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## “TRUMPING” AFFIRMATIVE ACTION

VINAY HARPALANI\*

## ABSTRACT

This Essay examines the Trump administration’s actions to eliminate affirmative action, along with the broader ramifications of these actions. While former-President Trump’s judicial appointments have garnered much attention, the Essay focuses on the actions of his Department of Justice, Civil Rights Division. It lays out the Department of Justice’s investigations of Harvard and Yale, highlighting how they have augmented recent lawsuits challenging race-conscious admissions policies by Students for Fair Admissions. It considers the timing of the DOJ’s actions, particularly with respect to *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*. It examines the strategies used by Students for Fair Admissions and the Department of Justice—how they have used Asian American plaintiffs and forced universities to reveal information about their admissions processes—and considers the broader social and political impact of these strategies. The Essay also analyzes how the litigation challenging affirmative action has employed ambiguities in prior cases involving race-conscious university admissions. Although President Joe Biden’s administration can undo some of the Department of Justice’s actions, these actions have set the stage for affirmative action to be “trumped.”

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\* Copyright © 2021 by Vinay Harpalani, Associate Professor of Law and Henry Weihofen Professor at the University of New Mexico School of Law. J.D., 2009, New York University School of Law; Ph.D., 2005, University of Pennsylvania. I thank Professor Stacy Hawkins for her helpful feedback on this Essay. Additionally, editors of the *Villanova Law Review Tolle Lege*—Hannah Schroer, Anna Glorioso, and Pat Smith—did an outstanding job editing this Essay and suggesting revisions.

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## INTRODUCTION

Affirmative action<sup>1</sup> in university admissions has long been under attack,<sup>2</sup> but the Trump administration took this siege to a new level.<sup>3</sup> Ironically, during his Republican primary campaign in 2015, Trump himself twice stated that he was “fine with affirmative action.”<sup>4</sup> But then-President Trump’s nominees to the federal judiciary—particularly his U.S. Supreme Court appointees Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett<sup>5</sup>—moved the courts far to the right. Former President Trump also made numerous appointments to the federal appeals courts.<sup>6</sup>

1. “Affirmative action” refers to a broad range of policies that involve “an active effort to improve the employment or educational opportunities of members of minority groups and women.” *Affirmative Action*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/affirmative%20action> [<https://perma.cc/46ZC-T38W>] (last visited Oct. 25, 2020). Nevertheless, the term is often used in a narrower sense as synonymous with race-conscious university admissions. This Essay uses “affirmative action” in that narrower sense to mean “race-conscious admissions policies.”

2. See Margaret Kramer, *A Timeline of Key Supreme Court Cases on Affirmative Action*, N.Y. TIMES (Mar. 30, 2019), <https://www.nytimes.com/2019/03/30/us/affirmative-action-supreme-court.html> [<https://perma.cc/9T9A-GRXU>] (reviewing U.S. Supreme Court cases challenging race-conscious university admissions policies over past 46 years).

3. As with many other issues during his presidency, the challenge to affirmative action is part of President Trump’s broader appeal to White resentment. See Carol Anderson, Opinion, *The Policies of White Resentment*, N.Y. TIMES (Aug. 5, 2017), <https://www.nytimes.com/2017/08/05/opinion/sunday/white-resentment-affirmative-action.html> [<https://perma.cc/8KPQ-778N>] (“White resentment put Donald Trump in the White House. . . . Affirmative action is no different. It, too, requires a narrative of white legitimate grievance . . .”).

4. See Chris Gillizza, *Donald Trump on ‘Meet the Press,’ Annotated*, WASH. POST (Aug. 17, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/08/17/donald-trump-on-meet-the-press-annotated/> [<https://perma.cc/8HKT-K8RD>] (noting President Trump’s first such statement on news show *Meet the Press*); Paul Mirengoff, *Trump Piles on Scalia; Supports Racial Preferences*, POWERLINE BLOG (Dec. 17, 2015), <https://www.powerlineblog.com/archives/2015/12/trump-piles-on-scalia-supports-racial-preferences.php> [<https://perma.cc/HDY6-D6BP>] (covering President Trump’s December 2015 statements at CNN interview following oral argument in *Fisher v. Univ. of Tex. at Austin II* (*Fisher II*), 136 S. Ct. 2198 (2016)). Trump was responding to comments about Black students made by the late Justice Antonin Scalia during the oral arguments in *Fisher v. University of Texas at Austin II*. See Mirengoff, *supra*, see also Transcript of Oral Argument at 67, *Fisher v. Univ. of Texas at Austin II*, 136 S. Ct. 2198 (2016) (No. 14-981), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2015/14-981\\_onjq.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-981_onjq.pdf) [<https://perma.cc/JS2C-6GA3>] (Justice Scalia stating “there are those who contend that it does not benefit African-Americans to—to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a less—a slower-track school where they do well.”). Trump disagreed with Justice Scalia and actually said that Scalia was “very tough to the African-American community.” See Mirengoff, *supra*.

5. See *Amy Coney Barrett Confirmed to US Supreme Court*, BBC NEWS (Oct. 27, 2020), <https://www.bbc.com/news/election-us-2020-54700307> [<https://perma.cc/6DMN-N4YF>].

6. See Ian Millhiser, *What Trump Has Done to the Courts, Explained*, VOX, <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges> [permalink unavailable] (last updated Sept. 29, 2020, 10:32 PM) (“On the courts of appeal, the final word in the overwhelming majority of federal cases, more than one-quarter of active judges are Trump appointees. In less than four years, Trump has named a total of 53 judges to these courts, compared to the 55 Obama appointed during his entire presidency.”).

His remaking of the federal judiciary threatens to eliminate race-conscious university admissions altogether.<sup>7</sup>

But the Trump administration did not stop there. The Civil Rights Division of the Department of Justice (DOJ) worked vigorously to eliminate affirmative action. The DOJ began investigating race-conscious admissions policies at two of the most elite universities in the U.S.: Harvard and Yale.<sup>8</sup> During these investigations, the DOJ threatened to sue Harvard for delays in the production of documents.<sup>9</sup> In August 2020, the DOJ declared Yale's race-conscious admissions policy illegal and suggested that it might file a lawsuit.<sup>10</sup> And after Yale refused to stop considering race in its 2020–21 admissions cycle, the DOJ did file suit.<sup>11</sup>

7. Professor Stacy Hawkins argues that “President Trump’s ‘whitewashing’ of the federal judiciary will have grave consequences for the legitimacy and effective functioning of [U.S. federal] courts on behalf of an increasingly diverse citizenry.” Stacy Hawkins, *Trump’s Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20, 20 (2019). At the time that Professor Hawkins’s article was published, she notes that “[i]n a nation that is comprised of thirty percent white men, thirty percent white women, and forty percent racial and ethnic minorities, Trump’s judicial appointees have been ninety-two percent white and seventy-six percent male.” *Id.* at 44.

8. See Patricia Hurtado & David Yaffe-Bellany, *Yale Accused by Justice Department of Discriminating Against Asian American and White Applicants*, TIME (Aug. 14, 2020, 12:55 AM), <https://time.com/5879459/yale-discrimination-admissions-justice-department/> [<https://perma.cc/Q44C-M3FK>].

9. See Deirdre Fernandes, *Justice Department Investigating Harvard Over its Admission Policies*, BOS. GLOBE (Nov. 21, 2017, 8:14 AM), <https://www.bostonglobe.com/metro/2017/11/21/justice-department-investigating-harvard-over-its-admission-policies/LJL8KmnOZHY3qO0PjCU8LP/story.html> [<https://perma.cc/TR97-JNYX>].

10. See Hurtado & Yaffe-Bellany, *supra* note 8. According to Professor Samuel Bagenstos, the timing of this announcement may have reflected “the almost certain fear by Trump administration officials that there’s at least a substantial likelihood that come January, they won’t be here.” See Julia Brown & Amelia Davidson, *Biden Election Could Change DOJ Lawsuit*, YALE DAILY NEWS, (Nov. 8, 2020, 11:27 PM), <https://yaledailynews.com/blog/2020/11/08/biden-election-could-change-doj-lawsuit/> [<https://perma.cc/YJ8A-6V4G>].

11. See Press Release, Dep’t of Justice, Off. of Pub. Aff., Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions (Oct. 8, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-yale-university-illegal-discrimination-practices-undergraduate> [<https://perma.cc/3XTK-3R4U>] (“The Justice Department today filed suit against Yale University for race and national origin discrimination. The complaint alleges that Yale discriminated against applicants to Yale College on the grounds of race and national origin, and that Yale’s discrimination imposes undue and unlawful penalties on racially-disfavored applicants, including in particular most Asian and White applicants.”).

In April 2019, President Trump’s Department of Education, Office of Civil Rights, also settled a complaint dating back to the George W. Bush administration against Texas Tech University School of Medicine. The medical school agreed to stop considering race in its admissions process. See Benjamin Wermund, *Texas Tech Medical School Will End Use of Race in Admissions*, POLITICO, <https://www.politico.com/story/2019/04/09/texas-tech-medical-school-race-admissions-3048529> [<https://perma.cc/QX4M-AQNH>] (last updated Apr. 9, 2019, 5:07 PM).

Additionally, in September 2020, Trump’s Department of Education also announced that it was investigating racism at Princeton University, another one of the most elite universities in the U.S. See Collin Binkley, *Princeton Faces Federal Inquiry After Acknowledging Racism*, ASSOCIATED PRESS (Sept. 18, 2020), <https://apnews.com/article/discrimination-race-and-ethnicity-racial-injustice-archive-b51043edeece8b7899c26bfacc88e8eec> [permalink unavailable]. Prior to this investigation, Princeton had admitted that it had a history of racism. *Id.* While the Department of Education’s inquiry does not appear to target race-conscious admissions policies per se, it is “the latest escalation in the administration’s campaign against the Ivy League for its policies on matters of race.” Anemona Hartocollis, *Princeton Admitted Past Racism. Now It Is Under Investigation*, N.Y. TIMES (Sept.

The Trump DOJ’s actions stood in stark contrast with the Obama administration, which supported affirmative action and created legal guidance for universities to defend their race-conscious admissions policies<sup>12</sup>—guidance the Trump DOJ rescinded.<sup>13</sup> President Joe Biden’s administration will likely return to the Obama-era stance.<sup>14</sup> Nevertheless, the Trump DOJ’s actions will have a lasting impact. Moreover, these actions illuminate not only the legal strategies to defeat affirmative action but also the social and political dynamics at play in the debate.

After President Trump took office, his administration did not take long to begin attacking affirmative action. In August 2017, just seven months into his presidency, the DOJ launched an investigation into Harvard’s race-conscious admissions policies.<sup>15</sup> Harvard’s admissions policies were already under challenge from

18, 2020), <https://www.nytimes.com/2020/09/17/us/princeton-racism-federal-investigation.html> [<https://perma.cc/F4BP-NWMU>]. In 2006, the George W. Bush administration’s Department of Education began an investigation of Princeton University’s admissions policies for allegedly discriminating against Asian American applicants. See Scott Jaschik, *Anti-Asian Bias Claim Rejected*, INSIDE HIGHER EDUC. (Sept. 24, 2015), <https://www.insidehighered.com/news/2015/09/24/ocr-clears-princeton-anti-asian-discrimination-admissions> [<https://perma.cc/K8UF-BK4D>]. In 2015, the Obama administration cleared Princeton of any wrongdoing after nine years of investigation. See *id.*

12. See DEP’T OF JUSTICE, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION 1, 4–10 (2011) [hereinafter DOJ GUIDANCE], <https://files.eric.ed.gov/fulltext/ED585867.pdf> [<https://perma.cc/5YVV-CEFS>] (discussing Obama administration’s recommendations for implementation of race-conscious admissions policies and race-neutral alternatives in higher education).

13. See Camille Domonoske, *Trump Administration Rescinds Obama-Era Guidance Encouraging Affirmative Action*, NPR, <https://www.npr.org/2018/07/03/625750918/trump-administration-rescinds-obama-era-guidance-encouraging-affirmative-action> [<https://perma.cc/8WGU-KEC5>] (last updated July 3, 2018, 5:10 PM); see also *Attorney General Jeff Sessions Rescinds 24 Guidance Documents*, DEP’T OF JUSTICE (July 3, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents> [<https://perma.cc/9YG4-QAPK>] (guidance documents 18–24 pertained to race-conscious policies). President Trump’s hostility towards diversity also came out in other ways. For example, he issued an executive order in September 2020 that restricted the federal government and its contractors from implementing diversity training that was deemed to be divisive. See Exec. Order No. 13950, 85 C.F.R. § 60683 (Sept. 22, 2020) *Executive Order on Combating Race and Sex Stereotyping* (Sept. 22, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-28/pdf/2020-21534.pdf> [<https://perma.cc/4W5H-3ZB2>] (noting “[i]nstructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country”).

14. See Benjamin L. Fu & Vivi E. Lu, *Complete Switch in Position: SFFA-Harvard Admissions Suit Observers Anticipate Change in Affirmative Action Attitudes Under Biden Administration*, HARV. CRIMSON (Jan. 20, 2021), <https://www.thecrimson.com/article/2021/1/20/biden-admin-admissions-lawsuit/> [<https://perma.cc/7Y2R-H9NV>] (noting experts believe Biden administration will support affirmative action as Obama administration did); see also DOJ GUIDANCE, *supra* note 12 (promoting race-conscious admissions policies under President Obama). For President Biden’s prior record on affirmative action, see *Joe Biden on Civil Rights*, TIME, [http://content.time.com/time/specials/packages/article/0,28804,1849140\\_1849287\\_1849691,00.html](http://content.time.com/time/specials/packages/article/0,28804,1849140_1849287_1849691,00.html) [<https://perma.cc/T2CT-9JGE>] (noting Joe Biden was “[r]ated 100% by the NAACP, indicating a pro-affirmative-action stance”) (last visited Oct. 25, 2020).

15. Benjamin Wermund, *Trump Administration Sparks Age-old Affirmative Action Fight*, POLITICO (Aug. 4, 2017, 10:00 AM), <https://www.politico.com/tipsheets/morning-education/2017/08/04/trump-administration-sparks-age-old-affirmative-action-fight-221704> [<https://perma.cc/LP6R-LFGR>] (noting “[a]n internal Justice Department posting . . . was actually a call for volunteers to work on a complaint alleging discrimination against Asian-American applicants at Harvard”).

Students for Fair Admissions (SFFA), an anti-affirmative action organization.<sup>16</sup> SFFA contends that affirmative action, legacy preferences for children of alumni, and other evaluations used by admissions reviewers all discriminate against Asian-American applicants.<sup>17</sup> Former President Trump’s DOJ largely echoed this position.<sup>18</sup> The focus on Asian-American applicants adds another dimension to the discourse around affirmative action, as Asian Americans have historically faced racial discrimination in various sectors, including admissions.<sup>19</sup>

Both the Harvard and Yale lawsuits involve claims under Title VI of the Civil Rights Act of 1964<sup>20</sup> rather than the Fourteenth Amendment’s Equal Protection Clause. Title VI can unequivocally reach private universities: it prohibits race

16. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 19-2005, 980 F.3d 157 (1st Cir. 2020) (most recent court decision); see also Melissa Korn, *Harvard Didn’t Violate Federal Civil-Rights Law, Appellate Court Determines*, WALL ST. J. (Nov. 12, 2020), <https://www.wsj.com/articles/appellate-court-determines-harvard-didn-t-violate-federal-civil-rights-law-11605191351> [<https://perma.cc/YUT4-ANWY>]. SFFA has brought a similar lawsuit against the University of North Carolina at Chapel Hill (UNC). See Kate Murphy, *Trial on UNC-Chapel Hill’s Race-Related Admissions Ends, But Ruling Could Take Months*, CHARLOTTE OBSERVER (Nov. 19, 2020, 7:14 PM), <https://www.charlotteobserver.com/news/local/education/article247284969.html> [permalink unavailable]; STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/> [<https://perma.cc/G245-7JSR>] (last visited Oct. 25, 2020).

17. See STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/legal-issues/> (last visited Dec. 13, 2020).

18. See Delano R. Franklin & Samuel W. Zwickel, *Justice Department Says Harvard Illegally Discriminates Against Asian American Applicants*, HARV. CRIMSON (Aug. 30, 2018), <https://www.thecrimson.com/article/2018/8/30/doj-harvard-unlawful/> [<https://perma.cc/9UMM-38CEJ>].

19. In the context of university admissions, Professor Jerry Kang distinguishes between “affirmative action” and “negative action.” The latter refers to “unfavorable treatment based on race, using the treatment of Whites [rather than underrepresented minorities] as a basis for comparison.” Jerry Kang, *Negative Action against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996). Additionally, Professor Dana Takagi gives a history of Asian Americans in the affirmative action debate. See DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (Rutgers Univ. Press, 1992). In particular, Professor Takagi notes how in the 1980s, conservatives drew upon accusations of negative action to “reconstruct[] affirmative action discourse” and cast “Asians as the new ‘victims’ of affirmative action.” See *id.* at 138. Three decades later, the lawsuits against Harvard and Yale essentially do the same. See Benjamin L. Fu & Dohyun Kim, *What to Expect Next in the Harvard Admissions Suit*, HARV. CRIMSON (Oct. 13, 2020), <https://www.thecrimson.com/article/2020/10/13/harvard-sffa-next-steps/> [<https://perma.cc/3G9Z-YXAC>] (reporting author discussing how Harvard litigation “is about taking this idea of discrimination against Asian Americans, vis-a-vis white Americans . . . to actually challenge Grutter [v. Bollinger], to challenge race-conscious admissions to benefit African Americans and Latinos” (alteration in original)).

Although more Asian Americans have generally supported affirmative action than opposed it, attitudes do vary by ethnic group and other factors. Janelle Wong, Jennifer Lee, & Van Tran, *Asian Americans’ Attitudes Toward Affirmative Action: Framing Matters*, DATA BITS BLOG (Oct. 1, 2018), <http://aapidata.com/blog/aa-attitudes-affirmative-action/> [<https://perma.cc/7FFU-9DJF>]. The Harvard and Yale lawsuits could have the potential to turn more Asian Americans against affirmative action.

20. 42 U.S.C. §§ 2000d–2000d-7 (2018).

discrimination by all education institutions that receive federal funding.<sup>21</sup> Although the Supreme Court has not ruled directly on a Title VI case involving race-conscious university admissions,<sup>22</sup> it strongly suggested that the criteria for evaluating racial classifications under Title VI are the same as those for the Equal Protection Clause.<sup>23</sup> Racial classifications brought under the Equal Protection Clause must pass strict scrutiny: they must fulfill a compelling state interest and be narrowly tailored to that interest. The Supreme Court’s legal framework<sup>24</sup> for evaluating the constitutionality of race-conscious admissions policies under the Equal Protection Clause also guides the legality of affirmative action under Title VI.

#### I. AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS: U.S. SUPREME COURT CASES

While it has evolved some over the past forty years, the basic tenets of the Supreme Court’s framework have remained the same. In *Regents of the University of California v. Bakke*,<sup>25</sup> the Court was divided. Four Justices voted to uphold the University of California, Davis School of Medicine’s set-aside plan,<sup>26</sup> which reserved 16 seats out of 100 for underrepresented minority students,<sup>27</sup> while four Justices voted to strike it down under Title VI.<sup>28</sup> Justice Lewis Powell’s opinion in *Bakke* was controlling and became the model for determining the constitutionality of race-conscious university admissions policies.<sup>29</sup> Justice Powell found the UC Davis set-

21. *Id.* § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

22. Four dissenting Justices in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 421 (1978), found the University of California at Davis School of Medicine admissions plan violated Title VI by denying Bakke admission “because of his race.” *See Bakke*, 438 U.S. at 421 (Stevens, J., dissenting). Chief Justice Warren Burger, along with Justices Potter Stewart and William Rehnquist, joined Justice Stevens’s dissent. *Id.* at 408.

23. *See Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001). “Essential to the Court’s holding [in *Bakke*] reversing that aspect of the California court’s decision was the determination that § 601 [of Title VI] ‘proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.’” *Id.* (second alteration in original) (quoting *Bakke*, 438 U.S. at 287 (opinion of Powell, J.)); *see also Bakke*, 438 U.S. at 325, 328, 352 (Brennan, J., White, J., Marshall, J., Blackmun, J., concurring in the judgment in part and dissenting in part).

24. *See Bakke*, 438 U.S. at 313 (opinion of Powell, J.); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin II (Fisher II)*, 136 S. Ct. 2198 (2016).

25. 438 U.S. 265 (1978).

26. *See Bakke*, 438 U.S. at 368–69 (Brennan, J., concurring in the judgment in part and dissenting in part) (“We therefore conclude that Davis’ goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria.”). Justice William Brennan’s opinion was joined by Justices Byron White, Thurgood Marshall, and Harry Blackmun. *Id.* at 324.

27. *Id.* at 278–79. The admissions program was a racial quota because minority applicants to the University of California at Davis School of Medicine “were rated only against one another, and 16 places in the class of 100 were reserved for them.” *Id.* at 279.

28. *See id.* at 408 (Stevens, J., concurring in the judgment in part and dissenting in part). Justices Stevens, Burger, Rehnquist, and Stewart voted against the set-aside plan. *Id.* (Stevens, J., Burger, C.J., Stewart, J., Rehnquist, J., concurring in the judgment in part and dissenting in part).

29. *See* Mark Kende, *Is Bakke Now a ‘Super-Precedent’ and Does It Matter? The U.S. Supreme Court’s Updated Constitutional Approach to Affirmative Action in Fisher*, 16 U. PA. J. CONST. L. HEIGHT.



aside plan unconstitutional,<sup>30</sup> but he drew from Harvard University's admissions plan to hold race could be used as a "plus factor" in a university's admissions policy.<sup>31</sup> He found that attaining the educational benefits of diversity within its student body was a compelling interest that justified Harvard's use of race.<sup>32</sup> Justice Powell cited Harvard's admissions plan as a model for a constitutionally permissible race-conscious admissions policy.<sup>33</sup>

Universities used Justice Powell's *Bakke* opinion as their guide to implementing race-conscious admissions policies.<sup>34</sup> No other Justice had joined Justice Powell, though, and his opinion remained controversial until two cases from the University of Michigan came before the Supreme Court in 2003. In *Gratz v. Bollinger*,<sup>35</sup> the Court struck down the University of Michigan's undergraduate admissions plan, which awarded a fixed number of points to all underrepresented minority applicants without individualized review. In *Grutter v. Bollinger*,<sup>36</sup> the Court upheld the University of Michigan School of Law's holistic admissions policy, which considered race flexibly as one of many factors assessed during an individualized review of each applicant.<sup>37</sup>

Justice Sandra Day O'Connor's majority opinion reaffirmed diversity as a compelling interest, essentially bringing five votes to Justice Powell's *Bakke* opinion.<sup>38</sup> *Grutter* held that universities could use race to obtain a "critical mass" of minority students in order to attain the educational benefits of diversity.<sup>39</sup> *Grutter* also set other limitations on race-conscious admissions policies. Such policies

SCRUTINY 15, 18 (2013), <https://www.law.upenn.edu/live/files/2626-kendefinal-16upajconstonline15pdf> [<https://perma.cc/WU2W-Q7ET>] ("Justice Powell's . . . *Bakke* opinion . . . has shown stunning vitality given its initial fragility.")

30. *Bakke*, 438 U.S. at 320 (holding "special admissions program invalid under the Fourteenth Amendment."); *id.* at 316 (noting existence of other admissions programs considering race to achieve educational diversity demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end.)

31. *Id.* at 317 ("[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.")

32. *Id.* at 311–12 ("[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.")

33. *Id.* at 316 (quoting Harvard's program, which "expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups" without setting target quotas for the number of blacks")

34. *See Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (noting "universities . . . have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies" since *Bakke*).

35. 539 U.S. 244 (2003).

36. 539 U.S. 306 (2003).

37. *See id.* at 337 ("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. . . . Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." (citation omitted)).

38. *Id.* at 325 ("[The Court] endorse[s] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.")

39. *Id.* at 330 (noting that "critical mass is defined by reference to the educational benefits that diversity is designed to produce.")

cannot use race to “unduly harm” any racial group.<sup>40</sup> Justice O’Connor also noted that race-conscious admissions policies should be time-limited,<sup>41</sup> and universities should use race-neutral admissions policies if those could achieve an equally diverse class.<sup>42</sup>

In 2016, *Fisher v. University of Texas at Austin II (Fisher II)*<sup>43</sup> reaffirmed *Grutter*. But although the Court upheld race-conscious policies in *Fisher II*, Justice Anthony Kennedy’s majority opinion reiterated that narrow tailoring requires stringent review of whether universities have considered race-neutral alternatives.<sup>44</sup> Justice Kennedy stated that courts should scrutinize the use of race closely, requiring universities to produce evidence that affirmative action is necessary to attain the educational benefits of diversity.<sup>45</sup>

## II. ONGOING BATTLES OVER AFFIRMATIVE ACTION

*Fisher II* did not end the debate about affirmative action. Even before the case was decided, SFFA had initiated lawsuits against Harvard University (Harvard litigation) and the University of North Carolina at Chapel Hill (UNC).<sup>46</sup> And soon after President Trump was elected, the DOJ began to display hostility towards affirmative action.

In the summer of 2017, the DOJ announced that it would investigate universities’ use of race in the admissions process.<sup>47</sup> Then in October 2017, the DOJ turned down a Freedom of Information Act (FOIA)<sup>48</sup> request for any of its

40. *Id.* at 341 (“Narrow tailoring . . . requires that a race-conscious admissions program not unduly harm members of any racial group.”).

41. *Id.* at 342 (noting “race-conscious admissions programs . . . must have a logical end point”).

42. *Id.* at 339 (“Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

43. *Fisher v. Univ. of Texas at Austin II (Fisher II)*, 136 S. Ct. 2198 (2016).

44. *Id.* at 2208 (Narrow tailoring imposes “‘on the university the ultimate burden of demonstrating’ that ‘race-neutral alternatives’ that are both ‘available’ and ‘workable’ ‘do not suffice.’” (quoting *Fisher v. Univ. of Tex. at Austin I (Fisher I)*, 133 S. Ct. 2411, 2420 (2013))).

45. *Id.* at 2209–10 (noting university to tailor admissions plan as circumstances change).

The University [of Texas] engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan. . . . Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University’s examination of the data . . . must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.

*Id.* (citation omitted); see also Shakira D. Pleasant, *Fisher’s Forewarning: Using Data to Normalize College Admissions*, 21 U. PA. J. CONST. L. 813, 818 (2019) (“The holding in *Fisher II* unquestionably outlined the Court’s expectation that [universities] collect, scrutinize, and utilize data to evaluate and refine [their] race-conscious admissions process[es].”).

46. See *supra* note 16 for discussion on SFFA lawsuits.

47. See Wermund, *supra* note 15.

48. 5 U.S.C. §552 (2018). FOIA requires public disclosure of documents held by the U.S. government, subject to some exceptions.

documents related to Harvard's admissions policy, claiming that such documents pertained to an ongoing investigation.<sup>49</sup> In November 2017, while the Harvard litigation was proceeding, the DOJ announced it was specifically investigating Harvard's race-conscious admissions policy. It threatened to sue Harvard over "delays and challenges" in producing documents.<sup>50</sup> And in August 2018, the DOJ filed a "statement of interest" in the SFFA lawsuit, reiterating SFFA's claim that Harvard engages in "unlawful racial discrimination" against Asian American applicants.<sup>51</sup> One month later, Yale confirmed that it was also subject to a DOJ investigation regarding its race-conscious admissions policies.<sup>52</sup>

SFFA's case against Harvard went to trial in 2018 and had additional hearings in early 2019.<sup>53</sup> The case revealed more information about the details of elite university admissions than had ever been known to the public.<sup>54</sup> The parties presented a plethora of evidence, including studies of Harvard's admissions process and compelling interest in diversity, statistical models measuring how the college used race in its admissions process, and how race-neutral alternatives would affect the student body.<sup>55</sup>

In October 2019, Judge Allison Burroughs of the U.S. District Court for Massachusetts ruled in favor of Harvard, authoring a 130-page opinion.<sup>56</sup> Judge Burroughs considered at length the arguments presented by both sides.<sup>57</sup> She found

49. William S. Flanagan & Michael E. Xie, *Justice Department Actively Investigating Harvard Admissions*, HARV. CRIMSON (Oct. 11, 2017), <https://www.thecrimson.com/article/2017/10/11/foia-confirms-doj-investigation/> [<https://perma.cc/Y8EH-9U9R>].

50. See Fernandes, *supra* note 9.

51. See United States Statement of Interest at 1, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (2014), No. 14-cv-14176-ADB (opposing Harvard's motion for summary judgment); see also Franklin & Zwickel, *supra* note 18.

52. Delano R. Franklin, Idil Tuysuzoglu, & Samuel W. Zwickel, *Experts: Harvard, Yale Probes Signal Future Federal Attacks on Affirmative Action*, HARV. CRIMSON (Oct. 5, 2018), <https://www.thecrimson.com/article/2018/10/5/yale-doj-investigation-news-analysis/> [<https://perma.cc/RL2E-GY1V>]. The DOJ first notified Yale of this investigation on April 5, 2018. See Press Release, Dep't of Justice, Civil Rights Div., *Notice of Violation of Title VI of the Civil Rights Act of 1964* 1 (Aug. 13, 2020) [hereinafter Press Release, *Notice to Yale*], <https://www.justice.gov/opa/press-release/file/1304591/download> [<https://perma.cc/4AJR-Z5GY>] ("On April 5, 2018, the Department notified Yale that it was commencing a Title VI investigation into alleged discrimination in undergraduate admissions.").

53. See Camille G. Caldera & Sahar M. Mohammadzadeh, *Harvard Admissions Trial Ruling Will Determine Facts for Future Appeals, Experts Say*, HARV. CRIMSON (Feb. 20, 2019), <https://www.thecrimson.com/article/2019/2/20/sffa-harvard-admissions-final-arguments/> [<https://perma.cc/T53F-RUAG>].

54. Anemona Hartocollis, *Harvard Does Not Discriminate Against Asian-Americans in Admissions, Judge Rules*, N.Y. TIMES, <https://www.nytimes.com/2019/10/01/us/harvard-admissions-lawsuit.html> [<https://perma.cc/6SCU-WQ94>] (last updated Nov. 5, 2019) (noting trial "unveiled many secrets of Harvard's arcane admissions process").

55. See Caldera & Mohammadzadeh, *supra* note 53.

56. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 204 (D. Mass. 2019) (holding "Harvard's admissions process survives strict scrutiny. It serves a compelling, permissible and substantial interest, and it is necessary and narrowly tailored to achieve diversity and the academic benefits that flow from diversity."), *aff'd*, 980 F.3d 157 (1st Cir. 2020).

57. See *id.*

that Harvard did not intentionally discriminate against Asian American applicants,<sup>58</sup> and its use of race was consistent with equal protection guidelines laid out in *Grutter* and *Fisher II*—guidelines that also apply to Title VI race discrimination.<sup>59</sup> Nevertheless, the DOJ remained vigilant in its investigations. In December 2019, the DOJ declined another FOIA request for documents related to the Harvard probe, noting again that the probe was ongoing.<sup>60</sup> As SFFA appealed its case to the U.S. Court of Appeals for the First Circuit, the DOJ focused on Yale.

In August 2020, the DOJ accused Yale of violating Title VI of the Civil Rights Act of 1964. In a four-page letter from Eric Dreiband, Assistant Attorney General for the Civil Rights Division,<sup>61</sup> the DOJ contended that “Yale’s diversity goals appear to be vague, elusory, and amorphous” and “not sufficiently measurable,”<sup>62</sup> thus calling into question whether Yale has defined its compelling interest in diversity. The DOJ also claimed that Yale’s race-conscious admissions policy was not narrowly tailored because it weighted race too much, used race at multiple points in the admissions process, often made race a determining factor for an applicant’s admission, unduly burdened Asian-American and White applicants, and had no time limits.<sup>63</sup> Further, the DOJ claimed that Yale did not sufficiently explore race-neutral alternatives to achieve its diversity-related goals.<sup>64</sup>

The DOJ’s letter demanded that Yale refrain from using race in its 2020–2021 undergraduate admissions cycle. The letter further stated that if Yale wanted to implement a race-conscious admissions policy in the future, it should submit a plan to the DOJ demonstrating that the policy is narrowly tailored—and particularly that there is an end date to the use of race.<sup>65</sup> If Yale did not agree to these measures within two weeks, the DOJ threatened to file a Title VI lawsuit.<sup>66</sup> But Yale

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58. Judge Burroughs noted that “the disparity between white and Asian American applicants’ personal ratings has not been fully and satisfactorily explained.” *See Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 171. To determine personal rating scores, “relevant qualities might include integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit.” *Id.* at 141. Judge Burroughs further noted that “Harvard’s admissions program . . . would likely benefit from conducting implicit bias trainings for admissions officers . . .” *Id.* at 204.

59. *Alexander v. Sandoval*, 532 U.S. 275, 280–82 (2001) (discrimination under Equal Protection Clause by institution accepting federal funds also violates Title VI); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284–85 (1978) (noting Title VI must be read against background of Equal Protection Clause).

60. *See* Camille G. Caldera, *Justice Department Continues Investigation into Harvard Admissions*, HARV. CRIMSON (Dec. 18, 2019), <https://www.thecrimson.com/article/2019/12/18/foia-doj-continues-investigation/> [<https://perma.cc/35BU-FX5L>].

61. *See* Press Release, *Notice to Yale*, *supra* note 52, at 1 (“[T]he United States Department of Justice has determined that Yale University violated, and is continuing to violate, Title VI of the Civil Rights Act of 1964 by discriminating on the basis of race and national origin . . . in its undergraduate admissions with respect to domestic non-transfer applicants to Yale College.” (citation omitted)).

62. *Id.* at 2.

63. *See id.* at 3–4.

64. *Id.* at 4.

65. *Id.*

66. *See id.* (stating DOJ would consider lawsuit if “compliance cannot be secured by voluntary means”).

immediately announced that it would not change its admissions policy in response to the DOJ's letter.<sup>67</sup> And in October 2020, the DOJ did file suit against Yale.<sup>68</sup>

Meanwhile, SFFA continued its efforts to dismantle affirmative action. In the Harvard litigation, the U.S. Court of Appeals for the First Circuit affirmed the district court ruling for Harvard.<sup>69</sup> SFFA's lawsuit against UNC concluded trial in November, with a ruling expected in the next few months.<sup>70</sup> And despite the 2016 *Fisher II* ruling, SFFA again challenged the University of Texas at Austin's race-conscious admissions policy in state court and federal court.<sup>71</sup> While SFFA voluntarily dismissed the state lawsuit, the federal case is ongoing.<sup>72</sup>

### III. AFFIRMATIVE ACTION: UNCERTAINTIES IN THE LAW

The challenges by SFFA and the Trump DOJ have taken advantage of open issues in the Supreme Court's legal framework. *Grutter's* requirement that race-conscious admissions policies be flexible and individualized leaves many uncertainties and questions—questions that are asked through litigation. What constitutes a “critical mass” of minority students?<sup>73</sup> What are the limits on

67. Peter Salovey, *Yale's Steadfast Commitment to Diversity*, YALE U. (Aug. 13, 2020), <https://president.yale.edu/speeches-writings/statements/yales-steadfast-commitment-diversity> [<https://perma.cc/RL49-98YK>] (“Yale College will not change its admissions processes in response to today's letter because the DOJ is seeking to impose a standard that is inconsistent with existing law.”).

68. See Press Release, Dep't of Justice, *supra* note 11 (remarking on DOJ suing Yale).

69. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), <http://media.ca1.uscourts.gov/pdf/opinions/19-2005P-01A.pdf> [<https://perma.cc/GNF4-BYHQ>].

70. See Murphy, *supra* note 16.

71. See Press Release, Students for Fair Admissions, *Students for Fair Admissions Files Federal Lawsuit to Stop University of Texas's Race-Based Admissions Policies*, CISION PR NEWSWIRE (July 21, 2020, 7:31 AM), <https://www.prnewswire.com/news-releases/students-for-fair-admissions-files-federal-lawsuit-to-stop-university-of-texas-race-based-admissions-policies-301096964.html> [<https://perma.cc/L855-8TLF>].

Although SFFA's legal challenges have thus far been unsuccessful, there was another recent setback for affirmative action. In November 2020, California voters rejected Proposition 16, a referendum which would have repealed the state's 1996 ban on government use of race-conscious policies. See Vinay Harpalani, *What the California Vote to Keep the Ban on Affirmative Action Means for Higher Education*, CONVERSATION (Nov. 10, 2020), <https://theconversation.com/what-the-california-vote-to-keep-the-ban-on-affirmative-action-means-for-higher-education-149508> [<https://perma.cc/L6PN-PECK>].

72. See *Students for Fair Admission (SFFA) v. University of Texas at Austin: Case Summary*, LAWS COMMITTEE FOR CIVIL RTS. UNDER LAW, <https://lawyerscommittee.org/students-for-fair-admissions-sffa-v-university-of-texas-at-austin/> [<https://perma.cc/FL57-LX4B>] (last visited Jan. 20, 2021) (“On July 9, 2020, SFFA voluntarily dismissed its state-based lawsuit challenging UT's race-conscious policy. On July 20th, SFFA filed a new lawsuit in SFFA in the federal district court for the Western District of Texas. The new lawsuit similarly targets UT's holistic, race-conscious admissions program . . .”). For more information on the SFFA's current federal lawsuit against the University of Texas at Austin, see Henry Kokkeler, *University of Texas 'Increased Its Reliance on Race' After Supreme Court Admissions Ruling, Lawsuit Says*, C. FIX (July 30, 2020), <https://www.thecollegefix.com/university-of-texas-increased-its-reliance-on-race-after-supreme-court-admissions-ruling-lawsuit-says/> [<https://perma.cc/5UDM-USLK>].

73. For a general discussion of how “critical mass” is a maligned concept, see Vinay Harpalani, *Fisher's Fishing Expedition*, 15 U. PA. J. CONST. L. HEIGHT. 57, 58–59 (2012) (discussing

universities’ compelling interest in the educational benefits of diversity,<sup>74</sup> and in how much detail do universities have to articulate their diversity-related educational goals? Although courts give deference to universities in defining the compelling interest,<sup>75</sup> challenges to race-conscious policies always press universities to give specific, measurable, diversity-related goals.<sup>76</sup> Numerical set-asides for underrepresented minority groups are unconstitutional,<sup>77</sup> but some measurable index of “critical mass” is necessary to meet *Grutter* and *Fisher*’s narrow tailoring requirements.<sup>78</sup> Universities have to determine when race-neutral alternatives will suffice to attain a “critical mass” and they will no longer need to consider race in admissions.<sup>79</sup>

Similarly, the Supreme Court’s framework is also ambiguous regarding what is means for an admissions policy to “unduly harm” racial groups. It does not give clear guidelines on how much weight universities can give to race.<sup>80</sup> Generalizable standards to evaluate any of these issues would be difficult to devise because universities have different histories, demographics, and educational missions. Litigants can always claim that a university has not defined its diversity-related goals precisely enough to meet a compelling interest, that its race-conscious policy is not narrowly tailored to that interest, and that the university has not devised sufficient metrics to determine when race-conscious policies will no longer be necessary.

The Trump DOJ’s investigations take on greater importance in this context. They use federal government resources to mandate that elite universities reveal

oral argument in *Fisher I*, where several Justices pressed University of Texas at Austin’s counsel to define “critical mass”). *But see* Sheldon Lyke, *Catch Twenty-Wu? The Oral Argument in Fisher v. University of Texas and the Obfuscation of Critical Mass*, 107 NW. L. REV. COLLOQUY 209, 223 (2013) (“‘Unmasking’ the questions that lead to the critical mass catch-22 can lead to awareness that our present understandings of precedent are misguided. . . . [O]pponents of affirmative action have reframed and reconceptualized critical mass outside of its established framework as a relative, not a rigid, criterion.”).

74. *See* Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 772–80 (2015) (discussing how compelling interest in diversity lacks limits).

75. *See* *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 310 (2013) (noting courts give partial deference when evaluating educational benefits of diversity that universities consider “integral”). *Fisher II* noted that “[o]nce . . . a university gives ‘a reasoned, principled explanation’ for its decision, deference must be given ‘to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.’” *See* *Fisher v. Univ. of Tex. at Austin II (Fisher II)*, 136 S. Ct. 2198, 2208 (2016).

76. *See, e.g., supra* notes 61–62 and accompanying text.

77. *See* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (noting fixed numerical set-asides unnecessary for educational diversity).

78. *See supra* notes 41–42, 44–45, and accompanying text. Even the definition of “race-neutral” is ambiguous.

79. *See* Vinay Harpalani, *The Double-Consciousness of Race-Consciousness and the Bermuda Triangle of University Admissions*, 17 U. PA. J. CONST. L. 821, 837 (2015) (noting “the Supreme Court has not even acknowledged . . . disparate understandings of race-neutrality, much less addressed them in any meaningful way”).

80. *See* Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 558 (2007) (“[T]he Grutter Court failed to offer a theory for where the line should be drawn between programs that weight race too heavily and those that do not.”); Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 529 (2012) (“[T]he allowable weight given to race, in aggregate, needs to be clarified to provide a limiting principle for *Grutter*-like admissions plans.”).

information about their admissions processes. Universities are reluctant to reveal such information because open issues in the Supreme Court's framework allow almost any new information to be the basis of novel litigation.

Revelations about the admissions process can also be a source of embarrassment for universities, as shown by the Harvard litigation. Although Harvard prevailed against SFFA at the district court, the lawsuit forced Harvard to disclose many details about its admissions process.<sup>81</sup> And while Judge Burroughs found that Harvard did not intentionally discriminate against Asian Americans, her opinion criticized Harvard's admissions program for its unexplained disparity between white and Asian-American applicants on Harvard's personal rating scores.<sup>82</sup> To avoid embarrassment, some universities may be compelled to eliminate race-conscious admissions. Even if not, they may make their admissions processes even more obscure, or they may curb the use of race in admissions at the expense of student body diversity.

#### IV. THE FUTURE OF AFFIRMATIVE ACTION

The Trump DOJ's legal challenges have also been part of a broader political strategy to attack the use of race in admissions.<sup>83</sup> The DOJ investigations forced universities to reveal secretive and potentially embarrassing information about their admissions processes.<sup>84</sup> Even if these investigations do not lead directly to elimination of race-conscious policies, they can negatively affect public perceptions of such policies. In this way, former-President Trump's DOJ has damaged affirmative action in the long run.

President Joe Biden's DOJ can undo some of the damage to affirmative action that Trump's DOJ inflicted. Given President Biden's prior support for affirmative action<sup>85</sup> and his gratitude especially to African-American voters,<sup>86</sup> his DOJ is likely to take steps to defend affirmative action. Biden has selected Kristen Clarke and Vanita Gupta, leaders of two of the most prominent American civil organizations,

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81. See Franklin & Zwickel, *supra* note 18 (noting that “[o]ver the course of summer 2018, hundreds of pages of internal [Harvard] College documents related to the admissions process became public as part of the summary judgment phase of the lawsuit”).

82. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 171 (D. Mass. 2019) (discussing unsatisfactory discrepancy between white and Asian American applicants' personal ratings), *aff'd*, 980 F.3d 157 (1st Cir. 2020).

83. See Franklin, Tuysuzoglu, & Zwickel, *supra* note 52.

84. See Hartocollis, *supra* note 54; see also *Students for Fair Admissions*, 397 F. Supp. 3d at 141 (listing qualities included in personal rating scores); Franklin & Zwickel, *supra* note 18 (discussing numerous pages of admissions documents released).

85. For discussion on President Biden's prior support for affirmative action, see *supra* note 14 and accompanying text.

86. *Read the Full Text of Joe Biden's Speech After Historic Election*, ABC NEWS (Nov. 7, 2020, 9:44 PM), <https://abcnews.go.com/Politics/read-full-text-joe-bidens-speech-historic-election/story?id=74084462> [<https://perma.cc/2WQ9-J3YZ>] (President-elect Joe Biden stating: “[E]specially those moments when this campaign was at its lowest ebb, the African American community stood up again for me. You always had my back and I'll have yours.”).

to fill high-level positions in his DOJ.<sup>87</sup> The Biden administration can also reinstate Obama-era guidance for universities to make sure their race-conscious admissions policies are constitutional under Supreme Court precedent.<sup>88</sup> It can file amicus briefs in favor of universities that face lawsuits.<sup>89</sup> And of course, the Biden administration can drop the DOJ investigations of Harvard and Yale.<sup>90</sup>

Nevertheless, SFFA continues its efforts to dismantle affirmative action. It moved to intervene in the Yale lawsuit, but the U.S. District Court for the District of Connecticut denied this motion.<sup>91</sup> In the Harvard litigation, SFFA will file a petition for a writ of certiorari to the Supreme Court, which is due by mid-April 2021.<sup>92</sup> If the Supreme Court takes the case, it would likely strike down race-conscious admissions policies, given its current ideological composition.<sup>93</sup>

Alternatively, the Court might deny certiorari.<sup>94</sup> Chief Justice John Roberts in particular is concerned with the Court’s legitimacy,<sup>95</sup> and revisiting affirmative action could give the impression the Court is a political body rather than a legitimate, impartial government branch.<sup>96</sup> Less than five years have passed since the Court

87. See Press Release, Biden-Harris Transition, *President-elect Biden Announces Key Nominations for the Department of Justice* (Jan. 7, 2021), <https://yubanet.com/usa/president-elect-biden-announces-key-nominees-for-department-of-justice/> [<https://perma.cc/T9VC-TGVZ>]. Kristen Clarke, President and Executive Director of the Lawyers’ Committee for Civil Rights Under Law, is the nominee for Assistant Attorney General for Civil Rights. *Id.* Vanita Gupta, President and CEO of the Leadership Conference on Civil and Human Rights and former Acting Assistant Attorney General for the Civil Rights Division in the Obama administration, is the nominee for Associate Attorney General. See Leadership Conference on Civil and Human Rights, *Vanita Gupta: President and CEO*, CIVILRIGHTS.ORG, <https://civilrights.org/about/our-staff/vanita-gupta/> [permalink unavailable] (last visited Jan. 23, 2021).

88. See DOJ GUIDANCE, *supra* note 12. Additionally, the Biden administration would likely rescind Trump’s executive order that restricted diversity training for federal government employees and contractors. See *Joe Biden Administration Likely to Overturn Controversial Donald Trump Diversity Training Executive Order*, USA TODAY (Nov. 8, 2020, 7:01 AM), <https://www.usatoday.com/story/money/2020/11/08/donald-trump-diversity-executive-order-joe-biden/6180668002/> [<https://perma.cc/37W5-2RTW>].

89. See Fu & Lu, *supra* note 14 (noting experts believe Biden administration would file amicus brief to support Harvard).

90. See *id.* (noting “many legal experts anticipate the Department of Justice to shift its support toward Harvard” and end investigations); Brown & Davidson, *supra* note 10 (noting “Yale affiliates told the [*Yale Daily News*] that the new Democratic administration could drop the lawsuit”).

91. See *United States v. Yale Univ.*, Civil Action No. 3:20 cv 1534 (CSH), 2021 WL 219442, at \*6 (D. Conn. Jan. 19, 2021) (denying motion to intervene after finding United States capable of adequately representing SFFA’s interest in case).

92. Audrey Anderson, *Harvard’s Affirmative Action Plan Upheld by First Circuit: Victory Now But What Will Come Next?*, JD SUPRA (Nov. 17, 2020), <https://www.jdsupra.com/legalnews/harvard-s-affirmative-action-plan-68389/> [<https://perma.cc/79GR-2HQZ>].

93. See Vinay Harpalani, *The Supreme Court and the Future of Affirmative Action*, RACE AND THE LAW PROF BLOG (Oct. 28, 2019), <https://lawprofessors.typepad.com/racelawprof/2019/10/the-supreme-court-and-the-future-of-affirmative-action.html> [<https://perma.cc/Z8BX-KLWV>]. (indicating Justices Kavanaugh and Gorsuch thought to oppose race-conscious admissions policies).

94. See *id.*

95. See Jeffrey Rosen, *John Roberts is Just Who the Supreme Court Needed*, ATLANTIC (July 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/> [<https://perma.cc/MS3V-TR8A>] (“[Chief Justice] Roberts is . . . working with his colleagues to maintain the Court’s bipartisan legitimacy . . .”).

96. Harpalani, *supra* note 93.



decided *Fisher II*. In contrast, twenty-five years passed between the Court's rulings in *Bakke* and *Grutter*, and another decade passed before *Fisher I*. The Justices might think it prudent to wait for a circuit split before hearing another affirmative action case. This would give the Supreme Court additional justification for revisiting the issue, and the Court could consolidate two or more cases when doing so. SFFA's cases against the University of North Carolina at Chapel Hill<sup>97</sup> and University of Texas at Austin<sup>98</sup> are proceeding. The Court will have plenty of opportunities to consider the affirmative action again.

When it does, the outcome will probably not be good for colleges using race-conscious admissions policies. Universities will need to find other ways to attain diversity. Although Donald Trump is no longer president, it is quite possible that affirmative action will be "trumped" in the near future.

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97. For court documents and discussion of Chapel Hill lawsuit, see *supra* note 16.

98. For discussion of University of Texas at Austin lawsuit, see *supra* note 71.