

## AFFIRMATIVE ACTION AND HEALTH EQUITY ISSUE BRIEF

### AFFIRMATIVE ACTION AND PUBLIC HEALTH REPERCUSSIONS

DECEMBER 15, 2022

On October 31, 2022, the U.S. Supreme Court held oral arguments in 2 cases on affirmative action in private and public university admissions: [\*Students for Fair Admissions, Inc. v. President & Fellows of Harvard College\*](#) and [\*Students for Fair Admissions, Inc. v. University of North Carolina\*](#). At the center of these cases, respectively, is (1) whether universities may use race and/or ethnicity as a direct factor in student admissions process and (2) whether such affirmative action violates the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court's decision is not expected until mid-2023, but early signs indicate it may potentially restrict affirmative action in university admission processes. Rejection of affirmative action under principles of equal protection may include a general prohibition or significant restrictions of direct use of race and/or ethnicity as decision factors in other governmental contexts as well, including allocating public health resources or services or distributing health benefits.


To illuminate potential forthcoming impacts of these decisions, this issue brief highlights select ways in which race and/or ethnicity were historically or are currently used as public health decision-making or allocation factors in programs, research, funding, or workforce issues in the U.S. through (I) federal laws, (II) federal programs and agencies, and (III) select state laws in California and Florida.

#### I. Federal Laws

Congress and federal administrative agencies routinely describe or use race, ethnicity, minority, or other similar factors in creating, funding, or administering public health programs or health care services via statutes and regulations. The following examples are found directly within the U.S. Code and Code of Federal Regulations.

**Programs.** The [National Institute on Minority Health and Health Disparities](#) within the National Institutes of Health (NIH) was created in March 2022 to conduct and support research, training, information dissemination, and other programs "[with respect to minority health conditions and other populations with health disparities.](#)"

On December 27, 2020, Congress directed the Secretary of Health and Human Services (HHS) and Director of the Centers for Disease Control and Prevention (CDC) to conduct a national campaign to increase young women's knowledge of breast health and cancer, including "[general and specific risk factors in women who may be at high risk for breast cancer based on familial, racial, ethnic, and cultural backgrounds such as Ashkenazi Jewish populations.](#)"



As of December 14, 2020, states contracting with [managed care programs](#) pursuant to Centers for Medicare & Medicaid Services (CMS) regulations must assess and improve the quality of health care and services through these programs. State plans must "[identify, evaluate, and reduce . . . health disparities based on age, race, ethnicity, sex, primary language, and disability status.](#)" Hospitals reporting [quality measures related to specific orthopedic surgery procedures](#) to CMS in 2021 must include race and ethnicity data related to risk for patient-reported outcomes.

Report and recommendations of the [Tobacco Products Scientific Advisory Committee](#) (established August 12, 2009) focus on "[the impact of the use of menthol in cigarettes on the public health, including such use among children, African Americans, Hispanics and other racial and ethnic minorities\[.\]](#)"

The [Office of Minority Health](#) (OMH) was established in March 2010 within HHS to focus on "improving minority health and the quality of health care minorities receive, and [eliminating racial and ethnic disparities.](#)" OMH supports research, improves information dissemination, education, prevention services, and ensures the National Center for Health Statistics (NCHS) collects health data on minority groups.

Created in 2007, the [National Heart, Lung, and Blood Institute](#) conducts and supports research and education programs underlying the prevalence of "[heart attack, stroke, and other cardiovascular diseases in women, including African-American women and other women who are members of racial or ethnic minority groups.](#)" Similarly, the National Institute of Arthritis and Musculoskeletal and Skin Diseases supports research on the "[prevalence of lupus in women, including African-American women.](#)" Key sponsored studies assess the differences in frequency and disease trajectory among the sexes and racial and ethnic groups.

In 2006, Congress required the Substance Abuse and Mental Health Services Administration (SAMSHA) to "[assure that the unique needs of minority women, including Native American, Hispanic, African-American and Asian women, are recognized](#)" in creating goals and programs to prevent or eliminate the burden of mental and substance use disorders.

**Funding.** The National Center for Vital Statistics ([NCHS](#)) awards grants for states to facilitate data collection on ethnic and racial populations. Under the [Minority AIDS Initiative](#), grant funds are allocated to education and outreach services, health care providers, and centers who work towards evaluating and addressing the impact of HIV/AIDS on "[racial and ethnic minorities.](#)"

Effective March 15, 2022, organizations establishing or operating programs to deliver [integrated health services to pregnant and postpartum women](#) to improve health outcomes, including health disparities of minority populations, can receive grants provided they include individuals of communities with disproportionately higher rates of maternal mortality and morbidity, such as "[those representing racial and ethnic minorities.](#)"

**Workforce.** [OMH](#) requires its Advisory Committee members to represent, equally, "[racial and ethnic minority groups](#)" defined to include American Indian, Alaska Native, Eskimo, and Aleut individuals, Asian Americans, Native Hawaiians and Pacific Islanders, and Black and Hispanic populations.

SAMSHA's [Minority Fellowship Program](#) awards fellowships to post baccalaureate training for mental and substance use disorder treatment professionals to increase knowledge of such conditions relating to prevention, treatment, and recovery support for individuals from racial and ethnic minority populations, improving treatment services to minority populations, and increasing the number of culturally competent professionals.

To improve [nursing workforce diversity](#), HHS' Secretary may award grants to entities to increase nursing education opportunities "[for individuals who are from disadvantaged backgrounds \(including racial and ethnic minorities underrepresented among registered nurses\).](#)"



## II. Federal Programs/Agencies

This section highlights ways in which federal administrative agencies commonly use race and/or ethnicity as factors in supporting research, as well as creating and funding programs focused on public health or health care services.

**Research.** To the extent [biomedical research workforce diversity](#) improves the likelihood that research reaches diverse communities, race and/or ethnicity may be a core factor underlying specific research endeavors. On November 4, 2022, [NIH](#) approved offering diversity, equity, and inclusion grants to institutions addressing shortcomings illuminated by evaluations of institution-wide diversity and equity programs. The [UNITE program](#) was established in 2021 to address structural racism within the scientific community and increase racial equity in the biomedical research workforce. NIH also funds [diversity-related research](#) targeting communities of color (e.g., Black, Hispanic or Latino Americans, American Indian, Alaska Native, and Native Hawaiian persons) in [HIV](#), [genomics](#), [substance abuse and addiction](#), and [Alzheimer's Disease](#).

The Department of Veterans Affairs' (VA) [Center for Minority Veterans](#) advocates for inclusion of veterans belonging to minority groups in clinical research of particular health conditions (e.g., [diabetes](#), [hypertension](#), [cancer](#), [post-traumatic stress disorder](#)).

**Programs.** HHS established the [Indian Health Service \(IHS\)](#) in 1955 to provide health services to "persons of Indian descent belonging to the Indian community." Federal health programs like IHS that solely benefit American Indian populations may be directly impacted by additional, forthcoming Supreme Court jurisprudence centered on equal protection principles. On November 9, 2022, the Court held oral arguments in [Haaland v. Brackeen](#), considering whether "*Native American*" is a political or racial classification. Pursuant to various provisions of the federal Indian Child Welfare Act, Native Americans are considered political groups. In *Haaland*, this classification was challenged as potentially violative of equal protection principles related to adoption policies impacting Native American children. The Court's decision (expected in mid-2023) may seriously question federal programs like IHS that primarily [serve Native Americans](#).

On March 15, 2022, the newly-created [Advanced Research Projects Agency for Health \(APRA-H\)](#) was established to "[make pivotal investments in break-through technologies and broadly applicable platforms, capabilities, resources, and solutions that have the potential to transform important areas of medicine and health for the benefit of all patients\[.\]](#)" As the [White House](#) explained, APRA-H is also committed to improving health equity, understanding diseases from all lenses, and "[deliver\[ing\] benefits to those who are disproportionately affected by health inequities.](#)"

[CDC](#) routinely utilizes race and ethnicity as factors to collect and report health statistics that help address health disparities. During the COVID-19 pandemic, for example, CDC established the [National Initiative to Address COVID-19 health disparities](#), which included racial and ethnic minority populations. Disparities across racial groups during the pandemic informed the [allocation of scarce medical resources](#) (e.g., [vaccine distributions](#)) based explicitly on race. For example, [Dallas County](#) prioritized residents in predominately Black and Latino neighborhoods for COVID-19 vaccines. [Oregon](#) attempted to similarly prioritize minority populations for vaccine allocations in January 2021, but legality concerns derailed those plans.

President Biden's [American Rescue Plan](#) (May 2022) addressing the COVID-19 pandemic specifically prioritizes fund allocation by race. This includes debt relief to "socially disadvantaged" farmers, ranchers, homeowners, and business owners. Among persons who are considered "socially disadvantaged" are "[Black Americans; Hispanic Americans; Native Americans \(Including Alaska Natives and Native Hawaiians\); Asian Pacific Americans; or Subcontinent Asian Americans.](#)"



**Funding.** Federal funding is routinely allocated to projects with race and/or ethnicity goals at their core. [Maternal mortality and morbidity](#) disproportionately affect Black and Native American populations in the United States. In response, [HHS announced in 2021 nearly \\$350 million](#) to address these disparities. HHS' [Health Resources and Services Administration](#) awarded these funds to every state for specific maternal and child programs.

[HHS' OMH](#) provides support and federal grants to entities (e.g., state offices of minority health, community and faith-based organizations, institutions of higher education, tribal organizations, and research organizations) to eliminate health disparities among minority populations. Additionally relevant past and current federally-funded programs include:

- [American Indian/Alaska Native Health Disparities Program](#) (improving the effectiveness of efforts to eliminate health disparities for American Indian and Alaska Native communities);
- [Curbing HIV/AIDS Transmission among High-Risk Minority Youth and Adolescents](#) (improving HIV/AIDS health outcomes of high-risk minority youth);
- [Eliminating Lupus Health Disparities Initiative](#) (eliminating health disparities among racial and ethnic populations disproportionately affected by lupus);
- [Linkage to Life program: Rebuilding Broken Bridges for Minority Families Impacted by HIV/AIDS](#) (improving health outcomes among high-risk minority populations in transition from domestic violence, incarceration, and substance abuse treatment; addressing barriers contributing to HIV/AIDS incidence among high-risk, racial, and ethnic minorities); and
- [National Umbrella Cooperative Agreements I and II](#) (increasing diversity of the health-related work force, reducing health disparities for minority populations (I) and demonstrating how partnerships between the federal government and national organizations improve health access for targeted racial/ethnic minority populations (II)).

### III. State Laws

This section highlights select ways in which race and/or ethnicity are used in public health programs or health care services in state laws in California and Florida. Other states' laws may reflect similar examples or themes.

**California.** California's Health and Safety Code expressly defines vulnerable populations as including "[racial and ethnic groups experiencing disparate health outcomes](#)" (e.g., Black, American Indian, and Alaska Native populations). Pursuant to this and other state laws, manifold programs and initiatives focused on race and/or ethnicity are legally authorized including the following examples:

- On June 30, 2022, California developed a program to fund and support vital public health activities by local health jurisdictions, which includes base grants of \$350,000. Remaining funds will be provided to jurisdictions proportionally, including "[25 percent based on the 2019, or the most recent, portion of the population that is Black/African American, Latinx, or Native Hawaiian or Pacific Islander.](#)"
- On January 1, 2022, California's legislature declared that the "[Black, Hispanic, and Indigenous people have been disproportionately affected during the \[COVID-19\] pandemic.](#)" That same day it passed [California's Medical Equity Disclosure Act](#), which requires hospitals to formulate an annual equity report that includes an analysis of health disparities for vulnerable populations and plan "[to prioritize and address disparities for vulnerable populations identified in the data, with measurable objectives and specific timeframes.](#)" As the legislature observed, the "[dearth of racially and ethnically disaggregated](#)




data reflecting the health of communities of color underlie the challenges of a fully informed public health response, and is a matter of statewide concern."

- Effective January 1, 2017, under the California Cancer Clinical Trials Program, participating universities must use funding to increase patient access to cancer clinical trials in underserved communities, including women and patients from "racial and ethnic minority communities and socioeconomically disadvantaged communities."
- On June 27, 2016, California's legislature required allocation of funds for diagnostic and treatment centers for Alzheimer's disease to address health disparities in diverse populations, "with special focus and attention reaching African Americans, Latinos, and women."
- Effective October 21, 2009, the California Emergency Management Agency requires that shelters for victims of domestic violence, funded by the shelter-based services grant program, reflect the diversity of the state (e.g., ethnic, racial, economic, cultural, and geographic) and targets geographic areas and ethnic and racial communities that require resources based on findings pursuant to a needs assessment.
- On January 1, 2006, California established its Statewide African-American HIV/AIDS Steering Committee to "address the disproportionate impact of HIV/AIDS on the health of African-Americans" through a multi-pronged series of initiatives.
- As of July 29, 1995, California's AIDS Vaccine Research and Development Advisory Committee must include ethnic minorities and women.

**Florida.** Multiple state laws explicitly authorize public health or health care programs and initiatives focused on race and/or ethnicity, including the following:

- Effective July 1, 2021, the state Department of Health shall establish telehealth minority maternity care pilot programs to expand the "capacity for positive maternal health outcomes in racial and ethnic minority populations."
- On July 1, 2021, Florida established its Office of Minority Health and Health Equity to develop statewide implementation of policies and programs to increase "access to and quality of health care services for racial and ethnic minorities."
- Florida's Department of Health created the Closing the Gap grant, effective July 1, 2021, which awards funds based on the proposal's identification of a racial or ethnic disparity related to maternal and infant mortality rates, cancer, HIV/AIDS, cardiovascular disease, diabetes, increasing immunization, oral health, sickle cell disease, Lupus, Alzheimer's disease, or improving social determinants of health.
- Effective May 18, 2020, the Black infant health practice initiative "identifies] factors in the health and social services systems contributing to higher mortality rates among African-American infants."
- The State Child Abuse Death Review Committee, established February 27, 2020, requires the committee to represent the "regional, gender, and ethnic diversity of the state to the greatest extent possible[.]"
- Through its community-based prenatal and infant health care program, established in 2017, the Department of Health shall work with local health departments to establish prenatal and infant health care coalitions that are legislatively required to represent the "racial, ethnic, and gender composition of the community[.]"

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- Florida's Prostate Cancer Awareness Program, effective July 1, 2014, requires its advisory council to submit an annual report to the Governor and other stakeholders containing recommendations for legislative changes "[necessary to decrease the incidence of prostate cancer, decrease racial and ethnic disparities among persons diagnosed with prostate cancer.](#)" and promote community education.

## Repercussions of Overruling Affirmative Action

As selectively illustrated above, public health and health care programs, funding, research, committees, and other initiatives routinely feature race and/or ethnicity or similar classifications in their design, framework, or execution. If the U.S. Supreme Court outlaws affirmative action based on race and/or ethnicity in university admissions on broad equal protection grounds, the reach of the Court's opinion could immediately or later impact these efforts.

The potential impacts on medical school admissions alone would be "[catastrophic for the diversity of our physician workforce.](#)" A June 2022 [study](#) found that in states with university affirmative action bans (e.g., Arizona, California, Florida, Michigan, Nebraska, Oklahoma, Texas (reversed in 2003), and Washington), student enrollment of underrepresented racial groups decreased more than a third five years after the ban as compared to the year prior to the ban. Diverse physician workforces [improve health care delivery and outcomes for communities of color.](#) As per comments from Dr. Lee Jones, chair-elect of the board of directors for the Association of American Medical Colleges, "[consideration of race ... is not only appropriate but essential. U.S. medical schools - and health care generally - thrive on the diversity of thought, experience, and perspective.](#)"

Following the devastating health disparities illuminated via the COVID-19 pandemic, reducing inequalities has become a premier public health priority for the 21<sup>st</sup> century. As scholars Michelle A. Williams and Lawrence O. Gostin articulated in October 2022, "[race-based actions \[are\] needed to advance equity. . . . If the Supreme Court rules that race cannot be considered in college admissions, the justices could well apply the same reasoning to decisions in the public health sphere.](#)" Direct public health efforts to ascertain, address and diminish health disparities may be seriously curtailed.

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