TOM COTTON
ARKANSAS

326 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510
PHONE: (202) 224-2353

United States Senate

COMMITTEES
ARMED SERVICES
JOINT ECONOMIC COMMITTEE
JUDICIARY
SELECT COMMITTEE ON INTELLIGENCE

July 7, 2023

Brian C. Cornell
Chairman and Chief Executive Officer
Target Corporation
1000 Nicollet Mall
Minneapolis, MN 55403

Dear Mr. Cornell,

I write regarding Target's so-called "Diversity, Equity, and Inclusion" (DEI) program. Last week, the Supreme Court struck down affirmative action programs in higher education, holding that those programs impermissibly discriminated between college applicants based on race. Though that case focused on colleges, the same principles and indeed the plain text of federal law also cover private employers. Target's DEI program applies the same race-based criteria to job offers, promotions, and business partnerships, and is similarly prohibited under federal civil rights laws.

In September 2020, Target publicly pledged to impose a racial quota for hiring decisions, announcing that it would increase the number of black employees by 20%. This is not the only racially discriminatory plan in Target's DEI initiatives; Target also promised to direct more than $2 billion to businesses selected based on the skin color of the owners.

The Supreme Court was clear in its recent opinion that "eliminating racial discrimination means eliminating all of it." As Justice Gorsuch, joined by Justice Thomas, explained in a concurring opinion, private employers (including not just universities, but also companies like Target) are also prohibited from treating employees or job applicants differently based on race.

I urge you to immediately end all of Target's race-based employment and partnership practices. If you fail to do so, in the wake of the Supreme Court's recent decision you should expect significant and likely costly litigation.

Tom Cotton
United States Senator

JONESBORO
300 SOUTH CHURCH, SUITE 338
JONESBORO, AR 72401
(870) 933-6223

ROGERS
3333 S. PINNACLE HILLS PKWY, SUITE 425
ROGERS, AR 72758
(479) 751-0879

LITTLE ROCK
1401 WEST CAPITOL AVENUE, SUITE 235
LITTLE ROCK, AR 72201
(501) 223-9081

EL DORADO
106 WEST MAIN STREET, SUITE 410
EL DORADO, AR 71730
(870) 864-8582

JULY 17, 2023

COTTON WARNS TOP LAW FIRMS ABOUT RACE-BASED HIRING PRACTICES

FOR IMMEDIATE RELEASE
Contact: Caroline Tabler or James Arnold (202) 224-2353
July 17, 2023

Cotton Warns Top Law Firms About Race-Based Hiring Practices

Washington, D.C.— Senator Tom Cotton today sent letters to 51 law firms detailing the possible federal civil rights laws they and their clients may be violating with Diversity, Equity, and Inclusion (DEI) programs, if those programs treat people differently based on race. The letter advises the law firms to preserve documents relevant to those DEI practices in preparation for congressional oversightand private lawsuits over illegal racial discrimination in DEI programs.

In part, Senator Cotton wrote:

"Federal law has long prohibited treating employees differently because of their race. Employers should take to heart the Supreme Court's recent declaration that 'eliminating racial discrimination means eliminating all of it.' Congress will increasingly use its oversight powers—and private individuals and organizations will increasingly use the courts—to scrutinize the proliferation of race-based employment practices."

Full text of the letters may be found here and below.

July 17, 2023

Dear _____,

I write regarding your firm's employment law practice. In recent years, many major corporations have adopted race-based hiring quotas and benchmarks as part of their "Diversity, Equity & Inclusion" ("DEI") initiatives. This is often driven by investment firms like BlackRock that pressure companies to implement DEI hiring policies to satisfy their "Environmental, Social, and Governance" mandates. These initiatives are both unpopular and unlawful. Your firm has a duty to fully inform clients of the risks they incur by making employment decisions based on race.

The Supreme Court recently struck down racial discrimination in college admissions. Though that case focused on colleges, the same principles and indeed the plain text of federal law also cover private employers. Title VI of the Civil Rights Act already prohibits federal fund recipients from discriminating based on race. Title VII likewise prohibits private employers from basing hiring decisions on race, prompting a U.S. Equal Employment Opportunity Commissioner to recently warn that "diversity programs pose both legal and practical risks for companies."

Federal law has long prohibited treating employees differently because of their race. Employers should take to heart the Supreme Court's recent declaration that "eliminating racial discrimination means eliminating all of it." Congress will increasingly use its oversight powers —and private individuals and organizations will increasingly use the courts—to scrutinize the proliferation of race-based employment practices. To the extent that your firm continues to advise clients regarding DEI programs or operate one of your own, both you and those clients should take care to preserve relevant documents in anticipation of investigations and litigation.

Sincerely,

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JD VANCE
OHIO

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
SPECIAL COMMITTEE ON AGING
JOINT ECONOMIC COMMITTEE

United States Senate
WASHINGTON, DC 20510

July 6, 2023

Mr. Christopher Eisgruber
President
Princeton University
1 Nassau Hall
Princeton, NJ 08544

Dr. Lawrence Bacow
President
Harvard University
Massachusetts Hall
Cambridge, MA 02138

Dear College and University Presidents:

I write to express concern about your institutions' openly defiant and potentially unlawful reaction to the Supreme Court's landmark decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,[1] which reaffirmed the bedrock constitutional principle of equality under the law and therefore forbade invidious race-based preferences in college admissions. As you know, the Court has instructed you to honor the spirit, and not just the letter, of the ruling. Going forward, the Court explained, "universities may not simply establish through application essays or other means the regime we hold unlawful today."[2]

However, within hours of the decision's pronouncement, you and your institutions expressed open hostility to the decision and seemed to announce an intention to circumvent it. Statements along these lines are particularly disconcerting in light of recent revelations that proponents of unlawful affirmative action sometimes practice "unstated affirmative action," in which hiring and admissions decisions are made on the basis of race in a covert and unspoken way, even when the relevant decisionmaker is placed under oath in a deposition.[3] Below, I have highlighted a few alarming excerpts from your responsive statements:

- Princeton President Eisgruber complained that the Court's decision was "unwelcome and disappointing" and vowed to pursue "diversity . . . with energy, persistence, and a determination to succeed despite the restrictions imposed by the Supreme Court in its regrettable decision today."

[1] 600 U.S. ___ (2023).
[2] Slip op. at 39.
[3] Christopher F. Rufo @realchrisrufo, Twitter (June 29, 2023), https://twitter.com/realchrisrufo/status/1674548940522549248.

- Oberlin President Ambar felt "deeply saddened and concerned for the future of higher education" when the Supreme Court's ruling was announced. She assured her students and faculty that, rather than dampening her enthusiasm for affirmative action policies, the decision "only strengthens our determination to be a welcoming place where diversity is celebrated[.]"

- Dartmouth President Beilock wrote, "I want to be absolutely clear: This decision in no way changes Dartmouth's fundamental commitment to building a diverse and welcoming community of faculty, students and staff[.]"

- Harvard President Bacow boasted that "[f]or almost a decade, Harvard has vigorously defended an admissions system" that the Supreme Court ruled unlawful and then "reaffirm[ed] the fundamental principle that deep and transformative teaching, learning, and research depend upon a community comprising people of many backgrounds, perspectives and lived experiences[.]"

- Cornell President Pollack expressed "disappoint[ment] [in] the Supreme Court of the United States," boasted that Cornell has been "committed . . . to diversity and inclusion" since 1865, and indicated that it will remain so.

- Kenyon Acting President Bowman extolled the "transformative power of living, learning and working in a diverse community" and said that "the decision does not alter Kenyon's mission or [its] commitment to access and inclusion."

- Yale President Salovey told his university that he was "deeply troubled" by the Supreme Court's historic ruling and declared that although "[t]he Court's decisions may signal a new legal interpretation, . . . Yale's core values will not change."

- Brown President Paxson proudly noted Brown's having "joined no less than eight amicus briefs in support of the use of affirmative action in higher education" and promised that "Brown . . . will remain firmly committed to advancing diversity[.]"

- Penn President Magill stated that "we remain firm in our belief that our academic community is at its best when it is diverse" and that "our values and beliefs will not change" in light of the Court's demand for robust civil rights.

- And Columbia President Bollinger went on television to declare that the *Harvard College* opinion was a "tragedy" and to confirm Columbia's statement that "diversity is central to our identity" and that "we can and must find a durable and meaningful path to preserve it."

My colleagues have assured me that they share my concern that colleges and universities, and particularly the elite institutions to whom this letter is addressed, do not respect the Court's judgment and will covertly defy a landmark civil rights decision with which they disagree. I do not need to remind you of the ugly history of defiance and lawlessness that followed other landmark Supreme Court rulings demanding racial equality in education.[4] In one infamous case, Virginia Governor Thomas B. Stanley responded to the decision in *Brown v. Board of Education* by pledging to show "the rest of the country [that] racial integration is not going to be accepted in the South" and by vowing to organize "massive resistance" in the Southern States. Violence and racial animosity ensued.

The United States Senate is prepared to use its full investigative powers to uncover circumvention, covert or otherwise, of the Supreme Court's ruling. You are advised to retain admissions documents in anticipation of future congressional investigations, including digital communications between admissions officers, any demographic or other data compiled during future admissions cycles, and other relevant materials. As you are aware, a number of federal criminal statutes regulate the destruction of records connected to federal investigations, some of which apply prior to the formal commencement of any inquiry.[5]

In accordance with my interest in helping enforce the Supreme Court's decision in *Harvard College*, I would like answers to the following questions by **July 21, 2023**.

- What procedures will your institution implement to ensure that records are retained in accordance with this letter?
- What instructions are you giving staff about their obligations to preserve records in anticipation of a potential investigation? Please inform me of the date and nature of such instructions.
- Has your staff ever been advised *not* to preserve records or to communicate internally in ways that could circumvent future inquiries? If so, please discuss the date and nature of such advisements.
- How will your institutions ensure that new admissions practices do not "simply establish . . . the regime" that the Supreme Court has held unlawful?
- What admissions practices previously employed by your institutions will now be forbidden?

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[4] *See Brown v. Board of Education: Virginia Responds*, THE LIBRARY OF VIRGINIA, https://www.lva.virginia.gov/exhibits/brown/resistance.htm.
[5] 18 U.S.C. §§ 1505, 1519.

- If you have publicly committed to an interest in "diversity," how will you ensure that your commitment to that value does not entail direct or indirect race-based preferences?

Sincerely,

JD VANCE
United States Senator

CC:

Ms. M. Elizabeth Magill
President
The University of Pennsylvania
1 College Hall, Rm. 100
Philadelphia, PA 19104

Dr. Peter Salovey
President
Yale University
3 Prospect Street
New Haven, CT 06511

Dr. Christina H. Paxson
President
Brown University
1 Prospect Street
Providence, RI 02912

Dr. Martha E. Pollock
President
Cornell University
300 Day Hall
Ithaca, NY 14853

Ms. Carmen Twillie Ambar
President
Oberlin College
Cox Administration Building Rm. 20
70 N. Professor St.
Oberlin, OH 44074

Mr. Lee C. Bollinger
President
Columbia University
202 Low Library
535 W. 116th Street
New York, NY 10027

Dr. Jeffrey Bowman
Acting President
Kenyon College
Ransom Hall
Gambier, OH 43022

Dr. Sian Leah Beilock
President
Dartmouth College
207 Parkhurst Hall
Hanover, NH 03755

AUSTIN KNUDSEN

STATE OF MONTANA

August 29, 2023

Dear Managing Partners, Chairs, and CEOs of American Lawyer (Am Law) 100 Firms:

We, the undersigned Attorneys General of five States, issue this public letter to remind you of your obligations as an employer under federal and state law. Specifically, you owe a duty to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion," or otherwise. Put simply, differential treatment based on race and skin color, even for purportedly "benign" purposes, is unlawful, divisive, and exposes your firm to serious legal consequences, including potentially fines, damages, and injunctive relief.

As you know, in June 2023, the United States Supreme Court issued a sweeping decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) ("*SFFA*"). In striking down Harvard's and the University of North Carolina's race-based admissions policies, the Court issued its most definitive statement on the issue of race discrimination in the United States and reaffirmed "the absolute equality of all citizens of the United States politically and civilly before their own laws." *SFFA*, slip op., at 10.

Notably, the Court also recognized that federal civil-rights statutes prohibiting *private* entities from engaging in race discrimination apply at least as broadly as the prohibition against race discrimination found in the Equal Protection Clause. *See SFFA*, slip op. at 6 n.2. And the Court reiterated that this commitment to racial equality extends to "other areas of life," such as employment and contracting. *Id.* at 13. In sum, the Court powerfully reinforced the robust principle that *all* racial discrimination, no matter the motivation, is invidious and unlawful: "***Eliminating racial discrimination means eliminating all of it.***" *Id.* at 15 (emphasis added).

We write to ensure that you fully comply with your legal duty to treat all individuals equally—without regard to race, color, or national origin—in your employment and contracting practices.

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

A. Disturbing Reports have emerged that Racial Discrimination Is Commonplace Among AM Law 100 Firms and Others.

Sadly, racial discrimination in employment and contracting may be commonplace among AM Law 100 firms and other large businesses.[1] In an inversion of the odious discriminatory practices of the distant past, some of today's major law firms adopt explicitly race-based initiatives that are just as illegal as discrimination from generations ago. These discriminatory practices include, among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement. They also include shocking race-based contracting practices, such as racial preferences and quotas in selecting suppliers, providing overt preferential treatment to customers on the basis of race, and pressuring contractors to adopt the company's racially discriminatory quotas and preferences.

A few examples illustrate the pervasiveness and explicit nature of these racial preferences. According to a 2023 Bloomberg report:

- 79% of law firms "require diversity within a pool of candidates for management and leadership roles (and of those, an average of 25% of slated candidates must be diverse)"
- 57% of law firms "tie a component of partner compensation to diversity efforts"
- 48% of law firms "say that Practice Group Leaders have clear diversity and inclusion goals included as part of their annual performance review"
- 31% of law firms "shared a specific, time-bound action plan to increase the representation of diverse groups in leadership positions"

2023 Bloomberg Law Diversity, Equity, and Inclusion Framework, *available at* https://assets.bbhub.io/bna/sites/7/2023/07/DEI-Framework-2023-report.pdf.

These statistics are supported by specific examples. Baker McKenzie, for instance, has publicly admitted that it has "adopted targets for underrepresented racial and ethnic groups to comprise 15% of Principals, 20% of Local Partners and 15% of leadership by 2025." Baker McKenzie, *Inclusion, Diversity & Equity: Annual Report 2022*, Oct. 2022, 9, *available at* https://www.bakermckenzie.com/-/media/files/newsroom/2022/10/ide-annual report-2022.pdf. Similarly, White & Case has committed to misusing "data-driven techniques and concrete action to help recruit, retain and develop Black and minority ethnic talent." White & Case, *Racial justice and equality*, *available at*

[1] Commissioner Andrea Lucas from the U.S. Equal Employment Opportunity Commission recently noted that "Title VII bars … a host of increasingly popular race-conscious corporate initiatives: from providing race-restricted access to mentoring, sponsorship, or training programs; to selecting interviewees partially due to diverse candidate slate policies; to tying executive or employee compensation to the company achieving certain demographic targets; to offering race-restricted diversity internship programs or accelerated interview processes, sometimes paired with euphemistic diversity 'scholarships' that effectively provide more compensation for 'diverse' summer interns." Andrea R. Lucas, *With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs*, Reuters, June 29, 2023, https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.

https://www.whitecase.com/diversity/racial-justice-and-equality. Another firm, Winston & Strawn, concedes that it is "firmly embedding diversity, equity, and inclusion into the firm's cultural DNA" and

"back[ing] this up with measurable, high-impact goals and numerous recruitment, retention and advancement initiatives for . . . racial/ethnic minorit[ies]." Winston & Strawn, *Law Firm Diversity and Inclusion*, *available at* https://www.winston.com/en/who-we-are/firm-profile/diversity/index.html.[2]

Some large law firms also sponsor race-based fellowships and programs. Perkins Coie, for example, has an Entrepreneurship Program "to support Black and Latinx [sic] founders and entrepreneurs," a 1L "Diversity Fellows" Program, a "Supplier Diversity" Program, and acknowledges that it is considering the race of its employers in working to "[i]ncrease diversity in leadership positions and in our equity partner ranks." Perkins Coie, *Our Commitment to Racial Equality*, *available at* https://www.perkinscoie.com/en/about-us/firm/commitment-to-racial-equality/our-commitment-to-racial-equality.html. Another firm, Shook, Hardy & Bacon, similarly sponsors a "diversity fellowship" program, "diversity scholarships," and a "diversity retreat." Shook, Hardy & Bacon, *Diversity and Inclusion*, *available at* https://www.shb.com/about/diversity. Separately, Husch Blackwell prepares an "Inclusion Index" that quantifies the number of its attorneys who are non-Caucasian and/or have specific sexual orientations or gender identities. Based on these characteristics, the firm acknowledges that it seeks to staff certain attorneys on client matters, and that data "is reported to attorneys managing those accounts to assist them with assessing their utilization of diverse attorneys on their matters and in comparison with the firm's percentage of diverse attorneys." Husch Blackwell, *Diversity | Inclusion Advancement & Retention*, *available at* https://www.huschblackwell.com/ourfirm/advancement-and-retention.

Hundreds of law firms, including many of you, have sought and achieved a certification under the so-called Mansfield Rule, which asserts that its goal is to correct the perceived "imbalance" of law firm leadership not "reflect[ing] the diversity of the workforce or society." *Mansfield Overview*, Diversity Lab, *available at* https://www.diversitylab.com/pilot-projects/mansfield-overview/. To obtain Mansfield Certification, law firms engage in a process in which they are required to consider a minimum of 30% "diverse" candidates—defined as women, non-Caucasians, individuals who identify as gay, lesbian, bisexual, transgender, queer, or questioning, or individuals with disabilities—in a hiring pool, and meet periodic

[2] As the Civil Rights Division of the Justice Department noted during a recent en banc oral argument at the Fifth Circuit, "if 'a law firm is having a lunch to do CLEs and you have a policy that says we're only going to invite women but not men to this CLE lunch, that's of course actionable, and that's of course a term, condition, or privilege of employment' under Title VII. " *Hamilton v. Dallas County*, No. 21-10133, slip. op. at 25 (Aug. 18, 2023) (Ho, J., concurring) (quoting Audio of Oral Arg. 23:00–23:29). Moreover, "[t]he Justice Department agreed that 'a lot of law firms do that.'" *Id.* (quoting Audio of Oral Arg. 23:00–23:29 25:35.). CLE programs or other firm events that exclude individuals on the basis of race are likewise actionable under Title VII.

data collection and reporting milestones.[3] "Mansfield Plus" Certification is awarded to firms that maintain at least 30% "diverse" lawyer representation in their leadership roles.[4]

These programs were already questionable before the Supreme Court's decision in *SFFA*; now, they are unambiguously in tension with employer legal duties under state and federal law. Indeed, American Bar Association President Mary Smith recognized that "[i]n the wake of the Supreme Court decision in [*SFFA*], the legal profession needs to review its programs and identify ways to comply with the law."[5] Yet despite employing race-based policies and programs, some law firms have opted to flout the law, and indicated they were preparing to continue their efforts regardless of the Supreme Court's ruling in *SFFA*. For example, three weeks before the Supreme Court's decision in *SFFA*, Morrison Foerster's Chief Diversity and Inclusion Officer incorrectly predicted that "the upcoming SCOTUS verdict will have no bearing on Morrison Foerster's commitment to DEIA, nor will it impact the work that is being done to increase diversity at the firm." Morrison Foerster, *Law Firms Must Rise to Challenge if Affirmative Action Ends, DEI Officers Say*, June 8, 2023, *available at* https://www.mofo.com/resources/news/230608-law-firms-must-rise.

B. Race Discrimination Is Illegal Under Federal and State Law.

Such overt and pervasive racial discrimination in the employment and contracting practices of some AM Law 100 firms compels us to remind you of the obvious: Racial discrimination is illegal, divisive, and inconsistent with progress toward colorblindness. Race-based employment and contracting violate both state and federal law, and as the chief law enforcement officers of our respective states, we are committed to vigorously enforcing the law. "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017). As the multitude of state and federal statutes prohibiting race discrimination by private parties attests, this "commitment to the equal dignity of persons" extends to the private sector as well as the government.

Most notably, Title VII of the Civil Rights Act of 1964 prohibits race discrimination in employment. It provides that "[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"; or "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would

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[3] Julia DiPrete, *What is Mansfield Certification and Why is it so Important for Law Firms?*, FIRSTHAND, Dec. 9, 2022, *available at* https://firsthand.co/blogs/vaults-law-blog-legal-careers-and-industry-news/what-is-mansfield-certification-and-why-is-it-so-important-for-law-firms.

[4] *Id.*

[5] Statement of ABA President Mary Smith RE: Diversity programs at law firms, American Bar Association (Aug. 25, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/statement-of-aba-president-re-diversity-programs-law-firms/.

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a).

Furthermore, 42 U.S.C. § 1981, prohibits race discrimination in contracting. It provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a). This extends to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). Further, "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* § 1981(c).

The Supreme Court has repeatedly and emphatically condemned racial quotas and preferences. As the Court said in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion):

> [Racial] classifications promote "notions of racial inferiority and lead to a politics of racial hostility," "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."

Id. at 746 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Shaw*, 509 U.S. at 657; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (O'Connor, J., dissenting)). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

Race discrimination based on an asserted commitment to "diversity" is just as illegal as invidious discrimination. The "argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past and has been repeatedly rejected." *Parents Involved*, 551 U.S. at 742 (plurality opinion).

SFFA's sweeping decision leaves no doubt that the consideration of race is generally illegal: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *SFFA*, slip op. at 16 (internal quotes omitted). "[R]acial discrimination is invidious in all contexts." *Id.* at 22 (internal quotes omitted). Racial preferences are a "perilous remedy." *Id.* at 23. Before *SFFA*, the Court had announced a narrow exception for race-conscious college admissions to further student body diversity; but we have known for decades that that exception would be expiring soon—as indeed it did on June 29. *See generally Grutter v. Bollinger*, 539

U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary ….").

And the Court took pains to emphasize that the supposedly "benign" nature of racial preferences cannot save them. Despite the universities' claims in *SFFA* that they were actually helping people, not hurting them, the Court rightly noted that this argument itself "rest[ed] on [a] pernicious stereotype." *SFFA*, slip op. at 29. Likewise, when an employer makes employment or contracting decisions "on the basis of race, it engages in the offensive and demeaning assumption that [applicants] of a particular race, because of their race, think alike." *Id.* (internal quotes omitted). Further, racial preferences "stamp" the preferred races "with a badge of inferiority" and "taint the accomplishments of all those who are admitted as a result of racial discrimination." *SFFA*, slip op. at 41 (Thomas, J., concurring); *see also id.* ("The question itself is the stigma.").

And, of course, every racial preference necessarily imposes an equivalent harm on individuals outside the preferred racial groups, based only on their skin color. "[I]t is not even theoretically possible to 'help' a certain racial group without causing harm to members of other racial groups. It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Id.* at 42 (quotation omitted). Thus, "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Id.* Racial discrimination inevitably "provokes resentment among those who believe they have been wronged by the … use of race." *Id.* at 46.

Some of your law firms have justified racial employment practices by claiming they are "integral to the quality of legal services we provide to our global client base" because they provide "diversity of thought, approach, ability, and knowledge." *See, e.g.*, Sidley Austin, *Diversity, Equity & Inclusion*, *available at* https://www.sidley.com/en/us/diversitylanding/. This defense is unavailing after *SFFA*. As for Harvard's unlawful admissions program, the Supreme Court held firmly that it was a quota system in all but name—as all race-conscious practices inevitably are. "For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork." *SFFA,* slip op. at 32 n.7 (majority opinion). Playing this "numbers game" is flagrantly illegal: "[O]utright racial balancing" is "patently unconstitutional." *Id*. at 32.

Beyond the Supreme Court's renunciation of the same types of "holistic practices," law firm explanations for racial employment practices are both offensive and illogical. Harvard's and UNC's racial categories were incoherent, treating approximately 60% of the global population as fitting within one broad category—"Asian." And if definitive racial classifications were possible, such classifications would be immaterial in the legal context. Diversity of thought and experience may very well be valid commercial objectives, and they may be shaped by an individual's unique circumstance. The color of a person's skin, however, does not determine how well he or she can draft a contract or interpret a statute. Nor do hiring decisions based on a person's race inherently equate to viewpoint diversity.

Let there be no confusion: The Supreme Court's principles in *SFFA* apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting. Courts routinely interpret Title VI and Title VII alongside each other, adopting the same principles and interpretation for both statutes.[6] *See, e.g.*, *SFFA*, slip op. at 4 (Gorsuch, J., concurring); *Maisha v. Univ. of N. Carolina*, 641 F. App'x 246, 250 (4th Cir. 2016) (applying "familiar" Title VII standards to "claims of discrimination under Title VI"); *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014) ("We now join the other circuits in concluding that [the Title VII standard] also applies to Title VI disparate treatment claims.").

Race discrimination in employment and contracting, of course, also violates state law. And State courts often look to Title VII to interpret their own prohibitions against race discrimination in employment practices. *See, e.g.*, *Montana State Univ.-Northern v. Bachmeier*, 480 P.3d 233, 246 (Mont. 2021) ("Reference to federal case law is appropriate in employment discrimination cases filed under the [Montana Human Right Act]' because of the MHRA's similarity to Title VII of the Civil Rights Act of 1964."); *Texas Dep't of State Health Servs. v. Kerr*, 643 S.W.3d 719, 729 (Tex. Ct. App. 2022) ("The Texas Legislature modeled the TCHRA after federal law 'for the express purpose of carrying out the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.'"); *see also McCabe v. Johnson Cty. Bd. of Cty. Comm'rs*, 615 P.2d 780, 783 (Kan. 1980) ("Federal court decisions under [Title VII], although not controlling, are of persuasive precedential value [in construing the Kansas Act Against Discrimination]."). Likewise, refusing to deal with a customer or supplier or otherwise penalizing them on the basis of race is illegal under the laws of many states. *See, e.g.*, *J.T.'s Tire Service, Inc. v. United Rentals of North Am., Inc.*, 985 A.2d 211, 240 (N.J. App. 2010) (holding that New Jersey law "prohibits discriminatory refusals to do business" with any person on the basis of race); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225, 1231 (Cal. Ct. App. 1999) (noting that California law prohibits any "business establishment" from "discriminat[ing] against" or "refus[ing] to buy from, sell to, or trade with any person" because of race); *Mehtani v. New York Life Ins. Co.*, 145 A.D.2d 90, 94 (N.Y. 1989) (noting that New York law defines "unlawful discriminatory practice(s)" to include "discriminat[ing] against," "refus[ing] to buy from, sell to or trade with, any person" because of race).

Accordingly, *SFFA* places every employer and contractor, including law firms, on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices. Failure to stop racially discriminatory employment practices may result in lawsuits by employees or applicants for discrimination under federal or state anti-discrimination laws; investigations by state human rights commissions; injunction proceedings by state human rights commissions or state attorneys general; and/or administrative hearings

[6] Unlike Title VII, however, Title VI doesn't impose any disparate impact liability. *Compare* 42 U.S.C. § 2000e-2(k)(1)(A)(i) *with* 42 U.S.C. § 2000d *et seq.*; *see also, e.g.*, *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 794 (8th Cir. 2010) ("Title VI prohibits only intentional discrimination. Proof of disparate impact is not sufficient.").

before state human rights commissions. In addition, many of our states include non-discrimination clauses in contracts. Failure to comply with the Supreme Court's ruling may impact a law firm's ability to enter into or continue current contracts with states or localities.

Finally, we note that the use of some DEI programming in the workplace may discriminate on the basis of race, color, or national origin in violation of Title VII and state law. Title VII protects an employee's the right to a working environment free of racial discrimination. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (relying on *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (race discrimination can consist of an "environment heavily charged with ethnic or racial discrimination"), *cert. denied*, 406 U.S. 957 (1972)); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (reiterating *Meritor* standard); *Gray v. Greyhound Lines, E.*, 545 F.2d 169, 176 (D.C. Cir. 1976) (noting with approval that EEOC has consistently held that Title VII gives employees the right to a working environment free of racial intimidation).

Activities that utilize racial segregation, race stereotyping, and race scapegoating may violate civil rights laws because they can create a hostile environment and/or involve activities that result in different treatment on the basis of race.[7] This is particularly true when participation in such exercises is compulsory. This includes exercises that ascribe specific characteristics or qualities to all members of a racial group. Individuals cannot be forced to "reflect," "deconstruct," or "confront" their racial identities or be instructed to be less of any race, ethnicity, or national origin. Trainings may not assign fault, blame, or bias to a race or to members of a race because of their race. This encompasses any claim that, consciously or unconsciously, and because of his or her race, members of any race are inherently racist or are inherently inclined to oppress others. An employer that permits trainings that tell an individual that he or she should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race, likely creates a racially hostile environment. *See, e.g.*, *Gilbert v. Little Rock*, 722 F.2d 1390, 1394 (8th Cir. 1983) (environment "which significantly and adversely affects the psychological well-being of an employee because of his or her race" is enough to constitute Title VII violation); *Bundy v. Jackson*, 641 F.2d 934, 943-45 (D.C. Cir. 1981) (protection against race and sex discrimination extends to "psychological and emotional work environment").

Conclusion

As Attorneys General, it is incumbent upon us to remind *all* entities operating within our respective jurisdictions of the binding nature of American anti-discrimination laws. If your law firm previously resorted to racial preferences or naked quotas, that path is now definitively closed. Employers, including large law firms, are legally obligated to treat *all* employees, *all* applicants, and *all* contractors equally, without regard to an individual's race or skin color.

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[7] *See, e.g.*, 58 Op. Atty Gen. Mont. No. 1; 21 Ark. Att'y Gen Op., No. 042.

We strongly advise you to immediately terminate any unlawful race-based quotas or preferences that your firm has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable—sooner rather than later—for treating individuals differently because of the color of their skin.

Sincerely,

Austin Knudsen
Attorney General to Montana

Tim Griffin
Attorney General of Arkansas

Brenna Bird
Attorney General of Iowa

Kris Kobach
Attorney General of Kansas

Daniel Cameron
Attorney General of Kentucky

AMERICA FIRST LEGAL

June 30, 2023

Dean John F. Manning
Harvard University Law School
Wasserstein Hall, Suite 5027
1585 Massachusetts Avenue
Cambridge, MA 02138

Dear Dean Manning:

Yesterday, the Supreme Court declared racial preferences illegal in higher education. I write to inform you of the consequences that you and your institution will face if you fail to comply with or attempt to circumvent the Court's ruling.

It is unlawful for Harvard University Law School to flout the Constitution and the unambiguous command of Title VI by admitting students with lower LSAT scores and academic credentials than those demanded of others based on their race, sex, or national origin. It is unlawful for your school to violate Title VI, Title VII, and Title IX in its faculty hiring by discriminating in favor of female and minority faculty candidates at the expense of others. It is unlawful for your school to allow their student-run journals to give discriminatory preferences to women and minorities in membership and article selection.

You must immediately announce the termination of all forms of race, national origin, and sex preferences in student admissions, faculty hiring, and law-review membership or article selection. And you must, before the start of the next academic school year, announce an official policy that prohibits all components of the law school from giving preferential treatment to anyone because of that individual's race, national origin, or sex.

There are those within and outside your institutions who will tell you that you can develop an admissions scheme through pretext or proxy to achieve the same discriminatory outcome. Anyone telling you such a thing is coaching you to engage in illegal conduct in brazen violation of a Supreme Court ruling, lawbreaking in which you would be fully complicit and thus fully liable.

You are hereby warned.

611 Pennsylvania Ave SE #231
Washington, DC 20003

Any such regime—for example, relying on biography over qualifications—to achieve desired racial outcomes is clearly illegal and unconstitutional, and you will face legal repercussions accordingly.

We will ensure that every faculty member, staff member, student, and applicant for admission can communicate with us about any efforts to use underhanded race, national origin, and sex preferences, and we will use any information obtained to ensure accountability.

America First Legal is a charitable nonprofit and civil rights organization that provides free legal services to victims of unlawful discrimination. We will represent victims of these policies and sue any law school that allows these illegal and discriminatory practices to continue.

Sincerely,

Stephen Miller
President
America First Legal

cc: Kristi Jobson, Admissions
Diane E. Lopez, Vice President and General Counsel
Members of the Faculty

Students for Fair Admissions
2200 Wilson Blvd.
Suite 102-13
Arlington, VA 22201
703-505-1922
www.studentsforfairadmissions.org

July 11, 2023

Re: The end of racial preferences in college admissions

Dear [Colleges and Universities],

I write on behalf of Students for Fair Admissions, a non-profit organization of more than 20,000 members dedicated to eliminating the use of race in college admissions. For nearly a decade, SFFA has united Americans of varying backgrounds to accomplish their goal of eliminating racial preferences—a goal that public polling consistently confirms is shared by large majorities of all Americans.

As you are no doubt aware, the Supreme Court's recent decision in *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 20-1199, ended the legality of racial preferences in college admissions. Among other things, the Court explained that:

- Colleges' assertions that racial preferences can achieve educational benefits are "not sufficiently coherent" to survive strict scrutiny. Slip Op. at 23.

- No system can rely even in part on the traditional racial "categories," which are "imprecise," "overbroad," "underinclusive," and "opaque." *Id.* at 25.

- Because race can never be a "negative," it can never be a positive in admissions. *Id.* at 27. College admissions are "zero-sum" and thus "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.*

- Any program that includes race as a factor unconstitutionally tolerates "stereotyping," which "can only cause continued hurt and injury, contrary as it is to the core purpose of the Equal Protection Clause." *Id.* at 29-30 (cleaned up).

- Racial preferences cannot continue indefinitely. And any attempt to use race until a particular ethnic balance is achieved "turns" the equal-protection guarantee "on its head." *Id.* at 31-32 (cleaned up).

- And critically, our law is "'color-blind.'" *Id.* at 39. What some used to dismiss as "'rhetorical flourishes about colorblindness'" are actually the "proud pronouncements" of the Court's cases. *Id.* at 36.

It is therefore incumbent upon your institution to ensure compliance with this decision, starting with the upcoming admissions cycle. At the very least, you should take the following steps to avoid violating the Constitution, Title VI of the Civil Rights Act of 1964, and other similar laws:

- Cease making available to admissions officers "check box" data about the race of applicants. The College Board recently introduced a feature for the Common App that makes this easy. *See* Common App and Equitable Admissions, perma.cc/3WMD-DGUF (archived July 6, 2023) (noting that "[m]ember colleges are able to hide (that is, 'suppress') the self-disclosed race and ethnicity information from application PDF files for both first-year and transfer applications").

- During the admissions cycle, prohibit your admissions office from preparing or reviewing any aggregated data (i.e., data involving two or more applicants) regarding race or ethnicity.

- Eliminate any definition or guidance regarding "underrepresented" racial groups.

- Promulgate new admissions guidelines making clear that race is not to be a factor in the admission or denial of any applicant. This includes clear instructions that essay answers, personal statements, or other parts of an application cannot be used to ascertain or provide a benefit based on the applicant's race. For "what cannot be done directly cannot be done indirectly," and an applicant "must be treated based on his or her experiences as an individual—not on the basis of race." Slip op. at 39-40 (cleaned up).

"Eliminating racial discrimination means eliminating all of it." *Id.* at 15. We trust that your institution will take immediate steps to eliminate the use of race as a factor in admissions, will be open and transparent about those steps, and will reaffirm your commitment to the equal treatment of all applicants, regardless of their skin color.

Sincerely,

Edward Blum
President, Students for Fair Admissions
www.studentsforfairadmissions.org

GAO Highlights

Highlights of GAO-23-105857, a report to congressional committees

August 2023

SENIOR RESERVE OFFICERS' TRAINING CORPS

Actions Needed to Better Monitor Diversity Progress

Why GAO Did This Study

The Senior ROTC program is DOD's largest source of military officers. It produced more than 94,000 officers since academic year 2011 from ROTC units in every U.S. state and many U.S. territories. As such, the program can make significant contributions to DOD's efforts to cultivate diversity.

Senate Report 117-39, accompanying a bill for the National Defense Authorization Act for Fiscal Year 2022, includes a provision for GAO to review the ROTC program's contributions to a diverse military officer corps. GAO, among other things, (1) describes ROTC-commissioned officer diversity trends for academic years 2011–2021, by race, ethnicity, and gender, and socioeconomic makeup; (2) describes whether ROTC unit racial, ethnic, and gender makeup aligned with school makeup; and (3) assesses the extent to which the military departments have evaluated and, as necessary, modified ROTC programs to better ensure they contribute to a diverse officer corps.

GAO analyzed academic years 2011–2021 race and ethnicity and gender data for ROTC units and schools and Census Bureau socioeconomic data.

What GAO Recommends

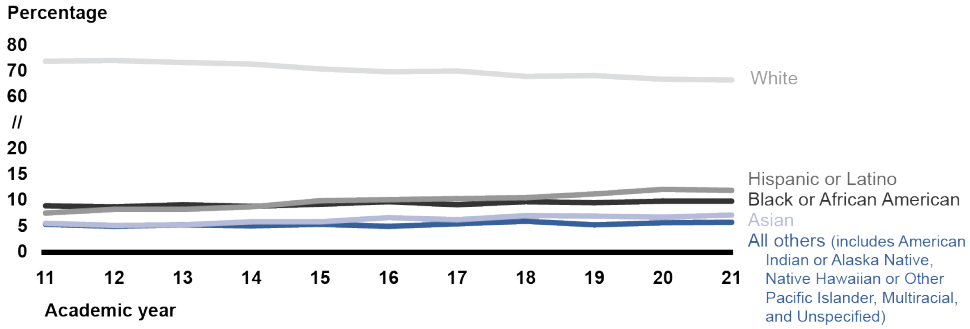
GAO makes four recommendations including that the Army develop quantifiable diversity goals, DOD establish a consistent process to identify a comparison group, the military departments collect and analyze quantifiable diversity data in program evaluations, and the military departments evaluate both the performance and resources of ROTC programs. DOD concurred with the recommendations.

View GAO-23-105857. For more information, contact Brenda S. Farrell at (202) 512-3604 or farrellb@gao.gov.

What GAO Found

The population of Senior Reserve Officers' Training Corps (ROTC)-commissioned officers became more diverse for race and ethnicity and gender in academic years 2011–2021. For example, during this period, the percentage of White officers decreased from 73.6 percent to 66.3 percent, while the percentages of Blacks or African Americans, Hispanics or Latinos, and Asians increased. Also, ROTC-commissioned officers have increasingly come from economically advantaged areas—that is, from those with poverty and unemployment rates below the national average and household incomes above the national median.

ROTC-Commissioned Officer Trends for Race and Ethnicity, Academic Years 2011–2021



Source: GAO analysis of military department data. | GAO-23-105857

Generally, the racial and ethnic and gender makeup of ROTC units did not align with the student body of their host schools, most notably for gender. However, Historically Black Colleges and Universities (HBCUs) and Minority-Serving Institutions (MSIs) generally had a more racially and ethnically diverse population for ROTC units to draw from. The military departments had ROTC units at 69 percent of HBCUs and 19 percent of MSIs.

The military departments have not developed a comprehensive approach for evaluating ROTC program contributions to a diverse officer corps, limiting their ability to inform decisions regarding any appropriate program modifications.

- The Navy and Air Force developed applicant goals—based on the eligible population—to evaluate the diversity of ROTC applicants, but the Army has not.
- These applicant goals do not share a consistent comparison group with the Department of Defense's (DOD) stated diversity goal to reflect the U.S. population.
- Each military department has conducted the required performance evaluations of ROTC units, but has not fully evaluated the extent to which the units contribute to a diverse officer corps.
- The military departments have not submitted the required resource documents to ensure resources are allocated effectively within the ROTC program or to determine whether—based on resources and performance—modifications to the program are advisable.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1199 and 21–707

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
20–1199 *v.*
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER
21–707 *v.*
UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 29, 2023]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

I

A

Founded in 1636, Harvard College has one of the most

First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F. 3d, at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F. Supp. 3d, at 656.

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? *Ibid.*; 980 F. 3d, at 173–174. Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." 567 F. Supp. 3d, at 656. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. 980 F. 3d, at 170, n. 29. And the District Court observed that Harvard's "policy of considering applicants' race . . . overall results in fewer Asian American and white students being admitted." 397 F. Supp. 3d, at 178.

Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." Brief for Respondent in No. 20–1199, at 51. But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative'" to be a student with lower grades and lower test scores. *Ibid.* This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. See *id.*, at 49; Brief for University Respondents in No. 21–707, at 2. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would

them to determine whether they remain necessary. See Brief for Respondent in No. 20–1199, at 52; Brief for University Respondents in No. 21–707, at 58–59. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U. S., at 342. But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted. *Ibid.*; see also *supra*, at 18.

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent in No. 20–1199, at 52 (Harvard "has not set a sunset date" for its program (internal quotation marks omitted)). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg. in No. 20–1199, at 91. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." 567 F. Supp. 3d, at 612. And UNC suggests that it might soon use race to a *greater* extent than it currently does. See Brief for University Respondents in No. 21–707, at 57. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although

both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. 438 U. S., at 362 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. Such an interest presents "an amorphous concept of injury that may be ageless in its reach into the past," he explained. *Id.*, at 307. It cannot "justify a [racial] classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered." *Id.*, at 310.

The Court soon adopted Justice Powell's analysis as its own. In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," we said plainly in *Hunt*, a 1996 case about the Voting Rights Act. 517 U. S., at 909–910. We reached the same conclusion in *Croson*, a case that concerned a preferential government contracting program. Permitting "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group." 488 U. S., at 505. Opening that door would shutter another—"[t]he dream of a Nation of equal citizens . . . would be lost," we observed, "in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.*, at 505–506. "[S]uch a result would be contrary to both the letter and spirit of a

constitutional provision whose central command is equality." *Id.*, at 506.

The dissents here do not acknowledge any of this. They fail to cite *Hunt*. They fail to cite *Croson*. They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (JUSTICE JACKSON's opinion ignores Justice Powell altogether). For what one dissent denigrates as "rhetorical flourishes about colorblindness," *post*, at 14 (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law. We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.[8]

The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely, until "racial inequality will end." *Post*, at 54 (opinion of SOTOMAYOR, J.). But *Grutter* did no such thing. It emphasized—not once or twice, but at least six separate times—that race-based ad-

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[8] Perhaps recognizing as much, the principal dissent at one point attempts to press a different remedial rationale altogether, stating that both respondents "have sordid legacies of racial exclusion." *Post*, at 21 (opinion of SOTOMAYOR, J.). Such institutions should perhaps be the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so. In any event, neither university defends its admissions system as a remedy for past discrimination—their own or anyone else's. See Tr. of Oral Arg. in No. 21–707, at 90 ("[W]e're not pursuing any sort of remedial justification for our policy."). Nor has any decision of ours permitted a remedial justification for race-based college admissions. Cf. *Bakke*, 438 U. S., at 307 (opinion of Powell, J.).

missions programs "must have reasonable durational limits" and that their "deviation from the norm of equal treatment" must be "a temporary matter." 539 U. S., at 342. The Court also disclaimed "[e]nshrining a permanent justification for racial preferences." *Ibid.* Yet the justification for race-based admissions that the dissent latches on to is just that—unceasing.

The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texas, 579 U. S., at 377, whose "goal" it was to enroll a "critical mass" of certain minority students, *Fisher I*, 570 U. S., at 297. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means. See 1 App. in No. 21–707, at 402 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is." (testimony of UNC administrator)); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from Harvard administrator).

Fisher II also recognized the "enduring challenge" that race-based admissions systems place on "the constitutional promise of equal treatment." 579 U. S., at 388. The Court thus reaffirmed the "continuing obligation" of universities "to satisfy the burden of strict scrutiny." *Id.*, at 379. To drive the point home, *Fisher II* limited itself just as *Grutter* had—in duration. The Court stressed that its decision did "*not* necessarily mean the University may rely on the same policy" going forward. 579 U. S., at 388 (emphasis added); see also *Fisher I*, 570 U. S., at 313 (recognizing that "*Grutter* . . . approved the plan at issue upon concluding that it . . . was limited in time"). And the Court openly acknowl-

edged that its decision offered limited "prospective guidance." *Fisher II*, 579 U. S., at 379.[9]

The principal dissent wrenches our case law from its context, going to lengths to ignore the parts of that law it does not like. The serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. *Fisher I*, 570 U. S., at 310. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown*. 347 U. S., at 495 (emphasis added). It depends, says the dissent.

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[9]The principal dissent rebukes the Court for not considering adequately the reliance interests respondents and other universities had in *Grutter*. But as we have explained, *Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time. See *supra*, at 20. *Grutter* indeed went so far as to suggest a specific period of reliance—25 years—precluding the indefinite reliance interests that the dissent articulates. Cf. *post*, at 2–4 (KAVANAUGH, J., concurring). Those interests are, moreover, vastly overstated on their own terms. Three out of every five American universities do *not* consider race in their admissions decisions. See Brief for Respondent in No. 20–1199, p. 40. And several States—including some of the most populous (California, Florida, and Michigan)—have prohibited race-based admissions outright. See Brief for Oklahoma et al. as *Amici Curiae* 9, n. 6.

That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees. *Post*, at 5 (opinion of JACKSON, J.). Indeed he did:

> "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting).

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, 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. See, *e.g.*, 4 App. in No. 21–707, at 1725–1726, 1741; Tr. of Oral Arg. in No. 20–1199, at 10. But, 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. (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,

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JUSTICE THOMAS, concurring.

In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves. The Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to the privileges or immunities of citizenship and the equal protection of the laws. Amdts. 13, 14. Because of that second founding, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting).

This Court's commitment to that equality principle has ebbed and flowed over time. After forsaking the principle for decades, offering a judicial *imprimatur* to segregation

ideal, as Justice Harlan emphasized in dissent: The Reconstruction Amendments had aimed to remove "the race line from our systems of governments." *Id.*, at 563. For Justice Harlan, the Constitution was colorblind and categorically rejected laws designed to protect "a dominant race—a superior class of citizens," while imposing a "badge of servitude" on others. *Id.*, at 560–562.

History has vindicated Justice Harlan's view, and this Court recently acknowledged that *Plessy* should have been overruled immediately because it "betrayed our commitment to 'equality before the law.'" *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___, ___ (2022) (slip op., at 44). Nonetheless, and despite Justice Harlan's efforts, the era of state-sanctioned segregation persisted for more than a half century.

E

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, JUSTICE SOTOMAYOR's dissent argues that several of these statutes evidence the ratifiers' understanding that the Equal Protection Clause "permits consideration of race to achieve its goal." *Post*, at 6. Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen's Bureau Act. That Act established the Freedmen's Bureau to issue "provisions, clothing, and fuel . . . needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children" and the setting

and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

B

JUSTICE JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. *Post*, at 1–26 (dissenting opinion). The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. *Post*, at 26. I strongly disagree.

First, as stated above, any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant. I, of course, agree that our society is not, and has never been, colorblind. *Post*, at 2 (JACKSON, J., dissenting); see also *Plessy*, 163 U. S., at 559 (Harlan, J., dissenting). People discriminate against one another for a whole host of reasons. But, under the Fourteenth Amendment, the law must disregard all racial distinctions:

> "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. 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 humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Ibid.*

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JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

For many students, an acceptance letter from Harvard or the University of North Carolina is a ticket to a brighter future. Tens of thousands of applicants compete for a small number of coveted spots. For some time, both universities have decided which applicants to admit or reject based in part on race. Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either.

I

"[F]ew pieces of federal legislation rank in significance

not alone. See, *e.g., Fisher*, 579 U. S., at 401–437 (ALITO, J., dissenting); *Grutter*, 539 U. S., at 346–349 (Scalia, J., joined by THOMAS, J., concurring in part and dissenting in part); 1 App. in No. 21–707, pp. 401–402 (testimony from UNC administrator: "[M]y understanding of the term 'critical mass' is that it's a . . . I'm trying to decide if it's an analogy or a metaphor[.] I think it's an analogy. . . . I'm not even sure we would know what it is."); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from a Harvard administrator). If the Court's post-*Bakke* higher-education precedents ever made sense, they are by now incoherent.

Recognizing as much, the Court today cuts through the kudzu. It ends university exceptionalism and returns this Court to the traditional rule that the Equal Protection Clause forbids the use of race in distinguishing between persons unless strict scrutiny's demanding standards can be met. In that way, today's decision wakes the echoes of Justice John Marshall Harlan: "The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion).

B

If *Bakke* led to errors in interpreting the Equal Protection Clause, its first mistake was to take us there. These cases arise under Title VI and that statute is "more than a simple paraphrasing" of the Equal Protection Clause. 438 U. S., at 416 (opinion of Stevens, J.). Title VI has "independent force, with language and emphasis in addition to that found in the Constitution." *Ibid.* That law deserves our respect and its terms provide us with all the direction we need.

Put the two provisions side by side. Title VI says: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any program or activity receiving Federal financial assistance." §2000d. The Equal Protection Clause reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, §1. That such differently worded provisions should mean the same thing is implausible on its face.

Consider just some of the obvious differences. The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties. By contrast, Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not.

In other respects, however, the relative scope of the two provisions is inverted. The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications. So, for example, courts apply strict scrutiny for classifications based on race, color, and national origin; intermediate scrutiny for classifications based on sex; and rational-basis review for classifications based on more prosaic grounds. See, *e.g.*, *Fisher*, 579 U. S., at 376; *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–495 (1989) (plurality opinion); *United States* v. *Virginia*, 518 U. S. 515, 555–556 (1996); *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 366–367 (2001). By contrast, Title VI targets only certain classifications—those based on race, color, or national origin. And that law does not direct courts to subject these classifications to one degree of scrutiny or another. Instead, as we have seen, its rule is as uncomplicated as it is momentous. Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.

In truth, neither Justice Powell's nor Justice Brennan's opinion in *Bakke* focused on the text of Title VI. Instead,

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JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join,* dissenting.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 20–1199 and joins this opinion only as it applies to the case in No. 21–707.

harm inflicted by segregation and the "importance of education to our democratic society." *Id.*, at 492–495. For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

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. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution

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JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.*

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 20–1199, and issues this opinion with respect to the case in No. 21–707.

holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), are a problem with respect to achievement of that aspiration, rather than a viable solution (as has long been evident to historians, sociologists, and policymakers alike).

JUSTICE SOTOMAYOR has persuasively established that nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education. I join her opinion without qualification. I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants. See, *e.g.*, Tr. of Oral Arg. 19.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.[1]

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

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[1] M. Oliver & T. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 128 (1997) (Oliver & Shapiro) (emphasis deleted).

B

History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families' median wealth was approximately $24,000.[46] For White families, that number was approximately eight times as much (about $188,000).[47] These wealth disparities "exis[t] at every income and education level," so, "[o]n average, white families with college degrees have over $300,000 more wealth than black families with college degrees."[48] This disparity has also accelerated over time—from a roughly $40,000 gap between White and Black household median net worth in 1993 to a roughly $135,000 gap in 2019.[49] Median income numbers from 2019 tell the same story: $76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households.[50]

These financial gaps are unsurprising in light of the link

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[46] Dickerson 1086 (citing data from 2019 Federal Reserve Survey of Consumer Finances); see also Rothstein 184 (reporting, in 2017, even lower median-wealth number of $11,000).

[47] Dickerson 1086; see also Rothstein 184 (reporting even larger relative gap in 2017 of $134,000 to $11,000).

[48] Baradaran 249; see also Dickerson 1089–1090; Oliver & Shapiro 94–95, 100–101, 110–111, 197.

[49] See Brief for National Academy of Education as *Amicus Curiae* 14–15 (citing U. S. Census Bureau statistics).

[50] *Id.*, at 14 (citing U. S. Census Bureau statistics); Rothstein 184 (reporting similarly stark White/Black income gap numbers in 2017). Early returns suggest that the COVID–19 pandemic exacerbated these disparities. See E. Derenoncourt, C. Kim, M. Kuhn, & M. Schularick, Wealth of Two Nations: The U. S. Racial Wealth Gap, 1860–2020, p. 22 (Fed. Reserve Bank of Minneapolis, Opportunity & Inclusive Growth Inst., Working Paper No. 59, June 2022) (Wealth of Two Nations); L. Bollinger & G. Stone, A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action 103 (2023) (Bollinger & Stone).

that UNC "enforced its own Jim Crow regulations."[73] Two generations ago, North Carolina's Governor still railed against "'integration for integration's sake'"—and UNC Black enrollment was minuscule.[74] So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters.[75] It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who "merits" admission.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students

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[73] 3 App. 1683.

[74] *Id.*, at 1687–1688.

[75] See O. James, Valuing Identity, 102 Minn. L. Rev. 127, 162 (2017); P. Karlan & D. Levinson, Why Voting Is Different, 84 Cal. L. Rev. 1201, 1217 (1996).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AMERICAN ALLIANCE FOR EQUAL RIGHTS, *Plaintiff*, v. PERKINS COIE LLP, *Defendant.*	Case No.

COMPLAINT

1. The law abhors racial discrimination. The lawyers who help administer that law are supposed to abhor it too. The ethical rules punish lawyers who "manifest by words or conduct, bias or prejudice based on race." Texas Disciplinary Rules of Professional Conduct 5.08, perma.cc/35YY-DFUW.

2. Yet Perkins Coie has been racially discriminating against future lawyers for decades. The firm's "diversity fellowships" for 1Ls and 2Ls exclude certain applicants based on their skin color. These prestigious positions are six-figure jobs that include five-figure stipends. Yet applicants do not qualify unless they are "students of color," "students who identify as LGBTQ+," or "students with disabilities." So between two heterosexual, nondisabled applicants—one black and one white—the latter cannot apply based solely on his race.

3. This kind of rank discrimination was never lawful, even before *SFFA v. Harvard* held that colleges cannot use race in admissions. Perkins is an employer making

hiring decisions, not a university pursuing educational benefits, and its gross racial exclusion is the kind of quota that the law has always banned. *See generally Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722-23 (2007). As Perkins told its corporate clients just days after the decision, "Employment decisions that are overtly made on protected bases ran afoul of the law before and after [*SFFA*]." *Seven Pressing Questions Following the Supreme Court's Admissions Decision*, Perkins Coie (July 5, 2023), perma.cc/5BYJ-SNBH.

4. But in case Perkins needed another reminder, *SFFA* reaffirms that "[e]liminating racial discrimination means eliminating all of it." 143 S. Ct. 2141, 2161 (2023). No racial discrimination is benign: It always "demeans the dignity and worth"' of every American "'to be judged"' by his or her race "'instead of by his or her own merit and essential qualities."' *Id.* at 2170.

5. That principle is true under the Constitution, true under Title VI, and true under 42 U.S.C. §1981—the federal statute that bars private employers, like Perkins, from discriminating based on race when making contracts. Because Perkins' diversity fellowships are contracts that discriminate on their face, they violate §1981.

PARTIES

6. Plaintiff, American Alliance for Equal Rights, is a nationwide membership organization dedicated to challenging distinctions and preferences made on the basis of race and ethnicity. The Alliance is based in Texas.

7. The Alliance has members who are ready and able to apply for Perkins' 1L fellowship in 2024 (and 2L fellowship in 2025), including Member A.

8. Defendant, Perkins Coie LLP, is an international law firm. It has an office in Dallas, Texas, as well as in Austin. Its diversity "fellowships are available in the … Perkins Coie offices" in "Austin," "Dallas," and elsewhere. The Dallas and Austin offices regularly hire diversity fellows, including in 2023 and 2022.

JURISDICTION AND VENUE

9. This Court has subject-matter jurisdiction under 28 U.S.C. §1331.

10. Venue is proper under 28 U.S.C. §1391 because Perkins resides in Dallas and a substantial part of the events or omissions giving rise to the claims occurred in Dallas.

11. Perkins has an office in Dallas, contracts to do business in Dallas, recruits fellows to its Dallas office and runs the challenged fellowships in that office, has committed the alleged tortious conduct in Dallas, and otherwise has contacts that make the exercise of personal jurisdiction in this district comport with due process.

12. Perkins' advertisements for the fellowships are published and widely circulated on the internet, including on Perkins' website, Facebook, popular job sites like LinkedIn, and law-school websites across the country. Perkins' various advertisements for the fellowships reach, and are intended by it to reach, Dallas and students interested in applying to its Dallas office. Perkins also sends instructions on how to apply to the

fellowships to law schools in Dallas, and to other law schools to recruit their students to its Dallas office.

FACTS

A. Perkins operates the 1L and 2L Diversity Fellowships, which exclude certain applicants based on race.

13. Perkins created its 1L diversity fellowship in 1991 and has run it every year since. It added the 2L diversity fellowship in 2020. "These fellowships are available in" several "Perkins Coie offices," including "Dallas." Candidates "may apply to one office only."

14. Perkins plans to operate the fellowships again in "2024," with no changes. It is "now accepting applications for [the] 2024 2L Summer Associate Program," including the 2L diversity fellowship for its Dallas office. Instructions "pertaining to the 2024 1L fellowship application timing" have been sent to law schools.

15. "The diversity fellowships are not tied to a specific practice group and may receive assignments from a variety of practices."

16. It is "common" that applicants to the 1L fellowship do not yet have any law-school grades by the application deadline. Perkins nevertheless encourages applicants to apply without grades and then "follow up" with their grades later. Decisions are made "by late January."

17. The 1L and 2L diversity fellowships are prestigious programs.

18. Students in their first year of law school are eligible to apply to the 1L fellowship, which consists of a paid summer-associate position and a $15,000 stipend. Though more common for 2Ls, paid summer-associate positions are incredibly rare for 1Ls. Summer associates are paid like entry-level associates at the firm, who at Perkins make $190,000/year. (And even for 2Ls, summer-associate positions do not normally pay an additional stipend or bonus on top of that pro-rated salary.)

19. In addition to summer employment at the firm, 1L fellows at Perkins sometimes get to "work on-site with the legal department at [Perkins'] clients' offices."

20. Students in their second year of law school are eligible to apply to the 2L fellowship, which consists of a paid summer associate position, and a $25,000 stipend, "awarded in two installments: the first [$15,000] following successful completion of the summer program and the second [$10,000] upon accepting an offer to join the firm as a full-time associate." By comparison, Perkins Coie offers a 2L summer program, which is facially open to all applicants and does not include the extra $25,000.

21. Students can apply to the 2L diversity fellowship "directly," even if Perkins does not come to their law school's "on-campus interview program."

22. The criteria are the same for the 2L diversity fellowship, except the applicant must be a "second-year law student." 2L diversity fellows are typically 1L diversity fellows who decided to "return" to Perkins for a second summer.

23. Both 1L and 2L summer associates "work on a wide range of challenging legal assignments similar to those given to new associates, including legal research, analysis and drafting." While summer associates provide work for the firm, the firm provides them with valuable training. "Supervising attorneys provide informal feedback to summer associates after each assignment, and they submit written, formal evaluations to the office hiring committee." Summer associates "are commonly invited to attend depositions, mediations, deal closings, client meetings, trials, and other professional activities and events," and "[t]hey have the opportunity for both informal and formal training." They are also "assigned mentors" who "generally guide their progress and development throughout the summer."

24. 2L summer associates are Perkins' "primary source of new associate hires."

25. Under the heading "Criteria," Perkins states that applicants cannot apply to the 1L diversity fellowship unless they meet four requirements, including the following diversity requirement: "Membership in a group historically underrepresented in the legal profession, including students of color, students who identify as LGBTQ+, and students with disabilities."

26. On a FAQs page, Perkins answers the question "What does the firm consider 'diverse'?" It reiterates that its "definition" of diversity "encompasses students of color, students who identify as LGBTQ+, and students with disabilities. If you feel that you are diverse in one or more of *these* ways, please apply." (Emphasis added).

27. In other words, if they are heterosexual and nondisabled, applicants are disqualified if they are white.

B. Perkins' racial exclusions injure the Alliance's members.

28. The Alliance has members who are harmed by Perkins' racially discriminatory fellowships, including Member A.

29. Member A is ready and able to apply to Perkins' 1L diversity fellowship in 2024 and its 2L diversity fellowship in 2025, if a court orders Perkins to stop racially discriminating.

30. Member A satisfies all the criteria for the 1L fellowship, except the discriminatory one. As a white, non-disabled, heterosexual man, he does not belong to a group historically underrepresented in the legal profession.

31. Member A is a U.S. citizen.

32. Member A is a first-year student in good standing at an ABA-accredited law school. His law school is highly ranked and well-regarded, and Perkins has previously hired its graduates as associates, counsel, and partners (even a managing partner). One Perkins lawyer currently teaches at Member A's law school.

33. Member A has a demonstrated record of academic achievement, excellent writing and interpersonal skills, and experience that will contribute to a successful career in the legal field. In college, he maintained a high GPA while holding leadership positions in his fraternity and a debating society. Then, as a long-time paralegal, he worked

at several law firms assisting immigrants and a national nonprofit assisting religious minorities. He also did extensive writing and worked closely with clients and colleagues of all backgrounds.

34. Member A's work, experiences, and views have set him up to meaningfully contribute to the diversity efforts of his law school, and he has a strong desire to continue supporting diversity, equity, and inclusion efforts upon entering the legal profession.

35. Member A wants to apply to the fellowships because they are prestigious programs (at one of the country's best-known firms) that would provide him with great professional opportunities. Member A believes that the fellowships would provide him meaningful work experience, help him create professional connections, and connect him with professional mentors.

36. Member A is also drawn to the fellowships by the fact that Perkins will pay him tens of thousands of dollars (as a mere law student) and offer full-time employment (after he graduates). Member A would use the money he earns at the fellowship to pay living expenses and the cost of daycare for his daughter. He would also pay off student debt and avoid further debt while in school.

37. Member A's first preference—where he would apply if Perkins were ordered to stop racially discriminating—is Perkins' office in Dallas. He would like to live and work in Dallas as an entry-level attorney. He has friends who strongly endorse living

there, and he enjoys visiting Texas. He and his wife rank it as one of the top places they would like to move after he finishes law school.

38. Member A is prepared to meet the fellowships' requirements and expectations if he is accepted and joins. If a court orders Perkins to stop racially discriminating, he would assemble and promptly submit all the requested application materials, including his law-school grades once they become available.

CLAIM FOR RELIEF

COUNT
Violation of the Civil Rights Act of 1866
42 U.S.C. §1981

39. The Alliance repeats and realleges each of its prior allegations.

40. Section 1981 states that "[a]ll persons … shall have the same right … to make and enforce contracts … and to the full and equal benefit of all laws … as is enjoyed by white citizens." 42 U.S.C. §1981(a).

41. Section 1981 applies to governmental and "nongovernmental" actors. §1981(c). The statute contains a federal cause of action "against discrimination in private employment on the basis of race." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). It authorizes both equitable relief and damages. *Id.*

42. Section 1981 "protects the equal right of all persons … without respect to race." *Domino's Pizza, Inc v. McDonald*, 546 U.S. 470, 474 (2006) (cleaned up). Its "broad terms" bar discrimination "against, or in favor of, any race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 298 (1976).

43. Perkins Coie is violating §1981 by expressly excluding certain applicants from the fellowships based on race.

44. The fellowships implicate the activities enumerated under §1981, including "making … of contracts." 42 U.S.C. §1981(b). A contract "need not already exist" to trigger §1981. *Domino's Pizza*, 546 U.S. at 475. The statute "protects the would-be contractor along with those who have already made contracts." *Id.* It "offers relief when racial discrimination blocks the creation of a contractual relationship." *Id.*

45. The fellowships involve and are designed to lead to contractual relationships between Perkins and the fellows. In exchange for paid employment and a stipend, the fellows agree to work at the firm as summer associates. The fellowships are also designed to lead to future, full-time employment contracts after graduation.

46. Perkins' facial race-based discrimination is intentional. Under §1981, "a plaintiff who alleges a policy that is discriminatory *on its face* is not required to make further allegations of discriminatory intent or animus." *Juarez v. Nw. Mut. Life Ins. Co., Inc.*, 69 F. Supp. 3d 364, 370 (S.D.N.Y. 2014).

47. Perkins cannot escape liability for racial discrimination by saying that it also discriminates against applicants who are not LGBTQ+ or disabled. An employer cannot "discriminate against some employees on the basis of race … merely because he favorably treats other members" of that race. *Connecticut v. Teal*, 457 U.S. 440, 455 (1982). An employer who refuses to hire "black women," for example, is not innocent just because it's willing to hire white women and black men. *Jefferies v. Harris Cnty. Cmty.*

Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980). "So long as the plaintiff's [race] was one but-for cause" of his exclusion, "that is enough." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020).

PRAYER FOR RELIEF

The Alliance asks this Court to enter judgment in favor of it and against Perkins and to provide the following relief:

A. a declaration that Perkins' 1L and 2L diversity fellowships violate §1981;

B. a temporary restraining order and preliminary injunction barring Perkins from closing the fellowships' application windows, selecting fellows, enforcing the fellowships' racially discriminatory eligibility requirements, or considering race as a factor when selecting fellows;

C. a permanent injunction ordering Perkins to end the 1L and 2L diversity fellowships; barring Perkins from considering race as a factor when selecting fellows; ordering Perkins to formulate new eligibility requirements for the fellowships that are strictly race neutral; and, if necessary, ordering Perkins to redo applications and selections for the fellows in a strictly race-neutral manner;

D. nominal damages of $1;

E. reasonable costs and expenses of this action, including attorneys' fees, under 42 U.S.C. §1988 and any other applicable law; and

F. all other relief that the Alliance is entitled to.

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Respectfully submitted,

/s/ James F. Hasson

Adam K. Mortara*
(TN Bar No. 40089)
LAWFAIR LLC
40 Burton Hills Blvd., Ste. 200
Nashville, TN 37215
(773) 750-7154
mortara@lawfairllc.com

Cameron T. Norris*
(TN Bar. No. 33467)
Tiffany H. Bates*
(VA Bar No. 94166)
Steven C. Begakis**
(VA Bar No. 95172)
James F. Hasson
(TX Bar No. 24109982)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com
tiffany@consovoymccarthy.com
steven@consovoymccarthy.com
james@consovoymccarthy.com

*pro hac vice forthcoming
**member of the Northern District of Texas who resides in Fort Worth