MMTC
Multicultural Media, Telecom and Internet Council
1250 Connecticut Ave NW, 7th Floor
Washington, D.C. 20036
Phone: 202-261-6543| MMTConline.org

MEMORANDUM

To: Multicultural Media, Telecom and Internet Council (MMTC)

From: Torryn Carter, Earle K. Moore Fellow

Re: *SFFA v. Harvard* Implications on FCC Policies & Practices

Date: November 27, 2023

I. Executive Summary

The U.S. Supreme Court's landmark decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA v. Harvard")* sent shockwaves through the realm of affirmative action in education. With its companion case, *Students for Fair Admissions, Inc. v. University of North Carolina ("SFFA v. UNC")*, the Supreme Court found that Harvard and the University of North Carolina's race-conscious admissions programs violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Title VI of the Civil Rights Act of 1964, marking a turning point in the long history of affirmative action jurisprudence in the United States.[1]

While this case centered on affirmative action in education, its implications extend far beyond academia, shaping the future of race-conscious affirmative action policies in employment and even influencing the Federal Communication Commission's (the "FCC") policies and practices.

This memo will begin by presenting a comprehensive timeline of the history of affirmative action in American education. Following that, it will delve into the immediate repercussions brought about by the *SFFA v. Harvard* case on race-conscious affirmative action policies within the corporate context. Subsequently, the memo will examine the effects of *SFFA v. Harvard* on FCC policies and practices, considering both internal and external aspects.

II. Affirmative Action Jurisprudence Timeline

On June 29, 2023, the U.S. Supreme Court issued a pivotal decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[2] The Court found that Harvard's and (in a companion case, *SFFA v. UNC*)[3] the University of North Carolina's affirmative action programs violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 by impermissibly considering race in their undergraduate admissions processes.[4] While this decision primarily centered on affirmative action in education, its ramifications are likely to extend far beyond the realm of academia.

To truly grasp the significance of *SFFA v. Harvard*, it's essential to delve into the historical context of affirmative action jurisprudence in the United States. The Supreme Court's first foray into

[1] *Students for Fair Admissions, Inc. v. Pres. And Fellows of Harvard College*, 600 U.S. 181, 190 (2023).
[2] *Id*.
[3] *Id.*
[4] *Id.* at 230.

this subject was in the 1978 landmark case of *Regents of University of California v. Bakke*.[5] In *Bakke*, the Court issued a plurality, non-binding, opinion declaring racial quotas in college admissions unconstitutional.[6] Nonetheless, *Bakke* laid the groundwork for considering race as one of many factors in admissions, recognizing that student body diversity serves as a compelling governmental interest under the Fourteenth Amendment.[7] *Bakke's* impact was profound – it emphasized the importance of diversity in higher education while establishing boundaries on the methods used to achieve it.[8] Although *Bakke* struck down the admissions program implemented by the University of California, Justice Powell's opinion provided the foundation for *Grutter v. Bollinger*, a landmark decision in 2003 concerning affirmative action in college admissions.

In *Grutter*, the Supreme Court essentially reaffirmed Justice Powell's stance in *Bakke*.[9] The Court held that considering an applicant's race as one factor in admissions policies does not violate the Fourteenth Amendment if the policy is narrowly tailored to the compelling governmental interest of promoting a diverse student body.[10] *Grutter* stressed a holistic approach to admissions, where race was just one element in evaluating applicants. It allowed affirmative action policies in higher education, as long as they were narrowly tailored and did not involve rigid racial quotas or point systems solely based on an applicant's race.[11] From a policy perspective, *Grutter* underscored the importance of student body diversity by highlighting that "universities . . . represent the training ground for a large number of our Nation's leaders . . . [a]ccess to legal education must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[12]

In 2013, the Supreme Court decided *Fisher v. University of Texas at Austin I*, the next chapter of affirmative action cases following *Grutter*.[13] In this decision, the Court ruled that the lower court needed to apply a stricter scrutiny in assessing the University of Texas at Austin's affirmative action policy.[14] In 2016, the Court reached a decision in *Fisher v. University of Texas at Austin II*, upholding the University of Texas at Austin's affirmative action policy.[15] *Fisher II* essentially reaffirmed the principles established in *Grutter*, permitting universities to consider race as one of many factors in admissions to achieve diversity, provided that the policy was narrowly tailored and essential for educational diversity.[16] Additionally, *Fisher II* clarified that courts should defer to universities in determining the educational benefits of diversity, while highlighting the importance of universities continually evaluating the impact and necessity of their affirmative action policies.[17]

Collectively, the Supreme Court allowed the utilization of race-conscious admissions programs provided that the compelling government interest used to justify these programs was student body diversity, the means employed were narrowly tailored, and the consideration of race was necessary to achieve adequate student body diversity. However, in June 2023, the Supreme Court reversed 45 years of precedent in *SFFA v. Harvard*.[18]

In *SFFA v. Harvard* and *SFFA v. UNC*, the Court initially reasoned that Harvard's and UNC's asserted interests in the educational benefits of diversity – including, but not limited to, training future leaders, preparing graduates to thrive in an increasingly pluralistic society, promoting the robust exchange of ideas, fostering innovation and problem solving, and encouraging respect, empathy, and cross racial understanding – were not sufficiently measurable and thus could not be subjected to meaningful judicial review.[19] Next, the Court explained that Harvard's and UNC's admissions programs failed to establish a meaningful connection between the means they employed and the goals they pursued.[20] Here, the Court emphasized the racial classifications that each institution used to measure racial composition and how some of these classifications were overly broad, conflicting with the institutions' stated goal of diversifying their student body.[21] Moreover, the Court noted that "[t]he race-based admissions systems that respondents employ also

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[5] *Regents of U. of California v. Bakke*, 438 U.S. 265, 269 (1978).
[6] *Id.* at 320.
[7] *Id.* at 311.
[8] *Id.* at 320.
[9] *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003).
[10] *Id.* at 343.
[11] *Id.*
[12] *Id.* at 332.
[13] *Fisher v. U. of Texas at Austin*, 570 U.S. 297, 300 (2013).
[14] *Id.* at 314.
[15] *Fisher v. U. of Texas at Austin*, 579 U.S. 365, 369 (2016).
[16] *Id.*
[17] *Id.* at 388.
[18] *Students for Fair Admissions*, 600 U.S. at 190.
[19] *Id.* at 214.
[20] *Id.* at 215.
[21] *Id.* at 216.

fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype."[22] Here, the Court explained that the admissions programs used by Harvard and UNC disadvantaged some racial groups and employed racial stereotypes by assuming that an applicant's race said something meaningful about their lived experiences or what qualities they could bring to a campus environment.[23] Lastly, the Court emphasized that UNC's and Harvard's admissions programs lacked a logical endpoint.[24] The Court's holding and rationale effectively dismantled the consideration of race in college admissions.

III. Impact on Businesses

Affirmative action foe, Edward Blum ("Blum"), is the founder of multiple nonprofit organizations that seek to dismantle affirmative action policies in various contexts.[25] In addition to Students for Fair Admissions, the non-profit organization that successfully challenged affirmative action in the educational context, Blum is also the founder of American Alliance for Equal Rights ("AAER").[26] AAER is a non-profit organization that seeks to challenge race-based affirmative action policies in the employment context.[27] Following Blum's Supreme Court victory in *SFFA v. Harvard*, he has since relied on the Court's holding to challenge affirmative action policies beyond the context of education.

On August 22, 2023, AAER filed suit against Perkins Coie and Morrison Foerster, two international law firms.[28] The complaints alleged that each firm had engaged in racial discrimination through the implementation of their diversity fellowships for law students.[29] The complaints further alleged that the diversity fellowships exclude applicants based on their race, requiring applicants to identify as a student of color, LGBTQ+, or disabled.[30] AAER brought their claims pursuant to the Civil Rights Act of 1866 (42 U.S.C §1981), which prohibits racial discrimination in private employment.[31] Ironically, 42 U.S.C. §1981 was implemented as part of the Civil Rights Act of 1866, and its purpose was to provide legal protections to newly freed slaves.[32] This statute was designed to ensure that African Americans, who had recently been emancipated, had the same rights and legal protections as white citizens in the context of making and enforcing contracts.[33] Nonetheless, AAER petitioned the courts to enter a judgment in its favor and declare that these programs violate §1981 and to bar both firms from considering race as a factor when selecting fellows.[34]

Less than two months later, AAER's claims against Morrison & Foerster, and Perkins Coie were dismissed on stipulation grounds.[35] Both firms agreed to no longer require applicants to identify their race when applying.[36] Further, the parties agreed that

[22] *Id.* at 218.
[23] *Id.* at 220.
[24] *Id.* at 221.
[25] Michael Hartmann, *A Conversation with the American Alliance for Equal Rights' Edward Blum (Part 1 of 2)*, CAPITAL RESEARCH CENTER (Oct. 10, 2023), https://capitalresearch.org/article/a-conversation-with-the-american-alliance-for-equal-rights-edward-blum-part-1-of-2/.
[26] Michael Hartmann, *A Conservation with the American Alliance for Equal Rights' Edward Blum (Part 2 of 2)*, CAPITAL RESEARCH CENTER (Oct. 10, 2023), https://capitalresearch.org/article/a-conversation-with-the-american-alliance-for-equal-rights-edward-blum-part-2-of-2/.
[27] *Id.*
[28] Complaint at 1, Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 1:23-cv-23189 (S.D. Fla. Aug. 22, 2023); Complaint at 1, Am. All. for Equal Rts. v. Perkins Coie LLP, No. 3:23-cv-01877 (N.D. Tex. Aug. 22, 2023).
[29] Complaint at 1, Morrison & Foerster LLP, No. 1:23-cv-23189 (S.D. Fla. Aug. 22, 2023); Complaint at 1, Perkins Coie LLP, No. 3:23-cv-01877 (N.D. Tex. Aug. 22, 2023).
[30] Complaint at 1, No. 1:23-cv-23189 (S.D. Fla. Aug. 22, 2023); Complaint at 1, No. 3:23-cv-01877 (N.D. Tex. Aug. 22, 2023).
[31] Complaint at 8, No. 1:23-cv-23189 (S.D. Fla. Aug. 22, 2023); Complaint at 9, No. 3:23-cv-01877 (N.D. Tex. Aug. 22, 2023).
[32] Civil Rights Act of 1866, 42 U.S.C. §1981.
[33] Alok Nadig, *Victims of Race Discrimination: Don't Forget About § 1981!*, SANFORD HEISLER SHARP (Aug. 31, 2020), https://www.sanfordheisler.com/blog/2020/08/victims-of-race-discrimination-don-t-forget-abou/.
[34] Complaint at 10, No. 1:23-cv-23189 (S.D. Fla. Aug. 22, 2023); Complaint at 11, No. 3:23-cv-01877 (N.D. Tex. Aug. 22, 2023).
[35] Stipulation of Dismissal at 1, Am. All. for Equal Rts. v. Perkins Coie LLP, No. 3:23-cv-01877-L (N.D. Tex. Oct. 11, 2023); Stipulation of Dismissal at 1, Am. All. For Equal Rts. v. Morrison Foerster LLP, No. 1:23-cv-23189-KMW (S.D. Fla. Oct. 6, 2023).
[36] Stipulation of Dismissal at 1, Perkins Coie LLP, No. 3:23-cv-01877-L (N.D. Tex. Oct. 11, 2023); Stipulation of Dismissal at 1, Morrison Foerster LLP, No. 1:23-cv-23189-KMW (S.D. Fla. Oct. 6, 2023).

"under the [fellowship] program, an applicants' race is not among the factors that will be considered, except to the extent contemplated by the Supreme Court in *SFFA v. Harvard*."[37]

In addition to these two complaints, AAER has filed suit against three other law firms for similar diversity fellowship programs – Winston & Strawn, Hunton Andrews & Kurth, and Adams & Reese.[38] Further, AAER has filed suit against Fearless Fund Management, a black women owned-venture capital fund, alleging racial discrimination in the making of contracts in violation of §1981.[39]

Thus, the consequences of the *SFFA v. Harvard* decision extend well beyond the confines of educational institutions. The effects are poised to reverberate throughout the corporate world, prompting businesses to reevaluate their strategies for achieving diversity and fostering an environment where the full spectrum of perspectives can thrive. As these cases continue to unfold, they will shape the course of affirmative action within the workplace, education, and beyond.

IV. Impact on FCC Policies & Practices

The *SFFA v. Harvard* decision may impact the FCC. Eliminating the use of race as a factor in college admissions may threaten communications policies and programs designed to promote diversity and equity. This impact would likely be twofold, impacting FCC policies both externally and internally.

A. External: Rulemaking Policies & Practices

The *SFFA v. Harvard* decision may impact the FCC's external rulemaking authority as it relates to diversity, equity, and inclusion within the communications industry. The FCC is responsible for regulating a wide array of entities, including broadcasters, cable operators, satellite service providers, telecommunications companies, and public interest groups.[40] The FCC's regulatory authority is designed to ensure that the communications industry operates in the public interest, promotes competition and innovation, and serves the diverse needs of the American public.[41]

Throughout much of its history, the FCC has demonstrated its commitment to minority representation within the communications industry in accordance with Congressional directives. Pursuant to the Communications Act of 1934, the FCC has adopted several programs and policies designed to advance racial diversity.[42] However, *SFFA v. Harvard* may adversely impact the FCC's rulemaking authority as it relates to these programs and policies. Although *SFFA v. Harvard* dealt with race-conscious admissions programs in the context of higher education, the Court's holding could be used as a framework to challenge affirmative action policies in other industries, including communications.

In 1977, minority ownership of broadcast stations represented a small fraction of the total number of stations on the air.[43] In response to this striking imbalance, the FCC issued two race-based affirmative action policies to promote programming diversity.[44] The first policy was a program that awarded an enhancement for minority ownership in comparative proceedings for new licenses.[45] The second policy permitted a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms (the "Distress Sale Policy").[46] These two policies were challenged and upheld by the Supreme Court in the case of

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[37] Stipulation of Dismissal at 2, Perkins Coie LLP, No. 3:23-cv-01877-L (N.D. Tex. Oct. 11, 2023); Stipulation of Dismissal at 2, Morrison Foerster LLP, No. 1:23-cv-23189-KMW (S.D. Fla. Oct. 6, 2023).

[38] Tatyana Monnay, *Blum Threatens More Law Firms Over Diversity Hiring*, BLOOMBERG LAW (Oct. 12, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%200000018b-253d-d03e-afeb-f7bf671b0001.

[39] Complaint at 1, Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 1:23-cv-03424-TWT (N.D. Ga. Aug. 2, 2023).

[40] FEDERAL COMMUNICATIONS COMMISSION, *What We Do*, https://www.fcc.gov/about-fcc/what-we-do (last visited Oct. 28, 2023).

[41] *Id.*

[42] Brief for Multicultural Media, Telecom, and Internet Council, Inc. et al. as Amici Curiae Supporting Respondents, *Students for Fair Admissions, Inc. v. Pres. And Fellows of Harvard College*, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707).

[43] Recommendation from the Advisory Comm. on Diversity for Communications in the Digit. Age to the Fed. Communications Comm'n (June 1, 2004) (on file with author).

[44] *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 552 (1990).

[45] *Id.*

[46] *Id.*

Metro Broadcasting, Inc. v. F.C.C.[47] In applying intermediate scrutiny, the Court held that the two policies were constitutional since the policies served an important government interest, were substantially related to accomplishing the interest, and did not place an undue burden on non-minorities.[48] Importantly, the Court acknowledged that "the interest in enhancing broadcast diversity is, at the very least, an important government objective."[49] The Court's rationale relied largely on affirmative action precedent in the educational context, namely *Bakke*.[50] The Court reasoned that "just as a "diverse student body" contributing to a "robust exchange of ideas" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values."[51] Lastly, the Court acknowledged that the American public would benefit by having access to a wider diversity of information sources.[52] A key takeaway from this case was that the government only needed to satisfy intermediate scrutiny, which required the government to demonstrate an "important government interest" to justify the use of race-based affirmative action policies, as opposed to strict scrutiny which required the showing of a "compelling government interest."[53]

Metro Broadcasting was overruled, in part, five years later in *Adarand Constructors, Inc. v. Pena* which held that all racial classifications imposed by the government must be analyzed under strict scrutiny.[54] Nonetheless, the Distress Sale Policy has persisted free of taint, as the FCC believes that this policy can survive strict scrutiny.[55] However, *SFFA v. Harvard*'s overruling of *Bakke* and *Grutter* effectively threaten FCC rulemaking authority as it relates to race-based affirmative action policies.

The compelling government interest that justified the use of race in college admissions, pre-*SFFA v. Harvard*, was the educational benefits of student body diversity.[56] Courts agreed that student body diversity promoted cross-racial understanding, broke down racial stereotypes, and enabled students to better understand persons of different races.[57] Despite these benefits, the Court in *SFFA v. Harvard* held that race-conscious admissions programs were unconstitutional since the educational benefits of student body diversity could not be subjected to meaningful judicial review.[58] In other words, the Court held that the compelling government interest that was relied upon by Harvard and UNC to justify their race-conscious admissions process was too broad to be subjected to judicial scrutiny, and thus unconstitutional. Since the educational benefits of student body diversity was the only compelling government interest that justified the use of race in college admissions prior to *SFFA v. Harvard*, race-conscious admissions programs are effectively unconstitutional following that case.

Since diversity in television programming and diversity in student body education each seek similar, unquantifiable benefits, the same rationale relied upon in *SFFA v. Harvard* could be used to contest race-conscious affirmative action policies adopted by the FCC. When the Supreme Court acknowledged diversity in programming as an important governmental interest in *Metro Broadcasting*, the Court largely relied on *Bakke* to substantiate its holding that diversity in programming was a valid interest to justify the FCC's adoption of race-conscious policies.[59] Since *Bakke* and *Grutter* have been overruled by *SFFA v. Harvard*, the Distress Sale Policy, and other race-conscious communications industry policies are now vulnerable to legal challenges and are at risk of being vacated.

An example illustrating this vulnerability is a proposed spending bill,[60] led by Rep. Greg Steube, which seeks to combat FCC programs and policies aimed at promoting diversity, equity, and inclusion. This bill was proposed in July of 2023,[61] shortly after the *SFFA v. Harvard* decision was published. The bill seeks to prohibit the FCC and other government agencies from using funds allocated under the bill to implement any diversity, equity, or inclusion initiative.[62] If this bill is passed it could negatively impact the FCC's authority in allocating resources for diversity efforts. Namely, this could lead to potential dismantling of key FCC entities such

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[47] *Id.*
[48] *Id.* at 566.
[49] *Id.* at 567.
[50] *Id.* at 568.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 567.
[54] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995).
[55] Recommendation from the Advisory Comm. on Diversity for Communications in the Digit. Age to the Fed. Communications Comm'n (June 1, 2004) (on file with author).
[56] *Grutter*, 539 U.S. at 325 (2003).
[57] *Id.* at 330.
[58] *Students for Fair Admissions*, 600 U.S. at 214.
[59] *Metro Broad., Inc.*, 497 U.S. at 568.
[60] H.R. 4664, 118th Cong. (1st Sess. 2023).
[61] *Id.*
[62] *Id.*

as the Communications Equity and Diversity Council ("CEDC") and the Office of Communications Business Opportunities ("OCBO"). The CEDC advises the FCC on promoting equity in digital communication services without discrimination,[63] while the OCBO is responsible for recommending policies that encourage the participation of small businesses, women, and minorities in the communications industry.[64] If H.R. 4664 is approved, these essential functions may be at risk.

B. Internal: Office of Workplace Diversity

The FCC's Office of Workplace Diversity is responsible for promoting and fostering diversity and inclusion within the commission itself.[65] Its mission is to create a more inclusive and diverse work environment, as well as to ensure that the FCC's employment practices are fair and equitable.[66] The office typically focuses on various aspects of diversity, such as race, gender, disability, and other protected categories, in the workplace.[67] Further, the Office of Workplace diversity is responsible for implementing initiatives related to equal employment opportunity and anti-discrimination within the FCC.[68]

Currently, the FCC employs about 1400 people. Approximately twenty seven percent identify as African American or Black, sixty percent as White, ten percent as Asian, and approximately three percent as Hispanic or Latino.[69] The gender makeup of FCC employees is balanced as forty nine percent of employees are female while fifty one percent are male.[70]

If the FCC sought to enhance the racial diversity of its employment profile, it may have to be careful and intentional in crafting race-neutral policies. Affirmative action programs that provide racial preferences or directly target applicants based on race are susceptible to judicial challenge and are at risk of being declared illegal following *SFFA v. Harvard*.

V. Conclusion

To conclude, the landmark decision in *SFFA v. Harvard* has reshaped the landscape of affirmative action jurisprudence in the United States. The Court's ruling which found that race-conscious admissions programs in higher education violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act, has far-reaching implications beyond academia. This decision marks a departure from decades of legal precedent, particularly in the foundational cases of *Bakke*, *Grutter*, and *Fisher*, which affirmed the importance of diversity in education and outlined guidelines for its consideration in admissions.

Further, the impact of this decision extends beyond the realm of education, as evidenced by the actions of advocacy groups like AAER. AAER and other organizations have seized upon the ruling to challenge affirmative action policies in employment contexts, demonstrating the potential ripple effect of this decision on businesses and corporations. Additionally, the decision could possibly influence the FCC's policies and practices, both externally in terms of rulemaking authority and internally through its Office of Workplace Diversity.

As legal challenges and policy shifts continue to unfold, they will undoubtedly shape the future of affirmative action, not only in education but also in workplaces and regulatory bodies, including the FCC. The fallout from *SFFA v. Harvard* underscores the evolving nature of affirmative action jurisprudence and the ongoing debate over the use of race-conscious policies to address historical inequalities and promote diversity and inclusion in American society.

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[63] FEDERAL COMMUNICATIONS COMMISSION, *Communications Equity and Diversity Council*, https://www.fcc.gov/communications-equity-and-diversity-council (last visited Nov. 20, 2023).
[64] FEDERAL COMMUNICATIONS COMMISSION, *About the Office of Communications Business*, https://www.fcc.gov/communications-business-opportunities/about-office-communications-business-opportunities (last visited Nov. 2023).
[65] FEDERAL COMMUNICATIONS COMMISSION, *Office of Workplace Diversity, Functions of the*, https://www.fcc.gov/general/office-workplace-diversity-functions (last visited Oct. 28, 2023).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] FEDERAL COMMUNICATIONS COMMISSION, *Employee Profile at the FCC*, https://www.fcc.gov/general/employee-profile-fcc#block-menu-block-4 (last visited Oct. 25, 2023).
[70] *Id.*