2. "An individual's race may never be used against him in the admissions process."

Giving applicants of one or more races preferences in the admissions process, according to the Court, by necessity is disadvantaging applicants of other races. The Court points out that, because there are a limited number of applicants who will be accepted, the admissions process is a "zero-sum game." Consequently, the Court asserts that an applicant's race is being used against him/her whenever the applicant is not part of a classification that is given beneficial treatment in the admissions process. The following excerpt from the Court's opinion provides empirical evidence in support of its point:

> Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. And the District Court observed that Harvard's "policy of considering applicants' race . . . overall results in fewer Asian American and white students being admitted."

3. Stereotyping individuals because of their race is repugnant to the Equal Protection Clause.

Establishing race-conscious admissions policies to ensure a diverse student body is one of the primary arguments in favor of admissions programs such as those at Harvard and UNC. The Court, however, offered counterarguments to this point:

> In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike. . . .'" (citations omitted)
>
> ……
>
> The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer."

4. Race-conscious admissions programs must have a "logical end point."

Citing its 2003 decision in *Grutter* v. *Bollinger* (a case involving the minority-conscious admission program at the University of Michigan Law School), the Supreme Court reaffirmed that race-conscious admissions policies must have an end date in order to be allowable under the Equal Protection Clause. The Court's opinion included the following language from *Grutter*:

> "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." (citations omitted)

The Court includes statements of Harvard and UNC to show that these race-conscious admissions do not have an end date, and thus are in violation of the Equal Protection Clause:

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

Minority Applicants Are Permitted to Write About Their Experiences with Discrimination

Commentators have been quick to point out that the ending paragraphs of the Supreme Court's opinion in the Harvard and University of North Carolina cases do not interfere with minority students' opportunity to include in their admission essays their life experiences dealing with discrimination. These commentators are correct. However, the closing paragraphs warn that the consideration and weighting of admission essays must not be used to evade compliance with the

legal requirements enunciated in this case. Note the following excerpt from the last section of the Court's opinion:

> At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today…. "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows"… (citations omitted)

UPDATE

The United States Department of Justice and Department of Education issued a Dear Colleague Letter (DCL) on August 14, 2023. The following are excerpts from this DCL:

> We also acknowledge that fulfilling this commitment will require sustained action to lift the barriers that keep underserved students, including students of color, from equally accessing the benefits of higher education. For decades, our Departments have sought to achieve the original promise of *Brown v. Board of Education*, that no student's educational opportunity should be limited by their race. Through that work, we have seen that there are no simple answers for unwinding the entrenched roots and sprawling branches of segregation and discrimination.
>
> For institutions of higher education, this may mean redoubling efforts to recruit and retain talented students from underserved communities, including those with large numbers of students of color. It may likewise mean a greater focus on fostering a sense of belonging for students currently enrolled. Through such efforts, colleges and universities can effectively support and retain students from diverse backgrounds. Colleges and universities can also ensure that prospective students of color know that the schools they are considering are places where all students will be welcome and will succeed. Colleges and universities may also choose to focus on providing students with need-based financial support that allows them not just to enroll, but to thrive. Students should not be waylaid on the path to a degree because they must shoulder crushing debt, further strain their families' finances, or work long hours to pay their bills.
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> ,,,,,,

> With respect to admissions practices themselves, especially for the upcoming cycle, the Departments encourage colleges and universities to review their policies to ensure they identify and reward those attributes that they most value, such as hard work, achievement, intellectual curiosity, potential, and determination. …[S]chools can consider the ways that a student's background, including experiences linked to their race, have shaped their lives and the unique contributions they can make to campus. Students should feel comfortable presenting their whole selves when applying to college, without fear of stereotyping, bias, or discrimination. And information about an individual student's perseverance, especially when faced with adversity or disadvantage, can be a powerful measure of that student's potential.

(Questions about this article and SFFO, Inc. *v.* Harvard and UNC *may be directed to the author at* dbalasa@aama-ntl.org.)