

To: New Jersey Women Lawyers Association Scholarship Committee
From: Najma Hassan
Date: February 12, 2024
Re: 2024 Scholarship Program

I. “Colorblindness” as a Sword in Educational Opportunity

The decision of the Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (“*SFFA*”) left minority students across the United States heartbroken for the uncertain direction our legal system is heading towards.¹ In my own personal experience, I was admitted into Seton Hall Law’s Legal Education Opportunity (LEO) program, which historically has been meant to assist students from minority or economically disadvantaged backgrounds to enter into law school with additional assistance, both financially and academically. After the decision in *SFFA*, I was left wondering, “What will happen to programs like LEO?”. The LEO program was meant to bridge the gap that is prevalent in the legal community today. It is meant to help equalize the inequality of legacy admissions and to assist others, that may not otherwise be in the legal field, in their professional development.

Historically, the Equal Protection Clause has been used as a sword for members of minority groups who have had unequal access to education. In regard to college admissions, the Majority opinion in *SFFA*’s literal “colorblindness” interpretation of the Equal Protection Clause will not provide constitutional relief against inequality in educational opportunity; it will likely do the opposite. The success that *Brown v. Board of Education* brought in raising the number of racially and ethnically diverse candidates in higher education was astronomical.

¹ 600 US 181 (USSC Docket No. 20-119, decided together with Docket No.21-707 *Students for Fair Admission, Inc. v. University of North Carolina et al*).

The Majority’s “colorblindness” opinion fails to consider the difference between equality and equity. Equality is the right of different groups of people to have a similar social position and receive the same treatment.² Equity is when there is justice according to natural law or right.³ Historically, the number of people of color in higher education has been stunted because of systematic racial and class issues that have been perpetuated by the legal system. The unfortunate reality is that the law isn’t as colorblind as the Supreme Court would like to believe. There are barriers put in place that have stunted the progression of people of color. As a result, the ruling in *SFFA* will disproportionately affect minorities and people of color. Athletic and legacy admissions, an overlooked type of preferential admission, will continue, and perpetuate the cycle even further.⁴ Even though a large amount of these admissions perpetuates a racial hierarchy, they will not be seen as an issue of “colorblindness” in the education system.⁵

II. The Court as the Ultimate Interpreter of the Law

Title VI, which was enacted as part of the landmark Civil Rights Act of 1964, was created to prohibit discrimination on the basis of race, color, and national origin.⁶ The Majority Court’s argument is that they properly deferred to the findings of the Court’s own precedent, given that the Majority in *Grutter* stated that they would revisit affirmative action in twenty-five years.⁷ Although the court points to *Grutter*’s twenty-five year timeline, the guidance of Title

² <https://dictionary.cambridge.org/us/dictionary/english/equality>.

³ <https://www.merriam-webster.com/dictionary/equity>.

⁴ Sarah Park, *Legacy admissions are another type of preferential admissions — and it isn’t all bad* (January 10, 2024),

<https://www.dailyprincetonian.com/article/2024/01/princeton-opinion-column-legacy-admissions-preferential-not-bad#:~:text=Legacy%20admissions%20are%20just%20another,like%20athletic%20and%20arts%20preferences>.

⁵ Angelica Gutierrez, *Harvard and other wealthy schools’ legacy admissions policies draw support from people who want to keep a ‘racial hierarchy,’ research shows* (July 13, 2023),

<https://fortune.com/2023/07/13/harvard-legacy-admissions-support-racial-hierarchy-social-dominance-academic-research/#:~:text=The%20complaint%20argues%20that%20legacy,70%25%20of%20whom%20are%20white>.

⁶ *Title VI of the Civil Rights Act of 1964*,

<https://www.justice.gov/crt/fcs/TitleVI#:~:text=Title%20VI%2C%2042%20U.S.C.,activities%20receiving%20federal%20financial%20assistance>.

⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 143 S. Ct. 2141, 2154 (2023).

VI cannot be disregarded. The Court's failure to address Title VI and precedent has a negative effect on the Supreme Court's identity as the supreme interpreter of the law, causing a nationwide shift in the perception of the American Legal System.⁸ The once ultimate interpreter of the law, this decision will now shake the country, and also "impair the military's ability to maintain diverse leadership, and thereby seriously undermine its institutional legitimacy and operational effectiveness."⁹

III. The Court's Disregarding Precedent

The Court does not specifically discuss overturning precedent of past cases, but merely implies that this is the natural progression of events post *Grutter v. Bollinger*.¹⁰ The reality is that the Court has not followed precedent in imposing *Grutter's* temporal period observation. Justice Ginsberg makes an important clarification at the end of *Grutter*, reminding the Court that regardless of the hopeful and optimistic attitude the Court holds at the ultimate termination of *Grutter*, that is not the current reality today,

"However strong the public's desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities... From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."¹¹

Justice Ginsburg addresses the actual reality of the statement and how there are inadequate educational opportunities. The word "safe" implies that there will be a better time, a time when there are equal opportunities for all, regardless of race. Unfortunately, we have not reached that

⁸ Jim Jump, *Ethical College Admissions: A Very Disappointing Decision*, (July 17, 2023), <https://www.insidehighered.com/opinion/views/2023/07/17/critique-supreme-court-ruling-affirmative-action-opinion>.

⁹ Ian Milhiser, *The monstrous arrogance of the Supreme Court's affirmative action decision*, (June 29, 2023), <https://www.vox.com/scotus/23616868/supreme-court-affirmative-action-harvard-unc-students-fair-admissions-john-roberts>.

¹⁰ *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

¹¹ *Id.* at 346.

time yet.¹² The action of the Court currently short-circuits traditional constitutional review of inequality and disregards the true essence of the Equal Protection Clause, which was meant to protect people of color from the effects of discrimination.¹³

Growing up as an Afghan-American, I was often confused about what legally I would be classified as. In the U.S. Census, I was told to check off that I am part of the Asian, White, and Middle-Eastern categories. I am much more than my race and ethnicity, that much is evident. But it is also evident that the category that I check off is imperative, and the mistake of checking off the wrong category erases years of my ancestor's histories and traditions. Regardless of policies in higher education, I do truly believe that a person's identity can be directly tied to their race and ethnicity. The Supreme Court's actions in *SFFA* disregard the true essence of an individual's identity. To honor Justice Ginsberg's views about racial understanding, we must first acknowledge that identity is complex and is the amalgamation of many factors, including race and ethnicity.

¹² *Separate But Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege*, <https://cew.georgetown.edu/cew-reports/separate-unequal>.

¹³ *The Equal Protection Clause*, <https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702>.