MEMORANDUM

To: Charitable Foundations And Nonprofit Organizations

From: Munger, Tolles & Olson LLP

Date: May 18, 2023

RE: Evaluating the Potential Implications for Charitable Foundations and Nonprofits of the Supreme Court's Upcoming Decisions on Consideration of Race in College Admissions

I. EXECUTIVE SUMMARY

This memorandum undertakes an initial analysis of (1) the potential outcomes of *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, Nos. 20-1199 & 21-707 (collectively, "*SFFA*"); and (2) the implications these outcomes may have for the philanthropic efforts of charitable foundations and the activities of nonprofit organizations.

We think there are three potential outcomes of *SFFA*. They are as follows.

1. First, and at a minimum, we expect the Supreme Court to hold that any consideration of race as a plus factor in college admissions constitutes impermissible discrimination under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964—but that colleges may continue to use race-neutral measures with the goal of increasing racial diversity.

2. Second, the Supreme Court could hold more broadly that while some race-neutral means that increase racial diversity are permissible, those measures become impermissible when they function as proxies for race (for instance, giving favorable consideration to essays describing overcoming racial discrimination might be an impermissible proxy even if theoretically race-neutral).

3. Third, and broadest, the Supreme Court could hold that *any* actions undertaken with a purpose of increasing racial diversity are impermissible in a zero-sum environment, even when the means used are race-neutral or race-blind. In this scenario, the intent to increase racial diversity would itself be evidence of racial discrimination.

Although *SFFA* itself concerns only college admissions, we expect that in the near future, the decision will be applied in a manner that substantially alters the existing legal framework for discrimination claims more broadly. That is because (i) the Court in *SFFA* will necessarily interpret the meaning of discrimination in the Constitution and Title VI of the Civil Rights Act of 1964 to reach a decision and (ii) courts typically look to the Constitution and Title VI for guidance on what constitutes impermissible discrimination under other federal nondiscrimination statutes. As a

result, charitable foundations and nonprofits engaged in diversity, equity, and inclusion (DEI) work are likely to risk heightened legal and tax-related exposure.

To frame the discussion that follows, we note that as a general matter, the law already forbids organizations from considering race as a plus factor in the employment and contracting contexts (with limited exceptions). *See, e.g.*, *Brandt v. Fitzpatrick*, 957 F.3d 67, 76 (1st Cir. 2020). But to this point, challenges to diversity initiatives have comprised a relatively small proportion of race discrimination cases. From that perspective, even if a narrow holding under *SFFA* does not dramatically expand the range of legally prohibited conduct, it may nonetheless increase litigation risk (i) by encouraging an influx of lawsuits challenging DEI policies and practices that have been in place for years; and (ii) by encouraging lower courts to pare back certain defenses and to construe ambiguities in the law against race-conscious practices.

We think that after *SFFA*, charitable foundations and nonprofits will face increased litigation risk in the following four areas:

1. **As recipients or distributors of grant funding or contracts,** charitable foundations and nonprofits should prepare for the possibility that courts will apply *SFFA* to conclude that **42 U.S.C. § 1981**, which prohibits discrimination in the making and enforcement of contracts, restricts parties from entering into certain kinds of funding agreements or arrangements that further diversity, equity, and inclusion. For example, post-*SFFA*, charitable foundations will not be able to consider the racial composition of a nonprofit's leadership or board when deciding whether to award grants. Nonprofits, for their part, should be aware that charitable foundations may find it increasingly difficult to fund programs that are intended to benefit persons of certain racial backgrounds.

2. **As potential or actual recipients of federal funds,** charitable foundations and nonprofits alike will be subject to *SFFA*'s holdings regarding race discrimination under **Title VI of the Civil Rights Act of 1964**, and should be mindful of how they structure any programs or initiatives that rely on those federal funds. For example, a nonprofit that receives federal funds to open a domestic violence shelter in a majority minority area will not be able to consider race as a factor in hiring counselors to work at the shelter.

3. **As employers,** charitable foundations will need to consider the possibility that courts may hold in the coming years that conduct prohibited by *SFFA* is also prohibited by **Title VII of the Civil Rights Act of 1964**, which governs discrimination in the workplace. At a minimum, *SFFA* will reinforce that charitable foundations and nonprofits may not consider race as a factor for any employment decisions post-*SFFA*—including for hiring, promotion, and termination. Depending on the reasoning employed by *SFFA*, the decision may well go beyond that and question the legality of race-neutral programs designed to increase diversity in the workforce.

4. **As charitable entities receiving 501(c)(3) tax exemption status,** charitable foundations and nonprofits should be cognizant that under future administrations, the IRS may expand its current non-discrimination requirements (which presently apply exclusively to 501(c)(3) schools) to all 501(c)(3) entities—a change that could significantly affect an organization's ability to continue receiving tax-exempt status. In addition, it is possible that purposes considered charitable at the moment (*e.g.*, advocating for the promotion of persons of color into positions of leadership) may be viewed as impermissibly discriminatory after *SFFA*.

In this memorandum, we summarize the potential outcomes of the *SFFA* decision and their implications for Title VI, Title VII, and section 1981 race discrimination claims against charitable foundations and the nonprofits they support. We also discuss how and to what extent foundations and nonprofits should be mindful of federal and state tax exemptions that might incorporate nondiscrimination requirements. Finally, we sketch out in a preliminary way how an *SFFA* decision might be applied more broadly to issues of gender discrimination.

II. POTENTIAL OUTCOMES OF *SFFA*

On October 31, 2022, the Supreme Court heard oral argument in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, and *Students for Fair Admissions, Inc. v. University of North Carolina*. At issue in those two cases is whether a college admissions office can, consistent with the Equal Protection Clause and Title VI, consider race as a "plus factor" during the admissions process. Based on the briefing and argument, we think that there are three possible outcomes.

First, and most narrowly, the Court could hold that an institution's use of race as a "plus factor" in college admissions violates the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. In this scenario, the Court would hold that favorably considering the race of underrepresented minority applicants is always an impermissible racial classification because it necessarily disadvantages applicants of majority races who do not enjoy the same "plus factor." Indeed, UNC admitted that race was outcome determinative in 1.2% of its applications decisions, a concession that could enable the Court to assert that any explicit consideration of race as a standalone factor can result in race being a but-for cause of admissions decisions in at least some cases.

In this scenario, the Court's holding would be limited to explicit racial classifications, so race-neutral means of increasing racial diversity would continue to be constitutional. In fact, the Court could well expressly encourage race-neutral measures such as giving favorable consideration to students from disadvantaged socioeconomic backgrounds or those who are first in their families to go to college—even if such measures are meant in part to increase racial diversity. The Court could further cabin its holding by suggesting that universities can consider race as part of the context for an applicant's experiences or qualifications, rather than as a standalone factor. So limited, the Court's opinion would likely permit institutions to consider an applicant's history of overcoming racial discrimination as part of the applicant's personal

statement. *See* 21-707 Tr. at 23-24 (challengers' concession that institution could permissibly consider an applicant's history of overcoming racial discrimination). Of course, the Court may not be entirely clear about the boundaries of impermissible racial classifications, and follow-on litigation may be necessary to provide that clarity.

Second, and less narrowly, the Court could hold not only that express racial considerations are impermissible, but also that race-neutral considerations become impermissible if they are used as proxies for race. In that scenario, a plaintiff might be able to prove that considerations such as socioeconomic status or overcoming adversity are being used intentionally as proxies for race, such that they should be treated as though they are racial classifications. Whether such measures are impermissible would turn on the facts—how close a correlation there is between the factor and race, and what evidence there is as to intent. Race-neutral measures would be carefully scrutinized, but they would remain permissible in at least some circumstances. In addition, this holding would make it difficult for universities to consider race in context (such as by considering essays recounting overcoming racial diversity and the like), because such considerations might be viewed as functional "plus factors" for race.

Third, and most broadly, the Court could hold that *any* program adopted for the purpose of increasing a university's racial diversity in a zero-sum environment constitutes impermissible racial discrimination. The reasoning would be that when an institution adopts selection criteria governing a finite number of admissions slots with the purpose of advantaging underrepresented minorities, it has necessarily acted with the impermissible racial purpose of *disadvantaging* individuals who are not underrepresented minorities. 21-707 Tr. at 133 (Alito, J.) (in "zero sum" circumstances such as admissions where there are limited spots, "giv[ing] a plus to a person who . . . falls within the category of underrepresented minority but not to somebody else" "disadvantag[es] the latter student" and constitutes racial discrimination). This broader decision would repudiate the current understanding that achieving racial diversity through race-neutral means is a compelling and legitimate interest. It would also categorically prevent institutions from adopting selection criteria that focus on socioeconomic diversity if those criteria were adopted in part to improve racial diversity—a course of action neither the first nor second outcome would foreclose.

Although it is not possible to predict with certainty how the Court might rule, the discussion at oral argument suggests that the Court has enough votes to overturn its prior decisions concluding that institutions may consider race as a factor in college admissions. What is less clear is which of the three approaches the majority will adopt to reach that outcome. Our view is that the third approach—which would deem unconstitutional and discriminatory any program adopted to increase racial diversity in a zero-sum environment, even race-neutral and race-blind programs—is the least likely to garner majority support on the Court because of how sweeping a ruling along those lines would be. Because the *SFFA* cases present a far narrower issue (whether institutions can *expressly* consider race as a factor in admissions), it seems doubtful that a majority of the Court (at least five members) would consider this case the right vehicle to announce a watershed broad ruling.

It is more likely that the Court will adopt either the first or the second approach. Both would eliminate express considerations of race in admissions—the primary difference is whether institutions will be permitted to consider race-neutral proxies for race to increase racial diversity. In the first scenario, they will. In the second, they will not.

Given the multitude of options available, it would also not be surprising if the Court issues a split decision. A split decision is one where all members of the majority agree on the outcome, but disagree as to the reasoning. Such a decision is always accompanied by multiple concurring opinions. When that happens, the Supreme Court has explained that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). If, for example, three Justices would decide in favor of the challengers in *SFFA* using the reasoning discussed in the third approach, one would rule for the challengers in *SFFA* using the reasoning of the second approach, and a fifth Justice would rely on the reasoning of the first approach, the Court's holding would be the first approach, because it is the narrowest of the three. In that scenario, even though four Justices favor a broader ruling, only express consideration of race in admissions would be prohibited—the Court's decision would still permit, for example, using race-neutral methods to improve racial diversity. That said, we expect at least some federal courts will look to these broader concurrences to restrict diversity, equity, and inclusion programs and initiatives.

III. TRANSLATING *SSFA* TO CHARITABLE FOUNDATIONS AND NONPROFITS

Although *SFFA* itself is only concerned with the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 in the higher education context, the Court's decision is likely to have serious implications for charitable foundations and nonprofits. The *SFFA* decision is poised to redefine what it means to engage in racial discrimination, and as we discuss below, that holding will likely be transposed to a number of other federal antidiscrimination statutes that apply to nonprofits and charitable actors.[1]

Broadly speaking, we have identified four potential post-*SFFA* areas of concern for charitable foundations and nonprofits: (1) liability under 42 U.S.C. § 1981; (2) liability under Title VI of the Civil Rights Act of 1964; (3) liability under Title VII of the Civil Rights Act of 1964; and (4) risks to 501(c)(3) tax exemption status. We discuss each of these areas of concern and their applicable legal frameworks in detail below. Once the Supreme Court issues its decision in *SFFA*,

[1] We note that nonprofits are not immune from suit under the Equal Protection Clause either. Although the Clause applies only to government actors, a nonprofit can be sued under 42 U.S.C. § 1983 for violating the Equal Protection Clause if it functions as a state actor. *See generally Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022). The state actor test is multifaceted and complex—no single factor is dispositive. *See Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001). Generally speaking, however, the more intertwined the organization is with public institutions, public officials, and public funding, the more likely it is that a court will deem the organization to be a state actor. *Id.* at 290-91.

we will update our analysis to include what we perceive to be some of the strongest defenses and counterarguments in support of nonprofit and charitable foundation DEI activities.

A. 42 U.S.C. § 1981: Organizations' Liability as Contracting Parties

Of particular interest to nonprofits and charitable foundations, *SFFA* will likely affect grantmaking and funding decisions moving forwards. That is because 42 U.S.C. § 1981, a federal statute, guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). That protection against race discrimination extends to the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). Stated simply, section 1981 prohibits discriminating on the basis of race in any contractual activities—a broad universe that captures everything from serving patrons at a restaurant to selecting contractors for a construction project to, potentially, awarding grants to organizations. Although charitable foundations may be able to defend against a section 1981 claim by arguing that a grant is a gift and not the product of a contract, that defense is untested and these issues are likely to generate significant litigation with corresponding costs.

As we discuss below, because section 1981 concerns racial discrimination, courts often look to the Supreme Court's Equal Protection cases for guidance when determining whether a defendant has violated the statute. Given that *SFFA* appears poised to redefine the framework for racial discrimination, we expect federal courts to apply *SFFA*'s framework to section 1981 claims with potentially wide-ranging consequences for charitable foundations and the nonprofits they support.

1. Requirements

Although section 1981 requires that all persons be given the same freedom to contract enjoyed by "white citizens," the Supreme Court held in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), that persons of any race, including white persons, may bring discrimination claims under section 1981. *Id.* at 287, 295-96. To establish a prima facie discrimination claim under section 1981, a plaintiff generally must show (1) that the defendant intended to discriminate on the basis of race; (2) that the defendant's activities concerned the making, performance, modification, termination, conditions or benefits of a contract; and (3) that the defendant's actions interfered with the plaintiff's ability to engage in the activities enumerated in section 1981. *See Daniels v. Dillard's, Inc.*, 373 F.3d 885, 887 (8th Cir. 2004); *Doyle v. City of Chicago*, 943 F.Supp.2d 815, 823 (N.D. Ill. 2013). For reverse-discrimination cases brought by white plaintiffs, some courts have additionally required a showing that "there are background circumstances sufficient to demonstrate that the particular [defendant] has reason or inclination to discriminate invidiously against whites or that there is something fishy about the facts at hand." *Doyle*, 943 F.Supp.2d at 823 (internal quotation marks omitted).

To show intentional discrimination, a plaintiff must point to either direct or circumstantial evidence of discrimination *or* to evidence of a "pattern or practice of discrimination." *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000); *see also Henley v. Turner Broadcasting Sys., Inc.*, 267 F. Supp. 3d 1341, 1357-58 (N.D. Ga. 2017). In pattern or practice suits, the plaintiff must establish that discrimination "was the company's standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1286 (internal quotation marks omitted). That requires proof of more than isolated or "sporadic" discriminatory acts; typically, a plaintiff relies on statistical evidence to demonstrate a consistent pattern or practice of discrimination, combined with anecdotal evidence of intent. *Id.* at 1287. For example, a restaurant that for years hires four times as many white servers as African-American servers in a majority African-American city and whose owners have alluded in the past to the desirability of having white servers is likely liable under section 1981 for engaging in a pattern or practice of racial discrimination in its contracts with servers.

In all cases, a private plaintiff must prove that "but for race, it would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1019 (2020). It is not enough for a plaintiff to show that race was a "motivating factor" in the defendant's challenged decision. *Id.* at 1014-19. As we discuss below, given the discretion often involved in contracting decisions, that robust causation requirement makes it difficult for some plaintiffs to plausibly allege a claim under section 1981.

2. Overlap with *SFFA*

It seems likely that the federal courts will eventually apply *SFFA*'s conclusions regarding racial discrimination under the Equal Protection Clause and Title VI to section 1981 claims. Although section 1981's text is quite different from that of Title VI—it does not mention "discrimination," for example—federal courts have long looked to the Supreme Court's equal protection cases in deciding whether the plaintiff has stated a claim for relief. *See, e.g.*, *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000) ("[P]laintiffs must meet the same pleading standard for their § 1981 claims as for their § 1983 claims under the Equal Protection Clause."); *Page v. City of Monroe*, 24 Fed. App'x 249, 251 (6th Cir. 2001) (applying equal protection standards to § 1981 claim); *Juarez v. Nw. Mut. Life Ins.*, 69 F.Supp.3d 364, 367-68 (S.D.N.Y. 2014) (describing the "close relationship between § 1981 and the Fourteenth Amendment"). That is because section 1981 and the Fourteenth Amendment "were expressions of the same general congressional policy" and intended to work hand-in-hand to restrict racial discrimination by the government as well as private parties. *Gen. Bldg. Contractors Ass'n, Inc. v. Penn.*, 458 U.S. 375, 383-391 (1981) (discussing history) (internal quotation marks omitted).

These ties between section 1981 and the Fourteenth Amendment may persuade at least some courts to expand *SFFA*'s conclusions to section 1981 with serious implications for nonprofits and charitable foundations.

3. Post-*SFFA* Implications

For nonprofit organizations, section 1981 is particularly relevant to awards of grant funding and contracts (*e.g.*, vendor contracts). Because grants generally take the form of

contracts, courts have recognized that section 1981 applies to the award of grants and related policies. *See, e.g.*, *Shirkey v. Eastwind Community Dev't Corp.*, 941 F.Supp. 567, 574-75 (D. Md. 1996).

Under current law—even before *SFFA*—section 1981 has been held to prohibit awarding grant funding on the basis of race. In *Shirkey*, for example, the district court granted summary judgment in favor of a white man who was denied the opportunity to apply for the position of community developer at a non-profit organization whose mission focused on community development in an African-American community. The nonprofit had received funding for the position from a church, which had conditioned its funds for the position on hiring an African American to serve as community developer. *Id.* at 571. Because the plaintiff was not African American, he was prohibited from applying for the position, which ultimately went to an African-American woman. *Id.* The district court held that these "racially restrictive criteria"—*i.e.*, making race a condition of eligibility—intentionally discriminated on the basis of race. *Id.* at 571, 573-75. In addition, the court held that the church (which had conditioned the funding on hiring an African-American community developer) was a proper defendant under section 1981, thus demonstrating that a foundation's decision to condition funding on racial considerations can subject it to liability. *Id.* at 575.

At the same time, demonstrating causation has been difficult for plaintiffs challenging race-conscious contracting policies that do not explicitly exclude candidates of certain racial backgrounds from consideration. In *Virdi v. DeKalb Cty Sch. Dist.*, 135 F. App'x 262 (11th Cir. 2005), the district court granted the defendant's motion for judgment as a matter of law midway through trial on causation grounds. The plaintiff had challenged the county's decision not to award him a contract on the theory that the county's Minority Vendor Involvement Program ("MVP")– which stated goal was to "provide increased opportunities for blacks, women, and other minorities to engage in business activities within the School System," *id.* at 264-65—violated section 1981. Despite being a member of a racial minority himself, the plaintiff believed that in actuality, the program was designed to hire "only" "black-owned firms," and that he was deprived of the opportunity to compete for and earn a contract with the government as a result. *Id.* at 265, 269. The Eleventh Circuit affirmed the district court's decision to grant the defendant's motion for judgment as a matter of law, explaining that "[w]hile the MVP's goals themselves are unconstitutional, they do not constitute evidence that [the plaintiff] himself was discriminated against" and there was no evidence that he had lost a contract he otherwise would have received. *Id.* at 268-69.

Generally speaking, suits like these have been brought only infrequently. And when contracting or grant policies are merely preferential rather than exclusionary, it has been difficult for plaintiffs to prove causation—that is, that race was a but-for cause of their not receiving the contract.

That said, *SFFA* may change the landscape in the following ways, depending on which of the three approaches the Court adopts:

- If the Court holds that any express consideration of race is impermissible but that institutions may strive to improve racial diversity using race-neutral means (the first approach), funding policies that express even a soft preference for organizations led by or comprised of persons from particular racial backgrounds will likely be illegal. A charitable foundation would not be able to prioritize funding minority-led nonprofits or otherwise give minority-led nonprofits a boost during the application process. A nonprofit could not award candidates from certain racial backgrounds a small "plus" in the application process for employment purposes, even if the nonprofit's mission is to assist communities of color.[2]

    - For example, a nonprofit that provides legal services for first-generation Asian immigrants would not be able to give preferential treatment to candidates from an Asian background for any positions at the nonprofit. However, the nonprofit could, if the position requires interacting with clients who do not speak English as their first language, given preferential treatment to candidates who are fluent in other languages.

    - Similarly, a charitable foundation would not be able to consider the racial composition of a nonprofit's leadership or board in determining which nonprofit receives funding. However, the nonprofit could consider the socioeconomic background of the nonprofit's leadership or board and other, race-neutral factors as part of an overarching purpose to support diversity.

    - A nonprofit also would have difficulty prioritizing awarding fellowships to candidates from certain racial backgrounds (and a charitable foundation would be in a difficult position to fund such fellowships), depending on (i) whether a court considers the fellowship to be a "contract" between the recipient of the fellowship and nonprofit and (ii) whether the fellowship implicates the First Amendment's protections for freedom of association.

- If the Court holds that any express consideration of race is impermissible *and* that race-neutral means may not be used if they function as proxies for race (the second approach), funding policies may be further restricted. In addition to prohibiting soft preferences for organizations led by persons of certain racial backgrounds, this approach would prohibit any use of race-neutral preferences that have the same effect.

    - In this universe (and in contrast to the first approach), a charitable foundation *would not* be able to consider the socioeconomic background of a nonprofit's leadership or board composition when awarding grants *if* that factor was intended to function (and does in fact function) as a proxy for race. As we

[2] We note that both of these examples include conduct that is likely prohibited even under the currently existing framework for section 1981 claims—in that sense, a decision in *SFFA* would simply reinforce the illegality of this conduct and encourage litigation challenging such policies.

discussed earlier, because this is a particularly fact-intensive inquiry, organizations may ultimately prevail at trial or summary judgment (after discovery). But the organization might incur significant litigation expenses.

- If the Court holds that the mere intent to increase diversity or racial representation in a zero-sum environment (the third approach) constitutes racial discrimination, an organization would likely not be able to consider increasing racial diversity *at all* in any selection process where the number of awards, offers, or positions is finite and limited.

    - In addition to prohibiting each of the examples we described above, this approach would more broadly prevent organizations from acting with a purpose to increase diversity, regardless of the means used. Unlike in the second scenario—where the key factual issue will be whether a given race-neutral factor like socioeconomic diversity *actually* functions as a proxy for race—in this third scenario, as long as the organization *intended* to increase racial diversity and, as part of that purpose, decided to consider factors such as socioeconomic background in awarding a limited contractual opportunity, the organization will have engaged in racial discrimination. For instance, taking the above scenario, a foundation would not be able to use socioeconomic status to prioritize grants if one of the foundation's goals was to increase the racial diversity of grant recipients—even if socioeconomic status does not function as a perfect proxy for race.

At a minimum, we expect conduct described in the first scenario to be squarely prohibited. We note, too, that because section 1981 prohibits a pattern or practice of discrimination, written policies that express a purpose or goal of advancing minority candidates or minority-led organizations may be used as evidence helping plaintiffs establish "a practice" of reverse-discrimination post-*SFFA*. That evidence could be combined with statistical evidence showing, for instance, that a significant or meaningful number of grants were awarded to minority-led nonprofits.

We also expect courts that presently demand an especially strong evidentiary showing or set of allegations for reverse discrimination claims will set aside that requirement post-*SFFA*. *See, e.g.*, *Doyle*, 943 F. Supp. 2d at 823. A decision by the Supreme Court holding that any consideration of race as a "plus factor" for individuals of some races but not others constitutes racial discrimination will be difficult, if not impossible, to reconcile with a framework for section 1981 claims that applies different standards to reverse discrimination cases.

Finally, we expect *SFFA* to encourage and embolden plaintiffs to pursue challenges to DEI initiatives in a variety of contexts. Given that discrimination remains relatively easy to plead and plaintiffs are likely to obtain discovery, the practical effect of *SFFA* may be an increase in litigation costs on nonprofit organizations seeking to defend their practices. Even a successful defense is likely to come at significant financial cost.

4. Potential Defenses to Section 1981 Claims

We do not mean to suggest that all such section 1981 claims are guaranteed to succeed post-*SFFA*. Nonprofits and charitable foundations can and should avail themselves of defenses and counterarguments. These include the following:

- **Lack of causation**. As we discussed earlier, the Supreme Court has held that private plaintiffs seeking to prevail on a section 1981 claim must prove that "but for race," the plaintiff "would not have suffered the loss of a legally protected right." *Comcast*, 140 S. Ct. at 1019. That can be difficult to establish, particularly in the absence of written policies, guidance, or communications that direct an organization to consider race as a factor in making contracting, funding, or hiring decisions. Organizations that consider race-neutral criteria only and apply a holistic review will be in a better position to argue that a plaintiff has failed to show that but for their race, they would have received a contract or grant that was later awarded to someone else.

- **Grants, fellowships, and funding arrangements are gifts, not contracts.** Because section 1981 applies only to contracts, nonprofits and charitable foundations can and should argue that grants, fellowships, and other funding arrangements are gifts as opposed to contracts and therefore inactionable under section 1981. *See, e.g.*, *Spirit Lake Tribe of Indians ex rel. Comm. of Understanding and Respect v. Nat'l Collegiate Athletic Ass'n*, 715 F.3d 1089, 1093 (affirming grant of summary judgment to defendant where there was no contract associated with the "grant[ing]" of the right to use a nickname); *Jimenez v. Wellstar Health Sys.*, 596 F.3d 1304, 1309 (11th Cir. 2010) (rejecting section 1981 claim because "medical staff privileges do not confer upon a physician any contractual rights"); *see also* Restatement (Second) of Contracts § 71 (1981) cmt. c ("[A] gift is not ordinarily treated as a bargain."). This is a relatively untested defense for section 1981 claims, but we note that in other contexts, courts have expressed skepticism that providing charitable services or awards "out of affection, respect, admiration, charity or like impulses" can constitute a contractual action. *United States v. Amirikian*, 197 F.2d 442, 443 (4th Cir. 1952); *see also Parsley v. Bentley*, 2011 WL 13229639, at *4 n.5 (N.D. Ala. Sept. 28, 2011). That said, this rule is subject to an important caveat: the gift-versus-contract question will turn on the circumstances and terms of the funding award at issue, and the more conditions attached to the grant or fellowship (such as attendance, use, and documentation requirements), the more likely it is that a court will consider those conditions a form of consideration that transforms a gift into a contract. *See, e.g.*, *Mass. Eye & Ear Infirmary v. Eugene B. Casey Foundation*, 417 F. Supp. 2d 192, 197 (D. Mass. 2006).

- **First Amendment freedom of association.** In some instances, a nonprofit may be able to argue that its First Amendment right to freedom of association supersedes section 1981's requirements. A nonprofit established by Latinx journalists to support and advance the careers of other Latinx journalists, for example, could argue that giving Latinx applicants a slight boost during the application process for a journalism

fellowship is part and parcel of their identity as an advocacy and associational group. Because forcing that organization to adopt a race-blind approach that could conceivably result in giving fellowships to non-Latinx applicants would effectively destroy the purpose of the organization, the nonprofit may be able to argue that a section 1981 claim would infringe its First Amendment rights. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658 (2000) (observing that First Amendment would bar discrimination claims that "materially interfere with the ideas that the organization sought to express"). We note two substantial caveats, however. First, the state may burden First Amendment rights if it can demonstrate a compelling interest, and *SFFA* will almost certainly reaffirm that the state has a compelling interest in eradicating racial discrimination. Suits alleging racial discrimination therefore may be able to overcome First Amendment defenses. Second, the Supreme Court will provide further guidance on these issues in its impending decision in *303 Creative LLC v. Elenis*, No. 21-476, which concerns whether Colorado's Anti-Discrimination Act violates the First Amendment because it compels a website designer to design wedding websites for both straight and gay couples against her will.

We intend to update our analysis of these defenses after the Supreme Court issues its decision in *SFFA*.

B. Title VI of the Civil Rights Act of 1964: Organizations' Liability as Recipients of Federal Funds

Title VI of the Civil Rights Act of 1964 provides that no one "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," 42 U.S.C. § 2000d. Because Title VI is one of the two laws at issue in *SFFA* (the other being the Equal Protection Clause), we expect that *SFFA* will hold that whatever practices violate the Equal Protection Clause—most likely, considering race as a plus factor—violates Title VI as well.[3] For nonprofits and charitable foundations, this means that the Court's decision in *SFFA* will immediately affect how courts across the country adjudicate Title VI discrimination claims, which extend to any use of federal funds—not just to use of federal funds by educational institutions.

[3] That outcome would be consistent with the Court's previous race-conscious admissions cases, which asserted that Title VI is coextensive with the Equal Protection Clause, such that the Court's construction of the Equal Protection Clause automatically applies to Title VI without any separate consideration of Title VI's text. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J.) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

1. Requirements

"Title VI prohibits intentional discrimination based on race in any program that receives federal funding." *Bridges ex rel. D.B. v. Scranton Sch. Dist.*, 644 F. App'x 172, 179 (3d Cir. 2016). To state a claim for relief under Title VI, a plaintiff must plead and prove that the defendant engaged in intentional race or national origin discrimination; and that "the entity engaging in discrimination is receiving federal financial assistance." *Wysocki v. Wardlaw-Hartridge Sch.*, 2023 WL 2728807, at *5 (D.N.J. Mar. 31, 2023).

The federal financial assistance aspect of Title VI sets it apart from the other statutes discussed in this memorandum. A private organization or nonprofit is not subject to Title VI liability unless one of the following conditions is satisfied:

- The organization receives federal funds that have been extended to the organization "as a whole," meaning the funds have not been earmarked for any specific purpose. If an organization receives general federal funding, then Title VI prohibits race discrimination in all operations of the organization, regardless of whether that operation has any connection to the federal funds. 42 U.S.C. § 2000d-4a(3)(A); *see also Shebley v. United Continental Holdings, Inc.*, 357 F.Supp.3d 684, 693-94 (N.D. Ill. 2019).

- The organization is "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation." 42 U.S.C. § 2000d-4a(3)(A). If an organization is principally so engaged, then Title VI (again) prohibits race discrimination in all operations of the organization, without regard to whether that operation is supported by federal funds.

- The organization receives federal funds designated for a specific activity or program and is not "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation." *Id.* In this situation, the organization may be sued under Title VI only for engaging in discrimination with respect to that specific program/purpose. So, for example, hiring decisions made in a department separate from the federally funded program would not trigger Title VI liability. *See Shebley*, 357 F.Supp.3d at 693-94.

If an organization does not receive any federal funding at all, it is not subject to Title VI liability. Conversely, organizations that *do* receive federal funds should be mindful that Title VI permits suits by persons (natural or corporate) who have been "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" the organization's operations as a whole or (if it receives earmarked federal funds) the funded program or activity. 42 U.S.C. § 2000d. Thus, potential plaintiffs include the beneficiaries of federal funds received by an organization (for instance, patients who receive federally funded medical treatment); participants in the federally funded program (including contractors hired to perform services with federal funds, such as food service providers hired by a federally funded anti-hunger

organization); and anyone who may be subjected to discrimination "under" the federally funded program (such as employees and board members). *See, e.g.*, *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 97 (5th Cir. 1992); 28 C.F.R. § 42.104 (listing examples of discriminatory actions against beneficiaries and participants).

Federal regulations further refine the prohibited methods of discrimination, including providing any benefits of the program that are "different" or "in a different manner"; subjecting an individual to "segregation or separate treatment" related to any benefit under the program; treating an individual "differently from others in determining" whether he satisfies admissions or enrollment criteria; selecting the site for a facility with the purpose of excluding particular individuals; and denying a person the opportunity to participate in the program by providing services or by serving as a member of a planning or advisory body. 28 C.F.R. § 42.104.

Importantly, Title VI prohibits only *intentional* race discrimination through the methods described above; it does not extend to disparate impact claims. *See Alexander v. Sandoval*, 532 U.S. 275, 281, 285-86 (2001); *see also Payan v. Los Angeles Community College Dist.*, 11 F.4th 729, 736 (9th Cir. 2021). But Title VI has been held to prohibit "pattern or practice" discrimination, that is, practices or policies that intentionally disfavor a particular race—much like section 1981, discussed above. *See, e.g., Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 299-300 (3d Cir. 2014). To succeed in such a claim, a plaintiff need not demonstrate that particular individuals were harmed, but must show a regular pattern of treating one race less favorably than others. Statistical evidence of racial disparities is often used to satisfy the plaintiff's burden of proof in such cases.

2. Post-*SFFA* Implications

We expect the Court to hold in *SFFA* (even under the narrowest approach described in the first scenario) that the term "discrimination" in Title VI includes any consideration of race as a plus factor, even when race is one of many factors taken into account (for instance, in awarding scholarships using federal funds). That outcome would be consistent with the Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which construed Title VII of the Civil Rights Act of 1964's causation requirement (construed coextensively with that of Title VI) capaciously enough to include *any* consideration of any prohibited characteristic:

> An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."

Id. at 1741. The combination of *SFFA*'s likely holding and *Bostock*'s existing construction will likely mean that any consideration of a prohibited characteristic, even as a plus factor among many considerations, constitutes "discrimination" on the basis of that characteristic—a decision with implications not only for Title VI race discrimination claims but Title VII race discrimination claims as well, *see infra*.

As a practical matter, depending on which of the three approaches the Supreme Court adopts, nonprofits and charitable foundations are likely to be significantly constrained, as illustrated below:

- If *SFFA* holds that Title VI prohibits considering race as an express factor (the first approach), an organization that receives either general or earmarked federal funds would likely be prohibited from encouraging racial diversity or provision of services to certain racial groups through any of the following means:

    - Maintaining policies or practices that prioritize persons of color as beneficiaries of federal funding or programs, for instance, prioritizing treating patients from underrepresented backgrounds, or hiring health care practitioners from underrepresented backgrounds.

    - Maintaining policies encouraging or prioritizing hiring staff who share a racial identity with the beneficiaries of the federal funds or programs (*e.g.*, hiring youth counselors from the same background as the youth they are expected to mentor).

    - Maintaining preferences for certain racial groups in awarding contract funds under a federal program. We note that like many of the examples in this section, this practice is already prohibited under current law. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Mountain W. Holding Co. v. Montana*, 691 F. App'x 326, 329 (9th Cir. 2017).

    - Providing scholarships or other opportunities for individuals where race is considered as a plus factor, or is a condition of eligibility.

    - Maintaining policies that require or encourage advisory boards or other governing bodies to have a certain number of members of particular races. Such policies, if sufficiently concrete, might be challenged as pattern or practice discrimination; or an individual excluded from a board might claim that race was a factor in the selection process.

    - Selecting the location for a federally funded facility (such as an urgent care center) based in part on its proximity to populations of particular races. Although the regulations forbid only site selection with the purpose of "excluding" individuals of a particular race, *SFFA* may suggest that an intention

to favor individuals of one race is equivalent to a purpose of disfavoring members of non-favored races.

- Using federal funds to advocate exclusively for members of a particular minority group, *e.g.*, Native American film directors. We note that post-*SFFA*, nonprofits focused exclusively on the interests of a particular racial minority may find it significantly more difficult to obtain federal funding. In that sense, an organization may feel *SFFA*'s effect most acutely through the funding (or lack thereof) it receives, rather than through an eventual lawsuit.

- If *SFFA* holds that express considerations of race *and* race-neutral proxies for race are prohibited (the second approach), the pool of prohibited conduct will expand to include conduct that the first approach would *not* prohibit, such as:

  - Prioritizing using federal funds to address certain issues or initiatives that are highly correlated with race (such as language or socioeconomic status), such that members of that race are substantially more likely to benefit from the federal funds, as compared to members of other races

  - Maintaining hiring policies that award plus points for candidates who have overcome adversity or come from underrepresented socioeconomic backgrounds, if it is apparent that these race-neutral factors are functioning as proxies for race.

  - Use of any other race-neutral means that courts are likely to view as proxies for race.

- If *SFFA* holds more broadly that race-neutral efforts undertaken with the purpose of increasing racial diversity constitute discrimination in zero-sum situations (that is, where the organization's choice of one person means another is excluded, the third approach), **we expect the decision will give rise to significant litigation risk around many of the diversity, equity, and inclusion efforts most commonly used by nonprofits and charitable foundations that receive federal funds today**.[4] That is because many aspects of nonprofit and charitable work are zero-sum. With limited resources, the decision to award a grant to one organization necessarily means that another organization under consideration did *not* receive the grant. So too for employment decisions, treatment decisions, and many other decisions that nonprofits and charitable foundations engage in on a regular basis. What this means

[4] This includes any programs adopted in part to increase racial diversity and in part to increase representation along other metrics, such as special needs. Because even a partial purpose to improve racial representation in a zero-sum environment could be alleged to deprive a plaintiff of an opportunity on the basis of race, programs adopted with that purpose in mind could be held to violate Title VI under this broader holding, absent evidence that the entity would have taken the same action for wholly race-neutral reasons.

is that nonprofits will not be able to use any *race-neutral* criteria to make decisions if at least one purpose for those criteria is to increase representation of racial minorities.

- The primary distinction between the second and third approaches is one of proof. Whereas the second approach would require persuasive evidence that the race-neutral factor is in fact functioning as a proxy for race (for example, if an organization uses socioeconomic diversity as a criterion, evidence that 90% of socioeconomically diverse candidates are also racially diverse, such that socioeconomic diversity effectively stands in as a proxy for race), the third approach would deem it discriminatory to consider socioeconomic diversity as a factor at all as long as *one purpose* behind that consideration is to increase racial diversity, regardless of what the overlap between race and socioeconomic diversity actually looks like.

That said, in all circumstances, organizations should remain able to design *non*-zero-sum efforts with a purpose of increasing racial diversity. By non-zero-sum efforts, we mean programs that do not select between multiple candidates for the same spot or that do not award benefits to one person at the expense of another. For example, nonprofits that design online programs that do not cap the number of attendees and encourage participation by racial minorities through extensive outreach efforts would likely be safe from any sort of Title VI or related challenge. Indeed, because the regulations define prohibited discrimination as discrimination in a *decision* of some sort—*i.e.*, a denial of benefits, denial of eligibility, placement of a facility, 28 C.F.R. § 42.104, organizations could likely continue considering race in taking actions that do not involve concrete dispositions, such as targeting outreach efforts to underrepresented minorities. A federally-funded clinic could, for example, prioritize distributing Spanish-language flyers to predominantly Latinx communities to ensure that members of the community in need are able to take advantage of the clinic's services.

In all scenarios, we expect *SFFA* will increase litigation by encouraging plaintiffs to challenge a broader range of policies, many of which have never been challenged before and typically employ softer preferences along the lines described in this memorandum. And as with section 1981, we expect *SFFA* may increase organizations' susceptibility to pattern or practice claims under Title VI.[5] Again, this is not to say that nonprofits and organizations will have no recourse for the inevitable deluge of post-*SFFA* litigation. They will. Due to Title VI's robust causation requirements (which mirror those of section 1981, described above), plaintiffs may have difficulty establishing that informal policies encouraging diversity as a general matter were

[5] To the extent an organization is subject to any existing federal regulations or executive orders, such as Executive Order 11246, that require the organization to develop placement goals to boost the representation of underrepresented minorities or women, *SFFA* will likely render those regulations and orders unconstitutional.

a but-for cause of any particular decision. But as a general matter, the more formal or concrete policies and practices become, the easier it will be for plaintiffs to establish causation, and nonprofits and charitable foundations should be mindful of that risk moving forwards.

C. Title VII of the Civil Rights Act of 1964: Organizations' Liability As Employers

Although Title VII is not one of the statutes at issue in *SFFA*, we anticipate that many if not most federal courts will look to *SFFA* for guidance when deciding Title VII discrimination claims. To the extent courts disagree as to the applicability of *SFFA* (which seems unlikely given that Title VII uses much of the same language regarding discrimination as Title VI), we expect the Supreme Court will eventually address this disagreement and clarify that *SFFA*'s holding applies with equal force to Title VII claims.

It is difficult to imagine the Supreme Court reaching a different conclusion given the parallels between Title VI and Title VII. Like Title VI, Title VII prohibits "discriminat[ion]": an employer may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Title VII also prohibits a second type of discriminatory action, namely, an employer may not "limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id*. Given the textual similarity, courts are likely to conclude that what constitutes racial discrimination under Title VI (as decided in *SFFA*) also constitutes racial discrimination under Title VII. Indeed, Justice Gorsuch made just this connection at oral argument, observing that "Title VI's language is plain and clear just as Title VII is. And Title VII does not permit discrimination on the basis of sex, and Title VI does not permit discrimination on the basis of race." 21-707 Tr. 162. Given this, we expect *SFFA* will have significant implications for nonprofits and charitable organizations in their roles as employers.

1. Requirements

A plaintiff asserting a Title VII claim for racial discrimination may proceed under one of two theories. The first, and more common and straightforward theory, is that the defendant has deprived the plaintiff of an employment opportunity because of the plaintiff's race. A plaintiff who challenges his or her exclusion from a diversity program on this ground must demonstrate (1) the existence of an employer-employee relationship; and (2) that she or he has been discriminated against with respect to the "compensation, terms, conditions, or privileges of employment," meaning that she or he suffered an adverse employment action. 42 U.S.C. § 2000e(2)-(a)(1). Generally speaking, adverse employment actions are those that "affect employment or alter the conditions of the workplace." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006). Such an action typically "involves discrete changes in the terms of employment, such as 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35 (1st Cir. 2010) (quoting *Burlington Indus., Inc. v. Ellerth*, 524

U.S. 742, 761 (1998)); *accord Alvarado v. Texas Rangers*, 492 F.3d 605, 611-13 (5th Cir. 2007) (same).

The second, and significantly less common, theory involves Title VII's prohibition of policies that "limit, segregate, or classify" employees based on a prohibited characteristic. Although decisions construing this prong are sparse, our current sense is that courts have treated policies as ones that "limit, segregate, or classify" employees when they *categorically* classify employees based on race—for instance, policies that prohibit all employees of a certain race from applying for a position, or practices involving segregating employees into different offices based on race. *See Kyles v. J.K. Guardian Sec. Servs., Inc*., 222 F.3d 289, 298 (7th Cir. 2000); *United States Equal Employment Opportunity Commission v. Autozone, Inc.*, 860 F.3d 564, 568 (7th Cir. 2017).

Of these two theories, the first is most likely to be affected by *SFFA*. It is less obvious how a decision in *SFFA* prohibiting express considerations of race (or any of the broader approaches we've discussed) would affect a court's understanding of what constitutes racial segregation in the work place.

2. Post-*SFFA* Implications

As with the other statutes discussed here, Title VII currently prohibits taking employment actions using race as one motivating factor. But suits challenging diversity initiatives, even those considering race, have been relatively rare. One reason for that may be that the Supreme Court has held that Title VII nonetheless permits employers to create "affirmative action programs" designed to "eliminate manifest racial imbalances in traditionally segregated job categories" if they do not "unnecessarily trammel the rights of white employees." *Shea v. Kerry*, 796 F.3d 42, 57 (D.C. Cir. 2015) (internal quotation marks omitted); *see also Johnson v. Transp. Agency*, 480 U.S. 616, 631-33, 637-38 (1987); *McNamara v. City of Chicago*, 867 F. Supp. 739, 752 (N.D. Ill. 1994) ("A race conscious employment decision made pursuant to a valid affirmative action plan is a defense to a section 1981 claim."). Thus, Title VII currently allows *some* uses of race as a favorable consideration. While that line of Supreme Court decisions is out of step with current Supreme Court jurisprudence, lower courts remain obligated to apply it. *SFFA*, however, will create momentum to abrogate or overrule those cases, thereby removing some ambiguity about the extent to which Title VII permits some consideration of race and eliminating a currently existing defense to liability.

Assuming at least some courts begin applying *SFFA* to Title VII employment discrimination claims, it will likely become increasingly difficult to defend various types of hiring, promotion, and even training policies aimed at increasing minority representation in the workplace. In particular, we note that *SFFA* is likely to reinforce the Supreme Court's prior conclusions that general notions of historical injustice do *not* justify race-conscious programs. Stated differently, organizations cannot and should not attempt to justify their DEI programs on the ground that they respond to historical or even ongoing inequities in the profession writ large.

Examples of risky programs in a post-*SFFA* world including the following:

- If the Supreme Court prohibits express considerations of race (the first approach):

  - Programs or policies that encourage considering racial diversity in the employment context. This extends not only to hiring and promotion but to termination decisions as well, *i.e.*, a policy that encourages or requires managers to maintain a racially diverse team when selecting employees to terminate during a downsizing.

    - The more explicit the "plus factor" consideration, the more problematic the policy is under current law and the more clearly illegal it will be post-*SFFA*. A policy that assigns candidates scores and provides a slight "boost" of X points for candidates from certain racial backgrounds is not permissible now and will remain impermissible post-*SFFA*. But even less express policies—such as a policy that encourages hiring decisions to "take into consideration the need for racially diverse perspectives"—are likely to prove problematic if the Supreme Court concludes in *SFFA* that *any* consideration of race constitutes an impermissible racial classification that violates Title VI and the Equal Protection Clause.

    - We understand that many organizations presently adopt some form of the Rooney Rule, which requires all NFL teams to interview at least one minority candidate for head coaching positions. That rule may run afoul of *SFFA*'s definition of racial discrimination regardless of which of the three approaches the Supreme Court employs, if courts view the rule as *requiring* race to be considered during an employment application process. A white candidate could assert that he or she was deprived of an opportunity to interview on account of his or her race, if the plaintiff can show that the organization utilized the Rooney Rule, that only a limited number of candidates were considered for interviews, and that interviews are necessary to securing the position in question. The plaintiff would also have to show causation: he would have to raise an inference that absent the Rooney Rule, he would have received an interview.

    - Critically, it generally will not matter for liability purposes if an organization's consideration of race is relevant to the organization's mission (although as we discuss above, the First Amendment may provide defendants with a potential defense). Among the types of hiring policies *SFFA* will likely endanger are those that encourage hiring candidates of certain racial backgrounds even when there are perfectly legitimate reasons for that sort of preference (*e.g.*, prioritizing hiring an Asian American director for a nonprofit that seeks to support Asian American migrants in labor disputes).

  - Programs or policies that give employees of certain racial backgrounds (but not others) access to training opportunities or resources aimed at increasing their

odds of promotion. For instance, mentorship programs for employees from underrepresented backgrounds.

- Speaking generally, a current employee's exclusion from a training or mentorship program is more likely to constitute an actionable adverse employment action under Title VII if the plaintiff can show that the exclusion had concrete job consequences (that is, consequences over and above exclusion from the training itself). *See, e.g., Johnson v. Long Island Univ.*, 58 F.Supp.3d 211, 223 (E.D.N.Y. 2014) ("[T]he denial of professional training opportunities may constitute an adverse employment action only where an employee can show material harm from the denial, such as a failure to promote or a loss of career advancement opportunities." (citation and emphasis in original omitted)). For instance, exclusion from a training or mentorship program that leads to concrete increased promotion opportunities could trigger Title VII liability.

- This problem is not solved by having separate programs for different races. It seems plausible to us that creating separate programs may create a segregation or racial classification issue under the second prong of Title VII even if the opportunities themselves are "equal."

- If the Supreme Court prohibits both express considerations of race as well as race-neutral proxies for race (the second approach), the following would likely be prohibited:

  - All of the conduct prohibited under the first approach, as well as any consideration of factors that substantially overlap with race. For example, a promotion policy for a national organization that requires some percentage of managers to reside in the South, where the evidence shows that more than 75% of the company's employees of color reside in the South, could be prohibited under this second approach.

  - An application process that includes questions intended to provide candidates with an opportunity to describe how their racial background contributes to their ability to handle a job or position.

- If the Supreme Court prohibits any policies intended to increase racial diversity in a zero-sum environment (the third approach), all of the approaches described above would be legally risky because employment opportunities, much like college admissions, tend to be zero-sum in that a candidate secures an offer, promotion, or position at the expense of another candidate. Of greater concern, however, a decision by the Supreme Court adopting the third approach could prohibit making any decisions in reliance on a race-neutral factor (even if that factor does not substantially correlate to race) as long as the factor was included for consideration as part of an overarching desire to increase racial diversity. A

nonprofit would not, for example, be able to consider socioeconomic diversity in making hiring decisions if one reason for having that consideration was to improve racial diversity.

With that said, it is unlikely that *SFFA*—even at its broadest—would prohibit organizations from making efforts to increase diversity through non-zero-sum measures such as outreach programs designed to publicize a nonprofit organization's employment opportunities among communities with high percentages of underrepresented minorities.

3. Potential Defenses

Whatever the scope of *SFFA*'s holding, organizations may also have several defenses based on the limits of Title VII's scope:

- The statute applies only to employers that have had at least 15 employees for much of the preceding year. 42 U.S.C. § 2000e(b). Thus, charitable foundations and nonprofits with fewer than fifteen employees are not subject to Title VII liability. *See, e.g.*, *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 365-66 (2d Cir. 2000).

- Title VII applies only to employers and employees, not independent contractors over whom the defendant exerts no control. *Felder v. United States Tennis Ass'n*, 27 F.4th 834, 842 (2d Cir. 2022); *EEOC v. Glob. Horizons, Inc*., 915 F.3d 631, 638 (9th Cir. 2019). Volunteers and unpaid interns also might not be protected by Title VII, although the Ninth Circuit has stated that lack of compensation is not itself dispositive. *Waisgerber v. City of Los Angeles*, 406 F. App'x 150, 152 (9th Cir. 2010). *But cf. O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997) (in the Second Circuit, lack of compensation may be determinative, such that unpaid interns and volunteers are not employees).

- Title VII requires that the plaintiff have suffered an adverse employment action, that is, an action that "affect[s] employment or alter[s] the conditions of the workplace." *Burlington*, 548 U.S. at 62. While the case law on adverse employment actions is voluminous, generally speaking, final decisions like hiring and firing will always count as adverse actions, while less concrete actions like exclusion from a mentorship program may not count.

D. <u>Federal 501(c)(3) Tax Exemptions</u>

Nonprofits and charitable foundations should also be mindful of the possibility that under future administrations, the IRS may issue new revenue procedures that condition 501(c)(3) tax exemption status on an institution's compliance with nondiscrimination laws. Currently, the IRS has two revenue procedures—75-50 and 71-447—that require 501(c)(3) educational institutions (such as charter schools) to annually announce their racial nondiscrimination policies or risk the revocation of their tax exempt status. *See* Rev. Proc. 75-50 (1975), *available at* https://www.irs.gov/pub/irs-tege/rp1975-50.pdf; Rev. Proc. 71-447 (1971), *available at* https://www.irs.gov/pub/irs-tege/rr71-447.pdf. In *Bob Jones Univ. v. United States*, 461 U.S. 574

(1983), the Supreme Court held that "[r]acially discriminatory educational institutions cannot be viewed as conferring a public benefit within the 'charitable' concept" that undergirds 501(c)(3) tax exemption status. *Id.* at 595-96. Accordingly, the IRS is authorized and empowered to revoke 501(c)(3) tax exemption status from educational institutions that engage in discrimination.

At present, the IRS states that a school policy that "favors racial minority groups with respect to admissions, facilities and programs, and financial assistance isn't discrimination on the basis of race when the purpose and effect of this policy is to promote establishing and maintaining the school's nondiscriminatory policy." Publication 557 (01/2023), Tax Exempt Status For Your Organization, *available at* https://www.irs.gov/publications/p557#en_US_202201_publink1000200078. That seems almost certain to change after *SFFA*. *Bob Jones* relied on several equal protection cases beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954), as well as Title VI, to conclude that racial discrimination in educational settings does not further a charitable purpose, and *SFFA* will establish that favoring racial minority groups is discrimination. It is therefore possible that *SFFA* will result in educational 501(c)(3) charities losing their tax exemption status if they employ admissions policies similar to the ones at issue in *SFFA*.

Following SFFA, the IRS (under a different administration) may also seek to revoke 501(c) status from organizations that explicitly advocate for members of one racial group to the exclusion of others on the theory that this type of "discrimination" does not constitute a charitable purpose. The U.S. Treasury's regulations for 501(c)(3) organizations defines charitable organizations to include "eliminat[ing] prejudice and discrimination." 26 C.F.R. § 1.501(c)(3)-1(d)(ii)(2). A hostile IRS could try to annul an organization's 501(c)(3) status in reliance on *SFFA* by arguing that the purpose of increasing access for members of certain racial groups constitutes discrimination against members of other racial groups and therefore does not meet the regulation's definition of charitable activities. This is an aggressive argument, given that the standard for charitable exemptions is whether "[t]he institution's purpose [is] so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." *Bob Jones*, 461 U.S. at 592. But it may be an available argument.

Because these concerns strike us as more contingent on political rather than legal developments, it is difficult to assess the likelihood that either of these two tax-related consequences will come to pass, but we nonetheless note them here.

IV. OTHER POTENTIAL CONSEQUENCES

In addition to the issues we outline above (which we believe will flow most directly from *SFFA*), we think it is worth highlighting two additional potential implications of *SFFA* for nonprofits and charitable foundations. First, courts may well expand *SFFA* to apply to gender discrimination claims under Title VII. Second, although we have not exhaustively surveyed different state laws and requirements, at least some states incorporate antidiscrimination requirements into their tax exemptions or look to federal antidiscrimination decisions. *SFFA* may affect an organization's eligibility for state tax exemptions and legal liability under state antidiscrimination laws.

A. Applying *SFFA* to Gender Discrimination

Although *SFFA* concerns race discrimination and, specifically, the use of race as a plus-factor in college admissions, we think there is some risk that courts could apply the same framework and reasoning to gender discrimination claims under Title VII, Title IX, and the Equal Protection Clause.[6]

Assuming that courts construe Titles VI and VII to prohibit any consideration of race as a plus factor, that construction will necessarily apply to consideration of gender and any other protected characteristic listed in Title VII. That is because, as a textual matter, *SFFA*'s holding would broaden the *actions* that constitute prohibited "discrimination," and there is no textual basis on which to argue that those actions are prohibited with respect to race but not with respect to other statutorily enumerated protected characteristics. And because Title IX is the "gender-based twin" of Title VI and employs identical language, any application of *SFFA* to Title VI will likely also apply to Title IX's prohibition of gender-based discrimination.[7] *Alexander v. Sandoval*, 532 U.S. 275, 297 (2001) (Stevens, J., dissenting); *see also Shotz v. City of Plantation*, 344 F.3d 1161, 1170 n.12 (11th Cir. 2003) ("We construe Titles VI and IX *in pari materia* . . . because Title IX was modeled after Title VI, which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs." (internal quotation marks and citation omitted)). Given this, it

[6] Title VI and section 1981 do not prohibit discrimination based on sex or gender. *See* 42 U.S.C. § 1981; 42 U.S.C. § 2000d; *see also Foster v. Michigan*, 573 F. App'x 377, 387-88 (6th Cir. 2014); *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340, 345 (5th Cir. 1981). The Supreme Court has explained that Title IX is the gender-based parallel to Title VI. *See Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 286 (1998). There is no gender-based parallel for section 1981.

[7] Title VI states that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681.

seems likely that at least some courts will conclude that discrimination under Title VI should qualify as discrimination under Title VII and Title IX as long as the *method* used is the same, even if the protected characteristic is different. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 358-59 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one." (internal quotation marks omitted)).

Beyond the statutory context, the justices discussed during the *SFFA* oral argument whether the Equal Protection Clause itself might prohibit colleges from favorably considering gender. *See* 21-707 Tr. at 51-53. Although *SFFA*'s counsel suggested that gender was different from race, *id.* at 53, Justice Gorsuch appeared to disagree, observing that in *United States v. Virginia*, 518 U.S. 515 (1996) (*VMI*), the Supreme Court had held that "gender would be an impermissible basis for discriminating against applicants." 21-707 Tr. at 53. While it is true that VMI tightened restrictions of sex classifications, the Court may be hesitant to fully equate gender to race for constitutional purposes, and in any event, the application of Title IX may effectively prohibit consideration of gender without the need to resort to Equal Protection Clause. This is something to keep an eye on in coming years.

B. Potential State Law Issues

We do not attempt in this memorandum to provide an exhaustive list of state laws and regulations which interpretation might be influenced by the Supreme Court's decision in *SFFA*. We note, however, two implications that *SFFA* may have for state law antidiscrimination protections.

The first is that some state courts, including in California, "look to Title VII in interpreting" state nondiscrimination and civil rights statutes. *State Dep't of Health Serv. v. Superior Court*, 31 Cal.4th 1026, 1040 (2003); *see also Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012). Indeed, some state nondiscrimination statutes expressly "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964," Tex. Lab. Code § 21.001(1), which all but requires state courts to consider how federal courts apply and interpret Title VII. To the extent federal courts apply *SFFA*'s holdings to Title VII claims (as we expect they will), we imagine at least some state courts will take *SFFA* into account when evaluating claims brought under state civil rights statutes. This is not to say that all state courts will apply *SFFA* to state discrimination claims, however. If a plaintiff's challenge implicates an aspect of the state nondiscrimination law that does not have an analogue or counterpart in Title VII or federal antidiscrimination law, state courts likely will give federal law and precedent little weight. *See e.g.*, *State Dep't of Health Servs.*, 31 Cal.4th at 1040 (observing that "explicit differences between federal law and [California's Fair Employment and Housing Act] diminish the weight of the federal precedents" (internal quotation marks omitted)); *see also Miller v. Mich. Dep't of Corrs.*, 2022 WL 3691908, at *3 (Mich. Ct. App. 2022) ("*[O]nly* if the controlling language in Title VII is substantially similar to that contained in [MCL 37.2701(a)], can we look to federal case law for potential guidance."). Given the variety of state laws and state constitutional provisions, it is difficult to predict in the abstract how *SFFA*'s holding might translate to, and become incorporated in, state

antidiscrimination laws.[8] That said, nonprofits and charitable foundations should be mindful that *SFFA* is likely to open up new avenues of both federal and state liability for DEI initiatives and programs, and take precautionary measures to mitigate their litigation risk.

The second implication that *SFFA* may have on state issues concerns state tax exemptions. Many states appear to condition tax exemptions or other benefits on nondiscrimination. *See, e.g.*, *Kosoglyadov v. 3130 Brighton Seventh, LLC*, 852 N.Y.S.2d 624, 626 (2007) (describing tax abatement and exemptions that include a nondiscrimination clause); *William K. Warren Med. Res. Ctr., Inc. v. Payne Cty. Bd. of Equalization*, 905 P.2d 824, 825 (Okl. Ct. App. 1994) (concluding organization qualified for state tax exemption where it did not discriminate as to race); *Neb. State Bar Foundation v. Lancaster Cty. Bd. of Equalization*, 237 Neb. 1, 14 (1991) (explaining that state tax exemption requires the organization not discriminate "on the basis of race, color, or national origin" in membership or employment). Unlike the IRS, which applies a nondiscrimination requirement to educational institutions only (for now), some state tax agencies apply broader nondiscrimination mandates to receive certain tax exemptions. We therefore encourage nonprofits and charitable foundations to consult with local counsel to determine what tax consequences, if any, they may face post-*SFFA*.

We will revisit the legal issues analyzed in this memorandum once the Court issues its decision in *SFFA*.

[8] Of course, the Court's precise holding as to the Equal Protection Clause will bind states and their universities.