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STUDENTS FOR FAIR ADMISSIONS v. HARVARD: HOW THE UNITED STATES SUPREME COURT REINFORCED BARRIERS TO EQUAL PROTECTION WHILE LEAVING OPEN THE POSSIBILITY OF BREAKING DOWN THOSE BARRIERS

BY NANCY L. ZISK *

I. INTRODUCTION

In its recent decision, *Students for Fair Admissions v. Harvard College* (“*SFFA*”), the United States Supreme Court reinforced the structure of systemic racism that has been woven into the fabric of this country since colonial times.¹ Just as contractors add steel and cement girders to keep building structures standing, the Court strengthened the system that has protected white people and disadvantaged people of color throughout this country’s history when it invalidated the race-conscious admissions programs used by Harvard College and the University of North Carolina (“UNC”).² As Justice Sotomayor observed in her dissenting opinion, the Court’s opinion “*cements* a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.”³

“The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality” at the hands of a government actor.⁴ Title VI of the Civil Rights Acts of 1964 codified the same guarantee as applied to nongovernment actors.⁵ Neither require any actor to be

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¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

² *See id.* at 2166 (invalidating the admissions plans because each University’s goals for achieving student body diversity could not “be subjected to meaningful judicial review”).

³ *Id.* at 2226 (Sotomayor, J., dissenting) (emphasis added).

⁴ *Id.* at 2225; U.S. CONST. amend. XIV, § 1.

⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a). *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (“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.”); *Gutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment” (alteration in original) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., plurality opinion)); *See also* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284-85, 293-94 (1978) (Powell, J., plurality opinion) (discussing the history of the Civil Rights Act and the Fourteenth Amendment’s protection of all persons). Currently, Title VI of the Civil Rights Act of 1964

blind to race, but the Court grounded its decision on the premise that the Constitution (and by extension, Title VI) is “color-blind.”⁶ The Supreme Court held that the race-conscious admissions programs adopted by Harvard College and UNC violated the guarantee of equal protection and, therefore, cannot stand.⁷ To reach this decision, the Court effectively overruled two earlier decisions validating race-conscious admissions plans.⁸ The Court ignored the fact that this country has used race as the basis for exclusion and mistreatment since white colonists kidnapped Africans, enslaved them, and created a system that established their inferior status and remains entrenched in society today.⁹ This system, built on both conscious and implicit considerations of race, has gained attention in recent years as “structural” or “systemic” racism and invites the analogy to steel and cement girders in the structures, both physical and systemic, that this country has built.¹⁰ In fact, this country’s most enduring structures, including the White House and the United States Capitol Building, were literally built by people the founders of this country enslaved.¹¹ By ignoring the barriers preventing African Americans from enjoying the same opportunities that white people have

states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Civil Rights Act of 1964, 42 U.S.C. § 2000d.

⁶ *SFFA*, 143 S. Ct. at 2175 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); *See also id.* at 2188 (2023) (Thomas, J., concurring) (explaining that “[p]roperly understood, our precedents have largely adhered to the Fourteenth Amendment’s demand for colorblind laws.”).

⁷ *Id.* at 2154, 2175. The Court invalidated the admissions programs at both the University of North Carolina (UNC) and Harvard on the grounds that they violated the Fourteenth Amendment’s guarantee of equal protection. *Id.* at 2175. In fact, the force of the Equal Protection Clause only applies to UNC, given that the Clause only applies against state actors and UNC is a public university. Title VI applies to Harvard, but, as the Court explained, both the Equal Protection Clause and Title VI protect the same interest. *Id.* at 2156-57, n.2; *See also supra*, note 5 (citing previous Supreme Court cases making this distinction clear).

⁸ *See Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2214-25 (2016) (validating admissions plans); *Grutter*, 539 U.S. at 343 (validating admissions plans).

⁹ As recognized by Justice Jackson in her dissent in *SFFA*, “[o]ur country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented ‘intergenerational transmission of inequality’ that still plagues our citizenry.” *SFFA*, 143 S. Ct. at 2264 (Jackson, J., dissenting).

¹⁰ *See, e.g.,* Melia Thompson-Dudiak, *The Black Maternal Health Crisis: How to Right A Harrowing History Through Judicial and Legislative Reform*, 14 DEPAUL J. FOR SOC. JUST. 1, 22-26 (2021).

¹¹ *See* Press Release, National Archives, Slaves Built the White House and Capitol – See the Records (Dec. 10, 2008), <https://www.archives.gov/press/press-releases/2009/nr09-28-images.html>.

enjoyed since this country was founded, and invalidating race-conscious plans that have been used by many of this nation's colleges to place applicants "on the same footing" when competing for seats in a class,¹² the Court has reinforced the structure that makes it harder for people of color to enjoy the same opportunities as their white counterparts.¹³ Importantly, however, after its emphatic insistence that the race-conscious plans guiding Harvard and UNC violated the guarantee of equal protection, the Court invited applicants to talk openly about their race and how it has affected their lives.¹⁴ Whether the Court intentionally left open the possibility that college admissions officers could and would consider race, the Court's invitation for students to discuss it leads the careful observer to conclude that colleges may, and will, continue to consider the race of each applicant to ensure that student body diversity is achieved.

This article examines the racial barriers that have been erected to subjugate African Americans from the time this country was comprised of British colonies and continue to permeate every aspect of our society today, and considers how the Supreme Court's decision reinforces the structures those barriers built. Part II defines structural racism and discusses how it has historically affected and still today affects access to the very basic needs to which all Americans are entitled, including health care, employment, and education.¹⁵ Part III examines the Supreme Court's prior decisions recognizing the importance of student body diversity in education and how it helps to dismantle this structure.¹⁶ Part IV reviews the Court's recent decision in *SFFA*¹⁷ and Part V considers the impact the decision will have on the system in which

¹² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J., plurality opinion).

¹³ Although the barriers discussed in this article were erected specifically to subjugate African Americans, they apply with equal force to other people of color and explain the disparities they face in education, health care, and employment. *See infra* Part II. Because much of the debate around race-conscious admissions programs have focused on the effect the programs have on Asian Americans, it should be noted that Asian immigrants and their descendants have enjoyed advantages over "multigenerationally oppressed minorities" on which this paper focuses for many reasons, including the fact that they or their parents or grandparents were invited to the United States as educated professionals to fill the country's needs in fields of science and technology. *See* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 246-47 (2022). When referring to the people from Africa who came as enslaved people or their descendants, this article will use the term African Americans or Black people, but when addressing the larger problem of racism, the article will refer more generally to "people of color" which may include people from Central America and South America.

¹⁴ *SFFA*, 143 S. Ct. at 2176.

¹⁵ *See infra* Part II.

¹⁶ *See infra* Part III.

¹⁷ *See infra* Part IV.

racism and discrimination are entrenched.¹⁸ Part VI concludes that the Court's decision reinforces the barriers that people of color have faced throughout this country's history, but also invites the applicants themselves to share their race and how it has affected their lives, thereby limiting the impact of the decision.¹⁹

II. STRUCTURAL RACISM AND THE BARRIERS TO EQUALITY IN HEALTH CARE, EMPLOYMENT, AND EDUCATION

Structural racism is a “societal web of social, economic, and governmental practices, systems, and policies, that advantages people classified as white and disadvantages those classified as people of color.”²⁰ In stark contrast to the picture of a color-blind society the majority of the Justices painted in the Court's recent decision in *SFFA*, discussed below, throughout this country's history a person's race has defined who that person was and the privileges that person would or would not have.²¹ As described in 1978 by Justice Marshall in *Regents of University of California v. Bakke*: “Three hundred and fifty years ago, the [African American] was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights.”²² While in bondage, enslaved people literally built the buildings that house the federal government, including the White House and the Capitol.²³ Their free labor in the colonies and newly formed states made it possible for slave holders to endow the oldest and most prestigious universities, including Harvard, Yale, Princeton, and the University of Virginia.²⁴

¹⁸ See *infra* Part V.

¹⁹ See *infra* Part VI.

²⁰ Thompson-Dudiak, *supra* note 10, at 3 (internal quotation marks and citations omitted).

²¹ John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 819 (2000) (positing that because the status of “white person” determined the rights that one would have in the United States during much of the nation's history, “[w]hiteness was transformed into a material concept imbued with rights and privileges”).

²² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–88 (1978) (Marshall, J. concurring in part and dissenting in part). Justice Marshall used the term “Negro” when referring to an African American because that was the term commonly used at the time that he wrote his concurring opinion. This article will replace that word with “African American” when quoting him or others writing at that time.

²³ Press Release, National Archives, *supra* note 11.

²⁴ Stephen Smith & Kate Ellis, *Shackled Legacy: History Shows Slavery Helped Build Many U.S. Colleges and Universities*, APM REPS. (Sept. 4, 2017), <https://www.apmreports.org/episode/2017/09/04/shackled-legacy>; *accord SFFA*, 143 S. Ct. at 2226 (Sotomayor, J., dissenting) (“American society was structured around the profitable institution that was slavery . . .”).

Defining the rights of the people of this country, the Constitution of the United States considered African Americans as property, not citizens, protecting the “Migration or Importation” of slaves²⁵ and ensuring the return of slaves to their owners if they escaped.²⁶ The Framers also made clear that African Americans were less than white people, counting them as only “three-fifths of a person” for apportioning representatives and taxes among the States.²⁷ As observed by Justice Marshall in *Bakke*, the Framers of the Constitution made it plain that “‘we the people,’ for whose protection the Constitution was designed, did not include those whose skins were the wrong color.”²⁸ Education was also denied.²⁹ As observed by Justice Sotomayor: “Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority, Southern States sought to ensure slavery’s longevity by prohibiting the education of Black people, whether enslaved or free.”³⁰

Government-sanctioned discriminatory practices continued for decades after the founding of this country, until the close of the Civil War in 1865 and the passage of the Thirteenth Amendment, when slavery was abolished.³¹ It took another three years before the formerly enslaved people were recognized as citizens and guaranteed the “equal protection of the laws.”³² Unequal treatment, however, continued and was no less a part of society’s structure than it was when slavery was government-sanctioned, as Justice Thomas himself observed:

Soon after the Thirteenth Amendment’s adoption, the reconstructed Southern States began to enact ‘Black Codes,’ which circumscribed the newly won freedoms of blacks. The Black Code of Mississippi, for example, imposed all sorts of disabilities on blacks, including limiting their freedom of movement and barring them from following certain occupations, owning firearms, serving

²⁵ U.S. CONST. art. I, § 9, cl. 1.

²⁶ U.S. CONST. art. IV, § 2, cl. 3.

²⁷ U.S. CONST. art. I, § 2, cl. 3.

²⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 389 (1978) (Marshall, J. concurring in part and dissenting in part).

²⁹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2226 (2023) (Sotomayor, J., dissenting).

³⁰ *Id.*

³¹ U.S. CONST. amend. XIII, § 1.

³² U.S. CONST. amend. XIV, § 1.

on juries, testifying in cases involving whites, or voting.³³

Indeed, the “so-called ‘Black Codes’ discriminated against Black people on the basis of race, regardless of whether they had been previously enslaved.”³⁴ Writing for the Court in *SFFA*, Chief Justice Roberts summarized this historical truth: “For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm.”³⁵

The Court itself reinforced this systemic discrimination, and Chief Justice Roberts did not hesitate to admit as much, stating that the “Court played its own role in that ignoble history, allowing in *Plessy v. Ferguson* the separate but equal regime that would come to deface much of America.”³⁶ Justice Thomas also acknowledged that the Court gave its stamp of approval for systemic discrimination against African Americans, noting that the Court offered “a judicial *imprimatur* to segregation”³⁷ Quoting *Plessy*, Justice Thomas observed that the Court “infamously” concluded that “the Fourteenth Amendment ‘could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.’”³⁸ Interpreting statutes passed by Congress in the 1800s to protect the rights of newly freed African Americans, the Court “strangled Congress’ efforts to use its power to promote racial equality,” as Justice Marshall observed in *Bakke*.³⁹ Indeed, as admitted by Justice Thomas, after *Plessy*, “the era of state-sanctioned segregation persisted for more than a half century.”⁴⁰

During that time and then over the next 150 years, as noted by Justice Marshall, “segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms.”⁴¹ Laws were passed to segregate African Americans from white people, requiring that they use separate phone booths and textbooks and even making sure African American prostitutes were kept in separate districts from

³³ *SFFA*, 143 S. Ct. at 2178 (Thomas, J., concurring) (internal quotations omitted).

³⁴ *Id.* at 2227 (Sotomayor, J., dissenting).

³⁵ *Id.* at 2149.

³⁶ *Id.* (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

³⁷ *Id.* at 2176 (Thomas J, concurring).

³⁸ *Id.* at 2184 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896)).

³⁹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 391 (1978) (Marshall, J., concurring in part and dissenting in part).

⁴⁰ *SFFA*, 143 S. Ct. at 2185 (Thomas, J., concurring).

⁴¹ *Bakke*, 438 U.S. at 393 (Marshall, J., concurring in part and dissenting in part).

white prostitutes.⁴² The “half century” between the end of the Civil War and the Court’s decision in *Plessy* grew into “centuries of unequal treatment” of African Americans, and in 1978 when *Bakke* was decided, “[m]easured by any benchmark of comfort or achievement, meaningful equality remain[ed] a distant dream.”⁴³

Still today, that dream of equal treatment and opportunity remains elusive. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark, as Justice Jackson emphatically declared in the first sentence of her dissent to the Court’s recent decision in *SFFA*: “Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens.”⁴⁴ Supporting her statement with recent data, Justice Jackson noted the disparities between African American and white communities in home ownership and wealth “at every income and education level”⁴⁵ She also observed that “[h]ealth gaps track financial ones.”⁴⁶ African American children are exposed to lead at twice the rate of white children and are more likely to die of heart conditions than white children.⁴⁷ In addition, as she noted, African American adults are today more likely to die of a variety of cancers than their white counterparts and African American mothers are “up to four times more likely than white mothers to die as a result of childbirth.”⁴⁸ Justice Jackson summarized the data with the inescapable conclusion that “[a]cross the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke, and asthma,” leading to 50,000 more deaths a year for Black Americans than for white Americans.⁴⁹

Justice Jackson’s data is widely supported and more broadly explained by representatives of the legal, medical, and education communities. As noted by the American Bar Association in its amicus brief to the Court, African Americans and white Americans live in segregated neighborhoods and African Americans are “more likely to live in communities where there are higher concentration[s] of pollutants and toxic uses” and “live closer to freeways and high traffic roadways, and have

⁴² *Id.*

⁴³ *Id.* at 395.

⁴⁴ *SFFA*, 143 S. Ct. at 2263 (Jackson, J., dissenting).

⁴⁵ *Id.* at 2269.

⁴⁶ *Id.* at 2270.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

longer commutes to jobs and school.”⁵⁰ According to the Association of American Medical Colleges, African Americans live in communities that “are far more likely to have physician shortages, regardless of income levels,” than white communities.⁵¹ There are pervasive disparities in health outcomes as well, as proven by numerous studies showing that children of color “with heart conditions are more likely to die than their white counterparts, Black men are twice as likely to die of prostate cancer than white men, and a Black mother is up to four times more likely than a white one to die from childbirth-related complications - with significant disparities existing even controlling for socioeconomic status, lifestyle, insurance coverage, and other factors.”⁵²

In addition, and particularly relevant given the Supreme Court’s recent decision, children of color do not have access to the same education at all levels that is available to white children.⁵³ As observed by the National Education Association and Service Employees International Union, which represent thousands of teachers, elementary and secondary schools are racially segregated and a “student’s race is still, by itself, largely predictive of the racial composition of the elementary and secondary schools they will attend.”⁵⁴ Moreover, the schools that students of color attend are at a distinct disadvantage to schools that educate primarily white students for many reasons, including their high rate of teacher turnover and less experienced teachers, the fact that they are “overcrowded and dilapidated,” with “inadequate heating and cooling,” and often feature “temporary, portable buildings or poorly maintained buildings.”⁵⁵ Attending these schools, students of color have access to fewer gifted and talented programs, high-level math and science courses, and Advanced Placement courses.⁵⁶ Studies also show that students of color face more frequent and stricter discipline than white students for the same misbehavior and that they are more likely to be

⁵⁰ Brief for the American Bar Association as Amicus Curiae in Support of Respondents at 12, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3108796, at *12.

⁵¹ Brief for Amici Curiae Association of American Medical Colleges et al. in Support of Respondents at 10, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3036400, at *10.

⁵² *Id.* at 8-9.

⁵³ Brief of the National Education Association and Service Employees International Union as Amici Curiae in Support of Respondents at 3, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3240767, at *3.

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 7-8.

⁵⁶ *Id.* at 9.

referred to the criminal justice system for school-based infractions than white students.⁵⁷

Given the myriad of obstacles that children of color face while in elementary and high school, it comes as no surprise that these students have more limited access to college than their white counterparts.⁵⁸ To begin with, fewer students of color apply to college, and those that do apply more frequently to two-year colleges than white students.⁵⁹ As observed by the Massachusetts Institute of Technology (“MIT”), Stanford, and a number of technology companies including IBM, the opportunity gaps that exist today “result in fewer students from underrepresented backgrounds even applying to schools like MIT and Stanford compared to their proportion in the population.”⁶⁰

In light of this data and the fact that “the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against” African Americans,⁶¹ it is disingenuous to conclude now, as the Court has done, that the Constitution is “race blind” and that race cannot be considered in admissions decisions.⁶² Indeed, as Justice Marshall observed: “It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.”⁶³ Based on this legacy, the Court for the next forty-five years agreed that race could be considered, as part of a holistic consideration of an applicant’s traits and characteristics, deciding twice that colleges and universities could consider race as one of many factors, as discussed in the following section.⁶⁴

⁵⁷ *Id.*

⁵⁸ *Id.* at 10-11.

⁵⁹ *Id.* at 11.

⁶⁰ Brief for Massachusetts Institute of Technology, Stanford University, International Business Machines Corp., and Aeris Communications, Inc. as Amici Curiae in Support of Respondents at 32, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199, 21-707), 2022 WL 3108891, at *32.

⁶¹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part).

⁶² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023).

⁶³ *Bakke*, 438 U.S. at 401 (Marshall, J., concurring in part and dissenting in part).

⁶⁴ *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016) (validating the University of Texas’s race-conscious admissions program); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (validating the University of Michigan law school’s race-conscious admissions program).

III. MAKING OPPORTUNITY EQUAL: UPHOLDING RACE CONSCIOUS
ADMISSIONS PROGRAMS

In 1978, the Court in *Regents of the University of California v. Bakke* invalidated the admissions program at the Medical School of the University of California at Davis (“UC Davis Medical School”) because it set aside a pre-determined number of seats for African American students.⁶⁵ In a splintered opinion, four Justices would have upheld the program, believing that the government can use race to “remedy disadvantages cast on minorities by past racial prejudice.”⁶⁶ Four other Justices held that the program violated Title VI’s guarantee of equal protection,⁶⁷ and one Justice cast the deciding vote to invalidate the program on the ground that it violated the Fourteenth Amendment’s guarantee of equal protection.⁶⁸ The one principle the Court did agree on was that a “State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”⁶⁹ Writing for a plurality of the Court, Justice Powell agreed that the medical school’s setting aside sixteen seats for applicants of color violates the Fourteenth Amendment because it prefers “one group for no reason other than race or ethnic origin” and that “is discrimination for its own sake.”⁷⁰ This, according to Justice Powell, “the Constitution forbids.”⁷¹

Considering race as one factor of many, however, would not violate the Constitution, as Justice Powell went on to discuss. In fact, he relied on Harvard’s admissions policies as “an illuminating example” of a constitutionally acceptable plan that considers race as one of many factors.⁷² Understanding that applicants with different traits will bring different strengths to the classroom, Justice Powell compared a farm boy to a Bostonian and a Black student to a white one, noting that a “farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a [B]lack student can usually bring

⁶⁵ *Bakke*, 438 U.S. at 269-71.

⁶⁶ *Id.* at 325 (Brennan, J., concurring in part and dissenting in part).

⁶⁷ *Id.* at 421 (Stevens, J., concurring in part and dissenting in part).

⁶⁸ *Id.* at 320 (Powell, J., plurality opinion).

⁶⁹ *Id.* See also *Grutter v. Bollinger*, 539 U.S. 306, 322-23 (2003) (noting that “[t]he only holding for the Court in *Bakke* was that a ‘State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.’”) (quoting *Bakke*, 438 U.S. at 320 (Powell, J., plurality opinion)).

⁷⁰ *Bakke*, 438 U.S. at 307.

⁷¹ *Id.*

⁷² *Id.* at 316-17.

something that a white person cannot offer.”⁷³ Making clear that race cannot be considered by itself but rather as one of many factors, Justice Powell emphasized that Harvard considered each applicant’s many traits and characteristics when making its admissions decisions, including “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”⁷⁴

The point, according to Justice Powell, and the reason a program like Harvard’s did not violate equal protection is because it “treats each applicant as an individual in the admissions process.”⁷⁵ Notably, Justice Powell did not interpret Harvard’s plan as “affirmative action” as the Court in its recent decision characterizes it, but instead, as a program that “is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration” with everyone else.⁷⁶ As emphasized by the Court twenty-five years after its *Bakke* decision, in *Grutter v. Bollinger*, “[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race.”⁷⁷ Rather, “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁷⁸

The Court in *Grutter* recognized that Justice Powell’s opinion in *Bakke* has served not only “as the touchstone for constitutional analysis of race-conscious admissions policies,” but also as a template on which “[p]ublic and private universities across the Nation have modeled their own admissions programs” that included the consideration of the race of each applicant.⁷⁹ In *Grutter*, the Court reviewed a challenge to the race-conscious admissions policy used by the University of Michigan Law School.⁸⁰ By its terms, the Law School’s policy allowed for the consideration of an applicant’s race to further the university’s “longstanding commitment” to “racial and ethnic diversity.”⁸¹ Agreeing

⁷³ *Id.* at 316.

⁷⁴ *Id.* at 317.

⁷⁵ *Id.* at 318.

⁷⁶ *Id.* at 317.

⁷⁷ *Grutter v. Bollinger*, 539 U.S. 306, 324-25 (2003) (quoting *Bakke*, 438 U.S. at 315 (Powell, J., plurality opinion)).

⁷⁸ *Id.* at 325 (quoting *Bakke*, 438 U.S. at 315) (Powell, J., plurality opinion).

⁷⁹ *Id.* at 323.

⁸⁰ *Id.* at 311.

⁸¹ *Id.* at 316 (internal citations to the record omitted).

with Justice Powell's observation in *Bakke* that student body diversity is a compelling interest, the *Grutter* Court made clear that "a race-conscious admissions program cannot use a quota system."⁸² As the Court articulated the proscription, a race-conscious plan cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants."⁸³

Contrasting the Law School's admissions policies with UC Davis Medical School's policy of setting aside sixteen seats, the Court recognized that the University of Michigan Law School policy did not define diversity "solely in terms of racial and ethnic status."⁸⁴ Instead, the Law School engaged in a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races."⁸⁵ The Court emphasized that the policy was not "insensitive to the competition among all students for admission to the [L]aw [S]chool."⁸⁶ Instead, the policy sought to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession."⁸⁷

Specifically, the Law School considered for admissions candidates "who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields."⁸⁸ In addition, as the Court pointed out, the record in that case made clear that admissions counselors "seriously consider[] each applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, non-academic performance, or personal background."⁸⁹ In sum, the Court concluded that a race-conscious plan does not violate the guarantee of

⁸² *Id.* at 334.

⁸³ *Id.* (quoting *Bakke*, 438 U.S. at 315 (Powell, J., plurality opinion)).

⁸⁴ *Id.* at 316 (internal citations to the record omitted). On the same day that it delivered its opinion in *Grutter*, the Court invalidated the admissions program used at the University of Michigan's College of Literature, Science, and the Arts because it "automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

⁸⁵ *Grutter*, 539 U.S. at 337.

⁸⁶ *Id.* at 316 (internal citations to the record omitted).

⁸⁷ *Id.* (internal citations to the record omitted).

⁸⁸ *Id.* at 338 (internal citations omitted).

⁸⁹ *Id.* (internal citations omitted).

equal protection when it is comprehensive enough to take “into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.”⁹⁰

With *Bakke* and *Grutter* as its guide, the Court again considered the constitutionality of a race-conscious plan in *Fisher v. University of Texas at Austin*.⁹¹ In its first consideration of the case, the Court reviewed the Fifth Circuit Court of Appeals’s decision upholding the race-conscious admissions plan used by the University of Texas.⁹² The Court of Appeals premised its decision on its conclusion that the University’s plan was based on “a holistic, multi-factor approach, in which race is but one of many considerations.”⁹³ Deciding that the Court of Appeals “did not hold the University to the demanding burden of strict scrutiny,” the Supreme Court vacated and remanded the case.⁹⁴ The second time the case was before it, the Supreme Court described the admissions program at the University of Texas as “a complex system of admissions”⁹⁵ which admitted seventy-five percent of its class through a percentage plan, a legislative enactment which guaranteed “college admission to students who graduate from a Texas high school in the top 10 percent of their class.”⁹⁶ Although race-neutral on its face, the adoption of that plan was intended to “boost minority enrollment.”⁹⁷ Indeed, as the Court noted, the plan was adopted “with racially segregated neighborhoods and schools front and center stage. It is race consciousness, not blindness to race, that drives such plans.”⁹⁸

The plaintiff in the case, however, did not challenge this aspect of the University of Texas’s admissions program, so the Court did not address its constitutionality.⁹⁹ Instead, the Court focused on the race-conscious program the University relied on to admit the remaining twenty-five percent of the class.¹⁰⁰ One part of that program calculated an “Academic Index” based on “an applicant’s SAT score and academic

⁹⁰ *Id.* at 339.

⁹¹ *Fisher v. Univ. of Texas (Fisher II)*, 136 S. Ct. 2198 (2016); *Fisher v. Univ. of Texas (Fisher I)*, 133 S. Ct. 2411 (2013).

⁹² *See Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 570 U.S. 297 (2013).

⁹³ *Id.* at 218.

⁹⁴ *Fisher I*, 133 S. Ct. at 2415.

⁹⁵ *Fisher II*, 136 S. Ct. at 2205.

⁹⁶ *Id.* (citing TEX. EDUC. CODE ANN. § 51.803 (West 2015)).

⁹⁷ *Id.* at 386.

⁹⁸ *Id.* (internal citations and question marks omitted).

⁹⁹ *Id.* at 378.

¹⁰⁰ *Id.* at 373.

performance in high school.”¹⁰¹ A second part of the consideration was the calculation of a “Personal Achievement Index” based on “the average score a reader gives the applicant on two required essays” and a review of information the applicant submits, including “letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.,” and the evaluation of “the applicant’s potential contributions to the University’s student body based on the applicant’s leadership experience, extracurricular activities, awards/honors, community service, and other ‘special circumstances.’”¹⁰² The “special circumstances” included “the socioeconomic status of the applicant’s family, the socioeconomic status of the applicant’s school, the applicant’s family responsibilities, whether the applicant lives in a single-parent home, the applicant’s SAT score in relation to the average SAT score at the applicant’s school, the language spoken at the applicant’s home, and, finally, the applicant’s race.”¹⁰³ Thus, after a thorough review of the record, the Court concluded that “race is but a ‘factor of a factor of a factor’ in the holistic-review calculus.”¹⁰⁴ Given the importance of student body diversity, as raised by Justice Powell in *Bakke* and adopted by the Court in *Grutter*, the *Fisher* Court therefore concluded that a consideration of race, when only one part of an admissions decision, does not violate the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁵

Both *Grutter* and *Fisher II* were decided on the premise, as articulated by Justice Powell in *Bakke* that “the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”¹⁰⁶ To attain this diversity, the *Grutter* Court observed, quoting Justice Powell in *Bakke*, that this goal “legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”¹⁰⁷ Recognizing the importance of diversity, the Court in both *Grutter* and *Fisher II* made clear the understanding that “enrolling a diverse student body ‘promotes cross-racial understanding, helps to break down racial

¹⁰¹ *Id.* at 371.

¹⁰² *Id.* at 373-74.

¹⁰³ *Id.* at 374.

¹⁰⁴ *Id.* at 375 (quoting the trial court’s decision at 645 F.Supp.2d 587, 608 (W.D. Tex.2009), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 570 U.S. 297 (2013) and *aff’d*, 785 F.3d 633 (5th Cir. 2014)).

¹⁰⁵ *See id.* at 385-88 (concluding that the “University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored.”).

¹⁰⁶ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J., plurality opinion).

¹⁰⁷ *Grutter v. Bollinger*, 539 U.S. 306, 322-23 (2003) (quoting *Bakke*, 438 U.S. at 320 (Powell, J., plurality opinion)).

stereotypes, and enables students to better understand persons of different races.”¹⁰⁸ Equally important, as explained in *Grutter* and reiterated in *Fisher II*, “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”¹⁰⁹

The Court in both cases also noted that a university’s decision to promote student body diversity is central to a school’s mission, well within the school’s expertise, and is entitled to deference by the Court.¹¹⁰ As Justice O’Connor stated in *Grutter*: “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”¹¹¹ Specifically, with regard to student body diversity, the *Grutter* Court noted that the “freedom of a university to make its own judgments as to education includes the selection of its student body.”¹¹² This led the *Grutter* Court then to conclude that a university’s “educational judgment that such diversity is essential to its educational mission is one to which we defer.”¹¹³

That deference, however, is not without limits. In *Grutter*, for example, the Court noted that the record in that case “substantiated” the “Law School’s assessment that diversity will, in fact, yield educational benefits”¹¹⁴ In *Fisher II*, the Court similarly noted that, as long as a university gives “‘a reasoned, principled explanation’ for its decision, deference must be given ‘to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.’”¹¹⁵ Moreover, the Court need not defer unless the university proves that its admissions plan is narrowly tailored to accomplish its goal.¹¹⁶ As made clear in *Grutter*, any racial classifications imposed by the government “must be analyzed by a reviewing court under strict scrutiny.”¹¹⁷

To be narrowly tailored, according to *Grutter*, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and

¹⁰⁸ *Fisher II*, 136 S. Ct. at 2210 (quoting *Grutter*, 539 U.S. at 330).

¹⁰⁹ *Id.* (quoting *Grutter*, 539 U.S. at 330 (internal quotation marks omitted)).

¹¹⁰ *Id.* at 2207-08; *Grutter*, 539 U.S. at 328.

¹¹¹ *Grutter*, 539 U.S. at 329.

¹¹² *Bakke*, 438 U.S. at 312 (1978) (Powell, J., plurality opinion).

¹¹³ *Id.* at 328.

¹¹⁴ *Id.*

¹¹⁵ *Fisher II*, 136 S. Ct. at 2207-08.

¹¹⁶ *Id.* at 2208; see also *Grutter*, 539 U.S. at 326.

¹¹⁷ *Grutter*, 539 U.S. at 326 (internal quotation and citation omitted).

to place them on the same footing for consideration, although not necessarily according them the same weight.”¹¹⁸ In *Fisher II*, the Court emphasized that “a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan.”¹¹⁹ After a close review of the record, the *Fisher* Court concluded that “the University could not be faulted on this score,” noting that before allowing admissions decisions to take race into account, “the University conducted ‘months of study and deliberation, including retreats, interviews, [and] review of data,’ and concluded that ‘[t]he use of race-neutral policies and programs ha[d] not been successful in achieving’ sufficient racial diversity at the University.”¹²⁰

Although both the *Fisher* and *Grutter* Courts explained in detail how the University of Texas and the University of Michigan, respectively, could—and did—prove that their admissions programs were narrowly tailored and satisfied the demands of strict scrutiny, the Court in *SFFA v. Harvard* renders such inquiry now irrelevant, because its decision makes clear that universities deserve no such deference, and that student body diversity is no longer an interest the Court is willing to protect.¹²¹ The Court’s decision, and the issues raised by it, are addressed in the following section.

IV. IGNORING THE REASONING BEHIND ITS PREVIOUS DECISIONS, THE COURT INVALIDATED THE HARVARD AND UNC ADMISSIONS PROGRAMS

Stopping short of explicitly overruling *Grutter* and *Fisher*, the Court in *SFFA* announced that a school’s interest in student body diversity deserves no deference and, in fact, cannot justify any race-conscious admissions program adopted by all universities to further this interest, because “the interests they view as compelling cannot be subjected to meaningful judicial review.”¹²² Moreover, even allowing for the possibility that a race-conscious plan may satisfy the strict scrutiny test the

¹¹⁸ *Id.* at 334 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J., plurality opinion)).

¹¹⁹ *Fisher II*, 136 S. Ct. at 2211.

¹²⁰ *Id.* (internal citations omitted).

¹²¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023). For a detailed analysis of how the University of Michigan and the University of Texas satisfied the Court’s strict scrutiny demands, see Nancy L. Zisk, *Embracing Race-Conscious College Admissions Programs: How Fisher v. University of Texas at Austin Redefines “Affirmative Action” as a Holistic Approach to Admissions That Ensures Equal, Not Preferential, Treatment*, 100 MARQ. L. REV. 835 (2017).

¹²² *SFFA*, 143 S. Ct. at 2166.

Court articulated in *Gratz v. Bollinger*, adopted in *Grutter*, and applied in *Fisher II*, the Court's invalidation of the programs used by UNC and Harvard appears to foreclose the possibility that any consideration of an applicant's race in an admissions decision will pass constitutional muster.¹²³

Premising its recent decision on the fact that the Constitution is color-blind,¹²⁴ the Court stated in no uncertain terms that “[e]liminating racial discrimination means eliminating all of it.”¹²⁵ This premise, however, fails to reflect how the Court in the past has interpreted the Constitution's equal protection guarantee. Indeed, as the *SFFA* Court recognized, the Constitution requires that rights available to some “must be made available to all on equal terms.”¹²⁶ The Court used these words when it invalidated school segregation in *Brown v. Board of Education*,¹²⁷ and, to use the Court's words in its recent decision, when it invalidated “all manner of race-based state action.”¹²⁸ In all of the cases the Court cited, the opinions made clear that what the Court sought when it invalidated laws that permitted segregation by race was equality, and it was not turning a blind eye to race.¹²⁹

It is important to note that the Court did not explicitly overrule *Grutter* or *Fisher*, leaving open the possibility for race-conscious actions to comport with equal protection.¹³⁰ Specifically, it repeated what those cases established, that if there is a classification based on race, then it must “survive a daunting two-step examination known in our cases as ‘strict scrutiny.’”¹³¹ The first step of this examination, as noted by the Court, relying on *Grutter*, is to ask “whether the racial

¹²³ *Id.* at 2168 (noting that “[r]acial classifications” may pass constitutional muster if they satisfy “the most exact connection between justification and classification”) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (internal quotation marks omitted)); accord *Fisher II*, 136 S. Ct. at 2208 (requiring a “narrowly tailored” plan); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (racial classifications “are constitutional only if they are narrowly tailored” to achieve the goals of student body diversity).

¹²⁴ *SFFA*, 143 S. Ct. at 2175.

¹²⁵ *Id.* at 2161.

¹²⁶ *Id.* at 2160 (quoting *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954)).

¹²⁷ 347 U.S. 483, 493 (1954).

¹²⁸ *SFFA*, 143 S. Ct. at 2160.

¹²⁹ *Id.* at 2160-61 (citing *Browder v. Gayle*, 142 F. Supp. 707, 715 (MD Ala. 1956), *aff'd* *Gayle v. Browder*, 352 U.S. 903 (1956) (*per curiam*) (invalidating bus segregation and making clear that “[t]he equal protection clause requires equality of treatment before the law for all persons without regard to race or color”); *Mayor and City Council of Balt. v. Dawson*, 220 F. 2d 386, 387 (4th Cir. 1955), *aff'd* 350 U.S. 877 (1955) (*per curiam*) (invalidating laws establishing segregated public beaches and bathhouses to protect the “ideal of equality before the law”)).

¹³⁰ See *infra* notes 123-130 and accompanying text.

¹³¹ *SFFA*, 143 S. Ct. at 2162 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

classification is used to ‘further compelling governmental interests.’”¹³² Second, if that racial classification does further a compelling interest, then, according to the Court citing *Fisher I*, the use of race must be “narrowly tailored—meaning necessary—to achieve that interest.”¹³³

To answer the first question, the Court acknowledged that both Harvard and UNC identified the benefits of a diverse student body.¹³⁴ Specifically, Harvard emphasized the importance of: “(1) ‘training future leaders in the public and private sectors’; (2) preparing graduates to ‘adapt to an increasingly pluralistic society’; (3) ‘better educating its students through diversity’; and (4) ‘producing new knowledge stemming from diverse outlooks.’”¹³⁵ Similarly, UNC identified the benefits of student body diversity that included: “(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”¹³⁶ Although it recognized these interests as “commendable goals,” the Court concluded that they were “elusive”¹³⁷ and “[could not] be subjected to meaningful judicial review.”¹³⁸

The Court contrasted the interests identified by Harvard and UNC with others the Court found compelling and capable of judicial review in previous cases, including the interest in segregating inmates based on their races to avoid racial violence in a prison and allowing a race-based benefit to compensate members of that race for discrimination they suffered at work.¹³⁹ The Court distinguished between “discerning whether a prisoner will be injured or whether an employee should receive backpay,” and “whether a particular mix of minority students produces ‘engaged and productive citizens,’ sufficiently “enhance[s] appreciation, respect, and empathy,” or effectively ‘train[s] future leaders”¹⁴⁰ Without explaining the difference, the Court decided that

¹³² *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

¹³³ *Id.* (quoting *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411, 2419-20 (2013)).

¹³⁴ *Id.* at 2166.

¹³⁵ *Id.* (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 173-74 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023)).

¹³⁶ *Id.* (quoting *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 656 (M.D.N.C. 2021), *rev'd sub nom*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023)).

¹³⁷ *Id.* at 2166-67.

¹³⁸ *Id.* at 2166.

¹³⁹ *Id.* at 2167.

¹⁴⁰ *Id.* (citations omitted).

interests in student body diversity asserted by the defendants before it were “standardless” and “inescapably imponderable.”¹⁴¹

The Court also did not explain why it found these same interests, when expressed by the University of Michigan in *Grutter* and the University of Texas in *Fisher*, to be worthy of judicial review.¹⁴² As stated in *Grutter*, “student body diversity is a compelling state interest that can justify the use of race in university admissions.”¹⁴³ Of course, the Court required the University in that case to justify its use of race and analyzed the admissions program “under strict scrutiny.”¹⁴⁴ Admitting that a university in this situation will face a “searching judicial inquiry,” the Court nevertheless recognized that a consideration of race in an admissions program is worthy of judicial consideration and may be upheld.¹⁴⁵ In the *Grutter* Court’s words: “Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”¹⁴⁶ Applying the strict scrutiny standard to the procedures followed by UNC and Harvard, which were strikingly similar to those upheld in *Grutter* and *Fisher*, the Court concluded that both plans had “fallen short.”¹⁴⁷

The Court summarized the arguments made by Harvard and UNC in defense of their admissions programs as “essentially, ‘trust us.’”¹⁴⁸ While recognizing that “Universities may define their missions as they see fit,”¹⁴⁹ the Court left little room for a university ever to justify any consideration of race, warning that: “Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.”¹⁵⁰ As noted above, the interests that Harvard and UNC identified as compelling government interests necessary to achieve student body diversity, cannot, in the Court’s opinion, “be subjected to

¹⁴¹ *Id.*

¹⁴² *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁴³ *Grutter*, 539 U.S. at 325.

¹⁴⁴ *Id.* at 326-27.

¹⁴⁵ See *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411, 2418-19 (2013) (stating that the “particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny.”).

¹⁴⁶ *Grutter*, 539 U.S. at 327.

¹⁴⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166 (2023).

¹⁴⁸ *Id.* at 2168.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

meaningful judicial review.”¹⁵¹ Thus, it appears that no race-conscious plan will now be able to withstand the Court’s scrutiny, and with this decision, the Court has redefined the Constitution’s guarantee of equality and reinforced the discriminatory system making it harder for people of color to achieve it. Understanding that system of discrimination, Justice Sotomayor observed that from *Brown v. Board of Education* to *Fisher v. University of Texas*, the Court has sought “to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment’s vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.” But those days are now apparently over.¹⁵²

V. THE COURT’S INVALIDATION OF THE RACE-CONSCIOUS PLANS
STRENGTHENS THE SYSTEM BUILT ON UNEQUAL TREATMENT AND
MAKES EQUALITY HARDER TO ACHIEVE

As articulated by Justice Sotomayor and explained in Part II above, racism is woven into the very structure of this country. This structural racism is reflected physically in the buildings enslaved African Americans built and entrenched in society today, as reflected in the inequality African Americans and other people of color face in access to health care, clean and healthy neighborhoods, and education.¹⁵³ Race-conscious admissions plans that universities and colleges have used for decades, and that have been validated by the Supreme Court, have alleviated some of that inequality in education, which opens opportunities in other areas of life as well.¹⁵⁴ As noted by Justice Sotomayor, the race-conscious plans that have been operating with the Court’s approval “ha[ve] helped equalize educational opportunities for all students of every race and background and ha[ve] improved racial diversity on college campuses.”¹⁵⁵

With its decision in *SFFA v. Harvard*, however, the Court “rolls back decades of precedent and momentous progress[.]”¹⁵⁶ and reinforces structural racism and “cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.”¹⁵⁷ In 2007, Justice

¹⁵¹ *Id.* at 2166.

¹⁵² *Id.* at 2234 (Sotomayor, J., dissenting).

¹⁵³ *See supra* Part II.

¹⁵⁴ *See SFFA*, 143 S. Ct. at 2225, 2261-63 (Sotomayor, J., dissenting).

¹⁵⁵ *Id.* at 2225.

¹⁵⁶ *Id.* at 2225-26.

¹⁵⁷ *Id.* at 2226.

Kennedy acknowledged that, even though the “enduring hope is that race should not matter; the reality is that too often it does.”¹⁵⁸ It mattered in 2007, and it matters today.¹⁵⁹

The Court has repeatedly expressed concern that there needs to be an “end point” to race based programs.¹⁶⁰ In *Grutter*, the Court voiced its aspiration that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹⁶¹ In *Fisher II*, it warned: “It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.”¹⁶² And in its recent decision, the Court blamed Harvard for conceding that its program lacked an end point.¹⁶³ The problem, as observed by the National Education Association, is that:

The reality remains that race still carries great weight in our society and continues to carve out opportunities and disadvantages based solely on the color of one’s skin. That remains true across our society, including in our nation’s schools, where race continues [to] divide educational opportunities inequitably and distort perceptions with stereotypes and prejudice.¹⁶⁴

¹⁵⁸ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring).

¹⁵⁹ *SFFA*, 143 S. Ct. at 2264 (Jackson, J., dissenting) (citations omitted) (referring to the “intergenerational transmission of inequality” that still plagues us today); *see also id.* at 2234 (Sotomayor, J., dissenting) (noting that “[e]ntrenched racial inequality remains a reality today.”). As described by the National Education Association in an amicus brief it filed with the Court:

In 2017, torch-wielding white supremacists descended on Charlottesville, Virginia for a ‘Unite the Right’ rally resulting in the murder of a peaceful protester and marking another rising tide of organized white supremacist violence in our country. In the summer of 2020, the murder of George Floyd by police officers sparked some of the largest racial justice protests in our nation’s history and spurred a vibrant debate about racial justice and police practices. And the continuing COVID pandemic has exacerbated and laid bare continuing deep racial inequities in access to healthcare and education and the life and death consequences of those disparities.

Brief of the National Education Association and Service Employees International Union as Amici Curiae in Support of Respondents at 3, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3240767, at *3.

¹⁶⁰ *SFFA*, 143 S. Ct. at 2165, 2170, 2175.

¹⁶¹ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

¹⁶² *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2215 (2016).

¹⁶³ *SFFA*, 143 S. Ct. at 2173.

¹⁶⁴ Brief of the National Education Association and Service Employees International Union as Amici Curiae in Support of Respondents at 3, *Students for Fair Admissions, Inc. v. President &*

As Justice Sotomayer explained:

A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. There is a sound reason why this Court's precedents have never imposed the majority's strict deadline: Institutions cannot predict the future. Speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst. There is no constitutional duty to engage in that type of shallow guesswork.¹⁶⁵

Race has always mattered when it comes to access to education, as recognized by the Court in *Brown v. Board of Education*, because education "is the very foundation of good citizenship."¹⁶⁶ Indeed, as Justice Sotomayer observed, "[e]qual educational opportunity is a prerequisite to achieving racial equality in our Nation."¹⁶⁷ She echoed Justice Thurgood Marshall's words in a case decided twenty years after *Brown* that "unless our children begin to learn together, there is little hope that our people will ever learn to live together."¹⁶⁸

When it invalidated the admissions programs at Harvard and UNC, the Court ignored the fact that race-conscious programs have helped to increase diversity in the country's colleges and universities and this diversity has worked to the benefit of the students of color who attend and the larger social fabric. As summarized by Justice Sotomayer:

By ending race-conscious college admissions, this Court closes the door of opportunity that the Court's precedents helped open to young students of every race. It creates a leadership pipeline that is less diverse than our increasingly diverse society, reserving positions of influence, affluence, and prestige in America for a predominantly white pool of college graduates. At its core, today's decision exacerbates segregation and diminishes the

Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3240767, at *3.

¹⁶⁵ *SFFA*, 143 S. Ct. at 2255 (Sotomayer, J., dissenting).

¹⁶⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also SFFA*, 143 S. Ct. at 2226 (Sotomayer, J., dissenting) (noting that education is "the very foundation of our democratic government and pluralistic society").

¹⁶⁷ *SFFA*, 143 S. Ct. at 2226 (Sotomayer, J., dissenting).

¹⁶⁸ *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

inclusivity of our Nation’s institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.¹⁶⁹

Without consideration of race, student body diversity will suffer. In California when, after its constitution was amended to prohibit the state from considering race in its admissions decisions, the number of minority students admitted to the University of California, Los Angeles (“UCLA”) “plummeted.”¹⁷⁰ In fact, after the ban took effect, “[t]he UCLA community was ‘shocked’” by how few students of color were admitted, “and university administrators declared the situation a ‘crisis.’”¹⁷¹ As warned by thirty-three colleges that describe themselves as “private, highly selective residential colleges whose small size and excellence attract students from around the nation and the world,” prohibiting schools like them to consider race in their admissions considerations “would have a drastic resegregating impact.”¹⁷² In fact, they suggest that it will take Black enrollment back to “early 1960s levels before colleges and universities began to make serious efforts to recruit minority students.”¹⁷³

Recognizing this fact, Justice Sotomayor observed that the result of this decision will be “costly” not only to students but also to “our institutions and democratic society more broadly.”¹⁷⁴ Relying on “dozens of *amici* from nearly every sector of society,” Justice Sotomayor made clear that banning race-conscious admissions plans will exacerbate the disparities that exist in “unemployment rates, income levels, wealth and homeownership, and healthcare access.”¹⁷⁵ It will also “decrease the pipeline of racially diverse college graduates to crucial professions,” spanning from the military and public services to private

¹⁶⁹ *SFFA*, 143 S. Ct. at 2262-63 (Sotomayor, J., dissenting) (internal citation and quotation marks omitted).

¹⁷⁰ Brief of the National Association of Basketball Coaches et al. as Amici Curiae in Support of Respondents at 28, *SFFA*, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707), 2022 WL 3130684, at *28; accord *SFFA*, 143 S. Ct. at 2260 (Sotomayor, J., dissenting) (“After California amended its State Constitution to prohibit race-conscious college admissions in 1996, for example, ‘freshmen enrollees from underrepresented minority groups dropped precipitously’ in California public universities.”).

¹⁷¹ Brief of the National Association of Basketball Coaches et al. as Amici Curiae in Support of Respondents, *supra* note 171, at 29, *29.

¹⁷² Brief of Amherst et al. as Amici Curiae Supporting Respondents at 1, 13, *SFFA*, 143 S. Ct. 2141 (Nos. 20-1199 & 21-707), 2022 WL 3108827, at *1, 13.

¹⁷³ *Id.* at 13, *13 (quoting WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 39 (20th ed. 2019); accord *SFFA*, 143 S. Ct. at 2260 (Sotomayor, J., dissenting).

¹⁷⁴ *SFFA*, 143 S. Ct. at 2260 (Sotomayor, J., dissenting).

¹⁷⁵ *Id.* at 2236, 2260 (internal citation omitted).

business.¹⁷⁶ The Court's decision, she explained, reinforces the system of discrimination because a "less diverse pipeline to these top jobs accumulates wealth and power unequally across racial lines, exacerbating racial disparities in a society that already dispenses prestige and privilege based on race."¹⁷⁷

Justice Thomas has repeatedly expressed his concern that considering race in the admissions process allows students of color to attend schools where they do not belong.¹⁷⁸ Most recently, in *SFFA v. Harvard*, he made clear that race-conscious admissions programs "do nothing to increase the overall number of [B]lacks and Hispanics able to access a college education."¹⁷⁹ Although he may be right when referring to admission to all colleges, including four-year schools and community colleges, data has shown that race-conscious plans help to place some applicants of color "into more competitive institutions than they otherwise would have attended," as he has admitted.¹⁸⁰ This, he identifies as a "mismatch" that places "many [B]lacks and Hispanics who likely would have excelled at less elite schools . . . in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete."¹⁸¹ He believes that admitting applicants of color through a race-conscious admissions plan "stamp[s] [Blacks and Hispanics] with a badge of inferiority"¹⁸² and "taints the accomplishments of all those who are admitted as a result of racial discrimination."¹⁸³

Justice Thomas is not alone in this belief, agreeing with Richard Sander, a Professor at UCLA, who described the "mismatch" theory in

¹⁷⁶ *Id.* at 2260-61.

¹⁷⁷ *Id.* at 2262.

¹⁷⁸ *See id.* at 2197 (Thomas, J., concurring) (stating that affirmative action policies "simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended"). *See also* *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411, 2431 (2013) (Thomas, J., concurring) ("The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched."); *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., concurring) (describing minority students admitted to the University of Michigan Law School through an affirmative action process as "unprepared" and asserting that they "cannot succeed in the cauldron of competition").

¹⁷⁹ *SFFA*, 143 S. Ct. at 2197 (Thomas, J., concurring).

¹⁸⁰ *Id.* (citing THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD* 145-46 (2004)).

¹⁸¹ *Id.* (quoting *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411, 2431 (2013) (Thomas, J., concurring)).

¹⁸² *Fisher I*, 133 S. Ct. at 2432 (Thomas, J., concurring) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring)).

¹⁸³ *Id.*

a Stanford Law Review article published in 2004.¹⁸⁴ After receiving much criticism for his position, Professor Sander wrote a second article where he reiterated his premise that race-conscious admissions programs “hurt those the preferences are intended to help.”¹⁸⁵ Although the details of his thesis are beyond the scope of this paper, it should be noted that his “work has been widely criticized for its serious methodological flaws,”¹⁸⁶ and, contrary to Professor Sander’s conclusions, many studies have found that when students of color attend a more selective school, they graduate at higher rates and enjoy higher earnings.¹⁸⁷ Justice Sotomayor noted that the “mismatch” theory has been “debunked” with an “extensive body of research” and highlighted what she called “the most obvious data point available,” which is that all three Justices of color on the Court today “graduated from elite universities and law schools with race-conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers.”¹⁸⁸

While making it harder, if not impossible, for a university to consider the race of its applicants when building a class, which will lead to a decrease in diversity as the data suggests, the Court did nothing to limit a university’s ability to give preference to children of its alumni, despite its repeated citations to the record of both Harvard and UNC’s consideration of this.¹⁸⁹ The reason this is important is because affording preference to legacy applicants is a form of affirmative action for white applicants that the Court foreclosed for applicants of color.¹⁹⁰ Even Justice Gorsuch, who agreed that the admissions plans of Harvard and UNC should be invalidated, recognized the preferences allowed by legacy admissions programs utilized by both Harvard and UNC and admitted that

¹⁸⁴ Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371-72, 449-54 (2004).

¹⁸⁵ Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1966 (2005).

¹⁸⁶ Brief of Empirical Scholars as Amici Curiae in Support of Respondents at 6, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3371295, at *6.

¹⁸⁷ *Id.* at 7, *7.

¹⁸⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2256 (2023) (Sotomayor, J., dissenting).

¹⁸⁹ The Court noted the fact that admissions officers at both Harvard and UNC can take note of the “legacy” status of each applicant but raised no concern about the effect of that. *Id.* at 2156 (majority opinion).

¹⁹⁰ Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry Into Harvard’s Legacy Admissions*, N.Y. TIMES (July 25, 2023), <https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html?searchResultPosition=2> (“Harvard’s practice of showing preference for the relatives of alumni and donors discriminates against Black, Hispanic and Asian applicants in favor of white and wealthy students who are less qualified.”).

“these preferences undoubtedly benefit white and wealthy applicants the most.”¹⁹¹

Almost immediately after the Supreme Court issued its decision in *SFFA*, a nonprofit organization, Lawyers for Civil Rights, filed a complaint with the Department of Education, alleging that admitting students because their family members attended Harvard before them “overwhelmingly benefit[s] [w]hite applicants and disadvantage[s] those who are of color.”¹⁹² According to information made available in *SFFA*, between 2009 and 2015, approximately thirty-four percent of applicants to Harvard “who were children of Harvard alumni were admitted” to Harvard, which was “far higher than the overall 6 percent admission rate for non-legacy applicants.”¹⁹³ In addition, this practice is not unique to Harvard, but rather followed at all of the Ivy League colleges, as well as other schools with low acceptance rates like Duke, Stanford, the University of Chicago, and, especially relevant here, UNC.¹⁹⁴ The Department of Education has now opened an investigation into the issue and it remains to be seen if it will take any action to curb this practice.¹⁹⁵

It is interesting to note that the Court went out of its way to comment that its ruling did not apply to the military.¹⁹⁶ It reasoned that the military’s exclusion was warranted because “[n]o military academy is a party to these cases,” but raised the possibility that its decision might be different when applied to the military academies, stating that there might be “potentially distinct interests that military academies may present.”¹⁹⁷ As pointed out by Justice Sotomayor in her dissent, the Court’s words here suggest that the Fourteenth Amendment might not “categorically prohibit the use of race in college admissions.”¹⁹⁸ Justice Sotomayor went on to note that the Court’s carving out the military illustrates “the arbitrariness of its decision” because it said nothing to exempt other universities that may also have other distinct interests, as expressed by the Catholic colleges and universities, which “rely on the use

¹⁹¹ *SFFA*, 143 S. Ct. at 2215 (Gorsuch, J., concurring).

¹⁹² Nick Anderson & Susan Svrluga, *Civil Rights Complaint Targets Harvard’s Legacy Admissions Preference*, WASH. POST (July 6, 2023, 12:19 PM), <https://www.washingtonpost.com/education/2023/07/03/harvard-university-legacy-admissions-civil-rights-complaint/>.

¹⁹³ *Id.*

¹⁹⁴ *Id.* The authors did note that “Amherst College, Johns Hopkins University, the California Institute of Technology and the Massachusetts Institute of Technology are among the most prominent private colleges and universities to declare that they will not give any legacy preferences in admissions. But most peers have declined to follow their lead.” *Id.*

¹⁹⁵ Shear & Hartocollis, *supra* note 190.

¹⁹⁶ *SFFA*, 143 S. Ct. at 2166 n.4 (majority opinion).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 2247 (2013) (Sotomayor, J., dissenting).

of race in their holistic admissions to further not just their academic goals, but also their religious missions.”¹⁹⁹

Both the arbitrariness and the limited reach of the decision are suggested as well by the Court’s invitation to applicants to highlight their race in their application materials.²⁰⁰ After criticizing the dissenting Justices’ view that race is relevant and an important factor to consider, calling their position “remarkably wrong,”²⁰¹ the Court then invited applicants to draw the attention of admissions officers to their race, stating in no uncertain terms 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.”²⁰² While warning that “what cannot be done directly cannot be done indirectly,”²⁰³ the Court appears to give permission to admissions officers to do exactly what they have been doing with the Court’s approval since *Grutter*, which is to consider the race of each applicant as it applies individually to that applicant as “one factor among many” in any admissions decision.²⁰⁴ In the Court’s words:

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.²⁰⁵

When read in full, the instructions given by the Court are exactly what universities have already done by relying on Justice Powell’s opinion in *Bakke* and what the Court has sanctioned in both *Grutter* and

¹⁹⁹ *Id.* (citing Brief of Georgetown University et al. as Amici Curiae in Support of Respondents at 18-29, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3108897, at *18-29).

²⁰⁰ *Id.* at 2176 (majority opinion).

²⁰¹ *Id.* at 2175.

²⁰² *Id.* at 2176.

²⁰³ *Id.*

²⁰⁴ *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

²⁰⁵ *SFFA*, 143 S. Ct. at 2176 (emphasis in original).

Fisher.²⁰⁶ Thus, it may be expected that universities will continue to do exactly what they have been doing—viewing an applicant’s race as one of many traits that make each applicant unique.

Finally, it cannot be overlooked that, regardless of how it is raised or whether it is explicitly addressed in an application or not, the race of each individual is hard, if not impossible, to ignore. As made clear by the Association of American Medical Colleges (AAMC), in their amicus brief submitted in support of Harvard and UNC in this case, “it would be difficult, if not impossible, to insulate all consideration of an applicant’s race or ethnicity from consideration of the rest of that individual’s background.”²⁰⁷ Even with no “race” box to check, the AAMC makes clear what may have been obvious to the Court when it invited applicants to discuss their race: “Where an admissions process includes reliance on personal statements, for example, ignoring race and ethnicity ‘might not even be possible,’ since ‘to read the file in a “color-blind” way, the admissions officer would likely have to ignore highly relevant information, without which the applicant’s personal statement might literally not make sense.’”²⁰⁸ By inviting applicants to discuss their race and its influence on who they are, the Court has endorsed, whether intentionally or not, what the late Justice Ginsburg expressed decades ago, that universities should “encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language.”²⁰⁹ This, she said “is preferable to achieving [their goals] through winks, nods, and disguises.”²¹⁰

²⁰⁶ See *Grutter*, 539 U.S. at 324-25 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J., plurality opinion) (internal citations omitted) (noting that “[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race. Rather, [t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”); accord *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2207 (2016) (“[A]lthough admissions officers can consider race as a positive feature of a minority student’s application, there is no dispute that race is but a ‘factor of a factor of a factor’ in the holistic-review calculus.”).

²⁰⁷ Brief for Amici Curiae Association of American Medical Colleges et al. in Support of Respondents at 31, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3036400, at *31.

²⁰⁸ *Id.* at 31-32, *31-32.

²⁰⁹ *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting).

²¹⁰ *Id.* at 305.

VI. CONCLUSION

Thus, the Court's decision in *SFFA v. Harvard* appears to prohibit any consideration of race during the college admissions process. By invalidating the programs at Harvard and UNC that consider race as one of many factors they have reinforced the barriers that have made it harder, if not impossible, for students of color to enjoy the same opportunities as white students. A careful reading of the decision, however, leaves open the possibility that colleges may, and will, consider the race of each applicant as they have in the past to ensure that student body diversity is achieved, thereby limiting the impact of the Court's decision.