Why a Consideration of Race is Important to Medical School Admissions

Nancy L. Zisk

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Abstract: The tremendous toll that COVID-19 has taken on this country's minority population is the most recent reminder of the health disparities between people of color and people who classify themselves as white. There are many reasons for these disparities, but one that gets less attention than it deserves is the lack of physicians of color available to treat patients of color.

I. Introduction

The tremendous toll that COVID-19 has taken on this country's minority population is the most recent reminder of the health disparities between people of color and people who classify themselves as white.[1] There are many reasons for these disparities, but one that gets less attention than it deserves is the lack of physicians of color available to treat patients of color. Though expertise may be exactly the same among physicians of color and white physicians, and treatment options may also be equal, studies show that patients of color are more willing to consent to diagnostic procedures and treatment when prescribed by physicians of color than when the same procedures and treatment options are prescribed by white physicians.[2] It is important, therefore, to ensure that there is a diverse pool of physicians from which all patients can choose. To populate that pool, medical schools must admit people of color in sufficient numbers to be meaningful. To this end, most schools consider the race of each candidate for admission, as one factor of many in a holistic consideration of each candidate.[3] As explained by the United States Supreme Court, a holistic consideration of candidates allows for the consideration of "a wide variety" of characteristics in addition to race,[4] including, for example, where they have lived, whether they are fluent in other languages or "have overcome personal adversity and family hardship, have exceptional records of extensive community service, and

Nancy L. Zisk, J.D., *is a Professor of Law at the Charleston School of Law. She began teaching there when the school opened in 2004 and teaches Torts, Employment Discrimination, and Remedies. She received her undergraduate degree and her Juris Doctor at Duke University in Durham, North Carolina. She speaks and publishes in the areas of employment discrimination, equal pay, affirmative action, and bioethics in health care. She is the author of several articles on the issues of race and gender in the workplace and college and graduate school education and bioethics in health care.*

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have had successful careers in other fields."[5] Race-conscious admissions plans used by medical schools and other undergraduate and graduate institutions have faced repeated challenges under the United States Constitution's guarantee of the "equal protection of the laws" to all.[6] In 1978, the United States Supreme Court struck down the University of California Davis School of Medicine's admissions program.[7] Since then, the United States Supreme Court has twice upheld race-conscious plans as constitutional under the Equal Protection Clause and, based on these decisions,[8] colleges and universities, including medical schools, have considered race, together with a variety of other attributes of each applicant, when deciding which applicants to admit and which to reject.

This paper examines the law as it has developed to allow a consideration of race as part of a holistic consideration of an applicant's character traits and the challenges currently facing race-conscious admissions programs.

This paper examines the law as it has developed to allow a consideration of race as part of a holistic consideration of an applicant's character traits and the challenges currently facing race-conscious admissions programs. Section II reviews the development of the law upholding the constitutionality of considering race as part of a holistic consideration of an applicant's traits and characteristics, and Section III discusses the cases that are currently challenging this well-settled law. Section IV reviews the reasons why medical schools and other university programs consider race when making their admissions decisions and the empirical evidence that supports the reasons for doing so. After a review of the data, Section V concludes that the law must continue to allow for a consideration of race by all undergraduate and graduate schools, including medical schools, as one factor of many in admissions programs and that a consideration of race in admissions programs is imperative to protect the diversity of this country's medical schools and, in turn, the quality of health care physicians in this country will provide.

II. The Development of the Law Upholding the Constitutionality of Race-Conscious Admissions Plans

The Supreme Court first considered the constitutionality of a university's race-conscious admissions program in 1978 in *Regents of University of California v. Bakke*[9] and, in that case and the others that followed,[10] the Court judged each program against the demands of the Fourteenth Amendment of the United States Constitution and federal statutory law. The Fourteenth Amendment guarantees that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."[11] Following the Civil War, Congress enacted the Civil Rights Act of 1866 to protect African-Americans who had recently been freed from slavery,[12] but that statute, written broadly, was intended to protect "all persons in the United States in their civil rights" and to apply to "every race and color."[13] Almost one hundred years later, Congress enacted the Civil Rights Act of 1964 and, in Title VI of that statute extended protections to anyone of any race, color, or national origin participating in a federally funded program with these words: "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."[14] Described by one Supreme Court Justice as "majestic in its sweep,"[15] these words mirror the guarantee of the Fourteenth Amendment and both extend protection to all persons regardless of race or ethnic group.[16]

Relying on this precedent, Allan Bakke a white male, sued the University of California Davis School of Medicine for rejecting twice his application for admission. Because the school reserved a pre-determined number of seats for minority applicants, the United States Supreme Court held in *Bakke* that the program violated the constitutional and statutory guarantees of equal protection.[17] Justice Powell, writing for a plurality of the Court, acknowledged that a quota system cannot stand, but that an admissions program may be constitutional as long as it considers race as part of a holistic consideration of an applicant's traits, characteristics, and accomplishments.[18] Recognizing that race is "a single though important element"[19] of the characteristics of an individual, Powell highlighted Harvard College's race-conscious admissions program as an example of one that would not violate the guarantee of equal protection.[20] In contrast to the UC Davis School of Medicine's setting aside a particular number of seats for minority applicants, Harvard

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had no pre-determined number of seats for minority applicants but, instead, considered race as part of a consideration of all aspects of the applicants, 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."[21] Harvard's admissions policies would be the subject of future challenges, which is discussed below.

Since 1978, when the *Bakke* case was decided, the Supreme Court has twice affirmed university admissions programs that allow for the consideration of the race of its applicants.[22] In both cases, the Court made clear that student body diversity is "a compelling interest."[23] According to the Court in *Bakke*, the interest in a diverse student body is compelling because it is "so essential to the quality of higher education."[24] As emphasized by the Court in 2016, enrolling a diverse student body is critical to higher education because it "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races."[25] The Court also noted that "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society."[26] Notably, neither the Equal Protection Clause nor Title VI requires that the race of a university applicant be ignored. Instead, both guarantee that no one should be denied the "equal protection" of the law.[27] To ensure this equal protection, the Supreme Court has suggested that the consideration of race is, in fact, necessary to place all applicants "*on the same footing* for consideration" in the admissions process.[28] Critics of race-conscious college admissions plans argue that, instead of placing all applicants on the same footing, a consideration of race may tip the balance in favor of one applicant over another, equally qualified applicant. It is this critique that has led to the challenges currently pending against two universities that consider race as part of their holistic consideration of their applicants.

III. Current Challenges to Race-Conscious Admissions Plans

Despite the Court's repeated affirmation of the constitutionality of race-conscious admissions programs, two major universities are currently facing challenges to their race-conscious plans. Harvard College and the University of North Carolina have been sued by a non-profit organization whose sole mission is to end any consideration of race in college admissions.[29] The lawsuits allege that both Harvard and UNC are intentionally discriminating against Asian-American students,[30] and the UNC suit alleges discrimination against White applicants as well.[31] In both of these lawsuits, Harvard and UNC have been challenged to justify their reliance on race, even though race is considered only as one part of a holistic consideration of its applicants' traits and characteristics, consistent with what the Supreme Court has defined as constitutional.[32]

The lawsuit against Harvard went to trial in the fall of 2019, after years of discovery and the compilation of admissions data. During the three-week trial, the court heard testimony from Harvard admissions representatives, as well as representatives from other colleges and universities, prospective, current, and former students from Harvard and the other universities, and experts in the field of education and diversity. On September 30, 2019, the United States District Court for the District of Massachusetts issued a 130-page decision rejecting the challenge and upholding the constitutionality of Harvard's race-conscious admissions program.[33] That decision was recently upheld on appeal.[34] The case against the University of North Carolina went to trial in November 2020, but the court has not yet issued a ruling.[35]

Following the lawsuits filed against Harvard and UNC, the United States Department of Justice under the Trump administration filed suit against Yale, alleging that "Yale's oversized, standardless, intentional use of race"[36] subjects Asian and White applicants "to unlawful discrimination on the ground of race."[37] Now under the direction of the Biden administration, the Justice Department has dropped the suit, but Yale's response to the suit is instructive because it echoes the arguments made by Harvard and UNC in defense of the cases against them and reflects the arguments other universities have made in support of their own plans and those used by Harvard and UNC, as discussed in the following section. In response to the lawsuit against the college, Yale's president, Peter Salovey, stated in no uncertain terms that Yale would not change its admissions policies as a result of "the filing of this baseless lawsuit."[38] President Salovey was defiant in his insistence that Yale and its admissions officers would continue to follow the admissions plan they currently have in place and described that plan in words used by the Supreme Court in upholding race-conscious plans:

> Our admissions process considers as many aspects as possible of an applicant's life experiences and accomplishments. That does include race and ethnicity, but only as one element in a multi-stage examination of the entire application file, which takes into account test scores, grades,

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> teacher recommendations, extracurricular activities, military service, and many other factors. No single element is considered independently of the whole application. We take this approach because we know that exposure to a diverse student body improves students' critical thinking, problem-solving, and leadership skills and prepares them to thrive in a complex, dynamic world.[39]

Finally, President Salovey made clear that at a time when "our country grapples with urgent questions about race and social justice," he has "never been more certain that Yale's approach to undergraduate admissions helps us to fulfill our mission to improve the world today and for future generations."[40]

Many other universities and their constituencies have expressed a similar commitment to diversity and using race-conscious admissions programs to achieve it. The expressions of this commitment and the reasons for that commitment, especially for medical schools, recognize that an applicant's race cannot be separated from who that applicant is and that to ignore an applicant's race is to ignore the reality that race plays an important role in shaping an applicant's perspective and experiences. These perspectives are reviewed in the following section.

IV. Why Universities Speak With "One Voice" to Protect Race-Conscious Plans and Why the Law Should Continue to Protect Them

Echoing Yale's refusal to retreat from its consideration of every aspect of an applicant's profile, including that applicant's race, several universities filed supporting briefs in the Harvard case described above, arguing that diversity is of critical importance to the quality of the educational experience and that a consideration of race in the admissions process is a necessary ingredient in achieving that diversity.[41] In briefs filed in support of Harvard's race-conscious plan when the lawsuit was first filed and, again, in support of the district court's decision upholding that plan, a number of universities, including public and private schools, both large and small, emphasize "the profound importance of a diverse student body for their educational missions."[42] These universities stress that a consideration of race "as one factor of many" allows them "to better understand each applicant and the contributions each applicant might make to the university environment."[43] They recognize that "it is artificial to consider an applicant's experiences and perspectives while turning a blind eye to race. For many applicants their race has influenced, and will continue to influence, their experiences and perspectives."[44] Speaking with "one voice,"[45] these universities agree that "race does matter"[46] and that to acknowledge this is "to acknowledge forthrightly that for many reasons race continues to shape the backgrounds, perspectives, and experiences of many in our society," including their students.[47] Observing that race may be "an attribute an applicant might well consider integral to their identity and experience,"[48] these universities insist that it would be "entirely antithetical … to ignore a facet of an applicant's identity that, for a number of applicants, will play an essential role in shaping his or her outlook and experience."[49]

The consideration of race is just as important for shaping medical school classes as it is for undergraduate institutions, and the Association of American Medical Colleges has recently said as much. In response to the Department of Justice's challenge to Yale's admissions policy, the AAMC acknowledged the importance of considering every aspect of an applicant's personal traits and characteristics, noting: "Medical educators, in selecting future physicians, consider a wide range of pre-professional competencies, including service orientation, interpersonal communication skills, cultural competence, leadership, resilience, adaptability, and teamwork."[50] While it did not include the consideration of race in this list, the AAMC made clear that schools like Yale should continue to consider race as part of an "individualized holistic review" of every candidate for admission.[51] Without it, the AAMC concluded, "fewer students of color would have access to educational opportunities and that would be unfortunate for the school and for the country."[52] The reason fewer students of color would have access to educational opportunities without a consideration of all of their traits, including race, is not because they lack the ability or aptitude to succeed, but instead because they have not had the chance to show that they do have the ability and aptitude to do so.

The AAMC also noted that the position taken by the Justice Department was offered to argue against the consideration of race in the Harvard case, but that argument "did not sway" the district court.[53] Instead, that court acknowledged that it is "somewhat axiomatic at this point that diversity of all sorts, including racial diversity, is an important aspect of education."[54] To achieve that diversity, the court noted, Harvard proved that all of its "race-neutral" outreach efforts, of which there were many, "do not suffice."[55] To the contrary, according to the court, without a consideration of race, "racial diversity at Harvard would likely decline so precipitously that Harvard would be unable to offer students the diverse environment that it reasonably finds necessary to its mission."[56] The evidence in the University of North Carolina case suggests the same. Citing a study done by an inde-

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pendent researcher, it is the University's position that "there is no race-blind alternative available to UNC that could be used, even in some practical combination with another alternative, that would allow UNC to maintain its current level of academic preparedness and racial diversity."[57]

The record in both the Harvard and UNC cases is replete with evidence that without a consideration of race in the admissions process, diversity will suffer. Even collegiate basketball coaches are concerned. In a brief filed in the Harvard case, they acknowledge that when "universities are prevented from cultivating diversity across the whole student body, the results can be disastrous."[58] Relying on data from California, a state that is legally prohibited from considering race in its admissions decisions, the coaches and the associations that represent them note that the number of minority students admitted to the University of California at Los Angeles "plummeted" after the law banning the consideration of race went into effect.[59] The President and Chancellors of the University of California provided proof in the 2016 Supreme Court case challenging the University of Texas's admissions program that the "abandonment of race-conscious admissions policies resulted in an immediate and precipitous decline in the rates at which underrepresented-minority students applied to, were admitted to, and enrolled at UC."[60] As noted by the coaches in support of Harvard's defense, the UCLA community was "shocked" by the paucity of black matriculants, and university administrators declared the situation a "crisis."[61] In fact, the University's provost acknowledged that "the quality of our education experience is absolutely affected, as well as our obligation to the citizens of this state."[62]

Nowhere is racial diversity more important than in the delivery of health care because the evidence is clear that people of color have a higher degree of trust in physicians who look like them.[63] As noted by the AAMC in a brief it filed in support of the University of Texas's race-conscious plan in the 2016 Supreme Court case, "[s]tudies have shown that this bias exists and negatively impacts clinical decision making, which leads to negative treatment decisions and outcomes."[64] Moreover, physicians of every color will benefit from learning in a diverse environment because, according to the AAMC, "[r]esearch shows that when physicians understand more about the diverse cultures of their patients, physician decision-making is better informed and medical outcomes improve."[65] Thus, preventing medical educators from continuing to consider racial diversity would not merely impoverish the educational experience of all future doctors; it would diminish their ability "to render with understanding their vital service to humanity."[66]

It is important to note that the law does not require universities to sacrifice academic excellence to achieve student body diversity or choose between the two. As the Supreme Court has repeatedly made clear, "the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence."[67] Moreover, as made clear by the district court in the Harvard case, including race as part of its admissions consideration did not sacrifice Harvard's "standards for academic excellence."[68] Observing that "academic excellence is necessary but not alone sufficient for admission to Harvard College," the court reviewed the evidence submitted by the Admissions Office and stated unequivocally that the school "seeks to attract applicants who are exceptional across multiple dimensions or who demonstrate a truly unusual potential for scholarship through more than just standardized test scores or high school grades."[69]

The same is true for medical schools. Noting that test scores and grades are "a significant barometer of merit," the AAMC has acknowledged that they have never been independently determinative in medical school admissions."[70] As noted by the AAMC, "[m]edical educators agree that success in medical school requires more than academic competence; it also requires integrity, altruism, self-management, interpersonal and teamwork skills, among other characteristics."[71] To find students with all of these characteristics, the AAMC states, just as Harvard proved to the satisfaction of the district court, there is "no proven substitute" than "this individualized, holistic review that may consider an applicant's race and ethnicity along with all other factors that make up his or her background."[72] By taking all of the characteristics of individual applicants into account, medical schools can thereby "produce a class of physicians best equipped to serve *all* of society."[73]

The belief that the consideration of race benefits everyone is not universal. In fact, Justice Clarence Thomas has registered his disagreement with the Supreme Court's decision to uphold race-conscious admissions programs in both cases in which the Court upheld race-conscious plans. Dissenting in the 2016 decision, Justice Thomas made very clear his position that race should not be considered at all, because, in his words, "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."[74] He has also warned that considering the race of applicants "taints the accomplishments of all those who are admitted as a result of racial discrimination" as well as "the accomplishments

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of all those who are the same race as those admitted as a result of racial discrimination."[75] According to Justice Thomas, when minority students graduate and "take positions in the highest places of government, industry, or academia, it is an open question ... whether their skin color played a part in their advancement."[76] It is Justice Thomas' position that "there is no evidence that [minority students] learn more at the University" to which they are admitted under a race-conscious admissions program "than they would have learned at other schools for which they were better prepared" and that "[i]ndeed, they may learn less."[77] Thus, he concluded, "the University's racial tinkering harms the very people it claims to be helping."[78]

There is another, more pragmatic reason why race must remain a component of any admissions decision. It simply cannot be ignored. As the AAMC observed, "ignoring race and ethnicity might not even be possible," because "to read the file in a colorblind way, the admissions officer would likely have to ignore highly relevant information, without which the applicant's personal statement might literally not make sense."[84] The late Justice Ginsburg understood this as well. In her words, if a university cannot openly include race as part of its admissions decisions, it "may resort to camouflage."[85] A university may, she suggested, "encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language."[86] Indeed, fully disclosing the consideration of race "is preferable to achieving similar numbers through winks, nods, and disguises."[87] Justice Souter agreed, observing that "[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball."[88]

"There is no proven substitute for this individualized, holistic review that may consider an applicant's race and ethnicity along with all other factors that make up his or her background." In the words of [the AAMC's] President, medical schools "must do more to educate and train a more diverse physician workforce to care for a more diverse America." To achieve this end, as observed by Justice Powell in *Bakke*, a race-conscious, holistic approach to admissions will allow medical schools to ensure that its classrooms will include students with a wide variety of "experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."

Professor Richard Sander, at the University of California at Los Angeles School of Law, has expressed similar concerns about race-conscious admissions programs and describes this concern as the "mismatch" theory of affirmative action.[79] According to Professor Sander, who relies on empirical data indicating that there is a "very large disparity" between the "median" student and the student being admitted because he or she received a "large" preference based on race, "the credentials gap will hurt those the preferences are intended to help."[80] Although this theory is not without support,[81] many in the academic community have raised questions about whether there is any evidence to actually support it.[82] As noted in a brief filed in support of Harvard in the suit recently decided in Harvard's favor, "the consensus of empirical scholars over the past seventeen years is that students of color attending universities with race-conscious admissions programs achieve *higher* grades, graduate at *higher* rates, and secure greater earnings than their peers at less selective schools."[83]

It should also be noted that medical schools require applicants, already deemed qualified, to interview before final admissions decisions are made. Indeed, as explained by the AAMC, "medical and other health professional schools have always considered and highly value personal interviews in order to learn what the applicant's background would contribute to a culturally competent workforce."[89] The AAMC expressed concern that if medical schools could not consider an applicant's race and ethnicity, it "would undermine their ability to assess the entirety of each individual's background, thus frustrating the goal of best serving the public's health."[90] Ultimately, and perhaps most importantly, according to the AAMC, "constraining a medical school's ability to consider a student's entire background would negatively impact not only the

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classroom, but also patients, who would be deprived of a pipeline of physicians better equipped through personal experience and a diverse learning environment to understand and serve patients from all walks of life."[91]

Despite the resounding support of many universities and their constituents for the continued consideration of race as one factor of many in admissions decisions and the Supreme Court precedent upholding the constitutionality of race-conscious programs, there is a very real possibility that when this issue reaches the Supreme Court again, and it is likely it will when the Harvard or UNC case makes its way through the federal court appeal process, the Court may overturn that precedent and ban any consideration of race in admission, given the current configuration of the Court.[92] It is, therefore, imperative for all institutions of higher education to consider this possibility as they advocate for protecting diversity in their classrooms and allowing race to be part of the consideration.

V. Conclusion

To best serve people of all races, backgrounds, and ethnicities, the pool of physicians should be drawn from all races, backgrounds, and ethnicities. Recognizing that race is a "single though important element" of every applicant to medical schools[93] and understanding that race cannot be separated from who a person is and what a person offers, the law must continue to allow for a consideration of race as one factor of many in admissions programs. According to a number of leading universities, it is "artificial to consider an applicant's experiences and perspectives while turning a blind eye to race," because, for many applicants, "their race has influenced, and will continue to influence, their experiences and perspectives."[94] As summed up by the AAMC: "There is no proven substitute for this individualized, holistic review that may consider an applicant's race and ethnicity along with all other factors that make up his or her background."[95] In the words of its President, medical schools "must do more to educate and train a more diverse physician workforce to care for a more diverse America."[96] To achieve this end, as observed by Justice Powell in *Bakke*, a race-conscious, holistic approach to admissions will allow medical schools to ensure that its classrooms will include students with a wide variety of "experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."[97]

Note

The author has no conflicts to disclose.

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24. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).
25. *Fisher*, 136 S. Ct. at 2210 (internal quotation and alteration omitted).
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28. Grutter, 539 U.S. at 334 (emphasis added) (quoting Bakke, 438 U.S. at 317 (1978) (Powell, J., plurality opinion)).
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34. *Students For Fair Admissions, Inc. v. President & Fellows of Harvard Coll., Inc. v. President & Fellows of Harvard Coll.*, 980 F. 3d 157 (1st Cir. 2020).
35. *See* K. Murphy, "Trial on UNC-Chapel Hill's Race-Related Admissions Ends, But Ruling Could Take Months," *The News & Observer*, November 19, 2020, *available at* <https://www.newsobserver.com/news/local/education/article247284969.html> (last visited March 22, 2021).
36. Complaint, *United States v. Yale University*, No. 3:20-cv-01534, ¶ 2 (D. Conn. Oct. 8, 2020), *available at* <https://www.justice.gov/opa/press-release/file/1326306/download> (last visited March 22, 2021) [hereinafter Yale Complaint].
37. *Id.* at ¶ 14.
38. P. Salovey, "Yale Will Continue to Foster a Diverse and Vibrant Educational Environment," Office of the President, Yale University, Oct. 8, 2020, *available at* <https://president.yale.edu/speeches-writings/statements/yale-will-continue-foster-diverse-and-vibrant-educational-environment> (last visited March 22, 2021).
39. *Id.*
40. *Id.*
41. Amicus Brief of Brown University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, Johns Hopkins University, Massachusetts Institute of Technology, Princeton University, Stanford University, University of Chicago, University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University in Support of Appellee, *Students for Fair Admissions,Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. Sept. 30, 2019), *aff'd*, 980 F. 3d 157 (1st Cir. 2020) [hereinafter Brown University Amicus Brief]. These universities filed a brief in support of Harvard's admissions plan, first to the trial court before the case went to trial and to the appellate court, in support of Harvard on appeal. Because of the similarity of the briefs, references will be made to the arguments made in the second brief submitted to the appellate court in this case.
42. *Id.* at 1.
43. *Id.* at 2.
44. *Id.* at 2-3.
45. *Id.* at 1.
46. *Id.* at 11 (quoting Parents Involved in *Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment)). *Accord Grutter v. Bollinger*, 539 U.S. 306, 332-33 (2003).
47. *Id.* at 11.
48. *Id.* at 16.
49. *Id.* at 15.
50. Association of American Medical Colleges, "AAMC Statement on the Department of Justice's Challenge to Yale's Admissions Process," Press Release, Aug. 14, 2020, *available* at <https://www.aamc.org/news-insights/press-releases/aamc-statement-department-justice-s-challenge-yale-s-admissions-process> (last visited March 22, 2021).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Corp.), 397 F. Supp. 3d 126, 133 (D. Mass. 2019), aff'd, 980 F. 3d 157 (1st Cir. 2020).
55. *Id.* at 200 (quoting *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016)).
56. *Id.* at 192.
57. Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 1:14-CV-954, 2019 WL 294284, § IID (citing the university expert's evidence that confirmed that the termination of race-conscious admissions programs would cause a decrease in "academic preparedness and racial diversity").
58. Amicus Brief of Brief of the National Association of Basketball Coaches, Women's Basketball Coaches Association, Geno Auriemma, James A. Boeheim, John Chaney, Tom Izzo, Michael W. Krzyzewski, Joanne P. McCallie, Nolan Richardson, Bill Self, Sue Semrau, Orlando Tubby Smith, Tara Vanderveer, Roy Williams, Jay Wright, and 326 Additional Current or Former College Head Coaches as Amici Curiae in Support of Appellee and Affirmance, at 19, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. Sept. 30, 2019), aff'd, 980 F. 3d 157 (1st Cir. 2020) [hereinafter Coaches Amicus Brief].
59. *Id.*
60. Brief for the President and the Chancellors of the Univ. of Cal. as Amici Curiae Supporting Respondents at 19, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).
61. Coaches Amicus Brief, *supra* note 58 at 20 (internal citations omitted).
62. *Id.* (quoting Rebecca Trounson, "A Startling Statistic at UCLA," *L.A. Times*, June 3, 2006, *available at* <https://www.latimes.com/archives/la-xpm-2006-jun-03-me-ucla3-story.html> (last visited March 22, 2021).
63. R. Huerto, "Majority Patients Benefit From Having Minority Doctors, But That's a Hard Match to Make," University of Michigan Lab Blog, Op-Ed, March 31, 2020, *available at* <https://labblog.uofmhealth.org/rounds/minority-patients-benefit-from-having-minority-doctors-but-thats-a-hard-match-to-make-0> (last visited March 22, 2021) (citing "mounting evidence" that when physicians and patients share the same race it improves the overall care, including medication adherence, cholesterol screening, patient understanding of cancer risks, and perception of treatment options).
64. AAMC Amicus Brief, *supra* note 3 at 16.
65. *Id.* at 5.

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66. *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J., plurality opinion)).
67. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2213 (2016) (quoting Grutter, 539 U.S. 306, 339 (2003)).
68. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 195 (D. Mass. 2019).
69. *Id.* at 136.
70. AAMC Amicus Brief, *supra* note 3 at 6.
71. *Id.* at 24 (internal quotation marks and citation omitted).
72. *Id.* at 5-6.
73. *Id.* at 6 (emphasis in original).
74. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2215 (2016) (Thomas, J., dissenting).
75. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 333 (2013) (Thomas, J., concurring).
76. *Id.* at 334 (alteration in original) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part)).
77. *Id.* at 332.
78. *Id.* at 334.
79. K. Rahl, "Racing to Neutrality: How Race-Neutral Admissions Programs Threaten the Future Use of Race-Based Affirmative Action in Higher Education," *Texas Tech Law Review Online Edition* 49, no. 109 (2017) (citing R. Sander and S. Taylor, Jr., "The Painful Truth About Affirmative Action," *Atlantic*, Oct. 2, 2012, *available at* http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/ (last visited MARCH 22, 2021).
80. R. H. Sander, "A Reply to Critics," *Stanford Law Review* 57 (2005).
81. *See id. See also* Zisk, *supra* note 16 at 94 (noting Justice Thomas' position on race-conscious plans and discussing Professor Sander's "mismatch" theory).
82. Brief Amicus Curiae of Pacific Legal Foundation in Support of Plaintiffs and Appellants at 14, *Sander v. State Bar of Cal.*, 237 Cal. Rptr. 3d 276 (Ct. App. 2018) (No. A150625) (citing to a number of articles challenging the soundness of the "mismatch" theory of affirmative action).
83. Brief of Student Amici Curiae in Support of Defendant's Motion for Judgment on the Pleadings on Counts IV and VI at 3, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. Sept. 30, 2019), aff'd, 980 F. 3d 157 (1st Cir. 2020) (citing Brief of Empirical Scholars as Amici Curiae in Support of Respondents at 14-16, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (emphasis in original)).
84. AAMC Amicus Brief, *supra* note 3 at 36-37 (quoting D. W. Carbado and C. I. Harris, "The New Racial Preferences," *California Law* Review 96 (2008)) (internal quotation marks omitted)).
85. *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting).
86. *Id.*
87. *Id.* at 305.
88. *Id.* at 298 (Souter, J., dissenting).
89. AAMC Amicus Brief, *supra* note 3 at 36.
90. *Id.*
91. *Id.*
92. *See* Zisk, *supra* note 16 at 60-61 (predicting this issue will reach the Supreme Court and, when it does, that the Court will overturn the well-established precedent upholding race-conscious plans).
93. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J., plurality opinion).
94. Brown University Amicus Brief, *supra* note 38 at 2-3.
95. AAMC Amicus Brief, *supra* note 3 at 15.
96. "The Majority of U.S. Medical Students Are Women, New Data Show," Dec. 9, 2019, Association of American Medical Colleges, *available at* <https://www.aamc.org/news-insights/press-releases/majority-us-medical-students-are-women-new-data-show> (last visited March 22, 2021) (quoting D. J. Skorton, M.D., AAMC president and CEO).
97. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J., plurality opinion).

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