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OVERTURNING *SFFA v. HARVARD*

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INTRODUCTION

On June 29, 2023, the United States Supreme Court issued its decision in *Students for Fair Admissions, Inc. (SFFA) v. President and Fellows of Harvard College*, holding that the race-conscious admissions programs of Harvard College and the University of North Carolina at Chapel Hill (UNC) violated the rights of SFFA under the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964.[1] It was a ruling expected by most in the legal community but the underlying rationale intrigued advocates on both sides of the spectrum.[2] After all, the Court recently issued opinions in *Fisher II* (2016), where it affirmed the strict scrutiny framework established in *Grutter v. Bollinger* (2003), and *Regents of University of California v. Bakke* (1978), which permitted universities to consider race in admissions through narrowly tailored means to pursue the educational benefits of diversity.[3]

1. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 213 (2023) [hereinafter Harvard] (holding that neither program fell "within the confines of narrow restrictions" and thus failed the strict scrutiny analysis).

2. *Compare* LAWS.' COMM. FOR C.R. UNDER L., ET AL., AS THE NATION AWAITS A DECISION IN AFFIRMATIVE ACTION CASES, FOUR KEY POINTS STAKEHOLDERS MUST CONSIDER TO ENSURE EQUAL EDUCATIONAL OPPORTUNITY FOR ALL (2023), https://www.lawyerscommittee.org/wp-content/uploads/2023/06/2023.06.13-AffAxn-Three-Pager_Final.pdf [https://perma.cc/3HBR-MRKC] (cautioning against expanding the parameters of the Court's ruling, such as its impact on K-12 schools or race-neutral measures—neither of which were issues before the Court), *with* Erin Wilcox, *A Decades-Old SCOTUS Ruling Could Impact the Future of Race-Based College Admissions Policies*, PAC. LEGAL FOUND. (Feb. 16, 2023), https://pacificlegal.org/old-scotus-ruling-impact-future-race-based-college-admissions/ [https://perma.cc/9EGN-ZBHC] (suggesting that the outcome of the *Harvard* case "will likely have implications that extend far beyond higher education" including the admissions process in K-12 schools).

3. *See* David Hinojosa & Genevieve Bonadies Torres, *The Absurd Reach of a "Colorblind" Constitution*, 72 AM. U. L. REV. 1775, 1782–86 (2023) (discussing the legal landscape of affirmative action in higher education post-Civil Rights movement); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) (*Fisher II* – previously before the court in 2013) (referring to a recent decision that has altered the course of legal precedent in education); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (acknowledging another line of precedent that has bridged that gap in constitutional analysis of race-based admission); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (highlighting the original foundation of strict scrutiny established to support considering race in admissions).

When the *Harvard* decision came down, many of the headlines proclaimed: "Affirmative Action is Dead."[4] Technically, that was incorrect.[5] The Court did not ban affirmative action or overrule *Grutter*.[6] Rather, in a classic "underrule," the Court affirmed its strict scrutiny framework but substantially revised it to make it nearly impractical for universities to pursue race-conscious admissions.[7] This essay argues that the majority's eagerness to all but eliminate race-conscious admissions without upending precedent, oddly enough, opens the ruling to a future attack.

We begin with a brief discussion of various *stare decisis* approaches by the Court.[8] To be clear, upending precedent is "serious business" and should not be flaunted by litigants.[9] As the Court has recognized, upholding precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[10] But *stare decisis* is not an "inexorable command" and is at its weakest when interpreting the Constitution.[11]

4. *See, e.g.*, David Brooks, *Affirmative Action is Dead. Campus Diversity Doesn't Have to Be*, N.Y. TIMES (June 29, 2023), https://www.nytimes.com/2023/06/29/opinion/affirmative-action-campus-diversity.html [https://perma.cc/V4PU-3HMU] ("The Supreme Court has ended affirmative action, meaning colleges and universities may no longer consider race in the admissions process.").

5. *See* Harvard, 600 U.S. at 230 (suggesting that its ruling is consistent with the prior ones since the Court has "never permitted admissions programs to work" in a way that would violate the newly created tenets of strict scrutiny, "and [it] will not do so today").

6. *Cf. id.* at 341–42 (Sotomayor, J., dissenting) (explaining how the majority opinion is contrary to precedent, from *Brown* to *Fisher*, yet does not attempt to apply demanding legal framework to upend *stare decisis*).

7. *See, e.g.*, Emily Cuneo Desmedt ET AL., *U.S. Supreme Court: Affirmative Action in College Admissions Must Come to an End*, MORGAN LEWIS (June 29, 2023), https://www.morganlewis.com/pubs/2023/06/us-supreme-court-affirmative-action-in-college-admissions-must-come-to-an-end [https://perma.cc/3U84-DT59] (noting that while the decision "did not expressly overrule *Grutter v. Bollinger*, and its progeny*,"* the Supreme Court's decision "focused heavily on the limitations those decisions imposed" and noted that there must by an endpoint for race-based admissions programs).

8. *See infra* Part I. Stare Decisis in the Supreme Court.

9. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring) ("In constitutional as in statutory cases, adherence to precedent is the norm. To overrule a constitutional decision, the Court's precedents on precedent still require a 'special justification . . .'").

10. *See* Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Couns. 31, 585 U.S. 878, 916 (2018) (expressing the importance of establishing strong constitutional precedent to provide guidelines for future cases (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))).

11. *See id*. (attributing the weakness to the fact that in constitutional cases, the Court's "interpretation can be altered only be constitutional amendment or by overruling our prior decisions").

Next, we briefly discuss *Harvard* and how the Court all but eliminated race-conscious admissions.[12] We then apply Justice Kavanaugh's three-prong *stare decisis* framework articulated in *Ramos v. Louisiana*, to the underlying rationale in *Harvard*: (1) whether the decision is egregiously wrong; (2) whether it has caused significant jurisprudential and real-world consequences; and (3) whether overruling the decision would unduly upset reliance interests.[13] We first argue that the Court's rationale for tightening the *Grutter* strict scrutiny standard was egregiously wrong on the law and the facts.[14] The Court's failure to recognize the dual purposes of the Equal Protection Clause to eliminate subjugation against Black people and to further equal opportunity operates as a death knell to justify a "colorblind" interpretation of the Clause and the restrictions on race-conscious admissions which, when narrowly tailored, seek to further both purposes.[15] The Court's propensity to marshal forward unsupported theories of how race-conscious programs operate was also wholly unsupported by the record in both cases and contradicted substantial social science research.[16]

We then demonstrate how *Harvard* is not likely to work and will cause significant negative jurisprudential and real-world consequences.[17] Although the decision only involved race-conscious admissions, the Court's misinterpretation of the Equal Protection Clause and by extension Title VI of the Civil Rights Act, led to a plethora of lawsuits and threatening letters to employers, law firms, nonprofits, graduate schools, states, and

12. *See infra* Part II. The *Harvard* Decision.

13. *See* Ramos, 140 S. Ct. at 1414–15 (Kavanaugh, J., concurring) (delineating the three "broad considerations"); *see infra* Part I. Stare Decisis in the Supreme Court.

14. *See* Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (noting the *Grutter* strict scrutiny standard); *see also infra* Part II. The *Harvard* Decision.

15. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 396–402 (1978) (Marshall J., concurring) (contending that neither the Fourteenth Amendment nor case law prohibit "race-conscious remedial measures"); *see also* Robert A. Sedler, *Beyond* Bakke*: The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L. L. REV. 133, 135–41 (1979) (discussing systemic racial inequality in American society and promoting "governmental action to overcome the lasting effects of racism in the United States").

16. *See* LEGAL DEF. FUND ET AL., AFFIRMATIVE ACTION IN HIGHER EDUCATION: THE RACIAL JUSTICE LANDSCAPE AFTER THE *SFFA* CASES 14–15 (2023) (discussing the testimony of experts, as well as current and former Harvard employees and students, all of whom concurred that having a racially diverse student body was critical to the college experience and noting that "[n]o members of SFFA nor any student testified in support of SFFA's claims").

17. *See infra* Part III. Harvard is Egregiously Wrong.

municipalities, among others.[18] These lawsuits and threats will only compound the difficulties colleges already face in recruiting, enrolling, and graduating racially diverse students, which in turn, will lead to real-world negative consequences.[19] These negative consequences include a decreased capacity to engage with a diverse citizenry, downticks in workforce innovation, and the lack of preparation of professionals to meet the demands of a multiracial society.[20]

Under the final *Ramos* prong, we argue how *Harvard* is likely to unduly upset reliance interests by groups such as employers, health care, military defense, and many others that rely on colleges to produce students who become critically-thinking citizens who can serve important functions within our society and democracy.[21] While the current Court is not likely to revisit its decision, proponents of racial equality may want to consider how future challenges may look like to upend *Harvard* and restore fair and just opportunity for historically marginalized people of color as intended under the Equal Protection Clause.

I. STARE DECISIS IN THE SUPREME COURT

Stare decisis helps preserve the legitimacy of the Court because the doctrine binds the Court to the rule of law rather than swings in the political pendulum.[22] Thurgood Marshall decried the dangers of decisions being based on the configuration of the Court stating:

18. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 198 n.2 (2023) (noting that Title VI is examined under the same lens as Equal Protection Clause); *see, e.g.,* GIBSON DUNN, DEI TASK FORCE UPDATE (2023), https://www.gibsondunn.com/dei-task-force-update/ [https://perma.cc/3LE2-MKY8] (discussing how attacks on DEI have permeated a myriad of aspects of life and industry).

19. *See, e.g.,* DUNN, *supra* note 18 (identifying an onslaught of cases since the SFFA decision).

20. *See, e.g.,* Natalie Runyon, *How to Address DEI Concerns of White Men Who Feel They're Being Disadvantaged*, THOMSON REUTERS (Sep. 30, 2022), https://www.thomsonreuters.com/en-us/posts/news-and-media/addressing-dei-concerns/ [https://perma.cc/JN8M-X7EQ] (listing the importance of DEI efforts and insinuating the damages if these efforts cease).

21. *See infra* Part IV. *Harvard* is Already Resulting in Significant Negative Jurisprudential and Real-World Consequences and its Effects Will Only be Compounded.

22. *See* Stare Decisis, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[T]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation"); *see also* Precedent, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[D]ecided case that furnishes a basis for determining later cases involving similar facts or issues"); *see also* Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 484 (discussing the importance of *stare decisis*).

> "[S]trong presumption of validity" to which "recently decided cases" are entitled "is an essential thread in the mantle of the protection that the law affords the individual . . . It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law."[23]

The Supreme Court has inconsistently approached *stare decisis* over the years.[24] Indeed, in the late 1990s, Justice Scalia argued that "the doctrine of stare decisis has appreciably eroded."[25] Statistics demonstrate how the Warren, Burger, and Rehnquist Courts all overruled prior decisions at a rate that far outpaced the rate of sitting courts in the earlier years of Supreme Court history.[26] During the early years of the Warren Court, the Court frequently revisited precedents that curtailed civil rights and civil liberties, but adherence to *stare decisis* intensified as those justices continued on the bench.[27] For instance, the Warren Court took a more relaxed approach to *stare decisis* when broadening the Court's interpretation of Fifth Amendment jurisprudence to establish "Miranda rights" for criminal suspects.[28] However, just a few years later when President Nixon appointed several new justices to the Court, members of the former Warren Court vehemently opposed undoing *Miranda v. Arizona* on precedential grounds.[29]

23. *Payne v. Tennessee*, 501 U.S. 808, 852–53 (1991) (Marshall, J., dissenting) (citations omitted).

24. *See, e.g.,* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 645 (1999) (highlighting Supreme Court decisions that use *stare decisis*).

25. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* THE TANNER LECTURES ON HUMAN VALUES 79, 87 (Grethe B. Peterson ed., 1997) (noting the importance of *stare decisis* in the context of the common law and statutory construction dichotomy).

26. *C.f.* Christopher P. Banks*, The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends,* 75 JUDICATURE 262, 263 tbl.1 (1992) (showcasing that over fifty-six percent of the reversals from 1789 to 1991 occurred between 1953 and 1991, and that just under thirty-four percent occurred between 1969 and 1991*)*.

27. *See id*. (emphasizing the stare decisis actions of the Warren court)*; see also* ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 74–75 (1972); *see also* Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis,* 62 WM. & MARY L. REV. 83, 134–137 (2020) (opining on the deterioration of *stare decisis* after recent Supreme Court decisions).

28. *See id*. (noting that the Court failed to a mention *stare decisis* throughout the entire opinion) (citing *Miranda v. Arizona,* 384 U.S. 436, 467–69, 479 (1966)).

29. *See id*. at 136 (highlighting how later Justices attempted to erode Miranda without deference to precedent).

Although the Roberts Court overruled prior rulings at a much lower rate than the Rehnquist, Burger, or Warren Courts, the role of politics looms large as the political climate outside the Court is similarly evident.[30] This Court occasionally ignored or misapplied *stare decisis* regarding some of the highest-profile questions of civil rights and civil liberties.[31] For example, *Dobbs v. Jackson Women's Health Organization* represented an opportunity for the Court to assure the public of its legitimacy by relying on years of precedent.[32] Yet, through tortured logic, the Court undermined that trust by overruling *Roe v. Wade* and *Planned Parenthood v. Casey*.[33]

When visiting precedent, the Court also applied various approaches.[34] In *Brown v. Board of Education*, no particular framework was used but the Court examined the profound, negative impact the "separate-but-equal" doctrine had on Black people for over fifty years in their decision to reverse *Plessy v. Ferguson*.[35] In *Ramos*, the Court overruled its prior decision in *Apodaca v. Oregon*, thus requiring unanimous verdicts in serious criminal cases.[36] The *Ramos* majority considered the "quality of

30. *See* Adam Liptak, *The Supreme Court's Mixed Record on Adhering to Precedent*, N.Y. TIMES (Jan. 29, 2024), https://www.nytimes.com/2024/01/29/us/supreme-court-precedent-chevron.html [https://perma.cc/5AXG-29X2] (explaining that the Warren Court overruled just over three precedents per term, the Burger Court overruled precedent at a rate of almost three-and-a-half precedents per term. The number dropped to just under two-and-a-half precedents per term under Chief Justice Rehnquist, and the Roberts Court has overruled precedents at a rate of just over one-and-a-half per term, the lowest rate between the four courts).

31. *See* Douglas Keith, *A Legitimacy Crisis of the Supreme Court's Own Making*, BRENNAN CTR. (Sep. 15, 2022), https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making [https://perma.cc/PQ6U-8EJ3] ("By deciding questions it doesn't have to, making major decisions via unexplained orders, and tainting key rulings with ethical lapses, last term's decisions give the public reason to think the Court is not saying what the law is, but what the justices personally prefer it to be.").

32. *See id.* (outlining recent Supreme Court decisions and particularly the opinions by Justice Brennan).

33. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–65 (2022) (highlighting how a lack a deference to precedent undermines public trust in the Court).

34. *See generally* Gentithes, *supra* note 26 (describing various approaches to stare decisis employed by the Supreme Court over the course of several decades).

35. *See* Brown v. Board of Educ., 347 U.S. 483, 494–95 (1954) ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law . . .."); *see also* Plessy v. Ferguson, 163 U.S. 537, 545 (1896) (offering reasons why the Court believed it would be beneficial to separate children in schools based on the importance of social norms).

36. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) (recognizing the cost of justice in the efforts to avoid retroactively applying Mr. Ramos's remedy for a Sixth Amendment violation

the reasoning"; its "consistency with related decisions"; "legal developments" since the decision; and "reliance interests."[37] Justice Kavanaugh's concurrence recognized a three-part test that will be used in this comment to examine the *Harvard* decision under stare decisis below: (1) whether the prior decision was egregiously wrong; (2) whether the decision has caused significant negative jurisprudential or real-world consequences; and (3) whether overruling the decision would unduly upset reliance interests.[38]

II. THE *HARVARD* DECISION

Facing a potential loss in both the Fifth Circuit and the U.S. Supreme Court in *Fisher v. University of Texas at Austin*, Edward Blum—the architect and financial backer of *Fisher*—went back to the drawing board.[39] He formed "Students for Fair Admissions" (SFFA) in 2014 to create a membership organization that not only allowed him to use disgruntled Asian American students and parents as a wedge in challenges to race admissions altogether, but also helped conceal the identity of participating students; thus encouraging more students to get engaged.[40]

In 2014, SFFA filed two lawsuits on the same day, against the oldest private and public universities, Harvard and The University of North

to this individual and other criminal defendants; thus clarifying the case-in-chief error as anything but harmless); *see also* Apodaca v. Oregon, 406 U.S. 404, 413–14 (1972) (rejecting the argument that "minority groups" will not be adequately represented on a jury panel and thus will be outvoted by their counterparts).

37. *See* Ramos, 140 S. Ct. at 1405 (discussing different aspects of the majority decision).

38. *Compare id*. at 1414–15 (advocating that the three considerations create a "structured methodology" when approaching a decision whether or not to overrule precedent), *with* Dobbs, 597 U.S. at 218–21 (considering the same five following factors that were previously used in *Roe v. Wade*: nature of the error, quality of reasoning, workability, effects on other areas of law, and reliance).

39. *See* Kali Holloway*, Inside the Cynical Campaign to Claim That Affirmative Action Hurts Asian Americans*, THE NATION (Aug. 9, 2023), https://www.thenation.com/article/society/affirmative-action-asian-americans/ [https://perma.cc/G6EJ-HLLB] (determining that Blum's Plaintiff, Fisher, a White woman, made for a "poor litigant" because her grades were lower than many other White individuals in her class who were also rejected from The University of Texas at Austin); *see also* Fisher v. Univ. of Tex. at Austin, 579 U.S. 369, 377 (2016) (*Fisher II* – previously before the court in 2013) (holding that The University of Texas met its burden of proving that their admissions policy at the time Fisher was rejected was narrowly tailored to meet its crucial educational needs).

40. *E.g.*, *id.* (quoting Blum in an online speech given in 2015: "I needed Asian plaintiffs.").

Carolina at Chapel Hill (UNC), respectively.[41] Like *Fisher*, both lawsuits challenged the universities' respective admissions programs as running afoul of the strict scrutiny standards of *Grutter* and *Fisher I*.[42] Unlike *Fisher*, both lawsuits sought to eliminate race-conscious admissions and prohibit admissions officers from learning the race and ethnicity of applicants.[43]

Following the extensive trials in each case, the federal district courts upheld the lawfulness of the universities' admissions programs.[44] SFFA appealed *Harvard* to the First Circuit and that Court affirmed the lower court's 2020 ruling.[45] While SFFA's petition for writ of certiorari was pending in *Harvard*, the district court in the *UNC* case issued its ruling.[46] SFFA then appealed the *UNC* ruling to the Fourth Circuit and quickly

41. Hinojosa & Bonadies Torres, *supra* note 3, at 1786 (examining the remedies for both cases to "enjoin the consideration of race in admissions altogether.").

42. *Compare* Hinojosa & Bonadies Torres, *supra* note 3, at 1790 (breaking down the high case summaries of allegations and remedies sought in both of Blum's lawsuits against Harvard and UNV), *with* Fisher II, 579 U.S. at 375 (arguing that the consideration of race as a factor in its admission decisions violated Fisher's Fourteenth Amendment rights under the Equal Protection Clause), *and* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (requiring the school's policy to be narrowly tailored to a compelling government interest of diversity in higher education), *and* Fisher v. Univ. of Tex. at Austin, 570 U.S. 300, 314–15 (2013) (*Fisher I* – appearing before the Court first in 2013 and later revisited in 2016) (reaffirming the strict scrutiny standard established under *Grutter*).

43. Hinojosa & Bonadies Torres, *supra* note 3, at 1777–87 (describing how SFFA's case against Harvard also claimed that the University intentionally discriminated against Asian American students *vis-à-vis* White students); *see also* Cara McClellan, *When Claims Collide: Students for Fair Admissions v. Harvard and the Meaning of Discrimination*, 54 LOY. U. CHI. L.J. 1, 6–12 (2023) (discussing in-depth the evidence and arguments of the intentional discrimination claim against Harvard).

44. *See* Findings of Fact and Conclusions of Law, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176), *rev'd*, 600 U.S. 181 (2023) (dismissing SFFA's claim to eliminate race-conscious admission because the Court was bound to the *Gutter* decision); *see also* Findings of Fact and Conclusions of Law, *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-954), *aff'd*, 980 F.3d 157 (2020), and *rev'd*, 600 U.S. 181 (2023) (preserving SFFA's claim for appeal); *accord* Hinojosa & Bonadies Torres, supra note 3, at 1791 (discussing the lower court rulings and the processes leading up to briefing and arguments in the Supreme Court).

45. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157, 204 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023) (focusing on allegations that Harvard University's admissions process discriminates against Asian-American applicants).

46. *E.g.,* SFFA Findings of Fact and Conclusions of Law, *supra* note 44, at 580 (holding originally that the University of North Carolina's use of race in the admissions process wasn't violative of the Equal Protections Clause).

sought review by the Supreme Court prior to a determination of the appeal.[47] The Supreme Court granted review in both cases and set the oral argument for October 31, 2022.[48]

On June 29, 2023, the Supreme Court issued its opinion, combining its review of both cases in one decision.[49] In striking down the admissions programs, the Court held that the compelling interests in the benefits of diversity in higher education, asserted by the respective universities, were too imprecise to measure and insufficiently coherent to meet the demands of strict scrutiny.[50]

The Court further held that the universities' programs were not narrowly tailored.[51] The Court found that the racial categories employed by both universities, such as "Asian" for broad differences among Eastern and Southern Asians, were "plainly overbroad" while others were imprecise.[52] The majority also found that universities must use race as a negative factor because the admissions program is a "zero-sum" game; if race can be considered a "plus" for some, then it must be disadvantageous for others.[53] The Court also ruled that race-conscious admissions were

47. *E.g.*, Petition for a Writ of Certiorari Before Judgment Filed, at 2–4, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (No. 21-707) (displaying both the motion to expedite briefing of the petition for writ of certiorari before judgment filed and the official petition for writ of certiorari by petitioner SFFA taking place on November 11, 2021).

48. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. at 198 (granting certiorari on January 24, 2022); *accord* Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896, 896 (2022) (considering whether promoting diversity on campus constituted a compelling interest that justified the use of race in its admissions process).

49. *See* Harvard, 600 U.S. at 231 (". . . [T]he student must be treated based on his or her experiences as an individual—not on the basis of race."); *see also* LEGAL DEFENSE FUND ET AL., AFFIRMATIVE ACTION IN HIGHER EDUCATION (2023) chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.naacpldf.org/wp-content/uploads/2023_09_29-Report.pdf [https://perma.cc/GKF6-BGCS] (utilizing the expertise of well-known civil rights leaders to provide a thorough legal history about affirmative action in higher education).

50. *See* Harvard, 600 U.S. at 352 (". . . Harvard's and UNC's policies are unconstitutional because they serve objectives that are insufficiently measurable, employ racial categories that are imprecise and overbroad, rely on racial stereotypes and disadvantage nonminority groups, and do not have an end point.").

51. *See id.* at 213 (reaffirming that a university may not use race as a stereotype regarding admissions programs).

52. *See id.* at 216 (arguing that the admissions process implicitly stereotyped Asian American applicants by categorizing them as one homogenous group).

53. *See id.* at 218–20 (considering how the perceived negative treatment of Asian American applicants influenced admissions decisions that potentially resulted in lower acceptance rates for this racial group despite their academic success).

reinforcing racial stereotypes.[54] Finally, the Court concluded that race-conscious programs must have a "logical end point" and that neither Harvard College nor the University of North Carolina at Chapel Hill had sufficiently identified such an endpoint.[55]

SFFA asked the Court to go further and censor admissions officials from becoming aware of any applicant's race.[56] However, Chief Justice Roberts refused to go that far, recognizing that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[57] While the Court did not restrict the consideration of race in other programs and services, the Court specifically recognized that race-conscious programs may be lawful in other circumstances, including those needed to remedy discrimination, ensure safety, and potentially satisfy the distinct interests of the military academies.[58]

III. *HARVARD* IS EGREGIOUSLY WRONG

In SFFA's opening merits brief, it urged the Supreme Court to interpret the Equal Protection Clause in a manner that would require colorblindness in all applications to outlaw any permissible race-conscious

54. *See id.* (reinforcing the idea that race-based admission would detrimentally affect racial groups across campuses, particularly in Asian Americans).

55. *See id.* at 221 (recognizing that the Constitution's Equal Protection Clause commands that the citizens be treated "as individuals, not as simply components of a racial, religious, sexual or national class.").

56. Hinojosa & Bonadies Torres, *supra* note 3, at 1801 ("Such relief . . . could perversely penalize applicants who wish to reference their race to fully express their prior experience[.]").

57. *See* Press Release, U.S. Dep't of Just. and U.S. Dep't of Educ., Questions and Answers Regarding the Sup. Ct.'s Decision in *Students for Fair Admissions, Inc. v. Harvard Coll. and Univ. of N.C.* at 2–3 (Aug. 14, 2023), https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf [https://perma.cc/Y5K6-HWHR] (discussing various ways colleges may consider racial experiences of student applicants for admissions).

58. *See generally id*. (recognizing that "seeking to enroll diverse student bodies can further the values of equality of opportunity embedded in the Fourteenth Amendment"); *see also* Hassan Kanu, *Affirmative-Action Foe's Military Lawsuits are Flawed, But Does That Matter?*, REUTERS (Oct. 26, 2023), https://www.reuters.com/legal/government/column-affirmative-action-foes-military-lawsuits-are-flawed-does-that-matter-2023-10-26/ [https://perma.cc/5RQ5-N5R3] (noting that SFFA has since sued the Naval Academy and West Point challenging their race-conscious admissions programs).

program.[59] SFFA's biggest hurdle, of course, was that the Court places a heavy burden on challengers to *stare decisis* to demonstrate "something more than 'ambiguous historical evidence'" to overrule precedent, yet it had no support for its encouraged ruling.[60] In 2003, the Supreme Court affirmed the consideration of race as a factor in holistic admissions for universities seeking the educational benefits of diversity in *Grutter v. Bollinger*.[61] The Court applied *Grutter* twice in *Fisher I* and *Fisher II*, and other decisions acknowledged that race may be considered under certain circumstances.[62]

Undeterred, SFFA marshaled forward its arguments, citing dissenting opinions over thirty times in its opening merits brief, including several dissents in admissions cases.[63] With a newly constituted majority of conservative justices since *Fisher II*, the Supreme Court took the bait and sought to hamstring if not end voluntary affirmative action programs, and accordingly, did not directly overrule *Grutter* and never applied any *stare decisis* framework.[64] However, the Court severely undermined *Grutter*, making it much more difficult for universities to engage in race-conscious

59. *See generally* Brief for Petitioner at 50–51, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (No. 20-1199); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S.Ct. 896 (2022) (No. 21-707) (referring to the Fourteenth Amendment which provides the principle that "free government demands the abolition of all distinctions founded on color and race.").

60. *See* Gamble v. United State*s,* 139 S. Ct. 681, 691 (2019) (echoing that this is standard required to "overrule several major decisions of this Court.").

61. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (adopting the framework which reasoned that "to be narrowly tailored, a race-conscious admissions program cannot use a quota system . . .") (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

62. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 300, 303 (2013) (*Fisher I* – appearing before the Court first in 2013 and later revisited in 2016) (concluding that the Court of Appeals "did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter*); *see also* Fisher v. Univ. of Tex. at Austin, 579 U.S. 381 (2016) (*Fisher II* – previously before the court in 2013) (holding that although the Court affirmed the University's admission policy, the University should still continue to refine, deliberate and reflect on its admissions policies); *see generally* David Hinojosa ET AL., *Brief for Respondent-Students*, 4 N.C. CIV. RTS. L. REV. 3, 28–29 (2023) (considering whether the Court should overrule a line of cases to "prohibit universities from considering race" in the admissions process).

63. *See* SFFA Brief for Petitioner, *supra* note 59, at 4; *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S.Ct. 896 (2022) (No. 21-707) (citing to one dissenting opinion stating "[o]ur nation gave its word over and over again [. . .]that all persons shall be treated Equally.").

64. *See* Harvard, 600 U.S. at 343–352 (Sotomayor, J., dissenting) ("[I]t is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*.").

admissions.[65] The Court's decision, however, was poorly supported by both the record and the law, opening up its vulnerability for a future court to upend *Harvard*.[66]

A. The Supreme Court's Distorted History of the Equal Protection Clause

The Court premised its heightened proscription of race-conscious admissions on its one-sided review of the history of the Equal Protection Clause of the Fourteenth Amendment, concluding that "[e]liminating racial discrimination means eliminating all of it."[67] For example, the Court cited a supplemental brief from the United States —not the opinion itself—in *Brown v. Board of Education* for its supposition that "[t]he Constitution . . . 'should not permit any distinctions of law based on race or color.'"[68] The Court further referenced arguments and other supplemental briefs in *Brown* in concluding that the Equal Protection Clause does not allow state actors to "use race as a factor in affording educational opportunities among its citizens" and that "the Constitution is color blind."[69] For a majority that purportedly embraces originalist theory, it barely mentioned any of the actual history concerning the congressional arguments on the Fourteenth Amendment.[70] Probably for good reason.

The historical record indicates that Congress had two intentions in enacting the Fourteenth Amendment: to end the subjugation of Black people by the states and to ensure that equality of opportunity would be

65. *See generally* Students for Fair Admissions vs. Harvard Univ., LAWYERS' COMM. FOR CIV. RTS. UNDER L., https://www.lawyerscommittee.org/students-for-fair-admissions-vs-harvard-university/ [https://perma.cc/S284-54YF] (providing a timeline summarizing key documents and events regarding *Students for Fair Admissions v. Harvard Univ.*).

66. *See* Harvard, 600 U.S. at 343–352 (Sotomayor, J., dissenting) (contrasting the majority's narrowly tailoring analysis with the record).

67. *Compare* Harvard, 600 U.S. at 206 (recognizing that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color"), *with* Harvard, 600 U.S. at 387–94 (Jackson, J., dissenting) (discussing in-depth the history of Equal Protection Clause).

68. *See* Harvard, 600 U.S. at 202 ("[D]etailing the history of the adoption of the Equal Protection Clause.").

69. *See id.* at 204 (pointing to the decision held by the Court in *Brown* that "the right to a public education must be made available to all on equal terms").

70. *See id.* at 201–8 (explaining that precedents "have identified only two compelling interests that permit resort to race-based government action").

realized for Black people.[71] History further demonstrates that Congress did not aspire for colorblindness but rather intended to permit the enactment of race-conscious measures to ensure equality of opportunity by people who were denied those opportunities as a result of being enslaved for well over two centuries.[72] In a vote of 7 to 38, Congress rejected proposed colorblind language that provided, in part, "no State . . . shall . . . recognize any distinction between citizens . . . on account of race or color or previous condition of slavery."[73]

Soon after the states ratified the Fourteenth Amendment, Congress passed several more bills intending to benefit not just formerly enslaved Black people, but also already-freed Black people.[74] This legislation included the Freedmen's Bureau Act of 1866 that provided support for the education of Black children,[75] programs providing financial support to Black women and children,[76] and the 1867 Colored Servicemen's Claims Act.[77]

The Court's treatment of *Brown v. Board* was particularly appalling. Though *Brown* was presented with "colorblind" arguments, the ruling did

71. *See* Evan Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 4 (2021) (exploring the framer's intent behind the Equal Protection Clause and its application for Black Americans); *see also* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 275–81 (1997) (outlining the rejected proposals by the 39th Congress to outlaw race-based state actions).

72. *E.g.,* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (exemplifying the intent of Congress in its debate over the Amendment to protect some forms of race-based distinctions).

73. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866) (documenting the debate over rejected language later injected by the courts); *see also* Joseph E. Holliday, *Daniel D. Pratt: Senator and Commissioner*, 58.1 IND. MAGAZINE OF HISTORY, 17–51 (1962) (transcribing Senator Pratt's acknowledgment that "[the Fourteenth Amendment] had special reference to the colored race")

74. *See generally* Schnapper, *supra* note 72, at 754–83 (exploring the later efforts by the same Congress at remedying past injustices through legislation).

75. *See, e.g., id*. at 772–75 (identifying one such piece of the aforementioned equalizing legislation).

76. *See, e.g.,* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430 (1997) (citing Act of July 28, 1866, Ch. 296, 14 Stat. 310 (1866)) (citing to additional legislation attempted at equalizing Black Americans through Congress).

77. *See, e.g.,* 1867 Colored Servicemen's Claims Act, Res. 25, 40th Cong., 15 Stat. 26 (1867) (providing yet another example of the efforts of Congress via legislation to remedy past inequities); *see also* Brief for Constitutional Accountability Ctr. as Amicus Curiae Supporting Respondents, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707) (discussing the full history around the Fourteenth Amendment and race-conscious programs such as the aforementioned legislation).

not adopt them.[78] In striking down the racial exclusion of Black students from white-only schools, the *Brown* Court recognized the dual roles of racial integration and cross-racial dialogue as critical for building the foundation of an educated citizenry.[79] Citing *Brown* in support of its ruling, *Grutter* also noted how race-conscious admissions sought to bring students across races together to achieve the benefits of integrated education without excluding any students on the basis of their race.[80] The present Court's suggestion that *Brown* supports the exclusion of highly qualified Black and Brown students, who are often overlooked in the normative admissions process, turns *Brown* on its head.[81] As civil rights giant Ted Shaw recently articulated, "Brown was once hallowed, and now has been hollowed."[82]

B. The Court's Drastic Errors in Strict Scrutiny Analysis

The Court's spurious interpretation of the Equal Protection Clause was not the only grievous error it committed.[83] Perhaps driven by its own biased, the mistaken notion that students were admitted based on their race alone, the Court concluded that the educational benefits of diversity

78. *See generally* Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 203-06, 215-18 (2008) (ruling based in, "the belief that racial classifications by the government are prohibited by the Equal Protection Clause of the Fourteenth Amendment.").

79. *See* LEGAL DEF. FUND ET. AL., *supra* note 16, at 9 (analyzing the history of *Brown* and its role in current cases of race-based determinations); *see also* Students for Fair Admissions v. President and Fellows of Harvard Coll., 143 S. Ct. 2141, 2231–34 (2023) (Jackson, J., dissenting) (analogizing history of *Brown* and *Grutter*).

80. *Compare* Brown v. Board of Edu., 347 U.S. 483, 494 (1954) (contrasting the harm caused by segregated schooling against the benefits of the integrated school system), *with* Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (recognizing the important benefits of students learning in a "racially diverse educational setting" through integration); *see also* Transcript of Oral Argument at 116–17, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (No. 21-707) ("Brown attempted to shut down this nation's terrible caste system, but stark racial inequalities persisted and stunted this nation's growth. Enter *Bakke* and *Grutter*, which have helped universities open the doors of opportunities to highly qualified students of color, who are often overlooked in the process that typically undervalues their talents and perspectives.").

81. *See generally* Schmidt, *supra* note 78, at 203–06 (revealing the core of the *Brown* decision as one permitting such distinctions where necessary, not forbidding them altogether).

82. *See* David Hinojosa ET. AL., Panel Address at Williams College, Access to Higher Education: Considering the Supreme Court's Decision (Aug. 10, 2023) (Notes on file with David Hinojosa).

83. *See* Students for Fair Admissions v. President and Fellows of Harvard Coll., 143 S. Ct. 2141, 2175 (2023) (holding against the intentions and precedent of both the *Brown* Court and the 39th Congress in granting advancing opportunities to Black Americans).

sought by the universities were not sufficiently measurable to satisfy strict scrutiny and thus the universities failed to meaningfully connect the means employed with their diversity goals.[84]

But the Court rejected those same arguments just seven years prior in *Fisher II*.[85] The lower courts found the same, citing expert testimony and documentary evidence in the record showing how UNC and Harvard were measuring such benefits.[86] Nevertheless, the majority held that the benefits were not sufficiently measurable for judicial review, citing no evidentiary support for such a ruling.[87]

The Court further strayed from its own precedent, concluding that the universities were impermissibly using race as a negative or stereotype.[88] But the evidence presented in the courts below demonstrated that race could only be used as a "plus" and only on an individualized basis.[89] That perspective flows logically from a ruling *permitting* the limited consideration of race.[90] Furthermore, there was no evidence demonstrating that race was used to admit students of a certain race or ethnicity because they held the same, specific belief or viewpoint.[91] Instead, there was abundant testimony and evidence from students of color, among others, demonstrating that when there are fewer students of color, these students are

84. *See id*. at 2175 (adopting a view that the current Court is not satisfied under strict scrutiny with the merits of diversity goals).

85. *See generally id*. at 2245 (Jackson, J., dissenting) (listing dissents in *Fisher II* and that Court's resounding rejection of such an argument against race-based policies in college admissions).

86. *See, e.g.,* SFFA Findings of Fact and Conclusions of Law, *supra* note 44, at 591–92 (M.D.N.C. 2021), *aff'd*, 980 F.3d 157 (1st Cir. 2020), and *rev'd* Harvard, 143 S. Ct. 2141 (concluding that UNC's proffered benefits are sufficiently measurable as they are able to be measured qualitatively and quantitatively, satisfying strict scrutiny).

87. *See* Students for Fair Admissions v. President and Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) (holding against the alleged measurability but providing no record citations to the lower courts' rulings supporting the thesis that they were reached in error).

88. *See id*. at 2168–70 (lamenting the college's act of lumping together students of vastly unique and singular Middle Eastern countries as an act of stereotyping).

89. *See id*. at 2243, n.28 (Sotomayor, J., dissenting) (evaluating the math conducted by the lower court as to whether race-based admissions considerations provided a net reduction of Asian student admittance but produced a net increase in minority students overall).

90. *See generally* LEGAL DEF. FUND ET. AL., *supra* note 16, at 10 (reviewing the *Bakke* decision and Justice Powell's advice that strict scrutiny could be satisfied for race-based college admissions where the purposes met a legitimate governmental interest).

91. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 219–220 (2023) (rejecting the ideology that members of minority groups "always (or even consistently) express some characteristic minority viewpoint" on any given issue).

treated as the spokespersons for their race or ethnicity.[92] Conversely, when there are more students of a particular racial or ethnic group, it allows for broader perspectives.[93] *Grutter*, itself, recognized that "diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."[94]

Finally, the Court concluded that the universities failed to articulate a logical endpoint, and that tying racial balancing to the educational benefits of diversity is prohibited under the Constitution.[95] Yet, SFFA never brought a racial balancing claim against UNC.[96] Unlike *Grutter*, the Court failed to account for the continuing barriers facing underrepresented students of color and shortcut the 25-year endpoint for race-conscious admissions predicted by Justice O'Connor in 2003.[97]

IV. *HARVARD* IS ALREADY RESULTING IN SIGNIFICANT NEGATIVE JURISPRUDENTIAL AND REAL-WORLD CONSEQUENCES AND ITS EFFECTS WILL ONLY BE COMPOUNDED.

The Supreme Court's misguided colorblind interpretation of the Equal Protection Clause in *Harvard* is already leading to significant negative jurisprudential and real-world consequences, which will likely be

92. *See, e.g.,* Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580, 592–94 (M.D.N.C. 2021) (questioning the assumption that members of minority groups will provide diverse viewpoints in academic spaces)

93. *See generally id*. at 592–94 (reporting that research and studies have presented evidence that racial and ethnic diversity creates the benefits sought by universities).

94. *See* Grutter v. Bollinger, 539 U.S. 306, 332–333 (2003) (expressing a need for heterogenous student bodies that reflect society at large); *see also* Uma M. Jayakumar ET AL., *Brief of 1,246 American Social Science Researchers and Scholars as Amici Curiae in Support of Respondents*, 4 N.C. CIV. RTS. L. REV. 64, 68–72 (2023) (referencing "a 2010 longitudinal study using survey data collected at nine public universities demonstrates that racially diverse college settings can mitigate the lingering effects of precollege segregation")

95. *See* Harvard, 600 U.S. at 219–220 (holding that the Equal Protection Clause mandates the government to treat citizens as individuals, rather than merely members of a specific racial or ethnic group).

96. *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, (2020) (holding that juries should reflect the diverse communities that they serve); *see also* Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580, 586 (M.D.N.C. 2021) (identifying claims before the district court).

97. *See* Harvard, 600 U.S. at 369 (Sotomayor, J., dissenting) (regarding the expectations of the *Grutter* majority to be merely aspirational statements).

compounded in the years ahead.[98] While *Harvard* only concerns admissions, its rationale is being applied by several extremist groups challenging educational opportunities for historically marginalized people of color in other facets of higher education (including diversity, equity, and inclusion programs) and k-12 school admissions.[99]

Concurrently, the extremist groups are attempting to apply *Harvard* to equal protection jurisprudence across several areas of law, including Section 1981 and Title VII.[100] For instance, in *American Alliance for Equal Rights v. Fearless Fund Management,* the American Alliance for Equal Rights has argued that Fearless Fund Management, a Black women-run company focused on providing grant funding to businesses started by women of color, allegedly excluded at least one White member of the Alliance from applying for a grant because of their race in violation of 42 U.S.C. § 1981.[101] In 1866, Congress created 42 U.S.C. §1981 primarily to protect people of color from being economically exploited in business contracts, yet the Fearless Fund lawsuit attempts to weaponize Section 1981 against the very groups it was meant to protect relying, in part, on Harvard.[102]

98. *See, e.g.,* DUNN, *supra* note 18 (describing several cases challenging race-conscious or race-based programs across sectors that rely, in part, on Harvard decision); *see also* Jonathan Berry, *Implications for Philanthropy: U.S. Supreme Court Ruling on Affirmative Action in Higher Education*, PHILANTHROPY ROUNDTABLE (Aug. 10, 2023) https://www.philanthropyroundtable.org/wp-content/uploads/2023/08/SFFA-Implications-Brief.pdf [https://perma.cc/6QZQ-TPHU] (predicting that the Court's ruling in *Harvard* will have a negative impact philosophy programs nationwide).

99. *See* DUNN, *supra* note 18 (targeting higher education, K-12 education, diversity, equity and inclusion (DEI) programs, employment, contracting, and programs that primarily aim to support minority students).

100. *See generally id*. (noting that advocacy groups have focused specifically on law firms as the targets of legal challenges).

101. *See* Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 1:23-CV-3424-TWT, 2023 WL 6295121, at *1 (N.D. Ga. Sept. 27, 2023) (noting the factual background of the suit).

102. *See* Brief of Lawyers' Committee for Civil Rights Under Law and Six Organizations as *Amicus Curiae*, *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 1:23-CV-3424-TWT, 2023 WL 6295121, at *1, *6–7 (N.D. Ga. Sept. 27, 2023) (recalling the historical significance of §1981 and its creation); *accord* Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 1:23-CV-3424-TWT, 2023 WL 6295121, at *7 (N.D. Ga. Sept. 27, 2023) (explaining the original intent of Section 1981 and some of the seminal Section 1981 cases like the education case, *Runyon v. McCrary,* 427 U.S. 160, 173 (1976), and the employment discrimination case, *CBOCS W., Inc v. Humphries*, 533 U.S. 442, 450-51 (2008)).

Anti-civil rights advocates have also used *Harvard* to threaten and discourage institutions and companies from engaging in DEI programs.[103] Following *Harvard,* several law firms were sued because of their diversity fellowship programs meant to increase the pipeline for Black and Brown attorneys and other underrepresented groups.[104] Some of these law firms pulled their diversity programs in response to the lawsuits and external pressures.[105] Additionally, several Republican state Attorney Generals and congressional members issued statements and letters urging corporations to stop the use of affirmative action policies in hiring.[106] SFFA also published a letter to university officials with a list of demands that rejected consideration of race in college admissions.[107] Many

103. *See generally* Scott Jaschik, *Students for Fair Admissions Sends Email with Demands to 150 Colleges,* INSIDE HIGHER ED. (July 12, 2023), https://www.insidehighered.com/news/quick-takes/2023/07/12/students-fair-admissions-sends-demands-150-colleges [https://perma.cc/5P7K-M3JY] (pressuring public and private colleges and universities to abandon diversity, equity, and inclusion efforts in favor of race neutral academic settings).

104. *Compare* Darreonna Davis, *Two Law Firms Sued Over DEI Programs After Affirmative Action Overturned,* FORBES (Aug. 22, 2023), https://www.forbes.com/sites/darreonnadavis/2023/08/22/two-law-firms-sued-over-dei-programs-after-affirmative-action-overturned/?sh=22b20eb51322 [https://perma.cc/8UWT-KUJ5] (reporting that some law firms were eagerly defending their diversity pipeline programs against legal challenges) *with* Nate Raymond, *Anti-affirmative Action Activist Targets 3 More Law Firms' Diversity Fellowships,* REUTERS (Oct. 12, 2023), https://www.reuters.com/legal/legalindustry/anti-affirmative-action-activist-targets-3-more-law-firms-diversity-fellowships-2023-10-12/ [https://perma.cc/75NT-NS2J] (considering legal action against law firms with diversity initiative programs).

105. *See generally* Jeff Green & Kelsey Butler, *Corporate America is Rethinking Diversity Hiring as Legal Challenges Rise,* BLOOMBERG (Nov. 22, 2023), https://www.bloomberg.com/news/articles/2023-11-22/corporate-diversity-becomes-next-dei-target-after-us-supreme-court-decision [https://perma.cc/H54B-XR66] ("America First Legal – founded by Stephen Miller, a former senior adviser to President Donald Trump – has lodged complaints with the US Equal Employment Opportunity Commission against more than 20 companies.")

106. *See* Sarah Fortinsky, *GOP Attorneys General Urge Corporations Against Using Affirmative Action to Hire, Promote,* THE HILL (July 13, 2023), https://thehill.com/homenews/state-watch/4096749-gop-attorneys-general-urge-corporations-against-using-affirmative-action-to-hire-promote/#:~:text=Thirteen%20Republican%20attorneys%20general%20wrote,affirmative%20action%20in%20college%20admissions [https://perma.cc/W9UW-HT8L] (warning businesses to move away from promoting diversity in hiring practices under threat of legal action); *but see* David Hood, *Democratic AGs Pledge Legal Cover for Companies' Diversity Goals,* BLOOMBERG L. (July 19, 2023), https://news.bloomberglaw.com/esg/democratic-ags-pledge-legal-cover-for-companies-diversity-goals [https://perma.cc/HRN5-TGAP] (promising "legal defense to companies whose diversity, equity and inclusion initiatives face challenges by Republican officials")

107. *See* Jaschik, *supra* note 103 (noting a list of demands from SFFA to colleges and universities); *see also* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, CRITICAL POINTS OF AFFIRMATIVE ACTION AND RESPONSE TO BLUM LETTER 2–3 (2023) https://www.lawyerscommittee.org/wp-content/uploads/2023/07/FINAL-Open-Letter-re-SFFA-July-12-Letter.pdf

colleges and universities viewed these as attempts to bully or intimidate them into going beyond the changes necessary under the decision, which would further impair diversity goals.[108]

In the context of K-12 education, similar attacks are underway to use *Harvard* to undercut race-neutral admissions programs that help diversify schools.[109] In *Coalition for TJ v. Fairfax County School Board,* the Fairfax County School Board was sued by a group of public-school parents and children arguing that the magnet high school's race-neutral admissions policy discriminated against Asian American children in violation of the Fourteenth Amendment's Equal Protection Clause.[110] The school's admissions policy was amended to help mitigate socioeconomic challenges and provide opportunities for students at all of Fairfax County's public middle schools.[111] In the plaintiff's petition for certiorari and in several supporting amicus briefs, they repeatedly cite *Harvard* to argue that the race-neutral admissions policy should be enjoined merely because the Board noted that its prior admissions policy had disparately impacted the admission of several student groups, including Black, Brown, and low-income students.[112] But as the Fourth Circuit found, race is not

[https://perma.cc/Y8SF-5W2K] (issuing a responsive letter to colleges and universities to dispel myths about *Harvard* and its implications for college and university admissions that also encouraged them to prioritize diversity and opportunity).

108. *See, e.g*., Eric Hoover, *SFFA Urges Colleges to Shield "Check Box" Data About Race from Admissions Officers,* CHRON. OF HIGHER EDUC. (July 12, 2023), https://www.chronicle.com/article/sffa-urges-colleges-to-shield-check-box-data-about-race-from-admissions-officers#:~:text=The%20letter%20also%20instructed%20colleges,promulgate%20new%20admissions%20guidelines%20that [https://perma.cc/665C-X8ZA] (reassuring colleges and universities that "[n]o one should mistake SFFA's letter for a list of legal commandments handed down from on high").

109. Lydia Wheeler, *High School Poses New Race and Admissions Challenge for Justices,* BLOOMBERG L. (Aug. 22, 2023), https://news.bloomberglaw.com/us-law-week/affirmative-action-proxies-a-test-for-high-school-admissions [https://perma.cc/CK2A-WGBW] (extending litigation aimed at suppressing diversity efforts in education to K-12 programs); David Hinojosa, *K-12 Schools Remain Free to Pursue Diversity Through Race-Neutral Programs*, 32 POVERTY & RACE RSCH. COUNCIL 5, 6 (2023) (allowing K-12 schools to "adopt general policies to encourage a diverse student body, one aspect of which is its racial composition").

110. *See generally* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, (4th Cir. 2023) (holding that Asian American students were not disproportionately impacted by the use of Affirmative Action practices in this instance).

111. *See generally* Brief in Opposition at 1, *Coal. for TJ v. Fairfax Cnty. Sch. Bd*., 68 F.4th 864 (4th Cir. 2023) (No. 23-170), *cert denied,* 218 L. Ed.2d 71 (2024) (explaining the admissions policy of Thomas Jefferson High School for Science and Technology).

112. *See* Petition for Writ of Certiorari at 2, *Coal. for TJ v. Fairfax Cnty. Sch. Bd*., 218 L. Ed. 2d 71 (No. 23-170) (portraying Fairfax County School board as "consumed with transforming

a criterion in the current policy and, therefore, plaintiffs must demonstrate intentional discrimination under *Arlington Heights*, which they ultimately failed to prove.[113]

Harvard is also resulting in negative real world consequences.[114] Colleges and universities across America are already treading carefully when it comes to creating admissions prompts and applications that comport with *Harvard*, but these practices are having a demonstrable effect on underrepresented students of color applying to colleges.[115] In holding that "[n]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life," Justice Roberts was quite clear—colleges can consider a student's racial experiences in the context of their application.[116] But Justice Roberts further complicated considerations of race when he said, "Many universities have for too long…concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin"[117] Justice Roberts refers to these challenges as a "benefit" to students of color who "overcame racial

the racial composition of [Thomas Jefferson High School for Science and Technology]"); *see also* Brief of *Amicus Curiae* of The Equal Protection Project in Support of Petitioner at 5, *Coal. for TJ v. Fairfax Cnty. Sch. Bd*., 68 F.4th 864 (4th Cir. 2023) (No. 23-170), *cert denied*, 218 L. Ed.2d 71 (2024) (requesting the Supreme Court to grant certiorari and make clear that racial discrimination under race neutral policies is unlawful under *Harvard*); *see also* Brief *Amicus Curiae of* Center for Equal Opportunity at 4, *Coal. for TJ v. Fairfax Cnty. Sch. Bd*., 68 F.4th 864 (4th Cir. 2023) (No. 23-170), *cert denied,* 218 L. Ed.2d 71 (2024) (arguing that Thomas Jefferson High School for Science and Technology's admissions policies violate the Equal Protection Clause and does not serve a compelling governmental interest); *see also* Brief of the American Civil Rights Project, Manhattan Institute, and Hamilton Lincoln Law Institute as Amici Curiae Supporting the Petitioner at 3, *Coal. for TJ v. Fairfax Cnty. Sch. Bd*., 68 F.4th 864 (4th Cir. 2023) (No. 23-170), *cert denied*, 218 L. Ed.2d 71 (2024) ("The Fourth Circuit instructs every racialist decisionmaker in America how to mask discrimination to defeat judicial scrutiny. That unworthy act threatens, practically, to undo this Court's course correction in [*Harvard*].").

113. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd*., 68 F.4th 864, 883 (4th Cir. 2023) (recognizing policy as not only "race-neutral, [but also] fully race-*blind*") (*emphasis* in original).

114. *See generally* Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your 'Identity,'* N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html [https://perma.cc/LKY8-TJAR] (last updated Aug. 18, 2023) (exploring how "life experience" essay topics have replaced former methods of race identification in college applications).

115. *See* Hartocollis & Edmonds, *supra* note 114 (revealing that colleges are exploring essay prompts that allow a student to share racial experiences in light of the constitutional ban).

116. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2176 (2023).

117. *Id*.

discrimination."[118] These statements seemingly erroneously cast racism as a surmountable obstacle that an individual student can overcome before college rather than both a systemic and interpersonal force that people of color experience throughout their entire lives.[119] The confusion about how to interpret lines like these from the decision have forced many colleges to consult lawyers to ascertain the acceptable line between a permissible essay prompt and a potentially unlawful one, and several colleges are interpreting that line differently.[120] *Harvard* has created a landmine of legal liability for colleges and universities seeking a workable race-neutral alternative to their previous race-conscious policies.[121]

As a result of contradictory and misleading policies and practices, Black and Hispanic applicants, among other people of color, will likely be overlooked in race-neutral application processes because normative admissions criteria often fail to account for their uniquely racialized experiences.[122] When using socioeconomic status as a proxy for race, institutions give fuel to false stereotypes that Black and Latino families are impoverished.[123] If colleges and universities adopt or lean toward completely race-blind policies, this will result in an untenable situation for students of color who will struggle to parse what portions of their stories

118. *See* id. at 2176 ("[A] student must be treated based on his or her experiences as an individual—not on the basis of race.").

119. *See generally* Hartocollis & Edmonds, *supra* note 114 (quoting a high school senior from Maryland: "I've definitely been talking about my racial identity and also my gender because as an Asian American woman, that shaped a lot of how I view the world and the struggles that I've faced.").

120. *See id*. (explaining that one attorney, Ishan K. Bhabha, has advised many colleges on the constitutionality of their essay prompts and several have differed on the risk they are willing to take with the language they will take).

121. *See id*. (detailing new essay prompts, such as John Hopkins University's, that include disclaimers that state, "[the information] will be considered by the university based solely on how it has affected your life and your experiences as an individual").

122. *See* Adewale A. Maye, *The Supreme Court's Ban on Affirmative Action Means Colleges Will Struggle to Meet Goals of Diversity and Equal Opportunity,* ECON. POL'Y INST. (June 29, 2023, 4:29 PM), https://www.epi.org/blog/the-supreme-courts-ban-on-affirmative-action-means-colleges-will-struggle-to-meet-goals-of-diversity-and-equal-opportunity/ [https://perma.cc/7QPJ-HDK6] (noting that universities that previously banned affirmative action have a poor history of producing meaningful diversity in their incoming classes).

123. *See* Brief for Admissions and Testing Professionals as Amici Curiae Supporting Respondents, *Students for Fair Admissions at 6, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199 and 21-107) (explaining that opponents of race-based admissions value a "colorblind" system).

and racialized experiences they can speak to in their applications.[124] In short, many students of color will believe they cannot present their whole selves in their application materials.[125] As Justice Sotomayor explained in her dissent as she quoted one Black Harvard student, "to try to not see [their] race is to try to not see [them] simply because there is no part of [their] experience, no part of [their] journey, no part of [their] life that has been untouched by [their] race."[126]

Harvard presents a reality for college and university admissions officers that will likely further prove to be unworkable as it relates to achieving the compelling interest of dynamic and diverse student bodies where ideas and perspectives flow freely.[127] In *Fisher I,* the Court noted, "the reviewing must be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[128] Ultimately the Court found that UT Austin attempted to implement every race-neutral policy that it could exhaust before adopting a race-conscious admissions policy.[129] *Harvard* would place universities all over America in the similar position of attempting race neutral policies that ultimately will not likely produce the educational benefits of diversity, as evidence by many social science studies demonstrates.[130]

124. *See id.* at 16–17 (predicting that "race-neutral" admissions would permit reviewers to consider an applicant's involvement in non-racial organizations and completely ignore volunteerism in race-based organizations).

125. *See* Hartocollis & Edmonds, *supra* note 114 (sharing the testimony of college applicants who are unsure about how much to reveal about their race on applications).

126. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023) (Sotomayor, J., dissenting) (quoting J.A. Vol. II of IV at 932, *SFFA*, 143 S. Ct. 2141 (No. 20-1199)).

127. *See* William C. Kidder, *How Workable are Class-Based and Race Neutral Alternative at Leading American Universities?,* 64 UCLA L. Rev. 100, 131 (2016) (identifying a series of social science studies that displayed the unworkability of race-neutral alternatives).

128. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013) (*Fisher I* – appearing before the Court first in 2013 and later revisited in 2016).

129. *See* Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 649 (5th Cir. 2014), *cert. granted,* 579 U.S. 365 (2016) (*Fisher II* – previously before the court in 2013) (explaining that despite the efforts UT Austin to implement race-neutral admissions, minority representation among incoming classes stagnated from 1998–2004).

130. *Compare* Kidder, *supra* note 127, at 131 (identifying a series of social science studies that displayed the unworkability of race-neutral alternatives) *with* Emma Bowman *Here's What Happened When Affirmative Action Ended at California Public Colleges,* NPR (June 30, 2023, 5:01 AM), https://www.npr.org/2023/06/30/1185226895/heres-what-happened-when-affirmative-action-ended-at-california-public-colleges [https://perma.cc/HZ2Q-5FSQ].

V. *HARVARD* WILL LIKELY UPSET RELIANCE INTERESTS

Harvard, indeed, presents a true threat to numerous democratic institutions that depend on universities to cultivate a diverse cohort of graduates.[131] For example, many employers in a free market rely on a social climate and workforce in which its citizens developed tools to engage and understand one another across races and beliefs.[132] Facilitating diverse classrooms where there is a free exchange of ideas and perspectives "helps to break down racial stereotypes, and enables students to better understand persons of different races."[133] These reliance interests are substantial. As the Supreme Court recognized, "[e]ffective participation by members of all racial and ethnic groups in the civil life of our Nation" is made easier by their access to and participation in higher education.[134] Social science research convincingly demonstrates that student body diversity plays a vital role in preparing students to become professionals who can engage meaningfully in an increasingly diverse workforce and society.[135] Research additionally demonstrates that students in diverse

131. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181, 379 (2023) ("Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially diverse college graduates to crucial professions.").

132. *See* Brief for Major American Business Enterprises as *Amici Curiae* Supporting Respondents at 27–31*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3130774 ("Increasing racial diversity helps all students normalize experiences with peers (and future colleagues) of different backgrounds, thereby breeding inclusivity. Those experiences then benefit the businesses where those students will work, and the clients and customers whom they will serve.").

133. *See* Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 381 (2016) (*Fisher II* – previously before the court in 2013) (quoting *Grutter v. Bollinger,* 539 U.S. 306 at 330).

134. *See* Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (emphasizing the importance of "[e]ffective participation" as "essential if the dream of one Nation, indivisible, is to be realized").

135. *See* Brief of the American Educational Research Association ET AL. as *Amici Curiae* in Support of Respondents at 4, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3108870 (referencing *Grutter v. Bollinger*, 539 U.S. 306 at 330, by stating "numerous studies show that student body diversity promotes learning outcomes . . . and better prepares them as professionals"); *see also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 24 (1998) (finding that students from "professional schools – regularly stress that much of what they gained from their education experience came from what they learned from their fellow students"); *and* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 63 (Gary Orfield & Michal Kurlaender ed. 2001) ("[R]acial diversity may promote the potentially compelling goal of producing well-educated professionals to practice in underserved areas."); *see generally* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 11 (Daria Witt, James Jones, Kenji Hakuta, Mitchell J. Chang eds. 2003 ("To what extent can students receive a meaningful

academic environments experience enhancements in cognitive capabilities and critical thinking skills.[136] One study focused on the impact of diversity over a decade past a student's undergraduate years and found that exposure to diversity during college positively influenced their personal development, sense of mission, capacity to recognize racism, and propensity for volunteering.[137]

In *Ramos,* the Court affirmed the notion that we, as a society, share an "interest" in the "preservation of our constitutionally promised liberties."[138] These reliance interests are socially held assumptions about the law that are concrete, knowable, and important to the stability of our society and democracy.[139] The potential loss of various advantages to our workforce carries profound implications for our society at large.[140] For instance, studies prove that students who graduate from diverse institutions and enter the workforce demonstrate improved decision-making and problem-solving skills.[141] Further, companies that implement pro-diversity policies are found to be more innovative, even when the economy is down.[142] In the medical field, research has unveiled that a multitude of health disparities impacting Black and Latino communities, such as Black maternal mortality rates, could be mitigated to some degree

education that prepares them to participate in an increasingly diverse society if the student body . . . [is] not diverse?").

136. *See generally* Brief of the American Educational Research Association ET AL. as *Amici Curiae* in Support of Respondents, *supra* note 135, at 11 (referencing effects of student body diversity on cognitive growth).

137. *See id*. at 16 (highlighting the "long-term advantages of these types of benefits").

138. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) (referring to the "reliance interests of the American people" regarding the Sixth Amendment).

139. *See* William N. Eskridge, Jr. & John Garver, *Reliance Interests in Statutory and Constitutional Interpretation*, 76 Vanderbilt L. Rev. 681, 689 (2023) (noting "reliance arguments usually cut both ways, and the relative weight of those interests will be influenced, often decisively, by the judge's perspective").

140. *Cf.* Brief for Major American Business Enterprises as *Amici Curiae* Supporting Respondents at 15*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3130774 (using a Harvard Business Review article to show that an increase of diversity in the workforce "improves business outcomes").

141. *See* Brief for Major American Business Enterprises as *Amici Curiae* Supporting Respondents at 6–7*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3130774 ("[R]acial diversity improves creativity, the flow of ideas and information, and the accuracy of information used to generate ideas and solutions.").

142. *See id*. (emphasizing the growth and stability companies can experience when they have "pro-diversity policies").

through the enhancement of diversity in medical education and practice.[143] Within the legal profession, the prohibition of race-conscious admissions policies would affect the ability of aspiring lawyers to recognize racial bias within themselves and to eradicate stereotypes from their perceptions of the world.[144] Consequently, this diminishes lawyers' ability to participate in the legal system and public policy impartially, thereby impeding the administration of justice.[145] In essence, the disruption of diversity on college and university campuses has potential material consequences for the life prospects, health, and justice outcomes of American citizens, and democracy more broadly.[146] If the Court opts to overturn *Harvard*, it could reverse these detrimental impacts on critical industries and service providers.[147]

CONCLUSION

The Court's failure to properly interpret the law and weigh the facts may very well put the decision in the crosshairs of future proponents should the Court's composition change. As Justice Sotomayor stated in her dissent,

> [i]n 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

143. *See* Brief for *Amici Curiae* Association of American Medical Colleges ET AL. in Support of Respondents at 12, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3036400 (drawing from studies that show a "racially diverse care team can produce measurably positive health outcomes for minority patients . . ..").

144. *See* Brief for the American Bar Association as *Amicus Curiae* in Support of Respondents at 20–21, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3108796 (reiterating a quote by Former Justice Ruth Bader Ginsburg that states "[a] system of justice is . . . [is] "poorer," . . . if its members-its lawyers, jurors, and judges-are all cast from the same mold").

145. *See id*. at 8 (inferring how "implicit biases" of attorneys' can could "adversely affect" the justice system).

146. *See* DUNN, *supra* note 18 (discussing impacts of targeting DEI efforts within life and industry).

147. *See id*.

> or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.[148]

148. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181, 318 (2023).