

United States Senate

September 12, 2023

The Honorable Miguel Cardona
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary Cardona:

On June 29, 2023, the Supreme Court struck a blow against institutionally-driven racism in the United States. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,¹ the Supreme Court found Harvard University and the University of North Carolina at Chapel Hill (UNC) were impermissibly discriminating against certain applicants based exclusively on their race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.²

We—and millions of Americans like us—read the decision and were pleased the Supreme Court properly interpreted the Fourteenth Amendment to prohibit racial discrimination in college admissions. As Chief Justice Roberts wrote, “[e]liminating racial discrimination means eliminating all of it.”³ Affirmative action policies, by their very nature, racially discriminate. As Justice Thomas eloquently wrote, “[i]ndividuals are the sum of their unique experiences, challenges, and accomplishments. ... A contrary, myopic world view based on individuals’ skin color to the total exclusion of their personal choices is nothing short of racial determinism.”⁴

The public support for ending race-based admissions in colleges and universities, even before the Supreme Court’s ruling, is a testament to the progress we have made as a people. In the weeks before the Supreme Court handed down its decision in *Students for Fair Admissions*, public polling suggested only 25 percent of American adults, including 23 percent of Hispanic Americans and 38 percent of African Americans, supported the notion colleges and universities should be permitted to consider race in admissions.⁵

But not everyone agrees with the majority of the public, nor shares enthusiasm for the Court’s decision. The defendant, Harvard University, issued a defiant statement expressing its dismay at the Court’s holding.⁶ Harvard was joined by a litany of colleges and universities sharing similar concerns regarding the newly-minted prohibition against colleges and universities from racially discriminating against applicants. These colleges and universities include, but are not limited to: The University of North Carolina at Chapel Hill (which plaintiffs also sued for racial discrimination),⁷ Stanford University,⁸ Dartmouth College,⁹ Northwestern University,¹⁰

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

² U.S. CONST. amend. XIV, § 1.

³ *Students for Fair Admissions*, 143 S.Ct. 2141, 2147.

⁴ *Id.* at 2204 (Thomas, J., concurring).

⁵ Kathy Frankovic et al., *What Role do Americans Think Race Should Play in College Admissions?*, YOUNGOV (June 21, 2023, 3:34 PM) <https://today.yougov.com/topics/politics/articles-reports/2023/06/21/what-role-should-race-play-college-admissions-poll>.

⁶ Letter from Lawrence S. Bacow, President, Harvard College, to members of the Harvard Community (June 29, 2023), <https://www.harvard.edu/admissioncase/2023/06/29/supreme-court-decision/>.

⁷ Kevin Guskiewicz (@KevinGuskiewicz), TWITTER (June 29, 2023, 3:25 PM), <https://twitter.com/KevinGuskiewicz/status/1674499336665956353>.

⁸ Stanford University (@Standford), TWITTER (June 29, 2023, 4:19 PM), <https://twitter.com/Stanford/status/1674513016153423872>.

⁹ Dartmouth (@dartmouth), TWITTER (June 29, 2023, 2018 PM), <https://twitter.com/dartmouth/status/1674482389769240576>.

¹⁰ Northwestern (@NorthwesternU), TWITTER (June 29, 2023, 12:46 PM), <https://twitter.com/NorthwesternU/status/1674459264641843200>.

Carnegie Mellon University,¹¹ Syracuse University,¹² Wesleyan University,¹³ Northeastern University,¹⁴ the University of Louisville,¹⁵ Boston University,¹⁶ and Princeton University.¹⁷ You joined these calls, claiming “[t]oday’s Supreme Court decision takes our country decades backward, ... To higher education leaders reviewing the decision: now is not the time to lessen your commitment ... We will continue working with you to raise the bar for inclusivity and work to better support students of color, because the inequities that exist in higher education access and outcomes remain unacceptable.”¹⁸ These institutions’, and your, expressions of tacit support for affirmative action raise concerns regarding the extent to which the Department of Education (ED), as well as American colleges and universities, will uphold the Supreme Court’s ruling of their own accord.

While the Court took a big step forward in eliminating racial discrimination in admissions, more work remains to be done. As was the case in the wake of the *Brown v. Board of Education of Topeka*¹⁹ decision, executive enforcement, additional legislation, as well as litigation, were all required to ensure the Supreme Court’s decision was faithfully and accurately implemented and reflected by schools across the country.

The U.S. Constitution is the supreme law of the land and *Students for Fair Admissions* has made clear there must be strict limits to any consideration of race in college admissions. The importance of the ED Office for Civil Rights (OCR) faithfully implementing this landmark decision cannot be understated.

Your expressed frustration, as well as the articulated displeasure of some colleges and universities over the Supreme Court’s decision, raises concerns regarding the extent to which colleges and universities aided by ED could impose pretexts through which they could continue to impermissibly discriminate against applicants. In our judgment, ED will have substantial oversight and enforcement responsibilities to ensure colleges and universities do not attempt to skirt the Supreme Court’s central holding that considering an applicant’s race in college admissions violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. In his remarks in the wake of the landmark decision, President Biden proposed “a new standard, where colleges take into account the adversity a student has overcome when selecting among qualified applicants. ... it also means examining where the student grew up and went to high school. ... including racial discrimination that individuals have faced in their own lives.”²⁰

Additionally, on August 14, ED and the U.S. Department of Justice (DOJ) sent a Dear Colleague letter to higher education institutions mirroring President Biden’s remarks in June. In particular, ED recommends schools consider “redoubling efforts to recruit and retain talented students from underserved communities, including

¹¹Carnegie Mellon University (@CarnegieMellon), TWITTER (June 29, 2023, 2:03 PM), <https://twitter.com/CarnegieMellon/status/1674478776091025431>.

¹² Syracuse University (@SyracuseU), TWITTER (June 29, 2023, 11:43 AM), <https://twitter.com/SyracuseU/status/1674443438438117389>.

¹³ Wesleyan University (@wesleyan_u), TWITTER (June 29, 2023, 2:33 PM), https://twitter.com/wesleyan_u/status/1674486255415861248.

¹⁴ Northeastern U. (@Northeastern), TWITTER (June 29, 2023, 10:42 AM) <https://twitter.com/Northeastern/status/1674428231506870273>.

¹⁵ University of Louisville (@uofl), TWITTER (June 29, 2023, 11:02 AM), <https://twitter.com/uofl/status/1674433167166701569>.

¹⁶ Boston University (@BU_Tweets), TWITTER (June 29, 2023, 1:28 PM), https://twitter.com/BU_Tweets/status/1674470021714550795.

¹⁷ Princeton University (@Princeton), TWITTER (June 29, 2023, 1:32 PM), <https://twitter.com/Princeton/status/1674470967840481306>.

¹⁸ The U.S. Dep’t of Educ., *Secretary Cardona Statement on Supreme Court Ruling on College Affirmative Action Programs* (June 29, 2023), <https://www.ed.gov/news/press-releases/secretary-cardona-statement-supreme-court-ruling-college-affirmative-action-programs>.

¹⁹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²⁰ The White House, *Remarks by President Biden on the Supreme Court’s Decision on Affirmative Action* (June 29, 2023, 12:48 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/29/remarks-by-president-biden-on-the-supreme-courts-decision-on-affirmative-action/>.

those with large number of students of color.”²¹ Further, ED suggests schools should “review their admission policies to ensure they identify and reward those attributes that they most value” and “consider the ways that a student’s background, including experiences linked to their race, have shaped their lives...”²²

We are disappointed these recommendations directly conflict with the spirit of *Students for Fair Admissions* and further encourage racially motivated admission practices. As Justice Thomas wrote in his concurring opinion, “[t]he solution to our Nation’s racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism.”²³ No policies derived from a racially motivated worldview benefit our democracy, our society, or our young college hopefuls. Each applicant deserves an equal chance to be admitted, regardless of their race. It is concerning to see your Department produce guidance to the contrary.

In the letter advocating against truly color-blind admissions, your Department and DOJ (the Departments) also stated, “[f]or decades, our Departments have sought to achieve the original promise of *Brown v. Board of Education*, that student’s educational opportunity should not be limited by their race.”²⁴ We would remind you, in *Brown* the Supreme Court wrote, “[w]here a State has undertaken to provide an opportunity for an education... such an opportunity is a right which must be made available to all on equal terms.”²⁵ Nowhere in the Court’s unanimous opinion in *Brown* is there a suggestion—or even an inference—the holding stands for the proposition it is morally proper to treat applicants differently by considering their “experiences linked to their race.”²⁶

To that end, we call upon the Biden administration to embrace the full essence of the Court’s holdings in both *Students for Fair Admissions* and *Brown v. Board of Education*: neither *de facto* nor *de jure* racial discrimination have any place in schooling. The American people deserve no less than an Executive Branch committed to enforcing the law equally to all people without concern for their race.

Given President Biden and the Departments’ expressed encouragement to colleges and universities to circumvent the spirit of *Students for Fair Admissions*,²⁷ we are concerned enforcement of the new legal standard will be insufficient. Please provide to cosigners of this letter as well as the Chairs and Ranking Members of the Senate Committee on Health, Education, Labor, and Pensions, and the Committee on Education and Workforce of the House of Representatives the following:

- A detailed plan of action for conducting rigorous oversight of college and universities’ admissions practices to ensure compliance with the Supreme Court’s ruling, to include the establishment of a publicly accessible repository of allegations from the public of noncompliance with *Students for Fair Admissions*;
- An advance copy of any new guidance OCR develops to ensure it does not permit colleges and universities to use pretexts for race or encourage their applicants to divulge their race by means other than direct request two weeks prior to publication; and

²¹ U.S. Dep’t of Educ. and U.S. Dep’t of Just., *Dear Colleague Letter* (August 14, 2023),

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

²² *Id.*

²³ *Students for Fair Admissions*, 143 S.Ct. 2141, 2196 (2023) (Thomas, J., concurring).

²⁴ *Id.*

²⁵ *Brown*, 347 U.S. 483, 493 (1954).

²⁶ U.S. Dep’t of Educ. and U.S. Dep’t of Just., *Dear Colleague Letter* (August 14, 2023),

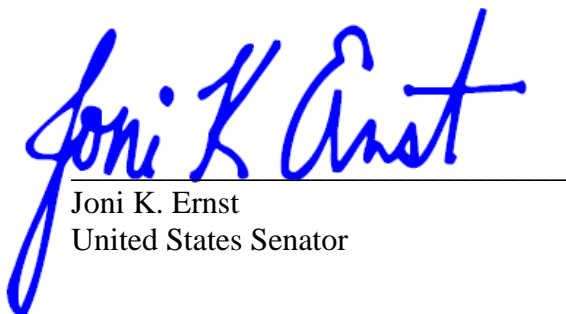
https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

²⁷ The White House, *Fact Sheet: President Biden Announces Action to Promote Educational Opportunity and Diversity in Colleges and Universities* (June 29, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/29/fact-sheet-president-biden-announces-actions-to-promote-educational-opportunity-and-diversity-in-colleges-and-universities/>.


- The number of employees and contractors ED plans to task with oversight and enforcement of the law in accordance with the decision in *Students for Fair Admissions*.

It is to everyone's benefit for colleges and universities to streamline the processing of application for admissions, and for such processing to be done in accordance with the law. To assist us in our oversight and legislative duties, please respond to this letter as soon as possible, but no later than September 29, 2023, with updates regarding the implementation status of the foregoing reforms.


Sincerely,




Joni K. Ernst
United States Senator



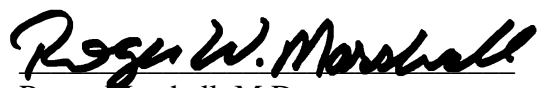
Marsha Blackburn
United States Senator



Mike Braun
United States Senator




Katie Boyd Britt
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Roger Marshall, M.D.
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Eric Schmitt
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Rick Scott
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