

**Preliminary Guidance Regarding the U.S. Supreme Court’s Decision in
SFFA v. Harvard and SFFA v. UNC
July 6, 2023**

This preliminary working draft has been developed to provide initial guidance regarding the Supreme Court’s SFFA opinions. We offer this draft, directional guidance to support understanding and leadership within the higher education community in light of immediate enrollment issues with which institutional leaders are grappling. Given the complexity of the decision and the issues implicated, this draft will be reviewed and supplemented in the coming weeks.¹

INTRODUCTION AND OVERVIEW

On June 29, 2023, the U.S. Supreme Court issued its decision in the *Students for Fair Admissions v. Harvard/UNC* cases regarding the universities’ consideration of race as one factor among many in undergraduate admissions to advance their interests in promoting the educational benefits of diversity for all students. In a consolidated opinion (reflecting a 6-2 decision in the Harvard case, with Justice Jackson recused; and a 6-3 decision in the UNC case) the Court ruled that Harvard’s and UNC’s admissions programs violated federal non-discrimination law.² While the Court did not expressly overrule past decisions that established a framework permitting the limited consideration of an applicant’s race to advance diversity interests, it significantly undercut that precedent to a point of eviscerating its continuing vitality—impeding efforts at many institutions to fully advance the research- and experience-demonstrated benefits of diversity that inure to all students in terms of educational, workforce, and civic aims.

This initial analysis provides a synthesis of the key points of the majority’s opinion in the two cases, followed by important actions for higher education institutions and leaders to take, which include policy and practice implications derived from the Court’s ruling. As part of the synthesis, we also offer commentary on each of the key segments of the Court’s opinion that

¹ Nothing in this document should be construed as providing institution-, organization-, or individual-specific legal advice. This guidance has been prepared to provide information to inform those conversations and judgments, which are inherently fact- and context-specific.

² The Court delivered a single decision covering both universities, analyzing their programs under 14th Amendment Equal Protection Clause standards. Even though the Equal Protection Clause doesn’t apply to private universities like Harvard, the Court recognized that a violation of the Equal Protection Clause is a violation of Title VI of the Civil Rights Act of 1964 (which applies to public and private recipients of federal funds). Thus, the Court “evaluate[d] Harvard’s admissions program under the standards of the Equal Protection Clause, itself.” Justices Thomas and Gorsuch opined that Title VI, alone, embedded a categorical statutory non-discrimination mandate; nonetheless, they joined the Court’s opinion in full.

establish the basis for its ruling. In our view, that analysis is essential to understand because, as a result of this decision, postsecondary institutions (including all undergraduate, post-baccalaureate, and professional school programs) are now faced with the challenge of grappling with a fundamentally new legal landscape, notwithstanding the Court’s assertion that it adhered to existing precedent.³ And, while this document is mostly focused on enrollment issues (that are the initial sets of issues that must be resolved quickly given admissions cycles), there are, to be sure, broader investment, policy and practice issues that will need to be addressed in coming months.

We are continuing to analyze the Court’s majority opinion, as well as the concurring and dissenting opinions, and will share a more complete analysis in coming weeks. Working with our partners and clients, we will provide additional analysis and insights on the Court’s decision and its implications, including how the higher education community and others could and must seize this moment to inspire a new commitment and era for equity and excellence in higher education.

Finally, it is important to note that nothing in the Court’s decision should affect higher education’s central role in society as an engine of social mobility and its core commitment to educational equity and excellence—particularly for students of color and students from other historically marginalized and underrepresented groups. While we summarize the Court’s rulings and our initial analysis of its impacts, that does not diminish the fact that this decision is also personal, with real consequences for students and families of color, and our nation. This is a moment for higher education leaders and institutions to demonstrate leadership, not retrenchment, in pursuit of their educational missions in comprehensive, thoughtful ways that, of course, also satisfy the law. This includes fostering access and inclusion and building equitable learning environments that can prepare a diverse set of leaders to take on our nation’s and world’s greatest current and future challenges. To this end, this analysis closes with additional perspectives on leadership toward the achievement of diversity and equity goals in light of the Court’s decision.

THE MAJORITY’S OPINION

I. Chief Justice Roberts’ Opinion

As a foundation for its ruling against Harvard and UNC, the Court rigidly applied a longstanding standard known as “strict scrutiny,” which the Court applies to any policy or practice determined to be “race-conscious” because they are deemed to be “invidious in all contexts.” Under that standard, race-conscious policies and practices will only be upheld where they serve

³ Indeed four Justices—Justice Thomas, concurring; and Justices Sotomayor, Kagan, and Jackson, dissenting—agreed: “*Grutter* is, for all intents and purposes, overruled.”

a “compelling interest” (the ends) and are “narrowly tailored” (the means) to achieve that interest. In prior rulings, the Court has held that higher education institutions may be permitted to take race-conscious actions to remedy the impact of their own institutional discrimination (if that can be established) but cannot do so to overcome broader societal discrimination. Additionally, the Court has also held that higher education institutions could use race as one factor of diversity among many to advance their interest promoting the educational benefits of diversity. This diversity interest has since formed the basis of a wide-array of race-conscious efforts in higher education, and was the interest being challenged here in relation to Harvard’s and UNC’s admissions programs.⁴ In reaching its decision, the majority in SFFA espoused a particular view of our nation’s history with regard to race (a view strongly at odds with the dissenting justices), adopting a strongly “race-blind” view of constitutional law.

The Court asserted three bases for its determination that the Harvard and UNC policies violated federal non-discrimination law.⁵ It found that both programs:

- ◆ Lacked “coherence” and “sufficiently focused and measurable objectives” warranting the use of race;
- ◆ Impermissibly employed race in a negative manner, involving racial stereotyping; and
- ◆ Lacked “meaningful end points.”

At the same time, the Court expressly recognized the “tradition of giving a degree of deference to a university’s academic decisions” and that “[u]niversities may define their mission as they see fit” within constitutional limits. It also ruled 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.” Favorable consideration in admissions for “a student who overcame racial discrimination, for example, must be tied to *that student’s* courage and determination;” and “a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute to the university.” (emphasis in original). Each of these points is explained further, below.

⁴ As we use the term “race-conscious” in this guidance, we refer to opportunities or benefits conferred upon an individual in cases where their *racial status* was a factor in the decision-making, in line with the Court’s analysis. As explained below, we distinguish (as the Court did) that categorization from the consideration of an individual’s *experiences associated with their racial identity* related to educational mission that can manifest in “challenges bested, skills built, or lessons learned,” which should be considered legally “race-neutral.”

⁵ Note that the Court expressly excludes military academies from its analysis, saying that “potentially distinct interests” may be present there.

A. Neither Institution Established a Legally Sustainable Compelling Interest

The Court ruled that neither Harvard nor UNC established a sufficiently compelling interest to justify the consideration of applicant’s racial status in admissions. In reaching that conclusion, it rejected similar sets of interests advanced by each institution. Harvard grounded its program on the interests of: training future leaders; preparing graduates to adapt to a pluralistic society; improving education; and fostering new knowledge. In a similar vein, UNC advanced the interests of promoting the robust exchange of ideas; broadening and refining understanding; fostering innovation and problem solving; preparing engaged and productive citizens and leaders; and breaking down stereotypes.

Notwithstanding the view that the asserted goals were “commendable” and “plainly worthy,” the Court found that, all told, these interests were too “amorphous,” “elusive,” and not sufficiently measurable” or “coherent” to permit judicial review required in a strict scrutiny evaluation of race-conscious policies. Moreover, the Court questioned how it was to determine when success could be declared: “How is a court to know when [these goals] have been reached, and when the perilous remedy of racial preferences may cease?”

Further, the Court also called into question the “connection between the [race-conscious] means they employ and the goals they pursue”—finding a “mismatch” between the means and ends. Specifically, the Court questioned the “imprecise” racial categories used by Harvard and UNC, as both overbroad in some instances and underinclusive in others.

Our take: In reaching this conclusion, the Court invalidated interests that were fundamentally the same as—or, in some cases, identical to—those it had endorsed in *Grutter*, *Gratz*, and *Fisher II*. Thus, rather than adhering to precedent, the Court on this point eviscerated it, even as it professed to be adhering to the teachings of *Grutter* and its precedent. The same point can be made with respect to the Court’s “mismatch” conclusion. Similar (and sometimes identical) racial categories were used by the University of Michigan and the University of Texas in their prior Supreme Court litigation; none were fatal to their defense, as here—a further manifestation of the Court changing course despite its claim to adhere to precedent.

B. The Institutions’ Consideration of Racial Status Has Impermissible Negative Effects and Stereotypes

The Court also found that in using racial status the challenged programs impermissibly were “used as a negative” and operated as a stereotype in violation of federal law.

The Court concluded that race was “used as a negative” because, in the case of Harvard, the “use of race” led to “fewer Asian American and white students being admitted,” with, in particular, an 11.1% decrease in the number of Asian American’s admitted. As part of its analysis, it rejected Harvard’s defense that race was not a negative as “hard to take seriously”—

concluding that “[c]ollege admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”

Correspondingly, the Court found that the challenged programs “tolerate[d] the very thing that *Grutter* foreswore: stereotyping”—reflecting the “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” That conclusion was grounded on the premise that the challenged programs provided for “some...preferences on the basis of race alone,” with an “inherent benefit in race *qua* race—in race for race’s sake.”

Our take: Coupled with the erroneous premise that the admissions decisions in the two cases considered race as rigid “classifications” in the process, the conclusions reflected here are based on a flawed factual conclusion that consideration of an individual’s racial status alone, without more, operated as a preference in the holistic review process leading to the selection of admittees. In each lower court record, trial judges found to the contrary—a point entirely bypassed by the Court.

C. Neither Institution Established a Sufficient End to the Consideration of Racial Status

The Court also struck down the challenged programs because they “lack[ed] a ‘logical end point’”—with two underlying points of analysis in support. First, the Court rejected the proffered assertion that the consideration of race would end when each institution achieved “meaningful representation and meaningful diversity.” That was problematic in the Court’s view because its construction of relevant data trends establishing, for example, “tight [percentage] bands” (similar from year to year) among underrepresented minority students suggested that each institution was after no more than “[o]utright racial balancing.” In corresponding fashion, the Court rejected the proffered end point of when the universities achieved the educational benefits of diversity, repeating concerns for those “qualitative standards” that were “difficult to measure.” See point A, above.

Finally, referencing Justice O’Connor’s last line of her 2003 majority opinion in *Grutter*—reflecting the “expect[ation] that 25 years from now []the use of racial preferences will no longer be necessary”—the Court said: “Twenty years later, no end in sight.” It also rejected the position of the institutions that they met the durational requirement through “periodic review” as required by strict scrutiny, ultimately concluding that there was, in fact, no end point in view for either institution, a marker of non-compliance with federal non-discrimination law.

Our take: The Court’s conclusion that postsecondary institutions that consider race in admissions must establish definitive and specific end points for such action is novel. In *Grutter* and in *Fisher II*, for example, neither challenged program had a definitive end point, and that fact did not affect the Court’s decision when upholding those challenged programs. To the contrary, across the board, relevant Court precedent has integrated its concern about having an end point into the periodic review element of strict scrutiny. In addition, the Court in *Fisher II*

emphasized that small changes in racial composition is evidence of adherence to strict standards, not of a violation of them.

II. The Majority's Conclusions Regarding Permissible Practices

Two important points made by the Court majority should be elevated, given their significant policy and practice implications for postsecondary institutions.

A. Authority to Establish Mission

One notable unambiguous statement of the Court bears emphasis: "Universities may define their mission as they see fit." This statement illustrates the important point that the Court's determination that neither institution established a compelling interest in the educational benefits of diversity was only in the context of the relevant legal standard that demanded a compelling interest to justify race-conscious policies and practices: "[R]acial classifications [demand]...the most exact connection between justification and classification." In short, nothing in the Court's opinion challenges institutional aims, standing alone, associated with diversity and equity.

B. Ability to Consider an Applicant's Experience and Background Expressly Associated with Race

Notwithstanding its ruling finding that Harvard's and UNC's use of race as one express factor among many in its holistic review process violated federal non-discrimination law, the Court stated 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," such as "a benefit to a student who overcome racial discrimination... tied to *that student's* courage and determination" or "a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal... tied to *that student's* unique ability to contribute to the university." (emphasis in original). The Court distinguished such consideration of the skills, knowledge, and character qualities that an applicant may acquire through their "experiences as an individual," from the impermissible consideration of an applicant "on the basis of [their] race." In other words, according to the Court, "the touchstone of an individual's identity [must be with respect to] challenges bested, skills built, or lessons learned"—not the color of their skin. This critical distinction reinforces the imperative of not stereotyping or making judgments without specific experience-related facts according to race.

III. The Issues the Majority Did Not Address

Finally, it is important to note that the Court's opinion addressed questions about race-conscious admissions. The Court's analysis was centered on race-conscious decision-making associated with holistic view and tracking class composition during a rolling enrollment process

(deemed problematically associated with unlawful racial balancing).⁶ The Court did not expressly address issues relating to: scholarships and financial aid; outreach and recruitment; pipeline and pathway programs; data collection; race-neutral strategies; or employment of faculty and staff. That said, it would be imprudent to conclude that the Court’s decision has no bearing on at least some of these issues, as explained below.

FIVE ACTIONS FOR INSTITUTIONS AND SYSTEMS TO TAKE

The Court’s decision in SFFA will require important reflections and actions by many institutions of higher education. Importantly, as stated above, this is a moment for higher education leaders and institutions to demonstrate leadership, not retrenchment, in pursuit of their educational missions in comprehensive, thoughtful ways that, of course, also satisfy the law. The five actions described below are directed particularly to higher education institutions and are framed around a leadership mindset that should, on the one hand, be clear about the impact of the Court’s ruling (what it says and what it doesn’t), and, on the other, reflect a more robust set of policy considerations to advance mission-based diversity and equity goals in light of those limits.

1. Remain focused and clear on advancing diversity and equity goals.

The establishment of diversity and equity mission-aligned goals, standing alone, is untouched by the Court’s decision. It’s critical that institutions that have this commitment make it clear, in word and deed. At the same time, the articulation of goals like those asserted by Harvard and UNC *as a foundation for race-conscious admissions policies and practices* are unlikely to survive legal challenge given the Court’s material shift and rejection of those interests.⁷ Therefore, in settings where institutional policies reflect race-conscious decision-making (i.e., where individual students receive some benefit or opportunity that is based at least in part on their racial status), institutions not pursuing strictly remedial aims (see Section I, above) will have to revise those policies, and/or develop new and legally untested interests to justify those policies). In contexts where diversity and equity goals are advanced through authentic neutral means, and the means by which aims are accomplished can qualify as legally “race-neutral,”⁸ there should be no constraints on the articulation or advancement of diversity and equity goals.

⁶ The Court did not specifically evaluate other admissions practices such as the practice often referred to as “shaping the class” at the end of the admissions cycle. See Opinion at 3 (factually describing Harvard’s “lop” process, by which the “list of tentatively admitted students is winnowed further to arrive at its final class).

⁷ The Court in *Grutter*, *Gratz*, and *Fisher II* accepted similar or identical goals as “compelling” in support of race-conscious policies it affirmed.

⁸ The Court in the SFFA cases applied its “strict scrutiny” standard to Harvard’s and UNC’s use of an applicant’s racial status as an express factor in student admissions. The Court then held their admissions policies invalid under its application of that standard. It did not address the issue of race-neutral strategies as part of that decision, as it has endorsed in many prior cases. Cf. Kavanaugh, J., concurring (“[G]overnments and universities still ‘can, of

2. Assure that barriers to achieving diversity and equity goals have been eliminated.

A comprehensive review of all relevant policies and practices should include attention to policies and practices that may have historically operated to create racial barriers (in some cases, that began from a place of intentional exclusion) and that now, with a new legal landscape, merit recalibration. As an important initial step, consider conducting a data-driven evaluation of whether merit definitions and measures in admission policies are mission-aligned and have predictive value. More specifically, reconsider and recalibrate criteria associated with merit in admission, such as grade thresholds, test use practices, and the extent to which student context is considered as part of the admissions decision. This process should include meaningful evaluation of the full range of qualities fully valued by the institution as it assesses admissibility factors, as well—to include consideration of the details of policies associated with legacy admissions, early decision, and the like, which often operate as barriers to diversity and equity goals. And, with a full enrollment lens, the examination of relevant financial aid and scholarship policies is in order, particularly with respect to the kind and amount of student support that is designed around need (vs. merit aid). In addition, an assessment of enrichment and other beneficial programs that depend on merit definitions warrant attention after the exigencies of the current admission cycle are addressed.

3. Reexamine or reimagine enrollment policies and advance all viable, authentic “race-neutral” policies and practices to achieve appropriate institutional goals.

The Court’s ruling elevates the importance of comprehensively considering all viable race-neutral strategies that may advance institutional diversity and equity goals. This includes:

a. The practices of engaging in diversity/equity-focused “inclusive” recruitment and outreach strategies and programs continue to be permissible.

For decades, federal courts have recognized that “inclusive” race-related recruitment and outreach policies are not subject to strict scrutiny standards, and nothing in the Court’s opinion

course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.”); see generally *Fisher I* (2013).

The question of whether a policy or practice is race-conscious (and therefore must satisfy strict scrutiny) or race-neutral (and need not) is important and more complicated than it may appear. In the future, the higher education community may face challenges to facially race-neutral efforts based on claims regarding institutional intent, a factor in determining whether a policy is, for legal purposes, race-neutral. In general, an institution’s intent must be authentic, with respect to the stated neutral interest. In this regard, it is important to note that higher education’s mission-based interests in promoting the educational benefits of diversity and advancing equitable opportunity to maximize human potential are and have long been broadly focused—involving multiple dimensions and groups including but not limited to persons of color.

has changed that precedent. As a consequence, renewed examination of strategies and investments in outreach and recruitment activities should be central to institutional planning. Relatedly, pathway collaborations with and transfer policies tailored to under-resourced high schools or community colleges should be considered; and criteria that are currently associated with overall transfer policies should be examined to consider ways in which they might broaden, rather than unnecessarily and artificially restrict access.

- b. The practice of considering an applicant’s background, experiences, and perspectives associated with race or ethnicity in admissions is permissible, and should shape the design of application essay questions.**

As discussed above, the Court advised 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,” such as “a benefit to a student who overcome racial discrimination... tied to *that student’s* courage and determination” or “a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal... tied to *that student’s* unique ability to contribute to the university.” (emphasis in original). The important point here is to note the distinction between the Court’s acceptance of consideration of an applicant’s skills, knowledge or character-related qualities that arise from “experiences as an individual,” which may be associated with their racial identity, and the impermissible consideration of an applicant’s racial status, without more, in admissions. According to the Court, in admissions, “the touchstone of an individual’s identity [must be with respect to] challenges bested, skills built, or lessons learned”—not the color of their skin. Thus, inquiring and valuing identity-neutral experiences, perspectives, skills and expertise that may be associated with, for instance, institutional aims to address issues of equity reflects the kind of practice the Court embraced. In this context, it is important not to make assumptions about a student’s experience based on their racial status, which the Court would consider to be unlawful stereotyping.

- c. The practice of designing policies associated with “race-neutral” factors like socio-economic status, wealth, geography, first-generation status, and more is permissible.**

Full consideration should be given to the array of admission factors that may be associated with institutional mission and goals, including those related to equity and diversity. Importantly, they must reflect alignment with authentic institutional aims. In assessing authenticity, institutions should document their commitment and actions in pursuit of the interest reflected in the relevant factors (e.g., socio-economic diversity) to help demonstrate that they would pursue the interest with comparable effort based on broad interests in diversity and equity, as well as to help evaluate and develop potential—not based on interests in racial diversity alone.

- d. The practice of collecting disaggregated data, including by race and ethnicity, continues to be permissible.**

The mere collection of disaggregated data based on race and ethnicity should remain as a viable, lawful practice. Nothing in the Court’s opinion addressed this practice, and more to the point, its ruling addresses the consideration (or “use”) of race as part of admissions decisions—not the data that may be collected for broader informational, research, and evaluation purposes. That said, it is important to segregate such collection practices from any effort to monitor class composition in real time with respect to rolling or other admissions practices, by which awareness of evolving class racial composition might influence the admissions decisions being made. In other words, maintain a clear separation between information accessible to those who are building an applicant pool and those involved in the individual applicant decision-making process.

4. Examine financial aid and scholarship policies and practices with care, given the complexities in design and execution of such programs.

Although the Court did not expressly address financial aid and scholarship policies and practices, a number of points bear emphasis with respect to any program that includes express consideration of applicants’ race or ethnicity status as part of the award process.

First, nothing in the Court’s opinion mandates a categorical exclusion of the role of race when considering an individual student’s experiences that can manifest in “challenges bested, skills built, or lessons learned.” See n. 4, above. To the contrary, the majority expressly recognized the relevance (and legal sustainability) of considering an applicant’s experience associated with race, and how that might relate to important skills, knowledge, and character qualities central to institutional mission-related aims.

Second, having effectively eliminated the long-standing compelling diversity interests that could support race-conscious policies and programs (see section I.A, above), any effort to sustain race-conscious financial aid and scholarship programs in the future will likely have to be based on new, currently untested goals and objectives (unless employing a strictly remedial justification that may be relevant among institutions with a past history of explicit racial discrimination).

Third, having effectively eliminated the consideration of an applicant’s racial status as permissible in admission, the Court’s ruling would suggest that any similar consideration of an applicant’s racial status in aid or scholarship decisions is, at a minimum, high risk of legal exposure.⁹ But there are distinctions between admissions and aid decisions that go precisely to

⁹ It is possible that certain principles in the Court’s opinion will apply beyond the admissions realm. As noted above, for example, the Court’s determination of what doesn’t qualify as a compelling interest to justify race-conscious decision-making will likely have a broader reach than in admissions. But, in light of key factual differences in the nature of admissions and the wide array of other activities that confer opportunities and benefits on individual students, any extension of the principles decided in this case in the context of admissions must reflect relevant contextual differences and nuances of other programs. In many circumstances, these differences may allow for many more defensible options in design and action in those programs.

the Court's (flawed) logic by which it characterized admissions as a "zero sum game." See, e.g., *Nondiscrimination in Federally Assisted Programs*; Title VI of the Civil Rights Act of 1964 (Vol. 59, No. 36) February 23, 1994. (rescinded in 2020, under Departmental review).¹⁰

Finally, in the limited context of privately endowed aid, one neutral strategy may sustain maintenance of and race-framed funding commitments: pooling and matching.¹¹

5. Examine and promote a broader strategy to advance equity and diversity goals across a range of institutional responsibilities.

There are many ways beyond admissions that higher education institutions do, can, and should act to advance their missions, roles, and responsibilities regarding equity and diversity. The SFFA decisions compel institutions to seize this moment to reexamine and maximize these efforts. These include, for example, strengthening recruitment, pathways, and bridge programs to foster access and inclusion; redesigning enrollment management policies to remove barriers and promote inclusive measures of potential; and transforming learning environments and supports to promote belonging and success.

Societal trends like racialized disparities in K12 outcomes, postsecondary access and attainment, wealth and income inequality, and labor market participation are interconnected and stubbornly persistent. But they are also unacceptable. Fostering a diverse learning community is a necessary step in addressing these trends, making professional opportunities

¹⁰ When contrasting aid with admissions decisions, the U.S. Department of Education stated in this guidance: "The use of race-targeted financial aid, on the other hand, does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race. Moreover, in contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed. For example, a college's receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid in a situation in which, absent the ability to impose such a limitation, the donor might not provide any aid at all."

¹¹ See Coleman and Keith, *Federal Nondiscrimination Law Regarding Diversity Implications for Higher Education Financial Aid and Scholarship Policies and Programs*, (College Board, NASFAA, EducationCounsel, 2019) at 13-14: "To help balance donor preferences and potential legal requirements, one strategy—"pooling"—may be helpful for institutions and private donors alike. When an institution pools funds, it places each individual donor gift in the same general scholarship pool with all other comparable aid. Comparable aid is aid for a common purpose (e.g., financial need or high GPA) if race, ethnicity and sex limitations were temporarily disregarded. When pooling, the institution should ensure any pooled aid that has race-, ethnicity-, or sex-conscious selection criteria is a small proportion of the total pool. Later, the organization considers only neutral criteria to determine which students will receive aid, and the amount and type of aid (loan, scholarship/grant, work-study, and allocation) each will receive. Only after making final aid decisions does the institution match individual student aid recipients with funding from the pool—first allocating funds from donors that restrict their awards to student aid recipients who satisfy additional requirements, and then allocating the unrestricted funds to the rest of the student aid recipients. Although not reviewed by any court, strong arguments support a characterization of this strategy as neutral because dollars are fungible and the strategy increases the pool of dollars available to all student aid recipients, including those who would not satisfy donor race, ethnicity, and sex preferences or restrictions."

more widely available to our increasingly diverse demography, but, more importantly, enriching our lives, social fabric, and democracy.

Even if one tool to advance diversity is further constrained or eliminated, this is an opportunity for all institutions to advance diversity and equity by identifying and eliminating systems, policies, and practices that pose barriers to student success and to implement high-impact, evidence-based, and legally appropriate strategies. To address this moment, higher education leaders must reinforce their commitment to students of color and other marginalized students and be active leaders in the immediate and long-term advancement of diversity and equity goals for all.

LEADERSHIP ADVANCING EQUITY AND DIVERSITY

As discussed at the beginning of this document, nothing in the Court’s decision should affect higher education’s central role in society as an engine of social mobility and its core commitment to educational equity and excellence—particularly for students of color and students from other historically marginalized and underrepresented groups. Even though the Court’s decision lacks intellectual coherence, we must take it seriously. It now defines the relevant legal landscape for the foreseeable future. Our summary and analysis of the Court’s decision—and our initial analysis of its impacts—also do not diminish the fact that this decision is also personal for many, with real consequences for students and families of color and our nation.

This is a moment for higher education leaders and institutions to demonstrate leadership, not retrenchment, in pursuit of their educational missions in comprehensive, thoughtful ways that, of course, also satisfy the law. In the coming weeks, in an array of settings, we will provide additional guidance on a comprehensive framework and multiple, concrete ways that higher education leaders, as well as other critical stakeholders including philanthropy, policymakers, and advocates, can take an array of actions within the law to lead on their mission aims associated with equity and diversity goals.