

Impact of the *Harvard/UNC* Affirmative Action Decision on Racial Equity Work, Resources, and FAQ

The Foundation's goals include achieving racial justice and our values include diversity, equity, and inclusion ("DEI"). In light of the growing number of lawsuits and other challenges to racial equity and DEI programs under anti-discrimination laws, it is more critical than ever that the Foundation's grantees and others with whom we engage have guidance and resources regarding the application of anti-discrimination laws to their work.

The below [Frequently Asked Questions \(FAQS\)](#) are designed to help answer common questions about how the Supreme Court's June 2023 decision in the affirmative action cases, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* (the "Harvard and UNC cases") impact the racial equity work of the Foundation's grantees. This is not intended as legal advice and grantees and others are encouraged to obtain legal counsel to understand this complex and evolving area of the law.

Other Resources

There are a variety of resources that grantees may take advantage of including the following:

- The Lawyers Committee For Civil Rights Under the Law has established a pro bono program where grantees may seek pro bono assistance to establish legally compliant programs or defend against complaints. The intake form can be found [here](#).
- If you are unable to obtain assistance from the Lawyers Committee, please consult with the Foundation to determine whether the Foundation might be able to obtain pro bono assistance for your organization through other sources or provide other monetary assistance for your organization to obtain counsel.
- The Association of Black Foundation Executives is also curating other [resources](#) that might be of use to organizations.
- Other resources, including articles of potential interest can be found [here](#)

FREQUENTLY ASKED QUESTIONS

A. [What was the holding in the *Harvard* and *UNC* affirmative action cases?](#)

On June 29, 2023, the Supreme Court held that race-based affirmative action in higher education is unlawful. *Harvard* and *UNC* are separate cases in which the legal advocacy group Students for Fair Admissions ("SFFA") argued that UNC's affirmative action practices violated the Equal Protection Clause of the 14th Amendment (the "Equal Protection Clause"), and Harvard and UNC's affirmative action practices violated Title VI of the Civil Rights Act of 1964 ("Title VI"). In a majority opinion that all

conservative Justices joined, the Court held that Harvard and UNC violated the Equal Protection Clause, and, by extension, Title VI, because their practices of considering race when making college admissions decisions were not narrowly tailored to serve a compelling interest.

B. How did the *Harvard/UNC* decision change the law that applies to affirmative action in higher education?

The Supreme Court's decision in *Harvard/UNC* effectively eliminates affirmative action in higher education. Prior to the *Harvard/UNC* decision, the Supreme Court had held that furthering racial diversity in higher education is a compelling state interest, so universities could engage in race-based affirmative action as long as they considered race as one factor among many in a holistic evaluation of the candidate. Even though Harvard and UNC's admissions programs closely followed the parameters that the Supreme Court had outlined for affirmative action programs in those prior cases, the Supreme Court held in *Harvard/UNC* that furthering student diversity was no longer sufficiently compelling to justify race-based admissions decisions.

C. What laws did SFFA use to challenge Harvard and UNC's affirmative action programs?

In *UNC*, SFFA argued that UNC's admissions processes violate the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964. In *Harvard*, SFFA argued that Harvard's admissions processes violate Title VI.

- The Equal Protection Clause prohibits federal and state governments from discriminating on the basis of race except when furthering a compelling government interest and using the least restrictive means available. The Equal Protection Clause applies to UNC's admissions processes because UNC, like other state universities, is a state actor.
- Title VI prohibits discrimination on the basis of race, color, and national origin in any program or activity receiving federal financial assistance. Title VI applies to both Harvard and UNC's admissions processes because Harvard and UNC receive federal financial assistance, such as research grants and federal student aid.

D. Do those laws apply to my work or programs?

The Equal Protection Clause does not apply to most of private organizations' DEI work because it only applies to government actors. However, if an organization operates or supports programs in conjunction with federal, state, or municipal agencies or organizations, the Equal Protection Clause could apply to those particular programs.

Title VI will similarly only apply to an organization's work if the organization receives federal financial assistance as a whole or for the particular program in question, or the if the organization receives federal financial assistance and is principally engaged in the business of providing education, health care, housing, social services, or parks or recreation.

E. How does the *Harvard/UNC* decision impact my work?

Although the Court analyzed Harvard and UNC's programs under the Equal Protection Clause, which does not apply to private organizations, the Court also held in a footnote that its same analysis applies under Title VI. Since the Supreme Court's decision, organizations and individuals have attempted to extend the

Supreme Court’s holding to claims under other anti-discrimination laws, such as Section 1981 of the Civil Rights Act of 1866. These organizations have filed challenges to employment programs, grant programs, fellowships, small business accelerators, and other racial equity programs.

F. [What is Section 1981 of the Civil Rights Act?](#)

Section 1981 of the Civil Rights Act of 1866 (“Section 1981”) prohibits private organizations from discriminating based on race when making and enforcing contracts. Section 1981 is a Reconstruction Era statute that was enacted to protect the rights of Black citizens to contract in the same way that white citizens “enjoyed.” Courts have since interpreted Section 1981 to prohibit not only discrimination against historically underrepresented racial groups, but also to prohibit granting contracts or more favorable contractual terms to *benefit* historically underrepresented racial groups. Some states also have their own state laws that prohibit considering race when making business decisions.

G. [When might Section 1981 apply to our work?](#)

Section 1981 applies to any contract or attempt to contract. Courts have historically defined contract under Section 1981 to include any exchange of consideration. Whether Section 1981 applies to a particular program is fact-sensitive, so if you are unsure whether Section 1981 applies to your work, it is best to consult counsel to discuss.

H. [Will the Supreme Court’s decision require our organization to modify our commitment to racial justice?](#)

No, Section 1981 does not prohibit organizations from generally pursuing racial equity or racial justice. However, the Supreme Court’s decision in *Harvard* and *UNC*, as well as subsequent lawsuits filed under Section 1981, have increased the risk of considering race when making contracting or investment decisions. It is best to consult with counsel when creating any racial equity or DEI program or strategy to mitigate the risk of challenge.