THE WIDENING EFFECT OF *STUDENTS FOR FAIR ADMISSIONS*[*]

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Sitting at the top of the judicial pyramid, the Supreme Court makes only a few dozen decisions each term. Rules announced in these cases, however, often instigate and then shape a significant amount of litigation in the lower courts on a wide range of issues.

The Supreme Court's decision in *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina* (collectively *SFFA*) is one of the most important civil rights decisions in American history.[1] In *SFFA*, the Supreme Court consolidated a lawsuit against Harvard University—the oldest, wealthiest, and most admissions-selective campus in the United States—with one against the University of the North Carolina—one of the nation's oldest and most prestigious and selective public universities. The Court granted certiorari only after the two cases were fully litigated in lower courts, so it had a complete factual record before it.

The Supreme Court held that racial preferences in college admissions violate the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act. In doing so, it announced broader rules which will affect the use of race not only in higher education, but also in a wide spectrum of public and private institutions. Chief Justice John Roberts' majority opinion

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] 600 U.S. 181 (2023).

declared that the Constitution generally forbids government use of race to benefit one group and harm another group and government use of race as a stereotype in judging a person's social condition or attitudes.[2]

A central theme in *SFFA* is that the racial categories used in higher education and elsewhere are indefensible. The presumption that all persons identified somehow with a particular racial or ethnic group are underrepresented or marginalized is a stereotype. Roberts pointed out that the racial categories the universities used were "imprecise," "overbroad," and "arbitrary."[3] Justice Neil Gorsuch, in his concurring opinion, expanded on this theme, questioning the check boxes used for racial and ethnic identifications.[4] He noted that they were created by bureaucrats without the help of "anthropologists, sociologists, ethnologists, and other experts."[5] Moreover, federal regulators had cautioned that these racial categories "should not be interpreted as being scientific . . . , nor should they be viewed as determinants of eligibility for participation in any Federal programs."[6] Justice Gorsuch detailed problems with the "incoherent" racial classifications in use by so many institutions.[7]

After any consequential Supreme Court decision, the losers try to minimize the scope of the decision, and the winners seek to widen the victory. That is what has happened after *SFFA*.[8] In less than two years since the decision came down, it is clear that the wideners are correct that the Supreme Court's decision will reverberate beyond the college admissions context. Not only is *SFFA* having a major effect on higher education admissions, its principles are showing up in disputes over racial preferences in the award of scholarships, in government contracting, in land and housing, and in professional

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[2] *Id.* at 220. The only exceptions are when race is used as a remedy for specific constitutional or statutory violations or to control prison riots. *Id.* at 207. The Court also held that many higher education and other institutions that use racial preferences that violate the Equal Protection Clause also violate Title VI of the Civil Rights Act, which states: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, denied the benefit of, or be subjected to discrimination in any program or activity receiving Federal financial assistance." *Id.* at 198 n.2 (citing 42 U.S.C. § 2000d (2024)).

[3] *Id*. at 216.

[4] *Id.* at 291 (Gorsuch, J., concurring).

[5] *Id.*

[6] *Id.* (citing Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19269 (May 4, 1978)).

[7] *Id.* at 291-93.

[8] Jonathan P. Feingold, *Affirmative Action After* SFFA*,* 48 J. COLL. & UNIV. L. 239 (2023); Aaron Sibarium, *Law School Administrators Huddle to Circumvent Affirmative Action Ban,* WASH. FREE BEACON (Aug. 23, 2023), https://freebeacon.com/campus/law-school-administrators-huddle-to-circumvent-affirmative-action-ban/.

associations. As Chief Justice Roberts stated for the *SFFA* majority, "[e]liminating racial discrimination means eliminating all of it. And the Equal Protection Clause . . . applies 'without regard to any differences of race, of color, or of nationality'—it is 'universal in [its] application.'"[9]

I. HIGHER EDUCATION ADMISSIONS

On June 29, 2023, the day the Court issued its decision in *SFFA*, the White House issued a press release entitled "FACT SHEET: President Biden Announces Actions to Promote Educational Opportunity and Diversity in Colleges and Universities." It began:

> Today, the Supreme Court upended decades of precedent that enabled America's colleges and universities to build vibrant diverse environments where students are prepared to lead and learn from one another. Although the Court's decision threatens to move the country backwards, the Biden-Harris Administration will fight to preserve the hard-earned progress we have made to advance racial equity and civil rights and expand educational opportunity for all Americans.[10]

The press release detailed the Biden administration's plans for executive actions to maintain as much of the pre-*SFFA* status quo as possible.

On August 14, 2023, the Department of Justice's Civil Rights Division and the Department of Education's Office for Civil Rights issued a joint "Dear Colleague" letter. It stated that *SFFA* "directly addressed only the universities' admissions programs"[11] and that both departments "stand ready to support institutions that recognize that such [racial] diversity is core to their commitment to excellence, and that pursue lawful steps to promote diversity and full inclusion."[12] It went on to encourage campuses to take actions to recruit students from underserved communities, partner with schools in underserved communities, ensure students of color that they are welcome, and

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[9] *SFFA*, 600 U.S. at 206 (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[10] Press Release, White House, Fact Sheet: President Biden Announces Actions to Promote Educational Opportunity and Diversity in Colleges and Universities (June 29, 2023), *available at* https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/06/29/fact-sheet-president-biden-announces-actions-to-promote-educational-opportunity-and-diversity-in-colleges-and-universities/.

[11] Letter from Kristen Clarke, Ass't Att'y Gen., Civ. Rights Div., U.S. Dep't of Justice, & Catherine E. Lhamon, Ass't Sec'y for Civ. Rights, Office for Civ. Rights, U.S. Dep't of Educ., to Colleague (Aug. 14, 2023), *available at* https://web.archive.org/web/20241118072243/https://www.ed.gov/media/document/colleague-20230814pdf.

[12] *Id.*

increase need-based financial aid. Regarding admissions, "schools can consider the ways that a student's background, including experiences linked to their race, have shaped their lives and the unique contributions they can make to a campus."[13]

On the same day, the two agencies released a six page "Questions and Answers" document about the effect of *SFFA*. After noting that it does not have the force of law or bind the departments "in the exercise of their discretionary enforcement authorities,"[14] the Q&A gave several examples of cases in which admissions offices might be permitted to consider an applicant's race in a "holistic" review, such as considering a student's admissions essay about overcoming racial prejudice.[15] It asserted that campuses may continue to articulate missions and goals tied to student body diversity and "use all legally permissible methods to achieve that diversity," including "targeted outreach, recruitment, and pathway programs" that serve predominantly students of color.[16]

Although the higher education establishment was vigorously opposed to the Court's ruling, it was expected, and schools were prepared. For example, Yale University, my graduate school alma mater, implemented new admissions procedures in less than three months. The university administration declared, "The Supreme Court changed the interpretation of the law, but it did not change our community's values."[17] The new admissions policy incorporated data on economic mobility in the candidate's census tract, refined identification of candidates from rural and small towns, and invested more resources in campus ethnic and racial cultural centers "to help them engage more prospective Yalies."[18] Alumni interviewers and committee members were also retrained on *SFFA*'s implications. After the new policies were implemented, the percentage of white freshmen admitted in 2024 remained about the same as it had been in previous years; the percentage of Hispanic,

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[13] *Id.* at 2.

[14] U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT'S DECISION IN *STUDENTS FOR FAIR ADMISSIONS V. HARVARD UNIVERSITY AND THE UNIVERSITY OF NORTH CAROLINA* 1 n.1 (2023), *available at* https://web.archive.org/web/20231011185441/https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf.

[15] *Id.* at 2 (citing *SFFA*, 600 U.S. slip op. at 39).

[16] *Id.* at 3-4.

[17] Zachery Groz, *Yale's First Post-Affirmative Action Class*, YALE ALUMNI MAG. (Nov./Dec. 2024), https://www.yalealumnimagazine.com/articles/5960-yales-first-post-affirmative-action-class.

[18] *Id.*

African American, and Native American students grew, while the percentage of Asian Americans declined.[19] Yale contrasted its racial diversity statistics with those of Columbia, Harvard, and MIT, where the percentage of black and Hispanic freshmen declined substantially, while Asian American enrollment increased.[20]

The effect of *SFFA* on student outcomes will be ascertained over the next few years as classes admitted after the decision proceed through college and graduate. But its effect on the role of race in admissions procedures may be much harder to ascertain.[21] Shortly after the decision, the SFFA organization sent a letter to 150 campuses declaring it would remain vigilant and continue to closely monitor changes in admissions procedures that are implemented by colleges and universities throughout the nation.[22] If litigation is required, however, it will involve extensive discovery.[23]

The University of California may be the testing ground for this strategy. On February 3, 2025, a group called Students Against Racial Discrimination, represented by Jonathan Mitchell and America First Legal, sued the nine-campus UC system arguing that its use of a "holistic" admissions policy masks illegal discrimination against Asian American and white applicants with objectively better qualifications than preferred racial minorities.[24] The complaint argues this admissions process violates Title VI of the Civil Rights Act, 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment as interpreted in *SFFA*.[25]

Because of the difficulty of discerning what is happening in admissions offices and the long road to finding out, the effect of *SFFA* may initially be

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[19] *Id.*

[20] *Id.*

[21] Eric Hoover, *A Time to Tear Down, a Time to Build Up,* THE CHRON. OF HIGHER EDUC. (Oct. 4, 2023), https://www.chronicle.com/article/a-time-to-tear-down-a-time-to-build-up.

[22] Eric Hoover, *SFFA Urges Colleges to Shield Check Box Data About Race from Admissions Officers*, THE CHRON. OF HIGHER EDUC. (July 12, 2023), https://www.chronicle.com/article/sffa-urges-colleges-to-shield-check-box-data-about-race-from-admissions-officers.

[23] Peter Arcidiacono & Tyler Ransom, *Are Elite Colleges Circumventing the Supreme Court*?, THE CHRON. OF HIGHER EDUC. (Dec. 3, 2024), https://www.chronicle.com/article/are-elite-colleges-circumventing-the-supreme-court.

[24] Complaint, Students Against Racial Discrimination v. Regents of the U. of Cal., No. 8:25-cv-00192 (C.D. Cal. filed Feb. 3, 2025), *available at* https://media.aflegal.org/wp-content/uploads/2025/02/05105146/1-w-exhs-202502023-Complaint_SARD-v-UC-et-al-wexhbits-1-and-2-1.pdf.

[25] *Id.* at 16-19.

seen more clearly in areas other than admissions, including scholarships, government contracting, land and housing, and professional associations.

II. HIGHER EDUCATION SCHOLARSHIPS

Race- and ethnicity-based scholarships are common in higher education, and they are funded by private donations, institutional funds, and the government. They have rarely been challenged, and the post-*SFFA* federal guidance did not discuss them.

The same day *SFFA* was decided, Missouri Attorney General Andrew Bailey ordered public universities in his state to stop using race as a factor in scholarship decisions. The state itself had more than four dozen funds that used race or ethnicity as a criterion for awards. Many of these funds were privately donated, so the University of Missouri System had to go to court to keep the funds while no longer using race or ethnicity as the donor intended.[26]

Sometimes state agencies create scholarships or other funding incentives which contain racial preferences. In 1992, Illinois created the Minority Teachers of Illinois Scholarship Program, which provides up to $7,500 per year to "American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, or Native Hawaiian or Other Pacific Islander."[27] These explicit racial preferences were generally tolerated until the American Alliance for Equal Rights (AAFER), represented by Pacific Legal Foundation (PLF), challenged them in federal court.[28] The complaint, filed on October 22, 2024, alleges that the scholarships violate several rules established in *SFFA*, including those against the use of racial preferences without evidence that they are being used to remediate any past constitutional or statutory violations and against the use racial stereotyping without an end date.[29]

In *Young Americans for Freedom v. Department of Education*, two students represented by the Wisconsin Institute for Law & Liberty (WILL) sued to

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[26] Natalie Schwartz, *University of Missouri System Moves to Strip Racial Criteria from Donated Scholarship Funds,* HIGHER ED DIVE (June 7, 2024), https://www.highereddive.com/news/university-of-missouri-system-racial-criteria-scholarships/717994/.

[27] Complaint for Declaratory and Injunctive Relief, Am. Alliance for Equal Rts. v. Pritzker, No. 3-24-cv-03299-SLD-JEH, at *1-*2 (C.D. Ill. 2024), *available at* https://pacificlegal.org/wp-content/uploads/2024/10/AAER-v-Pritzker_Complaint_10.22.24.pdf.

[28] *Id.*

[29] *See id.* at *7.

enjoin the federal McNair Post-Baccalaureate Achievement Program.[30] Through this four-decade-old program, the Department of Education provides competitive grants to universities to help undergraduates who wish to pursue doctoral graduate studies. These students receive various academic benefits—including tutoring, mentoring, seminars and workshops, travel opportunities, GRE preparation, and research grants—and they can receive a $2,800 stipend and other financial aid. In the 2023-24 academic year, the program's $60 million budget supported nearly 6,000 students on 216 campuses. Eligibility, however, turns on whether a student is from an underrepresented group in graduate education—defined by race—or is a first-generation college student or from a low-income family. The fact that the McNair program has both a race-neutral and a race-conscious track may have shielded it from legal challenge in the past. In August 2022, however, a Department of Education Assistant Secretary revealed that the purpose of the racial criterion was to change the "demographic" makeup of "future physicians, professors, scientists and other crucial professionals requiring graduate degrees."[31] After *SFFA*, programs providing benefits based on race in order to alter the racial composition of selected groups are vulnerable. The students' motion for a preliminary injunction against the McNair Program's racial eligibility criteria is currently pending in the federal district court for the District of North Dakota.[32]

Race-based scholarships funded by private organizations may also be vulnerable after *SFFA.* Do No Harm (DNH) is a 6,000-member national

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[30] Verified Complaint, Young Ams. for Freedom v. U.S. Dep't of Educ., No. 3:24-cv-00163-ARS (D.N.D. filed Aug. 27, 2024), *available at* https://will-law.org/wp-content/uploads/2024/08/Complaint-McNair-v14-FINAL-Aug-27-1.pdf.

[31] Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces $51.7 Million in 189 McNair Grants to Improve Disadvantaged Students' Preparation for Doctoral Study (Aug. 18, 2022), *available at* https://www.legistorm.com/stormfeed/view_rss/3455599/organization/69539/title/us-department-of-education-announces-517-million-in-189-mcnair-grants-to-improve-disadvantaged-students-preparation-for-doctoral-study.html.

[32] Pl. Memo. In Supp. of Mot. For Prelim. Inj., Young Ams. for Freedom v. U.S. Dep't of Educ., No. 3:24-cv-00163-PDW-ARS (D.N.D. filed Sept. 4, 2024), https://will-law.org/wp-content/uploads/2024/09/07-1-2024-09-04-Pls-Memo.-of-Law-in-Supp.-for-PI.pdf.

More challenges to government-awarded scholarships limited by race and ethnicity are coming. On February 11, 2025, a high school student represented by PLF sued the University of California Board of Regents and others over the racial criteria used in awarding access to UCSF Benioff Children's Hospital Oakland's Community Health and Adolescent Mentoring Program for Success (CHAMPS), a prestigious high school internship program which is granted only to "underrepresented minorities," defined by race. Complaint, G.H. v. U.C. Bd. of Regents, No. 4-25-cv-01399 (N.D. Cal. Feb. 11, 2025).

organization whose mission is to "protect healthcare from a radical, divisive, and discriminatory ideology."[33] In 2024, it challenged the American Association of University Women's (AAUW) Selected Professions Fellowships, which were "[o]pen only to women from ethnic minority groups historically underrepresented in certain fields within the United States: Black or African American, Hispanic or Latino/a, American Indian or Alaska Native, Asian, and Native Hawaiian or other Pacific Islander."[34] The DNH complaint begins by reminding the trial court of *SFFA*'s holding that "[r]acial discrimination is invidious in all contexts."[35] Seven weeks after the lawsuit was filed, AAUW agreed to stop using racial criteria in awarding its fellowships.

In a similar move, AAFER sued two prominent law firms, Perkins Coie LLP and Morrison & Foerster LLP, over their sponsorship of diversity fellowships for first- and second-year law students who are persons of color or LGBTQ+.[36] In its complaint against Perkins Coie, AAFER cited *SFFA* several times, along with a Perkins Coie staff memo that stated that "[e]mployment decisions that are overtly made on protected bases ran afoul of the law before and after [*SFFA*]."[37] Both law firms settled their cases by removing the preferences, likely setting a precedent for other law firms with similar programs around the country.[38]

Another AAFER complaint targets the venerable Smithsonian museums. One Smithsonian site, the National Museum of the American Latino, created an internship program "to prepare the next generation of Latino museum

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[33] Jeff McMillan & Kimberlee Kruesi, *Meet the Influential New Player on Transgender Health Bills*, ASSOC. PRESS (May 20, 2023), https://apnews.com/article/transgender-bills-lobbying-do-no-harm-94f56059d24608d724eb78fefecf4e09. *See About Us*, DO NO HARM, https://donoharmmedicine.org/about/ (last visited Feb. 5, 2025).

[34] Complaint at 6, Do No Harm v. Am. Ass'n of Univ. Women, No. 1-24-cv-01782 (D.D.C. filed June 20, 2024).

[35] *Id.* at 1.

[36] Complaint, Am. Alliance for Equal Rts. v. Morrison & Foerster LLP, No. 1:23-cv-23189-KMW (S.D. Fla. filed Aug. 22, 2023); Complaint, Am. Alliance for Equal Rts. v. Perkins Coie LLP, No. 3:23-cv-01877-L (N.D. Tex. filed Aug. 22, 2023).

[37] Complaint at 2, *Perkins Coie*, No. 3:23-cv-01877-L (citing Christopher Wilkinson et al., *Seven Pressing Questions Following the Supreme Court's Admissions Decision*, PERKINS COIE LLP (July 5, 2023), https://perkinscoie.com/insights/update/seven-pressing-questions-following-supreme-courts-admissions-decision). *See* Julian Mark & Taylor Telford, *Conservative Activist Sues 2 Major Law Firms over Diversity Fellowships,* THE WASH. POST (Aug. 22, 2023), https://www.washingtonpost.com/business/2023/08/22/diversity-fellowships-lawsuit-affirmative-action-employment/.

[38] Stipulation of Dismissal, *Morrison & Foerster*, 1:23-cv-23189-KMW; Stipulation of Dismissal, *Perkins Coie*, No. 3:23-cv-01877-L. *See* Tatyana Monnay, *Perkins Coie DEI Suit Ended by Anti-Affirmative Action Group*, BLOOMBERG L. (Oct. 11, 2023), https://news.bloomberglaw.com/business-and-practice/perkins-coie-dei-suit-dropped-by-anti-affirmative-action-group.

leaders with the skills, insights and networks they need to succeed."[39] AAFER cites *SFFA* at several places in its complaint. First, it asserts that the Latino intern program is not remedying any constitutional or statutory violations, and second, it alleges that the program's goal is merely racial balancing, which is "patently unconstitutional."[40]

Another AAFER lawsuit targets Southwest Airlines' award program, ¡Lánzate!, which provides free flights for Hispanic students who agree to let Southwest use their name, image, and likeness in various promotions.[41] The complaint opens with *SFFA*'s statement that "racial discrimination is invidious in all contexts."[42] AAFER sued because the ¡Lánzate! program specifically excludes non-Hispanic students. To be eligible, "student[s] must identify direct or parental ties to a specific country to determine Hispanic origin."[43] Southwest almost immediately terminated the ¡Lánzate! Program and offered to pay AAFER the one cent of damages sought in the lawsuit.[44] Nevertheless, Judge Sidney A. Fitzwater ruled in December that the plaintiff had standing, the case was not moot, and the plaintiff was entitled to nominal damages.[45]

III. PUBLIC CONTRACTING AND ECONOMIC BENEFITS

Litigation against race- and sex-based preferences in public procurement and economic benefits has been one of the most widely contested areas of equal protection law.[46] Vast amounts of money and political power are at stake. The landmark civil rights decisions *City of Richmond v. J.A. Croson Co.*[47] and *Adarand Constructors v. Peña*[48] created and affirmed the strict

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[39] Complaint at 5, Am. Alliance for Equal Rts. v. Zamanillo, No. 1:24-cv-00509 (D.D.C. filed Feb. 22, 2024) (citing museum press release).

[40] *Id.* at 10 (citing *SFFA*, 600 U.S. at 221-23).

[41] Complaint, Am. Alliance for Equal Rts. v. Sw. Airlines Co., No. 3:24-cv-01209-D (N.D. Tex. filed May 20, 2024), *available at* https://americanallianceforequalrights.org/wp-content/uploads/AAFER-SW-Air-Complaint-Filed-5-20-24.pdf.

[42] *Id.* at *1 (citing *SFFA*, 600 U.S. at 214).

[43] *Id*. at *3-*4.

[44] Daniel Wiessner, *US judge says Southwest must face bias claims over free flights for Hispanic students*, REUTERS, Dec. 6, 2024, https://www.reuters.com/legal/us-judge-says-southwest-must-face-bias-claims-over-free-flights-hispanic-2024-12-06/.

[45] *Sw. Airlines Co*., No. 3-24-cv-01209-D (N.D. Tex. Dec. 6, 2024).

[46] *See* George R. La Noue, *Racial Preferences in Economic Benefits: From Widely Accepted to Legally Indefensible*, 25 FEDERALIST SOC'Y REV. 72 (2024), *available at* https://fedsoc.org/fedsoc-review/racial-preferences-in-economic-benefits-from-widely-accepted-to-legally-indefensible.

[47] 488 U.S. 469 (1989).

[48] 515 U.S. 200 (1993).

scrutiny framework for evaluating such preferences. Plaintiffs won several important cases in this arena, but the litigation was expensive and arduous.[49] Government defendants almost always had more resources at their disposal than their adversaries, and many potential plaintiffs gave up before they started.[50]

But when the Biden administration began implementing its equity agenda,[51] courts were faced with clear-cut national race- and sex-based economic preferences. Even before *SFFA* was decided, courts began invalidating these programs under the Equal Protection Clause.[52] In one program, the Biden administration provided Covid-19 relief funding to restaurants, but it prioritized those owned by minorities and women such that funds were likely to run out before white male owners were even able to apply. When that prioritization was challenged in 2021, the Sixth Circuit found it unconstitutional.[53] More significantly, the panel majority, in an opinion by Judge Amul Thapar, set out new standards that a government must meet if it seeks to argue that past discrimination is the compelling interest that justifies such preferences:

> The government has a compelling interest in remedying past discrimination only when three criteria are met.
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> First, the policy must target a specific episode of past discrimination. . . .
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> Second, there must be evidence of *intentional* discrimination in the past. Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination. . . .

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[49] *See* Daniel Lennington & Skylar Croy, *The Twin Commands: Streamlining Equality Litigation Based on* Students for Fair Admissions, 25 FEDERALIST SOC'Y REV. 349 (2024), *available at* https://fedsoc.org/fedsoc-review/the-twin-commands-streamlining-equality-litigation-based-on-students-for-fair-admissions.

[50] La Noue, *supra* note 46, at 75.

[51] *See* Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 C.F.R. 7009 (Jan. 20, 2021), *available at* https://biden-whitehouse.archives.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

[52] *Id.* at 80-81. WILL has identified sixty-one current federal programs across eleven agencies that use racial preferences, and it has threatened lawsuits if they are not eliminated by legislative or administrative actions. Dan Lennington, *WILL Identifies over Sixty Discriminatory Federal Programs*, WISC. INST. FOR L. & LIBERTY (Nov. 13, 2024), https://will-law.org/will-identifies-over-sixty-discriminatory-federal-programs/.

[53] Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021) (citations omitted).

> Third, the government must have had a hand in the past discrimination, it now seeks to remedy.[54]

Another Covid-19 relief program forgave 120 percent of federal loans to farmers and ranchers, but only if they qualified as racial minorities. The beneficiaries did not even have to be currently in arrears in their United States Department of Agriculture (USDA) loans. These loan preferences were struck down by four federal district courts all over the country, all before the Supreme Court decided *SFFA*.[55]

As *SFFA* was being litigated, plaintiffs began to challenge long-established race preferential economic programs. Ultima Services Corporation had been successfully performing technical and support services for USDA local offices since 2015.[56] In 2018, the owner, Celeste Bennett, was informed that those contracts would now have to go to a minority-owned 8(a) company.[57] The Small Business Administration's (SBA) 8(a) program awards contracts in any federal agency to firms owned by "socially and economically disadvantaged" individuals.[58] Small business owners who self-identify as having some roots in any of dozens of countries from Mexico to the Mariana Islands are presumed to be disadvantaged without having to identify any particular discrimination that has affected them. The list of countries of origin that result in a person being presumed disadvantaged is enshrined in the Code of Federal Regulations.[59] This nationality list and the presumption are embedded in many federal programs, and they survived unscarred and unamended for decades.[60]

Bennett and her company turned to the Center for Individual Rights (CIR) for help. *SFFA* had not yet been decided, and that case did not have an obvious connection to contracting, so CIR engaged in intense discovery about the origins and current state of the socially and economically

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[54] *Id.*

[55] Wynn v. Vilsack, 545 F. Supp. 3d 1271 (M.D. Fla. 2021); Faust v. Vilsack, 519 F. Supp. 3d 470 (E.D. Wisc. 2021); Miller v. Vilsack, No. 4:21-cv-0595-O, 2021 WL 1115194 (N.D. Tex. 2021); Holman v. Vilsack, No. 21-1085-STA-jay, 2021 WL 2877915 (W.D. Tenn. 2021).

[56] Ultima Servs. Corp. v. U.S. Dep't of Agric., 683 F.Supp.3d 745, 753 (E.D. Tenn. 2023).

[57] *Id.* at 753-54.

[58] *Id.* at 755-56.

[59] Who Is Socially Disadvantaged?, 13 C.F.R. § 124103(b)(1) (2011).

[60] George R. La Noue & John Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action,* 6 J. POL'Y HIST. 439 (1994); David Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171 (2021) (cited in *SFFA*, 600 U.S. at 291 (Gorsuch, J., concurring)).

disadvantaged list. That strategy was successful. Twenty-one days after *SFFA* was decided—in an opinion criticizing ethnic and racial group definitions as "imprecise," "overbroad," and "arbitrary"[61]—the *Ultima* court determined:

> Defendant SBA has not added a group to the list of those entitled to the rebuttable presumption since 1999. Further, Defendant SBA has never removed a group from that list for no longer being adversely affected by the present effects of discrimination, and Defendant SBA does not have criteria to evaluate whether a group should be removed from the list. Defendant SBA has not considered any race-neutral alternatives to the use of the rebuttable presumption since 1986.[62]

Consequently, the *Ultima* court ruled the 8(a) program lacked both a compelling interest and narrow tailoring because it did not purport to remedy any specific past discrimination against the beneficiary firms.[63] That is a defect that exists in all other Disadvantaged Business Enterprise and Minority- and Women-Owned Business Enterprise programs as well. The DOJ did not appeal *Ultima*. The SBA now uses a personal essay application—like the one mentioned in *SFFA*, where race can be invoked as context to show disadvantage but cannot be used as a single criterion[64]—to determine which businesses are disadvantaged for purposes of awarding contracts.[65]

The Minority Business Development Agency (MBDA) was established by President Richard Nixon in a 1971 executive order. The Biden administration made it a permanent agency and created MBDA regional centers across the country to aid business owners. Under President Biden's equity agenda, those centers had a policy of providing services only to firms whose owners' identities were consistent with a federal list of racial and ethnic minorities. According to MBDA rules, "if a business owner belongs to an enumerated group, he or she is entitled to services without regard to their life circumstances, financial performance, or any social or economic metrics of 'disadvantage.'"[66] When white business owners approached these centers for help, they were rejected because of their race.

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[61] *SFFA*, 600 U.S. at 216.

[62] *Ultima Servs.*, 683 F. Supp. 3d at 757 (internal citations omitted).

[63] *Id.* at 769.

[64] *SFFA*, 600 U.S. at 230-31.

[65] *Updates on the 8(a) Business Development Program*, SMALL BUS. ADMIN., https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program (last visited Feb. 10, 2025).

[66] Nuziard v. Minority Bus. Dev. Agency, 721 F. Supp. 3d 431, 492 (N.D. Tex. Mar. 5, 2024).

By the time three plaintiffs represented by WILL challenged the MBDA's preferential policies, *SFFA* had been decided and was a powerful precedent to rely on. Judge Mark Pittman, in his opinion granting the plaintiffs' motion for summary judgment, noted that the MBDA racial presumptions had no logical end point, a criterion for narrow tailoring mentioned in *SFFA*.[67] He also found that MBDA's race-based presumption of social and economic disadvantage was both "under- and over-inclusive," because of the many irrationalities in how the included and excluded groups were determined and MBDA's inability to offer any rationale for these determinations.[68] The district court concluded that MBDA's use of race violated both of *SFFA*'s "twin commands": that "race may never be used as a 'negative' and . . . may not operate as a stereotype."[69] Despite the DOJ's strategy of hiring expensive experts and entering into evidence 2,200 pages of studies to support its position, WILL was able to win the case without hiring an expert or even taking a deposition.[70] The DOJ did not appeal.

The United States Department of Transportation's Disadvantaged Business Enterprise (DBE) program began in 1983. It has survived many challenges to its congressionally-supported compelling interest, though its choice of beneficiaries has been invalidated.[71] The DBE program uses the same presumption about which groups are socially and economically disadvantaged as other federal programs.[72] After *SFFA*, the DBE program became more vulnerable.

In 2024, a trucking company operating in Indiana and Kentucky—represented by WILL—sued the U.S. DOT to enjoin its use of DBE preferences. Considering the racial and ethnic presumptions in the DBE program, the district court said there must be evidence that "the Department of Transportation has previously discriminated against *those* groups. It cannot group all minority owned businesses into one gumbo pot, but then try to scoop out only the sausage and not the okra."[73] The court first enjoined the DBE program only in the two states where the plaintiffs worked, and then amended

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[67] *Id.* at 493-94 (citing *SFFA*, 600 U.S. at 212).

[68] *Id.* at 489.

[69] *Id.* at 479 (citing *SFFA*, 600 U.S. at 218).

[70] Lennington & Croy, *supra* note 49, at 361-62.

[71] *See* W. States Paving Co. v. Wash. Dep't of Transp., 407 F.3d 983 (9th Cir. 2005).

[72] *See* 49 C.F.R. § 26.5 (definitions section for DBE program of the Department of Transportation).

[73] Mid-America Milling Co. v. U.S. Dep't of Transp., No. 3:23-cv-00072-GFVT, slip op. at 19 (E.D. Ky. 2024).

the injunction to cover any state where the plaintiffs wished to bid, although the judge was reluctant to grant a national injunction.[74]

Though it was unable to defend and unwilling to appeal four cases it lost in 2021 for providing debt relief to only minority farmers, USDA was back in court in 2024. The Southwestern Legal Foundation and the Mountain States Legal Foundation represented plaintiffs challenging its program of allocating enhanced disaster relief to "socially disadvantaged farmers," defined to encompass farmers who are "(1) American Indians or Alaskan Natives; (2) Asians or Asian-Americans; (3) blacks or African-Americans; (4) Hispanics or Hispanic-Americans; (5) Native Hawaiians or other Pacific Islanders; and (6) women."[75] Citing *SFFA* and other Equal Protection Clause cases, particularly *Vitolo*, the court found that USDA's race- and sex-based policy was neither supported by a compelling interest nor narrowly tailored.[76] USDA was unable to identify any discriminatory actions it had previously taken that the program aimed to remedy, nor could it link the program to any statistical findings indicating discrimination.[77] USDA's disparity study, the court noted, was undertaken after the preferential policy was already in place, weakening its evidentiary value in proving that there would be stark disparities without the policy.[78] Nor were the preferred groups narrowly tailored.[79] Further, USDA could have created a race-neutral disaster relief program supporting all harmed farmers regardless of their race or sex.[80] The court granted a nationwide preliminary injunction.[81]

SFFA and these cases that successfully challenged federal race preferential policies will make it easier to win such cases at the state and local level as well. These programs are rarely based on remedying past constitutional or statutory violations, and they tend to work similarly to the federal programs that relied on the now-invalid federal list of groups presumed to be disadvantaged. Therefore, according to *SFFA*, these programs fail both the compelling interest and narrow tailoring prongs of strict scrutiny. A brief discovery period and

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[74] *Id*. at 27.

[75] Strickland v. Vilsack, No. 2:24-cv-00060-Z, slip op. at 2 (N.D. Tex. June 7, 2024) (order granting preliminary injunction), *available at* https://www.slfliberty.org/wp-content/uploads/sites/12/2024/06/20240607-Memorandum-Opinion-and-Order-Doc-26.pdf.

[76] *Id.* at 12 (citing *Vitolo*, 999 F.3d at 361); *id.* at 14.

[77] *Id.* at 13-14.

[78] *Id*.

[79] *Id.* at 14.

[80] *Id.* at 15.

[81] *Id.* at 22.

then a motion for summary judgment may often be enough for a plaintiff to win future contracting discrimination cases.

Two examples of state and local cases can be found in Texas. Landscape Consultants, represented by PLF, sued the City of Houston and its Midtown Development Corporation, both of which have decades-old MWBE programs.[82] The city readily admitted in discovery that these programs do not remediate any specific constitutional or statutory violations and that it requires no evidence of previous discrimination against an applicant for the applicant to qualify as a MWBE.[83] PLF and the defendants each moved for summary judgment in 2024, and Judge David Hittner denied all the motions in an order issued on February 11, 2025.[84]

Texas has a Historically Underutilized Business (HUB) program which provides special contracting opportunities for companies owned by women and certain minorities, as well as veterans and disabled persons.[85] The program has a massive economic impact. When any state entities—including more than 150 state agencies and 100 public colleges and universities—purchase anything, a percentage of the contract dollar amount is set aside exclusively for HUBs. Statewide HUB utilization goals are set for various industries. In fiscal year 2023, they totaled nearly four billion dollars.[86] Aerospace Solutions does not qualify to be a HUB, so it faces a considerable disadvantage when bidding for state contracts. Further, when it does win a state contract, it must subcontract a part of the work to a HUB.[87] Aerospace Solutions sued to enjoin the HUB program in November, and the case is pending in state court. Programs like Texas's are common in other states, so the outcome in this case will not only affect the enormous Texas economy, but may create a national pattern for litigation as well.

Philanthropy is a mostly untested arena for challenges to racial preferences. AAFER successfully challenged a race exclusive charitable fund,

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[82] Plaintiff's Opposition to City of Houston's Motion for Stay, Landscape Consultants v. City of Houston, No. 4:23-cv-03516 (S.D. Tex. May 28, 2024).

[83] City of Houston's Responses to Plaintiff's Request for Admissions, *Landscape Consultants*, No. 4:23-cv-03516 (S.D. Tex. Nov. 29, 2024) (admissions 12, 13, and 14).

[84] Order, *Landscape Consultants*, No. 4:23-cv-03516 (S.D. Tex. Feb. 11, 2025).

[85] Complaint at 2, Aerospace Solutions, LLC v. Abbott, No. 1:24-cv-01383 (W.D. Tex. filed Nov. 13, 2024), *available at* https://pacificlegal.org/wp-content/uploads/2024/11/Aerospace-Solutions-v.-Texas_Complaint_11.13.2024.pdf.

[86] *Id.*

[87] *Id.* at 8.

Fearless Fund Management LLC.[88] AAFER alleged that the Fearless program violated Section 1981 of the Civil Rights Act of 1866, which "protects the equal right of all persons . . . to make and enforce contracts without regard to race."[89] To receive a Fearless award, the recipient had to agree to a contract that gave the Fund the right to use her name, image, voice, biographical and other information for "public relations, advertising, [and] promotional purposes," so the 11th Circuit held that Section 1981's contractual language applied.[90] The dissent, however, argued strenuously that AAFER lacked standing to sue.[91] It remains to be seen whether the panel majority's arguments or the dissent's objections win out in other circuits if similar suits are brought.

IV. LAND AND HOUSING

The effects of *SFFA* are also being felt in litigation challenging preferences in government programs offering land and housing assistance. One such program is run by the Minnesota Department of Agriculture, which provides grants to help farmers purchase their first farms.[92] The grants come out of a limited state appropriation, and while it initially awarded grants on a first-come-first-served basis, it was later amended to prioritize certain groups for assistance, including "women, veterans, persons with disabilities, American Indian or Alaskan Natives, members of a community of color, young, LGBTQIA+, or urban, and any other emerging farmers as determined by the MDA commissioner."[93] A white male farmer represented by PLF challenged the race and sex priorities on equal protection grounds in federal court.[94] Five months later, before a judicial decision could be reached, Governor Tim Walz signed legislation removing the race- and sex-based priorities.[95] After *SFFA*, defending such preferences likely did not seem promising.[96]

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[88] Am. Alliance for Equal Rts. v. Fearless Fund Mgmt. LLC, 103 F.4th 765, 769 (11th Cir. 2024).

[89] *Id.* at 775.

[90] *Id.* at 770.

[91] *Id.* at 780-82 (Rosenbaum, J., dissenting).

[92] Complaint at 1-2, Nistler v. Walz, No. 0:24-cv-00186 (D. Minn. filed Jan. 24, 2024).

[93] *Id.* at 5.

[94] *Id.* at 2.

[95] SF 4942, 93d Leg. (Minn. 2024), *available at* https://www.revisor.mn.gov/bills/bill.php?f=SF4942&y=2024&ssn=0&b=senate.

[96] *Minnesota Ends Race-Based Grant Policy*, PACIFIC LEGAL FOUND., https://pacificlegal.org/case/nistler-mn-farm-down-payment-discrimination/ (last visited Feb. 12, 2025).

In Washington State, PLF is representing the Foundation Against Intolerance & Racism (FAIR) in a challenge to a Washington State Housing Finance Commission program that provides zero-interest secondary mortgage loans to first-time home buyers.[97] The program's benefits are only available to "an applicant whose parent, grandparent, or great-grandparent is black, Hispanic, Native American/Alaska Native, Native Hawaiian or other Pacific Islander, Korean or Asian Indian."[98] FAIR's complaint alleges that the housing program uses race as a "negative" and a "stereotype," both of which violate *SFFA*.[99]

PLF also represented the Californians for Equal Rights Foundation in a lawsuit challenging San Diego's "First-Time Homebuyer Program for BIPOC Households with middle income."[100] This program provides aspiring homebuyers with grants of up to $40,000 for down payment and closing costs, and eligibility is based on racial self-identification.[101] Applicants who do not self-identify as black, indigenous, or people of color do not receive the program's benefits.[102] The allegations in this lawsuit evoke Justice Gorsuch's admonition in his *SFFA* concurrence against using racial check boxes to determine program eligibility.[103] Ironically, the San Diego Housing Commission states that it will provide services "without regard to race, color, ancestry, national origin, citizenship, immigration status, primary language, age, religion, disability (mental or physical), sex, gender, sexual orientation, gender identity, gender expression, genetic information, marital status, familial status, source of income and military or veteran status."[104] The disconnect between the stated policy of nondiscrimination and the practice of limiting program eligibility based on race is jarring but not uncommon. San Diego terminated its BIPOC housing grant program on November 2, 2024.[105]

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[97] Complaint at 1-2, Found. Against Intolerance and Racism Inc. v. Walker, No. 2-24-cv-01770 (W.D. Wash. filed Oct. 29, 2024).

[98] *Id.* at 4.

[99] *Id.* at 6. *See SFFA*, 600 U.S. at 213.

[100] Complaint at 3, Californians for Equal Rts. Found. v. City of San Diego, No. 3-24-cv-00484-MMA-MSB (S.D. Cal. filed Mar. 22, 2024).

[101] *Id.* at 3-4.

[102] *Id.* at 4.

[103] *SFFA*, 600 U.S. at 291.

[104] *Affirmatively Furthering Fair Housing Statement*, SAN DIEGO HOUS. COMM'N, https://sdhc.org/affirmatively-furthering-fair-housing-statement/ (last visited Feb. 12, 2025).

[105] Stipulation for Dismissal of Action, *Californians for Equal Rts. Found.*, No. 3-24-cv-00484-MMA-MSB (S.D. Cal. Feb. 6, 2025). *See* Sam Ribakoff, *San Diego drops race requirement for minority homebuyer program*, COURTHOUSE NEWS SERV., Feb. 7, 2025,

V. PROFESSIONAL LICENSING BOARDS

It is common for governments to have licensing boards for various professions to set entry criteria, maintain ethical standards, and discipline those who violate their rules. At least twenty-five states and an unknown number of cities and counties "have race- or sex-conscious mandates or quotas for public board membership."[106] Until recently, these quotas were not the subject of public controversy. But since *SFFA*, numerous challenges across the country have emerged.[107]

In November, DNH, represented by PLF, sued the governor of Tennessee to challenge the racial quotas for two Tennessee licensing boards: the Board of Medical Examiners and the Board of Chiropractic Examiners, both of whose members are appointed by the governor.[108] Most of the boards' membership requirements relate to years of medical experience and other professional criteria. But state law also requires the governor to appoint at least one person who is a racial minority to each board.[109] The complaint argues that these racial quotas are not supported by a compelling interest because they are not aimed at remediating past discrimination, and that they are not narrowly tailored because they lack an end date.[110] DNH has also challenged state board race- and sex-based quotas in Louisiana and Montana.[111]

PLF also represented an individual plaintiff in a challenge to an Iowa state requirement that there be a man and a woman appointed from each of the state's four congressional districts on its State Judicial Nominating Commission.[112] Former state representative Charles Hurley wanted to serve on the commission, but there was already another man from his district on the

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https://www.courthousenews.com/judge-dismisses-claim-that-san-diegos-minority-homebuyer-program-is-unconstitutional-after-it-drops-race-requirement/.

[106] LAURA D'AGOSTINO & ANGELA C. ERICKSON, PUBLIC SERVICE DENIED: HOW DISCRIMINATORY MANDATES PREVENT QUALIFIED INDIVIDUALS FROM SERVING ON PUBLIC BOARDS (Pacific Legal Found. 2023), *available at* https://pacificlegal.org/discriminatory-mandates-prevent-qualified-individuals-serving-public-boards/.

[107] Ryan Mills, *The Surprising New Front in the Fight against 'Equity': Red-State Licensing Boards*, NAT'L REV. (Dec. 2, 2024), https://www.nationalreview.com/news/the-surprising-new-front-in-the-fight-against-equity-red-state-licensing-boards/.

[108] Complaint at 4-5, Do No Harm v. Lee, No. 3:24-cv-01334 (M.D. Tenn. filed Nov. 7, 2024).

[109] *Id.*

[110] *Id.* at 9-10.

[111] Complaint, Do No Harm v. Gianforte, No. 6:24-cv-00024-BMM-KLD (D. Mont. filed Mar. 12, 2024); Complaint, Do No Harm v. Edwards, No. 5:24-cv-00016 (W.D. La. filed Jan. 4, 2024).

[112] Hurley v. Gast, 711 F. Supp. 3d 1069 (S.D. Iowa 2024).

commission, so he was barred because of his sex.[113] Judge Stephanie M. Rose ruled that, while the sex-based quota may have originally addressed past discrimination, "the Court cannot find the law is substantially related to any *current* discrimination, nor can the Court find that the law is tailored to accomplish any of the government's other stated objectives."[114] Ten weeks later, the Iowa legislature voted to repeal the sex-based quota.[115]

PLF is representing the AAFER in a challenge to Minnesota's Board of Social Work.[116] That fifteen-member board is required to have at least five members from a "community of color" or "an underrepresented community."[117] The latter is defined as "a group that is not represented in the majority with respect to race, ethnicity, national origin, sexual orientation, gender identity, or physical ability."[118] This board licenses and regulates the social work profession in Minnesota by "holding examinations to assess social work applicants' qualifications, establishing such qualifications and standards, issuing licenses to qualified individuals, and taking disciplinary action against those who violate the requirements of a licensed social worker in Minnesota."[119] Echoing *SFFA*, the complaint notes that the racial quota "does not remediate any specific instances of racial discrimination that violated the Constitution or statutes."[120]

AAFER is also challenging the racial quotas on appointments to Alabama's Real Estate Appraisers Board. A district court judge denied AAFER's motion for a preliminary injunction[121] and later found that issues of material fact prevented him from being able to rule based on the pleadings, so the case is ongoing.[122]

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[113] *Id.* at 1074.

[114] *Id.* at 1082.

[115] Robin Opsahl, *Gov. Kim Reynolds Signs Law Repealing Gender-Balance Requirement for Boards*, DES MOINES REG. (Apr. 3, 2024), https://iowacapitaldispatch.com/2024/04/03/gov-kim-reynolds-signs-law-repealing-gender-balance-requirement-for-boards/.

[116] Complaint, Am. Alliance for Equal Rts. v. Walz, No. 0:24-cv-01748-PJS-JFD (D. Minn. May 15, 2024).

[117] *Id.* at 1.

[118] *Id.* at 4.

[119] *Id.*

[120] *Id.* at 6.

[121] Order Denying Prelim. Inj., Am. Alliance for Equal Rts. v. Ivey, No. 2:24-cv-104-RAH (M.D. Ala. 2024).

[122] Order Denying Judgment on the Pleadings, *Ivey*, No. 2:24-cv-104-RAH (M.D. Ala. July 17, 2024).

On December 12, 2024, PLF filed a complaint challenging racial quotas for appointments to the South Carolina Commission for Minority Affairs.[123] The plaintiff, Sandy Chiong, "is of Chinese, Cuban, and Spanish descent," and she alleges that she wanted to compete for the at-large position on the board but could not because of the quota.[124] South Carolina law requires that a majority of the board's nine members be African American.[125] Under *SFFA*, such a blatant racial quota will be difficult to defend, especially given that the law provides no justification for it, let alone a compelling one.[126]

A week later, on behalf of FAIR, PLF filed a lawsuit in West Virginia against the state bar association.[127] The West Virginia State Bar Board of Governors has one seat set aside for an "African American Representative" who is to be elected only by fellow African American bar members.[128] Given the rules laid down in *SFFA*, arbitrary racial mandates like these are increasingly difficult to defend.

VI. CONCLUSION

Racial preferences have long been illegal under the Fourteenth Amendment, federal civil rights laws, and some state constitutions and statutes. But lawsuits seeking to enforce that principle have long been exhausting and expensive. The aftermaths of *Brown v. Board of Education*[129] and *Richmond v. J.A. Croson Co.*[130] suggest it could take decades of litigation before the Supreme Court's *SFFA* rules are fully enforced.

Or it may be different this time. *SFFA* was about college admissions, but it set forth the rules that 1) race cannot be used unless its use in a program is a remedy for specific, recent constitutional or statutory violations and 2) race should never be used as a stereotype or negative. These rules are easy to apply and hard to argue against.[131] Yet even though American society is

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[123] Complaint, Chiong v. McMaster, No. 3:24-cv-7213-SAL (D.S.C. filed Dec. 11, 2024).

[124] *Id.* at 1, 4.

[125] *Id.* at 3.

[126] *Id.*

[127] Complaint, Found. Against Intolerance and Racism Inc. v. Pickens, No. 1:24-cv-00115 (N.D. W. Va. filed Dec. 19, 2024), *available at* https://pacificlegal.org/wp-content/uploads/2024/12/Foundation-Against-Intolerance-Racism-v.-Mary-Jane-Pickens_PLF-Complain_12.19.24.pdf.

[128] *Id.* at 4-5.

[129] 347 U.S. 483 (1954).

[130] 488 U.S. at 469.

[131] *See* Lennington & Croy, *supra* note 49.

characterized by frequent statistical disparities among its many groups, which can lead to simplistic findings of underrepresentation or marginalization, *SFFA* and lower federal court decisions have invalidated the use of ethnic and racial group categories for preferences and have been unwilling to approve group-based remedies for those disparities. Disparity studies—once a staple of cases like these—almost never demonstrate that disparities are the result of specific legal violations and thus are becoming irrelevant in litigation over racial preferences.[132]

While some race and sex preferences fell before *SFFA* was decided, that decision now looms over any court that might wish to equivocate. *SFFA* has stimulated new equal protection litigation and encouraged favorable settlements. A cohort of non-profit litigation firms are active and effective in challenging racial preferences wherever they exist. They are willing to represent clients pro bono, reducing the burden on farmers, students, and small businesses who wish to challenge preferences. If their membership or mission is national, they can litigate almost anywhere in the country.

Chief Justice Roberts stated in *SFFA*, "Eliminating racial discrimination means eliminating all of it."[133] That may turn out to be a prophecy of *SFFA*'s ultimate legacy.

[132] *See* George R. La Noue, *The Demise of Disparity Studies?*, L. & LIBERTY (Nov. 13, 2024), https://lawliberty.org/the-demise-of-disparity-studies/.

[133] *SFFA*, 600 U.S. at 206.