

# A “Fair Admissions Act”

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## Executive Summary

The Supreme Court’s decision in *SFFA v. Harvard* and *SFFA v. University of North Carolina* was a victory for advocates of fair and race-neutral college admissions. With the decision, colleges and universities face a new legal landscape and may no longer take students’ race, color, or national origin into account in their admissions decisions. But the Court’s ruling alone is not enough to ensure that institutions fully abandon employing racial preferences. Despite the Court’s clear prohibition of race-based admissions policies, emboldened institutions may attempt to skirt the law by relying on other application materials as proxies for race. Institutions could potentially, for example, give greater preference to applicants who write about their “racial experiences” with discrimination or “contribution to a diverse university environment” in their application essays.<sup>1</sup> The proposed “Fair Admissions Act” model legislation is designed to prevent these kinds of illicit practices, acting as an enforcement mechanism for the new ruling. In addition to holding institutions accountable by requiring them to collect and, when solicited, make available all admissions data, the model legislation encourages colleges to clearly articulate their goals and concretely assess how their current practices help meet those goals. If implemented, the “Fair Admissions Act” can help ensure that college admissions truly remain race-neutral, thereby ensuring equal opportunity and restoring meritocracy in higher education.

## Fair Admissions Act: Introduction and Overview

On June 29, 2023, the U.S. Supreme Court brought to an end a long period during which it permitted colleges and universities to take race into account in admissions decisions if the use of race was “narrowly tailored” to achieve a “compelling” institutional goal. In its decision in *SFFA v. Harvard* and *SFFA v. University of North Carolina*, the Court noted that this exception to general prohibitions on racial discrimination had always been viewed as a temporary expedient, and that the two university defendants had, in any case, not come close to articulating a coherent relationship between the ways they used racial preferences and their institutional rationales for doing so. Accordingly, the Court ruled that henceforth, college and university admissions must be race-neutral; institutions are prohibited from giving more favorable consideration to an applicant because of the student’s race, color, or national origin.

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<sup>1</sup> Two careful studies of admissions at the University of California, one commissioned by the university itself, found strong evidence that the schools had substantially deviated from race-neutral admissions. See Robert Mare, *Holistic Review in Freshman Admissions at the University of California-Los Angeles, 2009-11 Update* (2014); Danny Yagan, “Law School Admissions Under the UC Affirmative Action Ban” (2012).

The Court's ruling, however, is unlikely by itself to end the era of racial preferences. Some colleges almost immediately announced that they intended to use proxies for race, such as discussions of personal experiences of discrimination in application essays, to maintain their desired demographic goals. And there is abundant evidence that in the many states that have banned the use of racial preferences through voter referenda, some major higher education institutions continue to discriminate based upon race. Although the Court made it clear that its decision prohibits racial discrimination whether done "directly" or "indirectly," there is no enforcement mechanism to oversee implementation of the Court's ruling, and advocates of race-neutrality see long years of difficult litigation ahead.

In conjunction with UCLA legal scholar Richard Sander, the Martin Center has developed model legislation to provide a mechanism of accountability by fostering fairness, transparency, and honesty in the admissions process. The bill is, in essence, a legislative companion to the *SFFA* decision, providing simple mechanisms to foster higher education processes that comply with the Court's ruling and to create accountability to the public for those processes.

The model bill has also been endorsed by [ADD HERE].

The model legislation does several things.

- First and foremost, in line with the Supreme Court's decision, colleges and universities receiving state assistance are prohibited from discriminating on the basis of race, color, or national origin. This means institutions may not give applicants favorable treatment on the basis of these characteristics. They furthermore may not give weight to a factor that disproportionately advantages or disadvantages a particular racial group, unless they can show that that factor is related to a quantifiable goal and that there is not a less discriminatory alternative.
- Similarly, the bill prohibits state-supported colleges and universities from awarding financial aid to students based on their race, color, or national origin.
- It encourages institutions to articulate their goals and to gather and assess how their admissions criteria and academic success programs are helping them meet those goals.
- It does not prevent states from giving admissions preference to their residents.
- The bill will require colleges and universities to gather and make available for scholarly analysis all data used in making admissions decisions. This includes quantitative data such as standardized test scores and high school grade point averages, the scores used to evaluate qualitative characteristics, schools' weighting formulas and admission algorithms, and the race, color, and national origin of each applicant. The bill further directs that information regarding students' race, color, and national origin be redacted from application materials evaluated by admissions officers and admissions readers.

Institutions are required to maintain this information for at least ten years. The transparency required by this bill is consistent with the Federal Educational Rights and Privacy Act (FERPA). If schools have legitimate concerns that the data they provide may jeopardize student privacy, they are permitted to make minor changes to the data in order to “blur” identifiable information.

- All first-year undergraduate students will be required to submit standardized test scores, regardless of whether any given institution requires such scores. Institutions are not required to consider these scores in admissions decisions, but must disclose them upon request for scholarly analysis. Some applicants are exempt from the requirement to submit test scores. First-time students who are age 21 or older, for example, are not required to submit a standardized test score. Applicants with more than 24 transferable college credits and those on active duty in the military or a veteran with three or more years of active duty service are also exempt from this requirement. For students in extenuating circumstances, an institution’s chief academic officer may grant waivers to up to one percent of the applicant pool.

The “Fair Admissions Act” is a concrete step forward in restoring integrity and merit to college admissions and in encouraging higher education leaders to prioritize their educational mission.

Following the proposed text of the proposed Act, below, we have included a commentary that explains the legal rationale for some of the proposal’s provisions and their intended meaning and effect.

### **Language of the Act**

#### Section 1. Purpose.

Whereas the United States Supreme Court ruled in June 2023 that the use of racial preferences in higher education admissions was no longer a justifiable expedient, and would be henceforth unlawful; and

Whereas many university leaders promptly announced their intention to use subterfuges to work around the Court’s decision; and

Whereas there are well-documented instances of universities continuing to discriminate on the basis of race in the face of state prohibitions on the use of race in admissions to state universities;

Therefore, be it enacted:

#### Section 2, Transparency

Universities and colleges receiving assistance from appropriations by this state shall gather and make available sufficient data to enable an outside analyst to reasonably reconstruct, comprehend, and replicate the admissions process of each of the institution’s constituent schools and programs (hereinafter “schools”). This has three parts:

- a. Quantitative data used to evaluate applicants, such as SAT scores (SAT-1 as well as SAT-2), Advanced Placement test scores, high-school grade point averages, whether raw (i.e., as reported by the school or student) or adjusted (using any formula devised by the school).
- b. Any test score submitted by an applicant in compliance with subsection 3, below.
- c. Scores assigned by the school to evaluate qualitative characteristics of the applicant.
- d. The school's formula for weighing and combining these constituent scores into an overall assessment of the applicant, and the threshold used to determine which applicants to admit, which to reject, and which to wait-list.
  - i. Because the formula described in this section must translate into actual admissions decisions, the school must assign scores to any qualitative factors it wishes to consider in admissions.
- e. The race or ethnicity of the student, as gathered by the school for federal reporting purposes. Any information on race or ethnicity shall, however, be redacted from all application materials reviewed by admissions officers, departments, and staff members.
- f. Schools shall maintain the data required by this section for a period of no less than ten years after the matriculation date of the class selected, and shall provide without charge an electronic copy of the data, in a form convenient for purposes of analysis, to any person requesting the data in writing. Such disclosed data shall not include fields that are generally understood as containing personally identifiable information (e.g., name, street address, social security number). Moreover, if school administrators have a legitimate concern that disclosure of the data in its original form may allow outside parties to deduce individual identities, the school may undertake minor data-blurring modifications to reduce the risk of re-identification to minimal levels.

### Section 3. Non-discrimination

Universities and colleges receiving state assistance shall not discriminate on the basis of race, color, or national origin in admissions decisions. Discrimination occurs if:

- g. A school gives more favorable consideration to an applicant because of the student's race, color, or national origin;
- h. A school gives weight to a factor that disproportionately favors or disfavors a racial group, unless
  - i. The weight and the factor are demonstrably related to an articulated and quantifiable goal of the school, and
  - ii. There is not a less discriminatory alternative that so effectively achieves the goal.

### Section 4. Test score submission

Four-year universities and colleges receiving state assistance shall require all undergraduate applicants to submit a standardized test score such as a state or national

test, including end-of-course exams, and receipt of such a score shall be a requirement for admission. Nothing contained in this section, however, shall be interpreted as a requirement for universities to use standardized test scores in making admissions decisions.

- i. At the discretion of the college or university, students may be exempt from the test-score requirement if:
  - i. They are age 21 or older, or
  - ii. If they are a transfer applicant with 24 or more transferable college credits, or
  - iii. If they are a veteran of the United States armed forces with three or more years of active duty service, or
  - iv. If, at the time of their application, they are on active duty in the United States armed forces.
- j. To address special circumstances, the Chief Academic Officer of any college or university covered by this section may waive the testing requirement for individual applicants. Such waivers, however, shall not cumulatively exceed more than one percent of the total number of applicants in any annual admissions cycle.
- k.

#### Section 5. Financial aid and outreach

Universities and colleges receiving state assistance shall not use race, color, or national origin as a factor in awarding financial aid to current or prospective students. However, it is not a violation of this section for a university or college to undertake an outreach program or other program aimed at generating qualified applicants that is targeted in part based on goals of including or reaching persons who are racially underrepresented at a school's program, so long as such programs clearly do not exclude from participation any interested person based in whole or in part on race, color, or national origin.

#### Section 6. Articulating goals

To facilitate compliance with Section 2(c), universities and colleges should articulate their goals, and gather information that enables them to assess how well their admissions criteria, academic assistance programs, outreach programs, and financial aid programs are effectively fostering the attainment of their specified goals.

#### Section 7 In-state applicants

Notwithstanding other provisions of this section, it shall not be illegal for universities or colleges receiving aid from this state to give an admissions preference to bona fide residents of the state.

#### Section 8 International applicants

Universities and colleges receiving state assistance shall require freshmen applicants educated outside of the United States ("international" applicants) to demonstrate academic preparation comparable to that required of domestic applicants, and shall

require international applicants to submit a TOEFL score demonstrating English-language proficiency.

**Commentary and explanatory notes:**

- 1) General. The goal of this statute is to foster accountability, transparency, and honesty in the admissions practices of state-supported institutions of higher education. Its immediate purpose is to provide a mechanism to foster university compliance with the U.S. Supreme Court’s clear mandate, in its June 2023 decision in *SFFA v. Harvard* and *SFFA v. University of North Carolina*, that admissions should be race-neutral; but an important related purpose is to encourage these institutions to be more reflective and deliberate in setting their own educational goals. These two purposes are mutually reinforcing, as explained further in point 4(c), below.
  
- 2) FERPA. The Federal Educational Rights and Privacy Act protects the privacy of information that higher education institutions hold about their students. Some implications of FERPA are obvious: for example, colleges and universities should protect the privacy of medical information they have about their students, and cannot disclose information that could lead to identity theft, such as social security numbers. The extent to which FERPA prevents universities from disclosing information used in admissions decisions, or on the outcomes of students, is subject to debate and some conflicting court decisions. Many institutions have routinely disclosed on applicant characteristics and admissions decisions, but with prior removal of “identifying information” such as names, addresses, and social security numbers. This is called “anonymized data.” Some scholars (and courts) have contended that this is insufficient, because in the internet age it is possible to hack identities by matching anonymized information to other data that the applicants themselves have disclosed online (e.g., on Facebook) or matching to information gathered by commercial databases. There are at least two ways of providing transparency that are consistent with even the most aggressive interpretation of FERPA’s reach:
  - a. Require any person or entity requesting the data to sign a non-disclosure contract, stipulating that they will not share individual-level data or attempt to re-identify any person in the database. This poses no problem for legitimate scholars and researchers, since the goal is to conduct statistical analyses of how a school’s admissions operate, and to only report aggregated data.
  - b. Allow the school, if it is concerned that its “anonymized” data is still possibly subject to reverse engineering, to “blur” the data, using established techniques to add small amounts of random noise to data so that it becomes too fuzzy to re-identify, but is still accurate enough to permit robust analysis. The model legislation above takes this second approach. (We may add further language to this provision to ensure that the data-blurring does not become a loophole for generating misleading data)

- 3) The model statute's requirement that data be disclosed "in a form convenient for analysis," requires formats, such as Excel spreadsheets or text-delimited files, that can be readily imported into a variety of software programs for data analysis, in contrast to formats, such as PDF files, that represent images rather than numerical data.
- 4) Disparate impact. The most discussed portion of the Supreme Court's decision in the *SFFA* cases has been the Court's statement that "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....But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today....'What cannot be done directly cannot be done indirectly....'" The way that federal courts generally police "indirect" discrimination is through the doctrine of disparate impact, which has been most robustly developed in enforcing Title VII of the Civil Rights Act of 1964 (dealing with employment) but has also been applied in enforcing Title VI (dealing with education, and the key law, along with the Fourteenth Amendment, invoked by *SFFA*). Under a disparate impact standard, a hiring or admission criterion can be challenged as illegal if it produces significantly higher rejection rates for members of one protected group relative to others. The defense to a disparate impact challenge requires an employer or school to show that the challenged criterion is valid because (a) it is demonstrably related to a legitimate outcome, and (b) there is no alternative criterion that both predicts the outcome as well as the challenged criterion and has a smaller (or no) disparate impact.

Thus, for example, schools have been challenged in the past for their use of standardized test scores, which have a disparate impact on some racial minorities because of those groups' lower average scores. The use of scores has been successfully defended by showing that the scores are statistically significant predictors of better performance (e.g., higher grades) at a school, and that there is not an alternative predictor that has a smaller disparate effect. Consider, then, how a disparate-impact analysis would work if a university sought to maintain racial diversity by encouraging students to write about "how they can contribute to diversity on our campus," giving a preference to those who identify themselves as an underrepresented minority. There are at least three fairly obvious legal issues:

- a. First, the "experiences" essay would have a large, racially disparate effect upon admissions decisions. The school would therefore have to articulate why it is justified in using this criterion and giving it substantial weight.
- b. Second, the Supreme Court has clearly disallowed "racial diversity" as a goal. The university would have to articulate non-racial goals that the "preference

for essays about racial experiences” would advance. It is not impossible that schools could articulate such goals – for example, the goal at a medical school might be “to produce more graduates who will practice in underserved communities.” But, as the Court decision makes clear, such goals cannot be merely asserted; the nexus between the means and the end must be demonstrated. Therefore,

- c. Third, schools using criteria that have a notable racially disproportionate impact must develop and deploy data that quantitatively show the connection between a particular criterion and the particular goal that it is alleged to foster. This requirement has great ancillary benefits, because higher education institutions have generally done a poor job of articulating specific pedagogical goals or measuring what their students learn and accomplish. Creating an environment of greater accountability and transparency in higher education is not only an effective means of countering sub rosa racial discrimination; it is also a means of reforming and improving higher education. If several jurisdictions create accountability mechanisms of the types described here, it will be possible to compare the effectiveness of different higher education institutions and thus influence the culture in higher education generally.
- d. A similar analysis would be applied to a university’s use of socioeconomic (“SES”) preferences. While there may be more indirect goals served by increasing the representation of low-SES students in college, the representation itself is almost certainly a legitimate goal that would not invite constitutional or legal scrutiny. “Socioeconomic class” is not a suspect classification, and it is well-documented that low-SES students are substantially underrepresented in four-year colleges even when one controls for academic credentials. However, one can foresee two situations in which the use of SES preferences could run afoul of a disparate impact analysis.
  - i. The first of these is if a school selectively chooses, and gives much greater weight to, particular socioeconomic characteristics that have a particularly high correlation with race. One might reasonably suspect then that the school is not trying to increase socioeconomic diversity, but is trying to reverse engineer a racial preference. In such a case, the usual disparate impact analysis would be relevant: what is the goal served by this particular weighting, and can the school demonstrate that this goal is in fact better achieved by this weighting than by some other approach?
  - ii. The second of these occurs if a school gives such a large SES preference that it admits students who have a poor chance of success (what is often referred to as the “mismatch effect”). Here again, the



focus on requiring schools to not only identify goals, but also provide data on both the admissions process and the long-term outcomes of students, would enable observers to determine whether a given preference is sacrificing the welfare of the admitted student to the diversity goals of the school.

- 5) Some scholars have noted that a requirement for all applicants to submit a standardized test score (Section 3 of the proposed legislation) may have the unintended effect of excluding some low-and-moderate income applicants. An alternative approach for legislators to consider is to provide covered universities to access and incorporate into their data scores from statewide tests administered to high school students in the state.
- 6) By design, this legislation is intended to cover only “public” universities (see section 1). Because private colleges receive significant indirect assistance through their broad exemption from property taxes, a state that wished to include private universities within the scope of this legislation could modify the language in section one to include such indirect assistance.
- 7) More than 30 states already require or offer for free the ACT and/or the SAT. The proposal to require students to take standardized tests, therefore, is already common practice.