LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW

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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

[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.