions policies have also been criticized as sanctions of “reverse-discrimination,” a claim recently made by Asian-American students in relation to the Students for Fair Admissions v. President & Fellows of Harvard College.

On January 24, 2022, the Supreme Court agreed to hear challenges to affirmative action policies in college admissions at Harvard University and at the University of North Carolina (“UNC”). The cases are *Students for Fair Admissions v. President & Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina* were argued on October 31, 2022. Students for Fair Admissions (“SFFA”) is an organization led by Edward Blum, a conservative activist who also initiated the litigation in *Shelby County v. Holder* and *Fisher v. University of Texas II*.¹ While the Court has repeatedly upheld admissions programs similar to the ones being challenged in this lawsuit (as recently as 2016), these cases may come out differently due to the conservative supermajority of Justices that will be hearing these cases.

This Article will discuss the potential impact of these cases on affirmative action policies of universities and will examine how this may affect the practice of medicine. Part I will provide a brief overview of affirmative action jurisprudence to situate this case within a long history of affirmative action litigation. Part II will discuss the two cases being litigated by SFFA. Part III will expand upon the importance of diversity in the medical workforce and describe

1. Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He’s Taking On Harvard*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html> [<https://perma.cc/K66Z-QE47>].

how affirmative action policies promote diversity among physicians. Part IV will discuss the possible outcomes of this litigation and what the path forward looks like if the Court decides to prohibit race as a consideration in higher education.

I. A BRIEF HISTORY OF THE LITIGATION SURROUNDING AFFIRMATIVE ACTION

The affirmative action debate has continued across the United States for decades, and the Supreme Court has ruled on several cases that have shaped current practices on race-based admissions. The first case was *Regents of University of California v. Bakke*, decided in 1978, concerned a White man who alleged that he had been denied admission to the University of California School of Medicine at Davis due to the school's consideration of race in the admissions process.² The Court found that the use of race in school admissions would trigger the strict scrutiny standard of review, which warranted a showing that the government had a compelling interest and that the means chosen were narrowly tailored to achieve that interest.³ In *Bakke*, the Medical School's special admissions program was organized so that underrepresented minority applicants were considered in a separate pool from other applicants,⁴ and the two different pools had different admissions criteria. Also, the school had a specific racial quota (16 of 100 students in each class were allotted to underrepresented minority applicants).⁵ Justice Powell's opinion upheld the use of race as a consideration in higher education admissions generally but found that specified quotas were unconstitutional.

In 2003, the Supreme Court reaffirmed the holding in *Bakke* in *Grutter v. Bollinger*. In which the Court upheld the University of Michigan Law School's admission policy that focused on students' academic abilities, flexibly assessed their experiences and application materials, and looked at "soft variables" to ensure a critical mass of students from underrepresented minority groups.⁶ On the same day, the Supreme Court also decided *Gratz v. Bollinger*, in which it found that the University of Michigan's undergraduate admission policy—that use a system that awarded points to applicants from racial and ethnic minorities—was unconstitutional due to its lack of individualized assessment.⁷

In *Fisher v. University of Texas at Austin*, which came up twice before the Supreme Court, in 2013 ("*Fisher I*") and 2016 ("*Fisher II*"), a White woman challenged the University of Texas' admission policies, which dictated that 75% of the freshman class be allocated to students from the "Texas' Top Ten Percent Program while the remaining 25% would be admitted taking into account students' "Personal Achievement Index" that considered their race among other

2. *Regents of University of California v. Bakke*, 438 U.S. 265, 276 (1978).

3. *Id.* at 290-91.

4. *Id.* at 274. (identifying "minority groups" as "Blacks, Chicanos, Asians, and American Indians" (internal quotations omitted)).

5. *Id.* at 274-76.

6. *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).

7. *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003).

factors.”⁸ Here, Abigail Fisher—the plaintiff—was not among the top ten percent of her high school class and alleged that she was rejected because of her race.⁹ In *Fisher II*, the Supreme Court applied strict scrutiny and found that courts also must consider, in their analysis of narrow tailoring, whether universities have other race-neutral alternatives available.¹⁰ On these facts, the Supreme Court found that the University here had adequately demonstrated that race-neutral alternatives would not achieve their compelling interest in diversity.¹¹

II. THE STUDENTS FOR FAIR ADMISSIONS LITIGATION

The two cases at hand, *Students for Fair Admissions v. President & Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, were considered by the Supreme Court at three consecutive conferences in 2022 before review was granted.¹² The admission policies followed by *Harvard* and *UNC* have similarities and differences.

In Harvard’s first-read of the thousands of undergraduate applications it receives, it assesses applicants in four areas—academic, extracurricular, athletic, and personal.¹³ While Harvard held that race does not inform a student’s personal score, experiences tied to an applicant’s race did.¹⁴ In its application process, Harvard also uses a system of “tips,” or plus factors that are considered during the ratings and committee review processes.¹⁵ These tips include the consideration of race, and tips are also given to athletes, legacy applicants, dean’s interest list applicants, and children of faculty or staff (ALDCs).¹⁶

The University of North Carolina’s policy differs slightly from that of Harvard’s. UNC uses a list of forty criteria, one of which is race, which may be considered at any stage of the admissions process.¹⁷ Readers assign a numerical rating for some of these categories, but the scores are never added together, and while race, in addition to other criteria, may be awarded a “plus,” it is not assigned a numerical value, nor does it result in admission.¹⁸

8. *Fisher v. University of Texas*, 570 U.S. 297, 305-07 (2013).

9. *Id.*

10. *Fisher v. University of Texas*, 579 U.S. 365, 365 (2016).

11. *Id.*

12. Amy Howe, *Court Will Hear Challenges to Affirmative Action at Harvard and University of North Carolina*, SCOTUS BLOG (Jan 24, 2022, 11:44 AM), <https://www.scotusblog.com/2022/01/court-will-hear-challenges-to-affirmative-action-at-harvard-and-university-of-north-carolina/> [<https://perma.cc/JM3G-JGVA>].

13. Brief for Respondent at 7, *Students for Fair Admissions v. President & Fellows of Harvard College*, 142 S. Ct. 895 (2022).

14. *Id.* at 8.

15. *Id.* at 30.

16. *Id.*

17. Brief for Respondent at 9, *Students for Fair Admissions v. University of North Carolina* (2022) (No. 21-707).

18. *Id.* at 9-11.

In both cases, SFFA asks whether the Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions.¹⁹ SFFA also asks whether there is a violation of the U.S. Constitution due to improper compliance with the Equal Protection Clause, and Title VI of the Civil Rights Act of 1964.²⁰

A. Should Grutter v. Bollinger be Overruled?

To fully understand what *Grutter* accomplished, a deeper analysis of the *Bakke* case is warranted. In *Bakke*, Davis' special admissions program that considered race purported to serve four purposes: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."²¹

As law professor Guido Calabresi identified, *Bakke* involved a clash between two conceptions of egalitarianism—one that implicated the meritocratic notion of opportunity regardless of race, and the other that was built on the idea of reparation because of society's past discrimination.²² This contradiction was reflected by the Court. On one hand, four Justices voted to invalidate the Davis affirmative action program under Title VI of the 1964 Civil Rights Act (and did not reach the Constitution).²³ On the other hand, four Justices voted to uphold the affirmative action program, including for remedial reasons, and declared the Davis admissions program to be constitutional on the basis of the Equal Protection Clause of the Fourteenth Amendment.²⁴ Justice Powell, who provided the swing vote, split the difference between these two factions, finding that Davis' program was impermissible under both Title VI and the Equal Protection Clause, while refusing to invalidate affirmative action programs generally.

Justice Stevens' authored the opinion, joined by Chief Justice Burger and Justices Stewart and Rehnquist, which held that the dispute at hand did not require the consideration of constitutional questions. Instead, the dispute can be settled by considering Title VI, which he held was independent from the Equal Protection Clause and consisted of "language and emphasis in addition to that found in the Constitution."²⁵ Upon reviewing the legislative history of the Civil Rights Act of 1964, Justice Stevens found that there was a distinct statutory

19. See Brief for Petitioner, *Students for Fair Admissions v. President & Fellows of Harvard College* (2022) (No. 20-1199); see also Brief for Petitioner, *Students for Fair Admissions v. University of North Carolina* (2022) (No. 21-707).

20. *Id.* at 71.

21. *Bakke*, 438 U.S. at 306.

22. Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. UNIV. L. REV. 427, 427-28 (1979).

23. See *Bakke*, 438 U.S. at 412-21 (Stevens, J., concurring in part).

24. *Id.* at 375-76 (Brennan, J., concurring in part).

25. *Id.* at 416 (Stevens, J., concurring in part).

prohibition on the exclusion of individuals from federally funded programs because of their race.²⁶

Justice Brennan's opinion, joined by Justices White, Marshall and Blackmun, expressed a disagreement with Justice Stevens' reading of Title VI and found that it was coextensive with the Equal Protection Clause and would permit the use of race in accord with the Fourteenth Amendment.²⁷ Justice Steven's opinion then considered how Title VI and the Equal Protection Clause allowed for the remedial use of race-conscious measures:

“[A] reading of Title VI as prohibiting all action predicated upon race which adversely affects any individual would require recipients guilty of discrimination to await the imposition of such remedies by the Executive Branch. Indeed, such an interpretation of Title VI would prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements. This would be a remarkable reading of a statute designed to eliminate constitutional violations, especially in light of judicial decisions holding that under certain circumstances the remedial use of racial criteria is not only permissible but is constitutionally required to eradicate constitutional violations.”²⁸

This reading was substantiated by the Justices' reading of regulations adopted by the Department of Health, Education, and Welfare.²⁹ Justice Brennan next turned to whether a strict scrutiny standard of review should be adopted to review racial classifications serving remedial purposes, and instead followed an intermediate scrutiny standard used for sex discrimination challenges thereby upholding the Davis program as constitutional.³⁰

Justice Powell agreed with the Brennan group that Title VI had no independent force and only prohibited racial classifications that would violate the Equal Protection Clause.³¹ Justice Powell, however, believed that the strict scrutiny standard of review should be applied.³² In his controlling opinion, Justice Powell found that the first three interests articulated by UC Davis would not pass strict scrutiny for different reasons. He opposed the idea that race-conscious admissions were constitutional to meet the interest of “countering societal discrimination.” He found that such programs did not—

“ . . . justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have

26. *Id.* at 418.

27. *Id.* at 325 (Brennan, J., concurring in part).

28. *Id.* at 336-37.

29. *Id.* at 343.

30. *Id.* at 357-62.

31. *Id.* at 287.

32. *Id.* at 291.

suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.”³³

Justice Powell, however, found that achieving diversity within the student body was “a constitutionally permissible goal for an institution of higher education.”³⁴ His reasoning centered on “academic freedom” that “though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”³⁵

In driving home, the academic importance of diversity, Justice Powell held that— “[p]hysicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”³⁶

Despite the presence of a compelling interest, Justice Powell concluded that the Davis program was not narrowly tailored because it failed the “less burdensome means” requirement by denying Bakke his right to individualized consideration.³⁷ In his opinion, Justice Powell lauded Harvard College’s admission program that, without using set target quotas, prioritized creating diversity in the student body following the principle that “[a] farm boy from Idaho [could] bring something to Harvard College that a Bostonian [couldn’t] offer.” The decision in *Bakke* was so severely fractured that it left lower courts wondering how to apply Justice Powell’s ruling.³⁸

When *Grutter v. Bollinger* came before the Supreme Court in 2003, the diversity rationale adopted by Justice Powell in *Bakke* was espoused in a 5-4 majority that left no uncertainty.³⁹ Here, it became clear that a non-remedial justification for reverse discrimination by a public institution was possible.⁴⁰ In its reasoning, “the Court adopted an expansive vision of racial diversity through a ‘common good’ approach in characterizing the social goods provided by racial diversity.”⁴¹ Justice O’Connor’s opinion considered a variety of interests met by

33. *Id.* at 310.

34. *Id.* at 311.

35. *Id.* at 312.

36. *Id.* at 314.

37. *See id.* at 318-20.

38. *See Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“Justice Powell’s argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case”).

39. *Grutter*, 539 U.S. at 325 (“today we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions”).

40. *Id.* at 338-40.

41. Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in*

racial diversity including benefits related to cross-racial understanding, enhanced learning outcomes and preparation for a diverse workforce and society, enhanced business-related skills developed through exposure to diverse cultures, and cultivating leadership with legitimacy in the eyes of citizenry.⁴² A crucial aspect of Justice O'Connor's opinion in *Grutter* was its emphasis on reviewing a university's admission decisions with deference—

“Our scrutiny of the interest asserted by the Law School is no less strict for considering complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.”⁴³

In her opinion, however, Justice O'Connor cautioned that the narrow tailoring component of the strict scrutiny analysis “require[d] that a race-conscious admissions program not unduly harm members of any racial group.”⁴⁴

Justice O'Connor provided the swing vote in *Grutter*, and when she retired, the main swing vote on the Court was by Justice Anthony Kennedy, who in *Fisher II*, switched sides (from his dissenting vote in *Grutter*), and voted to uphold the consideration of race.⁴⁵ In this opinion, Justice Kennedy provided “controlling principles” that guided his review, and found that a university had to articulate “precise and concrete goals” that were “sufficiently-measurable” to survive strict scrutiny; in addition to providing a reasoned and principled decision for pursuing those goals.⁴⁶

The first question raised in the Family and Social Services Administration (“FSSA”) litigation is whether the Court should overrule *Grutter v. Bollinger* and largely do away with the diversity rationale. Before delving into the arguments made by the parties, it is worth considering the criticisms that the diversity rationale has garnered from both the left and right sides of the ideological spectrum.

Many scholars and commentators framed Justice Powell's decision as “judicial statesmanship” since it “neither legitimized racial quotas nor put down affirmative action programs.”⁴⁷ The same sentiment was echoed by then-Professor Robert Bork who found that Justice Powell's opinion interpreted the Equal

Community Schools v. Seattle School District No. 1, 88 BOS. UNIV. L. REV. 937, 948 (2008).

42. *Grutter*, 539 U.S. at 330.

43. *Id.* at 328.

44. *Id.* at 341.

45. See Noah Feldman, *This Supreme Court Won't Uphold College Affirmative Action*, BLOOMBERG (Jan. 24, 2022), <https://www.bloomberg.com/opinion/articles/2022-01-24/affirmative-action-in-college-admissions-faces-supreme-court-curbs> [https://perma.cc/XY92-MNRR].

46. See *Fisher II*, 579 U.S. at 365.

47. Linda Greenhouse, *Bell Hails Decision*, N.Y. TIMES (June 29, 1978), <https://www.nytimes.com/1978/06/29/archives/bell-hails-decision-calls-ruling-a-great-gain-plaintiff-is-pleased.html> [https://perma.cc/3HHY-K6MZ].

Protection Clause as allowing some but not too much reverse discrimination.⁴⁸

Ever since Justice Powell's opinion in *Bakke* was submitted, the intellectual foundation of the diversity rationale has been in question. Professor Calabresi referred to Justice Powell's opinion as a "subterfuge."⁴⁹ He argued that the appropriate degree of diversity was left to be decided by universities, thereby allowing them to "work out [their] own quiet compromise between our deeply held, but irreconcilable ideals."⁵⁰ Calabresi discussed the problems with this subterfuge—"the standard universities are to apply— diversity— has been sufficiently used by them in the past to disfavor disadvantaged groups that it should give one pause as to its suitability as the basis for the 'acceptable,' if unspoken and unreviewable, decisions of today."⁵¹

Reflections of Calabresi's critique that decisions about diversity were deferred to universities were echoed by conservatives, such as Brian T. Fitzpatrick who, following the decisions in *Grutter* and *Gratz*, made a bold claim that "the University of Michigan lied to the Supreme Court when it claimed it discriminates to obtain the educational benefits of diversity."⁵² He substantiated this claim by arguing that the University's scheme was underinclusive, and that it was insincere because while it purported to create a more lively and enlightened classroom space, it adopted measures to censor certain classroom conversations.⁵³ In a similar vein, Law Professor Jed Rubenfeld argued that the universities were not actually pursuing actual diversity, which is why there were no preferences for fundamentalist Christians and neo-Nazis.⁵⁴

Another robust body of critique comes from scholars who believe that the diversity rationale was a weaker justification for race-conscious admission policies than looking at affirmative action as a method of remediation for America's history of racism. Law Professor and scholar Melissa Murray has written how diversity— as the primary rationale for affirmative action— is unfaithful to the remedial rationales that animated such policies in the first place, and fails to engage deeply with the question of how affirmative action can be a remedy for state-sanctioned oppression.⁵⁵ In particular, she takes issue with the fact that "thinking about diversity in terms of what beneficiaries might contribute makes the benefits of affirmative action contingent and conditional."⁵⁶ Law Professor Randall Kennedy also discusses how the Supreme Court has limited the discourse around reparations-based affirmative action and rendered certain

48. Robert H. Bork, *The Unpersuasive Bakke Decision*, WALL ST. J. 1, 8 (July 21, 1978).

49. Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. UNIV. L. REV. 427, 430 (1979).

50. *Id.* at 431.

51. *Id.*

52. Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. L. J. & PUB. POL'Y 385, 386 (2003).

53. *Id.* at 389-97.

54. Jed Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427, 471 (1997).

55. Melissa Murray, *That Affirmative Action Ruling Was Good. Its Rationale, Terrible*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/opinion/harvard-affirmative-action.html> [<https://perma.cc/UF7F-WMUV>].

56. *Id.*

histories as irrelevant—

You know, in the latest Supreme Court affirmative action decision, *Fisher v. University of Texas at Austin*, the majority opinion never even cites *Sweatt v. Painter*. . . In *Sweatt*, a black man applies to be a student at the University of Texas Law School. The authorities reject him solely because he is black. The dean says, You're qualified, you're a good student, but you're black so you're ineligible. The Supreme Court in 1950 orders that he be admitted to the all-white University of Texas Law School. It says that Texas could exclude him on racial grounds if the state could offer to him a separate but equal law school for blacks. But since the state had no equal law school for blacks at hand, *Sweatt* was entitled to attend the white one.⁵⁷

Against this background of various criticisms levied against the diversity rationale, it is evident that the diversity rationale has been controversial since Justice Powell articulated the rationale in *Bakke*.

The brief for SFFA argues in support of overruling *Grutter* on three levels: that *Grutter* is grievously wrong, has spawned negative consequences, and generated no legitimate reliance interests.⁵⁸ A large part of the Petitioner's first argument is that *Grutter's* diversity rationale flouts equal-protection principles.⁵⁹ The Petitioner's brief makes arguments about how *Grutter* uses "race as proxy for views" and how such stereotyping doesn't have a place in today's society where racial lines are becoming more blurred.⁶⁰ Petitioners also objected to Justice O'Connor's deference to universities' experience.⁶¹

One of the Petitioners' main arguments in *SFFA* is that *Grutter* has led to consequences such as discrimination against Asian Americans.⁶² In the amicus brief of the Pacific Legal Foundation in support of the Petitioner, the amici argue that this discrimination exacerbates a long history of discrimination against Asian Americans.⁶³ These allegations were denied by Harvard in their brief and were not accepted by the lower courts.⁶⁴ The First Circuit held that Harvard had identified, in compliance with guidance in *Fisher II*, specific and measurable goals it sought to achieve by considering race. It found that Harvard had considered the Khurana Committee's report that set out various goals including training future leaders, allowing productive participation in a pluralistic society,

57. Randall L. Kennedy & Andra Gillespie, *Racial Preferences Are Fair—and They Work*, BOS. REV. (Oct. 9, 2013), <https://bostonreview.net/articles/gillespie-interview-randall-kennedy/> [<https://perma.cc/PW9J-B2U6>].

58. See SFFA Brief, *supra* note 19.

59. *Id.* at 50-60.

60. *Id.* at 52-53.

61. *Id.* at 55.

62. *Id.* at 72.

63. Brief of Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioner, *President & Fellows of Harvard College*, 142 S. Ct. 895 (2022) (No. 20-1199).

64. Harvard Brief, *supra* note 13, at 42.

and producing knowledge stemming from diverse outlooks.⁶⁵

B. Did the Admission Policies Meet the Strict Scrutiny Standard?

In addition to arguing that *Grutter*'s diversity rationale should be overruled, SFFA simultaneously argues that if not, the Court should still consider the argument that Harvard's policies did not pass strict scrutiny review because they were not narrowly tailored enough to meet the interest of diversity.

It should be reiterated that Justice O'Connor's opinion in *Grutter* stated that any admissions program that "unduly harmed" members of any racial group would fail to survive strict scrutiny.⁶⁶ While the admissions policy in *Grutter* was upheld, the policy in *Gratz v. Bollinger* was not because the policy awarded students from underrepresented minorities twenty points, making race a decisive factor for almost every candidate from this background, thereby failing to satisfy strict scrutiny.⁶⁷ In *Fisher I*, the Supreme Court summarized that an admissions program could not be narrowly tailored, if it involved racial balancing or quotas, and if it uses race as a mechanical plus factor.⁶⁸ In *Fisher II*, an addition to the *Bakke* criteria was not only that the University needed to provide evidence that it undertook "serious, good faith consideration of workable race-neutral alternatives" before resorting to its choice of a race-conscious plan, but that those alternatives either did not suffice to meet its approved educational goals or would have required some sacrifice of its "reputation for academic excellence."⁶⁹

SFFA argued that Harvard penalizes Asian Americans, and in this process, race is used as a "minus factor." In support of this argument, SFFA cited evidence compiled by the Harvard Office of Institutional Research ("OIR") that Asians were disadvantaged in the admissions process due to Harvard's "personal rating" system and pointed to expert testimony at trial that Harvard admitted Asian Americans at lower rates than Whites despite higher academic, extra-curricular, and alumni-interview scores.⁷⁰

SFFA alleged that Harvard engaged in racial balancing, and pointed to the fact that the percentages of racial groups in Harvard's class by race consistently fell within a narrow range as evidence of this, in addition to its use of "one-pagers" that displayed the racial makeup of a class.⁷¹ SFFA also argued that Harvard uses race as a mechanical plus factor, and that it failed to consider race-neutral alternatives such as "Simulation D"—an approach that would eliminate the consideration of race, eliminate tips for ALDCs, and increase the tip for low-

65. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 980 F.3d 157, 186 (1st Cir. 2020).

66. *Grutter*, 539 U.S. at 341.

67. *Gratz*, 539 U.S. at 275.

68. *Fisher I*, 570 U.S. at 311.

69. *Fisher II*, 579 U.S. at 385.

70. See SFFA Brief, *supra* note 19, at 25.

71. *Id.* at 48.

income students.⁷² In affirming the district court's opinion, the First Circuit went step-by-step in challenging SFFA's arguments. The First Circuit also concluded that SFFA failed to demonstrate discrimination towards Asian Americans.⁷³

An amicus brief in favor of SFFA, filed by a group of economists, found that based on data made available by Harvard, "Asian Americans should do better than Whites on the overall rating, but they do worse. African Americans and Hispanics would be expected to do much worse than Whites (and Asian Americans) on the overall rating, but they do much better."⁷⁴ This brief, in addition to reporting findings of discrimination against Asian Americans, took issue with the reasoning of the First Circuit, finding that it "misunderstood basic statistical principles for when an explanatory variable should be included or excluded from a regression model" and that its hypothesis regarding white privilege was dependent on evidence that was not in the record and contradicted the Court's own conclusions.⁷⁵

With respect to UNC, SFFA based the main thrust of its argument on alleging that UNC had workable race-neutral alternatives, including giving preference to socioeconomically disadvantaged students.⁷⁶ The District Court had argued that this suggested plan would lead to a drop in underrepresented minority admissions and SAT scores, but SFFA argued that if strict scrutiny had any teeth, "the tiny dips" identified by the District Court were not enough to justify the use of explicit racial classifications.⁷⁷

III. THE IMPORTANCE OF DIVERSITY IN THE MEDICAL PROFESSION

In the Harvard case oral arguments, Justice Kagan asked Mr. Norris, Counsel for the Petitioner: "If you're a hospital and you serve a diverse group of patients, is it super-important to you to have a diverse set of doctors?"⁷⁸ Mr. Norris responded saying that he did not know about the evidence around diversity of doctors and patients or anything about the medical field.⁷⁹ This section seeks to shed some light on the benefits of diversity in the medical field.

A statement by the American Council on Education ("ACE") recognizes some as furthering of diversity, which include enrichment of the educational experience, promotion of personal growth by encouraging critical thinking, strengthening of communities, and enhancing competitiveness.⁸⁰ Similar to

72. *Id.* at 33.

73. *See President & Fellows of Harvard College*, 980 F.3d at 202.

74. Brief of Economists as Amici Curiae Supporting Petitioners, *President & Fellows of Harvard College*, 142 S. Ct. 895 (2022) (No. 20-1199).

75. *Id.* at 18.

76. SFFA Brief, *supra* note 19, at 83-86.

77. *Id.* at 84.

78. Transcript of Oral Argument at 27, *President & Fellows of Harvard College* (2022) (No. 20-1199).

79. *Id.*

80. *On the Importance of Diversity in Higher Education*, AM. COUNCIL EDUC. (June 2012),

Justice O'Connor's description of diversity as furthering "the common good,"⁸¹ an analysis of the benefits of diversity in the medical profession show results beyond those that have been identified.

Diversity within the medical profession has special significance— due to the nature of the service that medical personnel provide to society— it is important that the workforce reflects the range of patients they serve.⁸² Diversity can ensure that providers understand the unique health issues their patients face and can recognize the roles their racial, ethnic, gender, and class backgrounds play in affecting their health.⁸³ This is particularly crucial because health disparities fall along racial and class lines, and a diverse and culturally competent workforce can respond to the cultural needs of their patients as well as the health needs shaped by their culture.⁸⁴ In contrast, the lack of a diverse workforce can lead to miscommunication between patients and their providers and to limited perspectives when providing care and support to a diverse population of patients.⁸⁵

Evidence suggests that a diverse medical workforce is associated with improved health outcomes, due in part to cultural competency and promotion of a relationship of trust. For instance, a study on hospital births in Florida between the years 1992 and 2015 found that there was an association between newborn infant and physician racial concordance.⁸⁶ There was reduced infant mortality for Black newborn infants, such that the mortality rates for Black babies were 0.169 when provided care by Black physicians versus 0.318 for those provided care by White physicians.⁸⁷

Studies have also found that minority patients are more likely to choose an under-represented minority ("URM") physician, and experience more satisfaction regarding care when it is provided by someone from a URM background.⁸⁸ In the

<https://www.acenet.edu/Documents/BoardDiversityStatement-June2012.pdf> [<https://perma.cc/62Y3-JEDV>].

81. See Claire Andre & Manuel Velasquez, *The Common Good*, 5 ISSUES ETHICS 1, 2 (1992).

82. *The Importance of Diversity in Health Care: Medical Professionals Weigh In*, ST. GEORGE'S UNIV. (Aug. 19, 2021), <https://www.sgu.edu/blog/medical/pros-discuss-the-importance-of-diversity-in-health-care/> [<https://perma.cc/SL6T-U636>].

83. *Id.*

84. See *Diversity in Healthcare and the Importance of Representation*, UNIV. ST. AUGUSTINE HEALTH SERVS. (Mar. 2021), <https://www.usa.edu/blog/diversity-in-healthcare/> [<https://perma.cc/2HC7-MTDE>].

85. *The Importance of Diversity in Healthcare & How to Promote It*, PROVO. COLL. (June 1, 2022), <https://www.provocollege.edu/blog/the-importance-of-diversity-in-healthcare-how-to-promote-it/> [<https://perma.cc/2X25-YHFJ>].

86. Brad N. Greenwood et al., *Physician–Patient Racial Concordance and Disparities in Birthing Mortality for Newborns*, 117 PROC. NATL. ACAD. SCI. 21194, 21194 (2020).

87. *Id.* at 21196.

88. See generally IN THE NATION'S COMPELLING INTEREST: ENSURING DIVERSITY IN THE HEALTH-CARE WORKFORCE (Brian D. Smedley et al., eds., 2004). See also Lisa Cooper et al., *Patient-Centered Communication, Ratings Of Care, And Concordance Of Patient And Physician*

same vein, a 2018 study found that African-American men were more likely to participate in preventive services if seen by a Black physician.⁸⁹ Additionally, this research also supported the fact that Black doctors, compared with non-Black doctors, could reduce cardiovascular mortality among Black men by 16 deaths per 100,000 per year.⁹⁰

In addition to benefits directly related to health outcomes, there are other benefits of a diverse medical workforce. Data have shown that URM physicians are more likely to care for minority and vulnerable patients,⁹¹ including those who are on Medicaid and from lower socio-economic classes.⁹² Some studies have also indicated that minority doctors, particularly Hispanic doctors, have higher career satisfaction and lower perceived stress when compared to their white peers, which may be associated with lower risks of burnout.⁹³

Despite the benefits of a diverse medical workforce, data published by the Association of American Medical Colleges (“AAMC”) showed that, in 2018, among active physicians, 56.2% identified as White, 17.1% identified as Asian, 5.8% identified as Hispanic, and only 5.0% identified as Black or African American.⁹⁴ In 2014, in New York City where 53% of the population was African American or Hispanic, data showed that only 12% of practicing physicians were from URMs.⁹⁵ This data highlights the disappointingly low numbers of Black and Hispanic medical professionals in the workforce.

These data points do not seem surprising considering the number of URM matriculants to medical school. In 2018-2019, of accepted applicants, half were White, 22.0% were Asian, 7.1% were Black or African American, and 6.2% were Hispanic, Latino, or of Spanish Origin.⁹⁶ While there has been a reported increase, observed in 2018, in the number of women and people of diverse racial

Race, 139 ANNALS INTERNAL MED. 907, 907 (2003).

89. Marcella Aslan et al., *Does Diversity Matter for Health? Experimental Evidence from Oakland* 29, NAT’L BUREAU OF ECON. RSCH., (Working Paper No. 24787) (2018).

90. *Id.* at 8.

91. Peter B. Bach, *Primary Care Physicians Who Treat Blacks and Whites*, 351 NEW ENG. J. MED. 575 (2004); see also Sarah E. Brotherton et al., *Minority and Nonminority Pediatricians’ Care of Minority and Poor Children*, 154 ARCHIVES PEDIATRICS & ADOLESCENT MED. 912, 912 (2000).

92. Lyndonna M. Marrast, *Minority Physicians’ Role in the Care of Underserved Patients: Diversifying the Physician Workforce May Be Key in Addressing Health Disparities*, 174 JAMA INTERN. MED. 289, 289 (2014).

93. M. Maria Glymour et al., *Physician Race and Ethnicity, Professional Satisfaction, and Work-Related Stress: Results from the Physician Work life Study*, 96 J. NAT’L MED. ASS’N 1283, 1288 (2004).

94. *Diversity in Medicine: Facts and Figures 2019*, ASS’N AM. MED. CS. (July 1, 2019), <https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018> [<https://perma.cc/D5G8-EELZ>].

95. Said Ibrahim, *Physician Workforce Diversity and Health Equity: It is Time for Synergy in Missions!*, 3:1 HEALTH EQUITY 601, 601 (2019).

96. *Diversity in Medicine: Facts and Figures 2019*, *supra* note 94.

groups applying to medical school,⁹⁷ in the longer-term, the reality is that the number of URM medical students has been declining.⁹⁸ For example, an AAMC report showed that there were fewer Black male medical students in 2014 than there were in 1978.⁹⁹

The declining rates of URM students in the medical field can be explained by many factors. Unfortunately, the reality remains that students from minority backgrounds must overcome obstacles through their journeys to becoming doctors. They might experience barriers at every step including gaining admissions into and pursuing undergraduate degrees, during the application process to medical school itself, throughout the duration of attending medical school, as well as barriers caused by the prohibitive cost of attendance.¹⁰⁰

If the Court prohibits the consideration of race in university admissions, this may make the entry of students of color much harder at the admissions stage for undergraduate degrees and medical schools independently. A smaller pool of racially diverse students at the undergraduate level would also impact the number of URMs who go on to join the medical profession. This was confirmed in a study published in 2022 that compared twenty-one public medical schools in eight states with affirmative action bans— compared to thirty-two medical schools in twenty four states without bans between 1985 and 2019.¹⁰¹ This study found that within five years of the implementation of these bans, URM enrollment declined 4.8% in the banned schools, as compared to schools in which affirmative action was not banned.¹⁰²

Another study published in 2015 examined the impact of affirmative action bans in six states on the matriculation rates of historically underrepresented students of color in public medical schools.¹⁰³ It concluded that affirmative action bans led to a seventeen-percent decline in this population.¹⁰⁴ Similar rates of decline have been noted in the enrollment of underrepresented students of color

97. *Id.*

98. *Id.*

99. Alicia Gallegos, *AAMC Report Shows Decline of Black Males in Medicine*, ASS'N AM. MED. CS. (Sept. 27, 2016), <https://www.aamc.org/news-insights/aamc-report-shows-decline-black-males-medicine> [<https://perma.cc/77XD-AMPJ>].

100. See *Addressing the Challenges to a Diverse Physician Workforce*, ASSOCIATED MED. SCH.'S N.Y. (Feb. 2020), <https://amsny.org/wp-content/uploads/2020/02/addressing-the-challenges-to-a-diverse-physician-workforce-amsny-optimized.pdf> [<https://perma.cc/ZD99-N9NU>].

101. Dan P Ly et al., *Affirmative Action Bans and Enrollment of Students From Underrepresented Racial and Ethnic Groups in U.S. Public Medical Schools*, ANNALS INTERNAL MED. (2022), <https://www.acpjournals.org/doi/10.7326/M21-4312> [<https://perma.cc/CWQ4-MRGP>].

102. *Id.*

103. Liliana M. Garces & David Mickey-Pabello, *Racial Diversity in the Medical Profession: The Impact of Affirmative Action Bans on Underrepresented Student of Color Matriculation in Medical Schools*, 86 J. HIGHER EDUC. 264, 264 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4454423/> [<https://perma.cc/22TN-SMM7>].

104. *Id.*

at some of the most selective public undergraduate institutions as well.¹⁰⁵ In their brief opposing the grant of certiorari, Harvard University claimed that if it were to abandon all consideration of race in their admissions process, African-American and Hispanic enrollment would decline from 14% to 6% and 14% to 9%, respectively.¹⁰⁶ Given the already low numbers of URMs in the medical profession, such a steep decline could severely curtail the medical school pipeline and have serious ramifications for public health and the medical workforce.

IV. POTENTIAL OUTCOMES OF THE SFFA LITIGATION AND THE PATH FORWARD

It is yet to be seen how the Supreme Court will assess the various arguments made by each party in the SFFA lawsuits and what the turning points will be. This section reviews some of the main arguments that may become relevant for the Justices and reviews the evidence that may sway the Court. This section also details some of the arguments that gained attention during the oral argument in October 2022.

How the Court deals with allegations of Asian American students being disadvantaged may become important to the outcome of the *Harvard* case and the future affirmative action policy. The District Court dealt with the issue of Asian American discrimination in a footnote, a decision that scholar Jeena Shah has lamented and argued should have been the primary focus of the court.¹⁰⁷ Similarly, in the First Circuit, Judge Sandra Lynch analyzed Harvard's affirmative action policy separately from the intentional discrimination claim, finding in favor of Harvard on both those claims.¹⁰⁸ A Harvard Law Review article argues that despite the First Circuit's convincing analysis, it failed to address the relationship between the two claims and did not adequately address SFFA's argument that "an intentional discrimination claim should be part of a race-conscious program's strict scrutiny analysis."¹⁰⁹

The author of this Article argues that "incorporating allegations of intentional discrimination into such analysis would, without precedent, invalidate affirmative action programs unless a defendant can prove that they aren't biased against any racial minority."¹¹⁰ Arguing that the First Circuit accepted such incorporation or merging of these two issues, the Article finds that Judge Lynch's analysis was "far from the 'stringent' narrow tailoring requirement[.]"¹¹¹ In light of the above,

105. *Id.*

106. Brief in Opposition at 35, *President & Fellows of Harvard College*, 142 S. Ct. 895 (2022) (No. 20-1199).

107. Jeena Shah, *Affirming Affirmative Action by Affirming White Privilege: SFFA v. Harvard*, 106 GEO. L. J. O. 134, 134-135 (2020).

108. *President & Fellows of Harvard College*, 980 F.3d at 157.

109. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College—First Circuit Holds that Harvard's Admissions Program Does Not Violate the Civil Rights Act*, 134 HARV. L. REV. 2630, 2634 (2021).

110. *Id.*

111. *Id.* at 2636.

it is important to determine whether Asian American discrimination is featured in the Court's analysis in this case, and if so, is it treated as part of the program's strict scrutiny analysis.

In their amicus brief in support of SFFA, America First Legal Foundation argued that the Court, instead of seeking to resolve harder constitutional law questions, should look simply to the statutory command of Title VI which "prohibits all forms of racial discrimination at universities that accept federal funds, with no exceptions for 'compelling interests,' 'diversity,' or 'strict scrutiny'."¹¹²

Following Justice Stevens' approach in *Bakke*, this brief argues that Harvard's stance, that Title VI prohibits only the racially discriminatory acts that would violate the Equal Protection Clause if committed by a state actor, is incorrect.¹¹³ This approach would be contingent on following textualist reasoning that has gained traction in recent times.¹¹⁴ It is important to consider how the Court reads Title VI and whether its reasoning mirrors that of Justice Stevens or Justice Brennan in *Bakke*. While this argument did not become too important during oral arguments, Justice Gorsuch returned to it time and again, even though Mr. Strawbridge, Counsel for the Petitioners, claimed that for their purposes, there was not a difference between how the Fourteenth Amendment should read, and how Title VI's prohibition should read.¹¹⁵

Separately from Title VI, there is a long-standing question about the scope of the Fourteenth Amendment and whether it is colorblind in its application. The brief for Harvard argues that the Equal Protection Clause does not mandate complete colorblindness.¹¹⁶ An amicus brief filed by Professors of History and Law disagrees with SFFA's claim that *Grutter* is at odds with the original meaning of the Fourteenth Amendment and argues that there exists a distinction between racial designations that harm and those that ameliorate discrimination, such that the latter are permissible under the Fourteenth Amendment.¹¹⁷

Similarly, the amicus brief filed by the Constitutional Accountability Center stated that the framers of the Fourteenth Amendment "time and again rejected proposed constitutional language that would have precluded race-conscious measures designed to assist Black Americans in their transition to equal citizenship."¹¹⁸ Deep into the oral arguments in the UNC case, Justice Kagan

112. Brief of America First Legal Foundation et al. as Amici Curiae in Support of Neither Party at 3, *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard College*, 142 S. Ct. 895 (2022) (No. 20-1199).

113. *Id.*

114. See Adam Liptak, *A Conservative Lawyer's New Target After Abortion: Affirmative Action*, N.Y. TIMES (May 23, 2022), <https://www.nytimes.com/2022/05/23/us/politics/supreme-court-affirmative-action.html> [<https://perma.cc/S44Q-43VD>].

115. Transcript of Oral Argument at 55, *University of North Carolina* (2022) (No. 21-707).

116. Harvard Brief, *supra* note 13, at 22.

117. Brief of Professors of History and Law as Amici Curiae Supporting Respondents at 2, *President & Fellows of Harvard College*, 142 S. Ct. 895 (2022) (No. 20-1199).

118. Brief of Constitutional Accountability Center as Amicus Curiae Supporting Respondents

expressed that there had been very little discussion of what originalism suggested about the issue of race-conscious admissions.¹¹⁹ While the conversation on this point was limited, the decision in *Brown v. Board of Education* was evoked by both sides. Mr. Strawbridge claimed that the decision “firmly rejected the view that racial classifications have any role to play in providing educational opportunities.”¹²⁰ But as legal journalists Dahlia Litwick and Mark Joseph Stern wrote, “Sotomayor and Jackson reminded their colleagues, this argument is a historical nonsense: The 14th Amendment was a color-conscious effort to give Black Americans all the rights and privileges enjoyed by white Americans.”¹²¹ It remains to be seen whether and how conservative judges will interpret the Fourteenth Amendment, and how they will respond to the more progressive originalist questions being raised by Justice Jackson and her colleagues on the bench.¹²²

Another argument that may become relevant is Justice O’Connor’s statement in her opinion in *Grutter*: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹²³ While her reasoning and the motivation behind her statement have been often debated,¹²⁴ and were raised at the oral arguments in the UNC case before the Supreme Court Justice Barrett asked:

“This -- this distance of time, this 50 years since *Bakke*, suggests accurately, I think, that achieving diversity and diverse student populations in universities has been difficult. What if it continues to be difficult in another 25 years? I take it that you, because you’ve repeatedly said that the 25 years is aspirational and you told Justice Kavanaugh it wasn’t a holding, that you don’t think that University of North Carolina has to stop in 25 years, at that 2028 mark. So, what are you saying when you’re up here in 2040? Are you still defending it like this is just indefinite, it’s going to keep going on?”¹²⁵

Justice Jackson came at the question of the 25-year expiration deadline from

at 7, *President & Fellows of Harvard College*, 142 S. Ct. 895 (2022) (No. 20-1199).

119. Oral Argument Transcript, *supra* note 115, at 160.

120. *Id.* at page 4.

121. Dahlia Litwick & Mark Stern, *The Supreme Court Has No Reason to End Affirmative Action. They’re Doing It Anyway*, SLATE (Oct. 31, 2022), <https://slate.com/news-and-politics/2022/10/supreme-court-end-affirmative-action-unc-harvard-why.html> [<https://perma.cc/Y2SF-JXCE>].

122. See Mark Joseph Stern, *Hear Ketanji Brown Jackson Use Progressive Originalism to Refute Alabama’s Attack on the Voting Rights Act*, SLATE (Oct. 4, 2022), <https://slate.com/news-and-politics/2022/10/ketanji-brown-jackson-voting-rights-originalism.html> [<https://perma.cc/B8FS-DTL9>].

123. *Bollinger*, 539 U.S. at 343.

124. See Vijay S. Sekhon, *Maintaining the Legitimacy of the High Court: Understanding the “25 Years” in Grutter v. Bollinger*, 3 CONN. PUB. INT. L. J. 301(2018).

125. Oral Argument Transcript, *supra* note 115, at 108.

a different angle and asked about UNC's history of exclusion. This led Mr. Park to claim that a university's history is relevant to the diversity analysis because it could help explain why the progress that UNC was pursuing was behind another universities. To this answer, Justice Jackson stated that the "25-year expiration deadline [couldn't] really be blanketly applied, because we start in different places with respect to how race has been considered to exclude people in -- in our various communities."¹²⁶ In light of this debate, it is yet to be seen how the Court interprets Justice O'Connor's statement.

Both briefs filed by Harvard and the University of North Carolina ("UNC") argue that the Supreme Court only revisits precedents when there are compelling reasons to do so, and that SFFA has failed to offer a legitimate justification for this extraordinary step.¹²⁷ In particular, both claim that SFFA did not identify any recent factual or legal developments that warranted revisiting the long history of affirmative action jurisprudence.¹²⁸ If the Supreme Court decides to overrule *Grutter*, what would be the reasoning for revisiting settled precedent at this point?

Some scholars who follow the proceedings of the Court believe that these cases may signal the end of affirmative action as we know it.¹²⁹ In *Fisher II*, Justices Thomas, Alito, and Roberts issued dissents to strike down the University of Texas' holistic admission policy.¹³⁰ These three Justices have now been joined by conservative Justices Gorsuch, Kavanaugh, and Barrett, tilting the ideological composition of the Court. Also, Justice Jackson, during her nomination process, said that she would recuse herself from the *Harvard* case given her previous position on Harvard's Board of Overseers and that she would therefore only hear the *UNC* case.¹³¹ With five conservative Justices and only two liberal Justices hearing the *Harvard* case, it is uncertain whether Harvard can succeed. . . It seems plausible that the Court may issue a single opinion from the Court applicable to both cases.

Despite how the Court rules, several institutions of higher education have vocalized their support for race-conscious admissions programs, while underscoring the vitality of diversity.¹³² Due to the potential demise of affirmative action, institutions of higher education have already begun strategizing on how

126. *Id.* at 91.

127. See Harvard Brief, *supra* note 13; UNC Brief, *supra* note 17.

128. Harvard Brief, *supra* note 13; UNC Brief, *supra* note 17.

129. See Ian Millihiser, *The Supreme Court Will Hear Two Cases That Are Likely to End Affirmative Action*, VOX (Jan. 24, 2022), <https://www.vox.com/2022/1/24/22526151/supreme-court-affirmative-action-harvard> [<https://perma.cc/2UMK-DQR8>].

130. See *Fisher II*, 579 U.S. at 365.

131. See Kimberly Strawbridge Robinson, *Supreme Court Decouples Harvard, UNC Affirmative Action Cases (2)*, BLOOMBERG (July 22, 2022), <https://news.bloomberglaw.com/us-law-week/supreme-court-separates-affirmative-actions-cases-for-jackson> [<https://perma.cc/63TK-Y5E2>].

132. See Brief of Amherst et al. as Amici Curiae Supporting Respondent, *President & Fellows of Harvard College*, 142 S. Ct. 895 (2022) (No. 20-1199).

they can continue to diversify their university campuses.¹³³ Some methods being suggested require making a more concerted effort to recruit from a greater number of high schools that may be geographically diverse and seeking potential students at churches and community centers.¹³⁴ Such strategies have reportedly helped in California, where affirmative action was outlawed in 1996 by Proposition 209.¹³⁵

Universities might also consider “race-neutral” alternatives suggested by the Petitioners.¹³⁶ One such alternative would eliminate Harvard’s racial preferences while simultaneously eliminating its preferences for ALDCs and increasing the socioeconomic boost to one-half that of recruited athletes.¹³⁷ This approach could be helpful as tips for ALDCs come under fire. Elie Mystal, a journalist, writes that the unfairness of Harvard’s treatment of Asian American applicants is the proper focus of the lawsuit rather than affirmative action:

An internal Harvard study, made public during the trial, suggested that if Harvard looked only at “academic” factors, Asian American students would make up 43 percent of its class, not the 20 percent representation they enjoy now. Furthermore, a different study found that 43 percent of white students at Harvard were actually legacies, athletes, or kids from families who donated money to the school. You’ve got to have some serious racial hang-ups to read those numbers and conclude that black and brown kids are why your kid didn’t get into school.¹³⁸

The adoption of race-neutral means will not be without challenge either. For instance, Justice Kavanaugh in the oral arguments for the UNC case asked if it would be permissible for a university to pick a race-neutral alternative if it would lead to the highest number of African American students.¹³⁹ In response to this, Mr. Strawbridge responded that if it were the only reason considered, and there was no other race-neutral justification that would have led them to adopt the policy anyway, it would create problems under the Court’s precedent.¹⁴⁰ To this, Justice Kagan pressed—“Well, that really means it’s not the reason at all. So, you are saying, if the -- if -- if -- if that contributes at all to the decision-making, then

133. See Laura Krantz, *As Affirmative Action Decision Looms, Colleges Look For Alternative Ways To Achieve Diversity*, BOS. GLOBE (May 22, 2022), https://www.bostonglobe.com/2022/05/22/metro/affirmative-action-decision-looms-colleges-look-alternative-ways-achieve-diversity/?s_campaign=8315 [<https://perma.cc/3JAW-X8J9>].

134. *Id.*

135. *Id.*

136. See SFFA Brief, *supra* note 19, at 80.

137. *Id.* at 81.

138. Elie Mystal, *Harvard’s Thrilling—and Pyrrhic—Affirmative Action Victory*, NATION (Oct. 2, 2019), <https://www.thenation.com/article/archive/harvard-affirmative-action/> [<https://perma.cc/9C45-7YJV>].

139. Oral Argument Transcript, *supra* note 115, at 15.

140. *Id.*

that’s impermissible?”¹⁴¹ This too did not lead to a clear answer about what would be permissible and impermissible, and it would not be surprising if race-neutral means adopted to improve diversity will be litigated separately.

In addition to the above recommendations, other methods have been suggested to target the historical White supremacy baked into the admissions process. In their article *Dismantling the Master’s House: Establishing a New Compelling Interest in Remediating Past Discrimination*, Chris C. Goodman and Natalie Antounian demonstrate how remediating systemic discrimination is equivalent to remediating past and present discrimination and should therefore qualify as a compelling government interest.¹⁴² A similar argument was also made in the Black Women Law Scholars’ amicus brief filed in the SFFA cases that recounted a history in which Black people were excluded from the educational institutions that they helped build after the Civil War.¹⁴³ It argues that while the Supreme Court has recently taken a “stingy view” of the remedial rationale, the Fourteenth Amendment was “meant for better things” and “was never meant to hamstring university officials from taking commendable steps to remedy the lasting effects of white supremacy and structural racism.”¹⁴⁴ Harvard University just invested one-hundred million dollars to redress its ties to slavery,¹⁴⁵ and measures such as this may be consistent with devising a new compelling interest. That said, since this measure requires the intervention of the Courts, it may be hard to accomplish.

Other more specific steps must also be taken to increase diversity in the medical workforce. In their Journal of the American Medical Association (“JAMA”) Article, *Diversity in Medical Schools—Need for a New Bold Approach*, Clyde W. Yancy and Howard Bauchner side-step conventional affirmative action arguments, and instead support the creation of a new medical school, specifically at a historically Black college and university (“HBCU”) to enhance capacity and substantively address the concerns of diversity in the medical profession.¹⁴⁶ In support of this proposal, this Article cites data showing that the current four medical schools in part aligned with HBCUs and serving Black medical students represent merely 2.6% of total medical schools, yet

141. *Id.*

142. Chris Chambers Goodman & Natalie Antounian, *Dismantling the Master’s House: Establishing a New Compelling Interest in Remediating Systemic Discrimination*, 73 HASTINGS L. J. 437, 437 (2022).

143. Brief of Black Women Law Scholars as Amici Curiae Supporting Respondent, *President and Fellows of Harvard College*, 142 S. Ct. 895 (2022) (No. 20-1199).

144. *Id.* at 24.

145. Cara J. Chang & Isabella B. Cho, *Harvard Pledges \$100 Million to Redress Ties to Slavery*, CRIMSON (Apr. 27, 2022), <https://www.thecrimson.com/article/2022/4/27/100-million-endowment-for-slaveryredress/#:~:text=Harvard%20committed%20%24100%20million%20to,by%20University%20President%20Lawrence%20S> [https://perma.cc/J7NG-PXP7].

146. Clyde W. Yancy & Howard Bauchner, *Diversity in Medical Schools—Need for a New Bold Approach*, 325 JAMA 31, 31 (2021).

account for 15% of all Black medical students.¹⁴⁷

CONCLUSION

This Article has aimed to provide an overview of the litigation led by Students for Fair Admissions against Harvard College and the University of North Carolina, and to situate it within four decades of litigation around affirmative action. It also discussed the “diversity rationale” and why diversity is important, particularly in the medical workforce. As we await a final decision in the SFFA cases, this Article provides context on why affirmative action is once again before the Court and how the Court’s opinion might be influenced by provocative matters of law and policy.

147. *Id.* (citing Facts: Applicants, Matriculants, Enrollment, Graduates, MD-PhD, and Residency Applicants Data, ASSOC. AM. MED. COLL. (2020), <https://www.aamc.org/data-reports/students-residents/report/facts> [<https://perma.cc/HK9D-YUJ8>]).