

November 16, 2021

Students for Fair Admissions, Inc. v. University of North Carolina, et.al:
What the Federal District Court Said and What It Can Mean for Postsecondary Institutions that Consider Race in Admissions

**An Analysis Prepared on Behalf of
The College Board Access & Diversity Collaborative**

This analysis provides a brief overview of the trial court decision and elevates some major legal and policy implications of the decision for the higher education community.¹

Summary and Key Takeaways

On October 18, 2021, the U.S. District Court for the Middle District of North Carolina rendered a [decision](#) in *Students for Fair Admissions, Inc. v. University of North Carolina et. al.*, upholding the University of North Carolina’s (“UNC”) consideration of race in its undergraduate admissions process under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, and other federal statutes. Guided by decades of legal precedent, and tied to significant evidence (including student and alumni testimony), the Court in a 155-page opinion concluded that UNC’s interest in the benefits of student diversity (including a focus on racial diversity) was compelling and its policies appropriately designed (“narrowly tailored”) to satisfy review under governing law.

Centered on SFFA’s claims, three major themes emerged from the Court’s ruling, as amplified in this document:

¹ This guidance has been authored for the Access & Diversity Collaborative by Art Coleman, Jamie Lewis Keith, and Rachel Pereira of Education Counsel, LLC. The opinions expressed are those of the authors and do not necessarily reflect those of the College Board or any other individual or organization.

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- ◆ ***Institutional goals:*** UNC articulated and established the authenticity of its interests in achieving the educational benefits of diversity (including racial diversity) for all students, focused on experiences and outcomes (not just numbers) that were intrinsic to its mission and history. Shaping the Court’s conclusion on this point were:
 - Evidence of UNC’s abundant, multifaceted, and longstanding commitment to the educational benefits of diversity intrinsic to its mission; and
 - Issues of racial equity at UNC that surfaced both in the context of its racist past and with respect to current UNC students’ lived experiences.

- ◆ ***Policy design.*** UNC provided evidence of an individualized holistic review policy and practice, including that:
 - Race was considered only as one factor among 40 other factors; and
 - Each applicant was considered in the full context of their lived experience, as revealed in their application—with race never operating as a mechanical or over-weighted factor in any evaluation.

- ◆ ***The necessity of considering race of individuals.*** UNC established a well-documented record of active and longstanding consideration, pursuit, and evaluation (as warranted) of race-neutral strategies designed to advance its educational diversity goals, a necessary condition for any consideration of race in admissions.

This trial court decision is binding only on the parties.

Instead of appealing the decision to the Fourth Circuit Court of Appeals, which would typically be the next step in any appeal, SFFA has instead sought review from the U.S. Supreme Court. On November 11, 2021, SFFA filed a [Petition for a Writ of Certiorari Before Judgment](#), requesting that the Supreme Court take the unusual step of granting “immediate review” of the District Court opinion, bypassing the intermediate appellate court. SFFA argues that because this “companion” case to *SFFA v. Harvard* (filed on the same day and now pending before the U.S. Supreme Court) “presents a question of ‘imperative public importance’ present in that case, the Supreme Court should review them at the same time.”² (The Supreme Court has not yet acted on SFFA’s pending request that it take the Harvard case for review.)

² SFFA argues, as it has in the Harvard case, that the legal precedent on which each adverse (to it) lower court decision depends “is plainly wrong.” Specifically, SFFA argues that the Court’s 2003 landmark *Grutter v. Bollinger* decision was “grievously wrong,” has “spawned significant negative consequences” and is “unworkable;” and has generated “no legitimate reliance interests” in the field to justify continuation of the doctrine established in that case.

1. **UNC established its compelling interest in the educational benefits of diversity, including racial diversity: UNC concretely articulated its diversity-related goals and demonstrated the authenticity of those goals with rich, multifaceted evidence.**³

UNC established its compelling interests in achieving the educational benefits for all students with evidence of its commitment to educational diversity as a cornerstone of its mission-related goals and obligation to residents of the State of North Carolina. Specifically:

- ◆ ***UNC's "principled and reasoned" explanation*** of its compelling interest in student diversity aligned with past Supreme Court precedent: UNC asserted interests and educational rationales associated with promoting the robust exchange of ideas, preparing students to be citizens and leaders, fostering innovation and problem-solving, enhancing cross-racial understanding and breaking down stereotypes.
- ◆ ***UNC produced credible and largely uncontested evidence regarding the authenticity of its interests in student diversity,*** including with evidence:
 - That, beginning in the late 1990s and continuing to the present day, UNC had determined that, as a public university responsible to the people of North Carolina, it had an obligation to “create and sustain an environment of educational excellence” and “foster mutually beneficial interactions among students, faculty, staff, and administrators who possess diverse backgrounds and wide varieties of perspectives and life experiences.” UNC further determined that, to fulfill this mission, it must enroll and admit a diverse student body.
And
 - That UNC engaged in decades-long assessments and engagement on diversity issues prior to the present litigation, overseen by the Educational Benefits of Diversity Working Group, which involved the collection, analysis, and action regarding a rich mix of quantitative and qualitative data that included:
 - The collection and reporting of disaggregated student data on enrollment and graduation rates;
 - Reports on actions taken by divisions within UNC to articulate, implement and research diversity-related issues (including research on the “lived experience” of underrepresented groups);
 - Feedback from faculty and staff, as well as regular climate studies;
 - An inventory of assessments related to the “Delivery of the Educational Benefits of Diversity and Inclusion” reflecting dozens of evaluations from various departments and divisions designed to measure progress towards diversity goals over time.

In this context, the Court rejected SFFA's attempt to reduce the question of student diversity to one of "pure numbers," just as it rejected SFFA's claim that UNC's diversity goals were “elusory and amorphous.”

³ Documentary evidence of relevance included: UNC's Mission Statement, Faculty Council statements, Academic Plans and more.

In refusing to impose a requirement that UNC embed in its policy specific numerical goals, the Court recognized that such a ruling would be inconsistent with federal law. Moreover, the Court recognized “the significant evidence that [UNC] defines, discusses, and measures critical mass by reference to the educational benefits that it seeks to achieve and that such diversity is designed to produce.”⁴

Finally, the Court recognized the relationship between UNC’s diversity goals and equity interests which, in combination, reflected the need for UNC to continue to do more to advance racial diversity. Notably, the Court found that:

- ◆ While UNC had worked hard to address its long history of white supremacy, racist policies, and segregation, it still has a lot of work to do to create a diverse and inclusive educational environment for all students⁵; and
- ◆ UNC needs to enhance racial diversity to create a sufficiently diverse campus environment for all students to feel welcome and able to fully participate as individuals and not as tokens of their race.⁶

The Court on this point concluded:

While no student can or should be admitted to this University, or any other, based solely on race, because race is so interwoven in every aspect of the lived experience of minority students, to ignore it, reduce its importance and measure it only by statistical models as SFFA has done, misses important context to include obscuring racial barriers and obstacles that have been faced, overcome, and are yet to be overcome.

2. UNC demonstrated that as one of 40 criteria evaluated, its consideration of race in admissions was a limited part of its individualized, comprehensive, and contextual consideration of each applicant.

The District Court concluded that UNC’s admissions policy and practice, at every stage, reflected a highly individualized, holistic review of each applicant’s file, which included serious consideration to all of the ways an applicant might contribute to and benefit from a diverse educational environment.

Admissions officers “credibly testified” that that race was considered “as one factor among many in a holistic review of all circumstances relevant to an individual applicant;” and that they were guided by UNC’s documented and calibrated policies and procedures, which required that candidates be evaluated

⁴ According to UNC’s Vice Provost for Enrollment and Undergraduate Admissions, “critical mass...is complicated....[I]t has to be assessed not exclusively in terms of numbers but really in the lived experience of our students: What they’re learning, how they’re thriving, what they’re contributing to the learning and the thriving of others...”

⁵ This case did not involve remedial claims associated with the present effects of past discrimination.

⁶ UNC students and alumni presented evidence on (1) the impact of UNC’s admission process on the educational experiences of all students including the critical mass of underrepresented students at the school; (2) the history of segregation and discrimination at UNC and North Carolina and (3) the paucity of diversity amongst faculty and administrators. Student testimony reflected that racism continues to burden students of color on campus, who continue to experience racial epithets, hostility, incidents of bias, tokenism and loneliness at UNC.

within the context of their lived experience.⁷ UNC's Vice Provost for Enrollment and Undergraduate Admissions explained: "Students are real people...We don't feel as though we can understand any student fully unless we try to understand as fully as we can the context within which the student has lived and done his or her work..." Any consideration of an applicant's race was undertaken in the context of their entire file, as one of forty well-documented criteria. Rigor in the application of admissions criteria was apparent in evidence regarding UNC's staff training and the calibration of criteria as part of the admissions process.⁸

Other key facts supporting the Court's judgment regarding the legal soundness of UNC's admissions policy design and practice included:

- ◆ Applicants were not required to disclose their race or ethnicity, and were not penalized if they elected not to do so.
- ◆ There were no quotas, fixed points, or separate admissions processes based on a particular candidate's race or ethnicity.
- ◆ Race was not considered mechanically: Although race might in some cases receive "a plus" in the evaluation of an applicant, "it is not automatically awarded and not considered in terms of numeric points or as the defining feature of an application;" and "[e]ven if awarded, a 'plus' does not automatically result in an offer of admission."
- ◆ There were no minimum test score thresholds and test scores were not part of any point or scoring process.
- ◆ Reports tracking racial composition of the class over the course of the admission cycle were not available to staff who reviewed files. Although the process evolved over time, UNC's practice at the time of trial precluded readers from learning the makeup of the incoming first-year class until reading was complete, the waitlist disbanded, and the class fully enrolled.

Based on a mix of qualitative and statistical evidence, the Court further concluded that race was not considered by UNC as a predominant factor in evaluating a candidate's admission.⁹ The percentage of decisions in which race was a determinative factor, as indicated by statistical evidence of both experts, was low: 1.2% according to UNC's expert and less than 5% according to SFFA's expert.

⁷ Applicants' "lived experience" included consideration of how their race, among many other factors, affected that experience.

⁸ Application readers were trained specifically on how to consider race and ethnicity in the evaluation process. In addition, more experienced readers in the past read behind new readers; presently, all applications are read in pairs, affording readers a chance to learn from each other and assure alignment. A major aim of UNC's training was to assure that readers understood that when reading an application, the context of "each applicant's experience" was important, and "success [could] be defined differently in different environments." In the words of one admissions officer, readers are "reading the entire applicant, not just the test score, not just the GPA, not just an essay. They're a whole person."

⁹ The Court concluded that SFFA's expert's statistical analysis that race is a determinative factor and over-weighed by race, was "far less credible" because: (1) he imputed missing test scores based on averages rather than using existing data provided by UNC, (2) he constructed a formula based on an academic index (grounded only in test scores and grades) that UNC does not use in making admission decisions, and (3) he added and subtracted bare race in his analysis without consideration of the context of an individual's lived experience of race.

Finally, the Court concluded that UNC’s second phase of application reviews (school group review),¹⁰ changed the racial composition of the class “very little” and to the extent that it did, it “only *reduced* the number of admitted underrepresented minority students.”

3. UNC seriously and in good faith considered a wide range of “race-neutral” strategies—and robustly pursued many of those strategies to advance its diversity goals.

The District Court concluded that UNC engaged in ongoing, serious, and good faith consideration of workable race-neutral alternatives for several years, and that UNC carried its burden of establishing that there were no adequate “race-neutral” alternatives to the consideration of race in admission available to achieve its goals associated with diversity and with institutional quality and excellence. (A university is not required to “choose between maintaining a reputation for excellence and providing educational opportunities for all racial groups.”)

The Court reached that conclusion following consideration of the following:

As a matter of process:

- ◆ UNC engaged in a longstanding and ongoing evaluation and use of neutral strategies, a key element of satisfying its burden of demonstrating the necessity for its consideration of race in admissions. That effort included the establishment of its Advisory Committee on Race-Neutral Strategies in 2016, composed of faculty and administrators who had expertise in fields relevant to exploring race-neutral alternatives, including diversity and inclusion, data integration, modeling the effect of deployed and potential neutral strategies, student affairs, and undergraduate admission.¹¹
- ◆ UNC worked with College Board’s Access & Diversity Collaborative [ADC] for over a decade to examine what other schools were doing and “to pay attention to” ADC-produced documents on race-neutral strategies and other issues.
- ◆ UNC’s admissions office completed a study that evaluated whether indicators of socioeconomic disadvantage could be used in lieu of race in the admissions process to yield a class with academic credentials and racial diversity similar to those of the admitted class.

*Substantively, with respect to SFFA’s specific claims regarding alternatives that UNC should have pursued:*¹²

¹⁰ UNC’s process involved an initial stage of readers making provisional decisions, followed by a process of school group review (SGR), in which a committee of experienced staff reviewed every decision, reviewing a report of every high school showing “all of the high school’s students who have applied for admission.” Including information such as class rank and GPA, those reports once included an applicant’s race, but that data point was not included after 2017.

¹¹ Relevant in this context were the robust efforts to assess quantitative and qualitative data to measure progress toward its diversity goals, discussed above, such as:

- ◆ Collection of input from faculty and students and testimonials from alumni on the value of diversity.
- ◆ The dissemination of climate surveys and other input regarding the student experience on campus.

¹² SFFA argued that UNC should have pursued the following “race-neutral” alternatives as a condition for ever considering race in admissions: (1) investing in programs that would bring in “more highly qualified, socioeconomically disadvantaged minorities into its applicant pool”; (2) increasing financial aid, scholarship and recruitment efforts; (3) recruiting high-achieving community college students; (4) eliminating UNC’s early

- ◆ UNC’s expert modeled and assessed the effects of every conceivable potential neutral strategy considered by UNC or suggested by SFFA, and demonstrated that UNC is using those that are workable (those that won’t require a change in the competitiveness and quality of education or students, including with respect to grades and test scores). UNC’s expert “used very generous assumptions that strongly favored [SFFA’s] proposed plans” but didn’t find there to be more workable neutral strategies that UNC could use, while maintaining its standards of excellence and advancing its educational diversity interests. More specifically:

<i>With respect to SFFA’s claim that UNC should have pursued...</i>	<i>The Court concluded...</i>
1. Increased aid and scholarship efforts	UNC already engaged in such efforts, “well beyond the suggestions offered” by SFFA, including “exceptional levels of financial aid that cover the full cost of tuition for qualifying students” and need-blind admissions. UNC awards 93% of its scholarships and grant funds “based solely on financial need.”
2. Expanded recruitment efforts	UNC had increased targeted recruiting, including a partnership with an advising corps and with community colleges across North Carolina “to target students who might not otherwise be considering a four-year degree.”
3. Elimination of its early admissions deadline and favoritism of legacy applicants	Relevant evidence was limited and in any event such action would have “de minimis effect” on UNC’s admission process.
4. Alternative socioeconomic models	Such models would not “achieve the educational benefits of diversity about as well as [UNC’s] race-conscious policies,” noting that “researchers across the board” reached “the same conclusion, that you couldn’t get racial and ethnic diversity from an SES-based plan.”
5. Top X percent plans	Such plans would not offer a “workable” race-neutral alternative because, such models would “meaningfully change[] the composition of the incoming class, [were] based on unrealistic assumptions, presented practical challenges..., and/or severely undermined [UNC’s] ability to achieve diversity in non-racial ways.
6. Geographic models	In combination, these models would result in “substantially lower average test scores” and/or “less racial diversity.”

admissions deadline and its policy of favoring legacy applicants; and (5) changing UNC’s admissions process altogether.

UNC’s expert conducted over 100 simulations to gauge the impact of a broad range of potential changes to UNC’s admissions process; none of these simulations, even when using very generous assumptions that strongly favored SFFA’s proposed plans, achieved diversity about as well as UNC’s race-conscious admissions policies. The models proffered by SFFA’s expert would have impermissibly forced UNC to choose between maintaining a reputation for excellence and providing educational opportunities to all racial groups.

Finally, the Court found UNC’s “periodic reassessment [of its policies] without any articulation of a sunset provision” was sufficient, given the evidence of its “robust” and “ongoing process through which it has and will continue to make such assessments” and in light of “evidence [that] unmistakably demonstrates” that the time to end all race-conscious admissions practices “has not been achieved.”

Major Takeaways—with Policy and Practice Implications

Since Justice Powell’s 1978 opinion in *Regents of the University of California v. Bakke*, and the Court decisions involving the University of Michigan a quarter century later, a common blueprint that frames key questions and points of analysis has provided higher education leaders with important guidance. Against that backdrop, however, every case is different. Particular facts regarding institutional contexts and aims, as well as the differences in admissions policies, lead to different court conclusions tied to case specifics.

The District Court in this case took extreme care to align her conclusions with long-standing court precedent, but in so doing, reflected in notable ways on unique facets of the case presented at trial. Most significantly, the Court:

- ◆ Provided a detailed discussion of the authenticity and seriousness of UNC’s decades-long work on issues of diversity that bolster its efforts to establish a compelling interest in achieving the educational benefits of diversity for all students;
- ◆ Recognized the relationship of UNC’s racial equity issues to its educational diversity interests, with notable reflections on the testimony of current students about their lived experiences of racism on campus. That testimony, in particular, demonstrated persistent effects of the university’s racist history (despite UNC’s steady efforts to eliminate those effects and harms), the importance of inclusion of students of color, and the need for greater understanding of issues of race by all students.

In addition, statistical evidence was a centerpiece of the Court’s decision, given that SFFA “relied almost exclusively on statistical evidence to support its case.” Recognizing the “meaningful information that ...statistical models provide,” the Court nonetheless observed their “limits”—where factors such as many admission criteria can be “accounted for in only a very imprecise way” and where some factors such as special talents and an individual’s experience of their race are simply “unobservable” in statistical modeling.

The Court’s discussion of these points merit consideration by policy leaders who are charged with advancing DEI aims in ways that are both impactful and legally sustainable. These practical takeaways may inform policy development and implementation:

- 1. To establish a compelling interest in the educational benefits of diversity for all students, assure not only that your institution has clear and concrete mission-aligned policy statements that articulate aims and associated rationales for those aims, but also assure that the various divisions and departments within your institution reflect the seriousness and authenticity of that commitment in the documented goals they set, the data they collect, and the actions they pursue to achieve those aims.**

2. **Assure that admissions policies are documented and clearly align with institutional goals and that any consideration of race is pursued through a comprehensive, contextual, and individualized review of each applicant—with a focus on the lived experience of race, among other experience—as part of a review of all relevant criteria for admission. Consider how the institution’s history relating to race and any persistent issues of race affect the present-day experience of students on campus.**
3. **Assure that processes and training of readers are documented and conform to policy goals and assure a rigor and quality control with respect to all facets of decision-making, particularly where issues of race may be relevant.**
4. **Recognize the importance that statistics may play in any review and evaluation of admissions policies and practices, as well as consider the ways that statistical modeling may help address key questions—including with respect to the viability of “race-neutral” strategies—that are essential in policy design.**
5. **Assure that you have a clear set of processes and protocols established by which any consideration of race in admissions (and elsewhere in enrollment policy) is annually evaluated in light of court standards, with particular emphasis on determining the necessity of continuing to consider race in admissions or other enrollment policies.**

For More Information

If you have questions about the work of the Access & Diversity Collaborative, contact Crystal Newby (cnewby@collegeboard.org); and if you have questions about legal issues described here, contact Art Coleman (art.coleman@educationcounsel.com) or Jaime Lewis Keith (jaimie.keith@educationcounsel.com).