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August 1, 2023

The Honorable Catherine Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education
200 Maryland Avenue SW
Washington, DC 20515

Dear Assistant Secretary Lhamon,

I write to request that the Department of Education promptly issue comprehensive guidance clarifying the obligations elementary and secondary schools and institutions of higher education (IHEs) have to their students under title VI of the *Civil Rights Act of 1964* ("Title VI").

Title VI was enacted to ensure the federal government stood with Americans historically discriminated against on the basis of their race, color, or national origin. Over the last 60 years, a conservative federal judiciary has slowly warped a law designed to ensure Americans of every race have equal footing in our society into one that bans any consideration of race at all.¹ This perversion of intent reached a new low with the decisions in the recent *Harvard* and *University of North Carolina (UNC)* cases overturning the consideration of race as one of many factors IHEs may use in their admissions process.²

Not content with this verdict, we have already seen conservative state and federal policymakers attempting to expand the holdings of these cases beyond their textual bounds. The Attorney General for the State of Missouri recently warned municipalities and public IHEs that the Court's decision means that decisions about "scholarships, programs, and employment" and facially

¹ See, e.g., Neil Gotanda, A Critique of "Our Constitution is Color-Blind", 44 Stan. L. Rev. 1, 37 (1991) ("The modern Court has moved away from .. notions of race that recognize the diverging historical experiences of Black and white Americans... In place of these concepts, the Court relies increasingly on the formal-race concept of race, a vision of race as unconnected to the historical reality of Black oppression.").

² Students for Fair Admissions v. President & Fellows of Harvard College, 600 U.S. ____ (2023) ("Today this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, 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. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society.")(Sotomayor, J. dissenting).

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race-neutral policies that result in racial diversity violate Title VI.³ Thirteen state attorneys general wrote collectively to the CEOs of the Fortune 100 companies that “diversity, equity, and inclusion” (DEI) efforts may amount to “overt and pervasive racial discrimination... [that] violates both state and federal law”.⁴ And last month, Republican House members hijacked the Fiscal Year (FY) 2024 National Defense Authorization Act with amendments proclaiming their own misguided interpretations of what Title VI means or requires.⁵ One amendment went so far as to contradict the Court’s decisions in the *Harvard* and *UNC* cases, ordering the service academies of our armed forces to refrain from consideration of race in admissions – a position the Court explicitly refrained from endorsing.⁶

It is clear that the intent of Title VI is being perverted by extreme Republicans in an attempt to roll back progress towards racial equality. This nation has only incrementally made such progress since 1964. Title VI has the potential to bring equity to our schools, and in turn make our society more equitable. But the long campaign to weaken Title VI was successful. It has now taken a new darker posture, as we witness attempts to use the law to perpetuate racial inequity. While I was heartened by your recent public comments that guidance on the Supreme Court decisions in the context of admissions will be released this month, I fear that guidance on one issue is not enough. The Office for Civil Rights has the power to conduct investigations without an intervening complaint, and I encourage you to use it strenuously to root out vestiges of discrimination in our education system.

Now that the Supreme Court has determined that the consideration of race in admissions violates Title VI and the Equal Protection Clause of the Fourteenth Amendment, the Department should fully investigate how race unjustly permeates many other policies and practices in our educational system. **Any honest assessment of the pervasiveness of race in that system would recognize that people of color consistently face unequal discriminatory treatment on the basis of their race, treatment that has been historically counterbalanced by affirmative actions, but now can only be eliminated with robust enforcement of Title VI.**

All of the following issues inform factors that colleges consider as part of their admissions process. Now that the Supreme Court has barred the consideration of race in admissions, the race-based discriminatory effects of these issues cannot be ignored. This includes, but is not limited to:

³ Letter from Andrew Bailey, Atty. Gen. of Mo. to Universities & Municipalities (June 29, 2023), <https://ago.mo.gov/docs/default-source/press-releases/2023-06-29-equal-protection-clause-letter.pdf>.

⁴ Letter from Kris Kobach, Atty. Gen. of Kan. & 12 other State Attys. Gen. to the CEOs of the Fortune 100 Companies (July 13, 2023), <https://ago.mo.gov/docs/default-source/press-releases/corporate-racial-discrimination-multistate.pdf>.

⁵ Amdt. # 363 to H.R. 2670, National Defense Authorization Act for Fiscal Year 2024, 118th Cong. (2023).

⁶ Amdt. #1421 to H.R. 2670, National Defense Authorization Act for Fiscal Year 2024, 118th Cong. (2023); *see* *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. ___, n.4 (2023) (“The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation’s military academies. ... This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.”).

Exclusionary discipline. While the use of suspension and expulsion has decreased over the last 10 years, school discipline data from the Civil Rights Data Collection (CRDC) indicate that Black students continue to be suspended at higher rates, respectively, than White or Latino Students.⁷ According to the 2017-18 CRDC, Black boys represented 8 percent of all students in 2017-18, they made up 31 percent of students expelled without educational services. Likewise, Black girls represented 7 percent of all students but make up 39 percent of students expelled without educational services.

De facto segregation in substandard schools. In 2016, the Government Accountability Office (GAO) found that public schools had grown more segregated by race and class than at any time since the 1960s.⁸ According to the report, high-poverty schools serving students who were 75-100% low-income and Black or Latino increased from 9% in 2000-2001 to 16% in 2013-2014.⁹ These levels of de facto segregation in our schools are appalling as we approach the 70th anniversary of *Brown v. Board of Education*. These facilities are both separate and unequal. The GAO report found that these segregated schools had fewer resources and less access to math, science, and college preparatory courses and disproportionately suspended, expelled, or held back students.¹⁰ Independently substantiating these findings, EdBuild's research revealed a \$23 billion racial funding gap between school districts serving students of color and school districts serving predominantly white students.¹¹ Further, the National Center on Education Statistics has found that nearly half of Black and Latino students attend high-poverty schools.¹²

Undereducation of Black and Brown students. Whether it is the achievement gap generally¹³, or the race gap in the availability of high school honors classes,¹⁴ Black and Brown students are being undereducated compared to other children in schools subsidized with federal funds. Correspondingly, Black and Brown students have been underrepresented on college campuses even with the constitutional, limited consideration of race in admissions of the last 50 years.¹⁵ If Black students with straight A's from under-resourced majority black public schools are rejected in favor of white students with straight A's from prestigious predominantly white schools, it is

⁷ Renee Ryberg, et al., *Despite Reductions Since 2011-12, Black Students and Students with Disabilities Remain More Likely to Experience Suspension*, ChildTrends, Aug. 9, 2021, <https://www.childtrends.org/publications/despite-reductions-black-students-and-students-with-disabilities-remain-more-likely-to-experience-suspension>.

⁸ U.S. Gov't Accountability Off., GAO-16-345, *K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*. (May 17, 2016).

⁹ *Id.* at 10.

¹⁰ *Id.* at 16.

¹¹ \$23 Billion, EdBuild (Feb. 2019) edbuild.org/content/23-billion.

¹² *Concentration of Public School Students Eligible for Free or Reduced-Price Lunch*, Nat'l Ctr. For Educ. Stats. (May, 2020)

[https://nces.ed.gov/programs/coe/indicator_clb.asp#:~:text=In%20fall%202017%2C%20the%20percentages,Asian%20students%20\(15%20percent\)%2C](https://nces.ed.gov/programs/coe/indicator_clb.asp#:~:text=In%20fall%202017%2C%20the%20percentages,Asian%20students%20(15%20percent)%2C)

¹³ See H. Rep. 116-495, pt. 1, at 4-9 (2020).

¹⁴ E.g., Roby Chatterji et al., *Closing Advanced Coursework Equity Gaps for All Students*, Ctr. for Am. Prog., June 30, 2021, <https://www.americanprogress.org/article/closing-advanced-coursework-equity-gaps-students/#:~:text=Even%20in%20high%20schools%20with,these%20courses%20than%20their%20peers>.

¹⁵ E.g., Tomas Monarrez & Kelia Washington, *Racial and Ethnic Representation in Postsecondary Education* vii, Urban Inst., (2020), https://www.urban.org/sites/default/files/publication/102375/racial-and-ethnic-representation-in-postsecondary-education_1.pdf.

concerning that race may have unfairly impaired one group of students' access to higher education, and conversely improved access for the other.

The use of standardized testing in college admissions. Research suggests that the standardized tests many IHEs require applicants to take produce scores that correlate more with a student's income, zip code, family wealth, the socioeconomic demographics of their school or parent's educational attainment than the ability of the student to succeed in college.¹⁶ To continue their use in admissions without further examination of their discriminatory effects on the basis of race appears to violate Title VI.

The use of athletic, legacy, developmental, and children of faculty and staff categories in college admissions. During the district court trial in the *Harvard* case, evidence was presented that showed the extent to which athletes, legacies, applicants on the Dean's list (often from families with a history of developmental giving), and children of Harvard faculty and staff, collectively known as ALDC admits, make up a large percentage of each admitted class. The appeals court disaggregated this data by race to show that ALDC admits are disproportionately white compared to other admitted students.¹⁷ Allowing schools to consider ALDC admits, thereby perpetuating generations of discrimination against applicants of color,¹⁸ is cruelly unconscionable in a world where consideration of race which may favor students of color in admissions has been declared unconstitutional. I understand the Department has begun an investigation of at least one complaint alleging legacy and developmental admits violate Title VI;¹⁹ I commend you for taking that step but also recommend that you take a comprehensive look at all other factors at all other schools to ensure equity in the admissions process.

Violations of Title VI stemming from the issues above would likely only be justiciable under the theory of disparate impact; the policies have discriminatory effects although they may lack a provable discriminatory intent. Unfortunately, the Supreme Court in *Alexander v. Sandoval* ruled that there is no private right of action to bring a case using the theory of disparate impact under

¹⁶See, e.g., Rebecca Zwick, *The Role of Standardized Tests in College Admissions*, The UCLA Civ. Rts. Proj., June 08, 2023; Ember Smith & Richard Reeves, *SAT math scores mirror and maintain racial inequity*, Brookings, Dec. 1, 2020, <https://www.brookings.edu/articles/sat-math-scores-mirror-and-maintain-racial-inequity/> (“However, a recent analysis of the California system suggests that family income, parents’ education, and race each play a significant role in predicting SAT scores.”); Andre M. Perry, *Students need more than an SAT adversity score, they need a boost in wealth*, Brookings, May 17, 2019, <https://www.brookings.edu/articles/students-need-more-than-an-sat-adversity-score-they-need-a-boost-in-wealth/> (“Standardized tests are better proxies for how many opportunities a student has been afforded than they are predictors for students’ potential.”).

¹⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 171 (2020) *rev'd* 600 U.S. ___ (2023).

¹⁸ 600 U.S. at ___ (“From Harvard’s founding, slavery and racial subordination were integral parts of the institution’s funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was ‘vital to the University’s growth’ and establishment as an elite, national institution... Exclusion and discrimination continued to be a part of campus life well into the 20th century.”) (Sotomayor J., dissenting).

¹⁹ Lawyers for Civ. Rts., Press Release, *Federal Civil Rights Complaint Challenges Harvard’s Legacy Admissions*, <http://lawyersforcivilrights.org/our-impact/education/federal-civil-rights-complaint-challenges-harvards-legacy-admissions/>.

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Title VI.²⁰ Shortly after the *Sandoval* decision, the Department of Justice’s Civil Rights Division issued a memo affirming that the federal government retained the authority to enforce disparate impact theory via regulations promulgated under Title VI.²¹ This duty is still articulated in the Civil Rights Division’s Title VI Manual:

In addition to the administrative complaint process, federal funding agencies are authorized to initiate affirmative compliance reviews as a mechanism for ensuring recipient compliance. **Federal funding agencies should prioritize vigorous enforcement of their Title VI disparate impact provisions both through investigation of complaints and through compliance reviews.**²²

The federal government must again take up the mantle of ensuring that all Americans have equal protection under the law. I ask you to work within your office and colleagues in the whole of government to formulate a response that ensures that all vestiges of racial discrimination in our education system are overcome. No later than August 15, 2023, please provide answers to the following questions:

1. What plan does the Department have in place to issue guidance to end discriminatory practices in education including, but not limited to, the ones described in this letter?
2. How will you work with the Department of Justice and other agencies to coordinate compliance reviews, and, if necessary, legal challenges to discriminatory practices in education where appropriate?

Thank you in advance for your response.

Sincerely,



ROBERT C. “BOBBY” SCOTT
Ranking Member

²⁰ 532 U.S. 275, 293 (2001).

²¹ U.S. Dept. of Justice, Title VI Legal Manual, § VII, p. 5, <https://www.justice.gov/crt/fcs/T6manual>.

²² *Id.* (emphasis added).