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RACE CONSCIOUS AFFIRMATIVE ACTION BY TAX EXEMPT  
501(C)(3) INSTITUTIONS AFTER  
*STUDENTS FOR FAIR ADMISSIONS v. HARVARD AND UNC*

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RACE CONSCIOUS AFFIRMATIVE ACTION BY TAX EXEMPT  
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*David A. Brennan* \*

INTRODUCTION

In 1983, several years after its 1954 decision in *Brown v. Board of Education*,<sup>1</sup> the United States Supreme Court decided a case that significantly impacted tax-exempt § 501(c)(3) charitable schools that consider race in making admissions decisions.<sup>2</sup> In *Bob Jones University v. United States*, the Court held that a private school that discriminates against African Americans in admissions is not entitled to § 501(c)(3) tax-exempt status.<sup>3</sup> The Court based its decision on the public policy doctrine, an off-shoot of the well-established illegality doctrine.<sup>4</sup> Pursuant to the public policy doctrine, the Court upheld the IRS's decision to deny § 501(c)(3) tax exemption to a private school because its actions violated clear, established public policy.<sup>5</sup>

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<sup>1</sup> *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>2</sup> See generally *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>3</sup> See *id.* at 591 (“A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate *established public policy.*”) (emphasis added).

<sup>4</sup> See *id.* at 586 (“[E]ntitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to *established public policy.*”) (emphasis added).

<sup>5</sup> See *id.*

Among the many determinants of established public policy is constitutional law doctrine. Thus, since the Court held for decades that discrimination against African Americans in school admissions violates the Fourteenth Amendment's Equal Protection Clause, the Court naturally concluded that a private school engaged in such discrimination is not entitled to § 501(c)(3) tax exemption.<sup>6</sup>

Since its decision in *Bob Jones*, the Court has ruled many times on the constitutionality of race-based actions when making resource allocation decisions.<sup>7</sup> While the Court has consistently stuck to its guns on the matter of discrimination against African Americans, it has not shown the same fortitude in its analysis of affirmative action—that is, race-conscious decisions aimed at helping (as opposed to hurting) African Americans and other minority groups.<sup>8</sup> In fact, in a line of decisions involving the workplace and education, the Court has consistently recognized that, while invidious racial discrimination against minority groups is always prohibited, benign affirmative action is at times permissible if done in the right way and for the right reasons.<sup>9</sup> Accordingly, tax-exempt law's public policy doctrine has likewise consistently been interpreted as prohibiting invidious racial discrimination against African Americans and other minority groups while simultaneously permitting the use of race-conscious affirmative action.<sup>10</sup>

In its October 2022 term, the Supreme Court heard yet another case aimed at addressing the issue of the Fourteenth Amendment's limitations on the use of race in educational admissions.<sup>11</sup> But this case was different. The Court's race-conscious affirmative action cases typically involve claims by white people that affirmative action aimed at helping African Americans or

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<sup>6</sup> See *id.* at 605.

<sup>7</sup> See generally *Rice v. Cayetano*, 528 U.S. 495 (2000); see also *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>8</sup> See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

<sup>9</sup> See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see also *Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 244.

<sup>10</sup> See David A. Brennan, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1 (2006).

<sup>11</sup> See generally *Students for Fair Admissions*, 600 U.S. at 181.

other minority groups impermissibly harm (or discriminate against) them as white people.<sup>12</sup> In *SFFA v. Harvard/UNC*, instead of white people complaining about harm, one minority group (Asian Americans) alleged they suffered harm due to race-conscious affirmative action aimed at helping other minority groups (African Americans, Hispanics, and Native Americans).<sup>13</sup> Specifically, the Court in *SFFA v. Harvard/UNC* faced the issue of whether race-conscious affirmative action should necessarily be prohibited if it has a negative impact on members of other minority populations, as opposed to on members of the majority white population.<sup>14</sup> This Essay will examine the potential impact of this important constitutional law decision on the applicability of the public policy doctrine as a possible limitation on the use of race-conscious affirmative action by tax-exempt § 501(c)(3) charitable entities.

Part I of this Essay examines how constitutional law limits on the use of race in college admissions are impacted by the Court's recent decision in *SFFA v. Harvard/UNC*. Specifically, Part I focuses on the ramifications of the Court's decision on the ability of public colleges, as well as private ones that receive federal financial assistance, to use race when making admissions decisions. Part II provides a brief primer on tax-exempt law's public policy limitation—emphasizing its correlation (or lack thereof) with Equal Protection Clause jurisprudence when it comes to limiting race-based activity by tax-exempt § 501(c)(3) charitable entities. Part III hypothesizes how the IRS, in light of the Court's decision in *SFFA v. Harvard/UNC*, might interpret the public policy limitation in the context of determining the permissibility of race-based affirmative action by tax-exempt § 501(c)(3) entities. Finally, the Essay concludes that despite the apparent inability of public colleges (or private ones that receive federal financial assistance) to engage in race-based affirmative action after *SFFA v. Harvard/UNC*, tax-exempt § 501(c)(3) entities are not necessarily prohibited from using race as a factor when making important resource allocation decisions, such as admission to college.

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<sup>12</sup> See, e.g., *Grutter*, 539 U.S. at 306; see also *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016).

<sup>13</sup> See *Students for Fair Admissions*, 600 U.S. at 216.

<sup>14</sup> *Id.* at 217–18.

## I. IMPACT OF *SFFA v. HARVARD/UNC* ON THE ABILITY OF COLLEGES AND UNIVERSITIES TO USE RACE WHEN MAKING ADMISSIONS DECISIONS

The legal issue in *SFFA v. Harvard/UNC* centers on the language of the Equal Protection Clause of the Fourteenth Amendment. That clause states that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>15</sup> The Supreme Court historically interpreted this language to require that government resource allocations based on race must be *necessary* and with the aim of accomplishing a *compelling* government interest.<sup>16</sup> In the context of college admissions, Justice Louis Powell’s concurring opinion in *Regents of University of California v. Bakke* has been pivotal for decades.<sup>17</sup> In *Bakke*, Justice Powell recognized that similar to remedying prior acts of specific discrimination, achieving racial and ethnic diversity in the classroom could be a compelling government interest that satisfies the Fourteenth Amendment if it can be shown that the use of race is necessary to accomplish diversity.<sup>18</sup>

Prior to 2003, federal courts were divided on the permissibility of race-based affirmative action admissions by public colleges based primarily on their view of Justice Powell’s concurring opinion in *Bakke*.<sup>19</sup> Those pre-2003 jurisdictions that rejected the use of race in admissions decisions usually explicitly rejected Justice Powell’s assertion that diversity is a compelling government interest that may justify the use of race.<sup>20</sup> Those jurisdictions that accepted the use of race usually embraced Justice Powell’s view of diversity

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<sup>15</sup> U.S. CONST. amend. XIV, § 1.

<sup>16</sup> See, e.g., *Adarand Constructors, Inc.*, 515 U.S. 200, 235 (1995) (“Federal racial classifications . . . must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”).

<sup>17</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978).

<sup>18</sup> *Id.* at 314–15 (“As the interest of diversity is compelling in the context of a university’s admissions program, the question remains whether the program’s racial classification is necessary to promote this interest.”).

<sup>19</sup> See David A. Brennen, *Race-Conscious Affirmative Action by Tax Exempt 501(c)(3) Corporations after Grutter and Gratz*, 77 ST. JOHN’S L. REV. 711, 714–18 (2003).

<sup>20</sup> See *id.* at 715–18 (discussing *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1249–50 (11th Cir. 2001) and *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996)).

in education as a compelling interest.<sup>21</sup> In 2003, in the companion cases of *Grutter v. Bollinger*<sup>22</sup> and *Gratz v. Bollinger*,<sup>23</sup> the Supreme Court resolved this divide amongst the circuits by implicitly adopting Justice Powell’s view that classroom diversity is a compelling government interest for college admissions that may be achieved by taking explicit account of race, so long as the use of race is not a deciding factor.<sup>24</sup>

Two decades after deciding the *Grutter* and *Gratz* companion cases, the Court again considered the issue of the permissibility of race-based admissions by colleges where the goal was to achieve diversity.<sup>25</sup> However, this most recent consideration was different in a couple of ways. First, in addition to considering the use of race by a public university, the Court also addressed the issue in the context of a private university that was a recipient of federal financial assistance.<sup>26</sup> Second, instead of addressing the issue in the context of alleged discrimination against white applicants who were denied admission in favor of admitted minority applicants, the issue was presented in the context of alleged discrimination against non-admitted minority applicants (Asians) who were denied admission in favor of other admitted minority applicants (Blacks, Hispanics, and Native Americans).<sup>27</sup> In *SFFA v. Harvard/UNC*, the Court held that, while achieving classroom diversity may be a compelling government interest, using race as a “stereotype or negative” to achieve this goal is not necessary.<sup>28</sup>

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<sup>21</sup> See *id.* at 718–20 (discussing *Smith v. Univ. of Washington*, 233 F.3d 1188, 1200 n.9 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001)).

<sup>22</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>23</sup> See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>24</sup> See generally *id.*; see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

<sup>25</sup> See generally *id.*

<sup>26</sup> *Id.* at 190.

<sup>27</sup> *Id.* at 272.

<sup>28</sup> See *id.* at 213 (“University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents’ admissions systems—however well-intentioned and implemented in good faith—fail each of these criteria.”).

The Court's decision in *SFFA v. Harvard/UNC* almost completely ended the ability of public institutions, and private ones that receive federal financial assistance, to use race in achieving diversity goals. One example where use of race is still permitted is when an applicant raises it on their own.<sup>29</sup> Thus, public institutions, and private ones that receive federal financial assistance, that want to create a diverse classroom environment must now seek out race-neutral ways of achieving diversity. Given the experiences of California and Michigan, this is not a complete impossibility. Indeed, certain socioeconomic factors correlate significantly with racial status and thus might work nearly as well as explicitly using race. However, using socioeconomic factors is not a guarantee of achieving the type of diversity that many colleges desire. While using socioeconomics as a substitute for race in an affirmative action policy might allow for the admission of racial minorities who are poor, it does not necessarily achieve the objective of attracting minorities who are not poor.<sup>30</sup>

Since the interest of diversity is to create an environment that includes all voices<sup>31</sup>—those from poor minorities as well as those from minorities who are not poor—race-neutral affirmative action policies in a post-*SFFA v. Harvard/UNC* world might fail at fully achieving educational diversity. Aside from the issue of whether educational diversity will be fully achieved, a related issue deals with what this decision means for private actors who are not recipients of federal financial assistance. Does the prohibition on the use of race by public colleges and private ones that receive federal financial assistance also have implications for private 501(c)(3) colleges that do not receive federal financial assistance?

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<sup>29</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (Roberts, C.J., majority) (“At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”).

<sup>30</sup> See *id.* at 364 (Sotomayor, J., dissenting) (“[Racial stereotype] conversations occur regardless of socioeconomic background or any other aspect of a student’s self-identification . . . . As Andrew Brennen, a UNC alumnus, testified, ‘running down the neighborhood . . . people don’t see [him] as someone that is relatively affluent; they see [him] as a black man.’”).

<sup>31</sup> Nancy Cantor, *From Grutter to Fisher and Beyond: The Compelling Interest of Diversity in Higher Education*, 48 U.S.F. L. REV. 261, 262 (2014) (“. . . race still matters in this country, and it matters a lot, every day, for whites and for persons of color, and for rich and poor and in between . . .”).



## II. TAX LAW'S PUBLIC POLICY LIMITATION AS A LIMITATION ON RACE-BASED ACTIVITY BY TAX-EXEMPT § 501(C)(3) ENTITIES

On its face, the Court's prohibition in *SFFA v. Harvard/UNC* on the use of race in college admissions only applies to public colleges and to private ones that receive federal financial assistance.<sup>32</sup> Private colleges are often operated as nonprofit § 501(c)(3) charitable institutions. Thus, if a private nonprofit college refuses to accept federal financial assistance, may it then use race in making admissions decisions? Further, what are the implications of the *SFFA v. Harvard/UNC* decision outside of college admissions? Does the prohibition on the use of race apply in the context of awarding race-based scholarships aimed at achieving diversity goals? If so, what are the implications for private nonprofit § 501(c)(3) entities that award race-based scholarships?

The reference to “§ 501(c)(3)” is a reference to a provision of the Internal Revenue Code that provides tax benefits to certain organizations.<sup>33</sup> Among the tax benefits are exemption from federal income tax,<sup>34</sup> the ability to receive tax-deductible contributions from the public,<sup>35</sup> and also often leads to exemption from the obligation to pay state income and property tax.<sup>36</sup> Thus, an organization achieving and maintaining § 501(c)(3) federal tax-exempt status can be quite valuable. However, achieving this status comes at

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<sup>32</sup> See *Students for Fair Admissions*, 600 U.S. at 197–98 (supporting the proposition that discrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds also constitutes a violation of Title VI, which provides 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).

<sup>33</sup> I.R.C. § 501(c)(3).

<sup>34</sup> I.R.C. §§ 501(a) & (b); see also I.R.C. §§ 511–514; section 501(c)(1) organizations are not subject to the § 511 unrelated business income tax (UBIT).

<sup>35</sup> I.R.C. § 170.

<sup>36</sup> See, e.g., §§ 196.196, Fla. Stat. (2023) (Providing that “[o]nly those portions of property used predominantly for charitable, religious, scientific, or literary purposes are exempt” and, further, that “[p]roperty owned by an exempt organization qualified as charitable under s. 501(c)(3) of the Internal Revenue Code is used for a charitable purpose if the organization has taken affirmative steps to prepare the property to provide affordable housing to persons or families that meet the extremely-low-income, very-low-income, low-income, or moderate-income limits.”).



a cost. One such cost is that the exempt entity must not engage in illegal conduct or conduct that violates “established public policy.”<sup>37</sup> The prohibition against violating established public policy is often referred to as the public policy doctrine.<sup>38</sup>

Though arguably in existence years earlier, the Supreme Court first formally recognized the public policy doctrine in 1983 in *Bob Jones University v. United States*.<sup>39</sup> In *Bob Jones*, the Court upheld the IRS’s revocation of the § 501(c)(3) tax exemption of a private religious university that discriminated against African Americans in admissions decisions.<sup>40</sup> In reaching the conclusion that there was a fundamental public policy against such invidious racial discrimination, the Court in *Bob Jones* looked at decisions by the three branches of the federal government, which had unanimously concluded that invidious race-based discrimination against African Americans in public education is unconstitutional and against public policy.<sup>41</sup> The Court therefore upheld the IRS’s revocation of the university’s § 501(c)(3) tax exemption—concluding that tax-exempt charities cannot violate established public policy and maintain their tax exemption.<sup>42</sup>

Other than in *Bob Jones*, the Supreme Court never again directly addressed the issue. Further, the IRS has never used the public policy

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<sup>37</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (“Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”).

<sup>38</sup> See Brennen, *supra* note 10, at 28–29.

<sup>39</sup> See *Bob Jones Univ.*, 461 U.S. at 575.

<sup>40</sup> *Id.* at 595 (“There can thus be no question that the interpretation of § 170 and § 501(c)(3) announced by the IRS in 1970 was correct.”).

<sup>41</sup> *Id.* at 598 (“On the record before us, there can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear. The correctness of the Commissioner’s conclusion that a racially discriminatory private school ‘is not ‘charitable’ within the common law concepts reflected in . . . the Code[]’ is wholly consistent with what Congress, the Executive and the courts had repeatedly declared before 1970.”) (citation omitted).

<sup>42</sup> *Id.* at 598–99 (“Clearly an educational institution engaging in practices affirmatively at odds with this declared position of the whole government cannot be seen as exercising a ‘beneficial and stabilizing influence in community life[]’ and is not ‘charitable,’ within the meaning of § 170 and § 501(c)(3). We therefore hold that the IRS did not exceed its authority when it announced its interpretation of § 170 and § 501(c)(3) in 1970 and 1971.”) (citation omitted).

limitation as a vehicle for revoking or denying § 501(c)(3) tax-exempt status, except in cases of clear race-based discrimination by whites against African Americans (i.e., invidious discrimination). However, the IRS has indicated a willingness to consider using the public policy limitation in other contexts—such as when racial preferences are used for affirmative action purposes aimed at improving overall diversity outcomes (i.e., benign or remedial race preferences).<sup>43</sup> The deciding factor for the IRS would be whether the use of such preferences violates established public policy.

### III. HOW MIGHT THE IRS VIEW THE PERMISSIBILITY OF RACE-BASED AFFIRMATIVE ACTION BY TAX-EXEMPT § 501(C)(3) ENTITIES IN LIGHT OF *SFFA V. HARVARD/UNC*

In light of the Court's decision in *SFFA v. Harvard/UNC*, what does it mean to violate established public policy in the context of using racial preferences to accomplish appropriate diversity goals? It appears that, if one were to look (as did the Court in *Bob Jones*) at the actions of the three branches of government, there are a couple of possibilities.<sup>44</sup> First, since race-based discrimination against African Americans has always been viewed, uniformly, as contrary to accepted norms by the executive, legislative, and judicial branches of government, it has always been a violation of established public policy to engage in acts of this type of invidious racial preference (i.e., discriminatory).<sup>45</sup> Second, the reverse has not always been true. That is, racial preferences aimed at achieving a laudable (i.e., compelling) goal, such as improving racial diversity, were not, prior to 2023, uniformly viewed by the executive, legislative, and judicial branches of government as contrary to

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<sup>43</sup> For additional discussion, see generally David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779 (2002); see also I.R.S. Tech. Adv. Mem. (issued to the Kamehameha Schools/Bernice Pauahi Bishop Estate) (Feb. 4, 1999) (unpublished and unnumbered) (on file with author).

<sup>44</sup> See generally *Bob Jones Univ.*, 461 U.S. 574.

<sup>45</sup> See *id.*

accepted norms. Indeed, prior to 2003, race-based affirmative action was viewed as consistent with Equal Protection Clause jurisprudence.<sup>46</sup>

In 2003, the Court in *Grutter* and *Gratz* approved the use of race-based affirmative action so long as race was not a deciding factor in college admissions.<sup>47</sup> But now that the Court in 2023, in *SFFA v. Harvard/UNC*, expressly disapproved of the constitutional use of race in making admissions decisions,<sup>48</sup> what does this mean for the IRS in terms of its application of the statutory public policy doctrine to § 501(c)(3) tax-exempt entities that engage in race-based affirmative action as a means of achieving diversity?

To be clear, in making its statutory public policy determinations, the IRS is not bound by constitutional jurisprudence. The dictates of the Equal Protection Clause only apply to state actors, not private ones.<sup>49</sup> Thus, a ruling that a state school is constitutionally prohibited from using race in admissions does not necessarily limit a private school from using race. However, many private institutions may be effectively limited by constitutional norms applicable to state actors because they also receive federal financial assistance.<sup>50</sup> Nevertheless, the Court in *Bob Jones* did not rule that the actions of a private § 501(c)(3) entity that would violate either the Constitution (if it were a state actor) or federal civil rights laws (if it were a recipient of federal financial assistance) would also necessarily violate established public policy.<sup>51</sup> Stated differently, the Court's conclusion in *SFFA v. Harvard/UNC* that race cannot be considered in admissions does not, by itself, necessarily

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<sup>46</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (“In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file . . .”).

<sup>47</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding the University of Michigan Law School’s affirmative action plan as consistent with the Equal Protection Clause); see also *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (invalidating the University of Michigan’s undergraduate admissions policy as violative of the Equal Protection Clause).

<sup>48</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230–31 (2023).

<sup>49</sup> See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (“Our cases have accordingly insisted that the conduct allegedly causing that deprivation of a [constitutional] federal right be fairly attributable to the State.”).

<sup>50</sup> See *Gratz*, 539 U.S. at 275–76 n.23 (stating that discrimination that violates the Equal Protection Clause committed by an institution that accepts federal funds also constitutes a violation of Title VI).

<sup>51</sup> See generally *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

mean that the public policy doctrine now prohibits the use of race by § 501(c)(3) tax-exempt entities.

This view of the public policy doctrine, as not necessarily co-existent with constitutional jurisprudence, is consistent with Justice Powell's concurring opinion in *Bob Jones* when he concludes that § 501(c)(3) tax-exempt entities contribute to a "vigorous, pluralistic society."<sup>52</sup> Thus, to intimate in any way that § 501(c)(3) tax-exempt entities that do not also receive federal financial assistance are limited by constitutional norms would be completely contrary to this pluralistic view. True, constitutional norms certainly do offer guidance in terms of understanding the outer limits of the public policy doctrine. However, constitutional norms do not necessarily define those outer limits. If that were the case, there would have been no need for the Court in *Bob Jones* to examine the views of the executive and legislative branches of government in reaching the conclusion that invidious racial discrimination violates established public policy. Notably, on the heels of the Court's decision in *SFFA v. Harvard/UNC*, the President, as leader of the executive branch, stated publicly that the Court's decision to prohibit the use of race was the wrong decision.<sup>53</sup> This type of dispute between the judicial and executive branches on the issue of the permissibility of the use of race did not exist at the time of the *Bob Jones* decision. Accordingly, while the Court's decision in *SFFA v. Harvard/UNC* sends a reasonably clear message that race-based affirmative action aimed at achieving appropriate diversity goals is no longer constitutionally permissible, this ruling should not necessarily be viewed as a statement that race-based affirmative action violates the public policy doctrine.

#### CONCLUSION

The Court's decision in *SFFA v. Harvard/UNC* sends a reasonably clear message as to the constitutionality of the use of race in college admissions. Prior to *SFFA v. Harvard/UNC*, the use of race was constitutionally allowed if race was one of many factors in the admissions decision and not a deciding factor. After *SFFA v. Harvard/UNC*, it appears that race cannot (with minor exceptions) be a factor in admissions decisions of public colleges or private

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<sup>52</sup> *Id.* at 609 (Powell, J., concurring).

<sup>53</sup> Remarks by President Biden on the Supreme Court's Decision on Affirmative Action, 2023 Daily Comp. Pres. Doc. 00582 (June 29, 2023).

ones that receive federal financial assistance. Since the Court in *Bob Jones* relied principally on constitutional law doctrine in concluding that a private § 501(c)(3) tax-exempt entity that engages in invidious racial discrimination against African Americans in making admissions decisions is not entitled to tax exemption, the question arises as to what the implications are of the Court's decision in *SFFA v. Harvard/UNC* for the public policy doctrine. Since the public policy doctrine is defined not only by constitutional norms but also by executive and legislative enactments, this essay concludes that the *SFFA v. Harvard/UNC* decision is not the sounding of the death knell for race-based affirmative action by private § 501(c)(3) entities that are not state actors and not recipients of federal financial assistance. Further, given the goal of § 501(c)(3) entities to contribute to a "vigorous, pluralistic society," it makes sense that such entities are not necessarily constrained to the same extent that government is so constrained.