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By German Lopez

**Good morning. A conservative Supreme Court majority seemed skeptical of allowing colleges to consider race as a factor in admissions.**



The Supreme Court yesterday morning. Shuran Huang for The New York Times

## A policy in peril

Laws need support from the public or the courts to survive. Affirmative action seems to have neither.

The Supreme Court [heard arguments](#) yesterday in two cases challenging race-conscious admissions policies at the University of North Carolina and Harvard.

The anti-affirmative action group Students for Fair Admissions brought both cases. The group argued that the policies amounted to illegal and unconstitutional racial discrimination, particularly against white and Asian applicants who might lose out in a zero-sum admissions process if their Black and Latino peers were to get preference.

Lawyers arguing in support of affirmative action, including from the Biden administration, countered that the policies were necessary to address racial

disparities in education going back centuries. They also said that race was only one factor among several that colleges take into account in deciding which students to admit.

The Supreme Court has upheld affirmative action policies going back to 1978 and most recently in 2016. But the court's ideological makeup has changed drastically since then. Now, six of the nine justices are conservatives appointed by Republican presidents who typically take an unfriendly view toward affirmative action.

Throughout nearly five hours of heated arguments for both cases, the justices in the court's conservative majority aggressively questioned the lawyers arguing in favor of affirmative action policies. They appeared skeptical that such policies were necessary, fair or the best way to address racial gaps in higher education. Chief Justice John Roberts, who has long been skeptical of affirmative action, and other conservative justices suggested that Harvard had discriminated against applicants of Asian descent by disfavoring them in the admissions process.

Affirmative action policies "seemed to be in peril," my colleague Adam Liptak, who covers the court, wrote after the hearings. The court will likely issue its rulings in June.

## **Public opposition**

Lawmakers can, in theory, override Supreme Court decisions. But such a reversal typically requires support from their constituents: The public, after all, elects representatives who enact laws and place judges on courts. The public can also protest or criticize the courts to try to sway them. And the public can push to amend the U.S. Constitution or state constitutions.

That process is playing out over abortion rights, through a backlash to the Supreme Court's decision in June striking down *Roe v. Wade*. Weeks after the ruling, voters in reliably conservative Kansas overwhelmingly chose to preserve abortion rights in the state's Constitution. Of [four abortion-related measures](#) on state ballots in next week's midterms elections, three seek to explicitly affirm the right to the procedure.

Democrats also saw boosts in polls after *Roe* was overturned (though those gains have diminished). And President Biden has promised to sign abortion rights protections into federal law if Democrats expand their control of Congress.

A similar movement defending affirmative action seems unlikely because a majority of Americans oppose the policy. Nearly three-quarters of U.S. adults

said in March that race or ethnicity should not be a factor in college admissions, a Pew Research Center survey [found](#). A majority of Black, Hispanic and Asian respondents opposed the consideration of race or ethnicity.

Even in liberal states, most voters [do not support](#) affirmative action. In 2020, about 57 percent of Californians rejected an amendment to the state's Constitution that would have let government and public institutions, including public universities, adopt affirmative-action policies. In that same election, Biden won more than 63 percent of the vote in the state.

So if the Supreme Court strikes down affirmative action, it's not clear what, if any, path exists for policies like the University of North Carolina's or Harvard's to survive.

Without affirmative action, schools could struggle to boost diversity. Or they may have to resort to socioeconomic status and [other proxy measures](#) to do so, which some conservative justices seemed open to allowing. "That's the question, really," Adam said. "Not 'Do the universities lose?' but 'How do they lose?'"

## More on the hearings

- In their questions, the court's conservative justices suggested that schools [could achieve educational diversity](#) without directly accounting for race.
- Battles over selective high schools' admissions policies have [galvanized Asian American voters](#) in states like California and Virginia.
- Affirmative action is used in about a quarter of countries around the world, [including France and Brazil](#).
- The pandemic particularly affected students of color and low-income students. Many are struggling to [navigate college](#).
- In Times Opinion, John McWhorter has written that Asian American students shouldn't [pay the price for campus diversity](#). Jennifer Lee argued that Asian Americans [benefit from a positive bias](#) from teachers before they apply to college.

A MESSAGE FROM AURA

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