AFFIRMING AFFIRMATIVE ACTION: WEIGHING THE USE OF RACE IN ADMISSIONS FOR HIGHER EDUCATION

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I. INTRODUCTION

Its admissions season and you're starting the never-ending process of reviewing applications to determine who will be admitted to Victory University. Scouring over the first applications, you review the traditional measures: name, test scores, GPA. With one spot remaining, you're scrutinizing the last two applicants, a talented Hispanic soccer player from a poverty-stricken town in the state, and a wealthy nonminority applicant. While identical under all the objective

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standards, the minority applicant embodies certain qualities like athletic abilities and unique life experiences that would contribute to fostering a diverse educational environment. In states that implement affirmative action policies, the value of such characteristics would generally be considered in admission decisions, but as affirmative action policies continue to be litigated around the United States, universities around the county are being forced to rethink this decades old practice.

In October and November of 2014, Students for Fair Admissions (SFFA) filed federal lawsuits against Harvard University and University of North Carolina - Chapel Hill (UNC).[1] SFFA claimed, that Harvard and UNC's race-conscious admissions policies unfairly discriminated against Asian Americans while disproportionately favoring African American and Hispanic applicants.[2] On October 8, 2020, the Justice Department, led by Attorney General William Barr, filed a lawsuit against Yale University accusing the Ivy League school of undertaking similar discriminatory actions against Asian Americans.[3]

These lawsuits are each located in separate federal circuits and are likely to continue escalating through the federal court hierarchy. The First Circuit Court of Appeals has affirmed the District Court of Massachusetts's decision that Harvard University's admissions process did not discriminate against Asian American applicants. The lawsuit against Yale will be heard in the Second Circuit, whereas the lawsuit against UNC will be heard in the Fourth Circuit. If one the two federal

1. Nate Raymond, *Affirmative Action Opponents Ask U.S. Supreme Court to Take Up Harvard Case*, REUTERS (Feb. 25, 2021),
https://www.reuters.com/article/us-usa-court-harvard-idUSKBN2AP2FY; Kate Murphy, *Trial on UNC-Chapel Hill's Race-Related Admissions Ends, But Ruling Could Take Months*, NEWSOBSERVER (Nov. 19, 2020),
https://www.newsobserver.com/news/local/education/article247284969.html (summarizing the case findings).

2. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019),
https://lawyerscommittee.org/wp-content/uploads/2020/07/Docket-672_Findings-of-Fact-and-COL_Harvard_GBT.pdf (alleging that Harvard's admissions policy used racial balancing to unfairly discriminate against Asian American applicants).

3. Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions, US DEPARTMENT OF JUSTICE, Office of Public Affairs (Oct. 8, 2020),
https://www.justice.gov/opa/pr/justice-department-sues-yale-university-illegal-discrimination-practices-undergraduate (alleging that Yale engaged in racial balancing by maintaining the annual percentage of African American admitted applicants to 1% of the previous year's admitted class).

circuit courts were to issue a conclusion contrary to the First Circuit, it would set up a circuit split, likely prompting the U.S. Supreme Court to act.

This article analyzes the history of affirmative action and the legal standard universities are required to meet when implementing affirmative action in their admissions processes, culminating in a prediction on how the Supreme Court is likely to rule. Part II focuses on the legislative and judicial history of affirmative action, beginning with its implementation in the 1960s through its development in subsequent decades. This section also discusses the legal standard for affirmative action cases as it has been developed by Supreme Court over the years. Part III focuses on the ongoing lawsuits against Harvard, Yale, and UNC, with particular focus on the Harvard case given that it is the ripest of the three cases for Supreme Court review. Part IV predicts how the Supreme Court is likely to rule on the Harvard case, by applying the legal standard set out in Part II. The article concludes by analyzing the likely impact of such a decision on the use of race in admissions by institutions of higher education.

II. HISTORY OF AFFIRMATIVE ACTION

According to the Stanford Encyclopedia of Philosophy, affirmative action is defined as "positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded."[4] In other words, affirmative action is a steppingstone for historically underrepresented minorities to achieve representation in areas where they have traditionally been excluded.

Affirmative action was implemented in 1961 under the Kennedy administration and has remained a staple of American society and higher education since then.[5] During this time affirmative action has been the subject of numerous lawsuits, heated family discussions, and political fervor.[6] Recently, it has been used as a political football against reputable universities like Harvard, Yale, and UNC, to argue that their use of race as a factor in admissions unfairly discriminates

4. *Affirmative Action*, *Stanford Encyclopedia of Philosophy*, STANFORD (last updated Apr. 9, 2018) (defining affirmative action and providing a background history on the issue).

5. TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION, 1, 61 (2003) (elaborating on the history of affirmative action).

6. *See* Anemona Hartocollis, *Harvard Won a Key Affirmative Action Battle. But the War's Not Over*, N.Y. TIMES (Oct. 18, 2020), https://www.nytimes.com/2020/02/18/us/affirmative-action-harvard.html (detailing the history of legal challenges against affirmative action dating back to the 1970s).

against Asian American applicants by favoring black and Hispanic applicants.[7]

A. Legislative History

The history of affirmative action dates to 1961, when President John F. Kennedy issued an executive order mandating federal contractors take "affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin."[8] Later, in 1964, President Johnson signed the Civil Rights Act, which expanded the prohibition on employment discrimination to the private sector and established the Equal Employment Opportunity Commission (EEOC).[9] This was followed by Richard Nixon's 1969 executive order promising to implement affirmative action for those seeking government employment.[10] Upon signing Executive Order 11478, Nixon announced, "It is the policy of the Government of the United States to . . . promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency."[11] When universities began implementing affirmative action policies for minority applicants, it triggered an immediate backlash from nonminority applicants claiming they were victims of "reverse discrimination."[12] In response to decreasing public support for affirmative action in higher education, more states like California have taken legislative action to reduce or outright ban the practice in higher education admissions evaluations.[13]

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7. *See id.*; Scott Jaschik, *Appeals Court Backs Harvard on Affirmative Action*, INSIDE HIGHER ED. (Nov. 16, 2020), https://www.insidehighered.com/admissions/article/2020/11/16/appeals-court-backs-harvard-affirmative-action (writing that the various ongoing lawsuits against UNC, Yale, and Harvard, make it more likely that the Supreme Court will hear the dispute).

8. ANDERSON, *supra* note 5, at 61 (elaborating on the history of affirmative action).

9. Genevieve Carlton, *A History of Affirmative Action in College Admissions*, BEST COLLEGES (Aug. 10, 2020), https://www.bestcolleges.com/blog/history-affirmative-action-college/ (detailing the relationship and origins of the Civil Rights movement and affirmative action policies).

10. *Id.*

11. Exec. Order No. 11478, 3 CFR 803 (1969) (mandating the federal government to provide equal opportunity in employment to all persons through application of affirmative action programs in executive departments and agencies); *see Carlton*, *supra* note 9.

12. Carlton, *supra* note 9 (noting that as affirmative action policies facilitated the admission of more black students, nonminority white applicants began bringing lawsuits against the universities to end affirmative action practices).

13. Dominique J. Baker, *Why might states ban affirmative action?*, BROOKINGS (Apr. 12, 2019),

B. Proposition 209

In 1997, California passed Proposition 209 (Prop. 209), banning affirmative action, and modifying the state's Declaration of Rights, to include the following language: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[14] As of 2020, nine states had imposed bans on affirmative action in higher education, with Idaho the most recent state to ban such policies in March 2020.[15] State curtailment of affirmative action enjoys broad public support.[16] A February 2019 survey conducted by the Pew Research Center showed that seventy-three percent of participants believed race or ethnicity should not be a factor in college admissions decisions—Sixty-five percent of Hispanics, sixty-two percent of African Americans, and fifty-eight percent of Asians supported this view.[17]

Following the implementation of Prop. 209, college enrollment rates for both African Americans and Hispanics fell, yet graduation rates improved for four-year public universities.[18] A study by the Public Economics Department of Duke University using data from the Integrated Postsecondary Education Data System (IPEDS) found that between 1998 and post Prop. 209—overall enrollment in four-year public universities increased, but average annual enrollment rates

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https://www.brookings.edu/blog/brown-center-chalkboard/2019/04/12/why-might-states-ban-affirmative-action/; Associated Press, *Idaho governor Signs Affirmative Action Ban Into Law* (Mar. 31, 2020) https://apnews.com/article/bbe0f81d2b4ef63102d749879c045a10; *See also* Nikki Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, PEW RESEARCH CENTER (Feb. 25, 2019)
https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/ (revealing that the majority of participants believe race should not be a factor in college admissions).

14. CAL. CONST. art. I §31(1996) (adding to the state's Declaration of Rights, "[California] shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting").

15. Baker, *supra* note 13 (listing reasons why states would ban affirmative action).

16. Graf, *supra* note 13 (finding that 73% of Americans surveyed believed race or ethnicity should not be a factor in decisions on student admissions).

17. *Id.* (expressing the difference in responses based on class of minority).

18. Peter Arcidiacono Et Al., *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California*. DUKE U., 1 (Dec. 2011),
http://public.econ.duke.edu/~psarcidi/prop209.pdf

declined for both Hispanics and African Americans.[19] Universities in Florida and Washington, which have also ended the use of race-sensitive admissions policies, revealed a similar drop in enrollment.[20]

However, the study goes on to note that this disparity could be explained by the rise in "unknowns" (applicants declining to state their race or ethnicity).[21] It also found that the on-time graduation rate for African Americans and Hispanics increased by twenty-three percent.[22] Thus, the study concluded that the use of objective academic criteria in college admissions likely accounted for the net improvement in minority education rates and school matching.[23]

On November 3, 2020, California residents voted on Proposition 16, which would have repealed Prop. 209.[24] Fifty-seven percent of California residents voted against Proposition 16, thus preserving Prop. 209 and maintaining the Golden State's use of race neutral admission standards.[25]

C. Legal History

In 1978, the Supreme Court heard arguments in *Regents of the University of California v. Bakke*.[26] The Court analyzed whether the University of California at Davis Medical School violated the 14th Amendment's Equal Protection Clause and Title VI Civil Rights Act of 1964 through its affirmative action policy, which resulted in Mr.

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19. *Id.* at 5–6 (indicating that average annual enrollment rates for African Americans declined by 15% and by 10.3% for Hispanics post Prop. 209).

20. Journal of Blacks in Higher Education, *How State Bans on Race-Sensitive Admissions Have Damaged Black Enrollments in Professional Schools* (2006), https://www.jbhe.com/features/51_professional_schools.html (noting that undergraduate enrollments at state universities in Florida and Washington have declined dramatically since ending the use of race as a factor in decisions for admission).

21. Arcidiacono, *supra* note 18, at 6–7 ("Between 1997 and 1998, the first year after the implementation of Prop 209, Unknowns enrolling at 4-year public colleges goes from 4,252 to 6,805, a 60% increase").

22. *Id.* at 7–9 (noting that on time graduation rate increased 23.1% for African Americans and 23.8% for Hispanics post Prop. 209. The increase in the 6-year graduation rates for these two groups were 9.3% and 6.4% respectively.).

23. *Id.* at 32 (finding that Prop. 209 "accounted for 28% of our estimated net effect of Prop 209 on minority graduation rates and almost 67% for the bottom part of the preparedness distribution.").

24. Cal. Prop. 16 (2020) (proposing a constitutional amendment to repeal Prop. 209 and permit the use of affirmative action policies in California).

25. Adolfo Guzman-Lopez, *Prop 16 Fails: California's Affirmative Action Ban Stands*, VOTER GAME PLAN (last updated Nov. 10, 2020), https://laist.com/elections/2020/results/proposition-16-affirmative-action.php (showing the results of the vote on Prop. 16).

26. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Bakke's rejection from medical school.[27] The medical school adopted two admissions programs, a regular admissions program and a special one for minority students.[28] Mr. Bakke argued that under objective standards such as test scores and college GPA, his qualifications exceeded those of minority students admitted to the program.[29] The Medical School reserved sixteen places for minority applicants from the special program.[30] Further, nonminority applicants were excluded from applying under the special admissions program.[31] The Supreme Court agreed with Mr. Bakke, finding that while the use of race as a factor in admissions decisions was constitutional per-se, the process was also subject to limitations.[32] For example, using race as one factor along with a myriad of other considerations was permissible, but universities were not permitted to implement rigid racial quotas.[33] In other words, a process mandating that a specific percentage of the admitted class constitute applicants of minority backgrounds was unconstitutional.[34] Such a process was not narrowly tailored to remedying the history of past discrimination.[35]

By contrast, the Court in *Grutter v. Bollinger* upheld the admissions process used by the University of Michigan, finding that the school properly considered race as "only one element in a range of factors" for achieving a diverse student body.[36] The Court in *Grutter*

27. *Id.* at 265 (explaining that Title VI provides that no person shall be excluded from participating in any program receiving federal financial assistance on the ground of race or color).

28. *Id.* (detailing the regular admissions process, where any student with a GPA less than 2.5 on a 4.0 scale was rejected).

29. *Id.* at 266 (stating that Bakke had applied and been rejected twice to UC Davis, and both times applicants with lower test scores than him were accepted under the special admissions program).

30. *Id.* at 266–67 ("The special committee continued to recommend candidates until 16 special admission selections had been made").

31. *Id.* at 266 (finding that no disadvantaged whites were admitted to the special program, although many applied).

32. Regents of the University of California v. Bakke, 438 U.S. 265, 266 (1978). (holding the special admissions program unconstitutional because it operated as a racial quota).

33. *Id.* (reasoning that the use of race had to be narrowly tailored toward the purpose of furthering educational diversity).

34. *Id.* (applying strict scrutiny standard for the use of race in admissions for institutions of higher education).

35. *Id.* (upholding the California Supreme Court that, applying a strict scrutiny standard, "the special admissions program was not the least intrusive means of achieving the compelling state interest of integrating the medical profession and increasing the number of doctors willing to serve minority patients.").

36. Grutter v. Bollinger, 539 U.S. 306, 324 (2003) (upholding the use of race in admissions to contribute to the "robust exchange of ideas").

affirmed the opinion in *Bakke* certifying that there is a compelling interest in attaining a diverse student body.[37] Thus, the question was whether the school's procedures governing admission were narrowly tailored to achieve that compelling interest.[38] The school considered race as a "plus" factor while still effectively evaluating other individual qualities that could contribute to achieving a diverse educational environment.[39] This was evidenced by statistics revealing that the University of Michigan Law School accepted nonminority applicants with objective standards, like test scores and grades, lower than other rejected nonminority applicants, thus precluding the argument that race was considered an outcome determinative factor in the admissions process.[40] Further, the Court determined that strict scrutiny did not require "exhaustion of every conceivable race neutral alternative," but that the school must, in good faith, consider "workable, race neutral alternatives" as a method to obtain student body diversity.[41] Notably, Justice O'Connor's opinion indicated the Court's desire that the use of race-conscious admission procedures be a temporary solution.[42] Such language revealed that the Justices considered affirmative action in higher education to be justified by their effectiveness in eliminating racial disparities, and that the eventual satisfaction of that objective would eliminate the need for the use of race in admissions.[43]

The Court's jurisprudence in *Grutter* was tested later in *Gratz v. Bollinger*.[44] In *Gratz*, two students sued the University of Michigan

37. *Grutter* at 308 (affirming student body diversity as a compelling government interest).

38. *Compare Grutter* (reasoning that the use of race as an individual consideration, in contrast to a strict quota reserving a fixed amount of seats for minorities, is narrowly tailored toward furthering higher education), *with* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 912 (1978) (finding that the use of racial quotas was not narrowly tailored).

39. *Grutter* at 334–37 (permitting the use of race in admissions as a "soft" variable collective with other variables as part of an individualistic, holistic review).

40. *Id.* at 338–39 (reasoning that the admission of nonminority applicants with lower test scores and grades than other rejected applicants to reveal that the school allocates substantial consideration to diverse factors other than race); *see also* Gratz v. Bollinger, 539 U.S. 244 (2003) (rejecting the use of race in admissions where race is used as an "outcome determinative" factor in consideration).

41. *Grutter*, at 339–40 ("[N]arrow tailoring require[s] consideration" of "lawful alternative and less restrictive means") (citing *Wygant v. Jackson Bd. of Ed*., 476 U. S. 267, 280 (1986)).

42. *Id.* at 342 ("We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point").

43. *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today").

44. Gratz v. Bollinger, 539 U.S. 244 (2003) (reasoning that allocating 20% to the admissions decision based on race granted too much weight on one factor for it to be considered as an individual consideration).

alleging that the school's admissions procedures discriminated against non-minorities because the practice of maintaining a racially and ethnically diverse student body amounted to "holding seats" for certain minority groups.[45] The Court agreed, distinguishing *Grantz* from *Grutter* because they were unconvinced that the University of Michigan's policies complied with strict scrutiny.[46] The Court reasoned that the admissions procedures did not provide "individual consideration" and that they led to the admission of nearly every minority applicant.[47] Specifically, the Court held that allocating twenty points (20%) of consideration to "underrepresented minorities" based solely on race or ethnic status, was not a narrowly tailored solution to achieve educational diversity, because such a "decisive" process basically guaranteed admissions to certain applicants while also precluding a detailed assessment of additional qualities that could further the purpose of higher education.[48] The Court developed a hypothetical scenario involving two African American applicants from contrasting socioeconomic backgrounds.[49] In the hypothetical point-based admissions system, the admissions officers would assess diversity solely on the basis of race while disregarding or minimizing other valuable qualities associated with diversity and race like an applicant's individual background, experiences, and characteristics. The Court found that in doing so, the policy would actually dilute the benefits of a diverse student population.[50]

In *Fisher v. University of Texas*, [51] the Court reaffirmed that cases involving affirmative action in higher education are subject to strict scrutiny, and therefore that admission procedures which apply

45. *Compare* Gratz v. Bollinger, 539 U.S. 244 (2003) (finding that the University's admissions process violated the 14th Amendment's Equal Protection Clause, Title VI, and §1981), *with* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 266 (1978) (determining that the use of racial quotas could not be narrowly tailored toward the purpose of furthering educational diversity).

46. *Gratz* at 270 (finding the University of Michigan's system allocating 20 points to applicants based on race not narrowly tailored to achieving educational diversity).

47. *Id.* at 270–74 (adding that this system dilutes individual qualities or experiences associated with race like socioeconomic status or personality).

48. *Id.*

49. *Id.* at 272–73 (expressing concern that extraordinary qualified nonminority applicants would be excluded whereas minority applicants would automatically be allocated twenty points for submitting an application, without considering their unique backgrounds) ("Thus, the critical criteria are often individual qualities or experiences not dependent upon race, but sometimes associated with it").

50. *Id.* at 274–75 (finding that the university's means must be narrowly tailored to achieving diversity; the university cannot employ whatever means it desires).

51. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013).

affirmative action must be "precisely tailored to serve a compelling government interest."[52] In *Fisher*, the Court analyzed the University of Texas at Austin's admissions program, which coupled Texas's "Ten Percent Law,"—which provided for students in the top 10% of their high school class in Texas to be granted automatic admission into any public state college—with a race-conscious program seeking to increase overall diversity.[53] The Court in this case instructed the lower court to consider whether race neutral alternatives would achieve the same diversity outcomes when determining whether the university's use of race in admissions was "necessary."[54] Specifically, Justice Kennedy wrote that while institutions of higher education were not required to exhaust every "conceivable race neutral alternative[]," they should be required to have given "serious, good faith consideration [to] workable race neutral alternatives."[55] In other words, the burden is on the university to prove that race neutral alternatives would be insufficient, with no good faith presumption.[56] The *Fisher* decision expanded on the "narrowly tailored" requirement that universities must meet to comply with the strict scrutiny standard established by the Court in *Bakke*.[57]

In *Fisher II*, the Court held that where the university had attempted to implement various race neutral alternatives, and none of them successfully achieved the institution's objectives regarding diversity, the university had complied with strict scrutiny.[58] The University of Texas created three new scholarship programs, opened new regional admission centers, increased its recruitment budget by $500,000, and organized over 1,000 recruitment events over the span of seven years, yet failed to significantly increase minority enrollment.[59] Justice Thomas dissented in *Fisher II*, vehemently

52. *Id.* at 304 (rejecting the lower court's decision that a university's consideration of race did not constitute a compelling state interest).

53. *Id.* at 305 (elaborating on the Ten Percent Law).

54. *Id.* at 312 ("Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity") (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978)).

55. *Id.* at 312 (determining that a university's consideration of workable race neutral alternatives to be necessary for a race-conscious admissions program to be narrowly tailored to achieving educational diversity).

56. *Id.* at 313–14 (stating that a university's good faith would not satisfy strict scrutiny for the consideration of race in admissions).

57. *See Fisher*, 570 U.S. at 312–15.

58. *See* Fisher v. Univ. of Tex. at Austin II, 579 U.S. 1 (2016) [hereinafter *Fisher II*].

59. *Id.* at 16–17 (finding that reliance on a percentage plan would not make a university's admissions plan more race neutral because it would sacrifice other diverse characteristics that contribute to educational excellence).

disagreeing with the Court's decision to not overrule *Grutter*.[60] Thomas wrote that he did not perceive racial diversity as a compelling interest, and therefore the use of race as a factor in admission procedures should be barred by the Equal Protection Clause.[61] Writing separately, Thomas distinguished educational diversity from the justifications for government sponsored racial discrimination analyzed by the Court in *Korematsu* and *Richmond v. J. A. Croson Co.*[62] Thomas reasoned that whereas the compelling government interests in those cases were based on national security and remedying past discrimination, here, given the lack of evidence presented by the universities correlating educational diversity with race-conscious admission policies, the government interest claimed—educational diversity—was not justified.[63]

Thomas also joined Justice Scalia concurring and dissenting in part in *Grutter*, and concurred in *Grantz*, arguing there was no correlation between classroom diversity and institutional prestige, and comparing Michigan Law to University of California, Berkeley School of Law, which did not consider race in admitting students.[64] Justice Thomas's writings in *Fisher* and *Grutter* reveal his disregard for race-conscious admissions programs and educational diversity as a

60. *Id.* at 1 (Thomas. J., dissenting) (writing that the use of race in higher education admissions decision is expressly prohibited by the 14th Amendment); *see also Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (upholding educational diversity as a compelling state interest under a strict scrutiny standard).

61. *See Fisher* at 312–13. (Thomas, J., concurring) (disagreeing with the Court's determination of racial diversity in higher education as a compelling interest).

62. *Compare Fisher* at 313–14 (distinguishing the compelling interest in diversity from the compelling interest in protecting national security or remedying past discrimination), *with* Korematsu v. United States, 323 U.S. 214 (1944) (justifying government racial discrimination in times of public necessity and for purposes of national security), *and* Richmond v. J. A. Croson Co., 488 U.S. 469, 500, 504 (1989) (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 277 (1986) (plurality opinion)) (holding that remedying past discrimination is a compelling interest that justifies race-based relief under strict scrutiny and the Equal Protection Clause).

63. *See Fisher* at 321–28 (expressing concern that the Court deferred to the University's determination that the diversity by race-conscious admissions policies would yield educational benefits) (comparing the University's assertion to that of the segregationist's to justify school segregation).

64. *See* Gratz v. Bollinger, 539 U.S. 244, 281 (Thomas. J., concurring) ("For the immediate future, however, the majority has placed its imprimatur on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. Our Constitution is color blind, and neither knows nor tolerates classes among citizens."); *see also Grutter* at 351–58 (Thomas. J., concurring) (writing separately to express his view that racial discrimination in higher education admissions should be expressly prohibited under the Equal Protection Clause).

compelling interest. They also serve to forecast the direction of his vote if Harvard's case were to eventually reach the Supreme Court.[65]

III. THE LEGAL FIGHTS TO SURVIVE

On November 12, 2020, the First Circuit held that Harvard's use of race as a factor in their admissions process was limited enough to comply with strict scrutiny, thereby affirming the District Court of Massachusetts's decision.[66] Of the three ongoing cases challenging affirmative action in higher education, this is the first case to be decided at the appellate level. The lawsuit against UNC commenced with oral arguments in the Middle District of North Carolina on November 9, 2020, whereas the complaint against Yale is not yet scheduled for trial, having just recently been filed by the US Department of Justice.[67] As such, each case is at a different stage in proceedings, potentially setting the issue up for Supreme Court review in a few years. All three lawsuits argue that the universities are violating Title VI of the Civil Rights Act of 1964, which applies to institutions that receive federal funds.[68]

A. SFFA v. Harvard

Students for Fair Admission vs. Harvard, was decided by the First Circuit on November 12, 2020.[69] This case stems from a complaint

65. *See Fisher* at 312–13. (Thomas. J., concurring) (disagreeing with the Court's determination of racial diversity in higher education as a compelling interest); *see also Grutter* at 351–58 (finding that "marginal improvements in legal education do not qualify as a compelling state interest").

66. Pete Williams, *Appeals Court Rejects Affirmative Action Lawsuit Against Harvard*, NBC, (Nov. 12, 2020), https://www.nbcnews.com/politics/politics-news/appeals-court-rejects-affirmative-action-lawsuit-against-harvard-n1247545 (summarizing the First Circuit's decision upholding Harvard's admissions practices).

67. Melissa Korn, *Latest Trial Over College Affirmative Action to Begin in North Carolina*, WALL STREET JOURNAL (Nov. 8, 2020), https://www.wsj.com/articles/latest-trial-over-college-affirmative-action-to-begin-in-north-carolina-11604855799; *see also* Susan Svrluga, *Justice Department Sues Yale, Alleging Discrimination Against White and Asian Applicants*, WASH. POST (Oct. 9, 2020),
https://www.washingtonpost.com/education/2020/10/08/yale-lawsuit-admissions/ (stating that the Justice Department sued Yale University on October 9 arguing that their admissions practices disfavors certain applicants based on race).

68. *See* Svrluga, *supra* note 67.

69. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019),
https://lawyerscommittee.org/wp-content/uploads/2020/07/Docket-672_Findings-of-Fact-and-COL_Harvard_GBT.pdf; Students for Fair Admission v. Presidents and Fellows of Harvard College, No. 19-2005, 1, 65–67 (1st Cir. 2020) [hereinafter "SFFA II"]
https://ogc.harvard.edu/files/ogc/files/2020.11.12_-_opinion.pdf?m=1605196533 (finding that

filed in 2014 by a nonprofit organization known as Students for Fair Admission (SFFA).[70] SFFA strongly believes that affirmative action in higher education is unconstitutional and leads to the exclusion of other qualified candidates on the basis of subjective admissions criteria.[71]

SFFA's complaint alleged that Harvard's race-conscious admissions procedures discriminated against Asian Americans by using subjective standards like "personality" that favored other minority groups such as African Americans and Hispanics in violation of Title VI of the Civil Rights Act of 1964.[72] The District Court ruled in Harvard's favor, finding that Harvard's admissions procedures showed no evidence of unconstitutional racial quotas, that there was no statistical support to indicate that racial balancing had occurred, and that the annual variations in Harvard's minority class compositions were statistically insignificant—likely stemming from the natural randomness of the admissions cycle.[73] The District court rejected the admissions statistics presented by the petitioner, which were from the years 2014–2019, reasoning that the marginal difference in admissions between Asian Americans and African Americans during those years was too minimal to reveal discriminatory intent by Harvard admissions officers.[74] The court also applied the *Fisher* test to determine whether there were any race neutral alternatives for Harvard to achieve their standard of racial diversity.[75] In doing so, it found that a race neutral admissions policy would result in an eight percent reduction of Harvard's African American student body and a five percent reduction

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the variations in admissions for Asian Americans resembles the variations for Hispanic and African American applicants).

70. *Id.*

71. Students For Fair Admissions, *About Students for Fair Admission*, (last visited Nov. 13, 2020), https://studentsforfairadmissions.org/about/ (containing the mission statement for SFFA).

72. Harvard University, *The Lawsuit*, (last visited Nov. 13, 2020), https://admissionscase.harvard.edu/lawsuit.

73. *See SFFA I* at 220 (finding that Harvard's admissions process involves an individual, holistic review of all applicants that considers race as a "plus" factor in a flexible, non-mechanical way).

74. *Id.* at 172–73 (finding a marginal difference of less than 1% insufficient to support a determination of implicit bias against Asian Americans).

75. *Id.* at 176; *Fisher*, 570 U.S. 297 (2013) (requiring strict scrutiny test for affirmative action to determine whether the university had exhausted all race neutral alternatives to achieve racial diversity before turning to affirmative action policies).

for Hispanics.[76] Therefore, Harvard's admissions guidelines were narrowly tailored to achieve the benefits of a diverse student body.[77]

SFFA immediately appealed to the First Circuit, who rendered their decision on November 12, 2020.[78] The First Circuit upheld the lower court's decision, finding no evidence that Harvard's use of race in admissions equated to racial balancing.[79] The court stated "[t]he fact that Harvard's admitted share of applicants by race varies relatively little in absolute terms for the classes of 2009 to 2018 is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period."[80] Further, the panel of judges distinguished Harvard's procedures from the mechanical point based system used by the University of Michigan in *Gratz*, finding that Harvard used a "holistic admissions process" which considered various other factors in admitting students without race as a "decisive" factor.[81] It also considered the impact of eliminating affirmative action admission policies on minorities.[82] The Trump administration filed an amicus brief in support of SFFA arguing that Harvard's admission policies discriminated against highly qualified applicants by

76. *SFFA I* at 177 ("At least 10% of Harvard's admitted class, including more than one third of the admitted Hispanics and more than half of the admitted African Americans, would most likely not be admitted in the absence of Harvard's race-conscious admissions process").

77. *Id.* at 111–12 ("Removing considerations of race and ethnicity from Harvard's admissions process entirely would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background. Further, throughout this trial, SFFA did not present a single admissions file that reflected any discriminatory animus, or even an application of an Asian American who it contended should have or would have been admitted absent an unfairly deflated personal rating.") ("Further, the Court concludes that while the admissions process may be imperfect, the statistical disparities between applicants from different racial groups on which SFFA's case rests are not the result of any racial animus or conscious prejudice and finds that Harvard's admissions program is narrowly tailored to achieve a diverse class and the benefits that flow therefrom.").

78. Benjamin L. Fu & Dohyun Kim, *First Circuit Rules Harvard Admissions Process Does Not Violate Title VI*, THE HARVARD CRIMSON (Nov. 12, 2020), https://www.thecrimson.com/article/2020/11/12/harvard-sffa-appeal-ruling/

79. *See SFFA II* at 45–47 (rejecting claims of racial balancing where there had been more year-over-year variation in Asian American admitted applicants than in Asian American applicants to Harvard).

80. *Id.* at 67.

81. *Id.* at 70–73; *Gratz*, 539 U.S. at 271–72 (finding unconstitutional admissions guidelines that give disproportionate and decisive consideration to race).

82. *SFFA II* at 72 (finding that African American and Hispanic applicants would decline by 45% under a race neutral policy); *see also Grutter* at 314 (upholding the University of Michigan Law School's race-conscious admissions program where eliminating such a program would result in a 72.4% decline of admitted minority applicants).

considering race in every step of the admissions process, an argument the First Circuit disregarded.[83] The court also agreed that Harvard had attempted to achieve its diversity goals through race neutral alternatives, but that such policies did not succeed.[84] Specifically, it cited Harvard's attempts to eliminate Early Action from 2012 to 2015 and the university's efforts to increase financial aid, which led to decreased enrollment for Hispanic and African American applicants, apparently because the most qualified of those applicants chose to attend universities which offered early admission or early decision.[85]

Finally, the judges rejected petitioner's argument that Harvard's policy discriminated against Asian Americans or that an applicant's personal rating was influenced by race.[86] Instead, they found that while there was a correlation between race and personal rating, there was no causation.[87] Applying a statistical analysis accounting for the personal rating found an overall average marginal effect on admission probability of -0.08%.[88] In other words, under the school's current model, Asian American applicants had an 0.08% less chance of being admitted to Harvard than a similarly situated white student.[89]

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83. *SFFA II* at 74–75 ("[The United States] reads Fisher II as mandating that race only be considered at one step in a university's admissions process because race was considered at only one point in the University of Texas at Austin's process. . . . Its premise is questionable") ("It is difficult to imagine how a school could both consider an applicant's race and holistically review their application, as required by Supreme Court precedent, at only a single point in the admissions process."); *Fisher II* at 33 (citing *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 598 (W.D. Tex. 2009) ("[b]ecause an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation.").

84. *SFFA II* at 77–78 (showing that Harvard had considered all alternatives and found they "would undercut its educational objectives"); *Grutter* at 339 ("Narrow tailoring does not . . . require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.").

85. *SFFA II* at 78–80 (determining that Harvard's race neutral policies failed to meet the desired diversity outcomes); *SFFA I*, 397 F. Supp. 3d at 178–80 ("[Eliminating early action] actually had the unintended consequence of decreasing matriculation rates among some categories of African American and Hispanic applicants, apparently because the most qualified of those prospective applicants were choosing to attend other colleges that offered early admission or early decision") (finding that Harvard had already achieved the maximum returns related to diversity through the use of financial aid and outreach).

86. *SFFA II* at 90–98 (distinguishing between race being correlated with the personal rating and race influencing the personal rating).

87. *Id.* at 92–93 ("If race is only correlated with the personal rating, excluding it from regression models could make it appear as if Harvard discriminates when it does not. If race influences the personal rating, including it in the experts' regression models could make it appear as if Harvard does not discriminate when it does.").

88. *Id.* at 100.

89. *Id.* (Finding that the negative statistical impact on Asian American applicants to be nearly zero).

Excluding the personal rating, the overall average marginal effect on Asian American applicants increased to -0.34%.[90] However, the court found that this model did not include meaningful statistical fluctuations in admissions between minorities for other years, and that the model did not account for the fact that for two years, applicants who identified as Asian American had an increased chance of admission to Harvard.[91]

B. SFFA v. UNC

SFFA is also suing UNC-Chapel Hill. The suit was filed in 2014 around the same time as the Harvard complaint, and the District Court of North Carolina heard the case on November 9, 2020.[92] The complaint alleges facts similar to those filed against Harvard; specifically that the university's race-conscious admission policies discriminate against white and Asian American applicants while disproportionately favoring African Americans and Hispanics.[93] Under the strict scrutiny standard required by the Supreme Court, the school is required to assess the effectiveness of race neutral alternatives prior to implementing race-conscious admission policies to meet their diversity goals.[94] The university alleged in court filings that in 2012, they considered a race neutral admissions approach of accepting the top ten percent of in state applicants, but determined that while such a policy would have increased racial diversity slightly, it also bore the risk of potentially degrading academic quality.[95] UNC was not the first nor the only school to have attempted a 10% policy; The University of Texas at Austin similarly accepted the top ten percent of in state applicants at the time *Fisher* was decided.[96] In deciding *SFSA v. UNC*,

90. *Id.* at 100–01.

91. *See Id.* at 101–02 (Finding that the effect of Asian American identity varies during each admissions period and that the model fails to capture the weight of other unobserved factors, thus not showing enough evidence to prove implicit bias against Asian Americans.)

92. Korn, *supra* note 67.

93. Kate Murphy, *UNC-Chapel Hill Defends Use of Race In The Admissions Process as Federal Trial Begins*, THE NEWS & OBSERVER (Nov. 9, 2020) https://www.newsobserver.com/news/local/education/article247073222.html

94. *See Fisher*, 570 U.S. at 315 (holding that institutions of higher education may consider race in admissions if race neutral alternatives are neither "workable" nor "available").

95. Jeremy Bauer-Wolf, *Court Hears Another Attempt At Ending Affirmative Action, This Time At UNC-Chapel Hill*, EDUCATION DIVE (Nov. 9, 2020), https://www.educationdive.com/news/court-hears-another-attempt-at-ending-affirmative-action-this-time-at-unc-/588650

96. *See Fisher*, 570 US 297 (2013) (applying a race neutral percentage plan in addition to a race-conscious admissions program after finding that the percentage plan alone would not achieve the university's diversity goals).

the Supreme Court expressed concern that such percentage plans might not only impede universities from assembling a racially diverse student body, but also could impede universities from evaluating alternative standards for diversity in admissions, thereby diluting the institution's overall educational value.[97]

Unlike in the Harvard case, where the objective evidence was limited to a statistical analysis of Harvard's admission policy, UNC is at a disadvantage in their litigation because of online chat messages between admissions officers that were introduced as evidence in the case.[98] These chat messages implied that race was a heavily weighted factor in the university's admissions policy.[99] While UNC does not maintain a racial quota, some of the messages may reveal issues similar to those in *Grutter*, where using race as a "decisive" factor was found unconstitutional.[100] Thus, the court will likely focus on the degree to which UNC used race as a factor in admissions coupled with other individualized qualities.[101] Regardless of the holding, the result is likely to be appealed to the Fourth Circuit, where the issue would be ripe for Supreme Court consideration, particularly if it results in a circuit split.[102]

C. United States v. Yale

Unlike the Harvard and UNC lawsuits, the Yale lawsuit was not brought by SFFA, but by the U.S. Department of Justice.[103] The

97. *See Grutter*, 539 U.S. 306, 340–41 (2003) (recommending that institutions of higher education balance the use of race neutral and race-conscious admissions programs to achieve a diverse student body that maximizes the university's educational mission without unduly discriminating against qualified nonminority applicants).

98. *See generally* Benjamin Wermund, '*Give These Brown Babies a Shot': UNC Defends Its Use of Race in Admissions*, POLITICO (Feb. 20, 2019), https://www.politico.com/story/2019/02/20/unc-race-admissions-1162175 (revealing messages indicating the consideration given by admissions officers when admitting applicants).

99. *Id.*

100. *Compare Grutter v. Bollinger*, 539 U.S. 306 (2003) (finding the use of race as a decisive factor in admissions to be unconstitutional), *with* Wermund *supra* note 98 (revealing messages like "giving brown babies a shot at these merit $$," and statements such as "We know this is late admission but we would like to see [REDACTED] have a shot. She is a Hispanic minority and good background to have this opportunity.").

101. *See generally Grutter* at 340–41 (allowing the use of race-conscious admissions programs where it does not unduly harm nonminority applicants and considers race as one factor among many).

102. Murphy, *supra* note 93 (writing that both the UNC and Harvard cases could impact how universities use race as a factor in college admissions).

103. Korn, *supra* note 67 (stating that the Justice Department sued Yale, alleging that the university violated Title VI by discriminating against white and Asian American applicants in their admissions process).

complaint alleges that Yale's use of race as a factor in admissions unfairly discriminates against white and Asian American applicants in violation of Title VI of the Civil Rights Act of 1964.[104] Interestingly, however, this case could also be the easiest of the three ongoing lawsuits against affirmative action to be dismissed. Whereas the Trump administration has actively opposed the use of race as a factor in admissions, supporting SFFA in their cases against Harvard and UNC, the Biden administration is less likely to continue such policy.[105]

Although the SFFA did not file the original lawsuit against Yale, they have been far from silent on the issue. On October 27, 2020, SFFA filed a Motion to Intervene in the case, alleging that they are entitled to intervention because some of their members had been rejected by Yale, and that other members were planning to apply.[106] If the District Court grants SFFA's motion, then SFFA would have the right to continue the lawsuit despite the potential absence of the DOJ.[107] SFFA President, Edward Blum, has already revealed his intention to continue the litigation, stating "SFFA brings a unique perspective and standing to the challenge to Yale's admissions practices that is not fully articulated in the DOJ complaint."[108] As such, if SFFA's Motion to Intervene is granted, the case will likely proceed to trial in the District Court of Connecticut.[109] Like the pending UNC case, the District Court's decision on this matter will inevitably be appealed to the Second Circuit, where a potential circuit split could be lurking in the shadows.[110]

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104. *Id.* (noting that the Trump administration has also supported SFFA's lawsuits against UNC and Yale, including filing an amicus brief supporting SFFA in the First Circuit).

105. *See generally* Amelia Davidson, *Harvard Affirmative Action Ruling Upheld, Could Move to Supreme Court, As Yale Case Remains In Flux*, YALE DAILY NEWS (Nov. 13, 2020) https://yaledailynews.com/blog/2020/11/13/harvard-affirmative-action-ruling-upheld-could-move-to-supreme-court-as-yale-case-remains-in-flux/; *see also* Julia Brown & Amelia Davidson, *Biden Election Could Change DOJ Lawsuit*, YALE DAILY NEWS (Nov. 8, 2020) (believing that a Biden administration will be more accommodative of affirmative action and drop the DOJ lawsuit against Yale).

106. *See* United States v. Yale University, *Memorandum of Law in Support of Motion to Intervene*, No. 3:20-cv-01534, (hereinafter "Motion to Intervene") (D. Conn. 2019).

107. *See generally* Davidson, *supra* note 105 (noting that court approval of SFFA's motion to intervene would allow SFFA to maintain the lawsuit).

108. Brown, *supra* note 105 (demonstrating Mr. Blum's intention to actively participate and continue the lawsuit against Yale University even if the DOJ were to drop it).

109. *Id.* (indicating SFFA's intent to maintain the case).

110. *See generally* Scott Jaschik, *Appeals Court Backs Harvard on Affirmative Action*, INSIDE HIGHER ED (Nov. 13, 2020),
https://www.insidehighered.com/admissions/article/2020/11/13/appeals-court-backs-harvard-affirmative-action (predicting that the First Circuit's decision, coupled with the remaining

IV. WHY SCOTUS SHOULD UPHOLD HARVARD'S AFFIRMATIVE ACTION ADMISSIONS PROGRAM

Assuming the Supreme Court grants certiorari, the first affirmative action case on the docket will be the one against Harvard, given that it is the most advanced stage of the three, having recently been decided by the First Circuit.[111] The Court could decide the case in one of three ways: (1) uphold the First Circuit's decision that Harvard's use of race was narrowly tailored in achieving a diverse educational environment; (2) reverse the First Circuit and find that Harvard's admissions program was not narrowly tailored toward achieving a diverse educational environment and that its use of race was decisive; or (3) reverse *Grutter* and hold there is no compelling interest in the use of race in higher education admissions programs.

A. Uphold the First Circuit's Decision

Both the First Circuit and the District Court of Massachusetts found Harvard's use of race in its admissions program to be part of a holistic, individualized process, thus passing strict scrutiny. Under *Fisher*, the lower Court must be convinced that the university has considered all race neutral alternatives to achieving their diversity objectives and has found such alternatives are not "workable."[112] Harvard spent a significant amount on six race neutral proposals and found that allocating more funds to them would significantly improve results.[113] Further, Harvard evaluated these programs twice a year, probing for possible improvements.[114]

A narrowly tailored race-based admissions policy cannot involve racial balancing, cannot use race as a decisive factor, and cannot be used where there exist workable race neutral alternatives.[115] The lower court found that Harvard could not have engaged in racial balancing given the inconsistent fluctuations in admitted Asian American applicants.[116] On the issue of race as a decisive factor, the First Circuit

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pending cases on affirmative action, makes it likely the Supreme Court will eventually weigh in on the issue).

111. *SFFA II*, No. 19-2005, 1, 65 (1st Cir. 2020).

112. *Fisher*, 570 U.S., at 312.

113. *SFFA II* at 35–37 (citing the Smith Report which examined whether Harvard could achieve its diverse interest notwithstanding a race-conscious admissions program).

114. *Id.* at 38.

115. *Id.* at 64 (citing *Fisher*, 570 U.S. 297, and *Fisher II*, 579 U.S. 1).

116. *Id.* at 65 ("The level of variation in the share of admitted Asian American applicants is inconsistent with a quota, as is the fact that the share of admitted Asian Americans co-varies almost perfectly with the share of Asian American applicants").

contrasted Harvard's admissions program from *Gratz* in that Harvard did not use a point based system.[117] Further, there was a lack of evidence supporting petitioner's argument that race was given disproportional consideration in admissions compared to other qualities.[118] Indeed, SFFA's expert analysis revealed that a significant number of Hispanic and African American applicants who excelled in objective categories like test scores and GPA were also rejected, likely due to other factors unrelated to race or ethnicity.[119]

Harvard also carefully considered all workable race neutral alternatives and found they would not meaningfully add to the overall diversity objectives they were seeking.[120] Further, such race neutral alternatives would have impaired enrollment opportunities for applicants with other diverse qualities like athletic skill, extracurricular activities, and applicants with varied life experiences.[121]

Finally, the First Circuit analyzed statistical models to determine whether Harvard's numerical ratings, including an applicant's personal ratings, were influenced by race.[122] The lower court was convinced that while there was a correlation between race and an applicant's personal rating, such correlation did not necessarily imply causation between the two factors.[123] In addition, both the District Court and First Circuit cited Harvard's statistical model incorporating non-quantifiable personal ratings for evaluating applicants in finding no implicit bias on Harvard's part, determining the overall marginal impact on Asian American admissions to be "statistically insignificant."[124]

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117. *See SFFA II* at 72–73 (finding that Harvard's consideration of race is less than UM's admissions program in *Grutter*); *Gratz* at 272 (holding that a system allocating 20% of consideration to race converts race into a decisive factor in admissions).

118. *Id.*

119. *SFFA II* at 73 (showing that Harvard rejects 2/3 of Hispanic applicants and nearly 50% of African American applicants that are among the top 10% in GPA and standardized test scores).

120. *Id.* at 79 (finding that while adoption of "Simulation D", a proposed race neutral alternative, would have increased Asian American enrollment by 7% and Hispanic enrollment by 5%, it would decrease it for African Americans and White applicants by 7% and 4%).

121. *Id.* at 80 (showing that Simulation D would reduce the fraction of applicants with high extracurricular, personal, or athletic ratings by 10-22%).

122. *Id.* at 50 (finding that Asian American applicants tended to have worse personal ratings than African Americans and Hispanics).

123. *Id.* at 93–95 (rejecting petitioner's argument that correlation is indicative of causation in that the model omitted non-quantifiable aspects of an applicant's personal essay).

124. *Id.* at 100–102 (determining that SFFA's preferred model shows an overall marginal effect of -0.34% on Asian American applicants, but includes all Harvard applicants and excludes the personal rating).

Given all this information, the Supreme Court should find that Harvard's use of race was narrowly tailored and complied with the legal standards set by the Court in *Grutter* and *Fisher*.[125]

B. Reverse the First Circuit's Decision

Alternatively, the Supreme Court could decide to reverse the First Circuit and find that Harvard's use of race in admissions was not narrowly tailored to achieving a diverse educational environment. The Court could agree with SFFA's argument that Harvard intentionally discriminated against Asian American applicants by using a subjective personal ratings evaluation that is predicated on outdated stereotypes.[126] While *Bakke* did permit the use of "flexible" subjective admissions procedures, such systems cannot be predicated on bias or stereotypes.[127] Thus, if the Court were to find that Harvard's personal rating was influenced by racial bias or stereotypes against Asian American culture, then it could find the university's admissions process to be unconstitutional.[128]

Pursuant to this decision, many universities would then likely be required to revise and reform their admissions programs to conform to the new standard. Systems using a personal rating system would require periodic review of their procedures to ensure that all personal evaluations are based on an individual assessment of the applicant's overall personal qualities. This system would allow universities to avoid allegations that such evaluations could be predicated on bias or antiquated stereotypes.[129] While universities would be required to undertake remedial measures to comply with a more rigorous strict scrutiny standard, such a decision would preserve the idea of affirmative action, in contrast to the scenario discussed below.

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125. *Grutter* at 339 (requiring institutions of higher education to consider race neutral alternatives before considering race as a factor); *see also Fisher II*, at 19 (stating that institutions have the burden of showing that they did not have additional "available" and "workable" race neutral alternatives to the consideration of race).

126. *SFFA II* at 85 (stating SFFA's argument citing a 1990 OCR Report warning Harvard that its admissions process could be racially biased).

127. *Compare SFFA II* at 86 (finding no evidence that Harvard's subjective process facilitated bias or stereotyping), *with Bakke*, 438 U.S., at 317–18 (approving of Harvard's subjective, "flexible" admissions system where "the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class").

128. *SFFA II* at 92–93 (explaining Harvard's admissions program would be unconstitutional if race influenced the personal rating).

129. *Id.* at 88 (citing personal reports characterizing Asian American applicants as "quiet, flat, shy, and understated").

C. Reverse Grutter and Prohibit the Use of Affirmative Action in Higher Education

The final route the Supreme Court could take, would be to reverse *Grutter* and determine there is no compelling interest in fostering a diverse educational environment in higher education.[130] At the time *Grutter* was decided, Justice O'Connor wrote "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[131] Moreover, since *Grutter* was decided in 2003, six more states have acted to ban affirmative action, lending credibility to the argument that racial preferences are not required to achieve a diverse student population.[132] Studies evaluating enrollment and graduation rates post Prop. 209 in California also indicate how universities may achieve their objectives pertaining to educational diversity in the absence of an affirmative action framework.[133]

Going this route would constitute a drastic reversal of precedent that would impact every state that has not yet imposed a ban on affirmative action.[134] Further, such a decision would have to be carefully timed, to provide universities with sufficient time to bring their admissions policies into conformity by the following admissions cycle. As the pressure on affirmative action in higher education increases, it becomes more likely that the Supreme Court will determine that a diverse student body no longer constitutes a compelling state interest.[135]

V. CONCLUSION

Given the vital history and importance of affirmative action in higher education, it is highly likely the Supreme Court will grant certiorari to hear this issue. A ruling by the Court on this issue may

130. *See Grutter*, 539 U.S. 306, 325 (endorsing student body diversity as a compelling state interest justifying the use of race in college admissions).

131. *Id.* at 343.

132. *Id.* at 342 ("Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race neutral alternatives as they develop").

133. Arcidiacono, *supra* note 18, at 6–7 (noting a significant increase in graduation rates for African American and Hispanic students following the enactment of Prop. 209).

134. *See Grutter* at 340 (upholding a diverse student body as a compelling government interest, thus satisfying one element of strict scrutiny).

135. *Id.* at 342 ("We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point").

have repercussions on admissions policies in universities all around the country, requiring them to reconstruct their admissions programs to be either completely or slightly more race neutral. In addition, it could also impact minority enrollment rates in certain universities, as occurred with Berkeley and UC following Prop. 209. Although the Supreme Court should find that that Harvard's admissions policies are narrowly tailored to achieving educational diversity, universities should be prepared for an alternative scenario. One in which the Court overturns *Grutter* and determines that educational diversity is no longer a compelling interest. Amid the Supreme Court deliberation, admissions seasons will be hectic.