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Memorandum

To: Interested Parties

From: David H. Thompson

Date: June 30, 2023

Re: *Students for Fair Admissions v. Harvard* & Employment Affirmative Action Programs

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In *Students for Fair Admissions v. Harvard*, 600 U.S. ___ (2023), the Supreme Court struck down affirmative action programs in college admissions that give preferences to students based on their race. Under the Court's holding in *Students for Fair Admissions*, racial affirmative action programs in the employment context are also now illegal. The memorandum proceeds in three sections. Section I outlines that Title VI of the Civil Rights Act of 1964 prohibits employers that accept federal assistance from giving racial preference in hiring. Section II demonstrates that Title VII of the Civil Rights Act of 1964 prohibits all employers—regardless of whether they accept federal funding—from employing racial affirmative action programs. Section III concludes that 42 U.S.C. § 1981 provides an independent prohibition against race-based affirmative action policies in employment.

I. Title VI Prohibits Racial Discrimination in Hiring in Organizations That Accept Federal Assistance.

In *Students for Fair Admissions v. Harvard*, 600 U.S. ___ (2023), the Supreme Court held that the Equal Protection Clause, as applied to Harvard through Title VI of the Civil Rights Act of 1964, prohibits universities that receive federal funding from considering race in their admissions process. In light of the Court's ruling, Title VI similarly prohibits employers that accept federal funding from considering race in their hiring process.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides that "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." This restriction extends to private companies that receive federal assistance; in particular, it covers "an entire corporation, partnership, or other private organization, or an entire sole proprietorship . . . if assistance is extended to such

corporation, partnership, private organization, or sole proprietorship as a whole." 42 U.S.C. § 2000d-4a.

Therefore, when a business accepts federal funding, that transaction triggers Title VI's protection against racial discrimination. "Under Title VI, it is never permissible 'to say 'yes' to one person . . . but to say 'no' to another person' even in part 'because of the color of his skin.'" *Students for Fair Admissions*, 600 U.S. at ___ (Gorsuch, J., concurring) (slip op., at 25) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 418 (1978)). By straightforwardly applying the Court's holding in *Students for Fair Admissions* to other programs or activities, no organization subject to Title VI of the Civil Rights Act of 1964 can engage in racial discrimination, including in its hiring practices. When such an organization considers race as a factor in its making hiring decisions, it violates the law.

II. Title VII Prohibits Racial Discrimination in Hiring.

The Civil Rights Act of 1964 also provides another robust backstop against racial discrimination in employment. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, which governs all employers—regardless of whether they qualify as a program or activity that accepts federal funding—provides:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VI and Title VII should be read to offer similar proscriptions; both statutes use "essentially identical terms the same way." *Students for Fair Admissions*, 600 U.S. at ___ (Gorsuch, J., concurring) (slip op., at 4). If *Students for Fair Admissions*' interpretation of unlawful discrimination "on the ground of race, color, or national origin" in the Title VI context means that Harvard cannot make an admissions decision that turns on any of those three characteristics, so too does unlawful discrimination "because of . . . race, color, religion, sex, or national origin" in the Title VII context mean that employers cannot make any hiring decision that turns on any of those five characteristics either.

To be sure, in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court held that Title VII does not prohibit race-conscious affirmative action plans. But it seems unlikely that the Supreme Court would reaffirm that holding today. In *Weber*, the Court justified its position that affirmative action policies "voluntarily adopted by private parties to eliminate traditional patterns of racial segregation" are acceptable by ignoring the plain text and instead looking to the Civil Rights Act of 1964's legislative history. *Id.* at 201. Justice Brennan's majority

opinion stated that "an interpretation of the sections [of Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected. *Id.* at 202 (quoting *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953)). But today's Court rejects the authority of legislative history and interprets the law in alignment with the ordinary public meaning of the statute. In fact, in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020), the Court affirmed this very principle *in the Title VII context*, claiming:

> [O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

Though *Bostock* centered on Title VII sex discrimination, its logic extends to Title VII race discrimination. Combining *Bostock*'s textualist logic with *Students for Fair Admissions*' affirmative action proscription, any affirmative action hiring policies that rely in any part on an employee's race are in jeopardy of violating Title VII. Just as an employer violates Title VII when firing an employee because of sex, an employer likely violates Title VII when giving preference to an applicant because of race.

III. 42 U.S.C. § 1981 Independently Prohibits Racial Discrimination in Hiring.

The Civil Rights Act of 1964 does not provide the only prohibition on racial discrimination in employment. The Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981, also provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."

To date, the Supreme Court has not ruled on whether 42 U.S.C. § 1981 bars affirmative action programs in contracting. However, if confronted with that question, the Court would likely apply an Equal Protection Clause framework to 42 U.S.C. § 1981, rule in alignment with its reasoning in *Students for Fair Admissions*, and hold affirmative action programs in contracting illegal.

In 1976, the Court explicitly affirmed that 42 U.S.C. § 1981 exists, in part, to "prohibit racial discrimination in the making and enforcement of . . . contracts." *Runyon v. McCrary*, 427 U.S. 160, 168 (1976). But the position that the Court adopted in *Runyon* was not always widely accepted. In fact, at the time of the Civil Rights Act of 1866's enactment, members of Congress disagreed on the Act's very constitutionality; some members thought that Congress had no authority to pass the legislation, while others believed that the Thirteenth Amendment provided the authority. Nevertheless, a critical mass of legislators agreed that the Act's protections were necessary, so they began drafting the Fourteenth Amendment, in part to retroactively shore up the

Civil Rights Act of 1866's legal basis. *See Students for Fair Admissions*, 600 U.S. ___ (Thomas, J., concurring) (slip op., at 12) (explaining that the Fourteenth Amendment "was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses.").

Despite "the tragic failure of [the] Court" in its previous "misinterpretation of the Reconstruction Amendments," *Students for Fair Admissions* resoundingly reaffirms that the Fourteenth Amendment is colorblind. *Students for Fair Admissions*, 600 U.S. ___ (Thomas, J., concurring) (slip op., at 58). There, the Court straightforwardly states that the Fourteenth Amendment's prohibition on racial discrimination is absolute and that "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions*, 600 U.S. at ___ (slip op., at 15). Based on the text of the statute and yesterday's holding, it is now clear that race-based affirmative action has no place in contracting.