Statement for UA-UNM
July 3, 2023

On June 29, 2023, the U.S. Supreme Court held—in a widely decried opinion—that the race-conscious admissions programs of Harvard College and the University of North Carolina were unconstitutional under the Equal Protection Clause of the 14th Amendment and unlawful under Title VI of the Civil Rights Act of 1964.

The lawsuit was initiated by Students for Fair Admissions (SFA), an organization founded by the 71-year-old former stockbroker, Edward Blum. He is infamous for orchestrating cases challenging the Voting Rights Act since the mid-1990s and affirmative action programs since at least 2013. Blum recently lost two challenges to the race-conscious admissions program at the University of Texas, *Fisher I* in 2013 and *Fisher II* in 2016. In this case, SFA argues that "racial preferences" are unfair, unnecessary, and unconstitutional. The Roberts Court unfortunately agrees.

United Academics of the University of New Mexico (UA–UNM) squarely rejects the Court's holding, which upends decades of Supreme Court precedent on race-conscious admissions and the judicial test evaluating the constitutionality of government and private action based on race.

The traditional two-part "strict scrutiny" test to determine constitutionality requires the Court to analyze whether (1) the government has a "compelling"—not merely important or legitimate—interest in using a racial classification, and (2) the policy is "narrowly tailored" to meet that compelling interest. There are some exceptions such as when there is no other workable option.

As to the first part, the Supreme Court has consistently held that the benefits of racial and ethnic diversity constitute a compelling governmental interest justifying race-conscious affirmative action policies in higher education. This includes *Regents of the University of California v. Bakke* in 1978, which was upheld by *Grutter* and *Gratz* in 2003, and subsequently reaffirmed in *Fisher I* in 2013 and *Fisher II* in 2016. As to the second part, as recently as 2016 in *Fisher II*, the Court held that holistic review of college applications which includes race as one of many factors is both narrowly tailored and the only workable option for achieving the compelling interest of diversity.

Last week, however, the Roberts Court, with its so-called "conservative supermajority," proclaimed an ahistorical, regressive, and "race-blind" interpretation of the Equal Protection Clause. They held that the goals of the race-conscious holistic admissions review used by the two schools promote negative stereotyping; cannot be adequately measured and meaningfully reviewed by the Court; and are not limited in time. Op. at 22-23. According to the Court, "these are commendable goals, [but] they are not sufficiently coherent for purposes of strict scrutiny," and are therefore unconstitutional. *Id.* at 23. The Court's so-called race-blind approach echoes arguments made by opponents of the 14th Amendment in the 1860s, mid-20th century segregationists, and others who oppose realizing the promise of the United States as a multiracial democracy.

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As Justices Sotomayor and Jackson (joined by Justice Kagan) explain in their lengthy dissents, the Equal Protection Clause of the 14th Amendment originated when Congress attempted to reconstruct the Union from the ashes of the Civil War. After the states ratified the 13th Amendment in December of 1865 (prohibiting slavery), Congress saw the need to protect further the recently-emancipated Black people given that their enslavement had been justified by racist ideas and policies that promoted white supremacy. In that context, Congress enacted the Civil Rights Act of 1866, over the veto of President Andrew Johnson, and ratified the 14th Amendment in July of 1868. The original text was intended as an "affirmative act" to provide additional protections to a particular race so that their equal rights to due process would be protected.

In the following 185 years, the Court has wrestled with the meaning of the Equal Protection Clause. Low points include 1896's *Plessy v. Ferguson*, in which the Court established the segregationist "separate but equal" doctrine. High points include 1954's *Brown v. Board of Education*, in which the Court reversed itself and held that state-sanctioned racial segregation in public schools was inherently harmful to students and thus unconstitutional. That same year, in *Hernandez v. Texas*, the Court extended equal protection benefits to Mexican Americans, who had been excluded as a class from the Texas grand jury system for 25 years.

The Court has established another low point in the history of Equal Protection jurisprudence.

Although the Court does not expressly overrule its prior holdings, it restricts race-based considerations to the *individual's* experience with race (e.g., discrimination, inspiration). As explained by the dissents, this race neutral approach ignores widespread systemic racism and multi-generational impacts that limit educational opportunities and economic mobility. Justice Jackson highlights why race is relevant to college admissions:

> [O]ur present reality indisputably establishes that such programs are still needed – for the general public good – because after centuries of state-sanctioned (and enacted) race discrimination, the aforementioned intergenerational race-based gaps in health, wealth, and well-being stubbornly persist.

Universities continue to have many remaining options to recruit, support, and graduate diverse cohorts of students. UA–UNM calls on its members, the University of New Mexico administration and staff, and the public to reject the Court's assertion that race-conscious admissions programs are unconstitutional, unfair, and unnecessary.

In the coming academic year, UA–UNM members will organize a variety of internal and public workshops around improving admissions policies and continuing work to advance the interests of and honor New Mexico's diverse peoples. Despite the Supreme Court's latest opinion, we shall march on in support of justice and equity.