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November 3, 2026

Mr. Frank J. Bisignano
Chief Executive Officer
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Dear Mr. Bisignano:

I write in opposition to the Internal Revenue Service's (IRS) Proposed Rule, "Racial Nondiscrimination in Private Schools" ("Proposed Rule"),[1] which the IRS claims would "end federal tax-exempt status for private schools that engage in racial discrimination."[2] If enacted, the IRS would be permitted to remove the exemption from Federal income tax of a private school that discriminates on the basis of race, color, or national or ethnic origin in the administration of its educational, admission, scholarship, athletics, or other policies.[3] The Administration claims that the Proposed Rule is "based on the fundamental public policy of the United States."[4] In actuality, the Proposed Rule appears to be part of this Administration's efforts to exaggerate the scope of the recent, narrow ruling by the Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,*[5] subverting decades of legal precedent and public policy. The government has already abandoned other attempts to use the *SFFA* decision as justification for sweeping changes in public policy, it should abandon this attempt as well.

Recent case law is too limited to establish "fundamental public policy"

The rationale underlying the Proposed Rule relies heavily on an expansive interpretation of the 2023 Supreme Court ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*).[6] In this case, six justices agreed that the undergraduate admissions programs at Harvard College (Harvard) and the University of North Carolina (UNC) violated both the Equal Protection Clause of the Constitution and Title VI of the *Civil Rights Act of 1964*. Supporters of the opinion tend to end discussion of the holding of the case there or focus on dicta

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[1] Racial Nondiscrimination in Private Schools, 91 Fed. Reg. 56811 (Sept. 4, 2026) [hereinafter IRS NPRM].
[2] https://www.irs.gov/newsroom/treasury-irs-move-to-end-tax-exempt-status-for-discriminatory-practices-in-private-schools
[3] *Id.*
[4] *Id.*
[5] 600 U.S. 181 (2023).
[6] 600 U.S. 181 (2023).

from the opinion offering platitudes about equality,[7] rather than recognizing that the Court noted the *SFFA* decision was narrowly tailored to the controversy before it.[8] Further, the ruling makes clear that the question of the use of race in admissions is not fully settled. The Administration's interpretation expressed in the Proposed Rule suggests there was no nuance or exception to what the Court held when it comes to the use of race in admissions.[9]

The *SFFA* revisited, but did not overturn, the Court's previous decision in *Regents of the University of California v. Bakke* (*Bakke*).[10] In *Bakke*, the Court struck down the use of racial quotas in a medical school admissions program but held that the use of race as one of many factors in admissions was indeed constitutional.[11] *Bakke* ruled that achieving diversity (including racial diversity) in a university class was a compelling governmental interest, satisfying the first part of the strict scrutiny test.[12] *SFFA* did not strike down the Harvard and UNC admissions programs because the schools' attempts to achieve diversity (including racial diversity) were not compelling governmental interests.[13] Instead, the *SFFA* decision presented tests heretofore unknown to the trial and Circuit courts to hold that Harvard and UNC had not articulated a compelling interest.[14] This is an important distinction; on its face, the *SFFA* holding suggests that an admissions program that considers race, but can survive these new tests, would be narrowly tailored to achieve the compelling governmental interest of diversity.

Notably, the scope of *SFFA* is so narrow the decision did not even speak to the use of race in admissions at *all* institutions of higher education. The Court made clear that its ruling, which covered both public and private institutions of higher education, did *not* cover admissions decisions made at the U.S. service academies.[15] The Court denied certiorari on this very question less than a

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[7] IRS NPRM at 56814 ("'[o]ur acceptance of race-based state action has been rare for a reason. Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. That principle cannot be overridden except in the most extraordinary case.'") (quoting *SFFA*, 600 U.S. at 208 (internal citations omitted)).

[8] 600 U.S. at 208 ("These cases involve whether a university may make admissions decisions that turn on an applicant's race."); 600 U.S. at 343 ("Answering the question whether Harvard's and UNC's policies survive strict scrutiny under settled law is straightforward, both because of the procedural posture of these cases and because of the narrow scope of the issues presented by petitioner Students for Fair Admissions, Inc.") (Sotomayor, J., dissenting).

[9] *E.g.*, IRS NPRM at 56815 ("These proposed regulations would provide that **all forms of discrimination** … are against a fundamental public policy of the United States. . .", "the proposed regulations would make clear that discriminating based on race, color, or national or ethnic origin **for any purpose** by a private school is contrary to a fundamental public policy of the United States.") (emphasis added).

[10] 438 U.S. 265 (1978); *see Grutter v. Bollinger*, 539 U.S. 306, 325(2003).

[11] *Id*. at 320 ("[t]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.").

[12] *Bakke*, 438 U.S., at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

[13] The reluctance to directly overrule *Bakke* may rest upon the fact that the Court had affirmed the core holding of *Bakke* less than a decade before deciding *SFFA*. *See* IRS NPRM at 56814 (summarizing the near 50-year line of precedent from *Bakke, Grutter, Fisher I, and Fisher II* distinguished by *SFFA*).

[14] *SFFA*, 600 U.S., at 230. Nearly 50 years prior, Harvard's program was upheld as an exemplar in its use of race in admissions in *Bakke*. 438 U.S. at 316.

[15] 600 U.S. 213 (n.4) ("The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.").

year after the *SFFA* ruling, suggesting a majority of the Justices recognized some constitutional interest in sustaining racial diversity in at least one aspect of university admissions.[16]

Together, the narrow scope and limited holding of *SFFA* suggest the decision cannot support broader public policy like the Proposed Rule. This was the case last year when the Department of Education (Department) attempted to use the *SFFA* decision to issue guidance far afield of the actual holding of the case. On February 14, 2025, the Department promulgated guidance in the form of a Dear Colleague Letter (DCL) that threatened to take away funding from any school that exceeded the Department's expansive reading of *SFFA*.[17] In its guidance to schools, ED claimed that the *SFFA* holding could be interpreted beyond admissions, to touch any consideration of race, including diversity, equity, and inclusion (DEI) in education generally.[18] Further, ED would have required schools to certify that they were complying with the viewpoints expressed in the guidance, leaving them liable to litigation if they were found to have certified falsely.[19]

The National Education Association (NEA), American Federation of Teachers (AFT), and National Association for the Advancement of Colored People (NAACP) all brought suits challenging the guidance and the certification requirement in different federal courts as violations of both federal law and the Constitution.[20] After the AFT succeeded in having the DCL and its certification requirement vacated, the Department declined to appeal that case, and filed joint motions to dismiss the NEA and NAACP cases.[21] The guidance the Department attempted to justify under *SFFA* now has been held unlawful and vacated.[22]

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[16] *Id.*; *Students for Fair Admissions, Inc., v. United States Military Academy at West Point et al.*, cert. denied, 601 U.S. 1010 (2024); *but see* Memorandum from the Sec'y of Defense to Senior Pentagon Leadership Defense Agency and DOD Field Activity Directors (May 9, 2025), https://media.defense.gov/2025/May/09/2003707514/-1/-1/1/CERTIFICATION-OF-MERIT-BASED-MILITARY-SERVICE-ACADEMY-ADMISSIONS.PDF.

[17] U.S. Dep't of Educ., Off. for C.R., Dear Colleague Letter: Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf; *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023).

[18] U.S. Dep't of Educ., Off. for C.R., Dear Colleague Letter: Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf ("Although SFFA addressed admissions decisions, the Supreme Court's holding applies more broadly. At its core, the test is simple: If an educational institution treats a person of one race differently than it treats another person because of that person's race, the educational institution violates the law.")

[19] *Id.*; U.S. Dep't of Educ., Off. for C.R., Reminder of Legal Obligations Undertaken in Exchange for Receiving Federal Financial Assistance and Request for Certification Under Title VI and SFFA v. Harvard (April 3, 2025), https://www.ed.gov/media/document/reminder-of-legal-obligations-undertaken-exchange-receiving-federal-financial-assistance-and-request-certification-under-title-vi-and-sffa-v-harvard-april-3.pdf.

[20] *Nat'l Educ. Ass'n v. Dep't of Educ.*, 1:25-cv-0091 (D. N.H., Mar. 5, 2005); *Am. Fed'n of Teachers v. Dep't of Educ.*, 1:25-cv-00628 (D. Md., Feb. 25, 2025); *NAACP v. Dep't of Educ.*, 1:25-cv-01120 (D. D.C., Apr. 15, 2025).

[21] Press Release, Am. Fed'n of Teachers, Major Victory for Public Education as Trump Administration Abandons Appeal on "Dear Colleague Letter", (Jan. 21, 2026) https://www.aft.org/press-release/major-victory-public-education-trump-administration-abandons-appeal-dear-colleague; Press Release, NAACP, NAACP Celebrates Legal Victory in Challenge to Education Department's Anti-Opportunity "Dear Colleague Letter" (Feb. 6, 2026), https://naacp.org/articles/naacp-celebrates-legal-victory-challenge-education-departments-anti-opportunity-dear; Press Release, Nat. Educ. Ass'n, Department of Education Backs Down on Unlawful Directive Targeting Educational Equity (Feb. 18, 2026), https://www.nea.org/about-nea/media-center/press-releases/department-education-backs-down-unlawful-directive-targeting-educational-equity.

[22] *Am. Fed'n of Teachers v. Dep't of Educ.*, 1:25-cv-00628 (D. Md., Aug. 14, 2025) https://storage.courtlistener.com/recap/gov.uscourts.mdd.577437/gov.uscourts.mdd.577437.83.0_3.pdf.

The IRS' Proposed Rule argues that "all forms of racial discrimination in education, regardless of the intent behind or the legality of such discrimination (for example, where such discrimination is defended as serving remedial or diversity-related objective), are against a fundamental public policy of the United States."[23] The rule attempts to justify this position by referencing a line of cases stretching back over 75 years.[24] However, up until three years ago, it was understood that the fundamental public policy of the United States was not affronted by a "policy of a school that favors racial minority groups with respect to admissions, facilities and programs . . . when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students."[25]

In *Bob Jones University v. United States*, one of the cases the Proposed Rule relies on, the Supreme Court held as valid the IRS' interpretation that discriminatory practices of the University were contrary to a fundamental public policy.[26] But it is important to note that the discriminatory practices at issue in that case, the school's prohibitions on interracial dating and marriage, were ones that had long been held unconstitutional by the Supreme Court.[27] By 1983 when the case was decided, it was abundantly clear that the school's policies were contrary to fundamental public policies that for decades had outlawed segregation in education and bans on interracial marriage. Further, at the time the case was decided the IRS' 1975 interpretation allowing for the consideration of race in admissions to integrate private schools was in effect.

In claiming that a private school that engages in any form of racial "discrimination" in education should lose its nonprofit status, the Administration tries to justify itself in the Proposed Rule by claiming it is the logical outgrowth of over 75 years of cases. The problem is that for the majority of those 75 years, Courts recognized that using race as a factor to make determinations about admissions was constitutional and not counter to public policy. The Proposed Rule is simply not justified by decades of precedent.

The longstanding argument that race-conscious policies to remedy past discrimination are constitutional must be reconsidered

Justice Thurgood Marshall wrote a dissenting opinion to the *Bakke* decision that argued affirmative action programs were constitutional as an attempt to ameliorate past effects of systemic racial discrimination.[28] He argued that the same Congress that framed the Fourteenth Amendment also established "race-conscious relief measures" in law suggesting that the framers saw no conflict between the Fourteenth Amendment and laws directing state action to remedy the past effects of discrimination.[29] While racial equality, often rhetorically referred to as "colorblindness" should be the goal of the law, it was clear to Justice Marshall based on America's long legacy of entrenched

[23] IRS NPRM at 56815.
[24] *Id.*
[25] *Id.* at 56813 (quoting IRS Rev. Proc. 75-50 § 3.02).
[26] *Id.*
[27] *Brown v. Board of Education*, 327 U.S. 483 (1954) and *Loving v. Virginia*, 388 U.S. 1 (1967) were decided 29 and 16 years respectively, before *Bob Jones.*
[28] *Bakke*, 438 U.S., at 387 (Marshall, J., dissenting).
[29] *Id.* at 396-98 (Marshall, J., dissenting).

racial discrimination, that such equality could not be achieved via "colorblind" policies.[30] This reasoning highlights that there is a fundamental distinction between state action that advances continued racial discrimination, and state action designed to remedy the effects of past discrimination.[31]

While the effects of past discrimination were very obvious in the immediate aftermath of the Civil War, they persisted with the premature end of Reconstruction, the institution of Jim Crow, the *Brown* decision, the passage of civil rights legislation in the 1960s, and Supreme Court judgements requiring such laws to be enforced.[32] Justice Marshall's dissent presented statistics to suggest at the time of the *Bakke* decision, systemic racism was alive and well. The statistics covered multiple sectors of life where disparities between Black Americans and White Americans persisted.[33] These included life expectancy, child and infant mortality, median family income, poverty, unemployment rate, and, perhaps most relevant to *Bakke*, rates of degreed professionals (e.g., doctors, lawyers).[34] He concludes the statistical portion of his opinion stating

> The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.
> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.[35]

Nearly 50 years after Justice Marshall wrote his dissent in *Bakke*, Justice Ketanji Brown Jackson echoed his sentiment and reasoning in her dissent in *SFFA*, stating

> Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal.[36]

Justice Jackson revisits many of the same statistics cited by Justice Marshall illustrating disparities that have not closed significantly since *Bakke*.[37] Although they are separated by a half century, the two dissents are consistent: the refusal to confront the legacy of centuries of *de jure* and decades of

[30] *See id.* at 400-02 (Marshall, J., dissenting).
[31] *Id.* at 399-401 (Marshall, J., dissenting).
[32] *Id.* at 390-95 (Marshall, J., dissenting).
[33] *Id.* at 395 (Marshall, J., dissenting).
[34] *Id.* at 395-96 (Marshall, J., dissenting).
[35] *Id.* at 396 (Marshall, J., dissenting).
[36] *SFFA*, 600 U.S., at 384 (Jackson, J., dissenting).
[37] *Id*. at 393-96 (Jackson, J., dissenting).

de facto discrimination against African Americans make a mockery of the Fourteenth Amendment, written to secure the blessings of liberty for all Americans.[38]

The majority opinion in *SFFA* discounts the statistics and arguments of the Jackson dissent.[39] It claims these arguments have been presented before and could not garner enough support at the Court to become binding precedent, or run counter to past precedent.[40] Arguably the same thing could be said about the majority opinion, as many of its arguments echo back to previous dissents in cases upholding the use of race in admissions.[41] If the only thing determining the constitutionality of the consideration of race in admissions is the makeup of the Supreme Court, it does not seem to be an issue where "fundamental public policy" can be established.

Since assuming power, the current administration has attempted to make the *SFFA* decision a cornerstone supporting multiple policies not covered by the decision. This Proposed Rule is another attempt to do just that and remove the ability of private schools to use race as a factor in admission and other aspects of education. For the reasons stated, I request that the IRS abandon the Proposed Rule.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member

[38] *Id*. at 398 (Jackson, J., dissenting) ("Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise."); *Bakke*, 438 U.S., at 396-97 (Marshall, J., dissenting) ("It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negros").
[39] *SFFA*, 600 U.S., at 227.
[40] *Id.*
[41] *See*, *e.g.*, *Grutter*, 539 U.S., at 386 (Rehnquist, C.J., dissenting) ("Finally, I believe that the Law School's program fails strict scrutiny because it is devoid of any reasonably precise time limit on the Law School's use of race in admissions. We have emphasized that we will consider "the planned duration of the remedy" in determining whether a race-conscious program is constitutional."); *Fisher*, 579 U.S., at 401 (Alito, J., dissenting) ("Here, UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny.")