# The Unconstitutionality of State Laws Requiring Race-Based State Action

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Racial discrimination is wrong. It is also unconstitutional. Yet Florida maintains several laws on its books that promote and require discrimination on its face. Therefore, I requested, and I am now giving, an official opinion in writing on a question of law relating to my official duties.[1] As Florida's chief legal officer, the constitutionality of laws that seek to mandate discrimination based on race relates to my official duties as Attorney General.

The question of law presented here is: Are Florida laws that mandate discrimination based on race by giving preferences to certain racial groups, using race-based classifications, or employing racial quotas, constitutional? In short, the answer is no. Any laws requiring race-based state action are presumptively unconstitutional under the Fourteenth Amendment's Equal Protection Clause and Article I, section 2, of Florida's Constitution.[2]

## I. Constitutional Framework for Race-Based State Action

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[3] Article I, section 2 of Florida's Constitution similarly guarantees that all residents of Florida "are equal before the law" and prohibits any person from being "deprived of any right because of race, religion, national origin, or physical disability." "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."[4] Our country and our Constitution are therefore committed to "treat[ing] citizens as individuals, not as simply components of a racial, religious, sexual, or national class."[5] Were it otherwise, we would "effectively assur[e] that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decision making such irrelevant factors as a human being's race will never be achieved."[6]

For government officials, the path forward is simple: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[7] The Supreme Court recently reaffirmed as much in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), 600 U.S. 181 (2023). There, the Supreme Court invalidated Harvard College's and the University of North Carolina's race-based admissions procedures because they violated the Equal Protection Clause and Title VI of the federal Civil Rights Act. In doing so, the Court explained that such racial preferences are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[8] The Court further explained that "[a]ny exception to the Constitution's demand for equal protection must survive a daunting two-step examination known . . . as 'strict scrutiny.'"[9]

Strict scrutiny requires that any race-based state action be: (1) "used to 'further compelling governmental interests'" and (2) "'narrowly tailored'—meaning 'necessary'—to achieve that interest."[10] The Supreme Court has identified only two compelling interests that permit race-based state action: (1) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" and (2) "avoiding imminent and serious risks to human safety in prisons, such as a race riot."[11] These constitutional justifications are narrow and may not be extended lightly.

Narrow tailoring also requires race-based state action to be limited in duration because "all governmental use of race must have a logical end point."[12] Finally, race-based state action cannot be undertaken—and can never be narrowly tailored—if race-neutral alternatives have not been considered before a state resorts to utilizing race.[13] Putting this all together, the "moral imperative of racial neutrality" ensured by the Fourteenth Amendment demands that racial classifications are permitted only "as a last resort."[14]

These principles are "universal in [their] application."[15] *SFFA*'s reasoning and strict scrutiny analysis applies equally to race-based state action occurring in any context—whether it be in government contracting, business, healthcare, appointments, or other areas.[16] Indeed, the Florida Supreme Court recently applied *SFFA* outside of the educational context,[17] as have several federal courts.[18] Courts are therefore clear that honoring and enforcing the Fourteenth Amendment's promise to root out all forms of racial discrimination must be uniform throughout contexts and circumstances. After more than a century, it appears that American jurisprudence has finally caught up with Justice John Marshall Harlan's dissent in *Plessy*:

> Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[19]

## II. Florida Laws That Discriminate Based on Race

Despite the principles discussed above, Florida still has numerous race-based discrimination laws on its books.[20] These discriminatory laws generally come in the form of race-based classifications, preferences, or quotas. But as the Supreme Court directed in *SFFA*, "[e]liminating racial discrimination means *eliminating all of it*."[21] Accordingly, for the reasons explained below, Florida laws that mandate race-based discrimination violate the U.S. and Florida Constitutions. Consistent with the Fourteenth Amendment, the Florida Constitution, and my oath of office, my studied opinion is that these laws are unconstitutional.

### A. Race-Based Classifications

Florida law currently employs a system of race-based classifications that seeks to compel state agencies and other entities to discriminate based on race.[22] None of these laws withstands strict scrutiny. First, these laws do not further a compelling governmental interest because none of these laws identifies any of the limited, recognized constitutional justifications for race-based classifications—namely remedying specific instances of past discrimination or avoiding imminent and serious risks to human safety.[23] These laws further fail strict scrutiny because none are limited in duration and because they preclude race-neutral alternatives.[24]

One of the most egregious examples of race-based discrimination is section 110.112, Florida Statutes, which mandates state-wide participation in "programs of affirmative and positive action." Under section 110.112(2), the head of every executive agency must "develop and implement an affirmative action plan" which includes goals for race-based hires. Heads of agencies must also establish "annual goals for ensuring full utilization of groups underrepresented in the agency's workforce, including women, minorities, and individuals who have a disability, as compared to the relevant labor market."[25] To implement section 110.112, the Department of Management Services further promulgated detailed requirements for the content of each affirmative action plan: one such requirement is the listing of an organizational profile depicting the agency's organizational structure and "demographic information for all supervisors and employees within each unit and ... a total employee count … by race or ethnicity."[26] The affirmative action plan must also describe the agency's auditing procedure used to measure and determine the agency's progress toward meeting its goals[27] and requires each agency to report race-based metrics, ostensibly as evidence of progress in meeting numeric goals outlined in each agency's plan.[28]

Neither section 110.112 nor Rule 60L-40.002 would survive strict scrutiny. First, compliance with the statute or the Rule would not achieve a compelling public interest because the policy does not address either of the constitutionally recognized race-based justifications. And neither section 110.112 nor Rule 60L-40.002 are narrowly tailored because they are not limited in duration and disregard other potential means of achieving diversity in a workforce through race-neutral alternatives like geographic residence or socioeconomic status.

In sum, Florida law contains numerous race-based classifications that seek to compel state agencies and other entities to discriminate based on race. Because these laws compel discriminatory race-based state action and fail strict scrutiny, these and any other similar Florida laws are unconstitutional.

### B. Race-Based Preferences in Government Contracting

Like the race-based classifications, Florida law also contains a variety of discriminatory provisions for government contracting.[29] Because these provisions are simply another form of race-based state action, these government contracting laws are subject to the same strict scrutiny review discussed in *SFFA*. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court provided additional instruction on the issue of discriminatory contracting provisions. There, the Court struck down a city's plan requiring contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of their contracts to minority businesses, stating that an amorphous claim of past discrimination made by the city could not justify such quotas.[30] Instead, the Court noted that the Constitution requires a "strong basis in evidence" for any race-based remedial action.[31]

Like the race-based contracting plan in *Croson*, Florida's discriminatory contracting provisions earmark certain opportunities for minority contractors without providing any "strong basis in evidence" to support this racebased action. For example, section 287.09451, Florida Statutes, provides "spending goal[s]" based on race for state contracts:

a. For construction contracts: 4 percent for black Americans, 6 percent for Hispanic-Americans, and 11 percent for American women.
b. For architectural and engineering contracts: 9 percent for Hispanic-Americans, 1 percent for Asian-Americans, and 15 percent for American women.
c. For commodities: 2 percent for black Americans, 4 percent for Hispanic-Americans, 0.5 percent for Asian-Americans, 0.5 percent for Native Americans, and 17 percent for American women.

d. For contractual services: 6 percent for black Americans, 7 percent for Hispanic-Americans, 1 percent for Asian-Americans, 0.5 percent for Native Americans, and 36 percent for American women.

As justification, the Legislature simply pointed to "a systematic pattern of past and continuing racial discrimination against minority business enterprises and a disparity in the availability and use of minority business enterprises in the state procurement system."[32] This hat-tip to the racial lingo du jour falls woefully short of evidencing "specific, identified instances of past discrimination."[33] This and other provisions fail to satisfy strict scrutiny under *SFFA* because they are not tied to a compelling governmental interest, are not limited in duration, and do not appear to have considered any race-neutral alternatives.[34] Accordingly, any Florida law that seeks to compel race-based discriminatory provisions through government contracting is unconstitutional.

### C. Race-Based Quotas

Finally, Florida law contains various explicit and implicit quota requirements for minority representation on different boards, councils, and other similar entities.[35] Like the other forms of race-based state action, race-based quotas are subject to strict scrutiny. The Supreme Court has addressed race-based quotas in the past and held that such quotas cannot satisfy strict scrutiny review.[36]

Specifically, in *Regents of University of California v. Bakke*, the Supreme Court reviewed an admissions policy that reserved 16 out of 100 seats in a medical school class for members of certain minority groups.[37] Under this racial spoils system, non-minorities were ineligible for the reserved minority seats, while minorities were eligible for both the reserved minority seats and the remaining 84 unreserved seats.[38] The Court struck down the policy because it violated the Fourteenth Amendment.[39] And the Court has reaffirmed *Bakke* time and again.[40]

Like the quotas at issue in *Bakke*, Florida's explicit quota provisions reserve a proportional share of opportunities for minorities alone. For example, at least four members of the Florida Cancer Control and Research Advisory Council must be minorities.[41] Those statutes mention no remedial justifications for the discriminatory provisions. These and other similar quotas fail to comply with the Equal Protection Clause. They are tied to no compelling interests, are unlimited in duration, and have not considered any race-neutral alternatives. Accordingly,

all race-based quota requirements in Florida law are unconstitutional.

## III. Conclusion

Any Florida law that seeks to mandate discrimination based on race by giving preferences to certain racial groups, using race-based classifications, or by employing racial quotas is unconstitutional.[42] The Supreme Court has spoken directly and clearly on this issue: "Eliminating racial discrimination means *eliminating all of it*."[43] As Attorney General, I and my office must honor the U.S. and Florida Constitutions' guarantee of equal protection under the law. Because enforcing and obeying these discriminatory laws would violate those bedrock legal guarantees, those laws are unconstitutional. "The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."[44] My office, therefore, will not defend or enforce any of these discriminatory provisions.

Sincerely,

James Uthmeier
Attorney General

## Appendix[45]

**AHCA § 395.807, Fla. Stat.**: the family practice retention advisory committee is required to develop a program for recruiting minority physicians into family practice residency programs and to promote further efforts to retain and place minority physicians into local communities.

**AHCA § 409.901, Fla. Stat.**: defines "minority physician network" as a network of primary care physicians with experience managing Medicaid or Medicare recipients that are predominantly owned by minorities and have a partnership with a public college/university.

**AHCA § 409.920, Fla. Stat.**: includes minority physician networks in the definition of "managed care plans."

**AHCA § 641.217, Fla. Stat.**: requires any entity contracting with AHCA to provide services to Medicaid recipients or state employees to submit a plan outlining its plan for recruitment and retention of minority providers.

**Commerce § 20.60, Fla. Stat.**: requires the Secretary of the Department of Commerce to promote minority businesses.

**Commerce § 288.001, Fla. Stat.**: provides that minority status must be taken into consideration when making appointments to the Florida Small Business Development Center Network advisory board.

**Commerce § 288.0065, Fla. Stat.**: the annual report provided on annual incentives as part of the commercial development and capital improvements plan must include a description of the trends relating to business interest in and usage of incentives by minority-owned businesses receiving incentives.

**Commerce §§ 288.702-288.706, Fla. Stat.**: establishes the "Florida Small and Minority Business Assistance Act," which includes a loan program for minority businesses.

**Commerce § 288.7094, Fla. Stat.**: provides that black business investment corporations are eligible to participate in the Black Business Loan Program established under § 288.7102 and shall receive priority consideration.

**Commerce § 288.7102, Fla. Stat.**: Establishes the "Black Business Loan Program."

**Commerce §§ 288.7103 and 288.714, Fla. Stat.**: establishes the conditions of the black business loan program.

**Commerce § 288.1167, Fla. Stat.**: sets aside 15% of contracts for sports franchise food and beverage concessions for minority businesses.

**Commerce § 288.12266, Fla. Stat.**: creates the Targeted Marketing Assistance Program to enhance the tourism business marketing of small, minority, rural, and agritourism businesses in the state.

**Commerce § 288.1229, Fla. Stat.**: the Florida Sports Foundation's board of directors is required to contain representatives of all regions of the state and must represent ethnic diversity.

**Commerce § 288.124, Fla. Stat.**: authorizes the "Florida Tourism Industry Marketing Corporation" to establish a convention grants program to attract minority conventions.

**Commerce § 288.7015, Fla. Stat.**: requires the Governor to appoint a rules ombudsman who—among other things—reviews rules for any disproportionate impact on small and minority businesses.

**Commerce § 288.776, Fla. Stat.**: provides that minority representation must be taken into consideration when making appointments to the Florida Tourism Industry Marketing Corporation.

**Commerce § 290.0056, Fla. Stat.**: provides that minority representation in enterprise zone development agencies must be taken into account when making appointments.

**Commerce § 290.0057, Fla. Stat.**: requires strategic plans for new enterprise zones to identify the amount of private/public partnerships which may include cooperation with black business investment corporations.

**Commerce § 290.046, Fla. Stat.**: as part of the application for grants in the urban redevelopment program, the "needs score" may take into account the use of minority-owned enterprises in previous grants.

**Commerce § 625.3255, Fla. Stat.**: "An insurer may invest in any capital participation instrument or evidence of indebtedness issued by the Department of Commerce pursuant to the Florida Small and Minority Business Assistance Act."

**Commerce § 658.67, Fla. Stat.**: "up to 10 percent of the capital accounts of a bank or trust company may be invested in any capital participation instrument or evidence of indebtedness issued by the Department of Commerce pursuant to the Florida Small and Minority Business Assistance Act."

**DBPR § 320.63, Fla. Stat.**: motor vehicle applicants and licensees must report annually to DBPR on its efforts to add new minority dealer points.

**DBPR § 473.3065, Fla. Stat.**: establishes the "Clay Ford Scholarship Program" to assist minority people in becoming Certified Public Accountants.

**DBPR § 489.111, Fla. Stat.**: requires DBPR to establish "a sensitivity review committee" made of representatives of various ethnic and minority groups to ensure that no discriminatory questions are present in the contracting licensing exam.

**DEP § 373.1135, Fla. Stat.**: authorizes water management districts to implement a program to encourage minority owned businesses to participate in district procurement and contract activities.

**DEP § 373.607, Fla. Stat.**: authorizes water management districts to implement recommendations to achieve minority business enterprise procurement goals.

**DEP § 376.84, Fla. Stat.**: provides for incentives for minority business enterprises program for brownfield redevelopment.

**DFS § 17.11, Fla. Stat.**: requires the Chief Financial Officer to submit a report regarding disbursements to minority-owned businesses.

**DFS § 626.2415, Fla. Stat.**: authorizes DFS to provide life insurance examinations providers demographic information on applications relating to examinations taken to qualify for an insurance agent license if DFS requires

the provider to review and analyze examination results in conjunction with the race or ethnicity and native language of examinees.

**DHSMV § 320.605, Fla. Stat.**: declares it the intent of the Legislature to provide minorities with opportunities for full participation as motor vehicle dealers.

**DHSMV § 322.292, Fla. Stat.**: when considering applications for DUI program licenses, the Department of Highway Safety and Motor Vehicles is required to take into account if the program will provide improved services for minority clients.

**DMS § 110.112, Fla. Stat.**: declares the policy of this state is to assist in providing the assurance of equal opportunity through programs of affirmative and positive action that will allow the full utilization of minorities.

**DMS § 110.211, Fla. Stat.**: requires state employment recruitment efforts to place special emphasis on attracting minorities and other groups that are underrepresented in the workforce of the employing agency.

**DMS § 110.605, Fla. Stat.**: requires DMS to develop an affirmative action program to ensure the "full utilization" of minorities in Selected Exempt Service positions in the state.

**DMS § 255.101, Fla. Stat.**: cross references to §§ 287.093 and 287.09451, which relate to affirmative action in contracts for public construction works.

**DMS § 255.102, Fla. Stat.**: establishes affirmative action programs in construction contracts for state universities capital projects.

**DMS § 255.20, Fla. Stat.**: provides that the local government may further consider the impact on local economic development, the impact on small and minority business owners as part of their consideration of bids for public construction work.

**DMS § 287.012, Fla. Stat.**: defines "minority business enterprise" and "office" (Office of Supplier Diversity).

**DMS § 287.042, Fla. Stat.**: the Office of Supplier Diversity within DMS may monitor to ensure that opportunities are afforded for contracting with minority businesses as part of state contracts for commodities and contractual services. DMS must explore "reasonable and economical" ways to use certified minority businesses.

**DMS § 287.055, Fla. Stat.**: acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services—when securing professional services, an agency must endeavor to meet goals set by § 287.09451. One of the requirements agencies must consider as part of the procurement process is whether the vendor is a minority business.

**DMS § 287.057, Fla. Stat.**: procurement of commodities or contractual services—several provisions related to the use of minority businesses and the Office of Supplier Diversity.

**DMS § 287.059, Fla. Stat.**: one of the characteristics that agencies are "encouraged" to consider when hiring outside counsel is the law firm's minority status.

**DMS § 287.093, Fla. Stat.**: authorizes counties, municipalities, community colleges, and district school boards to set aside up to 10% of funds allocated for the procurement of personal property and services for the purpose of entering into contracts with minority business enterprises.

**DMS § 287.0931, Fla. Stat.**: state and local government agencies are encouraged to offer at least 20% participation to minority firms in bond underwriting.

**DMS § 287.094, Fla. Stat.**: establishes the certification of minority business enterprises.

**DMS § 287.0943, Fla. Stat.**: creates a task force to establish criteria to increase minority business participation in the procurement process.

**DMS § 287.09431, Fla. Stat.**: statewide and local government agreement to "remedy social and economic disadvantage suffered by certain groups."

**DMS § 287.09451, Fla. Stat.**: creates the Office of Supplier Diversity within DMS to assist minority businesses in becoming suppliers of commodities, services, and construction to the state. Establishes racial quotas for several professions who may contract with the state, such as construction workers, architects, engineers, and other contracted services.

**DMS § 287.0947, Fla. Stat.**: creates the Florida Advisory Council on Small and Minority Business Development. The council researches and reviews the role of small and minority businesses in the state, reviews emerging issues

relating to small and minority business development, and assesses the reasonableness and effectiveness of agency actions to assist minority businesses.

**DOE § 446.041, Fla. Stat.**: establishes the duties of DOE in administering apprenticeship programs; requires DOE to ensure that "minority … diversity" is considered in administering the program.

**DOE § 1001.216, Fla. Stat.**: establishes the Council on the Social Status of Black Men and Boys. The Council's goal is to make a systematic study of the conditions affecting black men and boys, including homicide rates, arrest and incarceration rates, poverty, violence, drug abuse, death rates, disparate annual income levels, school performance, and health issues.

**DOE § 1001.452, Fla. Stat.**: requirements for district and school advisory councils to be representative of the "ethnic, racial, and economic" community served by the school; requires councils to appoint additional member to ensure proper representation; requires the Commissioner of Education to determine that each council has maximized their efforts to include minority persons and persons of lower socioeconomic status.

**DOE § 1002.32, Fla. Stat.**: requires lab schools to promote and encourage the student admissions process to result in a representative sample of public-school enrollment based on race, socioeconomic status, and academic ability, notwithstanding non-discrimination requirements in schools, set forth ins. 1000.05.

**DOE § 1004.42, Fla. Stat.**: establishes the FSU College of Medicine with a principal focus on recruiting and training professionals to meet the primary health care needs of the state, especially the needs of the state's elderly, rural, minority, and other underserved citizens. Clinical exposures are programmed with a focus on that goal. The College is directed to increase recruitment of minority students by participating in outreach efforts like the Program in Medical Sciences targeting middle and high school students.

**DOE § 1006.20, Fla. Stat.**: the Florida High School Athletic Association's public liaison advisory committee is required to include a member school principal who is a member of a racial minority.

**DOE § 1007.34, Fla. Stat.**: creates a college reach-out program to increase the number of low- income educationally disadvantaged minority students to increase their likelihood of attending post-secondary institutions.

**DOH § 20.43, Fla. Stat.**: establishing within the Department of Health the Office of Minority Health and Health Equity.

**DOH § 383.216, Fla. Stat.**: mandating that the membership of any prenatal and infant health care coalition must represent a community's racial composition.

**DOE § 1007.35, Fla. Stat.**: creates the Florida Partnership for Minority and Underrepresented Student Achievement with the aim to "prepare, inspire, and connect" students to success in higher education with a particular emphasis on minority students.

**DOH § 383.402, Fla. Stat.**: appointments to the Child Abuse Death Review Committee must represent the regional and ethnic diversity of the state.

**DOH § 1004.435, Fla. Stat.**: four appointed members of the Florida Cancer Control and Research Advisory Council must be minorities.

**EOG § 187.201, Fla. Stat.**: state comprehensive plan includes the goal to promote entrepreneurship and minority owned business startup by providing technical and informational resources, facilitating capital formation, and removing regulatory restraints which are unnecessary for the protection of consumers and society.

**Elder § 430.502, Fla. Stat.**: a requirement for memory disorder clinics to receive above base-level funding to show that they are significantly increasing their outreach to low- income and minority populations.

**FCHR § 760.80, Fla. Stat.**: minority representation on boards, commissions, councils, and committees—requires that all appointments select among the best-qualified candidates those who would best represent the proportion of each minority group in the state. Applies to any statutorily created decision making or regulatory board, commission, council, or committee of the state.

**Gaming § 16.71, Fla. Stat.**: requires the Governor to take into consideration the state's racial and ethnic diversity when making appointments to the Florida Gaming Control Commission.

**Gaming § 551.104, Fla. Stat.**: the FGCC is required to create a written policy creating opportunities to purchase from vendors in this state "including minority vendors."

**Judiciary § 25.382, Fla. Stat.**: requires the Supreme Court to have written goals for the recruitment of minorities, including women, throughout the state courts system. The Chief Justice is to receive an annual report on the progress of this goal.

**Judiciary § 26.021, Fla. Stat.**: requires then Judicial Nominating Commissions ("JNC") of each circuit court to take into account racial and ethnic considerations when making judicial appointment recommendations.

**Judiciary § 43.291, Fla. Stat.**: requires the Governor to take into consideration the racial and ethnic diversity of the state when making appointments to the JNC.

**Lottery § 24.113, Fla. Stat.**: requires the Florida Lottery to promote minority business participation in Lottery retail.

**OIR § 627.3511, Fla. Stat.**: minority businesses may exempt up to $50 of the escrow requirements of the take-out bonus and the business may simultaneously file the business' proposed take-out plan with Citizens.

**Space Florida § 331.351, Fla. Stat.**: Space Florida is required to "involve and utilize women, minorities, and socially and economically disadvantaged business enterprises" in the operation of spaceports.

**State University System § 1001.706, Fla. Stat.**: the Board of Governors is required to ensure compliance with §§ 287.09451, 255.101, and 255.102 for most procurement and construction contracts (these sections relate to the usage of minority business enterprises).

**State University System § 1009.23, Fla. Stat.**: authorizes each Florida College System institution board of trustees to charge a fee up to 5% of the student tuition for the purposes of financial aid. The statute authorizes up to 25% of $600,000—whichever is greater—of those fees to be used to provide merit scholarships for students but also for students who "identify" as members of a targeted ethnic minority population.

**State University System § 1009.60, Fla. Stat.**: creates the minority teacher education scholars program, which provides scholarships for education majors who are African American, Hispanic American, Asian American, or Native American.

**State University System § 1009.605, Fla. Stat.**: creates the "Florida Fund for Minority Teachers."

**State University System § 1009.70, Fla. Stat.**: creates the Florida Education Fund which among other goals, aims to enhance access to higher education programs by minority and economically deprived individuals, with particular consideration given to the needs of both blacks and women. The funds were obtained through a grant from the

McKnight Foundation.

**State University System § 1009.72, Fla. Stat.**: creates the Jose Marti Scholarship Challenge Grant Program for Hispanic American students.

**State University System § 1013.46, Fla. Stat.**: authorizes counties, municipalities, or boards to set aside up to 10% of funds allocated for capital construction project contracts to enter into contracts with minority business enterprises in order to redress present effects of past discriminatory practices.

**Transportation § 339.175, Fla. Stat.**: appointments to each metropolitan planning organization's citizens' advisory board must be made with the consideration that minorities, the elderly, and the handicapped are adequately represented.

**Workforce Development § 445.004, Fla. Stat.**: when making appointments to the CareerSource Florida Board the Governor must take into account the minority and geographic composition of the Board.

**Workforce Development § 445.007, Fla. Stat.**: appointments to the local workforce development board must take into account minority representation.

[1] *See* § 16.01(3), Fla. Stat.

[2] In addition to the statutes and rules cited throughout this Opinion, see the **Appendix** to this Opinion for a non-exhaustive list of other state laws that require race-based discrimination.

[3] U.S. Const. amend. XIV § 1.

[4] *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."); *Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

[5] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

[6] *Id.* (quotation marks omitted).

[7] *Id.* at 748.

[8] *SFFA*, 600 U.S. at 208 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2007)).

[9] *Id.* at 206 (citing *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995)).

[10] *Id.* at 206-07.

[11] *Id.* at 207.

[12] *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003); *see also SFFA*, 600 U.S. at 221 (explaining that the colleges' admission procedures "also lack a 'logical end point'" (quoting *Grutter*, 539 U.S. at 342)).

[13] *See Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 377 (2016) (reasoning that narrow tailoring requires the government to show that no workable race-neutral alternatives would achieve its compelling interest). The Supreme Court in *SFFA* permitted states to consider race-neutral alternatives. "The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb." 600 U.S. at 220, 230 (emphasis in original) (explaining that "nothing in [*SFFA*] 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"); *see also Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 62 (1st Cir. 2023) (explaining that "treating students differently based on the zip codes in which they reside was not like treating them differently because of their skin color"). Consequently, there would likely be no constitutional issues if a state, like Florida, were to replace racially biased language in policy or laws with language giving preferences to groups based on factors such as geography or socioeconomic status, so long as they are not proxies for race. *See SFFA*, 600 U.S. at 230-31.

[14] *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009).

[15] *SFFA*, 600 U.S. at 206.

[16] *See Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745, 770 n.8 (E.D. Tenn. 2023) ("The facts in [*SFFA*] concerned college admissions programs, but its reasoning is not limited to just those programs.").

[17] *Black Voters Matter Capacity Bldg. Inst., Inc. v. Sec'y of Fla. Dep't of State*, 415 So. 3d 180, 196 (Fla. 2025).

[18] *See, e.g.*, *Ultima Servs. Corp.*, 683 F. Supp. 3d at 764-74 (applying the *SFFA* analysis to a contract award program administered by the U.S. Department of Agriculture and the Small Business Administration); *Mid-Am. Milling Co., LLC v. United States Dep't of Transp.*, 2024 WL 4267183, at *9 (E.D. Ky. Sept. 23, 2024), *opinion clarified*, 2024 WL 4635430 (E.D. Ky. Oct. 31, 2024) (applying *SFFA* to the Department of Transportation's Disadvantaged Business Enterprise Program); *Fellowship of Christian Athletes v. D.C.*, 2024 WL 3400104, at *87-88 (D.D.C. July 11, 2024) (applying *SFFA* when evaluating an anti-discrimination policy applied against a high school chapter of the Fellowship of Christian Athletes); *Smyer v. Kroger Ltd. P'ship I*, 2024 WL 1007116, at *7-8 (6th Cir. Mar. 8, 2024) (Boggs, J., concurring) (considering *SFFA's* application in the context of employment discrimination).

[19] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[20] *See* **Appendix**.

[21] *SFFA*, 600 U.S. at 206 (emphasis added).

[22] *See, e.g.*, § 288.1167(1)-(3), Fla. Stat. (giving preferences to minorities in sports franchise contracting); § 1002.32(4), Fla. Stat. (requiring laboratory schools to create and utilize admissions programs considering race); § 1006.20(6)(a), Fla. Stat. (requiring a minority principal to be placed on every public liaison advisory committee).

[23] *SFFA*, 600 U.S. at 207.

[24] *Id.* at 221.

[25] § 110.112(2)(b), Fla. Stat.

[26] Rule 60L-40.002(2)(c), Fla. Admin. Code (titled, "Equal Employment Opportunity and Affirmative Action").

[27] Rule 60L-40.002(2)(i), Fla. Admin. Code.

[28] Rule 60L-40.002(2)(o)-(p), Fla. Admin. Code.

[29] *See, e.g.*, § 288.706, Fla. Stat.; § 1013.46(1)(c), Fla. Stat.

[30] *Croson*, 488 U.S. at 497-99.

[31] *Id.* at 510 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

[32] § 287.09451(1).

[33] *SFFA*, 600 U.S. at 207.

[34] A Florida federal court has already held that section 287.09451 violates the Fourteenth Amendment. *Fla. A.G.C. Council, Inc. v. Florida*, 303 F. Supp. 2d 1307, 1316 (N.D. Fla. 2004) (holding "that § 287.09451 *et seq.* is not narrowly tailored to serve a compelling governmental interest, and consequently violates the Equal Protection Clause of the Fourteenth Amendment").

[35] *See, e.g.*, § 420.622(2), Fla. Stat. (requiring minority representation to be considered in the appointment of members to the Council on Homelessness).

[36] *See* 438 U.S. 265, 319-20 (1978).

[37] *Id.* at 289.

[38] *Id.* at 319-20.

[39] *Id.* at 320.

[40] *See, e.g.*, *Grutter*, 539 U.S. at 334 (holding that race-based quota programs are not narrowly tailored and are thus incapable of surviving strict scrutiny review).

[41] § 1004.435(4)(a), Fla. Stat.

[42] To be clear, this Opinion does not purport to discuss every race-based discriminatory law in the State of Florida. The laws cited herein are examples of *some* of these discriminatory laws. The Appendix to this opinion contains additional laws that—for reasons expressed herein—are unconstitutional as applied in a racial context.

[43] *SFFA*, 600 U.S. at 206 (emphasis added).

[44] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

[45] The state agency or branch primarily affected by the statute is listed next to the applicable statute along with a general description of the statute.