



July 14, 2023

Re: Critical Points on Affirmative Action Decision and Response to Blum Letter

Dear Presidents, Deans of Admissions, and General Counsels:

Co-Chairs
Dean Danielle Holley
Joseph K. West

Treasurer
David Smith

General Counsel
Nicholas T. Christakos

*President and Executive
Director*
Damon T. Hewitt

The Lawyers' Committee for Civil Rights Under Law, which represented students and alumni in the Supreme Court's recent affirmative action decision in *SFFA v. Harvard* and *SFFA v. UNC*, writes in response to a recent letter you may have received from Ed Blum, the President of Students for Fair Admissions (SFFA). We aim to provide further clarity about the true scope of the Supreme Court's recent decision and help ensure that your college and university continues to do the great work that welcomes and supports highly talented students across all backgrounds.¹

The Supreme Court's majority opinion held that UNC and Harvard's race-conscious admissions programs violated the Equal Protection Clause and Title VI. As you may know, the decision alters, but does not ban, the permissible scope of race-conscious admissions programs for public and private higher education institutions. Through our clients' testimony, we and co-counsel highlighted the centrality of race in their life experience and the contributions of our clients to their universities and communities. Perhaps informed by the student testimony presented, the Court left undisturbed a student's right to put forward their race as part of their identity and experience and a university's right to consider that information in the application process.

Mr. Blum's letter reflects an effort to overstate the reach of the decision and stoke fears through implicit and explicit threats of litigation. We implore universities to not overreact to opportunists' efforts, but instead to thoughtfully digest the decision and work within its bounds in ensuring that qualified students across races and ethnicities continue to learn and grow together through means consistent with the recent decision. To that end, we ask you to consider some initial critical points about the decision and responses to Blum's letter.

Critical Points About the Affirmative Action Decision

1. **The Court's decision is clear that racialized experiences may be considered in admissions.** As Chief Justice Roberts held, "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." Slip Op. at 40. Therefore, it is imperative that colleges and universities make clear that prospective students may describe the ways that their personal racial identities inform and shape their individual experiences in their applications. And it is appropriate for colleges to consider those experiences in weighing admissions decisions alongside other criteria. Colleges also should ensure they are not forcing or implying that students should self-censor from sharing such experiences as such practices may implicate important First and Fourteenth Amendment protections

¹ This letter should not be construed as legal advice and readers should consult their attorney for legal consultation.

2. Nothing in the decision prevents your colleges and universities from focusing on Diversity, Equity, Inclusion and Accessibility (DEIA) and other efforts to ensure all students are welcomed, valued, and supported. The Court’s decision only addresses race-conscious college admissions. You should continue, or start anew, great programs that ensure success for all students on your campuses, such as outreach targeting underserved communities, supporting student affinity organizations, and providing anti-discrimination and anti-bias training consistent with state and federal laws.

3. Your colleges and universities may continue to embrace diversity, including racial diversity. This means that you may continue to embed diversity goals in your missions and work to achieve those goals through permissible race-conscious and race-neutral means. Nothing in the opinion suggests otherwise.

4. Your colleges and universities should ensure that they eliminate artificial barriers to admission. Federally-funded institutions have affirmative duties under Title VI of the Civil Rights Act of 1964 to ensure they are not intentionally and unintentionally preventing access to historically marginalized students of color. Such discriminatory policies and practices may include the consideration of standardized test scores—which under predict the talent and potential of Black and Brown students—for admissions and scholarships; legacy and donor preferences; and unnecessary course requirements for certain degree programs.

Responses to Mr. Blum’s Suggestions

The suggestions provided by SFFA grossly overstate what the Supreme Court’s decision requires colleges and universities to do. None of the suggestions provided by SFFA are explicitly required by the Supreme Court’s decision. Our responses follow:

SFFA’s suggestions	What colleges and universities can actually do:
<p>“Cease making available to admissions officers “check box” data about the race of applicants.”</p>	<p>Universities can use their discretion in deciding whether admissions officers may continue to look at this information as part of a lawful race-conscious admissions program. For other admissions programs, while admissions officers should not make decisions based on an applicant’s race, nothing in the opinion requires universities to shield such information.</p>
<p>“During the admissions cycle, prohibit your admissions office from preparing or reviewing any aggregated data (i.e., data involving two or more applicants) regarding race or ethnicity.”</p>	<p>Universities can use their discretion in including aggregated data regarding the race or ethnicity of applicants as part of a lawful race-conscious admission program. For other admissions programs, nothing in the opinion forbids universities from monitoring admissions demographics. They simply should not make admissions decisions based on an applicant’s race.</p>

SFFA’s suggestions	What colleges and universities can actually do:
<p>“Eliminate any definition or guidance regarding ‘underrepresented’ racial groups.”</p>	<p>Lawful race-conscious admissions programs may continue to include this type of guidance. Moreover, the Supreme Court’s decision is focused on college admissions, and does not ban all definitions or guidance addressing the needs of underrepresented racial groups. Therefore, universities and colleges can and should continue to be aware of underrepresentation and make efforts to ensure that qualified students, including historically marginalized students of color, are not overlooked due to racial bias or discrimination. Additionally, the Supreme Court’s decision does not address race-neutral efforts to achieve diversity and concurring opinions acknowledged the lawfulness of such programs. Accordingly, colleges and universities can continue to use race-neutral efforts to increase the diversity on their campuses.</p>
<p>“Promulgate new admissions guidelines that make clear race is not to be a factor in the admission or denial of admission to any applicant.”</p>	<p>The Supreme Court’s decision does not categorically ban the use of race-conscious admissions programs and efforts to overcome past discrimination. Colleges and universities can exercise their discretion in what specific language needs to be included in their guidelines. And as noted above, they should make clear that students are free to express their authentic selves in their application, including how they may have “overcame racial discrimination,” or how their “heritage or culture motivated” them so long as the student is “treated on the basis of his or her experiences as an individual.” Slip Op. at 40.</p>

We are, of course, greatly disappointed that the Supreme Court has made the work of ensuring diversity in higher education more difficult. This action by the Supreme Court could undermine opportunity, diversity, and fairness in our education system for generations if universities overreact to the decision and abandon these fundamental values out of fear. Universities are at the forefront of innovation and creativity and are able to ensure higher education remains a place of opportunity for all students to meet their full potential in school and in life—and to do that within the bounds of the law. We are counting on you to have the will to strive for this goal.

For additional information, please visit [Affirmative Action | Lawyers' Committee for Civil Rights Under Law \(lawyerscommittee.org\)](https://www.lawyerscommittee.org) or contact us at eop@lawyerscommittee.org.

Sincerely Yours,

/s/ David Hinojosa
 Director of the Educational Opportunities Project
 Lawyers’ Committee for Civil Rights Under Law