

**MEMORANDUM FOR MANAGING BOARDS AND ADMINISTRATORS OF
INSTITUTIONS OF HIGHER EDUCATION**

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RE: Use of Race in College and University Admissions Policies

The Defense of Freedom Institute for Policy Studies (“DFI”), a national nonprofit organization dedicated to protecting the civil and constitutional rights of Americans at school and work, has prepared this memorandum analyzing the impact of the U.S. Supreme Court’s decisions in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*¹ and *Students for Fair Admissions, Inc. v. University of North Carolina et al.*² (“*Harvard* and *UNC* cases”) on the use of race, color, national origin, or ethnicity³ as a factor in admissions by institutions of higher education (“IHEs”).⁴

THE APPLICABLE LAW

Section 1 of the Fourteenth Amendment to the U.S. Constitution reads, in pertinent part, as follows: “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵ This constitutional guarantee applies to the rules and policies established and implemented by state-supported IHEs.

Title VI of the Civil Rights Act of 1964 provides that “[n]o person in the United States shall, on the ground of race, be excluded from participation in, be denied the benefits of, or be subjected to

¹ No. 20-1199 (Jun. 29, 2023).

² No. 21-707 (Jun. 29, 2023).

³ Subsequent references in this memorandum to race include color, national origin, and ethnicity. Issues of discrimination on the basis of sex or other characteristics were not before the Court in the *Harvard* and *UNC* cases.

⁴ The purpose of this memorandum is to educate the general public about the legal impact of the *Harvard* and *UNC* cases. Nothing in this document should be construed as creating an attorney-client relationship with any person, organization, or institution.

⁵ U.S. CONST. amend. XIV, § 1.



discrimination under any program or activity receiving Federal financial assistance,”⁶ thus extending racial antidiscrimination protections to public and private IHEs receiving federal funding, including federal student aid programs.

The Supreme Court recognized in the *Harvard* and *UNC* cases, as it has in past decisions, that the protections of the Equal Protection Clause and Title VI extend to the same conduct;⁷ therefore, courts evaluate the programs and activities of private IHEs under the same Equal Protection Clause-based standards to which public IHEs are subject.

THE SUPREME COURT’S DECISION IN THE *HARVARD* AND *UNC* CASES

In the *Harvard* and *UNC* cases, the Supreme Court considered whether each university’s use of race as a factor in student admissions decisions violated the Equal Protection Clause’s guarantee against racial discrimination.⁸ The Court first found that their use of race as a factor in admissions must be evaluated under “strict scrutiny,” “a daunting two-step examination” in which the Court must first ask “whether the racial classification is used to further compelling governmental interests” and then inquire “whether the government’s use of race is narrowly tailored—meaning necessary—to achieve that interest.”⁹

With regard to the first question, Chief Justice John Roberts, writing for the Court, found that the interests asserted by Harvard and UNC in pursuing their race-based admissions programs—such as “training future leaders,” “preparing graduates to adapt to an increasingly pluralistic society,” “better educating . . . students through diversity,” and “enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes”—are not “sufficiently coherent” for the purpose of evaluating whether they satisfy strict scrutiny.¹⁰ Unlike interests the Court has accepted as compelling outside the education contexts—remediating specific instances of past discrimination and serious safety risks in prisons¹¹—the interests asserted were “inescapably imponderable,” making measuring the goals themselves or whether the IHE has fulfilled them practically impossible.¹²

⁶ 42 U.S.C. § 2000d.

⁷ *Harvard & UNC*, slip op. at 6 n.2 (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of title VI. . . . We accordingly evaluate Harvard’s admissions program under the standards of the Equal Protection Clause itself.”) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003)) (internal quotations marks omitted).

⁸ *Id.* at 39.

⁹ *Id.* at 15 (internal quotation marks omitted) (quoting *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312 (2013)).

¹⁰ *Id.* at 23 (internal quotation marks omitted).

¹¹ *Id.* at 15 (citing *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007); *Shaw v. Hunt*, 517 U.S. 899, 909–910 (1996); *Johnson v. California*, 543 U.S. 499, 512–513 (2005)).

¹² *Id.* at 24.



The Court next determined that Harvard and UNC had failed to meet the “narrow tailoring” prong of strict scrutiny because their “admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue.”¹³ Specifically, the process these universities used to assign students to various “imprecise,” “arbitrary,” and “undefined” racial categories, such as “Asian” and “Hispanic,”¹⁴ created an impermissible “mismatch between the means [the universities] employ and the goals they seek.”¹⁵

The Court also concluded that the Harvard and UNC admissions programs unconstitutionally and unlawfully used race as a “negative” for some students by providing a benefit to some applicants but not for others in the “zero-sum” scenario of college admissions.¹⁶ This use relied on racial stereotypes—the “demeaning assumption that [students] of a particular race, because of their race, think alike.”¹⁷

Finally, the Court held that the challenged admissions programs violated its requirement in *Grutter v. Bollinger* that such programs have a “logical end point.”¹⁸ On the contrary, the Court found that Harvard and UNC’s programs “effectively assure[] that race will always be relevant . . . and that the ultimate goal of eliminating race as a criterion will never be achieved.”¹⁹

Because both admissions 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,” the Court held that they “cannot be reconciled with the guarantees of the Equal Protection Clause” and struck them down.²⁰

IMPLICATIONS OF THE DECISION FOR RACE-BASED ADMISSIONS POLICIES

The unmistakable consequence of the Supreme Court’s decision in the *Harvard* and *UNC* cases is that, in performing strict scrutiny analysis of any race-based admissions program at an IHE, courts are no longer permitted to accept asserted interests related to the benefits of racial diversity as “compelling,”²¹ no matter how effectively an IHE might claim to have tailored its admissions program to that goal. Furthermore, in line with past cases, the Court indicated that it will not accept

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 26.

¹⁶ *Id.* at 27.

¹⁷ *Id.* at 29 (internal quotation marks omitted) (quoting *Miller v. Johnson*, 515 U.S. 900, 911–912 (1995)).

¹⁸ *Id.* at 31 (internal quotation marks omitted) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003)).

¹⁹ *Id.* at 32–33 (internal quotation marks omitted) (quoting *City of Richmond v. J.A. Croson*, 488 U.S. 469, 495 (1989)).

²⁰ *Id.* at 39.

²¹ *See supra* note 12.



an IHE’s interest in remedying the effects of broad, societal discrimination as a compelling justification for pursuing a race-based admissions policy.²²

All state-supported IHEs and private institutions in receipt of federal financial assistance must cease any consideration of an applicant’s race as a factor in admissions decisions. Due to the “zero-sum” nature of the admissions process, IHEs must immediately halt such programs without regard to whether these factors are applied as a “plus” or a “minus” to some applicants.

CONSIDERATION AND TRACKING OF RACE AND ETHNICITY IN ADMISSIONS PROCESSES

In his opinion for the Court in the *Harvard* and *UNC* cases, Chief Justice Roberts wrote that “[e]liminating racial discrimination means eliminating all of it.”²³ Any attempt by an institution to bypass the decision by engaging in pretextual conduct, such as pretending to apply a facially neutral policy while obtaining information on race and using it to advantage certain applicants and disadvantage others, is as forbidden as implementing an openly race-based admissions program.

The Chief Justice’s opinion included the following limitations on how IHE admissions offices can obtain and use information about an applicant’s race during the admissions process:

[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, be it through discrimination, inspiration, or otherwise. . . . A benefit to a student who overcame racial discrimination, for example, must be tied to *that student’s* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual’s identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.²⁴

These instructions are unambiguously aligned with the Court’s holding: IHEs must only consider an applicant’s individual experiences and skills and the challenges *that* specific applicant has faced in the admissions process without reference to that applicant’s race. *Harvard* and *UNC* conclusively foreclose any consideration of an applicant’s race on its own as a “plus” or “minus” in the admissions process.

²² *Harvard & UNC* at 34–36.

²³ *Id.* at 15.

²⁴ *Id.* at 39–40.



The Common Application, a standard, online college application form used by over 900 IHEs,²⁵ has announced that beginning on August 1, 2023, it will allow institutions “to hide (that is, ‘suppress’) the self-disclosed race information from application PDF files for both first-year and transfer applications.”²⁶ Thus, with the start of the 2023–24 admissions cycle, IHEs participating in the Common Application will have a critical compliance tool available to them that will shield information on an applicant’s race and ease compliance with the Court’s ruling.²⁷

While continuing to collect such data for general research purposes does not run afoul of the Court’s decision, requiring or permitting admissions offices to solicit, record, store, or use racial information from applicants during the admissions process is plainly at odds with the Court’s decree that race no longer be used as a factor in admissions decisions. Simply put, the only reason an admissions office might use such information on race as it determines whether to admit students to the IHE is to subvert the Supreme Court’s unambiguous holding in these cases.

IHE administrators and managing boards should thus instruct their admissions offices not to solicit, record, store, or use any data regarding the race of an applicant. Moreover, they should direct their institutions to take any opportunity to suppress race self-disclosed by applicants and prospective students in applications and other materials. Any institutional data collection and reporting on race should be performed by personnel other than those in the admissions office and not disclosed to admissions staff.

Administrators and managing boards should also direct their admissions offices not to request, solicit, or direct applicants and prospective students to provide, such as through application essays, recommendations, admission inquiries, or other requirements, information to admissions staff concerning their race. To the extent that application or other materials include unsolicited information about the race of the applicant or prospective student, admissions offices must only consider such information to the extent that it reflects on the experiences of the specific applicant as an individual and not use the student’s race as a factor in the admissions process.

CONCLUSION

Although the *Harvard* and *UNC* cases mark the end of judicially sanctioned race-based admissions policies at IHEs, the facially neutral policies that replace them will likely serve as a flashpoint for

²⁵ The Princeton Review, Guide to the Common Application, <https://www.princetonreview.com/college-advice/common-application> (last visited Jul. 20, 2023).

²⁶ Common App, Common App and Equitable Admissions, <https://www.commonapp.org/race-in-admissions> (last visited Jul. 20, 2023).

²⁷ Students for Fair Admissions, which brought the litigation in the *Harvard* and *UNC* cases, agrees with the legal soundness of exercising this option. See Eric Hoover, *SFFA Urges Colleges to Shield “Check Box” Data About Race From Admissions Officers*, CHRON. OF HIGHER ED., Jul. 12, 2023, https://www.chronicle.com/article/sffa-urges-colleges-to-shield-check-box-data-about-race-from-admissions-officers?sra=true&cid=gen_sign_in.



litigation over whether such policies are based on racially discriminatory motives and thus violate the standards of the Equal Protection Clause. If [DFI](#) can be of assistance in the development of admissions policies that comply with Supreme Court precedent in this area, please contact Robert S. Eitel at robert.eitel@dfipolicy.org or Paul Zimmerman at paul.zimmerman@dfipolicy.org.