HOW SCOTUS'S DECISION ON RACE-BASED ADMISSIONS IS SHAPING UNIVERSITY POLICIES

HEARING

BEFORE THE

SUBCOMMITTEE ON HIGHER EDUCATION AND WORKFORCE DEVELOPMENT

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

HOW SCOTUS'S DECISION ON RACE-BASED ADMISSIONS IS SHAPING UNIVERSITY POLICIES

Thursday, September 28, 2023

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HIGHER EDUCATION AND WORKFORCE DEVELOPMENT,
COMMITTEE ON EDUCATION AND THE WORKFORCE,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:18 a.m., 2175 Rayburn House Office Building, Hon. Burgess Owens [Chairman of the subcommittee] presiding.

Present: Representatives Owens, Grothman, Stefanik, Good, Moran, Williams, Foxx, Takano, Jayapal, Leger Fernandez, Courtney, Bonamici, Adams, and Scott (Ex Officio).

Staff present: Cyrus Artz, Staff Director; Nick Barley, Deputy Communications Director; Mindy Barry, General Counsel; Hans Bjontegard, Legislative Assistant; Isabel Foster, Press Assistant; Daniel Fuenzalida, Staff Assistant; Sheila Havenner, Director of Information Technology; Paxton Henderson, Intern; Amy Raaf Jones, Director of Education and Human Services Policy; Marek Laco, Professional Staff Member; Georgie Littlefair, Clerk; John Martin, Deputy Director of Workforce Policy/Counsel; Hannah Matesic, Deputy Staff Director; Audra McGeorge, Communications Director; Rebecca Powell, Staff Assistant; Mary Christina Riley, Professional Staff Member; Chance Russell, Economist and Policy Advisor; Brad Thomas, Deputy Director of Education and Human Services Policy; Maura Williams, Director of Operations; Amaris Benavidez, Minority Professional Staff; Ilanad Brunner, Minority General Counsel; Rashage Green, Minority Director of Education Policy & Counsel; Christian Haines, Minority General Counsel; Emma T. Johnson, Minority Legal Intern; Stephanie Lalle, Minority Communications Director; Raiyana Malone, Minority Press Secretary; Shyann McDonald, Minority Staff Assistant; Kota Mizutani, Minority Deputy Communication Director; Veronique Pluviose, Minority Staff Director; Clinton Spencer IV, Minority Staff Assistant; Banyon Vassar, Minority IT Administrator.

Chairman OWENS. The Subcommittee on Higher Education and Workforce Development will come to order. I note that a quorum is present. Without objections, the Chair recognizes the call to recess at any time.

The Committee has gathered today to discuss the aftermath of the Supreme Court decision in Students for Fair Admission v. Har-

vard, and the Students for Fair Admission v. University of North Carolina, to explore the future possibilities of college admissions without racial discrimination.

The Court in its 6 to 2 decision, held that race-based admissions are a violation of the Constitution and a violation of the Civil Rights Act. For too long, the gatekeepers of postsecondary education have treated applicants differently based on the color of their skin. For far too long within the walls of our educational institutions, generations of Americans have been taught to accept the theory of eugenics as normal.

This theory assumes that as a race, black Americans think with their skin, that based on their skin color they are monolithic in their politics, reasoning and most importantly their intellectual potential. Those who do not fit within certain expectations and boundaries are considered traitors to their race.

The theory of Eugenics has a prescribed baseline of expectations. This baseline accepts as a fact that the white race is inherently and intellectually superior, privileged and destined to dominate other races. It also believes that the black race is inherently hopeless, hapless and forever broken due to slavery 200 years ago.

Not taught in our educational institutions is our proud history as national leaders and a love of faith, family, the free market, education and our country. Americans are always shocked to hear that the black community once led our country in categories of success that all communities sought after.

During the 40's to 60's, black men led our Nation in percentage matriculating college, commitment to marriage, and percentage of entrepreneurs, over 40 percent. We had a thriving community of which between 50 to 60 percent were middle class.

Today's history is purposely silent on this community's commitment to hard work, grit, tenacity, resilience, intelligence, loyalty and leadership. Instead, our story has been transformed into that of a weak race, hopelessly oppressed and not to be respected but pitied.

The decades of demeaning messages our country has accepted that black Americans are overall incapable of competing against white Americans when it comes to intellectual merit. Affirmative action has been a subtle and stealth Trojan horse that has effectively messaged this racist attack of low intellectual expectations.

Thankfully, the Supreme Court has recently granted us a major win for equal opportunity and for meritocracy, the two principles essential for the attainment of the American dream. Students across America, whether black, white, Hispanic, Asian or other, can now realize their potential without fear of overt racial discrimination or subtle bigotry.

We are already seeing small changes due to racial blind, merit-based acceptance that's slowing the assiduous pace of the Radical Left's agenda. For example, Columbia Law Review temporarily froze hiring because of the Court's ruling, disrupting their long-standing practices of selecting senior editors based on race versus merit. Columbia Law Review has since resumed hiring without unfairly discriminating, and hopefully more law schools will follow this example.

As our Nation celebrates the Supreme Court's ruling, we must remain diligent in identifying those who are defiant, those who despite the Supreme Court's ruling are determined to implement unconstitutional policies of affirmative action.

There remain administrators who expressed their intent to selectively ignore both the substance and the spirit of the Supreme Court ruling. Americans should never accept these subversive attempts to preserve race-based admissions, and I promise you this congressional body will not.

Chief Justice John Roberts was very clear when he wrote, and I quote "Despite the dissent's assertion to the contrary, universities may not simply establish through application, essays or other means the regime that we hold unlawful today. What cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows, and the prohibition against racial discrimination is leveled at the thing, not the name."

Let me repeat, and I quote, "what cannot be done directly cannot be done indirectly." Those institutions who think the Supreme Court ruling is a pretty please ask, this Committee will keep a close eye on the 2024 application process as it unfolds. Racism hidden or overt will not be tolerated by this oversight body.

Today's admission process must not resemble yesterday's. Further, we will watch as the ruling disrupts the landscape of other race-based institutions across America, as they have been also put on notice. The Constitution is color blind. The Civil Rights Act is color blind. In these tumultuous times, we should all be grateful that our democracy is steadfast dedicated to treating everyone equally under the law, regardless of race, creed, color or zip code. With that, I yield to the Ranking Member's opening statement.

Mr. Scott.

[The prepared statement of Chairman Owens follows:]

COMMITTEE ON EDUCATION & THE WORKFORCE

COMMITTEE STATEMENT

Opening Statement of Rep. Burgess Owens (R-UT), Chairman
Subcommittee on Higher Education and Workforce Development
Hearing: "How SCOTUS's Decision on Race-Based Admissions is Shaping University Policies"
September 28, 2023

(As prepared for delivery)

The Committee has gathered today to discuss the aftermath of the Supreme Court decision in *Students for Fair Admissions v. Harvard and Students for Fair Admissions v. University of North Carolina* and to explore the future possibility of college admissions without racial discrimination.

The Court, in a 6-2 decision, held that race-based admissions are a violation of the Constitution and a violation of the *Civil Rights Act*. For too long, the gatekeepers of postsecondary education have treated applicants differently based on the color of their skin. For far too long, within the walls of our education institutions, generations of Americans have been taught to accept the theory of eugenics as normal. This theory assumes that, as a race, black Americans think with their skin, that based on their skin color, they are monolithic in their politics, reasoning, and, most importantly, their intellectual potential. Those who do not fit within certain expectations and boundaries are considered traitors to their race.

The theory of eugenics has a prescribed baseline of expectations. This baseline accepts as a fact that the white race is inherently "intellectually" superior, privileged, and destined to dominate other races. It also views the black race as inherently hopeless, hapless, and forever broken due to slavery 200 years ago.

Not taught is our history as national leaders for our love of faith, family, free market, and education. Americans are always shocked to hear that the black community once led our nation in categories of success that all communities sought. During the 1940s-60s, black men led our nation in the percentage matriculating from college,

commitment to marriage, and percentage of entrepreneurs—40 percent. This led to a thriving middle-class community of 50 to 60 percent. Today's history is purposely silent on this community's commitment to hard work, grit, tenacity, resilience, intellect, loyalty, and leadership. Instead, this story has been transformed into one of hopeless oppression.

Through decades of demeaning messages, our country has accepted that black Americans are overall incapable of intellectually competing against white Americans through merit. Affirmative action has been the Trojan Horse for that message. Again, we see the soft bigotry of low expectations.

Thankfully, the Supreme Court has recently granted us a major win for equal opportunity and meritocracy, the two principles essential for the attainment of the American Dream.

Students across America—whether black, white, Asian, Hispanic, or other—will now be able to realize their potential without fear of overt racial discrimination or the demeaning soft bigotry of low expectations.

We're already seeing that the change to a race-blind, merit-based acceptance is slowing the insidious pace of the radical Left's agenda. For example, the Columbia Law Review temporarily froze hiring because the Court's ruling disrupted their longstanding practice of selecting senior editors based on race versus merit. Columbia Law Review has since resumed hiring without unfairly discriminating, and hopefully, more law schools follow this example.

As our nation celebrates the Court's ruling, we must remain diligent in identifying those who are defiant—those who, despite the Supreme Court ruling, are determined to implement the unconstitutional policy of affirmative action.

There remain administrators who have expressed their intent to selectively ignore both the substance and spirit of the Supreme Court's ruling.

Americans should never accept subversive attempts to preserve race-based admissions. I promise that this congressional body will not.

Chief Justice John Roberts was very clear when he wrote, and I quote, "Despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. …What cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows, and the prohibition against racial discrimination is leveled at the thing, not the name."

Let me repeat that, "What cannot be done directly cannot be done indirectly."

So, to those at institutions who think the Supreme Court ruling is a "pretty please" ask, this Committee will keep a close eye as the 2024 application process unfolds. Racism, hidden or overt, will not be tolerated by this oversight body.

Tomorrow's admissions processes must not resemble yesterday's. Further, we will watch as the ruling disrupts the landscape of other race-based institutions across America, as they have all been put on notice.

The Constitution is colorblind. The *Civil Rights Act* is colorblind. In these tumultuous times, we should all be grateful that our democracy is steadfastly dedicated to treating everyone equally under the law, regardless of race, creed, color, or zip code.

Mr. SCOTT. Thank you, Chairman Owens. I thank the witnesses for your testimony today. Our nation still has a compelling interest in fostering racially diverse campuses, and the Supreme Court ruling in the Harvard/UNC cases does not change that.

In fact, it was the Supreme Court in 1978 in the Bakke decision that established that institutions could pursue a diverse student body to advance academic freedom and consider race as one of many factors to evaluate prospective candidates.

While the consideration of race is one of many factors in admissions is vital, it is important that we put the conversation in appropriate context. Of approximately 4,200 degree granting institutions in the United States, less than 100 selective schools consider race as a factor in admissions, and only ten consider race as an important factor.

Before the adoption of race-conscious admissions policies at the University of Texas at Austin in 2005, black students never made up more than 4–1/2 percent of the freshman class. Following implementation of race-conscious admissions procedures, blacks, Hispanics and Asian Americans enrollment increased, as did classroom diversity.

Narrowly tailored race conscious admissions practices actually leveled the playing field and counterbalance discriminatory admissions factors that are otherwise in place, such as standardized tests and legacy admissions. For example, the district court in the Harvard case illustrated how recruited athletes, legacy applicants, applicants whose family have a history of donating money to the school and children of Harvard faculty make up a large percentage of each admitted class.

In fact, while the applicants make up less than 5 percent of the, what the—these applicants make up 5 percent of Harvard applicants every year, they constitute 30 percent of the applicants admitted each year, and nearly 70 percent of these applicants are white.

Research also shows that standardized tests that many institutions require for admissions have a discriminatory impact, and in fact reduced scores that correlate more with students' income, zip code, family wealth, socioeconomic background and parents' educational attainment than the student's ability to succeed in college.

To blindly allow the use of admissions without further examining their discriminatory effect is in fact unacceptable. When my colleagues across the aisle say they want a system based on merit, I agree. The problem is the current system is not based solely on merit, and without policies to counterbalance the discriminatory factors, the outcome of the system will remain discriminatory.

After the Supreme Court's ruling in June, the administration's responsibility to eliminate disparities in higher education and achieve diverse learning environments did not end. I called on the Department of Education to issue comprehensive guidance to ensure schools and colleges fulfill their Title VI obligations and address existing discriminatory factors in college admissions, now that the discriminatory factors are not counterbalanced by affirmative action.

One tool we could have is to achieve equal opportunity would be the Equity and Inclusion Enforcement Act, which is pending—

which has been pending in Congress for several years, and it restores the private—would restore the private right of action for students and parents to bring disparate impact cases under Title VI.

We also have pending is the Strengthen Diversity Act, which Representative Jayapal and I reintroduced this Congress, to provide resources to states and school districts that want to voluntarily develop plans to integrate their public schools.

Finally, if we are serious about expanding access to higher education, then we must focus on ensuring that the system is available to all. That means instituting reforms such as those that we have proposed in the Loan Act, which will make going to college more affordable for both current and prospective college students.

Justice Sotomayor said it best in her dissent. "Ignoring race will not equalize a society that is racially unequal." What was true in the 1860's and again in 1954 is true today. Equality requires acknowledgment of inequality. Thank you, Mr. Chairman, and I yield back the balance of my time.

[The prepared statement of Ranking Member Scott follows:]

ED & WORKFORCE DEMOCRATS

OPENING STATEMENT

House Committee on Education and the Workforce
Ranking Member Robert C. "Bobby" Scott

Opening Statement of Ranking Member Robert C. "Bobby" Scott (VA-03)
Subcommittee on Higher Education and Workforce Development
"How SCOTUS's Decision on Race-Based Admissions is Shaping University Policies"
2175 Rayburn House Office Building
Thursday, September 28, 2023 | 10:15 a.m.

Thank you, Chairman Owens, and thank you to our witnesses for your testimony today.

Our nation still has a compelling interest in fostering racially diverse campuses, and the Supreme Court's ruling in the *Harvard* and *UNC* cases does not change that.

In fact, it was the Supreme Court, in 1978, in the *Bakke* (Bah-kee) decision that established that institutions could pursue a diverse student body to advance academic freedom and consider race as one of many factors to evaluate prospective candidates.

And, while the consideration of race as one of many factors in admissions is vital, it is important that we put the conversation in the appropriate context. Of the approximately 4,200 degree granting institutions in the United States, less than 100 selective schools consider race as a factor in admissions, and only 10 consider race as an important factor.

Before the adoption of race-conscious admissions policies at the University of Texas at Austin (UT) in 2005, Black students never made up more than 4.5 percent of the freshman class.

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Narrowly tailored, race-conscious admissions practices actually level the playing field and counterbalance discriminatory admissions factors that are otherwise in place, such as standardized tests and legacy admissions.

For example, the district court in the *Harvard* case illustrated how recruited athletes, legacy applicants, applicants whose family have a history of donating money to the school, and children of Harvard faculty make up a large percentage of each admitted class. In fact, while these applicants make up less than 5 percent of Harvard applicants every year, they constitute 30 percent of the applicants *admitted* each year. And nearly 70 percent of these applicants are White.

Research also shows that the standardized tests many institutions require for admissions have a discriminatory impact and, in fact, produce scores that correlate more with students' income, zip code, family wealth, socioeconomic background, and parents' educational attainment than the student's ability to succeed in college. To blindly allow their use in admissions without further examining the discriminatory effect is, in fact, unacceptable.

So, when my colleagues across the aisle say they want a system based on merit, I agree. But the problem is that the current system is not based solely on merit. And, without policies to counterbalance the discriminatory factors, the outcome of the system will remain discriminatory.

After the Supreme Court's ruling in June, the Administration's responsibility to eliminate disparities in higher education and achieve diverse learning environments did not end. And I called on the Department of Education to issue comprehensive guidance to ensure schools and colleges fulfill their Title VI obligations and address existing discriminatory factors in college admissions now that the discriminatory factors are not counterbalanced by affirmative action.

Now, one tool we could have to achieve equal opportunity would be the *Equity and Inclusion Enforcement Act*, which has been pending in Congress for several years and it would restore the private right of action for students and parents to bring disparate impact cases under Title VI.

We also have pending the *Strength in Diversity Act*, which Representative Jayapal and I reintroduced this Congress, to provide resources to states or school districts that want to voluntarily develop plans to integrate their public schools.

Finally, if we are serious about expanding access to higher education, then we must focus on ensuring that the system is available to all. That means instituting reforms, such as those that we have proposed in the *LOAN Act*, which would make going to college more affordable for both current and prospective college students.

Justice Sotomayor said it best in her dissent, *"Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality."*

Thank you, Mr. Chairman, and I yield back the balance of my time.

Chairman OWENS. Thank you. Thank you so much, Mr. Scott. Pursuant to Committee Rule 8(c), all Members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m., 14 days after the hearing, which is October 4th, 2023.

Without objections, the hearing record will remain open for 14 days, to allow such statements and other material referenced during the hearing to be submitted for the official hearing record.

I will now turn to introducing our four witnesses, distinguished witnesses, and thank you again for being here. The first witness is Ms. Allison Somin, who is a Legal Fellow at the Pacific Legal Foundation, located in Arlington, Virginia.

Our next witness is Mike Zhao, who is president of the Asian American Coalition for Education in Orlando, Florida. Our third witness is Mr. David Hinojosa, J.D., who is the Director of the Educational Opportunities Project in the Lawyers Committee for Civil Rights Under Law in Washington, DC.

Our final witness is Mr. Delano Squires, who is a Research Fellow at the Richard and Helen DeVos Center for Life, Religion and Family at the Heritage Foundation, which is located in Washington, DC, and who is testifying on his own behalf. We thank the witnesses for being here today and look forward to your testimony.

Pursuant to Committee rules, I would like to ask each to limit your oral presentation to a 5-minute summary of your written statement. I would also like to remind the witnesses to be aware of your responsibility to provide accurate information to the Subcommittee. I would first like to recognize Ms. Somin.

STATEMENT OF ALLISON SOMIN, LEGAL FELLOW, PACIFIC LEGAL FOUNDATION, ARLINGTON, VIRGINIA

Ms. SOMIN. Chair Owens, Ranking Member Scott, distinguished Members of Congress, thank you for the opportunity to present testimony on behalf of Pacific Legal Foundation. We are a non-profit legal organization that defends Americans' liberties when threatened by government overreach and abuse.

I want to make three main points today. The Students for Fair Admissions decisions were important because they uphold the vital principle that individuals should be treated as individuals and not on the basis of their race. Two, followup litigation is necessary to realize the promise of these decisions. Three, the Education Department's guidance is a missed opportunity to inform schools of their important obligations in this area.

Under the Constitution and Title VI of the Civil Rights Act of 1964, government and recipients of government money may not discriminate based on race. Before Students for Fair Admissions, there was a limited exception for universities to achieve a compelling interest in student body diversity.

Universities largely slipped the leash of the Supreme Court's opinions and used race very broadly. The Students for Fair Admissions plaintiffs challenged this exception, bringing one case against Harvard University and a second against the University of North Carolina. The Court held that these universities had not met their burden.

As the Chief Justice wrote, "Each student must be treated as an individual, not on the basis of her race. Many universities have for far too long done just the opposite, and in doing so they have concluded wrongly that the touchtone of an individual's identity is not challenges vested, skills built, lessons learned but the color of their skin. Our Constitutional history does not tolerate that choice.

That is not likely to be the end of race preferences in admissions. Chief Justice Roberts anticipated schools would use proxy discrimination to evade the opinion's core prohibitions. The majority acknowledges that universities may consider admissions essays about how a student's race affects her life.

It also firmly states that universities may not simply establish through essays the regime held unlawful in the case, and further quotes an earlier Supreme Court opinion. "What cannot be done directly cannot be done indirectly."

Unfortunately, the early evidence suggests evasion is going to be rampant. We see statements of intention to defy the ruling from the deans of major law schools, from presidents of universities and even the statements of State Governors telling universities in their State that they can safely ignore the decision. If these evasions go unchecked, Students for Fair Admissions guarantees of equal treatment will ring hollow.

At the Pacific Legal Foundation, we have been fighting back against proxy discrimination at the K through 12 level. Several other attorneys from there and I represent the Coalition for T.J., a group of parents challenging a reengineered proxy discrimination admission scheme at top science and magnet technology school Thomas Jefferson High School in Fairfax County, Virginia.

In the summer of 2020, Fairfax County restructured its admission process to in effect lower the numbers of Asian American students that could attend T.J. The text messages and emails produced in discovery make it clear that admissions were restructured because of, not in spite of, these effects on the number of Asian American students there.

Yes, Fairfax County's discrimination was the proxy kind, not the direct kind. Is it no less pernicious and certainly no less hurtful to the kids, told that they could not go to their dream high school because of their race. Right now, that case is pending before the Supreme Court on a petition for certiorari. My PLF colleagues also have three other cases pending in the pipeline in the Federal appellate courts, involving proxy discrimination at high schools in Boston, New York City, Montgomery County, Maryland that all follow the same general pattern.

While litigation by non-profit groups is an important way to enforce the core promise at Students for Fair Admissions, it is not the only way. The Department of Education has an important role to play in making sure that the civil rights laws are followed.

Unfortunately, the frequently asked questions document that the Office for Civil Rights issued following the Students for Fair Admissions decision indicates they are not going to do that. It basically ignores the large and looming problem of proxy discrimination, and essentially tells universities that whatever they want to do is fine, as long as they are not too open about it.

That is not right, that is not the law, and these universities need to be held to account to realize the core American promise that individuals should be treated as individuals and not on the basis of their race. Thank you.

[The prepared statement of Ms. Somin follows:]

PACIFIC LEGAL FOUNDATION

Testimony
Before the House Education and the Workforce Committee
Subcommittee on Higher Education and Workforce Development
Hearing on How SCOTUS's Decision on Race-Based Admissions Is Shaping University Policies

Alison Somin
Legal Fellow, Pacific Legal Foundation

Chair Owens, Ranking Member Wilson, and distinguished members of Congress, thank you for the opportunity to present testimony on behalf of the Pacific Legal Foundation on why the *Students for Fair Admissions* decisions represent an important victory for the constitutional and moral principle of equality before the law and about the work that needs to be done to extend and entrench this landmark opinion.

Pacific Legal Foundation is a nonprofit legal organization that defends Americans' liberties when threatened by government overreach and abuse. We sue the government when it violates Americans' constitutional rights, providing *pro bono* representation to people from all walks of life. We also do extensive work at the federal and state levels on legal policy and strategic research to further our goal of vindicating important constitutional rights and principles.

Individuals should be treated as individuals and not on the basis of their membership in racial groups. The *Students for Fair Admissions* decisions are important because they vindicate that principle. But there is still significant work to be done across all three branches of the federal government to realize the promise of equal protection of the laws as guaranteed by the Fourteenth Amendment. Today, I'll begin by summarizing the Supreme Court's ruling and explaining its importance. Then I'll discuss what future litigation is needed to fulfill the promise of the Fourteenth Amendment, including a discussion of Pacific Legal Foundation cases in this area. Next, I'll address the Education Department's recently issued Frequently Asked Questions document and explain why it does not adequately advise schools how to comply with the Supreme Court's mandate. Finally, I will address some measures that courts or policymakers could take to increase opportunity for all.

I. The *Students for Fair Admissions* decisions uphold the American principle that individuals should be treated as individuals and not on the basis of their membership in racial groups.

Eliminating race discrimination means eliminating *all* of it, as the Supreme Court recently held in *Students for Fair Admissions*. Under the Constitution and Title VI of the Civil Rights Act of 1964, government and recipients of federal money may not discriminate on the basis of race, color, or national origin.

The Supreme Court first grappled with affirmative action in university admissions in 1978, in *University of California Regents v. Bakke*.[1] At that time, the University of California's medical school maintained a two-track system of admissions, where a specific number of seats were set aside

[1] 438 U.S. 265.

exclusively for students from certain racial and ethnic groups.[2] In a fractured 4-1-4 opinion, the Court held that this system was illegal.[3] But in a concurring opinion necessary to secure a controlling majority, Justice Lewis Powell (writing only for himself) said that the University of California system was only illegal because of its explicit set-asides. He viewed Harvard University's more opaque holistic system of disguised preferences as comporting with the Constitution.

Twenty-five years later in 2003, in *Gratz v. Bollinger* and *Grutter v. Bollinger*, the Supreme Court endorsed and expanded upon Powell's concurrence and held that universities may lawfully discriminate based on race in admissions when such use of race is narrowly tailored to serve a compelling interest in student body diversity.[4] In theory, *Grutter* carved only a narrow exception to the Constitution and Title VI's general prohibitions on race discrimination. But in practice, many colleges and universities viewed it as *carte blanche* to discriminate unabated, as long as they claimed that the discrimination furthered its interest in diversity.

Grutter's contradictions were apparent almost from the day it was decided. It allowed universities to engage in limited discrimination to promote diversity, but it also prohibited them from using stereotypes to do so. In a paradox for the ages, *Grutter* reconciled broad racial preferences on the grounds they were necessary to ensure that students did not think that all racial and ethnic minorities think alike.

Taking the *Grutter* Court's cue, most universities designed their admissions policies in ways that made little sense if their goal was true multidimensional diversity. For example, most universities use only broad racial classifications and ignore the substantial linguistic, cultural, religious, and other forms of diversity within racial groups. Further, most universities also gave substantially less weight to diversity along non-racial dimensions, such as unusual political or philosophical perspectives or growing up in poverty, than they did to coming from an under-represented racial group. The logical inference is that most universities cared mostly about remedying historical injustice or about racial parity for its own sake instead of diversity—interests that they could not lawfully pursue under Supreme Court precedent.

A decade after *Grutter* and *Gratz*, Abigail Fisher challenged the University of Texas's use of race in admissions. Texas allocated most seats through a program that awarded admission to any student in the top ten percent of her high school graduating class. But the University of Texas did use a holistic admissions process that included race as a factor to decide who received the remaining seats. *Fisher* seemed like a good opportunity to score a victory for the principle of race neutrality of admissions that (because of the Top Ten Percent plan) nonetheless would not have much impact on the University of Texas's racial demographics. While the Supreme Court clarified that reviewing courts should not defer to a university's opinion about whether their program is narrowly tailored, that doctrinal clarification made little practical difference. Most universities continued to use race in admissions.

In contrast to *Fisher*, the two most recent Supreme Court cases on race in admissions—*Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*—challenged *Grutter*'s diversity exception directly. The North Carolina case involved a challenge to race preferences in a public university, to which the Constitution applies; the Harvard case involved Title VI, which applies

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[2] 438 U.S. at 273–76.
[3] 438 U.S. at 271.
[4] 539 U.S. 306 (2003).

to any college or university, public or private, that receives federal funding. Instead of trying to chip away at *Grutter*, as *Fisher* attempted, the *Students for Fair Admissions* cases asked the Court to consider whether *Grutter* was correct.

In a 6-3 opinion written by Chief Justice Roberts, the Court held that Harvard and the University of North Carolina had not satisfied strict scrutiny. The Court rejected the universities' asserted interest in the educational benefits of a racially diverse student body and held that the universities' extensive use of race was not narrowly tailored to advance this interest. As the Chief Justice said at that opinion's conclusion: "Each student must be treated as an individual—not on the basis of her race. Many universities have far too long done just the opposite. And in doing so, they have concluded wrongly that the touchstone of an individual's identity is not challenges bested, skills built, lessons learned, but the color of their skin. Our constitutional history does not tolerate that choice."[5]

Nothing in *Students for Fair Admissions* requires universities to use any particular method of selection, as long as the methods that they do choose are not intended to achieve particular racial goals. For example, universities may lawfully use or not use standardized tests, essays, interviews, or auditions to choose their students. Finally, schools may constitutionally pursue diversity along many dimensions, such as socioeconomic status or life experience, as long as they are not discriminating on the basis of race.

II. Universities and Colleges May Not Use Proxy Discrimination to Do Indirectly What They Are Forbidden to Do Directly.

Unfortunately, the early evidence suggests that many universities will try to evade *Students for Fair Admissions* by engaging in proxy discrimination—using non-racial characteristics as proxies for race to achieve racial goals. As racial segregation started to crumble in the South, state and local governments that wanted to preserve its system of race discrimination tried again and again to do indirectly what they could not directly do via proxies for race. The Supreme Court consistently struck down each effort, holding that grandfather clauses,[6] literacy tests,[7] and poll taxes[8] were, despite being facially neutral, in fact prohibited proxy discrimination. "The Supreme Court has repeatedly ruled against racial discrimination by proxy," observes Vanderbilt Law Professor Brian Fitzpatrick in *The Wall Street Journal*. "If the purpose of an apparently race-neutral decision is to cause racial effects, and the decision in fact causes racial effects, then the decision is as illegal as using race itself would be."[9]

Village of Arlington Heights v. Metropolitan Housing Development Corp. is today the leading Supreme Court case setting forth the framework for analyzing proxy discrimination.[10] That case involved claims by a developer that local authorities were using zoning as a tool of proxy discrimination.[11] *Arlington Heights* requires courts to look at the "totality of the relevant facts" and to conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" to

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[5] *Students for Fair Admissions v. Harvard*, Nos. 20-1199, 21-707 (June 29, 2023), slip op. at 40.
[6] *Guinn v. United States*, 238 U.S. 347 (1995); *Lane v. Wilson*, 307 U.S. 268, 269 (1939).
[7] *Schnell v. Davis*, 336 U.S. 933 (1949).
[8] *Harper v. Va. State Board of Elections*, 383 U.S. 663 (1996).
[9] Brian Fitzpatrick, "Racial Preferences Won't Go Easily," The Wall Street Journal, May 31, 2023, *available at* https://www.wsj.com/articles/racial-preferences-wont-go-easily-thomas-jefferson-harvard-unc-court-bfa302b3.
[10] 429 U.S. 252 (1977).
[11] 429 U.S. at 257–60.

determine if a facially race neutral policy can be "traced to a discriminatory purpose." Varied facts may be relevant to this analysis, including "the impact of the official action—whether it bears more heavily on one race than another," "the historical background of the decision," "the specific sequence of events leading up to the challenged decision," and "contemporary statements made by members of the decision-making body."

Writing for the majority in *Students for Fair Admissions*, Chief Justice Roberts anticipated schools using proxy discrimination to evade the opinion's prohibition on race preferential admissions. In response to a hypothetical discussed at oral argument, the majority opinion acknowledges that universities may consider admissions essays about how a student's race affects her life "so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can bring to the university."[12] But "despite the dissent's assertion to the contrary" the majority opinion firmly states that "universities may not simply establish through application essays or other means the regime we hold unlawful today"[13] and quotes *Cummings v. Missouri*: "What cannot be done directly cannot be done indirectly."[14]

Nonetheless, it appears that many universities will use indirect techniques to avoid compliance with the law. Ten days after the *Students for Fair Admissions* ruling, the American Association of Law Schools held a "Conference on Affirmative Action."[15] Panelists there discussed how to "protect diversity gains" via "race-conscious, but also race-neutral means" such as "zip code."[16] Instead of suggesting that law schools stop illegal discrimination, Tim Lynch, vice president and general counsel of the University of Michigan, coached his fellow university officials on how they could bury evidence of illegal activity while continuing to discriminate covertly. He lamented that "courts look into text messages, they look for anything that could be used for discriminatory intent" and that "it's very difficult for your tenured faculty members sometimes to hold back."[17] Lynch added "Look at your websites and materials. What do they actually say?" and recommended that universities "Have an undergrad go online" and identify evidence of discrimination to scrub. University presidents at Yale, Columbia, and the State University of New York have issued statements stating that they plan to subvert *Students for Fair Admissions,* and the governors of California, Washington, New Jersey, Massachusetts, and New York have encouraged the universities in their states to flout the law.[18] Even President Biden committed the executive branch to fighting the decision.[19]

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[12] *Students for Fair Admissions*, slip op. at 8.
[13] *Id.*, slip op. at 39.
[14] *Id.*, citing 4 Wall. 277, 325 (1867).
[15] Program, Association of American Law Schools, Conference on Affirmative Action (July 10, 2023), https://www.aals.org/events/affirmative-action/program.
[16] *Id.*
[17] *Id.*
[18] Amicus Curiae Brief of the Cato Institute, *Coalition for TJ v. Fairfax County School Board*, 10–17, *available at* https://www.supremecourt.gov/DocketPDF/23/23-170/280038/20230920161304491_Coalition%20for%20TJ_Final.pdf.
[19] President Joe Biden, Remarks by President Biden on the Supreme Court's Decision on Affirmative Action (June 29, 2023), *transcript available at* https://tinyurl.com/4tacm437.

If such evasions by universities go unchecked, *Students for Fair Admissions*'s guarantees of equal treatment in admissions will ring hollow. Some Pacific Legal Foundation cases illustrate how courts should rule to make sure that such indirect discrimination is rooted out and stopped.

III. The Pacific Legal Foundation's Proxy Discrimination Cases Show How Courts Can Stop Proxy Discrimination and Ensure that All Students Are Treated Equally Regardless of Race.

The Supreme Court never held that *Grutter*'s student body diversity exception to the Constitution and Title VI bans on race discrimination applied to K-12 schools. K-12 school districts that wanted to racially balance their schools had to avoid facial race preferences. But that didn't stop them altogether. My employer, the Pacific Legal Foundation, has challenged race preferential admissions schemes by school districts that were not facially discriminatory. Although these cases are at different stages in litigation and have somewhat different facts, all follow the same general factual pattern. First, school administration observes that a competitive school's demographics do not match the district's overall demographics and bewail what they perceive to be the over-representation of Asian American students.[20] Second, to change future admitted class demographics, school officials eliminate or de-emphasize traditional measures that predict academic success, such as standardized test scores or grades. New measures that have no apparent relationship to scholastic ability or performance—such as zip code, neighborhood preferences, or middle school choice—are added or receive increased weight because of their likely outcome on demographics. In some cases, there are statements from school officials about the new plan's likely effects on Asian Americans or even statements showing animus against Asian Americans as a group.

This is precisely what Fairfax County did in the summer of 2020, as debates over race relations and equality reached a fever pitch. The Fairfax County School Board revamped admissions procedures at Thomas Jefferson High School (TJ) to bring the elite science and technology magnet's racial demographics closer to Fairfax County's overall racial demographics. The Board dropped the longstanding admissions exam and replaced it with a system that filled most slots at TJ by guaranteeing admission to the top 1.5% at each Fairfax County middle school. Students outside the top 1.5% received an additional boost in admissions if they came from middle schools that are "underrepresented" at TJ. Because Asian American students in Fairfax County disproportionately attend particular high-achieving middle schools, the changes were intended to, and did, significantly lower Asian American representation at TJ.

In private text chats as revealed in discovery, some of Fairfax County's twelve Board members candidly admitted that the process targeted Asian students. Stella Pekarsky and Abrar Omeish agreed "there has been an anti [A]sian feel underlying some of this, hate to say it lol" and that Asian students were "discriminated against in this process." They observed that the district's superintendent had "made it obvious" with "racist" and "demeaning" comments and that he came "right out of the gate

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[20] Although these cases' more vituperative critics have sometimes bemoaned the "white privilege" of plaintiffs suing their magnet schools, in many places Asian American students have been the group that has lost the most magnet school seats due to racially discriminatory admissions changes. At Thomas Jefferson High School in Alexandria, Virginia, for example, whites actually gained a small number of seats after the discriminatory changes were implemented, while Asian American numbers dropped significantly (from 73% of the admitted class to 54% of the admitted class.)

blaming" Asian American students and parents. They reasoned that the proposals would "whiten our schools and kick ou[t] Asians" and said "Asians hate us."[21]

The Coalition for TJ, a grassroots group of parents and alumni, sued in federal court, claiming that the revamped policy violated students' constitutional rights to equal protection. The Coalition won on cross-motions for summary judgment in district court, but that ruling was reversed on appeal by a divided panel in the Fourth Circuit. In dissent, Judge Allison Rushing chided the majority for "refus[ing] to look past the policy's neutral varnish." She would have held that "undisputed evidence shows that the Board successfully engineered the policy to reduce Asian enrollment at TJ—while increasing enrollment of every other racial group—consistent with the Board's discriminatory purpose."[22] The Coalition's petition for a writ of certiorari is currently pending in the Supreme Court.[23]

Just across the Potomac River, Montgomery County, Maryland, similarly redesigned its admissions processes to change the demographics of its magnet middle schools.[24] First, Montgomery County adopted "socioeconomic norming," in which a student's standardized test score was normed according to the socioeconomic status of her elementary school. Second, it adopted a policy that put students with a group of "academic peers" in their home middle schools at a disadvantage when applying for magnet programs. Because Asian American students are concentrated in particular Montgomery County middle schools, these combined policies were intended to lower Asian American representation in magnet school programs. That case is on appeal to the Fourth Circuit.

In Boston, exam scores traditionally determined admission to the famous Boston Latin School. But in 2019, the school board adopted a plan that allocated 20% of magnet seats based on grade point average and the rest based on zip codes. Boston's school board did not attempt to disguise its racial motivations. One working group member said that the admissions changes were meant to address "historic racial inequities," and the School Committee's chair was caught on a live microphone mocking Chinese American surnames. Because Asian American and white students in Boston tend to live in certain zip codes, the new system meant that students from these groups went from receiving 61% of the seats available in magnet programs to just over half of them. This case is pending appeal in the First Circuit.

New York City is home to some of the best-known competitive admission high schools in the country, including Stuyvesant High School, the alma mater of four Nobel Prize winners. Until recently, Stuyvesant and other New York City magnets made most admissions decisions based on Specialized Admissions High School test scores. Students from low-income backgrounds could qualify for magnet attendance through the Discovery program, which set aside a limited number of seats for students from low income families who scored just below the cutoff. Starting in 2020, however, then-Mayor DeBlasio limited the Discovery program to students from middle schools with a 60% or higher poverty rate. Because Asian Americans in New York City tend to cluster in middle schools with a lower than 60% poverty rate, this change decreased the numbers of seats available to them in New York City's magnet schools. The adverse effect on Asian Americans students was not coincidental; then-New York City Schools chancellor Richard Carranza observed in a television interview, "I just don't buy the narrative

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[21] *Coalition for TJ v. Fairfax County School Board*, 86 F.4th 864, 892 (4th Cir. 2023) (Rushing, J., dissenting).
[22] *Id.*
[23] The petition is available here: https://pacificlegal.org/wp-content/uploads/2023/08/2023-08-21-Coalition-for-TJ-Cert-Petition.pdf.
[24] *Association for Education Fairness v. Montgomery Cnty. Bd. of Ed.*, 560 F. Supp. 3d 929 (D. Md. 2021).

that any one group owns admissions to these schools."[25] Pacific Legal Foundation's suit challenging these policies is pending in the Second Circuit.

These stories of school districts engaged in sneaky discrimination, coupled with the early media reports about universities thinking of engaging in sneaky discrimination, suggest that attempts to evade *Students for Fair Admissions* will be rampant. The Supreme Court should fulfill the promise made in *Students for Fair Admissions* and hold that such proxy discrimination is unconstitutional and violates Title VI of the Civil Rights Act of 1964.

IV. The Department of Education's Frequently Asked Questions Document About *Students for Fair Admissions* Was a Missed Opportunity to Clarify Universities' Obligations.

The Department of Education's Office for Civil Rights and the Civil Rights Division of the Department of Justice (among other federal civil rights agencies) are charged with enforcing the civil rights laws that prohibit race, color, or national origin discrimination by recipients of government funds. The Department of Education has indicated that it is not going to fulfill its mission and ensure that all students benefit from the guarantee of equal protection enshrined in *Students for Fair Admissions*. Some of its "Questions and Answers Regarding the Supreme Court's Decision in *Students for Fair Admissions, Inc. v. Harvard College and the University of North Carolina*" merely reiterates or paraphrases core passages of the Court's lengthy opinions and is noncontroversial. But the Department largely ignores the looming problem of universities engaging in proxy discrimination. Instead of reaffirming Chief Justice Roberts's statements against indirect discrimination, it largely ducks the issue and may give devious colleges and universities the mistaken impression that whatever they want to do is fine as long as they are not too open about it. The problem is that the Constitution and Title VI command otherwise. Continued congressional oversight is necessary to make sure that the Department is fulfilling its legal obligations.

V. By Enforcing Other Constitutional Rights, Courts and Policymakers Can Remove Barriers to Opportunity and Clear New Paths to Success for All.

Although some of *Student of Fair Admissions*'s more outspoken critics have wailed that these decisions will take away valuable academic or professional opportunities from talented but poor racial and ethnic minority students, many other and better strategies are open to improve opportunity for all. As Justice Thomas discusses in his concurring opinion, because many colleges and universities have open admission, race preferential admissions do not affect the overall number of minority students who can receive college degrees. They merely shift students around in the academic hierarchy, nudging some students to higher-ranked schools than they might have attended otherwise. It is far from clear that students who attend schools where they receive large preferences are actually better off academically or professionally as a result; as discussed in Justice Thomas's concurrence, the research into academic mismatch suggests that many students are better off attending colleges, graduate or professional programs where their credentials are closer to those of the median student. When students are admitted to universities based on their individual skills, talents, and interests—not race or ethnicity—they're more likely to find the right fit.

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[25] Mayor wants to diversify specialty high schools, Fox5 New York, (June 4, 2018) https://www.fox5ny.com/news/mayor-wants-to-diversify-specialty-high-schools.

Reasonable minds can and do differ on what educational, family, workplace and housing policies best set up all children and young adults for academic and professional success. At the Pacific Legal Foundation, we have focused our litigation and policy efforts in three areas. First, the courts should vindicate the constitutional right to earn a living. We have brought suit on this basis on behalf of Ursula Newell-Davis, who tried to open a respite care facility for special needs children but was blocked from doing so by a Louisiana law that gives competitors a veto over her plans. A petition for writ of certiorari has been filed in the Supreme Court.[26] Second, courts and policymakers can protect the right of parents to choose the best school for their children. Today, children from poor backgrounds tend to benefit the most from school choice programs.[27] Third, courts and policymakers should take a fresh look at housing policies that wrongfully deprive individuals of property rights, including rent control laws that reduce the supply of housing and zoning laws that prevent new housing from being built.[28]

VI. Conclusion:

Students applying to competitive high schools, colleges, universities, and other selective academic programs should be treated on the basis of their character and accomplishments and not on the basis of their race or color. The Supreme Court's opinions in the *Students for Fair Admissions* cases are a ringing endorsement of this moral and constitutional principle and deserve to be celebrated accordingly. But the struggle does not end there. Many educational institutions will probably try to find indirect ways of discrimination so that they can keep getting the same demographic results they did under more direct discrimination. We as Americans should not tolerate this evasion, and these institutions should be held to account.

Respectfully submitted,

Alison Somin
Pacific Legal Foundation

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[26] The petition is available at https://pacificlegal.org/wp-content/uploads/2021/01/06.12.23-Ursula-Newell-Davis-et-al.-v.-Courtney-N.-Phillips-et-al.-PLF-Petition-for-Writ-of-Certiorari.pdf.
[27] Patrick J. Wolf, Programs Benefit Disadvantaged Students, EducationNext, Spring 2018, Vol. 18, No. 2, https://www.educationnext.org/programs-benefit-disadvantaged-students-forum-private-school-choice/.
[28] For a fuller description of PLF's work in this area, please see Amicus Curiae Brief of Pacific Legal Foundation, *Students for Fair Admissions v. Harvard*, *available at* https://www.supremecourt.gov/DocketPDF/20/20-1199/222643/20220505160636226_20-1199%20AC%20brief%20final2.pdf.

Chairman OWENS. Thank you. Now Mr. Zhao, Mr. Zhao.

STATEMENT OF MR. YUKONG MIKE ZHAO, PRESIDENT, ASIAN AMERICAN COALITION FOR EDUCATION, ORLANDO, FLORIDA

Mr. ZHAO. Yes. Chairman Owens and distinguished Members of Congress, I am Yukong Mike Zhao, a survivor of China's Cultural Revolution, during which my family endured political persecution, devasting personal loss and extreme poverty. In 1992, I came to American as poor foreign student. In this land of opportunity, I achieved my American dream, later becoming the Director of Global Planning at Siemens Energy.

Through affirmative action, as shown in Appendix A of my testimony, colleges used higher admission standards, de facto racial quotas and racial stereotypes to discriminate against Asian American applicants. This discrimination unjustly created unbearable study loads, stress and psychological harm to our children. Many Asian American applicants even hide their racial identity when applying to colleges.

In 2014, I and other co-founders of Asian American Coalition for Education (AACE) started our journey of galvanizing the Asian community to support Students for Fair Admissions for its lawsuit against Harvard and UNC. AACE and partner organizations filed civil rights complaints against Harvard, Yale and other colleges.

We organized rallies, encouraged students to join the lawsuits, and filed five amicus briefs in support. Today, our alliance has grown into over 300 organizations nationwide. This June, the Supreme Court rightly struck down race-based affirmative action.

This is a historic victory for Asian-Americans, as our children should no longer be treated as second class citizens in college admissions. This is also a historic victory for all Americans, as the ruling will help restore meritocracy, the bedrock of the American dream.

It will also advance America toward a color-blind society, as Martin Luther King dreamed of 60 years ago. However, advocates of diversity, equity and inclusion have not given up. On August the 14th, the Department of Education and Justice issued guidance that advocates continued use of race and race proxies in outreach and other programs.

This guidance again misses the point. The root cause of racial disparity in college enrollment is the failure of the K through 12 education, particularly in inner cities, to prepare black and Hispanic children for colleges. Improving K through 12 education is a better and a constitutional way to enhance racial diversity in higher education.

Further, while America is faced with a STEM talent shortage and our K through 12 education is behind other industrial nations, the Biden administration irresponsibly suggests colleges should further eliminate objective and rigorous admissions standards.

In response, AACE issued a policy statement attached as Appendix B, where we urge American colleges to stop the use of race and race proxies in college admissions, adopt a blind rating system by hiding student's name and other information that would disclose race, make students race data inaccessible to admissions eval-

uators, base admissions criteria on the needs of educational program, not racial diversity or equity, restore standardized testing as major criterion in admissions.

The troubling fact is today nearly 81 percent of all colleges have made the standardized testing optional. In China, I witnessed during the Cultural Revolution Chairman Mao abolished the National College Entrance Exam in order to achieve class equity. After destroying the meritocracy, Chinese colleges produced millions of revolutionaries who could not conduct research or managing enterprise. As a result, China's innovation stopped, and its economy collapsed.

America cannot afford to repeat this mistake by destroying meritocracy in the name of racial equity. When our Nation is faced unprecedented competition from international rivals, it is imperative to restore meritocracy in our educational institutions in order to maintain America's technological leadership and economic prosperity.

The Supreme Court's landmark ruling provides historic opportunity for American colleges to correct their mistakes by promoting equality and a meritocracy. I hereby call upon Federal, State and local governments to support our policy recommendations to do just that. Thank you.

[The prepared statement of Mr. Zhao follows:]

Asian American Coalition for Education

Testimony of Mr. Yukong Zhao, before the Congressional Subcommittee on Higher Education and Workforce-Development Hearing Titled "How SCOTUS's Decision on Race-Based Admissions is Shaping University Policies"

September 28, 2023

Mr. Chairman and other members of the committee:

I am Yukong Mike Zhao, a survivor of China's Cultural Revolution, during which my family endured political persecution, devastating personal loss, and extreme poverty. In 1992, I came to America as a poor foreign student. In this land of opportunity, I achieved my American dream, later becoming the Director of Global Planning at Siemens Energy and raising a happy family in Orlando, Florida.

Through affirmative action, as shown in Appendix A of my testimony, colleges used higher admission standards, de facto racial quotas, and racial stereotypes to discriminate against Asian American applicants. This discrimination unjustly created unbearable study loads, stress and psychological harm on our children. Because of this second-class treatment, many Asian American applicants hid their racial identity when applying to colleges.

In 2014, I and other co-founders of Asian American Coalition for Education (AACE) started our journey of galvanizing Asian communities to support Students for Fair Admissions for its lawsuits against Harvard and the University of North Carolina. AACE and partner organizations filed civil rights complaints against Harvard, Yale, and other colleges. We organized rallies, encouraged students to join the lawsuits, and filed five amicus briefs in support. Today, our alliance has grown into over 300 organizations nationwide.

This June, the Supreme Court struck down race-based affirmative action.

This is a historic victory for Asian Americans, as our children should no longer be treated as second-class citizens in college admissions. This is also a historic victory for all Americans, as the ruling will help restore meritocracy, the bedrock of the

American Dream, and ends race-based policies in higher education, thereby advancing America toward a color-blind society as Martin Luther King dreamed of 60 years ago.

However, advocates of diversity, equity, and inclusion have not given up.

On August 14th, the Departments of Education and Justice issued guidance, in defiance of the Supreme Court, that advocates continued use of race and race proxies in outreach and other programs.

This guidance again misses the point—the root cause of racial disparities in college enrollment is the failure of the K-12 education, particularly in inner cities, to prepare black and Hispanic children for colleges. Improving K-12 education is a better and constitutional way to enhance racial diversity in higher education.

Further, while America is faced with a STEM talent shortage and our K-12 education is behind other industrial nations, the Biden Administration irresponsibly suggests colleges should further eliminate objective and rigorous admissions standards.

In response, AACE issued a policy statement attached as Appendix B, where we urged American colleges to:

- Stop the use of race and race proxies in college admissions
- Adopt a blind rating system by hiding student name and other information that would disclose race
- Make students' race data inaccessible by participants of the student evaluation process
- Base admissions criteria on the needs of the educational programs, not racial diversity or equity, and
- Restore objective measures, especially standardized testing, as a major criterion in admissions. The troubling fact is, today nearly 81%, of all colleges have made standardized testing optional.

From my personal experience, I want to tell you: During China's Cultural Revolution, Mao Zedong abolished the National College Entrance Exam in order to

bring "class equity" to proletariats. After destroying the meritocracy, Chinese colleges produced millions of revolutionaries who could not conduct research or manage enterprises. As a consequence, China's technological innovation stalled, and its economy collapsed.

America cannot afford to repeat this mistake by destroying meritocracy in the name of racial equity. When our nation is faced with unprecedented competition from international rivals, it is imperative to restore meritocracy in our educational institutions in order to maintain America's technological leadership and economic prosperity.

The Supreme Court's landmark rulings provide a historic opportunity for American colleges to correct their mistakes by promoting equality and meritocracy. I hereby call upon federal, state and local governments to support our policy recommendations to do just that.

Thank you!

Appendixes:

A. The Anti-Asian Discrimination in College Admissions & Its Harms

B. AACE Policy Statement: It's Time for All American Colleges to Restore Meritocracy in Their Admission Processes

Appendix A:

The Anti-Asian Discrimination in College Admissions & Its Harms

Asian American Coalition for Education

September 2023

The Discrimination History Against Asian Americans

1. **"1882 Chinese Exclusion Act," the first race-based policy discriminating a racial group in America**
2. **Japanese interment during World War II**
3. **Racial Segregation before Civil Rights Movement**
4. **Discriminated by Affirmative Action in 21st Century of America**

- **In 19th Century: There were "too many" Chinese in America.**
- **In 21st Century: There are "too many" Asians in American colleges.**

The Tip of the Iceberg: Evidence Provided by Some Asian American Students Who Have Spoken

- **Since 2006**, Jian Li, Michael Wang, Hubert Zhao and a few other Asian American students have courageously filed complaints with the Office for Civil Rights (OCR), Department of Education.
- ***Michael Wang, 2013*,** Perfect ACT Score, 13 AP Classes, competed in national speech, was in top 150 in a national maths competition, 3rd place in a national piano contest, and performed in the choir that sang at President Obama's 2008 inauguration. He is interested in law/political science, but was rejected by six Ivy League schools while less qualified students got in.
- ***September 3, 2015***, a Floridian father filed a complaint against Harvard University. His son not only exceled academically and at sports, but also performed a lot of community service and won several national competitions in economics and rocketry. Yet he was still unfairly rejected by Harvard due to his being Asian. The top four of his graduating class at a Florida high school, were Asian-Americans. Not a single one got accepted by any elite university in the U.S. At the same time, five non-Asian students were accepted by Ivy League schools, a fact that cries out for an explanation as their combined academic and personal qualifications were clearly not as good.
- ***In recent Years,*** more and more students have spoken out, revealed the anti-Asian discrimination they endured during their college application processes, including Jon Wang, and Calvin Yang who joined SFFA's lawsuits against Harvard University.

Stanley Zhong, an exceptional student rejected by 16 colleges in 2023

- **Academic Performance:** GPA (UW/W): 3.97/4.42. SAT: 1590 & National Merit Scholarship finalist
- **Finalist of major global programing competitions:**
  - Advanced to the Google Code Jam Coding Contest semi-final
  - Led his team to the 2nd place in MIT Battlecode's global high school division (1st place in the US)
- **An innovator and entrepreneur: Created an e-signing startup (RabbitSign.com) that's**
  - Grown to tens of thousands of users organically.
  - Recognized by an Amazon Web Services Well-Architected Review as "one of the most efficient and secure accounts" they have reviewed.
  - Featured by Amazon Web Services case study for its exemplary use of AWS Serverless and compliance services.
  - Interviewed by Viewpoint with Dennis Quaid, a series of short documentaries on innovations. (past guests included President George H.W. Bush & Fortune 500 CEOs.)
- **Co-founded a non-profit that brought free coding lessons to 500+ kids in underserved communities in California, Washington, and Texas.**
- **Hired by Google (full-time) but rejected by 16 colleges** including Stanford, MIT, CMU, UC Berkeley, UCLA, UC San Diego, UC Santa Barbara, UC Davis, California Polytechnic State University, Cornell, Univ of Illinois, Univ of Michigan, Georgia Tech, CalTech, Univ of Wisconsin, and Univ of Washington.

Harvard and other Ivy League Schools' Discrimination against Asian Americans Applicants: Research #1

Daniel Golden ***(Pulitzer Prize Winner, Former Wall Street Journal Reporter, 2007):***

- The discrimination against Asian Americans by Harvard and other elite universities was so severe that Golden dedicated a special chapter "The New Jews" to compare it to the discrimination suffered by Jewish Americans in the 1920's and 1930's.
- He stated that "*most elite universities have maintained a triple standard in college admissions, setting the bar highest for Asians, next for whites and lowest for blacks and Hispanics*."
- He also provided various qualitative examples as to how Harvard and other elite schools use various stereotypes to discriminate against Asian-American applicants.

Source: Golden, Daniel, *The Prices of Admission, How America's Ruling Class Buys Its Way into Elite Colleges — and Who Gets Left Outside*, published in 2007

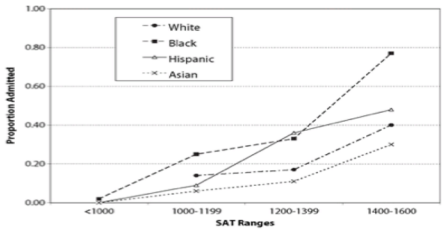
Civil Rights Violations:

- **The Use of The use of higher admission standards to unduly burden Asian American Applicants**
- **The Use of racial stereotypes**

Harvard and other Ivy League Schools' Discrimination against Asian Americans Applicants: Research #2

Thomas Espenshade (Princeton Professor) Alexandra Radford (2009)*:*

- Asian Americans have the lowest acceptance rate for each SAT test score bracket;
- Asian-Americans have to score on average approximately 140 points higher than White students, 270 points higher than a Hispanic student, and 450 points higher than a Black student on the SAT, after adjusting non-academic factors.



Item	Public Institutions: ACT-Point Equivalents (out of 36)	Private Institutions: SAT-Point Equivalents (out of 1600)
Race		
(White)	—	—
Black	3.8	310
Hispanic	0.3	130
Asian	−3.4	−140
Social Class		
Lower	−0.1	130
Working	0.0	70
(Middle)	—	—
Upper-Middle	0.3	50
Upper	0.4	−30

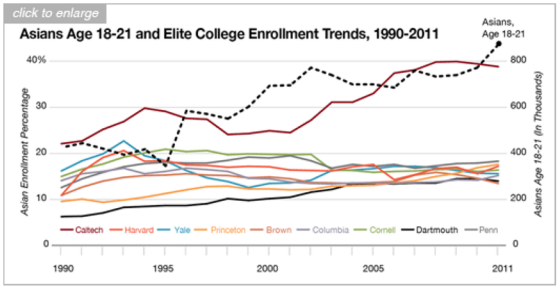
Source: Espenshade, Thomas J. & Alexandra Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life*, Princeton University Press, 2009.

Civil Rights Violation: The use of higher admission standards to unduly burden Asian American Applicants

Harvard and other Ivy League Schools' Discrimination against Asian Americans Applicants: Research #3

Ron Unz (2012)*:*

- The share of Asians at Harvard peaked at over 20% in 1993, then immediately declined and thereafter remained roughly constant at a level 3–5 percentage points lower, despite the fact that the Asian-American population has more than doubled since 1993. "The relative enrollment of Asians at Harvard was plummeting, dropping by over half during the last twenty years, with a range of similar declines also occurring at Yale, Cornell, and most other Ivy League universities."



Source: Unz, Ron, "The Myth of American Meritocracy," *The Conservative*, Page 14-51, December 2012

- Asian-American applicants' academic & other credentials have further improved over the last twenty years: Dominating all STEM related competitions; >40% Intel Talent Search & Siemens Science Competition Finalists; And >31% of Presidential Scholars (based on all-round evaluation) over the last five years.

Civil Rights Violation: The Use of racial rebalancing or a *de facto* racial quota

Harvard and other Ivy League Schools' Discrimination against Asian Americans Applicants: Research #4

Richard Sander (UCLA Professor, 2014):

- "*No other racial or ethnic group at these three of the most selective Ivy League schools is as underrepresented relative to its application numbers as are Asian- Americans*."
- Conducted a study of over 100,000 undergraduate applicants to UCLA over three years and found absolutely no correlation between race and non-academic "personal achievement."

Source: Students for Fair Admission, Inc.'s Complaint Against Harvard University, filed in the U.S. District Court for the District of Massachusetts Boston Division, November 17, 2014

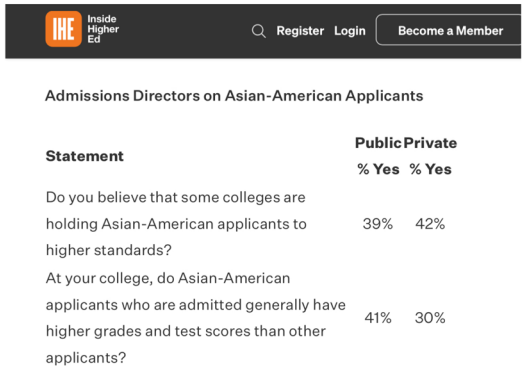
Recap: Specific laws violated: The Fourteenth Amendment to the U. S. Constitution and Title VI of the Civil Rights Act of 1964.

- **The Use of racial rebalancing or a *de facto* racial quota**
- **The Use of higher admission standards unduly burden Asian American applicants**
- **The Use of racial stereotypes (not treat applicant as individuals)**

It is one of the biggest civil rights issues Asian Americans face!

Evidences Disclosed by Former Admissions Officers

- ***On September 22, 2016***, Inside Higher Education reported a survey of admission officers. It further revealed 42% of admission officers from private colleges and 39% of admission officers from public colleges believe that colleges hold Asian American applicants at higher standard.



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Admissions Directors on Asian-American Applicants

Statement	Public % Yes	Private % Yes
Do you believe that some colleges are holding Asian-American applicants to higher standards?	39%	42%
At your college, do Asian-American applicants who are admitted generally have higher grades and test scores than other applicants?	41%	30%

- ***On May 25, 2016***, Dr. Michele Hernandez, former Dartmouth admission officer, revealed in Huffington Post that Ivy admission officers often use racial stereotypes to discriminate against Asian American students.

- ***On June 9, 2015,*** Sara Harberson, the former associate dean of admissions at the University of Pennsylvania wrote in her *Las Angeles Times* column: "*For example, there's an expectation that Asian Americans will be the highest test scorers and at the top of their class; anything less can become an easy reason for a denial. And yet even when Asian American students meet this high threshold, they may be destined for the wait list or outright denial because they don't stand out among the other high-achieving students in their cohort. The most exceptional academic applicants may be seen as the least unique, and so admissions officers are rarely moved to fight for them.* "

The Discriminatory Admission Practices against Asian Americans: Harvard Example

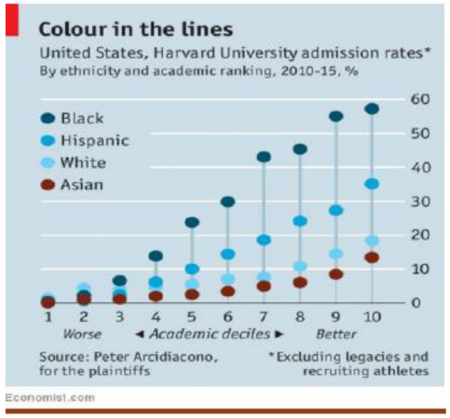
Evidence revealed by Students for Fair Admissions after reviewing 160,000 application records and interviewing many admissions officers and other stakeholders:

1. **De Facto Racial Quotas**: Harvard uses "ethnic stats" and other tools to manipulate the process so that it achieves essentially the same racial balance year over year. If, at the end of the admissions process, Harvard has admitted more (or less) of any racial group than it did the year before, then it reshapes the class to remedy the problem.

2. **Highest Admission Standards**: Asian American applicants has the lowest admission rate in every academic brackets. Professor Peter Arcidiacono's model shows that an Asian American applicant with a 25% chance of admission would see his odds rising to 35% if he were white, 75% if he were Hispanic, and 95% if he were African American.

3. **Racial stereotypes**: In spite of their exceptional credentials on all objective measures, Asian-American applicants are consistently rated the lowest by Harvard's personal ratings, which crudely categorize them as unlikeable, indistinguishable, or weak in grit, leadership and risk-taking.

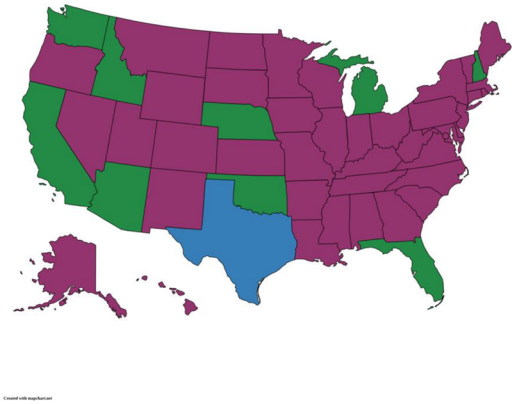
4. **Harvard's Office of Institutional Research** in 2013 concluded the College's admissions process disadvantages Asian Americans: "Asian high achievers have lower rates of admission."



The Discrimination against Asian Americans on College Admissions Was Widespread to 41 States before June 2023

Nine States Ban Race Based Affirmative Actions

2020	**Idaho**	Statute
2012	**Oklahoma**	Legislatively referred constitutional amendment
2011	**New Hampshire**	Statute
2010	**Arizona**	Initiative constitutional amendment
2008	**Nebraska**	Initiative constitutional amendment
2006	**Michigan**	Initiative constitutional amendment
1999	**Florida**	Executive order by governor
1998	**Washington**	Initiative statute
1996	**California**	Initiative constitutional amendment

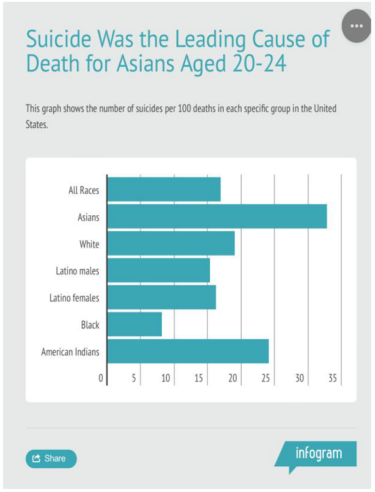


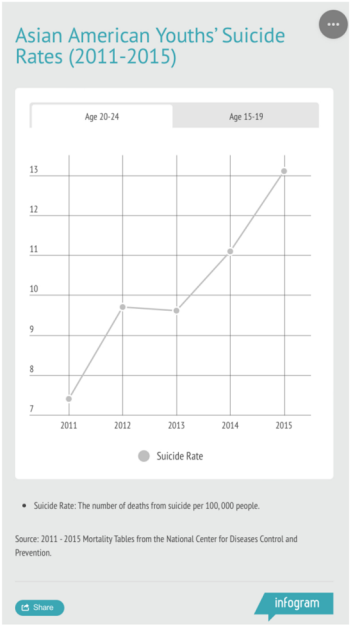
Harvard & UNC Cases Matter to admissions of thousands of colleges nationwide!

The Harm to Asian American Children

1. **Increases Pressure and Stress, Youth Suicide Rates** likely caused by higher admission standards and de facto racial quotas, which created unbearable study load for some Asian youth. Among many causes, the leading cause of Asian youth suicide was school problem.

2. **Undermines Trust in American Institutions and Feeling of Self-Worth.** The children of highest-Income, best-educated racial group has to hide their racial identity in order to get admitted by America's elite schools. Feeling as second-class citizen.





The Harm to America in General

1. **Creates Racial Barriers between Asian-Americans and Other Racial Groups.**

2. **Undermines the American meritocracy.**

3. **Exacerbates our nation's STEM talent shortage, and jeopardizes America's technological leadership, economic prosperity and national security!**

DIB Report Reveals U.S. STEM Shortage as Major Vulnerability to National Defense

by ADC | Feb 16, 2021 | Congress/DoD, On Base

The Department of Defense released its Fiscal Year 2020 Industrial Capabilities Report, which analyzed major developments and impacts of the coronavirus pandemic, as well as industrial base investments and initiatives carried out in 2020.

"The report promotes a strategy for a robust, resilient, secure, and innovative industrial base, which will require a substantial commitment of capital investment and resources, and continuation of the reforms undertaken in the past several years," according to a DoD press release.

A key takeaway from the report identified by National Interest found that the United States lags in STEM (Science, Technology, Engineering, and Mathematics) education leading to a severe shortage of technical talent in the U.S. workplace.

Appendix B:

Asian American Coalition for Education
Policy Statement

It's Time for All American Colleges to Restore Meritocracy in Their Admission Processes

Since our nation's birth, meritocracy and equal opportunity have been among the key principles which enabled America to attract talent from all over the world, build this country into the most advanced nation in the world, and achieve unmatched progress in social justice. Equal opportunity and meritocracy are the bedrock of the American Dream, which promises each citizen an equal opportunity to achieve success and prosperity through hard work, determination, and initiative.

For decades, college admissions have failed to provide equal opportunity to all Americans by adopting many policies that undermined meritocracy. Race-based affirmative action imposed unjust discrimination against Asian and other racial groups. As the Supreme Court clearly explained in its decisions, the college application process is a zero-sum game—while the intent of affirmative action might have been to help some racial groups, this could only be achieved by harming other racial groups. In addition, colleges frequently favor the children of faculty, staff, alumni, and donors. Furthermore, athletic programs have been abused by allowing otherwise academically unqualified applicants into universities and providing an opportunity for corruption in the admissions process, as was exposed by the college admissions scandal of 2019. Further still, in the wake of the Covid-19 pandemic and George Floyd's tragic death, over one thousand colleges and universities made standardized tests optional for their admissions.

Driven by "racial equity" ideologies, these assaults on equal treatment and meritocracy have caused tremendous harm to America. First, it creates racial division and racial discrimination by treating Americans differently based on their race or ethnicity. In addition, by not admitting the best and brightest into our nation's top colleges, these ideologies exacerbate our nation's STEM (Science, Technology, Engineering and Math) talent shortage, jeopardizes America's technological leadership in the world, and harms our national security. Furthermore, it creates a "mismatch" effect by admitting unqualified students into

the colleges, where many of them fail to graduate or underperform and develop unjustified resentment towards this country. When our nation is faced with unprecedented competition from international rivals, it is imperative to restore meritocracy in our educational institutions in order to maintain America's technological and economic competitiveness.

On June 29, 2023, the Supreme Court found race-based affirmative action to be both unconstitutional and in violation of the Civil Rights Act, thus eliminating one of the major barriers for America to achieve equal treatment and meritocracy.

However, on July 26, 2023, the U.S. Department of Education held a "National Summit on Equal Opportunity in Higher Education," where many speakers hand-picked by the Biden Administration openly advocated "creative" ways to circumvent the Supreme Court's rulings. Contrary to the summit's name of promoting equal opportunity, this summit promoted many measures intended to create equal outcome, such as canceling standardized tests, using "transfers" from community colleges as a backdoor to enhance racial diversity in four-year colleges, and using direct admissions to circumvent the admissions process entirely.

On August 14, 2023, the U.S. Departments of Education and Justice issued guidance titled "Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina."

In blatant violation of the rulings, which also bans use of race proxies in college admissions, the guidance advocates that "[i]n identifying prospective students through outreach and recruitment, institutions may, as many currently do, **consider race** and other factors that include, but are not limited to, geographic residency, financial means and socioeconomic status, family background, and parental education level. For example, in seeking a diverse student applicant pool, institutions may direct outreach and recruitment efforts toward schools and school districts that serve predominantly students of color and students of limited financial means. Institutions may also target school districts or high schools that are underrepresented in the institution's applicant pool by focusing on geographic location…"

Recklessly, while America is faced with a serious STEM (Science, Technology, Engineering and Math) shortage and our K-12 education is well behind China and other industrial nations, the Department of Education does not focus on how to improve our nation's educational quality. In this guidance, it even suggests

"institutions may investigate whether the mechanics of their admissions processes are inadvertently screening out students who would thrive and contribute greatly on campus. An institution may choose to study whether application fees, **standardized testing requirements, prerequisite courses such as calculus**, or early decision timelines advance institutional interests (inexplicitly racial diversity)." Clearly, The Biden Administration supports colleges' further elimination objective and rigorous admissions standards in their pursuit of "increasing access for underserved population[s]"

Condoned by the Biden Administration, the radical left in America has not given up their ideologies of using social engineering programs to undermine American meritocracy.

On behalf of over 300 Asian American organizations nationwide, AACE calls for colleges nationwide to take the following concrete steps to restore meritocracy in their admissions processes:

1. Colleges should faithfully implement the Supreme Court's decisions on affirmative action

The Supreme Court found the use of race in admissions to be both unconstitutional and a violation of the Civil Rights Act. As such, proxies for race or ethnicity are also illegal in admissions.

While educational institutions may be tempted to use essays, zip codes, high school of graduation, socio-economic status, or other non-race factors to intentionally favor certain races, the Supreme Court has already addressed the use of race proxies. Responding to a dissent's allegation that non-race factors could be intentionally used to further racial diversity, Chief Justice John Roberts wrote: "[D]espite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) '[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'"

To this effect, AACE recommends the following measures:

1.1. <u>Stop using race or ethnicity in the applications process</u>

1.2. Adopt blind rating approach

Much like blind grading, remove information from an application (at the time when an application is rated or judged for a decision on admission or denial) that would indicate an applicant's race, such as first and last name, zip code, parent's names and educational institutions, or names of social clubs;

1.3. When considering applicants' experiences, treat each applicant as an individual and not as a member of any racial group

As the Supreme Court rulings specified regarding a student writes race in an essay: "A benefit to a student whose overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."

1.4. Handle student race data lawfully. If required by the law, statistical data regarding students' race should be collected and stored in a separate database not accessible by admissions officers or other participants of student evaluation during the admissions process. It can be only used for post-admission statistical reporting.

1.5. Eliminate use of proxies for race or ethnicity, such as geographic areas of residence, zip code, family background, school districts, or names of individual schools, throughout the admissions process. Similarly, use of community outreach programs to recruit students from allegedly underserved or under-resourced areas is a thin proxy for race that should cease to be used. To faithfully implement the Supreme Court's rulings, colleges should treat all students of all racial groups the same.

1.6. Keep admissions data for at least seven years, in line with the statute of limitation for civil rights violations.

AACE and our partnering organizations will continue to actively monitor colleges and universities' admissions practices. Any use of race or race proxies during college admissions is a blatant violation of the Supreme Court's rulings and will trigger legal action, to include class action lawsuits and demands for damages and injunctive relief.

2. Colleges should base their admissions criteria on their educational programs, not woke skin-color diversity and racial equity

Colleges and universities should tailor their admissions criteria to the purpose of their academic programs. For example, in addition to sufficient academic readiness, admissions criteria for business or public policy programs should place reasonable weight on applicants' leadership skills and the diversity of students' ideas and experiences than those of other majors of study. In a similar vein, admission criteria for STEM programs should place more value on academic performance on STEM subjects. Perceived introvertedness should not be considered a weakness for STEM applicants.

Though an individual student's unique experiences or personality characteristics may contribute to student learning, it should not be the dominant factor to consider in admissions. Colleges should prioritize criteria that measure an applicant's potential to succeed in college. In this regard, uniqueness is an unhelpful characteristic, as many successful students, and people generally, share many similar characteristics, such as a solid academic foundation, strong intellectual curiosity, motivation, grit in overcoming adversity, and civic behaviors.

3. Rely on objective measures in admissions

Objective measures, such as standardized test scores, grade point average, and number of Advanced Placement classes and scores, and winning of objectively judged competitions, should be the primary means of judging applicants. Relevant subjective measures such as leadership skills could be used for appropriate fields of studies, such as business management or public policies. However, over reliance on subjective measures may lead to manipulation, abuse, or racial discrimination through more nebulous means. The troubling fact is, today nearly 81%, of all colleges have made standardized testing optional. Colleges and universities that ceased using standardized tests before or since the COVID 19 pandemic should restore use of standardized tests.

4. Cease use of legacy and other favoritism programs

AACE firmly believes that programs that favor children of faculty, staff, alumni, and donors are immoral and should not be legal. Thankfully, the solution to legacy and other favoritism programs is simple: Stop giving preference to children of faculty, staff, alumni, and donors.

5. Regulate and monitor athletic recruits

According to studies and recent criminal investigations, athletic programs have led to corruption and unfair treatment of other college applicants. Such programs need to be strictly regulated and monitored in several ways.

First, the number of athletic recruits should correlate with the needs of the athletic program; in other words, the number of athletic recruits admitted should be no more than is necessary for the program. Second, students enrolled through athletic programs must participate in their sports programs. Third, colleges and universities must audit their athletic programs to ensure student athletes actually participate in their sports teams with proven skills and ensure an athletic program is not used as a pay-for-admissions workaround to the admissions process. Fourth, student athletes should be subject to the adequate academic standards similar to all other applicants.

***

Finally, AACE urges American governments at the federal, state, and local levels to take concrete measures to address the root causes of the failing K to 12 education system in American inner cities.

It is not meritocracy, but politicians' failure to provide adequate K-to-12 education to too many black and Hispanic children that has caused a lack of racial diversity in colleges and universities. Without enough college-ready black and Hispanic high school graduates in the pipeline, colleges had to use race-based affirmative action to artificially improve their admissions. Affirmative action treated Asian Americans as scapegoats to cover up the failures of those politicians who manage America's inner cities.

For too long, American society has ignored this policy failure of those who run America's inner cities. After the Supreme Court's rulings on affirmative action, it is time to hold these politicians and governments accountable. Improving K-to-12 education in America through structure reform including school choice is the only constitutional and effective way to enhance diversity in American higher education.

Asian American Coalition for Education

August 25, 2023

Chairman OWENS. Thank you, Mr. Zhao. I would now like to recognize Mr. Hinojosa.

STATEMENT OF DAVID HINOJOSA, J.D., DIRECTOR OF EDUCATIONAL OPPORTUNITIES PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, D.C.

Mr. HINOJOSA. Good morning, Chairman Owens, Ranking Member Scott and Members of the House Subcommittee. My name is David Hinojosa, and I am the Director of the Educational Opportunities Project with the Lawyers' Committee for Civil Rights Under Law.

Thank you for the opportunity to testify today on the Supreme Court's decisions. The Lawyers' Committee has been a leader in the fight for racial equity, access and justice in higher education for many years. We have worked with coalitions nationally and in two Midwestern states, to ensure that all students may access, be supported, graduate and into the workforce fully prepared for our pluralistic society.

We have also had the distinct privilege and honor of representing an incredible multiracial group of students and organizations in the Harvard, UNC and UT-Austin cases, including black, Latino and Asian American students. Together with pro bono law firms, Asian Americans Advancing Justice (AAJC) and the North Carolina Justice Center, we represented the only State, the only students who have bravely testified in the UNC and Harvard cases about the tremendous academic and social benefits of diverse student bodies.

When I argued the UNC case in the Supreme Court last October, I carried with me their powerful stories of resilience, unity and determination. These included Luis Augusta, a child of Mexican immigrant parents, who wanted to become a doctor after visiting his grandmother as a young child in Mexico and seeing her with an abscess in her knee because she lacked access to adequate health care.

Luis had to fight his way into AP classes at his rural high school in North Carolina because a counselor did not think he could compete. Luis had strong grades, but did not have the highest test scores, because he did not even know that he could study for the SAT. Luis persevered and today he is in his fourth year of medical school.

Sally Chen, a child of Chinese immigrant parents, who grew up in San Francisco in a one-bedroom apartment with her family and siblings. Sally often translated for her parents in stores, schools and doctor's offices. She thought about whether in her application she should discuss her family story and decided that she would be true to herself and share those experiences that inspired her.

She was admitted to Harvard as a first-generation student, graduated and now helps lead work with the Chinese for Affirmative Action.

Andrew Brennan, a second-generation black college student, who grew up in Kentucky and wrote in his college application that he did not always fit into the black stereotype, because he identified as gay and did not just listen to rap music. He is among less than 125 black men in his class at UNC. Andrew graduated, continued

as a strong advocate for student voice, and today is enrolled at Columbia Law School.

These are only a fraction of the deep, profound stories of many of our students, whose range of academic and social achievements, attributes, experiences and talents, including those impacted by race, were fully vetted under affirmative action admissions plans, and still should be fully vetted today.

These students earned their seats, succeeded in school and are now succeeding in life. Our country needs more success stories like these, and we cannot allow others to use the Supreme Court's tortured history of the Equal Protection Clause and the promise of Brown v. Board, to take those seats away from other well-deserving students.

Let us be real, that is what many supporters of the decision want to do, and not just in education but all facets of life, where built in, unearned and bought up privileges for the few determine who has opportunity and who does not. That may be somebody's dream, but that is not the American dream.

Universities can do their part by instituting comprehensive reforms, including race-neutral programs of recruitment and outreach and student support, as well as deconstructing systemic barriers. We need Congress to do its part in helping to bring unity, opportunity and justice for all.

We have several of these recommendations in our written testimony, and I will just highlight a couple. Providing grant funding to analyze and implement fair and meaningful race-neutral alternatives that advance fair access and opportunity; increasing Pell grant funding and expanding eligibility; increasing dedicated funding for social and academic counselors in K–12; and investigating systemic barriers to higher education such as legacy admissions and the consideration of biased SAT and ACT exams for admissions and scholarships. Thank you.

[The prepared statement of Mr. Hinojosa follows:]

STATEMENT OF DAVID HINOJOSA

DIRECTOR OF THE EDUCATIONAL OPPORTUNITIES PROJECT

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON EDUCATION AND THE WORKFORCE

SUBCOMMITTEE ON HIGHER EDUCATION AND WORKFORCE DEVELOPMENT

HEARING ON

"HOW SCOTUS'S DECISION ON RACE-BASED ADMISSIONS IS SHAPING UNIVERSITY POLICIES"

SEPTEMBER 28, 2023

I. Introduction

On June 29, 2023, the Supreme Court decided *Students for Fair Admissions v. President and Fellows of Harvard College* ("*SFFA v. Harvard*") and *Students for Fair Admissions v. University of North Carolina* ("*SFFA v. UNC*"),[1] holding that Harvard's and UNC's race-conscious admissions programs violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 by failing to satisfy strict scrutiny. The Supreme Court disregarded nearly 50 years of precedent in an affront to the doctrine of *stare decisis* and the principle of ensuring that higher education remains visibly open to all students. As Justice Ketanji Brown Jackson wrote in her dissent, "[o]ur country has never been colorblind,"[2] and prohibiting institutions of higher education from accounting for underrepresented students of color's race as one piece of a holistic admissions process will only amplify the inequities that continue to exist in education in this country. To put it plainly, next year's entering classes at colleges and universities that previously employed the use of race-conscious admissions to ensure their student bodies reflected the rich racial and ethnic diversity of this country, may, unfortunately, include far fewer Black, Latinx, Native American and underrepresented Asian American students. This is exactly what happened in states like California and Michigan after affirmative action was barred in college admissions in those states. The recent Supreme Court decisions will only compound existing problems, as many universities continue to struggle to recruit, admit, retain, and graduate underrepresented students of color.

It is important that members of Congress have a comprehensive understanding of what the Supreme Court did and did not rule in the affirmative action cases. Contrary to common belief, the Supreme Court did not ban all consideration of race in college admissions. Colleges and universities can continue to consider how an applicant's race has impacted their lives, whether that is through a story an applicant tells about facing racial discrimination or a story about how an applicant's race has inspired them to succeed.

Congress has clear authority to take other steps to ensure that the populations of Black students and other underrepresented students of color at institutions of higher education increase, even without affirmative action. Congress can and should provide funding and incentives, especially for lower-funded public and private nonprofit institutions, to analyze and implement race-neutral alternatives that advance fair access and opportunity for students across race and background. Congress should increase Pell Grant funding to adequately reflect the true and current costs of higher education and expand the criteria for eligibility. Congress should provide additional resources to the Department of Education and the Department of Justice to investigate and remedy systemic policies and practices that create barriers to higher education based, directly or indirectly, on students' race and ethnicity. Congress should pass legislation that requires institutions of higher education that receive federal funds to report on disaggregated demographic information for applications, admissions, and enrollment so that the true impacts of the Supreme Court's decision in *Harvard/UNC* can be studied and corrected, as necessary. Congress should also provide

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[1] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 600 U.S. __ (2023) ("*Harvard*").
[2] *Id.* at 2264.

increased funding to Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs), Tribal Colleges and Universities (TCUs), and Asian American and Pacific Islander Serving Institutions (AAPISIs) that may have to serve a much larger population of students if those students are no longer able to gain admission into institutions of higher education that will now limit the use of race in admissions.

Our multiracial democracy depends on ensuring that pathways to leadership and economic prosperity—higher education being chief among them—are open to all talented, well-qualified Black and Brown students. For over 50 years, many of the nation's most selective colleges and universities have relied on affirmative action to overcome over 300 years of systemic exclusion and oppression of Black people and other people of color. There are people and institutions who view the past 50 years of race-conscious admissions as not only sufficient to cure over 300 years of oppression and racial exclusion but as unbearable, unwarranted, and unfair. While the Supreme Court majority has unfortunately fallen into that number, Congress must not take the bait. Instead, Congress must help lead and support institutions of higher education and communities to ensure that students across races and backgrounds learn together and grow together.

II. Background on *SFFA v. Harvard/UNC* Decisions

Despite the headlines of most news outlets proclaiming the end of affirmative action, the Court did not hold that all race-conscious admissions programs are unconstitutional in *Harvard/UNC*. However, the decisions do undermine the Court's precedent established in *Bakke* and *Grutter*, making it more difficult for universities to pursue race-conscious admissions.[3]

The Court grounds its decision in a narrow and misguided historical overview of the Fourteenth Amendment, ignoring the substantial history of the Equal Protection Clause that evidences Congress's intent both to stop the subjugation of Black people in America and to advance opportunity for Black people and other historically marginalized people of color.[4] Indeed, Congress rejected language in proposed amendments that were more aligned with "colorblindness." Nevertheless, the Court concludes that the Equal Protection Clause was enacted to ensure colorblindness and authorized racial classifications only under narrow circumstances, such as race-based remedial plans and plans that avoid imminent and serious risks to safety in prisons.[5]

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[3] The majority's heightening of the requirements of strict scrutiny in the context of higher education admissions is undoubtedly what led Justice Sotomayor, in her forceful dissent, to state that the Court's decision "is not meant to infuse clarity into the strict scrutiny framework; it is designed to render strict scrutiny 'fatal in fact.'" *Id.* at 2253-54. Similarly, Justice Thomas also appears to believe that this Court's decision "makes clear that *Grutter* is, for all intents and purposes, overruled." *Id.* at 2201. However, as noted by Justice Sotomayor, the Court did not engage in the required analysis to formally overturn precedent. *Id.* at 2239. Accordingly, colleges may want to continue to research ways to create race-conscious admissions programs within the confines described by the Court.

[4] *Harvard*, 143 S.Ct. at 2227-2230 (J. Sotomayor dissenting) (discussing dual purpose to enshrine guarantee of equality and to end the subjugation of Black people and other marginalized people of color).

[5] As discussed in footnote 3, the Court did not foreclose universities from presenting other compelling interests supporting the consideration of race in admissions. And the Court did not disturb military academies from pursuing race conscious admissions as the issue was not before the Court and "in light of the potentially distinct interests that

While the Court did not overturn its decision in *Grutter v. Bollinger* (2003),[6] it did rely on its own twisted historical understanding to tighten the requirements of the *Grutter* standard even while ostensibly keeping with precedent. For example, in its decision, the Court confirms that for schools to explicitly consider race in admissions, they must have a compelling interest in doing so. In *Grutter* and *Fisher II*,[7] the Court held that higher education institutions have a compelling interest in the educational benefits of diversity, such as promoting cross-racial understanding, breaking down racial stereotypes, increasing learning outcomes, and preparing students to work in a diverse workplace. In both the Harvard and UNC cases, the district courts respectively found both universities had a legitimate interest in these educational benefits and were adequately assessing this interest. SFFA presented no evidence disputing these findings. Yet, the Supreme Court held that the universities' stated interests—described similarly as the interests articulated in *Grutter* and *Fisher II*—could not be compelling because they are too imprecise for measurement. As a result, the Court concludes that the goals articulated by Harvard and UNC are "commendable" but "are not sufficiently coherent for the purposes of strict scrutiny."

The Court also finds that the race-conscious admissions programs are not narrowly tailored to the school's stated compelling interests. In doing so, the Court identifies four characteristics that a race-conscious admissions program must meet to be narrowly tailored.

First, the Court states that there must be a "meaningful connection between the means they employ and the goals they pursue."[8] Per the majority, Harvard's and UNC's programs lack this connection because their means, *i.e.*, the racial categories the schools use to identify the diversity of their class, are "imprecise" and "plainly overbroad." The Court notes, for example, that the "Asian" category is overbroad because it includes, without distinguishing, East Asian and South Asian students. It also critiqued that the categories do not clarify what option students from the Middle East should choose.[9] In holding so, however, the Court ignores the fact that for decades, the U.S. Census Bureau has used similar groupings for urban planning, federal grant-making, and academic and social studies, among others.[10]

Second, the Court holds that race-conscious programs must not use race as a negative. The Court found that Harvard's and UNC's programs fail to meet this requirement because their programs allowed for a tip or a plus to be given to an applicant based on their race alone. According to the Court, using race in this manner inherently allows for the negative use of race because in the "zero-sum" environment of admissions, a "benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[11] But this argument ignores

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military academies may present." *Harvard*, 143 S.Ct. at 2166. SFFA, however, recently sued West Point arguing that its affirmative action admissions program violates the Fifth Amendment's equal protection principle, which applies to the federal government and is analogous to the Fourteenth Amendment's Equal Protection Clause.; Bianca Quilantan, *Anti-affirmative action group sues West Point over race-conscious admissions*, POLITICO (Sept. 19, 2023), https://www.politico.com/news/2023/09/19/anti-affirmative-action-west-point-lawsuit-race-admissions-00116791.

[6] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[7] *Fisher v. Univ. of Texas at Austin,* 579 U.S. 365 (2016).

[8] *Harvard,* 143 S.Ct. at 2167.

[9] *Harvard*, 143 S.Ct. at 2167-68.

[10] *Id.* at 2254 (J. Jackson dissenting).

[11] *Harvard,* 143 S.Ct. at 2169.

several facts including that one, admitted students across races benefit from greater student body diversity; and two, that students could receive bumps for a range of factors from military experience to rural upbringing, so to suggest that somehow an admitted student of color gained a seat at the expense of another non-minority student, is wholly inaccurate and unreasonable.

Third, the Court rules that race-conscious admissions programs must not use race in a way that reinforces racial stereotypes. According to the Court, Harvard's and UNC's programs did not meet this factor because their programs provided preferences to students "on the basis of race alone."[12] This resulted in a system that the Court believes rests on the "pernicious stereotype that a black student can usually bring something that a white person cannot offer," which is impermissible.

The Court's conclusion here is particularly egregious for the way that it obscures and ignores the substantial, one-sided record painstakingly created at trial in both cases. For example, in both cases, several students testified that the diversity created by these race-conscious programs broke down, rather than reinforced, stereotypes.[13] Hanna Watson, an alumna of UNC, testified that racial diversity in classes fostered "better feedback" and discussion, and that *intra*-racial diversity within UNC's Black community broke down stereotypes by showing that "[B]lackness is not a monolith." Expert testimony on the research bolstered this evidence, as well as uncontradicted testimony on how Harvard and UNC were measuring the benefits of diversity on their campuses through surveys and other instruments. SFFA offered no evidence whatsoever refuting such testimony and evidence but the Court nevertheless held that Harvard's and UNC's race-conscious programs promoted stereotyping.

The fourth and final characteristic of a lawful race-conscious admissions program is that it has a "logical end point." Harvard's and UNC's programs lacked such endpoints because the schools' proposed endpoints, such as when "there is meaningful representation and [] diversity" on their campuses, could not be measured to determine when they were met. Although Justice O'Connor had written in *Grutter v. Bollinger* (2003) that she hoped that in 25 years from then race-conscious admissions would no longer be needed, the Court refused to grant Harvard and UNC even the five years remaining under that hypothetical timeline.

It is also important to note what the decisions directly and indirectly state about the role of race and diversity in college admissions. **Perhaps most importantly, the majority makes clear at the end of its opinion that its decisions do not command a completely race-blind admissions policy. For example, the opinion does not affect the ability of universities to consider racial experiences noted in an individual's application, which may include when an applicant discusses "how race affected his or her life, be it through discrimination, inspiration, or otherwise."[14]** While the Court did note that universities cannot assess such experiences in ways intended to circumvent the ruling, universities may continue to assess on an individualized basis an applicant's mention of race in essay questions and other parts of an application where a student may raise their race.

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[12] *Id.* at 2170 (citation omitted).
[13] *See Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 592-93 (M.D.N.C. 2021).
[14] *Harvard*, 143 S.Ct. at 2176.

In addition, the decisions are limited to the consideration of an applicant's racial grouping as a plus factor, but they do not prohibit universities from continuing to establish broad goals of diversity, inclusive of racial diversity. Such prohibitions would raise serious First Amendment concerns.

The decisions also do not prevent universities from pursuing diversity through race-neutral means.[15] At the heart of the Court's ruling is treating students differently based on their racial and ethnic grouping. Race-neutral admissions programs, such as those that consider high school rank or socioeconomic status of applicants, are not based on race and without more, do not demonstrate equal protection violations.

III. State of Racial Equity in Education & Why This Matters

America has long regarded higher education as the gateway to social and economic mobility. Indeed, today, a college diploma confers substantially higher earnings on those with credentials than those without—by some estimates more than 80% over a lifetime.[16] But for too long in our nation's history, people of color and women were shut out from postsecondary education and its benefits. That door cracked open in 1965 when President Lyndon B. Johnson signed the Higher Education Act into law after the Civil Rights Act of 1964 was enacted the prior year.[17] The Higher Education Act was aimed squarely at addressing racial and social inequality by granting access to people of color and women, establishing federal financial aid, and providing financial support to Historically Black Colleges and Universities. What followed were a host of race-conscious policies and practices that attempted to remedy systemic racism and discrimination and increase racial diversity on college campuses and in the workforce.

But the backlash to equal educational opportunities for communities of color and increased diversity in higher education was swift and intense. The Supreme Court decision in *Regents of the University of California v. Bakke* (1978), in which the Court prohibited affirmative action from being used to address societal discrimination and limited its consideration to pursue the educational benefits of diversity, spurred a string of rulings and policy choices that began to limit the tools colleges and universities could use to create more equitable and diverse student bodies.[18]

Today, systemic barriers to college enrollment and completion persist for Black people and other marginalized communities. While college enrollment rates for all racial and ethnic groups

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[15] Indeed, in their respective concurring opinions, both Justices Kavanaugh and Thomas make clear that universities may continue to pursue diversity through race neutral means. *Harvard*, 143 S.Ct. at 2225 (J. Kavanaugh) ("governments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'") (citations omitted); *id.* at 2206 (J. Thomas) (noting that race-neutral policies may "achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.").

[16] Anthony Carnevale, et al., *The College Payoff: Education, Occupations, Lifetime Earnings,* Georgetown Center on Education and the Workforce (2011), https://cew.georgetown.edu/wp-content/uploads/collegepayoff-completed.pdf.

[17] Pub. L. 89-329 (1965); Pub. L. 88-352 (1964)

[18] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

have increased over the years, significant gaps remain in access for historically marginalized groups, particularly Black and Latinx students.[19]

Even though Black and Latinx students' high school graduation rates have increased over the last two decades, their enrollment in most public colleges and universities has remained stagnant or declined in many states[20] and they continue to be underrepresented at public flagship institutions.[21] And despite the remarkable achievements and contributions that Native American and Alaska Natives continue to make in society, both student groups are largely rendered invisible, feeding an intractable college access and completion crisis among students of color nationally.[22] In addition, while some Asian American groups have better access and educational outcomes than others, underrepresented Southeast Asian American, Native Hawaiian, and Pacific Islander students continue to face unique and pressing challenges—poverty, language barriers, race-based bullying and harassment, among others—that impede their educational opportunities.[23]

Data show that only one out of five Black students graduate from their first four-year college within four years, compared to nearly one out of two white students. The challenges for students of color go beyond access and completion. Black students, especially those attending less racially diverse institutions, are more likely to face discrimination and feel physically and psychologically unsafe,[24] disrespected, and any number of implicit and overt forms of racial discrimination that cause many to check out or never enroll in the first place.[25] Lastly, the weight of the burden of the student loan crisis is disproportionately borne by Black and Latinx borrowers, exacerbating persistent racial wealth and income disparities.[26]

Yet, despite this troubling state of racial equity in higher education, access to more selective institutions, where Black student outcomes are much higher, continues to be threatened by attacks

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[19] U.S. Dep't of Treasury, *Post 5: Racial Differences in Educational Experiences and Attainment*, (June 9, 2023), https://home.treasury.gov/news/featured-stories/post-5-racial-differences-in-educational-experiences-and-attainment#.

[20] Mark Hueslman, *Social Exclusion: The State of State U for Black Students*, Demos (Dec. 2018), https://www.demos.org/sites/default/files/publications/SocialExclusion_StateOf.pdf.

[21] *See* Kati Haycock, et al., *Opportunity Adrift: Our Flagship Universities Are Straying From Their Public Mission,* The Education Trust (Jan. 2010), https://files.eric.ed.gov/fulltext/ED507851.pdf; Andrew Howard Nichols & J. Oliver Schak, *Broken Mirrors: Black Representation at Public State Colleges and Universities*, The Education Trust (Mar. 6, 2019), https://edtrust.org/wp-content/uploads/2014/09/Broken-Mirrors-Black-Representation-at-Public-Colleges-and-Universities-9.27-19.pdf; *The State of Higher Education in California, Asian Americans, Native Hawaiians Pacific Islanders*, The Campaign for College Opportunity (Sept. 2015), https://collegecampaign.org/wp-content/uploads/imported-files/2015-State-of-Higher-Education_AANHPI2.pdf.

[22] *Creating Visibility and Healthy Learning Environments for Native Americans in Higher Education*, American Indian College Fund (2019), https://resources.collegefund.org/wp-content/uploads/Creating-Visibility-and-Healthy-Learning-Environments-for-Natives-in-Higher-Education_web.pdf.

[23] *Overlooked and Underserved Debunking the Asian 'Model Minority' Myth in California Schools*, The Education Trust (Aug. 2010), https://west.edtrust.org/wp-content/uploads/sites/3/2015/01/ETW-Policy-Brief-August-2010-Overlooked-and-Underserved.pdf.

[24] Camille Lloyd & Courtney Brown, *One in Five Black Students Report Discrimination Experiences*, Gallup (Feb. 9, 2023), https://news.gallup.com/poll/469292/one-five-black-students-report-discrimination-experiences.aspx.

[25] Gallup & Lumina Foundation, *Balancing Act: The Tradeoffs and Challenges Facing Black Students in Higher Education,* Lumina Foundation (Feb. 9, 2023), https://www.luminafoundation.org/wp-content/uploads/2023/02/Black-Learners-Report-2023.pdf.

[26] Ben Miller, *The Continued Student Loan Crisis for Black Borrowers*, Center for American Progress (Dec. 2, 2019), https://www.americanprogress.org/article/continued-student-loan-crisis-black-borrowers/.

from anti-civil rights extremists intent on turning back the clock on civil rights and racial equity. The issue is more pressing than ever before as history shows that precipitous drops in the enrollment of Black, Latinx and other underrepresented students of color frequently follow the loss of affirmative action in admissions. While the *Harvard/UNC* decisions do not ban affirmative action programs, many higher education institutions are expected to drop race as a factor in admissions in their upcoming admissions cycles due to the highly restrictive standards imposed by the Supreme Court. As demonstrated by testimony of student-intervenors in the UNC case, students of all backgrounds have expectations that universities with race-conscious policies "will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world."[27] The loss of affirmative action will likely send signals to prospective students of color that they are no longer welcome and applications will likely decrease. Accordingly, it is imperative that Congress is aware of the potential decreases in racial and ethnic diversity that may be on the horizon and that it exercises all efforts to support universities' lawful efforts to ensure they reflect the rich diversity of hardworking Americans across backgrounds in our nation.

Nine states have banned affirmative action: Arizona, California, Florida, Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington.[28] The impacts on student diversity in some of those states likely foreshadow a coming national decline in enrollment at highly selective colleges and state flagship universities.

California, which is mistakenly seen as an exemplar of overcoming the loss of affirmative action, actually provides a good example of how states have struggled to attract and enroll underrepresented students of color at its more selective universities. In 1995, a year before California banned affirmative action, 29 percent of UCLA's enrolled freshmen were underrepresented students of color (compared to 38 percent of public high school graduates in the state). In 2021, though underrepresented students of color made up 58 percent of public high school graduates in California, only 33 percent of freshmen at UCLA were underrepresented students of color, representing a dramatic decline in the proportion of California's high school graduates of color who gained admission into UCLA.[29]

In Oklahoma, at the state's flagship Norman campus, enrollment of Black freshmen dropped from 5.1 percent to 3.7 percent and Native American students fell from 3.8 percent to 3.0 percent the year following that state's ban in 2012.[30] In Michigan, since the state's ban of affirmative action in 2006, the University of Michigan's Black undergraduate enrollment declined by 44 percent between 2006 and 2021, despite an increase in the percent of college-aged Black

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[27] *Harvard*, 143 S.Ct. at 2259 (J. Sotomayor dissenting) (citing Brief for Respondent-Students in No. 21–707, at 45; Harvard College Brief 6–11).
[28] Jennifer Liu, "*The Supreme Court ruled against affirmative action in college admissions– what students should know*, CNBC (June 29, 2023), https://www.cnbc.com/2023/06/29/scotus-affirmative-action-in-college-admissions-ruling-what-students-should-know.html.
[29] Brief of 1,246 American Social Researchers and Scholars as Amici Curiae in Support of Respondents at 28, *Students for Fair Admissions, Inc. v. Uni. of N.C.*, No. 21-707, 600 U.S. __ (2023).
[30] Brief for the University of Michigan as Amici Curiae in Support of Respondents at 25, *Students for Fair Admissions, Inc. v. Uni. of N.C.*, No. 21-707, 600 U.S. __ (2023).

people in the state over the same time period. Its Native American enrolled student population fell by nearly 90 percent over the same time period.[31]

Bans have also negatively impacted enrollment in graduate programs. Before California's ban, the University of California medical schools graduated a higher percentage of Black doctors than the national average; after the ban, the graduation percentage of Black doctors fell by more than one-fifth below the national average.[32] Research at selective law schools following affirmative action bans in California, Texas[33] and Washington showed a drop of nearly 67 percent in Black law student enrollment (from 6.5 percent to 2.25 percent) and more than a third for Latinos (from 11.8 percent to 7.4 percent).[34] A separate review of the effect of bans in Texas, California, Washington, and Florida across graduate programs showed reductions "by about 12 percent the average proportion of graduate students who are students of color. . . ."[35]

Following the *Harvard/UNC* decisions that have greatly proscribed affirmative action in higher education, preventing these declines and expanding access for high achieving students of color must be a national priority to ensure our multiracial democracy thrives at its fullest potential.

IV. What Colleges and Universities Can and Should Do to Advance Opportunity and Access for All Students

A. A Comprehensive Approach

Institutions of higher learning have a moral, ethical, and legal duty to promote equal opportunity and provide a learning environment free from racial harassment, hostility, and isolation. This was true during the days of de jure segregation before *Brown v. Board of Education*, through *Bakke v. Regents of California* and *Grutter v. Bollinger*, and remains true today following the decisions in *Students for Fair Admissions v. UNC and Harvard.*

As we know—and as some members of the Supreme Court seemingly acknowledge—racism continues to shape the cultures of postsecondary institutions, and most certainly impacts the experiences and outcomes of students, faculty, and staff.[36] All institutions—but especially public colleges and universities, which principally tend to serve their respective state and communities—have an obligation to improve racial equity and make their qualified student body population more reflective and inclusive of the communities they serve. Unfortunately, too many flagships and other selective public and private institutions do the opposite—they

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[31] *Id.* at 22
[32] Brief of 1,246 American Social Researchers and Scholars as Amici Curiae in Support of Respondents at 21-22, *Students for Fair Admissions v. University of North Carolina*, No. 21-707, 600 U.S. __ (2023).
[33] David Hinojosa, *Of Course the Texas Top Ten Percent is Constitutional…And It's Pretty Good Policy Too*, 22 TEXAS HISPANIC JOURNAL OF LAW & POLICY L.J., 1 (2016) (The Fifth Circuit's decision in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) had essentially banned affirmative action in Texas universities until the *Grutter v. Bollinger* decision in 2003).
[34] William C. Kidder, *The struggle for access from Sweatt to Grutter: A history of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 1-42 (2003).
[35] Liliana M. Garces, *The Impact of Affirmative Action Bans in Graduate Education*, The Civil Rights Project, 4 (July 2012), https://files.eric.ed.gov/fulltext/ED533648.pdf.
[36] *Harvard,* 143 S.Ct. at 2225 (J. Kavanaugh concurring).

disproportionately exclude underserved youth of color and low-income students.[37] To reverse this outcome, it is incumbent upon universities to partner with their students and communities to develop a comprehensive approach that encompasses all facets of the schooling experience.

Colleges and universities can begin by clarifying their institutional commitments to racial equity, examining their own assumptions about racism, and considering ways in which their policies and practices across the student experience from recruitment and admissions to campus climate and completion might implicitly reproduce racial inequities.

Consistent with the Court's opinion in *Harvard/UNC*, universities should also allow students to discuss, and schools may still properly consider, a student's individual racial experiences in the context of their applications. Universities must also ensure that their admissions reviewers are clearly and fully trained to ensure that they are not expressing bias, explicitly or implicitly, against students who choose to raise their racial experiences.

Furthermore, colleges and universities should continue to pursue and support diversity on their campuses through other means, such as:

- Adopting race-neutral alternative admissions programs that consider factors like high school class rank ("percentage plans"), socioeconomic status and wealth, overcoming adversity, and first-generation college student status.
- Developing a robust college pipeline that focuses on middle and high school students from traditionally underrepresented communities, including pre-college programs that provide exposure to campus and college preparatory opportunities.
- Increasing and expanding need-based aid, removing financial barriers to enrollment, redefining "merit," and expanding targeted recruitment to underserved communities.
- Deconstructing barriers to admission for underrepresented students, such as reducing or eliminating reliance on standardized testing for admissions and scholarships,[38] eliminating legacy and donor preferences[39] and early admissions programs, and eradicating arbitrary course degree requirements.

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[37] *See*, *e.g.*, Andrew Howard Nichols, *'Segregation Forever'?: The Continued Underrepresentation of Black and Latino Undergraduates at the Nation's 101 Most Selective Public Colleges and Universities*, The Education Trust (July 21, 2020), https://edtrust.org/wp-content/uploads/2014/09/Segregation-Forever-The-Continued-Underrepresentation-of-Black-and-Latino-Undergraduates-at-the-Nations-101-Most-Selective-Public-Colleges-and-Universities-July-21-2020.pdf.

[38] The Lawyers' Committee for Civil Rights Under Law and several organizations sent a letter to colleges and universities detailing the problematic nature of relying on SAT and ACT test scores for admissions, including the racial and socioeconomic biased nature of the exams, the weak measurement of a student's aptitude and potential, and the ability to "buy up" test scores for more affluent students. *Letter to All Universities and Colleges Relying on the SAT/ACT for Admission*, Lawyers' Committee for Civil Rights Under Law (June 16, 2020).

[39] Within a week of the affirmative action decisions, the Lawyers for Civil Rights, an affiliate of the Lawyers' Committee for Civil Rights Under Law, filed a complaint with the U.S. Department of Education's Office for Civil Rights challenging Harvard College's legacy and donor preferences. *Civil Rights Complaint Challenges Harvard's Legacy Admissions*, Lawyers for Civil Rights (July 3, 2023), http://lawyersforcivilrights.org/our-impact/education/federal-civil-rights-complaint-challenges-harvards-legacy-admissions/.

Colleges and universities' efforts to achieve racial equity must extend beyond the application and admissions process and include ensuring a healthy, vibrant campus climate for all students. Schools should adopt Diversity, Equity, Inclusion and Access (DEIA) efforts and other measures that schools can use to ensure that all students feel like they belong on campus. This may include support for affinity groups, implementing accessible systems to report and meaningfully address experiences of prejudice and discrimination on campus, and strengthening recruitment and outreach to underrepresented faculty groups.

Schools can and should continue to use all the tools at their disposal to ensure that they are able to recruit, admit, support, and graduate a diverse and inclusive group of students commensurate with their respective missions and goals.

B. The U.S. Department of Education and Department of Justice Provide Further Guidance to Ensure Equal Educational Opportunities Following the Decisions.

On August 14, 2023, the U.S. Department of Justice and the Department of Education issued a joint Dear Colleague Letter[40] and a set of Questions and Answers[41] addressing the ramifications of the Supreme Court's decision in *Harvard/UNC*. The Departments make clear that the decisions directly address only colleges and universities' race-conscious admissions programs that universities have relied upon for decades. Notwithstanding, the Departments recognize several opportunities that colleges may consider, including but not limited to the following:

- Universities can double down on their efforts to partner with underserved school districts to help improve learning and college readiness, as well as to recruit and retain students from underserved communities.[42]
- Universities can consider the ways that students' racial experiences and backgrounds have shaped their lives when considering them for admission, without giving a plus to a person's application solely because of their race.[43] Colleges and universities can also consider any quality or characteristic of a student that bears on an admission decision, such as courage, motivation, or determination, even if the student's application ties that characteristic to their experience with their race.[44]
- Universities should take action to ensure that all students are welcomed and supported, and that students feel comfortable when discussing their race when applying to college, without fear of stereotyping or discrimination.[45]
- Universities may continue to articulate missions and goals tied to student body diversity and may use all legally permissible methods to achieve that diversity, including consideration of an applicant's financial means, Tribal membership, parental attainment,

[40] U.S. Dep't of Educ. and U.S. Dep't of Just., SFFA Dear Colleague Letter, (Aug. 14, 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf (hereinafter "*DCL*").
[41] U.S. Dep't of Educ. and U.S. Dep't of Just., SFFA Q&As, (Aug. 14, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-questionsandanswers-tvi-20230814.pdf (hereinafter "*Q&As*").
[42] DCL, *supra* note 38, at 2.
[43] DCL, *supra* note 38, at 2; Q&As, *supra* note 39, at 2-3.
[44] DCL, *supra* note 38, at 2.
[45] DCL, *supra* note 38, at 2; Q&As, *supra* note 39, at 6.

spoken languages, socioeconomic status, overcoming adversity, and neighborhood and high school.[46]

- Universities can continue to collect demographic data of the student applicant pool, admissions outcomes, and enrollment and retention, so long as the use of that data is consistent with applicable privacy laws and ensures that the race of individual applicants does not influence admissions decisions.[47]
- Universities may continue to pursue targeted outreach, recruitment, and pipeline or pathway programs that promote opportunity, so long as those prospective students do not receive a preference in admissions based on their race.[48]
- Universities can evaluate their existing policies to determine whether they are fulfilling their institutional values and commitments. Such actions may include increasing access for first-generation or Pell-grant eligible students; and eliminating or revising legacy and donor preferences, application fees, standardized testing, course prerequisites, and early decision deadlines.

The Departments also provide legally permissible examples of stories that colleges can consider from applicants, including but not limited to: a) an applicant's story about his pride in being the first Black violinist in his city's youth orchestra; b) an applicant's account of overcoming prejudice when she transferred to a rural high school where she was the only student of South Asian descent; c) a counselor's description of how a Latina applicant conquered her feelings of racial isolation at a predominantly white high school to join the debate team; or d) an applicant's story of how learning to cook traditional Hmong dishes from her grandmother nurtured her sense of self by connecting her to past generations of her family.[49]

V. How Universities are Responding to the Harvard/UNC Decisions

For thousands of universities and colleges that did not engage in affirmative action admissions, including the universities in the nine states that currently ban affirmative action, they likely will not have to reform any of their admissions policies. Many of the two-hundred plus universities that have or had race-conscious admissions are still discussing how they intend to revise and conform their admissions policies and guidance to the *Harvard/UNC* decisions. As noted above, universities should continue to pursue broader diversity goals, inclusive of racial diversity. How they achieve those goals in light of the opinion is where the issue lies. As UNC Student Body President Christopher Everest poignantly shared, "The truth is, a lot of our students are scared for the future of our campus, both current and prospective. . . . But I recommit my promise to be an advocate for all and to work with students, university administration, and the members of this board to make sure that everyone who wants to, can become a Tar Heel."[50] A few examples are worth noting.

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[46] Q&As, *supra* note 39, at 3, 6.
[47] Q&As, *supra* note 39, at 5.
[48] Q&As, *supra* note 39, at 3-4.
[49] Q&As, *supra* note 39, at 2.
[50] Sierra Pfeifer, *UNC Trustees Talk Affirmative Action, Accessibility at First Meeting of 2023-24*, Chapelboro.com (Aug. 9, 2023), https://chapelboro.com/news/unc/unc-trustees-talk-affirmative-action-accessibility-at-first-meeting-of-2023-24.

The University of Texas at Austin ("UT-Austin") recently announced that it was eliminating race as a factor in its holistic admissions process that governs admissions for approximately 25 percent of its entering freshmen class. The remaining 75 percent is selected through the state's race-neutral "Top Ten Percent Plan," whereby graduates ranking in the top percentile of their high school graduating class are automatically admitted into the university.[51] As part of its revised holistic admissions process, UT-Austin created and distributed training guidance to its admissions officers to ensure race is not considered in unlawful ways.

SFFA is currently suing UT-Austin for its race-conscious program and the Lawyers' Committee, together with pro bono counsel, represents various student and organizational intervenors as defendants in the lawsuit. Although UT-Austin has abandoned its race-conscious program, SFFA is not satisfied and wants to push UT-Austin toward a completely race-blind admissions process, which, again, is not required by the *Harvard/UNC's* decisions.[52] The parties will be briefing the federal district court over the next few months.

The University of North Carolina announced in August that it would no longer consider race as one of several factors in admissions and was providing guidance to its provosts, deans, and admissions officers, among others.[53] While the *Harvard/UNC* decisions do not require universities to shield admissions reviewers from "check box" data on race, the university has removed such data from admissions reviewers. UNC separately stated that it planned to offer free tuition to admitted students whose families earned less than $80,000. UNC also shared that it would hire additional outreach staff to target students in underserved communities in the state.[54] These efforts supplement several race-neutral programs that UNC currently operates.[55]

The UNC System, however, recently issued troubling guidance that not only conflicts with the *Harvard/UNC* decisions, but also threatens to shut the doors to many North Carolinian students. For example, while the Supreme Court's decision plainly permits consideration of an applicant's discussion of race in their application, the guidance warns campuses against essay questions that may solicit such information. And though the guidance acknowledges that several race-neutral criteria such as geography and socioeconomic status are laudable criteria to consider, the UNC System warns that "any doubt as to whether the stated goal is a novel approach

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[51] Because UT-Austin applicants ranking in the top ten percent of their class oversubscribe to the university, the 75 percent statutory cap effectively means that students must rank in the top six percent of their class for admission.

[52] Intervenor-Defendants' Submission on Discovery and Dispositive Motion Schedule, Dkt. 79. *Students for Fair Admissions v. Univ. of Tex. at Austin*, No. 1:20-cv-00763-RP (Sep. 6, 2023, W.D. Tex.); *see also* Joe Killian, *Supreme Court's affirmative action ruling spurs a political battle over college admission policies*, NC Newsline (July 24, 2003), https://ncnewsline.com/2023/07/24/after-the-supreme-courts-ruling-against-race-in-college-admissions-a-political-battle-ensues/ (contrasting interpretations of the ruling on admissions between SFFA and the Lawyers' Committee for Civil Rights Under Law).

[53] J. Christopher Clemens, *Message From The Provost: Update On New Admissions Standards*, University of N. Carolina at Chapel Hill (Aug. 4, 2023), https://admissionslawsuit.unc.edu/message-from-the-provost-update-on-new-admissions-standards/.

[54] Nadine El-Bawab, *UNC to offer free tuition to some students whose families make less than $80,000 a year,* ABC News Network (July 8, 2023), https://abcnews.go.com/US/unc-offer-free-tuition-students-families-making-80000/story.

[55] *See, e.g.*, Brief for Respondent at 15-19, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707 (July 25, 2022) (describing several programs, including need-blind admissions, partnerships with community colleges and underserved high schools, among others).

undertaken in good faith or is instead [a] proxy. . . will likely subject a campus at least to threats of litigation. . . ."[56] Such guidance will likely paralyze universities from taking proactive steps to ensure they remain open to all qualified students in North Carolina. And for universities in states like North Carolina that continue to fail to provide equitable and adequate resources to their K-12 schools,[57] it is imperative that they have all the tools available to ensure they remain available as options for all students.

Still, other universities, including Wesleyan University, The University of Minnesota Twin Cities, and Occidental College,[58] have begun breaking down systemic barriers by eliminating legacy and donor preferences, which provide a preference for children and grandchildren of alumni. A 2022 survey by Insider Higher Ed and Gallup showed that 42 percent of private institutions, and 6 percent of public institutions, consider legacy as a plus in admissions. These preferences tend to operate similar to past "grandfather clauses" that were outlawed as unlawful prohibitions on voting rights for Black people and can increase an applicant's chance of admission by over 40 percent.[59] And several universities continue to go test-optional or test-blind, with at least 1,835 colleges reporting such policies according to the National Center for Fair and Open Testing.[60] These are among several options that universities can and should implement, and that Congress could support in various ways, to ensure that doors remain open for talented students across races and backgrounds.

VI. What Congress Can and Should Do

Over the past several decades, Congress has played a significant role in ensuring equal educational opportunities in higher education and pre-K-12 schools. One of those roles was enacting Title VI of the Civil Rights Act of 1964, which was intended to tackle once and for all Jim Crow laws that survived the last century. Unfortunately, the Supreme Court turned equal protection jurisprudence, and by relation Title VI case law, on its head by holding that limited affirmative action programs enacted by Harvard and UNC violated the Constitution and the laws of the United States.

But Congress can still help ensure that access and opportunity in higher education institutions, and accompanying pathways to economic leadership and prosperity, remain open to all hardworking students. Here are some options Congress should consider:

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[56] Joe Killian, *UNC System issues new directives after U.S. Supreme Court ruling on race in admissions*, NC Newsline (Aug. 23, 2023), https://ncnewsline.com/2023/08/23/unc-system-issues-new-directives-after-u-s-supreme-court-ruling-on-race-in-admissions/.

[57] *Harvard*, 143 S.Ct. at 2236 (J. Jackson) (citing North Carolina courts' determinations that the state has failed to provide underrepresented students of color equal access to educational opportunities).

[58] Harold Klapper, *It's Time to Abolish Legacy Admissions*, The Nation (Aug. 14, 2023), https://www.thenation.com/article/politics/affirmative-action-abolish-university-legacy-admissions-scotus/.

[59] *See, e.g., End Legacy College Admissions,* The New York Times (Sep. 7, 2019), https://www.nytimes.com/2019/09/07/opinion/sunday/end-legacy-college-admissions.html.

[60] Michael T. Nietzel, *More Than 80% of Four-Year Colleges Won't Require Standardized Tests For Fall 2023 Admissions*, Forbes (Nov. 15, 2022), https://www.forbes.com/sites/michaeltnietzel/2022/11/15/more-than-80-of-four-year-colleges-wont-require-standardized--tests-for-fall-2023-admissions/.

i. Provide grant funding and incentives, especially for lower-funded public and private nonprofit institutions, to analyze and implement race-neutral alternatives that advance fair access and opportunity for students across race and background.

ii. Increase Pell Grant funding to adequately reflect true education costs and expand eligible criteria, such as by passing the Lowering Obstacles to Achieve Now (LOAN) Act, which would nearly double the current Pell Grant maximum award to $14,000.

iii. Enact legislation that authorizes private rights of action against disparate impact policies and practices under Title VI, including the Equity and Inclusion Enforcement Act (EIEA) of 2023.

iv. Increase Title I funding to improve educational opportunities for our nation's most at-risk students and provide incentives to states to decrease funding inequities between property-wealthy and property-poor school districts.

v. Support continued funding of magnet school programs and other programs aimed at reducing school segregation, including the Strength in Diversity Act.

vi. Provide additional funding to the Department of Education and the Department of Justice to investigate and remedy systemic policies and practices that create barriers to higher education based, directly or indirectly, on students' race and ethnicity.

vii. Investigate barriers to higher education, such as minimum standardized test requirements for admission and scholarships, legacy and donor preferences, early admissions deadlines, arbitrary course degree requirements, college readiness inequities in K-12, and restrictive community college transfer policies; and issue a public report of the findings with research-informed, equity-based recommendations to remedy any deficiencies.

viii. Pass legislation that requires federal fund recipient institutions of higher education to report on disaggregated demographic information for applications and admissions, in addition to current requirements on enrollment.

ix. Provide funding to the Department of Education to annually analyze, compare, and report on selective higher education institutions' enrollment disaggregated by race and ethnicity for 2020 – 2027.

x. Increase funding levels for Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs), Tribal Colleges and Universities (TCUs), and Asian American and Pacific Islander Serving Institutions (AAPISIs) that may see a dramatic increase in applicants and admitted students who are no longer able to gain admission into colleges and universities that severely restrict the use of race in admissions.

xi. Request that the U.S. Government Accountability Office analyze the ways in which existing federal financial aid (grants and loans) contributes to or undermines racial diversity in college.

xii. Adequately fund GEAR UP, the U.S. Department of Education's discretionary grant program which is designed to increase the number of low-income students who are prepared to enter and succeed in postsecondary education, and the Federal TRIO Program, which is a set of eight federal outreach and student services

programs designed to identify and provide services for individuals from disadvantaged backgrounds.

xiii. Increase dedicated funding for counselors at the K-12 level, especially for underfunded school districts, both to assist with college admissions and to otherwise support student success.

VII. Anti-Civil Rights Extremists Attempt to Extending Harvard/UNC Ruling Beyond College Admissions

One final word on the potential implications that could result from the *Harvard/UNC* decisions beyond higher education admissions. Several anti-civil rights groups and extremists have suggested that the restrictions on affirmative action are only the beginning of pairing back civil rights gains. Consequently, there has been a barrage of attacks seeking to expand the application of the ruling to financial aid; diversity, equity and inclusion training and hiring programs; race-neutral admissions programs in K-12; employment recruitment and hiring; federal, state and municipal contracting; and even private foundations helping Black women, who continue to experience discrimination on the basis of both their race and gender.[61]

Most of those areas apply different laws than those upon which the *Harvard/UNC* decisions are based, such as Title VII for employers.[62] Others like the various challenges to K-12 race-neutral programs at selective high schools are dissimilar to the Harvard/UNC race-based programs.[63] Whether or not the courts give credence to any of these cases remains yet to be seen. But what we do know is that so long as the anti-civil rights extremists' divisive tactics continue to influence politics, policy, and the courts, they likely will not stop. Our nation deserves better.

VIII. Conclusion

For the past 50 years, colleges and universities have employed race-conscious admissions programs in recognition of the fundamental truth that the doors of equality were closed to Black people and people of color in this country for over 300 years. One needs to only look to the parties in the affirmative action cases to see that Harvard College, which was founded in 1636, did not see a Black person graduate from the college until 1870.[64] UNC's history is no less shameful. The Tar Heel state's flagship university was founded in 1789, but it did not see its first Black graduate until 1961, seven years after the Supreme Court decided *Brown vs. Board of Education*.[65] While

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[61] *See, e.g.*, Jessica Dickler, et al., *The end of affirmative action at colleges poses new challenges, and risks, in corporate hiring*, CNBC (Aug. 6, 2023), https://www.cnbc.com/2023/08/06/supreme-court-affirmative-action-ruling-corporate-hiring.html; Alexandra Olsen, *A small venture capital player becomes a symbol in the fight over corporate diversity policies*, AP News (Sep. 20, 2023), https://apnews.com/article/fearless-fund-dei-lawsuit-affirmative-action.

[62] *See, e.g.*, *Advancing Equal Employment Opportunity: Putting the Affirmative Action College Admissions Cases in Context*, Lawyers' Committee for Civil Rights Under Law (June 23, 2023), https://www.lawyerscommittee.org/wp-content/uploads/2023/06/LCCRUL_Adv-Equal-Emp-Opp.pdf.

[63] David G. Hinojosa, *K-12 Schools Remain Free to Pursue Diversity Through Race-Neutral Programs*, Poverty and Race J. (July 25, 2023), https://www.prrac.org/k-12-schools-remain-free-to-pursue-diversity-through-race-neutral-programs-april-july-2023-pr-journal/. (discussing different and high burden for challengers to race-neutral programs).

[64] *Q. Who was the first Black graduate of Harvard College?*, Harvard University Archives (Dec. 14, 2021), https://askarc.hul.harvard.edu/faq/.

[65] *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954)

there are those who wish to cover up this history and argue that college admissions should be colorblind in order to fulfill the Constitution's promise of equal protection under the law, "[o]ur country has never been colorblind."[66] Congress must act now to ensure America's institutions of higher education move closer to the promise of equal protection and opportunity for all.

[66] *Harvard*, 143 S.Ct. at 2141.

Chairman OWENS. Thank you, Mr. Hinojosa. Appreciate it.

Mr. HINOJOSA. Thank you.

Chairman OWENS. Last but not least, I would like to recognize Mr. Squires.

STATEMENT OF DELANO SQUIRES, RESEARCH FELLOW, RICHARD AND HELEN DEVOS CENTER FOR LIFE, RELIGION AND FAMILY, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. SQUIRES. Good morning. My name is Delano Squires, and I am a research fellow in the Richard and Helen DeVos Center for Life, Religion and Family at the Heritage Foundation. I would like to thank Chairman Owens, Ranking Member Scott and the Subcommittee for the opportunity to testify this morning.

The views that I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation. The predictions of gloom and doom in a world without racial preferences resonate with some people, only because affirmative action has been debated for over 40 years, but it is still largely misunderstood.

For starters, racial preferences were most common at highly selective universities like Harvard, Yale and Stanford, that admitted less than 10 percent of their applicants. There were less common in schools like Virginia Tech or the University of Missouri that admit well over half of their applicants.

During the 2018 Federal court case on this issue, Harvard's Dean of Admissions acknowledged that the school used different standards based on race to determine which prospective students received recruitment letters. The university ranked applicants using an academic index comprising SAT scores and grades. These scores were broken into deciles, where the first decile is lowest and the tenth is highest.

Harvard's own student data proved the school's two-tiered recruitment efforts were reflected in its admissions decisions. For instance, a black student in the fourth decile and Hispanic student in the sixth decile had a higher chance of being admitted than an Asian student in the tenth decile.

In the words of Justice John Harlan, the lone dissenter in Plessy v. Ferguson, "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 Supreme Court struck down the use of racial preferences in college admissions because they subjected Asian and white students to higher standards than their black and Hispanic counterparts.

What of the claim held by many progressive commentators that eliminating these policies will return American to a pre-civil rights era of segregation and discrimination? It's simply not true. The highest-performing black applicants at Harvard have close to a 60 percent chance of being admitted, and for legacy black students, that number rose to 99.9 percent.

Put simply, no selective university is turning away black students with the top grades and test scores. The main issue regarding race and enrollment at Harvard is that 75 percent of black and 57 percent of Hispanic applicants are clustered in the bottom three

deciles, compared to 16 percent of their Asian American and 24 percent of their white peers.

The solution to this problem is higher performance at the K through 12 level, not racial preferences at the collegiate level. Pity and paternalism do not lead to equality. Equality cannot be enforced through mandates or quotas. It cannot be declared through fiat or executive order.

Any of the policies that apply different standards based on race in order to achieve demographic representation only reinforce inequality because it is impossible to lower expectations and raise performance at the same time.

If we want to cultivate a truly diverse college campus that passes constitutional muster, we must pursue several long-term strategies at the K through 12 level. First, promote and advance education choice, specifically through options like education savings accounts which have been implemented in Arizona, Arkansas, Florida, Iowa, North Carolina, Utah and West Virginia.

Second, local policymakers should create pathways for gifted students to receive progressively challenging work in school, as well as specialized education programs outside the classrooms.

Third, we need to focus on one of the most important drivers of educational outcomes, family structure. Decades of research have strengthened the conclusion that children raised in homes with their married biological parents have better academic and behavioral outcomes than children raised in any other family arrangement.

Today, 40 percent of American children are born to unmarried parents, and 23 percent live in single parent homes, the highest rate in the world. Any attempts to improve education outcomes, whether on a K through 12 or postsecondary level, must include changes in policy and culture that encourage marriage and strengthen families.

This is why some schools are looking to incorporate the success sequence into the classroom. Students need to know that people who finish high school, secure stable employment and marry before having children have a single digit poverty rate by their mid–30's. The takeaway for politicians, policymakers and pundits should be clear. A student's family, home environment, study habits and school quality play a much larger role in determining their academic outcomes than their skin color.

Public policy should reflect these facts, not be used to socially engineer outcomes in ways that violate basic constitutional principles. Thank you very much for your time and attention.

[The prepared statement of Mr. Squires follows:]

CONGRESSIONAL TESTIMONY

Testimony Before
Committee on Education and the Workforce
Subcommittee on Higher Education and Workforce Development

U.S. House of Representatives
September 28, 2023

Delano Squires
Research Fellow
Richard and Helen DeVos Center for Life, Religion and Family
The Heritage Foundation

My name is Delano Squires, and I am a Research Fellow in the Richard and Helen DeVos Center for Life, Religion, and Family at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

The Supreme Court's landmark decision in *Students for Fair Admissions v Harvard* held that the use of race-based preferences (i.e., "affirmative action") in college admissions violated the Equal Protection Clause of the Fourteenth Amendment.[1] As you can imagine, the loudest opponents of this decision characterized it as a step backward in higher education and race relations. But their predictions of social regression only resonate with some people because affirmative action has been debated for over 40 years but is still largely misunderstood.

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[1] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. ___ (2023)*

Overview

A study from the Pew Research Center found that most colleges and universities admit more than 50% of their applicants.[2] The same study found that schools such as Harvard, Yale, Stanford, and Northwestern admit less than 10% of their applicants, while Georgetown University and the University of Southern California admitted between 10 and 20% of their applicants.

These highly selective schools were the institutions most likely to apply racial preferences in the admissions process. But it is important to note that these institutions only represented about 3% of the 2,300 universities in Pew's analysis.

Where race-based preferences were used is one issue. How they were implemented is another.

During the 2018 federal court case on this issue, Harvard's Dean of Admissions acknowledged that the university sends recruiting letters to black, Hispanic, and Native American students with top grades and combined math and verbal SAT scores of at least 1100 out of a possible 1600.[3] White students in states where Harvard acceptance is rare would receive letters if they scored at least 1310. Harvard held prospective Asian American students to the highest standards. Asian American women needed a combined score of 1350 to receive a recruitment letter. Their male counterparts had to score at least 1380.

The school's two-tiered recruitment efforts were reflected in its admissions decisions.[4] Harvard ranked applicants using an academic index comprising

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[2] Drew Desilver, "A majority of U.S. colleges admit most students who apply," Pew Research Center, April 9, 2019, https://www.pewresearch.org/short-reads/2019/04/09/a-majority-of-u-s-colleges-admit-most-students-who-apply/

[3] Joan Biskupic, "Harvard trial opens with challenge to recruitment practices", CNN, October 15, 2018, https://www.cnn.com/2018/10/15/politics/harvard-affirmative-action-opening-arguments/index.html

[4] Ed Whalen, "Harvard President's Dodgy Defense of Discrimination Against Asian Americans", National Review, January 25, 2022, https://www.nationalreview.com/bench-memos/harvard-presidents-dodgy-defense-of-discrimination-against-asian-americans/

SAT scores and grades. These scores were broken into deciles, where the first decile is lowest and the tenth is highest.

An analysis of the university's admissions data found that a black student in the fourth decile and Hispanic student in the sixth decile had a higher chance of being admitted (12.76%) than an Asian student in the *tenth* decile (12.69%). Harvard's own admissions data clearly demonstrates that the school was judging students by different standards based on race.

The average SAT score for Asian students admitted to Harvard between 2000 and 2017 was 1533.[5] For white students it was 1488. But the average scores for black and Hispanic students were 1407 and 1435, respectively. For context, the average SAT score in 2021 was 1060. This is important to note because it would be incorrect to claim Harvard was admitting subpar students.

Yes, the university used different standards of assessment–including highly subjective personality scores–based on race and ethnicity. But an average black applicant to Harvard would have been a very strong candidate at the University of Massachusetts, where the middle 50% of SAT scores range from 1280-1450.[6]

The use of racial preferences at highly selective schools creates a "mismatch" between students and schools which can affect student outcomes. The Heritage Foundation's special report on racial preferences cited prior research from Richard Sander that found black students are more likely than white students with similar academic and personal characteristics to start college but less likely than their white peers with similar characteristics to finish.[7]

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[5] Shera S. Av-Yonah and Molly C. McCafferty, "Asian-American Harvard Admits Earned Highest Average SAT Score of Any Racial Group From 1995 to 2013", October 22, 2018, https://www.thecrimson.com/article/2018/10/22/asian-american-admit-sat-scores/

[6] University of Massachusetts Amherst, https://www.umass.edu/admissions/undergraduate-admissions/explore/admissions-statistics

[7] Lindsey M. Burke, Jonathan Butcher, Mike Gonzalez, Adam Kissel, Hans A. von Spakovsky, Delano Squires, "Created Equal: A Road Map for an America Free of the Discrimination of Racial Preferences", p.7, The Heritage Foundation, June 29, 2023, https://www.heritage.org/sites/default/files/2023-07/SR274.pdf

Equality in Law and Practice

The Court's decision in *Students for Fair Admissions* was clear: racial preferences were struck down because they are unconstitutional. Harvard's admissions policies subjected Asian and white students to higher standards than their black and Hispanic counterparts.

In the words of Justice John Harlan — the lone dissenter in *Plessy v. Ferguson*, "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."[8]

The Supreme Court laid out the constitutional arguments for banning race-based preferences in college admissions. But there is also a belief, held by many progressive commentators, that eliminating these policies will return America to a pre-civil rights era of segregation and discrimination.

That assertion is simply not true. The highest performing black applicants at Harvard have close to a 60% chance of being admitted.[9] And for black legacy students, that number rose to 99.9%.[10] Put simply: no selective university is turning away black students with exceptional grades and test scores. The main issue regarding race and enrollment at Harvard is that 75% of black and 57% of Hispanic applicants are clustered in the bottom three deciles, compared to 16% of their Asian American and 24% of their white peers.[11]

The argument for racial preferences in perpetuity is built on the idea that the legacy of American chattel slavery and racial segregation casts a shadow that continues to keep equality out of reach. This structural explanation of group disparities is treated as truth today but was rejected by the nation's foremost abolitionist.

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[8] Plessy v. Ferguson, 163 U.S. 537 (1896).
[9] Peter Arcidiacono, Josh Kinsler, Tyler Ransom, "Legacy and Athlete Preferences at Harvard", page 45, National Bureau of Economic Research, September 2019, https://www.nber.org/system/files/working_papers/w26316/w26316.pdf
[10] Ibid
[11] Ibid

Frederick Douglass's answer to the question, "What shall be done with the Negro if emancipated?"[12] is a powerful insight into human nature:

> Deal justly with him. He is a human being, capable of judging between good and evil, right and wrong, liberty and slavery, and is as much a subject of law as any other man; therefore, deal justly with him. He is, like other men, sensible of the motives of reward and punishment. Give him wages for his work, and let hunger pinch him if he don't [sic] work. He knows the difference between fullness and famine, plenty and scarcity. "But will he work?" Why should he not? He is used to it. His hands are already hardened by toil, and he has no dreams of ever getting a living by any other means than by hard work.

Douglass understood that pity and paternalism do not lead to equality. He knew equality cannot be enforced through mandates or quotas. It cannot be declared through fiat or executive order. Any other policies that apply different standards based on race in order to achieve demographic representation only reinforce *inequality* because it is *impossible* to lower expectations and raise performance at the same time.

The only way to achieve equality–whether legally or socially–is to ensure the same rules and standards apply to each citizen, regardless of race, ethnicity, or skin color.

College Admissions in a Post-preferences World

The biggest losers in the fight over racial preferences are the universities who desired the social and political benefits of an ethnically diverse freshman class. Justice Clarence Thomas made this point in his dissenting opinion in the 2003 *Grutter v. Bollinger* case.[13]

> No one would argue that a university could set up a lower general admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high

[12] Frederick Douglass, "What Shall Be Done with the Slaves if Emancipated?" Douglass' Monthly, January 1862, University of Rochester Frederick Douglass Project, https://rbscp.lib.rochester.edu/4386
[13] *Grutter v. Bollinger, 539 U.S. 306 (2003)*

> admissions standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

Justice Thomas rightfully understood that there would be a national uproar if black students were outperforming their peers in the classroom but were subjected to arbitrary admissions limits similar to what Asian American students face today.

In the wake of the Supreme Court's decision in *Students for Fair Admissions*, some schools will undoubtedly try to find proxies for race that can be used to achieve their desired racial makeup.

But whatever standards universities use to assess students should be done without consideration of race, ethnicity, or skin color. If socioeconomic status is factored into admissions decisions, it should apply equally to the evaluation of each student. If schools want to strictly judge on the basis of academic profile, they can apply the same cutoff across the board and use a lottery system to ensure they are pulling from a similarly qualified pool of students.

There are also several long-term strategies that should be considered to cultivate truly diverse college campuses that pass constitutional muster.

One would be to promote and advance education choice at the K-12 level. All students should have access to safe learning environments that reflect their families' values and promote high academic standards.

Unfortunately, low-income and minority students, particularly in urban districts, have been consigned to poor-performing public schools by elected officials beholden to the interests of large teachers unions. State policymakers should break the link between zip code and schooling by funding children with their share of education dollars directly.

Several states have already implemented education savings account (ESA)-style options for all families, including Arizona, Arkansas, Florida, Iowa, North Carolina, Utah, and West Virginia.

Giving parents viable education options for their children is critically important to building a diverse pipeline of students who can compete at the most selective universities. But what happens inside of schools is equally important.

This is why current efforts across the country to eliminate homework, standardized tests, gifted programs[14], and graduation requirements[15] in the name of "equity" have the effect of punishing merit and hard work.

Therefore, schools should end all policies and programs that penalize high achievement or link praiseworthy behaviors, such as attention to detail, to specific ethnic groups.[16] Instead, education policymakers should create pathways for gifted students to receive progressively challenging work in school as well as specialized education programs outside the classroom.

Parents should understand the role they play in creating a home environment that is conducive to learning and high achievement, which schools can help to convey. These efforts can take the form of online resources, in-person orientation programs, and periodic parent-teacher check-ins that explain the link, for example, between studying and academic outcomes.

The percentage of Harvard's highest performing *applicants* tracks the average SAT scores for Asian (1229), white (1098), Hispanic (964), and black (926) students.[17] This pattern–Asian, white, Hispanic, black–also matches both the average number of hours students spend doing homework and the percentage who do it five days per week or more.[18] The same pattern appears in an analysis of non-marital birth rates—from lowest

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[14] Michelle L. Price, Bobby Caina Calvan, "New York public schools to end gifted and talented program", AP News, October 8, 2021, https://apnews.com/article/new-york-new-york-city-race-and-ethnicity-education-d027be86b7d202f1d4ef62e5c3255802

[15] "New Oregon law suspends graduation testing requirement", AP News, August 13, 2021, https://apnews.com/article/health-oregon-education-coronavirus-pandemic-graduation-1ac30980c9e2d26b288a5341464efde8

[16] Bob McManus, "New York's Toxic Schools Chancellor", City Journal, June 3, 2019, https://www.city-journal.org/article/new-yorks-toxic-schools-chancellor

[17] "SAT scores", National Center for Education Statistics, https://nces.ed.gov/fastfacts/display.asp?id=171

[18] Table 35, "Average hours spent on homework per week and percentage of 9th- through 12th-grade students who did homework outside of school and whose parents checked that homework was done, by frequency of doing homework and race/ethnicity: 2007", National Center for Education Statistics, https://nces.ed.gov/pubs2012/2012026/tables/table_35.asp

to highest—that reflect one of the most important drivers of education outcomes.[19]

Family structure and home environment play a significant role in student achievement. This connection is not new. The Equality of Educational Opportunity report, also known as the "Coleman Report," was released in 1966 to fulfill Section 402 of the Civil Rights Act of 1964. The report analyzed data from more than 600,000 students across the country. The author, James Coleman, found that the most important factors that determined student success had to do with a child's home environment.[20]

Six decades of subsequent research have strengthened the conclusion that children raised in homes with their married parents have better academic and behavioral outcomes than children raised in any other familial arrangement.[21]

This is why some schools are looking for ways to incorporate the "success sequence" into classroom instruction.[22] Students need to know that people who finish high school, secure stable employment, and marry before having children have a single-digit poverty rate by their mid-30s. This is particularly useful knowledge for students who have not grown up in an environment where married, two-parent homes are the norm.

The takeaway for politicians, policymakers and pundits should be clear: a student's family, home environment, study habits, and school quality play a much larger role in determining their academic outcomes than does their skin color. Policy solutions should reflect these facts, rather than attempt to engineer outcomes in ways that violate basic constitutional principles.

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[19] Mark J. Perry, "Charts of the Day, All Viral Edition", American Enterprise Institute, March 30, 2021, https://www.aei.org/carpe-diem/charts-of-the-day-all-viral-edition/

[20] Anna Egalite, "The Link Between Family Background and Academic Success", Institute for Family Studies, September 13, 2016, https://ifstudies.org/blog/the-link-between-family-background-and-academic-success

[21] Nicholas Zill, "Family Still Matters for Key Indicators of Student Performance," Institute for Family Studies, April 6, 2020, https://ifstudies.org/blog/family-still-matters-for-key-indicators-of-student-performance

[22] Wendy Wang and W. Bradford Wilcox, "The Millennial Success Sequence: Marriage, Kids, and the 'Success Sequence' Among Young Adults," American Enterprise Institute and the Institute for Family Studies, June 2017, p. 22, https://www.aei.org/wp-content/uploads/2017/06/IFS-MillennialSuccessSequence-Final.pdf?x91208

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Chairman OWENS. Thank you, Mr. Squires. Under Committee Rule 9, we will now question witnesses under 5-minute rule. I will begin the process. Mr. Squires, in this Subcommittee, there has been many discussions of what diversity should mean. Too many people focus exclusively on identity diversity. In contrast, you have spoken about a need for a wider net diversity.

What is wider net diversity and why should it be a standard adopted to today's college campuses?

Mr. SQUIRES. Put simply, when I talk about "wider net diversity," I am talking about extending and expanding opportunity to groups or individuals who may not have access to opportunity at a particular time. The key for wider net diversity is to uphold the same standards across the board.

Now a perfect example of that from history, and where we could talk about real racial discrimination, I would say would be the Tuskegee Airmen, who obviously could not serve as aviators because of racial discrimination in the armed forces.

When those opportunities came, they demanded that they had to meet the same standards as their counterparts, and in fact obviously they have a stellar service record and won the United States Air Force's first top gun competition in the late 40's.

Now wider net diversity I would contrast with lower bar diversity, which seeks to prioritize superficial identity categories in order to create a demographically representative population. I am always for wider net, and I think that lower bar does anyone a grave disservice.

Chairman OWENS. Thank you. Ms. Somin, after the Supreme Court's decision against race-based admissions, some colleges and universities seem dedicated to continue race preferences. If universities are practicing affirmative action called by another name, why should the courts consider these policies illegal?

Ms. SOMIN. Thank you. The name does not matter. What matters for the purposes of the law and the purpose of justice is whether or not universities are discriminating on the basis of race. If they are discriminating on the basis of race and admissions, even if they call that discrimination something else, it is illegal and they should be held to account.

Chairman OWENS. Interesting, faculty hiring has also been subject to race-based preferences. George Mason University published draft recommendations of a plan to enact race-balancing by hiring staff to reflect the democratic diversity of the student, quote "student population" through diversity cluster hiring initiatives.

This is just one example of professors being weeded out not by their expertise, but because they do not fit the university's imposed racial makeup. Given the Supreme Court's recent decision, do you think race-based preferences and faculty hiring also—do you consider that legal or not legal?

Ms. SOMIN. The decision does not directly address race preferences in faculty hiring, but at public schools under the Constitution and under Title VI, which prohibits race preferences by recipients of government money, and Title VII, which generally prohibits race preferences in hiring, yes, racial preferences in hiring are generally illegal.

While I believe the decision doesn't directly speak to it, the decision does change the climate and make it clear that the current court is not going to sit by and tolerate discrimination based on race.

Chairman OWENS. Thank you. Mr. Zhao, there are many who believe the racial discrimination in college admissions is a thing of the past, but you hear from exceptional students every day of being denied admissions despite their academic qualifications. Can you provide an example of students, of a student harmed by racial discrimination in college admissions?

Mr. ZHAO. Sure. Just this week, we received a complaint from outstanding student—He has a talent in programming. You know, everybody says that computer science is the future for the 21st century. He was hired directly from high school by Google but rejected by 16 of American's top schools like MIT, CMU, and he has outstanding credentials, academic performance. He also started up a—startup. He won the finalist of major global programming competitions.

I want to say it is a shame, you know, our colleges should welcome him because we have STEM talent shortage in this country. It is appalling for the colleges to ignore this kind of talents. He already filed a civil rights complaint 2 days ago. I hope that the U.S. Congress will support his equal treatment complaint.

Chairman OWENS. Thank you. I would like to now recognize Mr. Takano.

Mr. TAKANO. Thank you, Mr. Chairman. Mr. Zhao, I want to understand more about your definition of meritocracy in college admissions. I am speaking in the context of liberal arts undergraduate programs. You seem to want to return to a heavy reliance on standardized testing for admissions decisions, as a fair and a reasonable approach. Am I correct in that?

Mr. ZHAO. No. Actually, I support holistic evaluation, but it should be based primarily on objective like measurement, like standardized testing plus like leadership, other things. Very importantly educational——

Mr. TAKANO. Okay, thank you. Thank you for your response. How much would you weight standardized testing in the process?

Mr. ZHAO. It depends on the educational program. For example, for STEM education, that would be weighted——

Mr. TAKANO. Sir, sir, just—I want to confine our conversation to admittance into liberal arts institutions such as Harvard, a liberal arts undergraduate. I mean that is an important part of our educational system. How much would you say Harvard would be allowed to weight or should weight standardized testing?

Mr. ZHAO. I think it would be a major criteria——

Mr. TAKANO. Major criterion. Would that be more than 50 percent of the weight, less than 50 percent?

Mr. ZHAO. I do not have the number for that, but we should——

Mr. TAKANO. I think it is fair to say that you would weight, your emphasis is on objectivity. We know that grades can sometimes be subjective, dependent on what school that the grade may or may not. Would you—is it fair to say you would weight the testing as more than 50 percent?

Mr. ZHAO. No.

Mr. TAKANO. No?

Mr. ZHAO. For liberal arts, probably not that high. For STEM education, it should be very important.

Mr. TAKANO. Okay. We are not talking about STEM education. We are talking about a liberal arts undergraduate program.

Mr. ZHAO. Yes.

Mr. TAKANO. What is fair in that case?

Mr. ZHAO. Sure. I agree, it should not be weighted more than 50 percent——

Mr. TAKANO. More than 50 percent, thank you. More than 50 percent. That would mean that students that score the highest should be given greater preference. People who score in the top decile, you would say that is a fair system?

Mr. ZHAO. I support a holistic evaluation.

Mr. TAKANO. Can you answer? Holistic. Your definition of holistic means that more than 50 percent be weighted——

Mr. ZHAO. No, no, no. I did not say "more than." I said it could be less than 50 percent for liberal arts. I believe for STEM education——

Mr. TAKANO. Okay. Well, so it could be less than 50 percent for liberal arts.

Mr. ZHAO. Yes.

Mr. TAKANO. Other, other criteria. What other objective criteria are there? Grades, would you say, are objective?

Mr. ZHAO. Grades, yes. Grade is not consistently across the board.

Mr. TAKANO. That is right, that is right. How would you measure leadership ability?

Mr. ZHAO. Leadership can be measured by student—like take leadership roles in different clubs. It depends. If you say—management, absolutely it should be important. But if say, like——

Mr. TAKANO. Would you say it is difficult to measure leadership objectively through some measure? Is there an objective measure for leadership.

Mr. ZHAO. No. That is why——

Mr. TAKANO. I would conclude sir, that you really think that—you say several times that we need to return—actually, you criticize the fact that you say over 1,000 universities dropped the requirement for students to take an objective, standardized test, and you say this—you give that reasoning. You attribute that to the fact of the COVID–19 pandemic and George Floyd's tragic death. Do you think that George Floyd's death caused the universities to drop objective?

Mr. ZHAO. No.

Mr. TAKANO. You stated, you say in the wake, I am quoting, "In the wake of COVID–19 and George Floyd's"——

Mr. ZHAO. The advocates took advantage of that. The advocates of racial equity took advantage of that.

Mr. TAKANO. Well, my recollection is that the universities could not rely on the SAT because the tests could not be administered because of, you know, the proctoring and large numbers of students taking these tests was a danger to public health.

Mr. ZHAO. Yes, but it is time to restore that.

Mr. TAKANO. You, but you want to attribute it to George Floyd's death. That is kind of a curious thing.

Mr. ZHAO. No. I said that advocates took advantage of that.

Mr. TAKANO. Well, it is curious that you would say that George Floyd was—his death was the reason why universities——

Mr. ZHAO. No, I did not say that. Advocates of racial equity, you know, took advantage of that.

Mr. TAKANO. You actually say it. It is in your testimony, sir. It is in your testimony. I want to point that out to you. It is in your testimony. Well, you know, there is many—it is more questions I would like to ask, but I do not think you are being completely genuine in your answer about how much you would rely on an objective quote-unquote, measure, quote-unquote "an objective measure" such as standardized testing in the admissions process.

Mr. ZHAO. I was saying it would be part of a measurement——

Mr. TAKANO. I yield back, Mr. Chairman.

Mr. ZHAO. It depends on the educational program, should give different rate, weight based on the educational program.

Mrs. FOXX. The gentleman's time has expired. Mr. Grothman, you are recognized for 5 minutes.

Mr. GROTHMAN. First of all, I would like to thank all of you for being here today. I want to explore a little bit what is behind this drive for so-called diversity or this tremendous obsession with where one's ancestors come from. As I understand it, and we can ask really either one of you here, as I understand it, the drive for diversity is based on forms that people fill out as to what their ancestry is.

For example, I have a Peruvian grandmother and was raised in a northern suburb here. I could fill out a form and say I am so-called Hispanic; correct? For the purposes, for diversity purposes I would be labeled Hispanic; correct?

Mr. ZHAO. Who did you ask? I am sorry.

Mr. GROTHMAN. Okay. We are here talking about diversity, and that diversity is defined ethnically, okay, on where somebody's ancestors came from; correct?

Mr. ZHAO. Yes.

Mr. GROTHMAN. Okay. Which means, for example, that if I apply to college and I have a grandmother who was from South America, I could check on the form that I am Hispanic; correct?

Mrs. FOXX. Mr. Grothman, I think people are asking to whom are you addressing your question?

Mr. GROTHMAN. To Mrs. Somin there.

Ms. SOMIN. Yes.

Mr. GROTHMAN. Right, and could you explain to me, because they say what they are looking for here is diversity. Now, I may have never been south of the border. I may not know a word of Spanish, but I am filling out the form that I am Hispanic. What type of diversity would I be bringing to that institution, or how would the fact that I had a Peruvian grandmother give me a different viewpoint that would enrich that institution?

Ms. SOMIN. I think you put your finger on something very important, which is that universities have tended to emphasize skin color or ethnic diversity over true diversity of thought.

Mr. GROTHMAN. Is there any diversity there at all? I mean that is what I do not understand. If I have a Peruvian grandmother who for all I know died before I was born, the whole edifice is built on the idea that therefore I am going to bring a different viewpoint or something to the university.

Ms. SOMIN. I agree that it is very concerning, that many universities seem to have relied on crude stereotypes, rather than looking at true individuality and at the full depth of an individual's experience in what they cast as diversity. Universities should care about individuals and individuality, rather than reducing students to their ethnic or racial identities.

I am glad the Supreme Court ruled the way it did, so that we can get back to a focus on treating individuals as individuals.

Mr. GROTHMAN. Okay. Elizabeth Warren, when she wanted to become a professor at Harvard it was, she claimed that she was apparently partly Native American, apparently on the idea that therefore she would bring a different viewpoint to the faculty lounge. Could you even imagine wildly why she would—she would get preferences for that job based on presumably a different viewpoint in the world or something that she would know that other students would not know?

Ms. SOMIN. I am not familiar with the details of how Senator Warren views her identity. However, I agree that it is concerning that these preferences tend to reduce individuals to stereotypes, rather than looking at the full range of what they bring to the table as individuals.

Mr. GROTHMAN. Is anybody that you know in their own life, when they have to make own hiring decisions, a doctor, a dentist, an accountant, anybody, take into account people's ethnic background or even ask what their ethnic background is?

Ms. SOMIN. I agree that that would be unusual, and that for many individuals, individuals that value competence or what they bring to the job in their role as doctor or dentist, rather than racial stereotypes.

Mr. GROTHMAN. Mr. Squires, could you comment on that, I mean this idea that somebody's view of the world is based on where their ancestors came from and that they're a monolith? Could you, could you comment on that?

Mr. SQUIRES. Sure. I mean it is unfortunate that we have taken that perspective. This is one of the reasons why I believe quite frankly many black conservatives are easy targets in the media, is because the moment they say things that sort of the progressive left don't agree with, that they are attacked.

Mr. GROTHMAN. Is that part of the problem too? Is this a pretext design to force people of a certain ancestry to allow them to be promoted based on their ideology? I mean I can think of an example that I have heard of in my own life in just employment, where somebody was—a person of color let us say, and they were therefore educated, that they should have a certain viewpoint because they are of that ancestry. Is that part of the motivation here? Quick, a very quick quick answer.

Mr. SQUIRES. I will say this in general. I do not define diversity as having people of different skin colors who all think the same. To the extent that postsecondary institutions want to promote di-

versity, I think diversity of ethnic background is fine, diversity of region. It is particularly diversity of thought.

I think those should be their goals, and not just the color composition in the classroom.

Chairman OWENS. Thank you. I would like to now recognize Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chair. Race-conscious admissions was a critical tool for diversifying classrooms, for reducing racial bias and addressing racial disparities in enrollment for students of color. Right wing activists unfortunately waged a decades-long challenge to the use of race, and unfortunately, they succeeded when the Supreme Court struck down this tool for achieving diverse classrooms by ending race-conscious admissions policies.

My home State of Washington has had its own affirmative action ban unfortunately since 1998, restricting public colleges in considering race as an admissions factor. Despite the ban, half of Washington public college students are of color, and just as diverse as their private college counterparts.

One way that our Washington public colleges did this is through their guaranteed admission policy. These policies promise seats to eligible students from local high schools if they meet grade or other academic requirements. It is not unique to my State. Colleges throughout the country have adopted similar policies without standardized testing requirements.

Mr. Hinojosa, there may not be a policy that could help achieve racial diversity as the same level that race-conscious admissions has, but why are policies that eliminate reliance on testing helpful in diversifying student bodies?

Mr. HINOJOSA. Thank you, Congresswoman. First, you have to know a little bit about standardized testing, right? They are incredibly biased instruments. They were started way back based on eugenic science, you know, which has obviously been dismissed by the scientific community.

They are poor predictors of college success and college readiness, so there is no real connection to that, and they are basically or essentially your test score is predicted based on your zip code and the quality of education that you have received or your socioeconomic status, I should say, rather than any other quality that an applicant would cover.

I think it is imperative that universities, especially in light of the ban, which is always been followed with substantial drops in students of color, that they consider race-neutral alternatives as those in Washington, you know, because those are trying to take students for where they are coming from the high schools.

There are lots of inequality still in K–12 education within, across all states, and I think it is imperative that they look to solutions that allow students to still show up with their talents and experiences and the like, and not just reduce them a single test score, as though that tells something about their talents.

Ms. JAYAPAL. Very important. You know, it is interesting, but guaranteed admissions have even shown to help students graduate debt free. For example, Washington State University has a guaran-

teed admissions policy, and their low-income students can attend tuition free with our Washington college grant.

Supporting students in that way I feel like should be non-partisan, should be bipartisan, but instead the same right-wing organizations behind the affirmative action decision have also waged attacks against guaranteed admissions. They claim it could be a form, get this, of race-based discrimination. Are you aware of any of these policies considering race as an admission factor?

Mr. HINOJOSA. Absolutely not. I mean whether or not there are intentions to further diversity across socioeconomic status, across first generations, across language, etcetera, there are lots of qualities that even rural communities as well. I am most familiar with Texas' Top Ten Percent Plan, because I was at MALDEF for many years and worked on both policy and litigation around the Texas Top Ten Percent, and that has helped improve.

Sometimes it doesn't work as well. This is how and why universities need the resources to be able to explore exactly how these race-neutral alternatives may impact it. These absolutely have nothing to do with racial discrimination. They are not treating any individual differently based on their race.

Ms. JAYAPAL. In fact, your witnesses next to you have been arguing for not reducing people down to one factor. Seems like standardized testing should not be a factor that people get reduced down to. Alternative admissions policies do not—do not sound like a veiled racial quota like some on the right allege.

In fact, guaranteed admissions seem to be the same type of race-neutral policies that these activists claim to want in a postsecondary education. Today, a witness argued that black students are harmed by policies that promise to uplift them, but instead result in mismatching them into academically challenging programs.

As selective colleges reflect on their role in ensuring racial representation, should they be concerned about creating pipelines for under-represented students in their competitive programs?

Mr. HINOJOSA. Yes. Absolutely they should. If we are supposed to think of our universities as engineering, economic opportunity for all, then those universities need to be open to those students. The whole mismatch theory has already been debunked by real science. That soft science has been dismissed repeatedly by peer reviewed studies, and really should not be echoed in any chamber.

Ms. JAYAPAL. Real science, what a concept. I yield back. Thank you, Mr. Chairman.

Chairman OWENS. Thank you. Thank you so much. I would like now to recognize Ms. Stefani.

Ms. STEFANI. Thank you, Mr. Chairman. The Supreme Court correctly decided Students for Fair Admissions v. President and Fellows of Harvard College when they held that Harvard College's admissions did not comply with the principles of the Equal Protection Clause embodied in the Civil Rights Act.

Now Ms. Somin, previously Grutter v. Bollinger, assumed that race would be only treated as a plus in the admissions process. We saw at Harvard that in some cases, this was treated as a minus. Is this correct?

Ms. SOMIN. Yes.

Ms. STEFANI. Can you expound upon that?

Ms. SOMIN. Absolutely. When there are only a limited number of seats available at any given university, it is inevitable that a plus factor for some students will be a minus factor for others.

Ms. STEFANI. Particularly as a Harvard College graduate, I am very concerned that in 2013 Harvard's own Office of Institutional Research concluded that the university system was indeed biased with negative effects in the admissions process. Is it a fact, Ms. Somin, that they buried this report?

Ms. SOMIN. Yes.

Ms. STEFANI. I have concerns in the wake of the Supreme Court's decision, in one of the mailings that was sent out to alumni. The headline was "Harvard United in Resolve in Face of Supreme Court's Admissions Ruling." Do you have concerns about the compliance of the Supreme Court decision at some universities?

Ms. SOMIN. Well, I am not familiar with that particular mailing from Harvard. I have seen similar statements from the heads of other university officials. In an amicus brief filed in support of the Coalition for T.J. cert petition, the Cato Institute documented many such examples of evasions. I am very concerned about lack of compliance, yes.

Ms. STEFANI. How would you identify potential lack of compliance?

Ms. SOMIN. Statements from university officials would certainly be concerning. Changes in policy too, that do not seem to make sense in slight of academic qualifications, but that instead seem targeted at engineering a particular racial composition I would be concerned about.

Ms. STEFANI. Mr. Squires, I wanted to turn to you. In your testimony, you mentioned that it is universities themselves that benefit, not the students, from race-based discrimination. How does Harvard and how do other schools actively maintain internal incentives to keep discriminatory policies in place?

Mr. SQUIRES. Well, what I meant by that is that oftentimes universities will particularly focus, for instance, on the incoming class, the freshman class, and talk about how diverse it is. Part of the reason is because they, they want to receive the social benefits that come with being able to say, you know, look at all the black and brown students we have.

Again, there is a lot less emphasis on the graduating class. This happens oftentimes when individuals will say they are choosing a particular candidate for a particular position based on race and sex, and what it does it saddles that person with the burden of feeling as if they are not being judged by their qualifications and allows the person doing the choosing to say how virtuous they are because of how progressive they are.

Ms. STEFANI. Mr. Squires, how will the end of discriminatory race-based admissions help the next generation of college applicants?

Mr. SQUIRES. I think one of the things that it would do is allow everyone on campus ideally to be able to understand that we are all here because we are based on the same set of qualifications. I can guarantee you that if in 2043, the highest-performing students

on the SATs in terms of grades were black and Hispanic, no one on the other side of the aisle would say that too many of them are going to Harvard and Yale.

If we believe in equality, it has to be equal across the board, which means everyone has to be judged by the same set of standards. If we want to consider socioeconomic status, that has to be the same across the board. What we cannot do is say for one group of students you can come in at this particular bar, and for another group of students you have to come in at a much higher bar.

Ms. STEFANI. Thank you. I yield back.

Chairman OWENS. Thank you. I would like to recognize Ms. Bonamici.

Ms. BONAMICI. Thank you, Mr. Chairman. I want to start by just noting that one of the witnesses contended that although qualified black applicants at highly selective schools have earned their place, they are a small number of the total black applicants who are admitted. I would like to enter into the record an article by Forbes titled "Black Harvard and Princeton Students Graduate at Higher Rates Than Their Classmates Overall and Equally at Yale."

The article highlights Department of Education data that shows that 99 percent graduation rate for black students at Harvard, compared to 98 for all students. 99 percent graduation rate for black students at Princeton, compared to 97 percent of bachelor degree seekers overall, and 98 percent of Yale students graduate within 6 years, exactly the same for black Yale students. I would like to enter that into the record, Mr. Chairman.

Chairman OWENS. Yes, with no objections.

[The information of Ms. Bonamici follows:]

Black Harvard And Princeton Students Graduate At Higher Rates Than Classmates Overall, Equally At Yale

Shaun Harper
Contributor
I am a diversity, equity and inclusion (DEI) expert

Jul 3, 2023,07:31pm EDT

Black students graduate at rates higher than or comparable to peers from other racial groups at many ... [+]

The U.S. Supreme Court has ruled race-conscious college admissions policies and practices unconstitutional. Affirmative Action opponents have long argued that admitting presumably unqualified applicants of color to highly-selective institutions sets those students up for failure because they can't do the work. If completing a bachelor's degree is a reasonable measure of whether

someone has what it takes to succeed in the Ivy League or at another highly-selective university, then federal data from the three institutions where admission slots are among the most coveted in the world confirm that Black students are indeed more than capable and deserving of the opportunities they earned.

My analysis of statistics from a publicly-available U.S. Department of Education database reveal that six-year graduation rates (a commonly-used metric in higher education) for Black students are higher at Harvard and Princeton than they are for the overall student body. At Harvard, it's 98% for undergraduates overall and 99% for Black collegians. It's also 99% for Black students at Princeton, compared to 97% of bachelor's degree seekers there overall. Additionally, 98% of Yale students graduate within six years – the percentage is the exact same for Black Yalies.

Brian Peterson, a Black man, earned a bachelor's degree in engineering as well as a master's degree and a Ph.D. in education, all from the University of Pennsylvania. "Nothing about these graduation rates surprises me," says the three-time Ivy League graduate who now directs Penn's Black Cultural Center and teaches in Africana Studies and Urban Studies. "Black students understand the landscape when they apply, they build community, and they tap into their resources. They've also had to prove their brilliance time and again, and are aware that they're representing more than themselves."

Princeton, Yale, and Harvard aren't the only highly-selective institutions that have achieved similar results. At Cal Tech, 100% of Black students graduated in the most recent cohort for which data are available, compared to 94% of students overall. The University of Chicago, Johns Hopkins University, Case

Western Reserve University, and Wake Forest University are other highly-selective privates from which Black students have graduated at higher rates.

Additionally, graduation rates are exactly one percentage point lower for Black undergraduates than for students overall at Columbia University, NYU, Emory University, Vanderbilt University, and Boston University. For private institutions ranked among *U.S. News & World Report's* Top 20 National Universities, the average graduation rates are 93% and 95%, respectively, for Black collegians and for students overall.

DeAngela Burns-Wallace is a Black woman who's earned a bachelor's degree from Stanford, a master's from Princeton, and a doctorate from Penn. She also spent five years as Stanford's Assistant Dean of Undergraduate Admission, and now serves on the University's Board of Trustees. Her doctoral dissertation was on the racialized experiences of professionals of color who work in college admissions offices. She's one of our nation's most respected college access leaders.

"It is critical to understand that highly-selective institutions recruit students who not only excel academically, but also demonstrate intellectual curiosity, leadership, and bring rich perspectives," Burns-Wallace notes. "This is true of everyone they admit, including students of color. These particular institutions are good at holistically identifying the best, brightest, and next generation of thinkers from diverse backgrounds." Given this, Burns-Wallace says she isn't at all surprised that Black undergraduates complete degrees at rates that exceed or are comparable to their peers from other racial groups at highly-selective universities.

The Ivies and research universities like Stanford aren't our nation's only highly-selective postsecondary institutions. *U.S. News* annually produces a

separate rankings list comprised of 210 small liberal arts colleges. The average acceptance rate among the Top 20 is 13%. On average, 90% of Black students graduate from those colleges within six years, compared to 92% of students overall. Swarthmore, Wesleyan, Barnard, Haverford, Claremont McKenna, and Bryn Mawr are among the many elite liberal arts colleges from which Black students graduate at rates higher than or exactly equal to their classmates overall.

In 1835, Oberlin became the first college in America to openly admit Black students. Today, Carmen Twillie Ambar – a Black woman with degrees from Georgetown, Princeton, and Columbia – serves as its 15th president, and Black students graduate from the prestigious liberal arts college at one percentage point higher than students overall.

"These numbers support what many admissions professionals and social scientists know about elite selection: that many minoritized applicants come with skills, dispositions, and attitudes that make them more successful, not less, than the average applicant," contends University of Southern California Professor Julie Posselt, author of an acclaimed Harvard University Press book on graduate admissions. "We see this in education and the labor market alike," Posselt adds.

Alta Mauro, Harvard's Associate Dean for Inclusion and Belonging, knows firsthand that Black students who are admitted there can and almost always do succeed – they just have to be afforded the opportunity. "It is important to differentiate between a competence gap and an opportunity gap," she insists. "To say that Black people are less capable of thriving academically is an oft-refuted falsehood. Being expected to overcome opportunity gaps is a reality for

too many Black students, and a reflection of racial and economic inequities that are uniquely American."

It's worth noting that most undergraduates at highly-selective private research universities and liberal arts colleges graduate within four years. There possibly could be racial inequities in four-year graduation rates at some of these schools; the federal database I used for this article reports six-year bachelor's degree attainment numbers, which is the widely-accepted standard in higher education research and policy analyses. Regardless of whether it takes them three, four, five, or six years to complete, millions of Black students have proven that they are absolutely capable of succeeding in classrooms and graduating from elite institutions.

Ms. BONAMICI. Thank you. Mr. Chairman, our Nation's colleges and universities play a key role in preparing people for the jobs of today and the jobs of the future. They are an important part of preparing, for example, the highly qualified workforce we need to maintain our Nation's technological leadership and advance our national security interests.

In all of these areas, we benefit from the multiracial and multicultural student population that brings a wide range of perspectives and life experiences, including at elite colleges and universities. In fact, Chief Justice Roberts noted this in his point in the opinion in Students for Fair Admissions, saying that race-based admissions programs at military academies could further compelling interest at such academies.

Mr. Zhao, do you agree that there are a range of factors to consider in advancing the United States national security interests and its global economic and technological leadership, including preparing a workforce that reflects our Nation's racial and ethnic diversity, and that is a yes or no question?

Mr. ZHAO. I think No. 1, colleges should promote the diversity of ideas, right. Students benefit from that. Also, our Nation would benefit recruiting the best and brightest, and give them best education.

Ms. BONAMICI. Yes. I am going to reclaim my time, and I just want to enter into the record again, Mr. Chairman, an excerpt from an amicus brief submitted in the case by major American companies, including American Airlines, GE, GM, Intel, Johnson and Johnson and others, titled "American businesses rely on universities to create a pipeline of diverse leaders, equipped with the skills to thrive in the global marketplace."

Chairman OWENS. No objection.

[The information of Ms. Bonamici follows:]

Stephanie Tonneson, *Has Corporate America Reached a Diversity Tipping Point?,* ZoomInfo (June 23, 2020).[16] These investments underscore the critical importance of racial and ethnic diversity to the American business community.

II. AMERICAN BUSINESSES RELY ON UNIVERSITIES TO CREATE A PIPELINE OF DIVERSE LEADERS EQUIPPED WITH THE SKILLS TO THRIVE IN THE GLOBAL MARKETPLACE

While the benefits of diversity are real and tangible—and corporate DE&I programs seek to maximize those benefits—Amici do not recruit applicants in a vacuum. To succeed, these DE&I efforts depend on university admissions programs that lead to graduates educated in racially and ethnically diverse environments. Only in this way can America produce a pipeline of highly qualified future workers and business leaders prepared to meet the needs of the modern economy and workforce. This tradition of using education as an engine of economic growth stretches back to the Nation's great land-grant institutions.[17] It is equally important today to sow the seeds for business leadership, engineering expertise, innovation in computers and technology, sophisticated consultants, vibrant service industries,

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[16] https://zoominfo.medium.com/has-corporate-america-reached-a-diversity-tipping-point-fabe8ff6f07c.

[17] Genevieve H. Croft, Cong. Research Serv., No. R45897, The U.S. Land-Grant University System: An Overview (2019); Scott Key, *Economics or Education: The Establishment of American Land-Grant Universities*, 67 J. Higher Ed. 196, 198-99, 216 (1996).

and much more. Only through an integration of America's educational pathways with the needs of business can our economy flourish and achieve its greatest potential.

Specifically, Amici rely on universities such as Harvard, the University of North Carolina, and a host of other institutions to provide the highest levels of educational excellence, which is achieved through a racially and ethnically diverse environment. A university education drives today's economy: approximately half of occupations in the United States require at least post-secondary education. *See* Elka Torpey, *Projected Openings in Occupations That Require a College Degree*, U.S. Bureau of Labor Statistics (Sept. 2021).[18] And Amici depend on universities to ensure that these students are equipped with the skills to lead in today's increasingly diverse and globally interconnected workplaces, markets, nation, and world. Empirical research overwhelmingly supports the conclusion that diverse university environments promote the cognitive growth and leadership skills that are highly valued by Amici and across the American economy. Prohibiting universities nationwide from considering race among other factors in composing student bodies would

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[18] https://www.bls.gov/careeroutlook/2021/article/projected-openings-college-degree.htm; *see also* Nat'l Ass'n of Colleges & Employers, *2019 Recruiting Benchmarks Survey Report Executive Summary* (2019), https://naceweb.org/uploadedFiles/files/2019/publication/executive-summary/2019-nace-recruiting-benchmarks-survey-executive-summary.pdf (finding that 58% of all full-time, entry-level hires of U.S. businesses responding to survey were recent college graduates).

undermine businesses' efforts to build diverse workforces.

A. Students Trained In Diverse University Environments Gain The Skills Needed To Lead In Today's Global Marketplace

"[S]trong evidence" supports the insight, confirmed by Amici's experience, that university students who study and interact with diverse peers, and particularly with racially and ethnically diverse peers, exhibit enhanced cognitive development necessary for a wide range of skills highly valued in today's economy. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Res. 4, 22 (2010). Numerous studies have shown that cross-racial interactions and engagement during university contribute to essential job-related skills and competencies such as critical thinking, problem-solving, and the ability to work cooperatively. *E.g.,* Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, *in* Diversity Challenged: Evidence on the Impact of Affirmative Action 187, 196-98 (Gary Orfield ed., 2001).[19]

Students of all racial backgrounds benefit from

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[19] *See also* Thomas F. Nelson Laird, *College Students' Experiences with Diversity and Their Effects on Academic Self-Confidence, Social Agency, and Disposition Toward Critical Thinking*, 46 Res. Higher Educ. 365, 377-82 (2005); Eric Day Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 351-58 (2002).

diverse university environments. Empirical research shows that studying with someone from a different racial and ethnic background improves key employment-related competencies for all students. One study found that such experiences benefit students' self-reported intellectual and vocational skills and functioning as a member of the team, with white students reporting the most pronounced gains in several key areas. Shouping Hu & George D. Kuh, *Diversity Learning Experiences and College Student Learning and Development*, 44 J. College Student Dev. 320, 327-32 (2003). Another study found that attending a racially and ethnically diverse university significantly and positively correlated to the development of post-college cross-cultural workforce competencies for white students from both segregated and integrated neighborhoods, and to the development of leadership skills for white students from segregated neighborhoods. Uma Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse Society? Campus Diversity and Cross-Cultural Competencies*, 78 Harv. Educ. Rev. 615, 632 (2008). These conclusions are unsurprising; students drawn from various racial, ethnic, socio-economic, gender, and geographic backgrounds—to name a few elements of diversity considered in a holistic process—have different lived experiences as Americans and bring those varied experiences with them to the classroom and the workplace.

As suggested by the above discussion, though, the empirical research underscores the specific importance of *racial* diversity on university campuses. Of the various diversity experiences at universities, interactions with peers of different races

are more strongly linked with cognitive growth than are interactions with peers who exhibit other forms of diversity, "which suggests the particular educational importance of fostering a racially diverse student body." Bowman, *supra*, at 22. And because *college* exposure to diversity has been shown to be more important than pre- or post-college exposure for developing pluralistic skills, "the skills of perspective-taking and conflict negotiation required in today's diverse society and global marketplace may best be nurtured in the college context." Jayakumar, *supra*, at 642.

These studies also confirm that the representation of racially and ethnically diverse students on university campuses matters. Empirical research supports that, for white students, merely *attending* a racially and ethnically diverse university correlated positively with long-term workplace competencies. Jayakumar, *supra*, at 632. And even those researchers who conclude that the quality of interracial contact on university campuses is most important acknowledge that representation is essential to ensuring opportunities for meaningful cross-racial interaction. Hurtado, *supra*, at 198; *see also, e.g.,* Sylvia Hurtado, Univ. of Mich. Ctr. Stud. Higher & Postsecondary Educ., *Preparing College Students for a Diverse Democracy: Final Report to the U.S. Department of Education, Office of Educational Research and Improvement, Field Initiated Studies Program* 23 (2003).

Business leaders and educators alike understand that diversity in university classrooms facilitates the development of skills and perspectives necessary to help workers and businesses succeed. For example,

leading economist Peter Henry, who, as an undergraduate student at the University of North Carolina, Chapel Hill, experienced "first-hand" the "importance in higher education of exposure to diversity across many dimensions, including race," explained: "Diversity of perspective is not just a nice thing for companies. [It] is a critical competitive consideration in the business world .... Building a diverse classroom experience is how to turn out the most informed critical thinkers. Classroom diversity is crucial to producing employable, productive, value-adding citizens in business." UNCJA 1580-82.

Confirming the research and views of business leaders, individual students and alumni in these cases testified to the importance of racial and ethnic diversity to their own educational experiences. *E.g.*, HJA 938-40, 942, 955-58 (testimony from multiple students to this effect). As one student put it: "I think dismantling the race-conscious admissions policy would really rob students of that critical part of education where you learn from and with people who are different from you and have different experiences from you." HJA 971. Another explained, "being around students from different ethnoracial backgrounds made me a more critical thinker and a more independent thinker." HJA 910.

Accordingly, while Amici value and promote diversity broadly speaking, they also specifically value on-campus experience with racial diversity. Such experiences promote cognitive growth and help develop the skills needed to thrive in the modern American economy.

B. American Businesses Work Hand-In-Hand With Universities To Recruit Next Generation Business Leaders

As university students prepare to graduate and enter the workforce, American businesses collaborate with universities to recruit talent that will help those businesses succeed. Business recruitment on university campuses is widespread. A 2019 survey of 275 firms across many industries found that more than 75 percent conducted on-campus interviews, and nearly 60 percent of full-time entry-level college hires were initially interviewed on campus. Russell Weinstein, *Employer Geography, Campus Recruiting, and Post-Graduation Outcomes*, Nat'l Ass'n of Colleges & Employers (Nov. 1, 2019).[20] And of course, companies hire many additional recent college graduates through other recruiting methods.

Businesses rely on university relations and recruiting to promote the diversity of their talent. When selecting target universities at which to recruit, employers cite the diversity of the student body along with other considerations such as the quality of the individual academic programs. Nat'l Ass'n of Colleges & Employers, *2019 Recruiting Benchmarks Survey Report Executive Summary* (2019).[21] In a 2021 survey of American businesses, 88.4% of employers reported

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[20] https://www.naceweb.org/job-market/trends-and-predictions/employer-geography-campus-recruiting-and-post-graduation-outcomes (citing National Association of Colleges & Employers 2014 reporting).

[21] https://www.naceweb.org/uploadedfiles/files/2019/publication/executive-summary/2019-nace-recruiting-benchmarks-survey-executive-summary.pdf.

formal diversity recruiting programs at universities, up from 56.3% in 2016. Kevin Gray, *Formal Diversity Recruiting Efforts Climb Among Employers,* Nat'l Ass'n of Colleges & Employers (Mar. 7, 2022).[22] And a separate study of American employers found that in the one-year period from mid-2020 to mid-2021, more than two-thirds of respondents reported increasing their investments in university recruitment of historically underrepresented groups. *Id.*

University recruitment programs specifically designed to recruit candidates of racially diverse backgrounds have yielded results. One study of 829 midsize and large U.S. firms found that five years after companies implemented programs focused on recruiting racially diverse students from universities, the proportion of Black male and female managers increased by 8% and 9%, respectively. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*,

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[22] https://www.naceweb.org/diversity-equity-and-inclusion/trends-and-predictions/formal-diversity-recruiting-efforts-climb-among-employers/; *see also* ForbesInsight, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce*, https://images.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf (explaining that 52% of global enterprises responding to survey reported utilizing university or graduate school diversity associations to recruit talent, which was the most highly rated strategy); Ronald C. Machen et al., *Initiatives to Promote Diversity and Reduce Systemic Bias in Corporate America* 5 (Oct. 2021), https://www.wilmerhale.com/en/insights/publications/20211007-how-to-advance-corporate-diversity-in-compliance-with-the-law-a-toolkit (discussing how strategic partnerships with educational institutions are "essential to successfully increasing the rate of Black hires").

Harv. Bus. Rev. (2016).[23] The Dobbin & Kalev article also explains that increased recruitment of highly qualified, racially diverse employees is essential to achieving reduction of bias among all employees. *See id.* Once businesses recruit more racially diverse employees, they can then use mentoring and related programs to enhance employees' sense of belonging and inclusion and reduce social isolation and attrition. Machen, *supra*, at 7-8. Amici are committed to continuing and advancing such efforts, and they require a candidate pool that is both highly qualified and racially diverse to do so.

III. THE BUSINESS COMMUNITY'S EXPERIENCE DEMONSTRATES THAT DIVERSITY REMAINS A COMPELLING INTEREST

Amici's experience demonstrates that educational diversity remains a compelling interest. Petitioner's arguments are inconsistent with this experience and the research that supports it.

For instance, in an attempt to downplay the importance of student-body diversity, petitioner cabins its value to in-classroom benefits such as "livelier classroom discussions." Pet. Br. 51. Although such immediate on-campus educational benefits are an important part of the compelling

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[23] https://hbr.org/2016/07/why-diversity-programs-fail (explaining why interventions such as targeted college recruitment, mentoring programs, intergroup contact, and social accountability successfully increase diversity in business); *see also* Machen, *supra* at 7-8 (explaining that recruitment, mentoring, and accountability are central to promoting diversity and reducing systemic bias in corporate America).

Ms. BONAMICI. Thank you, Mr. Chairman. Mr. Zhao, in your written testimony, you mention your concerns with unfair admissions practices such as legacy preferences, and I am glad we share that concern. You also mentioned that legacy preferences are driven by, and I quote, "racial equity ideologies." Are you aware that legacy students are disproportionately white; for example, seven in ten at Harvard? That is a yes or no question.

Mr. ZHAO. That is a historic fact, I believe.

Ms. BONAMICI. Okay, thank you. I want to followup on Mr. Takano's line of questioning, Mr. Zhao, because you discuss meritocracy several times. In your testimony, you talk about restoring meritocracy and do not destroy meritocracy. You appeared to define that meritocracy based on test scores and grades.

The dictionary definition of meritocracy means based on ability and talent rather than wealth or social position. I submit that many people have tremendous ability and tremendous talent and potential and might not have high test scores or high grades. It seems like it is sort of counter to what you are saying, and I wholeheartedly reject the notion that meritocracy and racial diversity are somehow exclusive.

Saying so is really tantamount to claiming that black and brown students are not academically talented enough, or as Mr. Squires claimed, mismatched. Now that view, that view ignores a whole range of assets, experiences and perspectives that black and brown students bring to our Nation's colleges and universities. In fact, do you know what the PISA scores are, international test scores?

Mr. ZHAO. Yes. I think Congresswoman, you misinterpret my statement. I was saying, you know, the test score should be one of the key criteria, not the whole——

Ms. BONAMICI. Yes. I understand that that is what you are saying. I am reclaiming my time, and I just want to note—I am reclaiming my time, Mr. Zhao. I just want to note for the record that in country with high PISA scores, like China, South Korea and Singapore, they are pretty low on entrepreneurial skills.

In the United States, where we might on PISA scores have lower test scores, we have higher confidence and entrepreneurial skills. I think that is important to keep in mind.

Real quickly Mr. Hinojosa, based on your understanding of the Supreme Court opinions, would targeted outreach and recruitment policies and other policies that are outlined in the recent joint guidance from the Department of Education and Justice run afoul of the opinion, as some of my colleagues have claimed?

Mr. HINOJOSA. Are they prohibited?

Ms. BONAMICI. Are they—would they run afoul of the opinion.

Mr. HINOJOSA. Absolutely not.

Ms. BONAMICI. All right, thank you, and I appreciate that, and I am just about out of time, so I yield back. Thank you, Mr. Chairman.

Chairman OWENS. Thank you so much. I would like to now recognize Ms. Foxx, Dr. Foxx.

Mrs. FOXX. Thank you, Mr. Chairman. Thank you for leading this hearing today. For far too long, college admissions have pitted students against students based on race. This is undoubtedly a great stain on our postsecondary education system.

Today should be a day when this Committee can look forward to a brighter future for all students. I am most encouraged by universities that have committed to change, and am proud that the University of North Carolina-Chapel Hill has chosen to look forward.

On the day of the Supreme Court's decision, UNC Chancellor Kevin Guskiewicz shared with UNC campus community "we will follow the Supreme Court's decision in all respects. That means race will not be a factor in admissions decisions at the university," and did not stop with just words.

UNC is educating undergraduate admissions officers on the new legal standard. The university has reviewed admissions applicants for graduate degree programs and the university has made technology changes, so no one who makes admissions decisions has access to applicant's racial demographic data during the admissions season. It is my hope that many other colleges and universities are taking the same step.

Mr. Squires, we know it is important to provide more than just access to college. Schools should be equally focused on helping students complete college. You mentioned in your testimony that highly selective schools use race-based preferences—using race-based preferences run the risk of creating a mismatch between the student and the university.

How important is it for a student to be prepared to meet the academic rigor of a university, and what might a mismatch result in?

Mr. SQUIRES. Well, thank you for that question. It is incredibly important, particularly in the hard sciences. If you are an engineering student who comes into a school and let us say you scored a 650 on the SATs in the math portion, a very good score, but your peers on average scored a 750 and you are in a class that is taught at 750 speed, Physics or Calculus, you are going to fall behind.

What some of the research has shown is that oftentimes black students are more likely to major in STEM disciplines at selective schools and then—but also more likely to switch out of those majors. Mismatch is an issue, but I want to say something really quick.

I think part of the problem is that we have adopted in this country a college or bust, and particularly an Ivy League or bust attitude that makes people believe that if you do not attend college or an Ivy League institution, that you know, to some extent you are wasting your life.

I think that is the wrong way to go about talking about higher education. Again, regardless of what school we are talking about or what institution we are discussing, at the end of the day the admission standards should be consistent across the board, and not based on a person's skin color or ethnic background.

Mrs. FOXX. Well, thank you very much for that. Ms. Somin, do you have anything to add to that?

Ms. SOMIN. I thought Mr. Squires gave a very nice summary of the basic concept, and how it applies in the engineering area. I would add that there has been similar empirical work showing mismatch effects in law and on law students eventual ability to pass the bar exam.

There has been further work conducted by Eleanor Barber, showing that it affects minority students' ability to obtain graduate degrees and go into careers in academia. Finally, I would add that there is nothing that is unique about mismatch effects to the racial context.

When Peter Arcidiacono and his colleagues at Duke University were studying mismatch, they found that students who received legacy preferences in admissions also tended to drift away from science and engineering because they tended to come in with lower average academic credentials than their peers.

This is not about race. This is about differences in preparation, affecting your likelihood of success in a particular curriculum.

Mrs. FOXX. Well, thank you very much for adding that about the legacy admissions. I think that is useful. Mr. Zhao, you talked about how you lived your American dream. You have worked tirelessly to represent AACE's mission to achieve equal education rights for Asian Americans. Why is this mission still important today, even after the Supreme Court's decision against race-based preferences in admissions?

Mr. ZHAO. Yes. It is very important that we notice, like U.S. Department of Justice and Education issue the guidance that even encourage the continued use of race and proxies at the national level. In California, the Democrats have reintroduced AC, ACA–7, try to reintroduce race back in the admission of the California school system. As Ms. Somin mentioned, in high schools around the country, they have assault on the meritocracy to cancel the admission test for Thomas Jefferson—exam schools.

Basically unfortunately, the advocates of the, you know, racial diversity and the diversity, they have not given up. We have to continue on this fight.

Mrs. FOXX. Thank you, Mr. Zhao. Thank you, Mr. Chairman.

Chairman OWENS. Thank you so much. I would like to recognize now Dr. Adams.

Mrs. ADAMS. Thank you very much and thank you all for your testimony. Mr. Squires, you stated in your written testimony that the highest performing black applicants at Harvard have close to a 60 percent chance of being admitted and for black legacy students, that number rose to 99.

When you are talking about high performance students, are you referring to their test score and the grades for admittance?

Mr. SQUIRES. Yes. That was in reference to how Harvard categorizes and breaks down the scores of students by decile. I was talking about the ninth and tenth decile. They, they use test scores and grades, correct.

Mrs. ADAMS. Okay. I just want to just note that because a student is not "high-performing," and when we are talking about affirmative action, it does not mean that they do not deserve the chance to have access, and that is really what affirmative action provided for these young people.

Let me move on. Doctor or Mr. Hinojosa, the media has portrayed the holding in this case to be that affirmative action has completely been overruled. Some of the witnesses here have interpreted the opinions holding to be even broader, eliminating any consideration of race in higher education at all.

Your oral testimony gave us your legal take on the Court's holding. As an advocate who represented UNC student intervenors at the Supreme Court, what does this holding mean to those students and to their interests at UNC?

Mr. HINOJOSA. It means that racial equity still matters in America. We hear about lots of testimony here today about individuals being treated individually. For 300 plus years, individuals were not treated individually, and those people were black, Native American, brown students among others, even Asian American students for far too long, and they should have opportunity.

Just because you cannot consider race, so let us remember, the decision says that the way that Harvard and UNC considered race was unlawful. It does not mean that you still cannot pursue diversity in its broader breadth, including racial diversity, through race-neutral means. What they were concerned, and Chief Justice Roberts was specifically concerned with, was a student getting an automatic bump just because of their race.

That actually was not really happening in many places, not even at Harvard and UNC if you look at the real record, but that is what they suggest, you know, are these race-based considerations. For the students, it means having all their talents, all their experiences fully evaluated and them being able to express this in their applications and have that fully considered, and they should not be censored.

Mrs. ADAMS. Okay, I agree. You stated also, that increased funding levels for historically black colleges and universities, HBCUs, Hispanic-serving institutions, tribal colleges and universities, Asian American and Pacific Islander institutions, that they may see a dramatic increase in applicants and admitted students who are no longer able to gain admission into colleges and universities that severely restrict the use of race.

Can you talk a little bit more about the impact that restricting the use of race in admission will have on these institutions, and the ways in which these HBCUs, HSIs, TCUs can prepare the universities for the influx of applications?

Mr. HINOJOSA. Sure. Typically, what follows bans on affirmative action, we know this from Oklahoma, Michigan, California, Texas back in 1997, you have large dips in under-represented students of color. Some of that is because students are no longer applying to universities, because they do not feel like they might not get it, so they are undermatching themselves to other institutions.

Others want to feel more welcome, and they may not feel as welcomed at certain universities, especially State flagships and other universities as well. It is imperative that HBCUs and other institutions that you named, and we name in our report, they are going to be experiencing a large influx of applications from students who want to go there for lots of incredibly important reasons.

They are incredible institutions and show a lot of promise. They will increase with the applications they receive because students are not applying to other colleges that they may end up applying, but instead apply to HBCUs and the like.

Mrs. ADAMS. Okay. Just quickly, how can admission officers comply with both the SSFA holding and Title IV?

Mr. HINOJOSA. The holding in what?

Mrs. ADAMS. The SSFA holding and Title, Title VI? Are there any strategies that—or policies that can widen this area for them?

Mr. HINOJOSA. Yes. We have many of those in our written testimony, and the Department of Education/Department of Justice also lists a number of options. The door is not completely closed to ensuring equal opportunity for all.

Mrs. ADAMS. Thank you. I am out of time. Thank you, I yield back.

Chairman OWENS. Thank you. I would like to recognize Mr. Good.

Mr. GOOD. Thank you, Mr. Chairman. Thank you to all of our witnesses. Mr. Zhao, a review of the 65 universities that are in the so-called Power Five athletic conferences found that the typical institution has 45 DEI staff members on its payroll. 45 of the typical Power Five institutions, which is four times the typical number of employees devoted to supporting students with special needs.

By the way, colleges are increasingly offering, as you know, DEI programs of study for students. Given this growing number of DEI offices and positions on campus, how might that impact discrimination in other aspects of campus life?

Mr. ZHAO. I want to tell you, China, in China it has been similar since the Cultural Revolution. Colleges and institutions established revolutionary committees to distract the institutions, right? We, I think all, you know, in educational institutions, should be going back to its basics. Its goal to really educate, to make sure the best and brightest, and provide the best education, instead of like, you know, promoting some ideology. That is my take on that.

Mr. GOOD. Focus on education, academic excellence. Is there any return on investment for this spending on DEI positions besides raising tuition costs for the university?

Mr. ZHAO. I have not seen that. I have seen more negative impact, just like the revolutionary committee did to China about 50 years ago.

Mr. GOOD. Thank you. Mr. Squires, I know this has been talked about today, but can you just characterize the difference for us again between equity and equal opportunity? What is the difference when you use that term "equity" and what the goal of that is, versus equal opportunity?

Mr. SQUIRES. The way equity is typically used in sort of common parlance is suggesting that people from all different types of backgrounds end up in the same place. The actual definition of equity is the consistent and impartial application of a particular standard.

The equality of opportunity, again to me you are talking about being able to bring people from different backgrounds, and again, subject them to the same types of standards. For instance, a city may say we want to see SAT scores improve. We will provide free testing at high schools across the city. Those types of things provide equal opportunities.

Equity is when you turn around on the back end and say, and again particularly in the college context and say okay, we see that everyone is not coming in with the same types of score. Now we are going to socially engineer the demographic balance on the back end.

Mr. GOOD. I appreciate that, and I would submit that the focus on equity is perpetuating the harm done from previous years of discrimination and a lack of equal opportunity. Would you suggest that those who support equal opportunity should also support school choice?

Mr. SQUIRES. Absolutely. I believe school, education choice, whether through the expansion of charter schools, vouchers, and particularly education savings accounts have to be one of the highest priorities as we move forward in a world post-preferences.

A lot of people like to talk about race as it relates to higher education. Here is how the interaction of race, class, education, and politics actually works today. Black progressives, particularly politicians and the media, will rail against school choice on the K through 12 level, particularly vouchers, oftentimes being supported by teachers' unions. They send their own children to private schools.

Mr. GOOD. Right.

Mr. SQUIRES. Right. They summer on Martha's Vineyard, and then when it is time to apply to Harvard, they turn around and cite education disparities in the inner city to justify why their children need racial preferences. To me, if anyone wants to talk about race, education, and outcomes, and they are not for education choice, I think that is a big problem.

I would submit, I will make a quick policy suggestion for the Committee's hearing. I think any elected official, regardless of their jurisdiction, who stands against school choice should be required to send their child to the lowest-performing school in their district, because if the schools are not good enough for your child, then they should not be good enough for mine neither.

Mr. GOOD. Well said, Mr. Squires, and I encourage everyone on the Committee to support my Choice Act, which allows Federal dollars to go and follow the child to the educational opportunity of their choice, the parents' choice, and particularly obviously for those who are of lower income.

Last question. Ms. Somin, thank you for being with us today. Fairfax County in Virginia, the State where I am from, has moved toward equitable grading. Could you talk briefly about that equitable grading and the harm that is being done from that?

Ms. SOMIN. I am not familiar with the policy.

Mr. GOOD. Okay. Well equitable grading is, its stated goal is to combat institutional bias and eliminate racial disparities in grade outcomes, and it removes grade penalties for late assignments. I see I am out of time as well. I yield back, Mr. Chairman.

Chairman OWENS. Thank you so much, appreciate that. I would like to now recognize Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman. Mr. Hinojosa, one of the traditional strengths of our system of law is common law as well as legislation, is the principle of legal certainty, which is that to the—it has been expressed is that the law must be accessible and so far as possible intelligible, clear and predictable.

I mean people rely, in terms of just organizing their lives and their enterprises, in terms of just having clear signals from courts and legislative bodies, in terms of following what I think has really always been a really important and positive principle.

Your testimony on page five notes that for those who think that the Court made the admissions process completely race blind, in fact as you point out, there is language in there that suggests that there still is under the law the ability to conduct admissions in terms of how race has affected an applicant's life, be it through discrimination, inspiration or otherwise.

I have been—I was home in August and talking to some educators in higher education, as well as, you know, other secondary school institutions in Connecticut. I have to tell you, the principle of legal certainty was completely trampled by this Court.

Setting aside all of the political arguments that are here today, I mean, the fact of the matter is that if you are an admissions office right now trying to figure out, you know, with this decision about how to make choices in terms of applications, I mean it is really almost just chaos in terms of just trying to decipher this.

I mean they are talking about actually bringing on legal counsel to really screen sort of what the Court actually left them with in terms of this decision. I was wondering, again I know the DoE is talking about trying to get some guidance out there.

The fact of the matter is this Court has really left a mess as a result of this decision, regardless of how people feel about the merits of affirmative action.

Mr. HINOJOSA. Yes, and that mess started with the Court's own unjust, tortuous interpretation of the Equal Protection Clause, even suggesting that Brown v. Board somehow would support excluding black and brown students, highly qualified black and brown students from our Nation's most selected institutions.

That is sad, you know. I carry a copy of the same pocket guide that I got from the University of Texas School of Law when I went there back in the 1990's, and but what is most troubling about the more recent opinion is that you have Chief Justice Roberts almost trying to dictate educational policy.

He is a chief justice. He should limit his opinion to the issues that are before him, but he did not do that, and he started trying to write, you know, policy, and which has thrown confusion. It is been made even worse by organizations like Students for Fair Admissions, suggesting that the whole process has to be race blind.

That absolutely is not. If Chief Justice Roberts, just as an example, if Chief Justice Roberts says yes, you can consider race as a notion of resilience and the like, right, and overcoming discrimination. How can you talk about racial discrimination, overcoming racial discrimination and somehow have to divorce race from overcoming race discrimination.

It does not make sense. When you talk to lawyers, they will tell you that is what the opinion means, and that is why we have some chaos that has been created in many board rooms at colleges and universities, and in K12.

Mr. COURTNEY. Well again, this seems to be a trademark of the Roberts court. I mean if you look at the Dobbs decision, I mean it is the same situation that is happening in hospitals and clinics all across the country, where OB/GYNs are feeling the need to have legal counsel to advise them about how to practice medicine, because again, it is just they created all these cross-currents of possible criminal liability, as well as professional liability in terms of

just stepping outside lines that are not clear, in terms of just how they are supposed to practice medicine.

Again, moving forward though, I mean it is clear that in my opinion, Congress needs to act to set some clarity, so that we can again allow our legal system to achieve a goal that has always been, you know, recognized as essential.

Mr. HINOJOSA. Yes, and we need to make sure that students understand that their full experiences should be represented, and that universities shouldn't shy away from that. In fact, they might be running afoul of students' First Amendment and Fourteenth Amendment rights if they try to censor students' stories simply because they're related to race.

Chairman OWENS. Thank you. I would like to now recognize Mr. Moran.

Mr. MORAN. Thank you, Mr. Chairman. Ms. Somin, I want to come to you just for a little bit of response for Mr. Hinojosa's criticism of Chief Justice Roberts. When you look at his writings, and he said in particular in the most recent opinion, where folks were talking today in the—about the dissenting opinion, that he said the dissenting opinion defends "a judiciary that picks winners and losers based on the color of their skin."

What would be the consequences if our judicial system applies different laws based on race?

Ms. SOMIN. I agree that that would be very concerning. Individuals should be treated as individuals when they come before the law, and a judiciary that does not do that would be—I would be very concerned about it.

Mr. MORAN. Last week, the Students for Fair Admissions filed another lawsuit against West Point Military Academy, that is the military academy at West Point and the Department of Defense, citing the military academy's use of race as a preference in admissions. In fact, West Point publishes racial composition goals for every class, and these goals are adjusted yearly to reflect enlisted population.

During the Students for Fair Admissions Harvard and UNC oral arguments, what was the discussion around the military academy's race preferences?

Ms. SOMIN. There was a discussion concerning whether this was the kind of compelling interest that would evade scrutiny, that would allow the military academies to use race.

Mr. MORAN. Given the Students for Fair Admissions decision, how might the courts rule in the West Point Military Academy lawsuit? Do you have an opinion about that?

Ms. SOMIN. The Students for Fair Admissions decisionmakes it clear that what is known as strict scrutiny applies to the use of race in admissions everywhere, including the military academies. Any use of race must serve a compelling interest and must be narrowly tailored to serve that compelling interest. That is, the institution cannot use race any more than is necessary.

In the military context, what that compelling interest might look like might look a little different than the civilian context. Nonetheless, given the toughness of the standard enunciated in Students for Fair Admissions, I am skeptical that the military academies will be able to meet that heavy burden.

Mr. MORAN. Mr. Squires, I want to come to you now for a few questions if you do not mind. In an article that you and your colleagues from Heritage wrote titled "Created Equal, A Road Map for an America Free of the Discrimination of Racial Preferences," it states "Any racial preferences will provide opportunities for policymakers to focus on often-neglected factors that contribute to student success."

My question to you generally is what are those neglected factors that you were referring to and your colleagues when you wrote that article?

Mr. SQUIRES. I believe what we were referring to in our special report that came out after the decision particularly was around family and family structure, and as I said, the research is conclusive at this point, that children raised in two parent homes by married parents tend to do better on a host of educational and social outcomes, better than any other family arrangement.

For some reason, this is not seen as a priority oftentimes with respect to our policy, and I think it is something that we need to discuss more. Obviously we cannot fix this in one particular generation, but that is part of the reason I talked about the success sequence, so that children way before they start a family, understand that they have a sense of agency.

If they finish school, get a job, get married before they have children, their chances of being in poverty will be in the single digits. I think it is something that every student should know before they graduate from high school.

Mr. MORAN. You anticipated my very next question, because I wanted to raise that quote from your testimony, because it was astonishing to me to look at that and know that that is in fact a great recipe and a great formula to getting out of poverty, is to stay in school, to secure stable employment, to get married before you have children.

Those factors are much more prominent than anything else, and so that traditional family environment is so important to raise our kids up and to allow them then to succeed, and to do much better than we did. That was one of the things as I look back on my upbringing, that I credit a lot of where I am today to is——

Certainly was not money, certainly was not influence, but it was the stability and the security of loving parents that guided me through that time, to understand that my decisions would help me get further in life by working hard and by serving others and by instilling good values in me. Would you agree that that is a good formula ultimately to lead to success in this world?

Mr. SQUIRES. Absolutely. If your child—if the first time your child is read to is when they start on their first day of kindergarten, something has gone wrong, regardless of what skin color that child is. Home environment matters a great deal as it relates to education, and I think of my own father, who was the chief educational officer in our home, who stayed on me consistently because he refused to allow me to settle for a B+ when he knew that I could be an A student.

Students need obviously quality schools with dedicated teachers and administrators, but they also need to have the types of home

environments that cultivate a sense of wonder and a lifelong love of learning.

Mr. MORAN. I love what you just said, and I will yield back by finishing, by saying this. I started my day out this morning talking to my first grader and my second grader back home on FaceTime, getting them to show me the books they had checked out from the library and talking about their reading levels, and what they needed to accomplish this week in school. It is very important. I yield back.

Chairman OWENS. Thank you. I would like to now recognize Ms. Leger Fernandez.

Ms. Leger Fernandez. Thank you so very much, Mr. Chairman and Ranking Member and our witnesses. In New Mexico in Revo Mexico, we pride ourselves on our diversity. It is the foundation of our state's unique and beautiful culture and actually looked at across the country as what could a diverse nation look like. Well, it looks like New Mexico, and we are very proud of that.

New Mexico's colleges and universities, while they also reflect that diversity, we have 30 minority serving institutions including four tribal colleges.

I am here to say it wasn't always that way. Latino and Native American communities have to fight for their rightful place in our higher education system, because we know it is not just how much love you have at home, it is how much education you can get to go on and accomplish the things like sitting in Congress.

Under the GI Bill, this is a story I say often, because people do not think about it when applied to New Mexico. Under the GI Bill, my father and other Hispanos and Jews could go to our local university. Guess what? The white only fraternity barred them, banned them.

We can see that there has been an indisputable State of mind, active racism, active discrimination. What happened to that university? It became the country's first university with a Latino president at its head, and at UNM, which is our flagship university, it went and—went from about a 31 to about a 51 percent Latino population in 25 years because they worked at it. They wanted their universities to reflect their State.

You have to put in the hard work to make sure that our institutions reflect like I like to quote John Adams, in miniature the diversity that is our country. That is our Founding Father who recognizes the importance of diversity. We have seen study after study that economic, education, Democrats, democratic benefits that flow when you have diversity, that in so many different ways the Supreme Court and Students for Fair Admissions v. Harvard ignored that fact.

I want to thank you, Mr. Hinojosa, for the amazing work you did to bring those benefits to life. The decision is the decision. There are those of us who do not agree with it, but we must live by it. That does not mean that we cannot still work to diversify our educational institutions.

Can you tell us in Congress what we can do to make sure there is more diversity at our colleges?

Mr. HINOJOSA. Yes, and I do want to say I am a New Mexico State University grad, to go Aggies.

Ms. Leger Fernandez. Oh, maybe not flagship. One of our important universities, how about that?

Mr. HINOJOSA. The other flagship, as we like to say. There are lots of options for universities, and they have to think of things comprehensively, right? Affirmative action was never the silver bullet, right? It was not going to get us where we needed to go. Again, it was not these automatic admissions. There are plenty of extremely talented students across races and backgrounds who have been admitted through affirmative action programs.

Now we do not have that as an option at most universities. We still have it available at the military academies and possibly others for other reasons. There are still other opportunities. There are the analyzing race-neutral programs such as percentage plans that were mentioned earlier in Washington State.

Students attending their schools should be able to attend their State flagships. These are State flagships that should be representative of the State. We are not talking about racial balancing; we are talking about access in a true democracy. We are talking about need-based financial aid that needs to be increased considerably, climate support.

These DEI programs that were mentioned earlier, those are actually pivotal to providing the support and building a healthy, inclusive climate that does help broaden perspectives across campuses and the like. There are many things that Congress can do. We have a lot of options in our written testimony about how Congress can also help move the bar to ensure that racial equity is not written out of policy in our universities and institutions.

Ms. Leger Fernandez. In your written testimony that you just referenced, you also pointed out the importance of Pell grants, because Pell grants will help students from diverse socioeconomic, diverse racial backgrounds but with socioeconomic need access. I would point out that House Republicans proposed earlier this year to reduce Pell grant funding by 22 percent.

Imagine that, 22 percent, 80,000 Pell grant opportunities go away. I am going to have to ask you to perhaps elaborate on that in writing, because I have run out of time. That is a way where we are cutting opportunities across our country for our most deserving students. Thank you, Mr. Chairman. I yield back.

Chairman OWENS. Thank you. I now recognize Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Squires, you mentioned that race should not be the only measure of diversity. I think everybody would agree with that.

You want to look at all kinds of diversity. Does the college have the right to try to have a truly diverse college student, students because they are going to learn from each other and they are trying to be prepared for a diverse workforce. Does a college have a right to try to have a diverse student body?

Mr. SQUIRES. I think colleges have a right to determine admission standards. Again, I am not opposed to a diverse student body. I am actually very much in favor of a diverse student body. Again, part of that may be ethnic. Again, a big part of it is in terms of——

Mr. SCOTT. There is value, there is value to diversity of the student body because students are learning from each other, and you

are not going to learn much from a socioeconomically homogeneous student body.

Mr. SQUIRES. Well, a selective college has 100 students equally broken up into black, white, Hispanic and Asian, and all 100 went to Sidwell Academy. I am not sure how much diversity you are actually going to get. You may have people who look differently, but in terms of their life experiences they very much may be very much the same. I think——

Mr. SCOTT. They should try to diversify that?

Mr. SQUIRES. What I am saying is people on the outside will look at say this is very much a diverse class, and what I am saying is the people will look the same.

Mr. SCOTT. Okay. You can define diversity, but I think you are trying to say we should have as diverse as possible. Ms. Somin, you mentioned that the military academies should be diversified. Can you show why they need to be diversified and why that argument would not apply to other colleges?

Ms. SOMIN. What I said was that the military, the compelling interest in diversity may look a bit different in the military context than the civilian context, that said strict scrutiny still applies to any cases involving the military academies.

I am not certain that the military academies will be able to prove though that their use of diversity is in fact a compelling interest, and that the way that they are using race is narrowly tailored to serve that compelling interest.

Mr. SCOTT. You do not think diversity in the military academies is a compelling State interest?

Ms. SOMIN. That will need to be developed in the course of litigation. I agree that whether it is compelling, the analysis will look a little bit different than in a civilian context. The legal standard they have to meet is still high.

Mr. SCOTT. If a plaintiff could prove that an admissions test is in fact discriminatory, should it be allowed?

Ms. SOMIN. If a plaintiff can prove that a test is discriminatory, intentionally so, then that violates Title VI and possibly the Constitution at a public university.

Mr. SCOTT. A legacy program where the State like Virginia had a policy that essentially prevented most African-Americans from attending predominantly white institutions like UVA and Virginia Tech, would a legacy program where they would not benefit having grandparents that went there, should that legacy program with a discriminatory impact against African-Americans be allowed?

Ms. SOMIN. Under Title VI, a program has to be intentionally discriminatory to be prohibited. The plaintiffs or challengers would have to show that a particular program is intentionally discriminatory.

Mr. SCOTT. If it is discrimination but not intentional——

Ms. SOMIN. I would distinguish between programs that have a disparate impact, that is those that have an adverse effect on a particular racial group, but that are not necessarily intended to be discriminatory. Title VI is not a disparate impact statute. It is what is known as a disparate treatment statute.

Mr. SCOTT. Mr. Hinojosa, we know these tests are discriminatory, that legacy is discriminatory, athletic admissions can be dis-

criminatory. Wealthy donors get in at a higher rate. When people talk merit, how fair is it to have merit without offsetting all those discriminatory impacts with affirmative action?

Mr. HINOJOSA. Yes. I think certain parts of America, some of which are represented here today at the hearing, have such a jaded view of what meritocracy really is about and what merit is about, trying to suggest that it is anchored in many of these systemic, oppressive barriers such as legacy admissions and such as standardized test scores that really tell you nothing else about students.

They are simply used as barriers to admission, to prevent certain people, including the black and brown communities, Native American communities, from attending certain universities. It helps them excuse it and perhaps to sleep a little better on it, suggesting these are objective.

Mr. SCOTT. Sorry. My time is up. Well, you indicated that the Supreme Court did allow race to be used to a certain extent. Can you elaborate on that?

Mr. HINOJOSA. Yes. The Supreme Court held not that affirmative action itself is completely done away with. Race-based admissions programs in the way that the Supreme Court suggested that they are operated, cannot, you know, continue in the way that Harvard and UNC were doing it.

They can occur still at military academies, because of their national security interests. There might be other interests that are defined as compelling. The Court said that the way that Harvard and University measured their compelling interest in diversity was not measurable, that it was not linked to their specific goals, and that they had no end time limit on. If a university was to identify compelling interest, for example if a university wanted to make sure that all its doctors were leaving a medical school community and they were leaving certain parts of the community——

Chairman OWENS. I am going to have to interrupt. You have to close up. Thank you so much, appreciate that——

Mr. HINOJOSA. All right. Thank you, Chairman.

Chairman OWENS. Okay. I would like to first of all thanks again, everybody, for answering those questions, and I wouldd like to now recognize Mr. Scott for his closing statement.

Mr. SCOTT. Thank you. Mr. Chairman, I think it is clear that colleges have a right to have a diverse, and diverse in many ways student bodies. They learn from each other. The experience of a 4-year on campus liberal arts degree is such as that you come out as a different person, and a lot of that transformation has nothing to do with what happens in the classroom.

It is working with the other students, and if you have a homogeneous student body, you are not going to learn nearly as much from your students as you have from if you have a diverse student body, and that is part of the educational process.

We have heard some of the solutions, school choice. Let me just say just very briefly. School choice helps a few people that can choose, but it diverts money from the overwhelming majority and some of us are trying to help all students, not just a privileged few. The so called merit that we are talking about, and Mr. Hinojosa

has gone into good detail on this, most of that is in fact discriminatory.

The standardized tests have been studied and they have discriminatory impact against African-Americans. You can say whether it is intentional or not, but that is a fact. It is not fair to have a discriminatory test, discriminatory legacy admissions when African-Americans could not, because of public policy, go to predominantly white institutions in Virginia, and therefore cannot today benefit by having a grandparent that graduated from UVA or Virginia Tech.

That should not be a factor. The fact that your parents can have, make huge donations, I think the wealth disparity between black and white is well-known. All of those factors have discriminatory impact, but they were offset by affirmative action.

Now without the affirmative action, all you have are these discriminatory impacts, and that is a clear violation of Title VI. It is discrimination, and we have to do something about it. Now I do not know what we are going to do about it. You have got to have some kind of standards.

If all the standards you come up with are discriminatory, that is a problem. If you want to know what to do, ask the Supreme Court. They are the ones that came up with this idea, not me. You cannot end up with just factors that have a discriminatory impact and then try to hide behind the fact that it was not intentional and therefore not actionable under Title VI because we don't have a private right of action.

I want to thank our witnesses, particularly Mr. Hinojosa, who pointed out the discriminatory impact of what is left after affirmative action, and the challenges we have to make sure that equal opportunity is alive and well.

Chairman OWENS. Thank you again for our witnesses here. This is such an important topic. Let me just kind of set the record straight, for those who are not aware of this. Failure is not in the DNA of black Americans. Black Americans can think as well, if given the same opportunity, as any other American.

For us to enter this conversation thinking that black Americans because they are black and because they had slavery 200 years ago are inherently less intelligent is indeed racist. Do not, and I will kind of go back to a real quick point.

My dad was born in 1928. Segregation was very strong in those days. His dad was—dropped out of second-third grade and went on to be a business owner. My dad in 1950 got his Ph.D. at Ohio State in Agronomy and went on to make circles around men and women at that same time that were not his color because he was taught about meritocracy.

That generation was taught that if you want to go out and win, you work harder, you study harder, you run harder, and you do not feel sorry for yourself if bad things do happen. You man up, woman up, grit and get through it. Today, if that same success story would be to my dad, they would say he got through because of affirmative action, which is an insult to him and everybody else before and after him.

We have an issue, a problem right now where black Americans, 75 percent in 2017 of black boys in the State of California could

not pass standard reading and writing tests. Do you think they'll ever sit in this room succeeding? Do you think they will ever go to college or whatever and succeed? No.

Just recently, a couple of days ago, Baltimore, 13 districts, zero proficiency in math. Now affirmative action could get them to a college, but guess what is going to happen? They are going to fail. They are going to be upset. They are going to think the system is against them because they have not been prepared.

We are going to look at the Super Bowl game this coming year. No one will ever talk about the fact that it is discrimination and meritocracy, because they know the best, the best talent is on the field that day. Those guys who got on that field, whether they are black, white, Hispanic, it does not matter how tall or short they are.

They are there because they have proved themselves to be the best prepared to win the game. We can do the same thing intellectually. Do not allow this country to go down that pathway of thinking because of our color, we cannot think, we cannot compete.

It is very, very—what is the word I am looking for—insulting. I want to thank you guys for this conversation. This very helpful. I want to thank my colleagues.

For America to have this process of thinking through this what we are going through right now, for us to be on the other side of affirmative action, which for 60 years has been a detriment to too many good people, we are now in the process of seeing how can we now make sure that we have a level playing field, that our kids come out of the school system they can compete, feel good about themselves and when they get to that position of success, never feel they have to apologize because they were given a head start because of their color.

I am excited about this process, and we are going to find some solutions. I would like to again thank our witnesses for taking the time to testify before the Subcommittee today, and without objections and no further business, this Subcommittee stands adjourned. Thank you so much.


AFFIRMATIVE ACTION IN HIGHER EDUCATION
The racial justice landscape after the *SFFA* cases
LDF Legal Defense Fund
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
ASIAN AMERICANS ADVANCING JUSTICE AAJC
ACLU
latinoJustice PRLDEF
Asian American Legal Defense and Education Fund

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I. INTRODUCTION

For decades, affirmative action has been a vital tool in advancing equal opportunity in higher education. But it was dealt a devastating blow in the United States Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. Harvard* and *Students for Fair Admissions, Inc. v. University of North Carolina*. Although it was never a panacea for the stark inequalities in our educational system, affirmative action helped countless women and people of color overcome barriers to entry and gain admission to higher education.[1] Then and now, the success of our multiracial democracy relies upon pathways to professional achievement that are open to all.

This report utilizes the expertise of leading civil rights organizations to provide a legal history of affirmative action in higher education, analyze the Supreme Court's decision in the *Students for Fair Admissions (SFFA)* cases, discuss the racial justice consequences of upending 45 years of precedent, and offer recommendations for advancing educational equity in light of the decision.[i] This report is a resource for those furthering their commitment to pursuing racial equity and a diverse educational setting in the wake of this decision, including but not limited to a wide range of advocates and stakeholders, prospective and current college students and alumni, and education professionals. Despite the substantial setback from the Supreme Court's decision on affirmative action, it is as vital now as ever before to ensure that all Americans—regardless of their backgrounds—have equitable access to resources and opportunities at all levels of our educational system.

i This report is not intended to serve as legal advice. Should you require legal advice, please seek an attorney. Another available resource is the "Questions and Answers Regarding the Supreme Court's Decision in *Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina*," issued by the U.S. Department of Justice and U.S. Department of Education, available at https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf.


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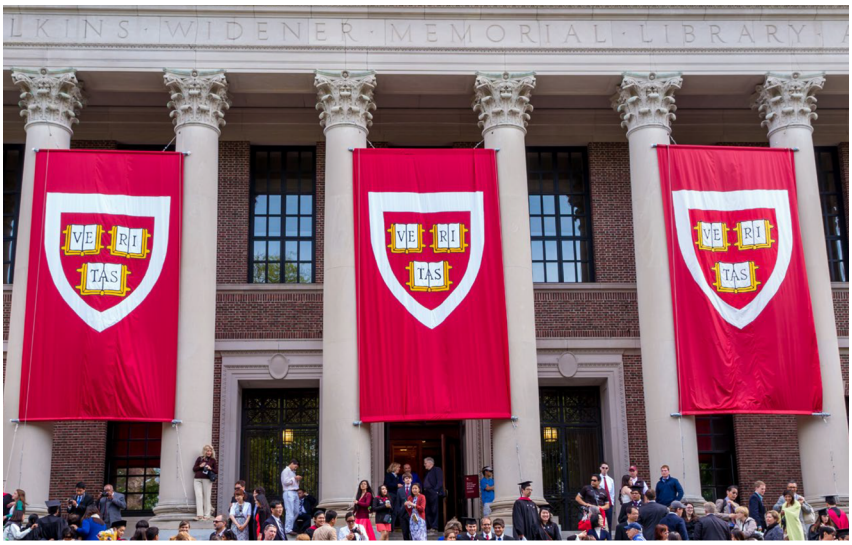
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the Constitution of 1776.

II. EXECUTIVE SUMMARY

Beginning in the 1970s, affirmative action programs helped dismantle racial segregation and boost the enrollment of students of color in institutions of higher education, creating more integrated, diverse learning environments at the nation's colleges and universities. Decades of litigation watered down and narrowed these programs, beginning with the Supreme Court's decision in *Regents of the University of California v. Bakke* in 1978, which rejected the use of affirmative action as a remedy for societal discrimination. Still, as recently as 2016, the Supreme Court affirmed the constitutionality of considering race as one of many factors in admissions decisions to promote diversity on college campuses.

In 2014, SFFA, an organization founded by conservative activist Edward Blum, challenged the constitutionality of race-conscious admissions programs at Harvard and University of North Carolina at Chapel Hill (UNC).[2] With the support of conservative donors, Blum has long challenged civil rights and racial justice advancements, including spearheading *Shelby v. Holder*, which gutted key protections of the Voting Rights Act.[3]

SFFA argued that the consideration of race in admissions constitutes impermissible race discrimination. After trials in Massachusetts and North Carolina, both federal trial courts rejected all claims and concluded that the respective admissions programs were lawful under the legal standard affirmed by the Supreme Court in 2016. SFFA ultimately secured review by the Supreme Court, which issued its opinion in *SFFA v. Harvard* and *SFFA v. UNC* in June 2023. Writing for the majority, Chief Justice John Roberts reversed the trial court findings and held that the admissions programs at Harvard and UNC violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Though devastating, the Court's decision nevertheless leaves colleges and universities with lawful avenues to advance educational equity. The Court explicitly preserved the ability of schools to consider an individual student's experiences with race and how those experiences affect their qualifications for admission. Schools may also continue to pursue race-neutral efforts to increase diversity in college admissions, such as those highlighted in this report. Finally, the Court held that colleges may consider race to remedy specific instances of past discrimination, and that its decision did not bar military academies from having race-conscious admissions policies.[4]

The Supreme Court's weakening of affirmative action underscores the urgent need to promote equal educational opportunities and advance racial equity through other lawful means. To help in this endeavor, this report makes the following recommendations:

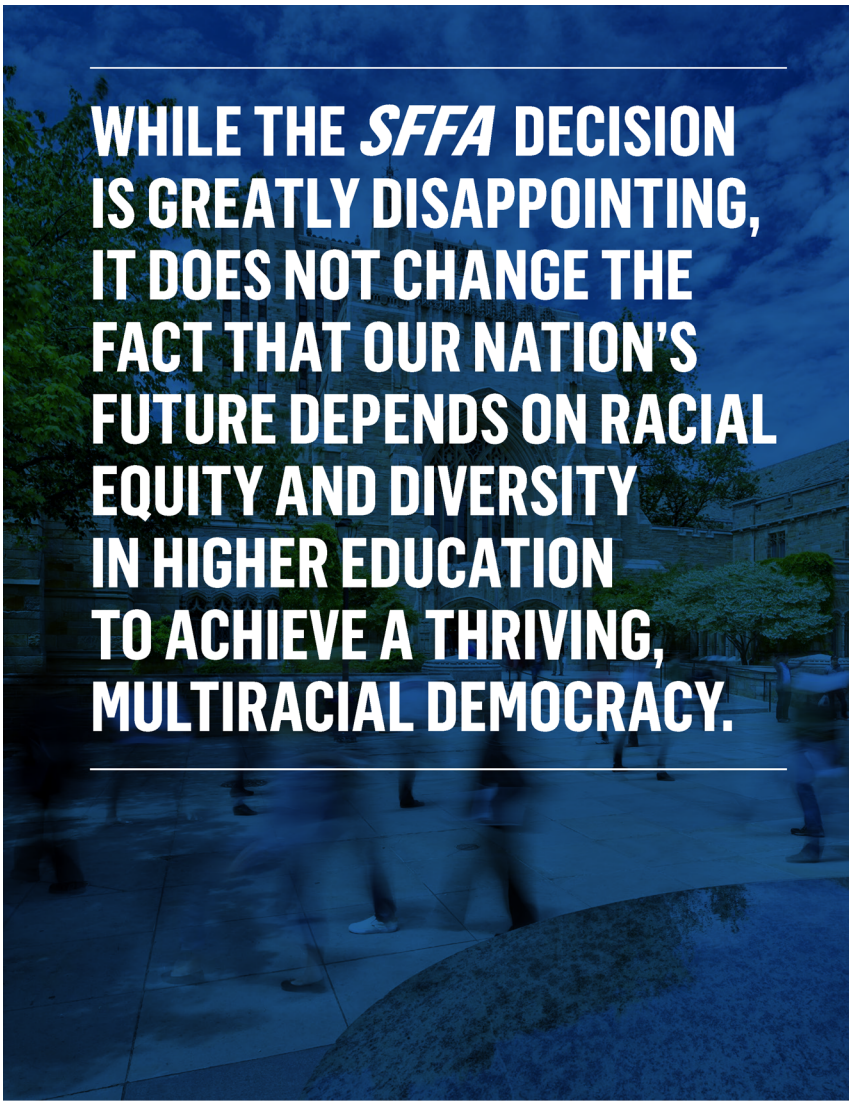
Diligently Comply with Anti-Discrimination Laws. Schools should take proactive measures to ensure that their policies and practices comply with federal and state anti-discrimination laws, including those that prohibit funding recipients from intentionally or unintentionally limiting opportunities for people on the basis of race or ethnicity.

Reimagine and Retool Admissions Policies in Higher Education. Schools should engage in holistic admissions processes that evaluate applicants' demonstrated capacity and strength in light of resources and opportunities available to them in their K-12 community. Schools should also critically examine and revise admissions requirements, policies, and procedures to ensure that they do not create inequitable and unnecessary barriers to access.

Expand Recruitment Efforts and Build Robust Pipelines. Schools should develop innovative strategies to target recruitment efforts to underrepresented and underserved communities. This includes the creation of tailored programming for students who cannot visit campus, development of robust pipelines for students of all ages, and investment in and compensation for historically underrepresented students and alumni to serve as ambassadors for the institution in their communities.

Support Historically Marginalized and Underrepresented Students on Campus. A healthy, vibrant campus climate for all students is critical for ensuring equity in higher education. Schools should implement systems to address prejudice and discrimination on campus, and conduct institutional climate reviews. In addition to pre-college programming for first generation students, schools should provide holistic supports for basic needs like housing, nutrition, and health.

These efforts are especially critical in the context of the opposition's continued attack on educational equity and attempts to drive a wedge between communities of color. Undoubtedly, some will seek to exploit the Supreme Court's decision in order to slow or reverse the progress created through affirmative action. However, while the *SFFA* decision is greatly disappointing, it does not change the fact that our nation's future depends on racial equity and diversity in higher education to achieve a thriving, multiracial democracy. To that end, colleges must engage with stakeholders and consider the range of lawful tools and policies to achieve these goals.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III. THE LEGAL HISTORY OF AFFIRMATIVE ACTION IN HIGHER EDUCATION

Nettie Hunt and her daughter Nickie sit on the steps of the U.S. Supreme Court. Nettie explains to her daughter the meaning of the high court's ruling in the *Brown vs. Board of Education* case that segregation in public schools is unconstitutional. (Photo by Bettman/Getty Images)

Affirmative action is rooted in the Supreme Court's 1954 decision, *Brown v. Board of Education,* which overturned decades of Supreme Court precedent upholding racially segregated schools. Following nearly 250 years of institutionalized slavery, Jim Crow laws further entrenched the legal, social, and economic subjugation of Black people. This racial segregation relegated Black people, including Black students, to dehumanization and second-class citizenship in all walks of life, including education. Other people of color were likewise subject to a racial caste system. For example, in the 1927 case *Gong Lum v. Rice,* Chinese American students in Mississippi "could not insist on being classed with the whites" and instead were forced to "attend the colored public schools of [their] district."[5] *Brown* established that the Equal Protection Clause cannot tolerate racially segregated school systems and recognized that "education is perhaps the most important function of state and local governments [and] the very foundation of good citizenship."[6] The *Brown* decision drew upon the reasoning of earlier Supreme Court cases, such as *Sweatt v. Painter*,[7] which struck down segregation in higher education and emphasized the importance of studying and exchanging views with other students, and decisions like *Mendez v. Westminster School District of Orange County,*[8] which held that the segregation of Mexican American children was unlawful.

Affirmative action was one way to help realize the promise of *Brown*. The term "affirmative action" first appeared in early government interventions to promote equal opportunity, focused primarily on stamping out intentional discrimination in government contracting and employment.[9] In 1961, responding to pressure from the civil rights movement and other activists, President John F. Kennedy signed Executive Order 10925, which required government contractors to "take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or national origin."[10] A few years later, President Lyndon B. Johnson built on this directive by signing Executive Order 11246.[11] The order required federal contractors, including public and private colleges and universities that contracted with the federal government, to implement and maintain affirmative action plans, including steps to improve recruitment, hiring, and promotion of members of historically marginalized racial groups and women.[12]

The assassination of Dr. Martin Luther King, Jr. in 1968 galvanized a push to recommit to diversifying institutions of higher education that had been, in large part, exclusively white.[13] In response, early affirmative action admissions programs facilitated a swift and significant boost in the enrollment of Black[ii] Americans in institutions of higher education.[14] The number of Black students admitted to Ivy League and peer universities rose sharply in 1969, often more than doubling.[15] Black college enrollment then continued to rise from about 522,000 to nearly a million between 1970 and 1980. By 1976, the enrollment share of Black college students caught up to the population share of Black college-aged Americans.[16] The same was true for other historically underrepresented groups. For example, Asian Americans constituted only 3% of Harvard's Class of 1980—now, Asian Americans make up 27.6% of the Class of 2026.[17]

Just as affirmative action policies began to succeed, however, challenges to those policies also started winding through the courts. Allan Bakke, a white man twice rejected by the University of California at Davis School of Medicine, challenged the school's affirmative action system all the way to the Supreme Court. In 1978, the Court dealt the first blow to affirmative action in *Regents of the University of*

ii Naming preferences for specific racial and ethnic groups differ across and within communities. While respecting and acknowledging these differences, this report and guidance utilizes the following terms for ease of reference: Black, Latinx, Indigenous, Asian American, and Pacific Islander.

California v. Bakke. The Supreme Court held that the university's affirmative action program, which reserved 16 seats for underrepresented applicants of color to redress longstanding racial exclusions from the medical profession, violated the Fourteenth Amendment by failing to satisfy the Court's strict scrutiny legal framework.[18]

The Supreme Court's reasoning in support of this decision, however, was fractured and made it difficult for schools to know if and how they could consider race in admissions programs. Four justices concluded that the medical school's use of set-aside seats, or quotas, violated Title VI. By contrast, four other justices concluded that the medical school's remedial program was permissible to address the effects of systemic discrimination. Justice Lewis F. Powell, Jr. cast the deciding vote, holding that racial quotas were impermissible, thus invalidating the medical school's admissions program. However, he asserted that the use of race in admissions programs could be constitutional if narrowly tailored to achieve a compelling interest. Notably, though the medical school had articulated several justifications for the use of race in its admissions programs, the only interest that Justice Powell recognized as "compelling" was the medical school's interest in the educational benefits of diversity.[19] As a result, *Bakke* signified a transition away from considering affirmative action as a remedy for societal discrimination and inequality and a shift toward the virtues of diverse learning environments as affirmative action's animating purpose and benefit—a change that Justice Thurgood Marshall recognized, in a separate opinion, as a tremendous loss for racial equity.[20]

Nearly 25 years later, the Supreme Court affirmed and clarified Justice Powell's reasoning in *Bakke* through its rulings in two companion cases, *Grutter v. Bollinger* and *Gratz v. Bollinger* (2003). White plaintiffs challenged the University of Michigan's use of race in law school (*Grutter*) and undergraduate (*Gratz*) admissions. A majority of the Supreme Court upheld the law school's consideration of race as one factor in the holistic review of individual applicants to further the compelling goal of reaping the educational benefits of diversity, but struck down the undergraduate admissions system that awarded applicants from underrepresented racial groups an automatic numerical bonus.[21]

In 2013, the Court considered a case funded by Edward Blum and brought by a white student who was denied admission to the University of Texas at Austin, *Fisher v. University of Texas at Austin* (*"Fisher I"*).[22] The university considered race as one of many factors in evaluating candidates who were not automatically admitted as part of a policy accepting the "Top 10%" of each Texas

STRICT SCRUTINY

Courts apply "strict scrutiny" review under the Equal Protection Clause of the Fourteenth Amendment to governmental laws and policies that treat people differently on the basis of race. A provision subject to "strict scrutiny" is presumed unconstitutional unless a governmental entity can demonstrate that it has a compelling interest that can be achieved through narrowly tailored means. This is the most stringent level of review applied by courts and is, therefore, generally difficult to satisfy. Despite this, the Supreme Court has held that some explicitly race-conscious actions can satisfy this standard of review. Most laws and policies, including those that advance diversity and racial equity, do not use racial classifications and are not subject to strict scrutiny.

high school's graduating class.[23] The *Fisher I* Court affirmed the constitutionality of considering race in undergraduate admissions decisions, explaining that courts owe some deference to a university's judgment that diversity is essential to its educational mission. However, the Supreme Court clarified that—without getting this same deference from the Court—universities must prove that the means they choose to attain diversity are narrowly tailored. The Court sent the case back to the lower courts to analyze the facts with this clarification.[24] The U.S. Court of Appeals for the Fifth Circuit subsequently found that the admissions program at the University of Texas was sufficiently narrowly tailored to comply with the Fourteenth Amendment, and in 2016, the Supreme Court upheld that ruling in *Fisher v. University of Texas* ("*Fisher II*").[25]

In both *Fisher I* and *Fisher II*, Justice Clarence Thomas and Justice Samuel A. Alito, Jr. placed the model minority myth about Asian Americans—which pits communities of color against each other—squarely in the affirmative action debate. Justice Thomas's concurring opinion in *Fisher I* made explicit and misleading comparisons between Black and Asian American students, noting that

MODEL MINORITY MYTH

This false narrative celebrates Asian Americans for purportedly overcoming discrimination and succeeding in comparison to other people of color.[135] A 1966 *New York Times* story first popularized the myth, comparing Japanese Americans to Black Americans. The article noted that, despite being placed in internment camps during World War II, Japanese Americans are "better than any other group in our society, including native-born whites," and it went on to emphasize Japanese Americans' educational attainment.[136] As such, the model minority myth perpetuates the belief that Asian Americans have "earned" their place in American society—implicitly blaming other people of color for not doing the same.

This myth is problematic because it pits communities of color against each other and ignores how Asian Americans benefited from immigration policies that recruited highly educated immigrants.[137] It also renders invisible Asian Americans who are low-income, lack higher education, and are learning the English language. Finally, it erases the discrimination Asian Americans continue to face and reinforces the assumption of their "perpetual foreign[ness]."[138]

Disaggregated data is critical for challenging the model minority myth and revealing the diversity within the Asian American community—as well as the differences that exist between Asian American subgroups. These differences are especially stark with respect to socioeconomic background and educational attainment.[139] Prioritizing data disaggregation in education research and advocacy can help ensure that the most marginalized Asian Americans are made visible and have access to resources. Colleges and universities should collect disaggregated data by Asian American subgroups. Institutions and individuals can also support the Office of Management and Budget's efforts to improve data disaggregation and advocate for state level data disaggregation policies, such as those recently adopted by Massachusetts and New York.[140]

DECADES OF LITIGATION RENDERED A WATERED-DOWN AFFIRMATIVE ACTION INTO A BARELY RECOGNIZABLE DESCENDANT OF THE ROBUST PROGRAMS OF THE 1960s AND 1970s.

Black students scored in the "52nd percentile of 2009 SAT takers nationwide" while Asians scored in the "93rd percentile," and surmising that "[t]here can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race."[26] However, as noted later in this report, test scores are a flawed metric to measure merit. One study from Georgetown University's Center on Education and the Workforce concluded, "[f]amily class plays a greater role than high school test scores in college attainment."[27] Justice Alito's dissent in *Fisher II* further suggested that the University of Texas discriminated against Asian Americans because the university deemed the Asian American students "overrepresented" relative to state demographics even though another campus survey indicated Latinx students outnumbered Asian American students.[28] Both Justice Thomas and Justice Alito drew upon the model minority myth to justify their opposition to affirmative action, setting the stage for legal challenges to affirmative action based on the purported discrimination against Asian Americans.

Decades of litigation rendered a watered-down affirmative action into a barely recognizable descendant of the robust programs of the 1960s and 1970s. As these legal attacks made their way through the courts, affirmative action in higher education was further hampered by state laws, ballot initiatives, and university policies in certain states. For example, in 1995, the Regents of the University of California voted to end affirmative action, and in 1996, California voters passed Proposition 209, prohibiting the use of affirmative action at all California public colleges and universities.[29] Over the next two decades, eight states followed suit.[30] These state and local policies exacerbated the gap in educational attainment for underrepresented communities of color.[31] Yet, despite these efforts to limit or abolish affirmative action, many Americans continue to support its use. For example, a May 2023 Associated Press-NORC poll found most respondents (63%) did not think the Supreme Court should prohibit the consideration of race and ethnicity in college admissions.[32] This included Asian Americans. According to the 2022 Asian American Voter Survey, 69% of Asian American voters supported affirmative action and better access to higher education for women and all communities of color.[33]


NOT YOUR
model
MINORITY!

IV. THE *SFFA* CASES

After the failed affirmative action challenge in *Fisher I*, Blum explicitly stated that he "needed Asian plaintiffs"[34] to end race-conscious college admissions. Blum recruited Asian American students to join white students as members of SFFA, a nonprofit "membership group" that believes that "racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional."[35] In 2014, SFFA filed a lawsuit against Harvard College ("Harvard"), the undergraduate liberal arts program at Harvard University—the nation's oldest private institution of higher education—and a separate lawsuit against the University of North Carolina at Chapel Hill ("UNC"), considered by many to be the nation's oldest public university.

A. SFFA's Challenge to Harvard's Admissions Process

Harvard receives more than 60,000 applications for roughly 2,000 seats in its freshman class.[36] The college seeks diversity along many dimensions—including racial diversity—and identified various educational benefits it pursued through diversity on its campus, such as preparing graduates to "adapt to an increasingly pluralistic society" and "producing new knowledge stemming from diverse outlooks."[37] Under the challenged admissions process, Harvard's admissions committee evaluated student applications in a holistic review that considered more than 100 factors. Admissions officers could give a "tip" for factors "that do not lend themselves to quantifiable metrics," including unusual intellectual ability; strong personal qualities; outstanding creative or athletic ability; backgrounds that expand the socioeconomic, geographic, racial, or ethnic diversity of the class; or a student's status as a recruited athlete, legacy applicant, member of the Dean's or Admissions Director's interest lists, or child of faculty or staff.[38] These "tips" could increase an applicant's chance of admission.

In its lawsuit, SFFA alleged that Harvard engaged in impermissible racial balancing, used race as a predominant factor, and failed to use race-neutral alternatives to pursue student body diversity. SFFA also alleged that Harvard intentionally discriminated against Asian American applicants vis-à-vis white applicants, a novel claim compared to earlier challenges to affirmative action in higher education, which were brought by rejected white applicants.

In a three-week trial in October 2018, the trial court heard testimony from 18 current and former Harvard employees, four expert witnesses, and eight current or former Harvard College students.[39] The students and alumni testified about the importance of racial diversity in their college experience, the discrimination or racial barriers they faced before applying to Harvard, and how their racial identity influenced their college applications. Experts explained that considering race as part of the admissions process was a crucial part of constructing a diverse class. They testified that removing race from the admissions process, while keeping everything else the same, would cause Black representation at Harvard to decline from approximately 14% to 6% of the student population and Hispanic representation to decline from 14% to 9%.[40] The declines would concomitantly increase the white student population more than students of any other race, including Asian Americans.

[S]tudents and alumni testified about the importance of racial diversity in their college experience, the discrimination or racial barriers they faced before applying to Harvard, and how their racial identity influenced their college applications. … No members of SFFA nor any student testified in support of SFFA's claims.

No members of SFFA nor any student testified in support of SFFA's claims. SFFA's case at trial focused on the analysis of their experts who presented statistical models, which they argued showed the effect of race in Harvard's admissions process and discrimination against Asian American applicants. By contrast, Harvard presented expert testimony and analysis countering SFFA's experts, focusing on the unreliability of the models used by SFFA and demonstrating how Harvard's program was not harming students on the basis of race.

In a detailed opinion, the trial court ruled that Harvard's race-conscious admissions program complied with Supreme Court precedent.[41] The trial court concluded that Harvard's race-conscious admissions policy was narrowly tailored to achieve the college's substantial and compelling interest in student body diversity. The trial court also found that Harvard did not intentionally discriminate

against Asian American applicants. This ruling was appealed to the U.S. Court of Appeals for the First Circuit, which affirmed the trial court's decision.[42]

B. SFFA's Challenge to UNC's Admissions Process

UNC's mission is to educate a "diverse community" of students "to become the next generation of leaders."[43] UNC was originally founded to educate the sons of white enslavers, and the university initially defied the Supreme Court's mandate, set forth in *Brown v. Board of Education*, to desegregate.[44] Even after Black students sued and secured a court order requiring integration in 1955, UNC continued to resist desegregation efforts well into the 1980s by permitting racial hostility and racial discrimination against students of color.[45]

Today, UNC is an internationally renowned, highly selective school, with approximately 43,500 applicants vying for only 4,200 freshman seats.[46] The admissions program challenged by SFFA used a holistic process, whereby admissions officers reviewed a wide portfolio of students' experiences and qualifications from sources such as the Common Application, essay questions, high school transcripts, standardized test scores, and letters of recommendation.[47] Race was one of the more than 40 criteria that UNC considered when deciding who to admit to its undergraduate college.[48] Like Harvard, UNC sought diversity across multiple dimensions, including race and ethnicity, to achieve educational benefits, such as "promoting the robust exchange of ideas" and "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."[49]

Similar to its case against Harvard, SFFA alleged that UNC impermissibly used race as more than a "plus" factor and failed to use race-neutral alternatives to pursue student body diversity. Unlike its case against Harvard, SFFA did not claim that UNC engaged in improper racial balancing or that

Experts testified about UNC's history of excluding Black and Indigenous students for nearly 200 years and the reverberating impacts of this exclusion to the present.

the university intentionally discriminated against Asian American students vis-à-vis white students.

In a November 2020 trial, SFFA presented no student witnesses and no evidence or testimony suggesting that the benefits of diversity were not profound. In contrast, administrators, students, alumni, faculty, and several experts testified in support of UNC's race-conscious admissions program. Students and alumni testified about how the racial diversity on campuses, and lack thereof, impacted their experiences in classroom discussions and in campus life. Experts testified about UNC's history of excluding Black and Indigenous students for nearly 200 years and the reverberating impacts of this exclusion to the present. They also explained that, without its race-conscious program, UNC's ability to build a diverse class would be significantly impeded.[50]

The trial court ruled that UNC's admissions program was permissible under Title VI and the Equal Protection Clause. The court found that UNC had a compelling interest in specific, measurable benefits of diversity and that the use of race as a plus factor was narrowly tailored to meet those goals.[51] Because the case was directly appealed to the Supreme Court, no intermediary appeals court reviewed the trial court's decision.

V. SUPREME COURT'S OPINION IN *SFFA* CASES

The United States Supreme Court granted review in both *SFFA v. Harvard* and *SFFA v. UNC* and heard oral arguments on Oct. 31, 2022.[iii] The Court issued its consolidated opinion in both cases on June 29, 2023. Chief Justice Roberts wrote for the majority; Justice Thomas, Justice Neil M. Gorsuch, and Justice Brett M. Kavanaugh submitted concurrences; and Justice Sonia Sotomayor and Justice Ketanji Brown Jackson dissented.

In a 6-2 decision in *SFFA v. Harvard* and a 6-3 decision in *SFFA v. UNC*, the Supreme Court reversed the rulings of the lower courts and ruled in favor of SFFA.[iv] The Court found that Harvard and UNC's admissions programs violated the Equal Protection Clause and Title VI because they failed to satisfy strict scrutiny.[52] Though the majority maintained that its strict scrutiny analysis was consistent with its prior decisions in *Grutter* and *Fisher II*, the Court struck down affirmative action practices that appeared to fully comply with its prior reasoning in those cases.

Per the Supreme Court, the educational benefits of diversity, as articulated by Harvard and UNC, were not sufficiently measurable to permit judicial review. Both Harvard and UNC argued that they had an interest in pursuing

iii Notably, *SFFA v. UNC* was appealed directly to the Supreme Court without review by the U.S. Court of Appeals for the Fourth Circuit on the argument that the legal issues were the same in both cases.

iv Justice Jackson recused herself from *SFFA v. Harvard* due to her prior role on Harvard's Board of Overseers.

CONCURRENCES

Justices Thomas, Gorsuch, and Kavanaugh all wrote concurring opinions, which were not part of the Supreme Court's binding opinion and do not have the force of law, but instead highlighted information these individual justices believe to be important. **Justice Thomas**, in his concurrence, offered an extreme colorblind interpretation of the United States Constitution, arguing that the Fourteenth Amendment prohibits the government from using any race-based classifications, even when those classifications are used to help support communities of color who have been historically and systematically denied access to government resources. **Justice Gorsuch**'s concurrence stated that Title VI should be interpreted to mean that higher education institutions cannot use race in their admissions programs at all. This is different than the Equal Protection Clause, which, even under the Court's opinion in *SFFA*, allows the consideration of race if a school's admission program is able to satisfy strict scrutiny. Finally, **Justice Kavanaugh** wrote to emphasize the temporal limits of any use of race in admissions.

the educational benefits of diversity, an interest recognized as compelling by the Supreme Court in previous cases. However, the Supreme Court found that while "these are commendable goals, they are not sufficiently coherent for the purposes of strict scrutiny."[53] In the Court's view, it was impossible to measure the universities' interests because "the question [of] whether a particular mix of minority students produces 'engaged and productive citizens,' sufficiently 'enhance[s] appreciation, respect, and empathy,' or effectively 'train[s] future leaders' is standardless" and "inescapably imponderable."[54]

The Supreme Court concluded that the race-conscious admissions programs at Harvard and UNC were not tailored to achieve the educational benefits of diversity. The Supreme Court found that Harvard and UNC failed to articulate "a meaningful connection between the means they employ and the goals they pursue."[55] In particular, the Court considered the racial categories used by the schools to be "imprecise" and "plainly overbroad."[56] For example, the Court stated that the "Asian" race category was overbroad because it included, without distinguishing, East Asian and South Asian students; likewise, it was unclear what racial category students from the Middle East should choose.[57] However, as Justice Sotomayor pointed out in her dissent, "the racial categories that the Court finds troubling resemble those used across the Federal Government ... including, for example, by the U.S. Census Bureau," where they do not raise constitutional concerns.[58]

DISSENTS

Justices Sotomayor and Jackson each wrote dissenting opinions vigorously disagreeing with the majority's decision. Justice Elena Kagan signed on to both dissents. **Justice Sotomayor** grounded her dissent in history, noting that since the nation's founding—when enslavers sought to prolong slavery by making it illegal to educate Black people—access to education has never been equal.[141] Those inequalities persist today.[142] Justice Sotomayor also highlighted the majority's perversion of Equal Protection, stating that "the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."[143] Finally, she criticized the majority for ignoring the careful factual findings of the lower courts and inappropriately crediting the factual assertions of SFFA that had been rejected by the courts below, noting that such actions undermine the Supreme Court's legitimacy.[144] According to **Justice Jackson**, "With let-them-eat-cake obliviousness, ... the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life."[145] Justice Jackson explained that "the origin of persistent race-linked gaps should be no mystery"—it is the "persistent and pernicious denial of the opportunities afforded to white people."[146]

The Supreme Court held that race must not be used as a "negative" or as a "stereotype." According to the Supreme Court, "the twin commands of the Equal Protection Clause" require "that race may never be used as a 'negative' and that it may not operate as a stereotype."[59] The Court concluded that both schools used race as a negative because, in the "zero-sum" environment of college admissions, "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[60] Moreover, the Court stated that "universities may not operate their admissions programs on the belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."[61] To do so would advance the "pernicious stereotype that a Black student can usually bring something that a white person cannot offer."[62] The Court held that by admitting students on the basis of race alone, Harvard and UNC were impermissibly treating students of a particular race as if they are all alike, or "at the very least alike in the sense of being different from non-minority students."[63] As Justice Jackson noted in her dissent, however, the Court's conclusion that students were admitted on the basis of race alone was not supported by the record, which established that both Harvard and UNC considered race as a "plus factor"—rather than a negative—among many factors in the individualized evaluation of every applicant.[64]

The Supreme Court emphasized the need for a logical end point in the use of race. Drawing on a line in *Grutter,* where Justice Sandra Day O'Connor's majority opinion expressed hope that race-conscious admissions would no longer be necessary in 25 years, the Court in *SFFA* stated that race-conscious admissions programs must have a "logical end point."[65] Harvard and UNC had suggested that they would end race-conscious admissions when they achieved "meaningful representation and meaningful" diversity on their campuses, rather than a "strict numerical benchmark."[66] The Court rejected this proposed end point, accusing the schools of using impermissible racial balancing.[67]

The Supreme Court made clear that student applicants may discuss how race affected their life experiences. The Supreme Court's decision does not require Harvard, UNC, or any other educational institution to be unaware of a student's race in the admissions process. When SFFA initially filed its lawsuits against Harvard and UNC, it asked the courts to rule that the schools must "conduct all admissions in a manner that does not permit those engaged in the decision process to be aware of or learn the race or ethnicity of any applicant for admission."[68] Ultimately, the Supreme Court's decision did not go that far. Indeed, to the contrary, the Court advised that "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."[69] Thus, the decision does not ban students from disclosing and discussing their race and does not prohibit colleges from considering how race has shaped a student's life experience or being aware of an applicant's race. However, the Court cautioned that this consideration must be individualized and not operate as an end run of the prohibitions on the use of race expressed elsewhere in the opinion:

> [U]niversities may not simply establish through application essays or other means the regime we hold unlawful today.... A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute

THE SUPREME COURT'S DECISION DOES NOT REQUIRE HARVARD, UNC, OR ANY OTHER EDUCATIONAL INSTITUTION TO BE UNAWARE OF A STUDENT'S RACE IN THE ADMISSIONS PROCESS.

> to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.[70]

Thus, schools may not assign tips based on race simply because an applicant discloses their race in an essay or elsewhere in the application. But schools can continue to consider how race (or heritage or culture) has influenced an applicant's individual experiences in ways that make them a good candidate for admission.

The Supreme Court maintained that race-conscious policies are still permissible in certain circumstances. The Court indicated that universities may have other compelling interests that can justify race-conscious programs. The Court reiterated support for the interest articulated by the University of Texas at Austin in *Fisher II*, where the stated goal was "to enroll a 'critical mass' of certain minority students."[71] The decision also confirmed that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" remains a compelling interest that can justify race-conscious programs and policies.[72] Moreover, the Court explicitly noted that its ruling does not address the legality of race-conscious admissions policies at military academies, which may have "potentially distinct interests."[73] Justice Jackson criticized the majority's military carve-out, noting that it is "particularly awkward" for the Court to conclude that "racial diversity in higher education is only worth preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom."[74]

Race-neutral efforts to increase diversity remain constitutional. The *SFFA* decision did not bar race-neutral efforts, such as percentage or class-based plans, designed to increase diversity in college admissions. Justice Kavanaugh made explicit in his concurrence that "governments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'"[75] Justice Thomas also acknowledged the use of race-neutral policies

in his concurrence, stating that "[r]ace-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies."[76] In a similar vein, Chief Justice Roberts reaffirmed in *Allen v. Milligan*, a voting rights case decided in the same term as *SFFA*, that government actions undertaken to ensure that opportunities are "equally open" to people of all races is a permissible practice consistent with the Equal Protection Clause.[77]

The Court's decision addressed only the unique practice of affirmative action in higher education. The Court's decision was limited to the consideration of race, as a tip, in college admissions as conducted by Harvard and UNC for the pursuit of the educational benefits of diversity. The decision does not alter the standards for compliance with federal civil rights in other areas, such as employment, lending, housing, and contracting, which are covered by different federal statutes and distinct bodies of law.[78] Importantly, the decision does not alter the lawfulness of diversity, equity, inclusion, and accessibility (DEIA) measures. As U.S. Equal Employment Opportunity Commission Chair Charlotte A. Burrows confirmed, "the decision in [*SFFA*] ... does not address employer efforts to foster diverse and inclusive workforces to engage the talents of all qualified workers, regardless of their background.... It remains lawful ... to ensure that workers of all backgrounds are afforded equal opportunity in the workplace."[79]

RACE NEUTRAL EFFORTS IN K-12

Race-neutral efforts to achieve equal educational opportunity are as vital now as ever. Race-neutral policies designed to expand access to K-12 specialized programs have faced challenges that often rely on the same model minority tropes in the affirmative action debate. These challenges have been unsuccessful thus far.[147] One prominent example is the case challenging race-neutral changes to the admissions process for the Thomas Jefferson High School for Science and Technology (TJ) in Fairfax County, Virginia, as purportedly discriminatory against Asian American students. In late 2020, the Fairfax County School Board changed the eligibility and admissions criteria for TJ, eliminating the admissions test and $100 application fee—barriers that impeded equal opportunity—and admitting the top performing 1.5% of eighth graders in each middle school who met rigorous eligibility criteria.[148] The changes led TJ's class of 2025 to be the most inclusive freshman class in years, increasing the share of low income, Black, Latinx, and female students. The number of low-income Asian American students admitted also increased significantly from one student to 51 students, as did the number of Asian American students attending middle schools that were historically underrepresented at TJ.

The district court ruled in the plaintiff's favor, but an appeals court reversed the ruling, reaffirming that "improv[ing] racial diversity and inclusion by way of race-neutral measures" is constitutionally permissible.[149] The plaintiff recently requested review by the Supreme Court, and the Court's decision over whether it will hear the case is pending.[150]

VI. GUIDANCE ON ADVANCING EQUAL OPPORTUNITY AND DIVERSITY IN HIGHER EDUCATION IN THE CURRENT LANDSCAPE

Affirmative action in college admissions has been an important tool, but it is not the only vehicle to ensure that educational opportunities are equally open to all. The Supreme Court's *SFFA* decision underscores the urgent and critical need to eliminate barriers and pursue policies that advance racial equity. Following centuries of racial subjugation and exclusion, no single program or policy alone will deliver equal opportunity. More than ever, colleges and universities must double down on comprehensive efforts to attract, embrace, and educate talented students from all backgrounds. They must act immediately to ensure all students feel welcomed and valued and to prevent declines in applications from students of color in the aftermath of the Supreme Court's *SFFA* decision. And they must support efforts to address structural inequality in the education system, from early childhood education through graduate school. The following guidance provides education professionals, community advocates, and other stakeholders with important suggestions on how to achieve these important goals. All schools have a responsibility to do everything in their power and means to foster diversity in and beyond their admissions process.

A. Diligently Comply with Anti-Discrimination Laws

At a minimum, schools must continue to comply with federal and state civil rights laws requiring schools to provide educational opportunities on an equal basis to students of all races. This includes ensuring that students are not unfairly disadvantaged in applying to school. It also includes protecting students from discrimination while attending school and requiring that students of all races engage equally with their education, from course work through the full range of campus life. Title VI of the Civil Rights Act of 1964 and its implementing regulations prohibit recipients of federal financial assistance from discriminating based on race, color, or national origin.[80] This law applies to both K-12 schools and institutions of higher education that receive federal funds, including through federal student loans. For schools with a history of racial discrimination, including any involvement with slavery or enslavers, schools must take proactive efforts to overcome the effects of prior discrimination.[81] Even in the absence of prior discrimination, all schools must act to ensure that their policies and practices do not unnecessarily limit opportunities for people on the basis of race or ethnicity[82] or other protected characteristics, including disability,[83] sex, sexual orientation, and

ALL SCHOOLS HAVE A RESPONSIBILITY TO DO EVERYTHING IN THEIR POWER AND MEANS TO FOSTER DIVERSITY IN AND BEYOND THEIR ADMISSIONS PROCESS.

gender identity.[84] In addition, schools must ensure that their climates enable all students to access and benefit from educational opportunities on an equal basis.[85] This responsibility extends to all aspects of a school's programs and activities, and to all of those who carry out the school's functions.[86]

Many state laws also mandate that schools ensure students are provided equal educational opportunities. This means that schools cannot discriminate against students based on a variety of factors, including race, ethnicity, nationality, and other protected characteristics.[87] Numerous states have made clear that schools must review their policies and practices to identify any disparate effect that they cause based on race, ethnicity, or disability, and take proactive measures to eliminate such disparities.[88] State laws may also prohibit harassment of students on the basis of race, national origin, ethnic group, or other protected characteristics, and require schools to create policies and procedures intended to foster school environments free from harassment, bullying, and discrimination based on a variety of factors, including race.[89]

Ensuring educational opportunities are open to people of all races is not only the law—it serves the mission of higher education. Many schools, as well as the courts, recognize that diversity exposes students to new ideas and ways of thinking, prepares them to live and work with one another in a diverse society, and increases understanding and respect across differences.[90] Those findings have not changed.

B. Reimagine and Retool Admissions Policies in Higher Education

Schools should engage in admissions processes that evaluate applicants' demonstrated capacity and strengths in light of the resources and opportunities available to them.[91] This form of review is particularly important given that American high schools are increasingly segregated and unequal.[92] Nearly 70 years since *Brown v. Board of Education*, students of all races face increasing segregation in their K-12 education.[93] This racial segregation also maps onto segregated educational opportunities. Black and Latinx[v] students are more likely to attend schools that are both racially segregated and have a far higher share of economic need.[94] And Black, Latinx, Indigenous, and Pacific Islander students are three to six times more likely than white students to attend a high-poverty K-12 school, where students are more likely to be taught by "out-of-field" teachers.[95]

In short, talent is everywhere, but opportunity is not. Given vastly unequal K-12 educational opportunities, traditional indicia of merit often under-predict and under-identify the potential of many talented applicants, including many applicants of color. The recommendations below are aimed at ensuring that admissions policies in higher education neutralize, as much as possible, the detrimental effect that societal inequalities have on the ability to fairly and accurately identify academic talent to avoid reinforcing and replicating those societal inequalities. The recommendations also seek to assist colleges and universities in creating a healthy campus environment in which all students can thrive.

Recommendations include:

Admissions criteria and considerations

- Soliciting and considering each individual applicant's relevant experiences, including racial experiences. The Supreme Court was clear that, so long as the benefit is given on the basis of "experience as an individual," the *SFFA* decision should not be "construed as prohibiting universities from considering an applicant's discussion of how race affected their life, be it through discrimination, inspiration, or otherwise."[96]
- Soliciting and considering how an individual applicant's unique heritage or cultural history, e.g., language ability or enrollment in a federally recognized Indian tribe, contributes to student body diversity. These factors are not the same as race.[97]
- Soliciting and considering whether an applicant is the first in their family to attend college.[98]
- Soliciting and considering whether an applicant comes from a socioeconomically disadvantaged background or a low-wealth family.[99]
- Soliciting and considering whether an applicant is from a geographic area, neighborhood, or high school that is underrepresented in the college community.[100]
- Adopting equitable guaranteed admissions or eligibility policies like percentage plans (i.e., Top 10%).[101]
- Tracking and collecting racial demographic data throughout the admissions process to ensure unfair policies and practices are not disadvantaging or unduly excluding historically marginalized and underrepresented students. While some colleges and universities may have removed all racial demographic data from admissions, this drastic step was not required by the Supreme Court in the *SFFA* decision.

v Importantly, these national findings were not able to address the experiences of Indigenous students or the unique experiences of students from communities included under the umbrella Asian American category.

[Whereupon, at 12:07 p.m., the hearing was adjourned.]

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