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HOW THE SUPREME COURT CAN IMPROVE EDUCATIONAL OPPORTUNITIES FOR AFRICAN AMERICAN AND HISPANIC STUDENTS BY RULING AGAINST HARVARD COLLEGE'S USE OF RACE DATA

By Genevieve Kelly*

Abstract

Students for Fair Admissions v. Harvard has not only exposed ways in which Harvard College's admissions office unfairly assesses Asian American applicants, but it has also revealed that Harvard's fixation on race per se can disadvantage the very African American and Hispanic students best positioned to bring instructive and underrepresented perspectives to the college. The facts show that Harvard's "tips" and "one-pager" system values African American and Hispanic students for their ability to boost Harvard's racial profile more than for their actual experiences confronting racial discrimination. This Comment explains how, by ruling against Harvard (and without overruling Grutter or Fisher II), the Court can force the college to adopt admissions policies that not only treat all applicants more fairly, but that more fully affirm African American and Hispanic applicants. This Comment also offers ways that a ruling against Harvard could benefit disadvantaged African American and Hispanic students at every grade level—whether or not they ever apply to Harvard.

Introduction

For the sake of African American and Hispanic students who have received the fewest educational opportunities, the Supreme Court should hear *Students for Fair Admissions, Inc.* and rule against Harvard.¹ Harvard's admissions policies harm not only Asian American applicants (who receive Harvard's lowest "personal rating"

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1. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 131 (D. Mass. 2019), *aff'd sub nom.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed*, _U.S._ (Feb. 28, 2021) (No. 20-1199).

scores),² but also some of its African American and Hispanic applicants who have faced the most racial adversity. That is because Harvard values applicants for their ability to boost the school's racial profile apart from their individual experiences confronting racism and discrimination.³

The undisputed facts described by the district court show that Harvard uses a "tips" system to provide applicants extra points for checking the "Black or African American" or "Hispanic or Latino" boxes on their applications.⁴ Harvard also uses a "one-pager" system to periodically assess how accepting those (over other) applicants would change the racial profile of its incoming class. It then uses these one-page data sheets to compare how the projected racial profile of the incoming class will stack up against the prior year's class.⁵

Harvard claims to cull these race data from more individual and personal aspects of students' applications in order to achieve student body diversity.⁶ But while Harvard relies on *Bakke*, *Grutter*, and *Fisher II* for the proposition that colleges can consider race to pursue student body diversity, those cases never held that a college has a compelling interest in pursuing the most marketable or politically correct racial profile.⁷ Instead, those cases recognized a college's compelling interest in bringing together students with different experiences, beliefs, "ideas[,] and mores."⁸ They merely acknowledged an important (and unfortunate) connection between racial differences and diverse viewpoints.⁹

Harvard's focus on its public racial profile and on racial categories *per se* suggests that it is more interested in appearing diverse than in bringing the most authentic or instructive experiences of racial discrimination to its campus or classrooms. This can detrimentally affect its African American and Hispanic applicants in at least two ways.

First, the race/ethnicity boxes themselves fail to capture the extent to which some applicants' underrepresented minority perspec-

2. *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 161–62.

3. *See id.* at 137.

4. *Id.* at 176.

5. *Id.* at 145.

6. *See id.* at 133.

7. *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003); *Fisher v. Univ. of Tex. at Austin* ("*Fisher II*"), 136 S. Ct. 2198 (2016).

8. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 313 (1978); *see infra* pp. 9–12 (distinguishing Harvard's admissions procedures from the procedures in *Grutter* and *Fisher II*).

9. *See Grutter*, 539 U.S. at 353–54 (Scalia, J., concurring in part and dissenting in part); *see also Fisher II*, 136 S. Ct. at 2213.

tives have influenced their beliefs and experiences. Accordingly, students who have faced the most systemic racism in segregated school systems, the most economic, emotional, or linguistic challenges from their family's immigration, or the most cultural or economic bias in standardized tests, can receive the same "tips" as applicants who have faced far less adversity.¹⁰

Similarly, any African American or Hispanic students who decline to check the race box because they believe—as some Harvard professors instruct—that race is an empty social construct,¹¹ could lose their advantage in admissions as a direct result of holding that underrepresented (but educative) viewpoint.

Second, by justifying its use of isolated race data with its purported interest in exposing students to different viewpoints, Harvard's admissions procedures harm African American and Hispanic students by perpetuating the myth that racial differences *per se* make us politically, emotionally, culturally, or intellectually different. The repetition of this lie, especially with a Harvard Corporation and high court imprimatur, can negatively influence not just the way African American and Hispanic students are treated by fellow students or faculty members, but how they view themselves.¹²

Harvard's focus on racial categories and statistics, even for applicants who give no indication of how race has influenced their experiences or views, has only two possible explanations. Either Harvard is substantially motivated by its desire to *appear* racially diverse in public demographics, or Harvard believes that racial categories *per se* thoroughly predict people's experiences and beliefs. But colleges have no compelling interest in achieving diverse "aesthetics."¹³ And the use of race *per se* as a proxy for "difference" or "otherness" is "Constitution[ally] abhor[rent]."¹⁴ As the district court

10. The latter group may include applicants identifying as African American or Hispanic through a single ancestor's experiences rather than through their own (potentially even an ancestor they never suspected having before taking a mail-in DNA test).

11. See Matthew Clair & Jeffrey S. Denis, *Sociology of Racism*, 19 INT'L ENCYC. SOC. & BEHAV. SCIS 857, 857–63 (2015) ("Among social scientists, 'race' is generally understood as a social construct.").

12. For an example of how educational institutions can "help students examine their pre-conceptions and assumptions about racial categories and understand the impossibility of constructing a consistent system of human racial classification," see, e.g., Scott Bronson, *For Teachers: Lesson Plans, The Empirical Challenges of Racial Classification*, PBS, https://www.pbs.org/race/000_About/002_04-teachers-04.htm [<https://perma.cc/7HZK-F5MJ>] (last visited June 12, 2021) (a lesson plan developed by DNA expert Scott Bronson for the Public Broadcasting Service's "Race: The Power of an Illusion" project).

13. *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part) (distinguishing between the "educational benefits" of including diverse points of view and the "aesthetics" of diversity).

14. *Id.* at 353–54.

observed, quoting Toni Morrison, “[r]ace is the least reliable information you can have about someone” and “tells you next to nothing.”¹⁵ Harvard’s admissions office cannot avoid stigmatizing applicants when it culls race data from applicants’ own descriptions of their unique identities.¹⁶

All Harvard needs to do to lawfully assemble a “genuine[ly] diverse[e]”¹⁷ freshman class—including a racially diverse class—is to ask its applicants more about the actual experiences they have had in their own skin. Focusing exclusively on applicants’ real experiences, beliefs, and ideas, and not on their potential to boost or maintain Harvard’s public image, will increase Harvard’s intellectual diversity and make minority applicants feel more valued. People’s best qualities can go unseen when they are viewed through the lens of racial classifications.¹⁸

The Court can force Harvard to improve its student body diversity and its treatment of minority applicants by acknowledging that Harvard failed to identify a specific and compelling interest in basing admissions decisions on racial categories *per se*. This approach is consistent with *Grutter* and *Fisher II*.¹⁹ And by clarifying *Grutter* and *Fisher II*, the Court can protect disadvantaged African American and Hispanic students of all ages—including those who may never apply to Harvard—from other well-intentioned but harmful policies rooted in racial stereotypes.²⁰

15. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 205 (D. Mass. 2019) (internal citation omitted); *see also* Bronson, *supra* note 12.

16. The following definition of “stigma” was referenced by Harvard Professor Matthew Clair in his essay by the same name: “the co-occurrence of four processes: (1) labeling human differences; (2) stereotyping such differences; (3) separating those labeled from ‘us’; and (4) status loss and discrimination against those labeled.” Matthew Clair, *Stigma*, in *CORE CONCEPTS IN SOCIOLOGY* 318–21 (J. Michael Ryan ed., 2019).

17. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 315 (1978).

18. RALPH ELLISON, *INVISIBLE MAN* 3 (1st ed. 1952) (“I am invisible, understand, simply because people refuse to see me”); Langston Hughes, *I Too*, in *THE WEARY BLUES* 91 (Alfred A. Knopf, 10th ed. 1925) (“They’ll see how beautiful I am/ And be ashamed—/ I, too, am America.”).

19. *See Fisher v. Univ. of Tex. at Austin (“Fisher II”)*, 136 S. Ct. 2198 (2016); *see also Grutter v. Bollinger*, 539 U.S. 306, 324 (2003).

20. *See* discussion *infra* Part III.

Part I: How Harvard Has Failed to Demonstrate a Specific and Compelling Interest in Student Body Diversity

To lawfully consider race in admissions, Harvard must show that it has a compelling interest in doing so and that its admissions procedures are narrowly tailored to the pursuit of that interest.²¹ “[T]he reasons for any [racial] classification [must be] clearly identified and unquestionably legitimate.”²² “A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.”²³

Universities must show a compelling interest in considering race in admissions to pursue the educational benefits that flow from student body diversity.²⁴ But colleges cannot claim an interest in “simple ethnic diversity,” or “an interest in enrolling a certain number of minority students.”²⁵ They must seek to provide “wide exposure to the ideas and mores of students as diverse as this Nation.”²⁶ That compelling interest “encompasses a [] broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”²⁷

While the Supreme Court has permitted colleges to consider race as “one factor *among* many,”²⁸ it has never allowed a university to consider race as an independent factor, apart from applicants’ “experiences, outlooks, and ideas.”²⁹

Here are some of the undisputed facts regarding Harvard’s use of race in admissions:

- “Applicants may, but are not required to, identify their race in their application by discussing their racial or ethnic identity in their personal statement or essays or by simply checking the box on the application form for one or more preset racial groups (e.g., American Indian or Alaskan Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or White)

21. See *Fisher II*, 136 S. Ct. at 2210.

22. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989) (internal quotation marks and citation omitted).

23. *Fisher II*, 136 S. Ct. at 2211.

24. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 306–07 (1978); see *Grutter*, 539 U.S. at 307–09.

25. *Bakke*, 438 U.S. at 315; *Fisher II*, 136 S. Ct. at 2210.

26. *Bakke*, 438 U.S. at 320; *Grutter*, 539 U.S. at 325 (“[F]or the reasons set out below, today we endorse Justice Powell’s view [in *Bakke*].”).

27. *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003) (citing *Bakke*, 438 U.S. at 315).

28. *Id.* at 340 (emphasis added).

29. *Bakke*, 438 U.S. at 314; see *Fisher II*, 136 S. Ct. at 2210.

- and may also select or indicate a subcategory of these groups.”³⁰
- “If applicants disclose their racial identities, Harvard may take race into account, *regardless of whether applicants write about that aspect of their backgrounds or otherwise indicate that it is an important component of who they are.*”³¹
 - Harvard gives students who identify themselves as African American or Hispanic “tips” in their admissions scores such that “the average scores and high school grades of admitted applicants from each racial group differ significantly.”³²
 - Harvard isolates the data it collects on applicant race to ensure that its decisions on individual applicants further its “goal” of an optimal “level of racial diversity.”³³
 - Harvard never identified or disclosed a precise numeric goal for its racial composition (doing so would have created an obvious numeric quota, which cannot withstand legal scrutiny).³⁴
 - Harvard’s unspecified numeric goal appears to bear some connection to the prior year’s racial composition because throughout the admissions process, the university dean, the admissions director, and other admissions officers receive “‘one-pagers’ that provide a statistical snapshot of the projected class and compare it to the prior year.”³⁵
 - “The one-pagers contain statistics on applications and admission rates by gender, geography, academic interest, legacy status, financial aid circumstances, citizenship status, racial or ethnic group, recruited athlete status, and applicants flagged as disadvantaged.”³⁶
 - “[I]f at some point in the admissions process it appears that a group is notably underrepresented or has suf-

30. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 137 (D. Mass. 2019).

31. *Id.* (emphasis added).

32. *Id.* at 199.

33. *Id.* at 147, 179–80.

34. *Id.* at 185; *see Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (stating that pursuing “some specified percentage of a particular group merely because of its race or ethnic origin” would “amount to outright racial balancing” and would be “patently unconstitutional.”).

35. *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 145.

36. *Id.*

ferred a dramatic drop off relative to the prior year, the Admissions Committee may decide to admit additional students within that group.”³⁷

The record before the lower courts also showed that from 2010-2019, incoming Asian American students always comprised roughly between 17% and 21% of admitted students, African Americans between 10% and 12% of admitted students, and Hispanic students between 10% and 12%.³⁸ Notwithstanding these facts, the district court found sufficient variance in the racial composition from year to year to determine that whatever Harvard’s unspecified racial goal was, it was not a strict quota and did not reflect “impermissible racial balancing.”³⁹ The court also found that “race is a determinative tip for approximately 45% of all admitted African American and Hispanic applicants.”⁴⁰

When tracking how its racial profile is “shaping up,” Harvard’s admissions officers employ three “methodologies.”⁴¹ These methodologies include the federal government’s “Integrated Postsecondary Educational Data System” (IPEDS), but the Admissions Office “prefer[s] [its] new methodology” over the government’s IPEDs system.⁴²

The Department of Education required universities to start using its current IPEDS survey by 2010 to reflect “the growing diversity of our nation.”⁴³ The updated survey allows students to check more than one race box, so that the Department can “obtain more accurate information about the increasing number of students who identify with more than one race.”⁴⁴ It asks students to first designate “ethnicity” as “Hispanic or Latino or Not Hispanic or Latino.”⁴⁵ It then asks individuals to indicate “one or more races that apply among the following:

- American Indian or Alaska Native
- Asian
- Black or African American

37. *Id.* at 146.

38. *Id.* at 177 fig. 2.

39. *Id.* at 176–77.

40. *Id.* at 178.

41. *Id.* at 145, 147.

42. *Id.* at 145.

43. See Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59,266, 59,276 (Oct. 19, 2007).

44. *Id.*

45. *Definitions for New Race and Ethnicity Categories*, NAT. CTR. EDUC. STAT., <https://nces.ed.gov/ipeds/report-your-data/race-ethnicity-definitions> [<https://perma.cc/6R5P-74VA>] (last visited May 28, 2021).

- Native Hawaiian or Other Pacific Islander
- White.⁴⁶

As of the date of this Comment's publication, Harvard's website advertises only the number of students who identify as "African American," "Asian American," "Hispanic or Latino," "Native American," or "Native Hawaiian."⁴⁷ Unlike IPEDS, the racial statistics Harvard advertises on its website do not specifically acknowledge students who identify as "[t]wo or more races."⁴⁸ Instead, Harvard "double count[s]" bi-racial and multi-racial students, without affirmatively disclosing that with its data, the same student could be counted in more than one minority category. Neither does Harvard's website disclose how many of its students identify (either fully or partially) as "white."⁴⁹

The district court did not address why Harvard aggregates the Department of Education data in this manner or whether it has a compelling interest in doing so.⁵⁰ Rather, it focused on Harvard's purpose for considering race: the pursuit of student body diversity.

To demonstrate its interest in diversity, Harvard assembled a "Committee to Study the Importance of Student Body Diversity," chaired by college dean Rakesh Khurana. "The report it issued (the 'Khurana Report') was part of Harvard's effort to explain the benefits Harvard derives from diversity, including racial diversity, as required by Supreme Court precedent."⁵¹

46. *Id.*

47. *Admissions Statistics*, HARV. COLL., <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/7HBH-5QAJ>] (last visited May 28, 2021).

48. *Compare Admissions Statistics*, HARV. COLL., <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/7HBH-5QAJ>] (last visited May 28, 2021) with *Collecting Race and Ethnicity Data from Students and Staff Using the New Categories*, NAT. CTR. EDUC. STAT., <https://nces.ed.gov/ipeds/report-your-data/race-ethnicity-collecting-data-for-reporting-purposes> [<https://perma.cc/6R5P-74VA>] (last visited May 28, 2021).

49. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 145 n.22 (D. Mass. 2019).

50. *See id.*

51. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 173 (1st Cir. 2020); *see also* RAKESH KHURANA, MAHZARIN R. BANAJI, EMMA DENCH, YUKIO LIPPIT, DAVID R. PILBEAM & JONATHAN L. WALTON, HARV. COLL., REPORT OF THE COMMITTEE TO STUDY THE IMPORTANCE OF STUDENT BODY DIVERSITY 1 (2016), https://inclusionandbelongingtaskforce.harvard.edu/files/inclusion/files/report_of_the_committee_to_study_the_importance_of_student_body_diversity_02-02-16.pdf [<https://perma.cc/7DR7-APFW>] [hereinafter KHURANA REPORT]. As of the date of publication, the KHURANA REPORT is available on Harvard's website. As discussed in the next section of this Comment, the report provides glimpses of how Harvard's fixation on racial categories may undermine its professed goals of "unsettl[ing] presumptions, to defamiliariz[ing] the familiar, [and] reveal[ing] what is going on beneath and behind appearances...." For that reason, Harvard could remove the KHURANA REPORT from its website (or revise it) in the near future.

The Khurana Report states that (1) race “plays an irreplaceable role in [Harvard’s] conception of a diverse student body,” and that (2) Harvard does not treat minority students as though they “share the same views, experiences, or other characteristics.”⁵² It states that Harvard’s “community of educated men and women” is “inclusive of but not bounded by race or ethnicity.”⁵³

Both lower courts relied on the Khurana Report in determining that Harvard had met its burden of demonstrating a specific, compelling interest in student body diversity. The district court found that Harvard’s goals in using “[r]acial categorizations” were “not ‘elusory or amorphous,’ and [were] instead ‘sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.’”⁵⁴ The court stated that Harvard’s goals include:

[[1]] enhancing the education of its students of all races and backgrounds to prepare them to assume leadership roles in the increasingly pluralistic society into which they will graduate . . . [[2]] achieving the benefits that flow from its students’ exposure to people of different background, races, and life experiences by teaching them to engage across differences through immersion in a diverse community, and [[3]] broadening the perspectives of teachers, and thus tending to expand the reach of the curriculum and the range of scholarly interests of its faculty.⁵⁵

The district court concluded that Harvard’s goals “are similar in specificity to goals the Supreme Court found ‘concrete and precise’ in *Fisher II*.”⁵⁶

The First Circuit agreed that Harvard’s goals, as communicated in the Khurana Report, demonstrated Harvard’s compelling interest in its “use of race.”⁵⁷ In the First Circuit’s view, “at least” the following specific goals were articulated in the Khurana Report:

(1) training future leaders in the public and private sectors as Harvard’s mission statement requires; (2) equipping

52. KHURANA REPORT, *supra* note 51, at 8–9.

53. KHURANA REPORT, *supra* note 51, at 5.

54. *Students for Fair Admissions*, 397 F. Supp. 3d at 192 (quoting *Fisher v. Univ. of Tex. at Austin* (“*Fisher II*”), 136 S. Ct. 2198, 2211).

55. *Id.* (internal quotation marks omitted).

56. *Id.*

57. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 179–80 (1st Cir. 2020).

[Harvard's] graduates and [Harvard] itself to adapt to an increasingly pluralistic society; (3) better educating [Harvard's] students through diversity; and (4) producing new knowledge stemming from diverse outlooks.⁵⁸

Despite identifying different goals from the district court, the First Circuit still concluded that Harvard's goals were "specific."⁵⁹ The First Circuit noted that "Harvard's use of race in admissions is contextual and it does not consider race exclusively," but, rather, looks at the other aspects of each application too.⁶⁰

But consistent with *Grutter* and *Fisher II*, the question should not be whether Harvard considers race exclusive of other factors, but whether Harvard culls and considers race data apart from other factors.⁶¹ Harvard admits it does—providing race-based tips "regardless of whether applicants write about that aspect of their backgrounds or otherwise indicate that it is an important component of who they are."⁶² In *Grutter*, the University of Michigan required every applicant to submit an essay "describing the ways in which the applicant will contribute to the life and diversity of the Law School."⁶³ *Grutter* gives no indication that the University of Michigan ever considered an applicant's race for any purpose outside of the applicants' own explanations of how race may have impacted their ability to bring valued and underrepresented experiences or views to the law school. Rather, the University of Michigan considered how "growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."⁶⁴ Considering race within the context of applicants' "own, unique experience[s],"⁶⁵ the university could select the applicants who would bring important underrepresented views—of race or otherwise—to the university. After all, "Harvard cannot . . . treat race monolithically be-

58. *Id.* at 173–74.

59. *Id.* at 186.

60. *Id.* at 190.

61. *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003); *Fisher v. Univ. of Tex. at Austin* ("*Fisher II*"), 136 S. Ct. 2198, 2212 (2016).

62. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 137 (D. Mass. 2019).

63. *Grutter*, 539 U.S. at 315.

64. *Id.* at 333.

65. *Id.*

cause students of the same race do not ‘share the same views, experiences, or other characteristics.’”⁶⁶

In *Fisher II*, the University of Texas did not require students to explain how they could contribute to the school’s life and diversity, but the circumstances in that case made it more reasonable for the university to treat the racial categories listed on its application as “hav[ing] some value as a gauge of the University’s ability to enroll students who can offer underrepresented perspectives.”⁶⁷ As a state school, the University of Texas was required to fill 75% of its incoming class with students who graduated in the top ten percent of their Texas high school.⁶⁸ The Court took judicial notice of the fact that the Texas legislature’s “Top Ten Percent Plan” was “adopted with racially segregated neighborhoods and schools front and center stage.”⁶⁹ Given that the university was required to accept such a high number of students coming from racially segregated schools and neighborhoods within its own state, it could infer from the race box something specific and meaningful about applicants’ experiences and perspectives. For that reason, it had a compelling interest in considering race “indirect[ly]” to “promot[e] [the] cross-racial understanding” that it knew so many of its applicants lacked.⁷⁰

Harvard is not bound by a “Top Ten Percent Plan” or by any other requirement to fill its seats with students from segregated schools or neighborhoods. The Khurana Report states that Harvard’s sports teams “are often the first time that [Harvard] students are interacting with someone who is poor or rich or gay or lesbian or African-American or Latino or whose parents did not attend college or whose ancestors came over on the Mayflower.”⁷¹ But the report includes no evidentiary support for the proposition that a significant number of Harvard athletes spend their entire lives prior to college without ever interacting with a single African American or Latino person. If Harvard fixates on race *per se* to cure its students’ cultural isolation, it should have to fully describe and demonstrate that cultural isolation to the court and explain its specific interest in curing it.

66. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 175 (1st Cir. 2020).

67. *Fisher v. Univ. of Tex. at Austin (“Fisher II”)*, 136 S. Ct. 2198, 2212 (2016).

68. *Id.* at 2206.

69. *Id.* at 2213 (quoting *Fisher v. Univ. of Tex. (“Fisher I”)*, 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting)).

70. *Id.* at 2211.

71. KHURANA REPORT, *supra* note 51, at 15.

There is another more critical distinction between Harvard's admissions program and the University of Texas plan. When Abigail Fisher applied to the University of Texas in 2008, the Department of Education had not yet required universities to employ its revised race survey reflecting the Department's belief that the earlier survey with single racial categories failed to reflect "the growing diversity of our nation."⁷² The Department of Education began mandating the use of a new survey in 2010 to "obtain more accurate information about the increasing number of students who identify with more than one race."⁷³ But Harvard does not prominently display its race data as collected by the Department of Education's current survey. Instead, it posts a simplified racial profile that ignores the Department of Education's more nuanced and "accurate" approach.⁷⁴ It lists students in only five single categories (African American, Asian American, Hispanic or Latino, Native American, and Native Hawaiian), without indicating that any of these students may have checked more than one box, including the "White" box.⁷⁵

This enables Harvard to magnify its African American and Hispanic or Latino profile. A student who checks the "African American" and "Hispanic or Latino" box could be counted the same as two minority students—one African American and another Hispanic or Latino. A student who checks the "African American" and "White" boxes—and who predominantly identifies as white—could be counted the same as a student who identifies only as African American.⁷⁶

Harvard never proposed to the district court or First Circuit why it might have a compelling interest in using race data less nuanced or less accurate than the data collected by the Department of Education.⁷⁷ Nor does it seem plausible that these over-simplified or aggregated data can accurately predict applicants' experiences and perspectives when they hide part of some applicants' racial identities.

The inability of Harvard's oversimplified racial categories to predict the experiences and perspectives of its applicants is only ex-

72. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. at 59,276.

73. *Id.*

74. See *Admissions Statistics*, HARV. COLL., <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/7HBH-5QA>] (last visited May 28, 2021).

75. *Id.*

76. See *id.*

77. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126 (D. Mass. 2019); see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

acerbated by the dawn of mail-in DNA tests, sales of which have “risen meteorically” since *Fisher II* was decided.⁷⁸ Test results informing individuals about possible African ancestry that they had never suspected can tempt some applicants to “game the system” in new ways that the University of Texas and Abigail Fisher did not anticipate.⁷⁹

Harvard’s aspirational twenty-two page report on the “Importance of Student Body Diversity” never explains whether Harvard regards racial diversity as an end in itself or as a necessary by-product of the diversity of thoughts and experiences in which it does have a compelling interest.⁸⁰ And while the First Circuit determined that “[r]ace is one piece of Harvard’s interest in diversity” and “is considered as part of a broader effort to achieve exposure to widely diverse people, cultures, ideas, and viewpoints,” neither the First Circuit nor Harvard identified what that “piece” was.⁸¹ By declining to specify, Harvard has had its cake and eaten it. It has enjoyed advertising an optimal “level of racial diversity” while holding onto the traditional academic measurements and preference for legacy applicants that disadvantage racial minorities—especially low-income African American and Hispanic students.⁸²

In that way, the apparent annual target of 10% to 12% of African American and Hispanic students could be functioning as a ceiling as well as a floor. But no court has read the Civil Rights Act or the Equal Protection Clause to tell African American or Hispanic students,

78. Ruth Padawer, *Sigrid Johnson Was Black. A DNA Test Said She Wasn’t*, N. Y. TIMES MAG. (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/magazine/dna-test-black-family.html> [<https://perma.cc/ZHX7-C2NH>] (stating that sales of at-home DNA kits increased from 2 million by April 2017 to 10 million by November 2018).

79. *Fisher v. Univ. of Tex. at Austin (“Fisher II”)*, 136 S. Ct. 2198, 2230 (2016) (Alito, J., dissenting); see also Padawer, *supra* note 78 (“When white test takers see results that indicate they have African ancestry, some, especially young people, welcome their newfound multicultural heritage, even when the percentage is small . . .”).

80. KHURANA REPORT, *supra* note 51, at 1–22.

81. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 186 (1st Cir. 2020) (internal quotation marks and citation omitted); see also KHURANA REPORT, *supra* note 51, at 1–22.

82. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 147 (D. Mass. 2019) (stating that Harvard tracks “how each class is shaping up [with regard to racial ratios] relative to previous years with an eye towards achieving a[n optimal] level of racial diversity.”); *id.* at 142 (stating that Harvard gives tips to legacy applicants and requires students to submit SAT scores, which it tracks on its one-pagers); see, e.g., Sarwat A. Rattani, *SAT: Does Racial Bias Exist?*, 7 CREATIVE EDUC. 2151, 2151–62 (2016); Saul Geiser, *The Growing Correlation Between Race and SAT Scores: New Findings from California* (U.C. Berkeley: Ctr. for Stud. in Higher Educ., Working Paper No. CSHE 10.15, 2015).

“[y]ou may come this far but no farther.”⁸³ If Harvard wants to tell the public that it has an acceptable number of African American and Hispanic students, it should have to adopt admissions procedures that risk giving those students more than 12% of its slots.⁸⁴

The Court cautioned the University of Texas in *Fisher II* that the university would have to “assess whether changing demographics” alter the compelling interest analysis.⁸⁵ Both changing demographics *and* the failure to precisely identify its interest in race alters that analysis for Harvard. Contrary to the lower courts’ decisions, Harvard’s interest in diversity is not “clearly identified, definite, and precise.”⁸⁶ Harvard has failed to demonstrate a specific interest in considering racial categories separately from applicants’ narratives about how race has impacted their experiences and ideas. And Harvard likely cannot rehabilitate its admissions program by defining its interest in using race data more precisely. If Harvard admits to valuing racial diversity as an end in itself, it cannot demonstrate a compelling interest under *Bakke*, *Grutter*, or *Fisher II*. If Harvard claims to value racial diversity only as a necessary by-product of accepting students with diverse thoughts and experiences, it cannot show that its use of isolated race data in its tips and one-pagers is narrowly tailored.⁸⁷

Harvard justifies its singular focus on race boxes with the claim that race is a “central element . . . of the identity of every American.”⁸⁸ This is false. How we have been treated and how we have treated others on account of our and/or their imputed race is unfortunately still central to our identities. Absent those experiences of judgment, discrimination, prejudice, segregation, cultural isolation, guilt, and even violence on account of race, race alone tells us nothing meaningful about each other, as at least some Harvard professors have acknowledged.⁸⁹

83. 38 *Job* 8:11 (Christian Standard) (“Who enclosed the sea behind doors/ when it burst from the womb,/ when I made the clouds its garment/ and total darkness its blanket,/ when I determined its boundaries/ and put its bars and doors in place,/ when I declared, ‘You may come this far, but no farther;/ your proud waves stop here?’”).

84. See, e.g., discussion *infra* Part II (discussing University of Chicago admissions procedures).

85. *Fisher v. Univ. of Tex. at Austin (“Fisher II”)*, 136 S. Ct. 2198, 2214 (2016).

86. *Students for Fair Admissions, Inc.*, 980 F.3d at 185.

87. *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part) (distinguishing between the “educational benefits” of including diverse points of view and the “aesthetics” of diversity).

88. KHURANA REPORT, *supra* note 51, at 5.

89. See *Clair & Denis*, *supra* note 11, at 857–63.

Harvard already knows how to lawfully consider race in the context of the human struggles, perspectives, and experiences that applicants might have had on account of race and other factors. “[I]n Harvard’s experience, [some] applicants do choose to write about how ‘their racial identities have shaped their pre-college experiences’ and admissions officers might read these essays as evidence of an applicant’s ‘abilit[y] to overcome obstacles’ and therefore infer their ‘leadership ability or other personal strengths.’”⁹⁰ As the district court found, Harvard’s consideration of race in this way “may improve the admissions chances of some Asian Americans who [choose to] connect their racial identities with particularly compelling narratives.”⁹¹ Harvard has no reason to consider race outside of these narratives.

Critics of this approach may say that if Harvard is permitted to consider race at all—even in the context of individual challenges and formative life experiences—that the college could cheat the system by continuing to assign points to applicants merely for identifying race in their personal essays rather than actually crediting the value of each applicant’s individual experience or perspective. But before considering race in applicant essays, Harvard would have to articulate a specific, compelling interest in doing so, and its procedures would have to be narrowly tailored to that end.⁹² Harvard will not be able to make that showing without a clear expectation of what kind of thoughts, experiences, and perspectives it wants represented in its student body.

Part II: How a Ruling Against Harvard Might Benefit Harvard’s Most Disadvantaged Minority Applicants Before and After They Matriculate

If Harvard focused on content of character, or beliefs, or life experience, rather than color of skin, it might admit more African American and Hispanic students who have suffered the most severe racial discrimination or who otherwise have the most instructive and underrepresented experiences and perspectives to share. And if considering race in this way does not immediately result in Harvard admitting the same or more African American and Hispanic stu-

90. *Students for Fair Admissions, Inc.*, 980 F.3d at 200.

91. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126, 178 (D. Mass. 2019).

92. *See Fisher v. Univ. of Tex. at Austin (“Fisher II”)*, 136 S. Ct. 2198, 2210.

dents, Harvard's interest in its public image might cause it to reevaluate some of its admissions criteria. Harvard can follow the University of Chicago's lead. Out of an interest in "genuine diversity," the University of Chicago made the SAT optional in 2018. After doing so, "[t]he number of first-generation and low-income students who committed to attend the university in the fall [rose] 20 percent."⁹³ And without giving race-based tips, the university filled 10% of its freshman class with African American students.⁹⁴

Requiring Harvard to acknowledge that skin color only matters to the extent that applicants have been treated differently on account of it—whether by institutions, strangers, family, friends, or self—might also help Harvard better fulfill what it believes is "the aim of a liberal education": "to unsettle presumptions, to defamiliarize the familiar, to reveal what is going on beneath and behind appearances."⁹⁵ The record on appeal contains several glimpses of possible ways that Harvard, as an institution, might undermine its educational goals by giving meaning to racial differences *per se*, thereby perpetuating the racial stereotypes or assumptions that flow from racial labels.

Although it was intended to highlight Harvard's appreciation of diversity, the Khurana Report exposed several situations in which Harvard's singular focus on race *per se* may have undermined its aims as a liberal arts college. One example comes from the following anecdote that the Khurana Committee found "particularly on point" regarding diversity at Harvard:

One of the people with whom we spoke observed that in 2002, the Freshman Dean's Office paired a white Jewish freshman coming from Westchester County, New York, in a double room in Strauss Hall with a first-generation son of Haitian immigrants. Speaking of the friendship ten years later, the black student observed that their friendship "was based on us being a couple of 17-year old kids who happened to be thrown into a room together." The student from

93. Aamer Madhani, *University of Chicago Becomes First Elite College to Make SAT, ACT Optional for Applicants*, USA TODAY (June 14, 2018, 8:45 AM), <https://www.usatoday.com/story/news/2018/06/14/university-chicago-sat-act-optional/701153002/> [<https://perma.cc/9KMP-7SAE>]; Scott Jaschik, *Chicago Sees Success by Dropping SAT Requirement*, INSIDE HIGHER ED (July 15, 2019), <https://www.insidehighered.com/admissions/article/2019/07/15/chicago-sees-success-dropping-testing-requirement-admissions> [<https://perma.cc/7BUB-WV7D>].

94. Madhani, *supra* note 93; Jaschik, *supra* note 93.

95. KHURANA REPORT, *supra* note 51, at 7.

Westchester was Mark Zuckerberg. His freshman year roommate, Samyr Laine, set the triple jump record at Harvard and, after graduation, represented Haiti in the Olympics. “What,” mused the person with whom we spoke, “must those freshman year conversations have been like.”⁹⁶

Neither the interviewed alum who “mused” over the cross-racial room assignment nor the Khurana Committee seemed to consider that both Laine and Zuckerberg both grew up in suburban New York, attended public high schools for at least a period of time, and were standout high school athletes, and that Zuckerberg (if not both students) was proficient in French.⁹⁷

Singular focus on race may also explain why one African American Harvard student, described in the following Khurana Report anecdote, was upset when his professor referred to “out-of-wedlock birthrates among African Americans:”

I was stunned when one of my black classmates became visibly angry and accused the professor of not realizing how much it hurt him to hear information [about out-of-wedlock birthrates among African Americans] presented in class. Thank goodness he did it politely and not accusingly. But he was obviously upset. And his upset got me very upset, but in the opposite direction.

This was the whole reason I had signed up to take this course. I need to grapple with unpleasant realities But my fellow black student really made it awkward—both for the professor and for me. I actually wanted to hear more details about those demographics. Not because I am happy about them, but because I absolutely need to understand them as well as I can. Illusions are definitely no help.

96. KHURANA REPORT, *supra* note 51, at 1, 12–23.

97. Craig Lambert, *Up Three Times*, HARV. MAG. (May–June 2006), at 82–83, <https://www.harvardmagazine.com/sites/default/files/pdf/2006/05-pdfs/0506-81.pdf> [<https://perma.cc/G6FA-TZ7D>] (providing background on Laine); Mary Bellis, *Biography of Mark Zuckerberg, Creator of Facebook*, THOUGHTCO. (June 19, 2019), <https://www.thoughtco.com/mark-zuckerberg-biography-1991135> [<https://perma.cc/D49R-7AA2>]; Seven Levy, *Inside Mark Zuckerberg's Lost Notebook*, WIRED (Feb. 12, 2020, 6:00 AM), <https://www.wired.com/story/facebook-mark-zuckerberg-lost-notebook/> [<https://perma.cc/U8S3-QNV2>] (providing background on Zuckerberg and indicating that Zuckerberg was captain of his high school fencing team).

Well, frankly, I didn't know quite what to do. [Fortunately,] there was a third African-American student in the class [who] had the courage to speak right up, and to thank the professor for sharing this awkward but real data. This guy basically said what I was thinking, except I didn't have the courage to verbalize it out loud.

The student who had complained to the professor seemed surprised that a fellow black student would criticize him. But this other student was so diplomatic that I think he somehow succeeded in getting the complainer to take a deep breath and to pause and reconsider his views. It took some courage for that black student to criticize another black student who clearly was upset. And in the context of a mostly white class.⁹⁸

The Khurana Report included the anecdote to show the value of having a "critical mass" of minority students to teach other students that members of one racial minority can still have different views.⁹⁹ The Report stated that the anecdote "highlight[s] and help[s] to resolve a false paradox: on the one hand, Harvard College recognizes that race plays an irreplaceable role in [their] conception of a diverse student body; on the other, [they] reject any implication that [they] essentialize race, or believe that all students of a particular race share the same views, experiences, or other characteristics."¹⁰⁰

Although the anecdote demonstrates that students of the same racial minority can disagree on an issue (if the Committee thought an anecdote was necessary to demonstrate that point, it should not have), the example was ultimately unsatisfying. The report identifies the problem in this scenario as the awkwardness in a mostly white class caused by an African American student "politely" accusing the professor of upsetting him with statistics about "out-of-wedlock birthrates among African Americans." The Khurana Committee seemed to accept that the problem was resolved when the upset African American student "reconsider[ed] his views." But the Committee never seemed to consider that the real—and unresolved—

98. KHURANA REPORT, *supra* note 51, at 8.

99. See KHURANA REPORT, *supra* note 51, at 8–9; see also *Grutter v. Bollinger*, 539 U.S. 306, 319–20 (2003) ("[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students.").

100. KHURANA REPORT, *supra* note 51, at 8–9.

problem in this story may have been that the professor haphazardly presented a single correlation—African American race—as though it was an actual causation, such as income level or lack of educational opportunity.¹⁰¹ The real lesson may have been missed entirely, that “[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns.”¹⁰²

The Khurana Report goes on to state that “[r]acial and other forms of diversity in the student body provide a similar matrix of otherness in which to embed any individual student, thereby encouraging students to examine ways of processing the world dissimilar to their own.”¹⁰³ The report does not define “matrix of otherness,” but the reference again begs the question about the extent to which Harvard expects or even encourages students to assume that racial distinctions themselves make people meaningfully different.

The findings by the district court do not reveal whether Harvard College’s focus on statistic-based racial classifications and its use of race as a proxy for “otherness” has anything to do with African American and Hispanic applicants accepting Harvard’s admission offers at a predictably lower rate than White and Asian applicants, despite Harvard’s robust financial aid offerings.¹⁰⁴ Neither the district court nor the First Circuit thought it necessary to probe why Harvard College is less attractive to admitted African American and Hispanic applicants than to White and Asian applicants before concluding that Harvard’s tips and one-pager system was necessary for Harvard to achieve its undisclosed, yet optimal “level of racial diversity.”¹⁰⁵ It is possible that Harvard has a school culture of defining people by race that could contribute to Harvard’s difficulty in enrolling African American and Hispanic students.

101. See KHURANA REPORT, *supra* note 51, at 8–9.

102. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

103. KHURANA REPORT, *supra* note 51, at 9.

104. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 135–36 (D. Mass. 2019) (“Harvard’s financial aid program guarantees full funding of a Harvard education for students from families earning \$65,000 or less per year and also caps contributions at 10% of income for families making up to \$150,000 per year.”); *id.* at 146 (“[A]dmitted Asian American students usually matriculate at a higher rate than white students, while admitted Hispanic, African American, Native American, and multi-racial applicants matriculate at a lower rate.”).

105. See *id.* at 147; see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

Part III: How a Ruling against Harvard Might Benefit Disadvantaged Students at Other Grade Levels

If the Supreme Court determines that Harvard failed to demonstrate a specific and compelling interest in diversity, disadvantaged students from racial minorities in various grade levels could benefit, regardless of whether they ever apply to Harvard. As the Harvard professor discussing “out-of-wedlock birthrates among African Americans” may have done, school boards, administrators, teachers, and community stakeholders often use statistics on education and race without distinguishing correlation from cause. But like the race box on Harvard’s application, these statistics by themselves “tell[] you next to nothing”¹⁰⁶ about the students they track.¹⁰⁷

As an attorney and educator serving significantly disadvantaged African American and Hispanic students, I have seen well-intentioned (or seemingly well-intentioned) school leaders base decisions on these two-dimensional statistics without articulating a compelling interest or even asking themselves the extent to which their ideas are shaped by inaccurate stereotypes. For example, despite gross differences in performance between schools in one district, many school boards have refused to disturb neighborhood school boundaries, justifying the decision with the ungrounded assumption that low-income African American or Hispanic families would prefer the convenience of a neighborhood school over the high performance of a school farther away.¹⁰⁸ School boards have also included race data in their solicitations for parent feedback on boundary proposals. Some superintendents have assigned African American or Hispanic teachers to schools with the most African American or Hispanic students without performing a full, individualized analysis to determine whether a candidate of another race might perform better in a certain position there.¹⁰⁹ Some school

106. *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 205.

107. See *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part) (recognizing the difference between actual diverse points of view and “racial aesthetics”).

108. See U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., 2017 NATIONAL HOUSEHOLD TRAVEL SURVEY (2019), <https://nhts.ornl.gov/households> [<https://perma.cc/48M2-U79M>] (showing that only 15% more low-income families rely on school buses for student transportation than higher income families).

109. See, e.g., NAT’L COUNCIL OF TEACHER QUALITY, INCREASING THE ODDS: HOW GOOD POLICIES CAN YIELD BETTER TEACHERS (2004); see also ANNE PODOLSKY, LINDA DARLING-HAMMOND, CHRISTOPHER DOSS, & SEAN REARDON, CALIFORNIA’S POSITIVE OUTLIERS: DISTRICTS BEATING THE ODDS (2019), <https://learningpolicyinstitute.org/product/positive-outliers-districts-beating-odds-report> [<https://perma.cc/EU8S-L43T>] (concluding that “teacher qualifications are the most important school-related predictors of student achievement”).

principals have unwittingly set expectations low for minority students by casually citing their school's racial profile during discussions of school performance. And some teachers have declined to assign homework in classes or schools with a large percentage of minority students, wrongly assuming that the students will not have the family support or aptitude needed to complete the assignments.¹¹⁰

School administrators' casual and "benign" interest in race data deprives many African American and Hispanic students of the high expectations that they deserve from their school leaders, teachers, and even from themselves.¹¹¹ We will never achieve equity in education while school leaders are permitted to use race data without first establishing a "clearly identified and unquestionably legitimate" interest in doing so.¹¹² By making this requirement clear to Harvard, the Court can send a strong message to other stereotyping and "meddling . . . administrators" whose "interference is doing [students] positive injury."¹¹³ Being seen and valued for themselves, disadvantaged African American and Hispanic students (as well as students identifying as any race or combination of races) will have more opportunities to reach their academic potential.

Conclusion

The African American and Hispanic students who have suffered the most racial adversity do not benefit from a system that continues to judge them on race *per se* apart from the knowledge, perspectives, and character that they have developed by their actual experiences in their own skin. A President of Harvard College cautioned in 1996 that "[t]he more narrow and numerical the definition of qualifications, the more likely we are to pass over (or discount) applicants—of many different kinds—who possess exceptional talents, attributes, and evidence of promise that are not well measured by

110. See, e.g., *Stereotype Threat Widens Achievement Gap*, AM. PSYCH. ASS'N, <https://www.apa.org/research/action/stereotype> [<https://perma.cc/772Y-ULEL>] (describing how stereotypical expectations placed on students directly impacts their performance on standardized tests).

111. See *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 294 n.34 (acknowledging the difficulty in distinguishing between "preferential classifications [that] reflect a benign remedial purpose [and] malevolent stigmatic classification[s] . . .").

112. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989) (internal quotation marks and citation omitted).

113. *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part).

standardized tests.”¹¹⁴ Harvard’s consideration of race *per se* is “narrow and numerical.”¹¹⁵ By ruling against Harvard, the Court can encourage a wide range of educational (and other) institutions to reject stereotypes and to more fully value people as individuals.

114. KHURANA REPORT, *supra* note 51, at 4–5.

115. KHURANA REPORT, *supra* note 51, at 4–5.