Nos. 20-1199 & 21-707

In The
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondents.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit And The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS ADVOCATES, ET AL., IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. INTERNATIONAL AND COMPARATIVE FOREIGN LAW ARE RELEVANT TO THE SUPREME COURT'S CONSIDERATION OF THE CONSTITUTIONALITY OF HARVARD AND UNC'S ADMISSIONS PROGRAMS 4

II. CONSIDERATIONS OF RACE IN ADMISSIONS DECISIONS ARE CONSISTENT WITH THE UNITED STATES' INTERNATIONAL HUMAN RIGHTS COMMITMENTS 8

A. Human Rights Treaties Ratified by the United States Require the Adoption of Race-Conscious Measures 8

1. Considerations of Race Are Consistent with the International Covenant on the Elimination of All Forms of Racial Discrimination 9

2. Considerations of Race Are Permissible and Encouraged under The International Covenant on Civil and Political Rights 18

B. Other Independent Human Rights Experts Have Recommended Considerations of Race in Higher Education to Address Inequality.................... 20

C. Racial Discrimination and Inequality Still Persist in the United States 21

D. Harvard University and The University of North Carolina's Holistic, Race-Conscious Approach to Admissions is Consistent with International Treaty Obligations and Recommendations..................... 24

III. OTHER JURISDICTIONS AFFIRM THE PROPRIETY AND BENEFITS OF RACE-CONSCIOUS APPROACHES TO ADVANCE EQUALITY AND NON-DISCRIMINATION............................. 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

U.S. Cases

Cal. Fed. Savings & Loan Ass'n v. Guerra
479 U.S. 272 (1987) 1

Fisher v. Univ. of Tex. at Austin
579 U.S. 365 (2016) 15, 21

Fisher v. Univ. of Texas at Austin
570 U.S. 297 (2013) 28

Graham v. Florida
560 U.S. 48 (2010) 1, 4

Grutter v. Bollinger
539 U.S. 306 (2003) (Ginsburg, J., concurring) 1, 7, 14

Lawrence v. Texas
539 U.S. 558 (2003) 6

Roper v. Simmons
543 U.S. 551 (2005) 1, 6

Sosa v. Alvarez-Machain
542 U.S. 692 (2004) 6

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.
980 F.3d 157 (1st Cir. 2020) 27

Students for Fair Admissions, Inc. v. Univ. of N. Carolina
567 F. Supp. 3d 580 (M.D.N.C. 2021) 26

United States v. Alvarez-Machain
504 U.S. 655 (1992) 9

United States v. Rauscher
119 U.S. 407 (1886) 9

Foreign Jurisdiction Cases

Badeck & Others
2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6 All ER (EC) 289, 2000 WL 281317 (E.C.J. 2000) 29, 30

Marschall v. Land Nordrhein-Westfalen
1997 E.C.R. I-6363 All ER (EC) 865 (E.C.J. 1997) 29

Motala & Another v. Univ. of Natal
1995 (3) BCLR 374(D) (Durban Sup. Ct.), 1995 SACLR LEXIS 256 (S. Afr. Feb. 24, 1995) 30

Constitution, Statutes, and Treatises

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 § 15(2), being Schedule B to the Canada Act, 1982, c.11 (U.K.) 31

The Declaration of Independence, para. 1 (U.S. 1776) 5

India Const. art. 15, cl. 5 (India) 31

Internatinoal Covenant on the Elimination of All Forms of Racial Discrimination, *adopted*, Dec. 21, 1965, S. Treaty Doc. No. 95-18, 660 U.N.T.S. 195 9

International Covenant on Civil and Political Rights, *adopted*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 18

New Zealand Bill of Rights Act 1990, § 19 (New Zealand) 31

Racial Discrimination Act 1975, § 8(1) (Australia) 31

U.S. Const., Article VI, ¶ 2 8

<u>International Law Materials</u>

Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/USA/4 (Dec. 30, 2011), https://2009-2017.state.gov/j/drl/rls/179781.htm 19, 21

L.R. et al. v. Slovakia, Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/2003 (2005), http://hrlibrary.umn.edu/country/decisions/31-2003.html 12

Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination (June 12, 2013), https://2009-2017.state.gov/documents/organization/210817.pdf 17

U.N. Comm. on the Elimination of Racial Discrimination: *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014) https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf 17

U.N. Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Uruguay*, U.N. Doc. No. CERD/C/URY/CO/21-23 (Jan. 12, 2017), https://www.refworld.org/docid/597b0e2f4.html 12

U.N. Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru*, U.N. Doc. No. CERD/C/PER/CO/22-23, (May 23, 2018), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/138/59/PDF/G1813859.pdf 14

U.N. Comm. on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), http://www.unhcr.org/refworld/docid/4885cfa70.html 15

U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, U.N. Doc. No. CERD/C/GC/32 (Sept. 24, 2009), http://www.unhcr.org/refworld/docid/4adc30382.html 11

U.N. Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, 50th Sess., Supp. No. 18, U.N. Doc. A/50/18 (Sept. 22, 1995), http://www.unhcr.org/refworld/docid/453779970.html 12

U.N. Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, 51st Sess., Supp. No. 18, U.N. Doc. A/51/18 (Sept. 30, 1996), http://www.unhcr.org/refworld/docid/3f52efba4.html 13

U.N. Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, 52nd Sess., Supp. No. 18, U.N. Doc. A/52/18 (Sept. 26, 1997), http://www.unhcr.org/refworld/docid/45c30c767.html 12

U.N. Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, 71st Sess., U.N. Doc A/62/18 (Oct. 1, 2007), http://www.unhcr.org/refworld/docid/473424062.html 13

U.N. Comm. on the Elimination of Racial Discrimination, *Reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of all Forms of Racial Discrimination: 6th periodic reports of States parties due in 2005: United States of America*, U.N. Doc. CERD/C/USA/6 (Oct. 24, 2007), http://www.unhcr.org/refworld/docid/4785e8be2.html.. 14

U.N. Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), https://www.refworld.org/docid/45c30bec9.html 18, 19

U.N. Human Rights Council, *Report of the Working Group of Experts on People of African Descent on its missions to the United States of America*, U.N. Doc A/HRC/33/61 (Aug. 18, 2016), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/183/30/PDF/G1618330.pdf 21

U.N. Human Rights Council, *Report of the Working Group of experts on people of African Descent: Visit to the United States of America (25 to 29 January 2010)*, Summary, U.N. Doc A/HRC/15/18 (Aug. 6, 2010), https://undocs.org/en/A/HRC/15/18 20

U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No. 30, The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, June 2005, No. 30, http://www.unhcr.org/refworld/docid/479477490.html 10

U.N. Office of the High Commissioner for Human Rights, *Racism, racial discrimination, xenophobia and related intolerance*, CHR Res. 2002/68, U.N. Doc. No. E/CN.4/2002/200 (Apr. 25, 2002), https://ap.ohchr.org/documents/alldocs.aspx?doc_id=4940 20

U.N.T.C., International Convention on the Elimination of All Forms of Racial Discrimination, Status as of 26-07-2022, Chapter IV Human Rights, No. 2, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en 31

U.N.T.C., International Covenant on Civil and Political Rights, Status as of 26-07-2022, Chapter IV Human Rights, No. 4, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en 31

Legislative Materials

138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) 8

140 Cong. Rec. S7634-02 (daily ed. June 24, 1994) 8

Other Authorities

American Bar Association Profile of the Legal Profession, *Demographics*, https://www.abalegalprofile.com/demographics/ 24

Ana Hernández Kent & Lowell Ricketts, *Wealth Gaps between White, Black and Hispanic Families in 2019*, Federal Reserve Bank of St. Louis (Jan. 5, 2021), https://www.stlouisfed.org/on-the-economy/2021/january/wealth-gaps-white-black-hispanic-families-2019 22

Association of American Medical Colleges, *Diversity in Medicine: Facts and Figures 2019, Figure 18. Percentage of all active physicians by race/ethnicity, 2018*, https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018 23

Bureau of Lab. Stat.,1095, *Labor force characteristics by race and ethnicity, 2020* (2021) 22

Bureau of Lab. Stat., *The Employment Situation-June 2022* (July 8, 2022), https://www.bls.gov/news.release/pdf/empsit.pdf 22

Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423 (1997) 9

Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and the American Founding* (2005) 5

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) 6

John Adams, *A Defence of the Constitutions of Government of the United States of America* (1787), https://openlibrary.org/books/OL7010684M/A_defence_of_the_constitutions_of_government_of_the_United_States_of_America 5

National Center for Education Statistics, *Characteristics of Postsecondary Faculty* (May 2022), https://nces.ed.gov/programs/coe/indicator/csc 23

National Center for Education Statistics, *Public High School Graduation Rates* (May 2021), https://nces.ed.gov/programs/coe/indicator/coi/high-school-graduation-rates 23

Ruth Bader Ginsburg & Deborah Jones Merritt, *Lecture: Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253 (1999) 7

Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) 6

*STF declared the constitutionality of the quota system at the University of Bras*ília, Supremo Tribunal Federal Portal Internacional (Apr. 26, 2012), http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=207138........... 30

U.S. Census Bureau, *Educational Attainment in the United States: 2020,* https://www.census.gov/data/tables/2020/demo/educational-attainment/cps-detailed-tables.html................... 23

U.S. Census Bureau, *Income and Poverty in the United States: 2020,* https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf... 22

The University of North Carolina at Chapel Hill, *Mission and Values* (Feb. 2014) https://www.unc.edu/about/mission/ 24

INTERESTS OF *AMICI CURIAE*

Human Rights Advocates and Human Rights First hereby request that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of respondents, President and Fellows of Harvard College ("Harvard") and the University of North Carolina ("UNC"). [1]

Human Rights Advocates (HRA) is a California non-profit corporation founded in 1978 with national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for more than thirty years. HRA has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal laws. Cases it has participated in include: *Graham v. Florida,* 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

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[1] Letters from all counsel consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No other person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief. In addition to counsel listed on the cover page partner Raymond C. Marshall and associate Matthew T. Lin from Sheppard Mullin Richter & Hampton LLP also contributed to this brief.

Human Rights First (HRF) is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with this country's human rights commitments. HRF coordinates and works with hundreds of other human rights and anti-corruption-focused NGOs from all over the world, documenting human rights violations and corruption. HRF has submitted expert testimony to Congress regarding targeted sanctions against international human rights abusers; the threat of domestic violent extremism; and international and domestic obligations to protect refugee and asylum seekers. HRF has also made submissions to the U.N.'s Office of the High Commissioner for Human Rights on issues related to migration, refugees and asylum protection. HRF has previously provided assistance as *amicus curiae* to the Supreme Court in interpretation of American law in relation to the nation's obligations under binding international treaties.

Amici urge the Court to consider international law, including the United States' treaty obligations, when applying the standards of the United States Constitution. These standards are part of United States law pursuant to the Supremacy Clause, and they provide for the use of "special measures" (the international law term for affirmative action) when needed to attain equality with respect to rights. Also addressed are the law and practice of other countries, which likewise affirm the consideration of race in higher education admissions decisions. The international and treaty standards support respondents' argument that their criteria are

narrowly tailored to furthering a compelling state interest justifying the consideration of race as part of their holistic admissions program to satisfy strict scrutiny under the Constitution's Equal Protection Clause.

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States since the adoption of the Declaration of Independence. The Founders were greatly influenced by international legal and social thought, and throughout the history of the United States, our Nation's courts have referred to international standards when considering the constitutionality of certain practices.

In this case, consideration of race as an aspect of holistic admissions decisions to universities is consistent with the United States' treaty obligations as well as international practice, which makes it all the more compelling. Indeed, the review bodies for two treaties that the United States is party to have urged the United States to undertake special and remedial measures to eradicate *de facto* discrimination in schools. Other independent international law experts have counseled the United States to do the same. The European Court of Justice and the national courts of other countries have also upheld affirmative action measures in relation to addressing racial disparities in higher education. The international treaties and practice support Harvard and UNC's approach to admissions and they should be considered when assessing the validity of that approach under the Fourteenth Amendment.

ARGUMENT

I.
INTERNATIONAL AND COMPARATIVE FOREIGN LAW ARE RELEVANT TO THE SUPREME COURT'S CONSIDERATION OF THE CONSTITUTIONALITY OF HARVARD AND UNC'S ADMISSIONS PROGRAMS

While the constitutionality of Harvard and UNC's undergraduate admissions programs is largely bound up in domestic law and Fourteenth Amendment jurisprudence, examining the permissibility of consideration of race as part of holistic admissions policies in the international context would continue the Court's "longstanding practice" of looking at international and foreign law to affirm and inform constitutional interpretation. *Graham v. Florida*, 560 U.S. 48, 80 (2010).

The Declaration of Independence itself speaks to the significance of other nations:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a *decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

The Declaration of Independence, para. 1 (U.S. 1776) (emphasis added).

Thomas Jefferson, drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. He had a broad understanding of eighteenth-century political thought, and was greatly influenced by European Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. *See* Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and the American Founding* 250–51 (2005). John Adams too understood the need to select the best the world had to offer in order to create a better government, and he believed that international opinion should inform the new nation's laws and institutions. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface (1787), https://openlibrary.org/books/OL7010684M/A_defence_of_the_constitutions_of_government_of_the_United_States_of_America.

In urging courts to afford the requisite "decent respect to the opinions of mankind" Justice Blackmun explained that:

> [T]he early architects of our Nation understood that the customs of nations—the global opinions of mankind—would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 39 (1994) (footnotes omitted). This Court has recognized that history and noted that:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729–30 (2004) (citations omitted).

In more recent decisions, the Court has referred to international standards and has invoked U.S. treaty obligations, particularly when human rights issues arise. *Roper v. Simmons*, 543 U.S. 551, 576-77 (2005) (citing the United Nations Convention on the Rights of the Child as well as other nations' practices in abolishing juvenile death penalty); *see also Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (referencing a decision from the European Court of Human Rights in finding Texas's sodomy law unconstitutional); Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 88 (2006) (describing this Court's cases as demonstrating "a longstanding tradition of relying on international law to inform constitutional meaning"). Thus, the Court recognizes the relevance of international law even when it is not directly binding. The relevance is even stronger in situations where the United States is party to a pertinent treaty.

Members of the Court have invoked international legal obligations in discussions of race-conscious policies in higher education, in particular. *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring). In *Grutter*, the concurrence explained that the Court's decision to uphold the University of Michigan Law School's race-conscious admissions program comported with the United States' obligations under The Convention on the Elimination of All Forms of Racial Discrimination (CERD) to enact "special and concrete measures" to guarantee equal protection and enjoyment of human rights for all races. *Id.* (citation omitted); *see also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Lecture: Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999) ("[C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups."). Particularly with respect to the CERD and the International Covenant on Civil and Political Rights (ICCPR), treaties which the United States has ratified, the United States has assumed international legal obligations that should inform the Court's analysis here.

II.
CONSIDERATIONS OF RACE IN ADMISSIONS DECISIONS ARE CONSISTENT WITH THE UNITED STATES' INTERNATIONAL HUMAN RIGHTS COMMITMENTS

A. Human Rights Treaties Ratified by the United States Require the Adoption of Race-Conscious Measures

The United States has ratified two international human rights treaties that support, and indeed require, the race-conscious measures that are at issue in this case: the CERD and the ICCPR. Under the Supremacy Clause of the Constitution, these treaties are the supreme law of the land, U.S. Const., art. VI, ¶ 2, and state and local governments share responsibility with the federal government for upholding the United States' human rights treaty commitments.[2] The ratification of these treaties creates binding international legal obligations for the United States to uphold and implement the principles

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[2] In ratifying CERD and the ICCPR, the United States attached an understanding setting forth a division of responsibility between federal, state and local government for domestic implementation. 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994) (U.S. reservations, declarations, and understandings, CERD); 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (U.S. reservations, declarations, and understandings, ICCPR). The record notes that the United States would implement the Conventions "to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention." 140 Cong. Rec. S7634-02, at § II.

of the CERD and the ICCPR, and it makes the provisions of these treaties the supreme law of the land.[3]

1. Considerations of Race Are Consistent with the International Covenant on the Elimination of All Forms of Racial Discrimination

CERD was ratified by the U.S. in 1994, and obligates parties to the treaty "to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations" and to "undertake to prevent, prohibit and eradicate all [racially discriminatory] practices." CERD, Preamble & art. 3, *adopted*, Dec. 21, 1965, S. Treaty Doc. No. 95-18, 660 U.N.T.S. 195.

CERD requires state parties to take affirmative steps to accomplish these goals. Article 1(4) states that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic

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[3] In considering the treaties for this purpose, this Court need not address the issue of whether the treaty provisions are self-executing or the validity of the "non-self-executing" declarations that accompany some of the treaties. For background and legislative history of the declarations, *see* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423, 456–62 (1997). Courts have applied treaty provisions in defensive postures without considering whether they are self-executing. *See United States v. Rauscher*, 119 U.S. 407, 430 (1886); *United States v. Alvarez-Machain*, 504 U.S. 655, 669–70 (1992).

> groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.

Id. art 1(4). Article 2(2) reiterates this requirement, providing that States shall take "special and concrete measures" to help guarantee full freedom and protection under the law for groups and individuals of all races. *Id*. art. 2(2). These special measures are limited in that they cannot lead to "unequal or separate rights for different racial groups," and are to end after the intended objectives have been achieved. *Id*. art. 2(2); art. 1(4).

The CERD treaty body, the CERD Committee,[4] has explained that special measures should include

[4] In ratifying the CERD and ICCPR, the U.S. accepted the obligation to submit to periodic review by the independent experts charged with monitoring treaty compliance ("the treaty bodies"). For CERD, the treaty body is the Committee on the Elimination of Racial Discrimination (CERD Committee). For the ICCPR, the treaty body is the Human Rights Committee. The review process entails the submission of a report by the state concerning the steps it has taken domestically to implement the treaty's provisions. The treaty body reviews this report, and then issues a set of recommendations calling attention to areas of concern with regard to that state's compliance. U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No. 30, The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, June 2005, No. 30, at 15, 17-23, http://www.unhcr.org/refworld/docid/479477490.html. The treaty bodies also issue comments

laws, policies, or practices that can affect areas such as housing, education, employment, and general participation in public life. U.N. Comm. on the Elimination of Racial Discrimination (CERD Comm.), *General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination* (*Gen. Recommendation No. 32*), U.N. Doc. No. CERD/C/GC/32 ¶ 13 (Sept. 24, 2009), http://www.unhcr.org/refworld/docid/4adc30382.html. These laws or policies should be implemented by parties to address the situation of disfavored groups, and should work towards both *de jure* and *de facto* equality for all races. *Id.* ¶ 22. The obligation for parties to "secure human rights and fundamental freedoms on a nondiscriminatory basis" requires that parties address not just intentional discrimination, but also discriminatory effects. *Id.* ¶ 14. Such affirmative or positive actions should be "appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary." *Id.* ¶ 16. The emphasis of the programs adopted as special measures should be to "correct[] present disparities and . . . prevent[] further imbalances from arising." *Id.* ¶ 22.

The CERD Committee has consistently held that *de facto* discrimination violates the Convention. In *L.R. v. Slovakia*, the Committee held the State party responsible for actions that have discriminatory

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called General Comments or General Recommendations setting forth their definitive interpretation of the various treaty provisions. *Id.* at 29. By their nature, General Comments apply to all states parties to a given treaty.

effects, regardless of whether they were committed with discriminatory intent. *L.R. et al. v. Slovakia*, Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/2003 (2005), http://hrlibrary.umn.edu/country/decisions/31-2003.html. Specifically addressing the treatment of Roma people, the CERD Committee found that Slovakia had failed its treaty obligation to "nullify any laws or regulations which have the effect of creating or perpetrating racial discrimination." *Id.* at § 3.2. The CERD Committee reiterated that discrimination, as defined in Article 1(1) of the CERD, extends beyond explicitly discriminatory measures to reach those which are also discriminatory in fact and effect. *Id.* at § 10.4. Article 5 states that the right to equality in education is especially important. CERD, art. 5(e)(v).

When reviewing countries' compliance with the convention, the CERD Committee has often raised the importance of special measures, particularly in the field of education. *See, e.g.*, CERD Comm., *Report of the Committee on the Elimination of Racial Discrimination*, 50th Sess., Supp. No. 18, ¶ 394, U.N. Doc. A/50/18 (Sept. 22, 1995), http://www.unhcr.org/refworld/docid/453779970.html ("The Committee strongly recommends that [Mexico] make an increased effort in promoting affirmative measures in the field of education and training."); CERD Comm., *Report of the Committee on the Elimination of Racial Discrimination*, 52nd Sess., Supp. No. 18, ¶ 94, U.N. Doc. A/52/18 (Sept. 26, 1997), http://www.unhcr.org/refworld/docid/45c30c767.html (urging Guatemala to increase efforts "to promote affirmative measures in the fields of education and training"); CERD Comm., *Concluding observations on the combined twenty-first*

to twenty-third periodic reports of Uruguay, ¶ 21, U.N. Doc. No. CERD/C/URY/CO/21-23 (Jan. 12, 2017), https://www.refworld.org/docid/597b0e2f4.html (recommending that Uruguay "adopt special measures for persons of African descent, especially adolescents, to remedy disparities in educational attainment, bring down school dropout rates and facilitate access to tertiary education"). Requests for states to initiate or enhance special measures to promote greater equality in education are common in the CERD Committee's annual reports.

Importantly, the CERD Committee has also made numerous references to concerns about access to higher education in particular, underscoring the recognition that inequalities at the university level are within the purview of the treaty, and that addressing those inequalities is part of the parties' legal obligations. *See, e.g.,* CERD Comm., *Report of the Committee on the Elimination of Racial Discrimination*, 51st Sess., Supp. No. 18, ¶ 503, U.N. Doc. A/51/18 (Sept. 30, 1996), http://www.unhcr.org/refworld/docid/3f52efba4.html (recommending that Namibia adopt "[a]ffirmative measures . . . to overcome vestiges of the past that still hamper the possibilities for black people, including vulnerable groups among them, to have access to secondary and higher education . . . ."); CERD Comm., *Report of the Committee on the Elimination of Racial Discrimination*, 71st Sess., ¶ 280, U.N. Doc A/62/18 (Oct. 1, 2007), http://www.unhcr.org/refworld/docid/473424062.html (urging the Former Yugoslav Republic of Macedonia to "intensify its efforts to reduce the high dropout rate in the secondary and higher levels of education among ethnic Albanian and

Turkish children"); *id.* ¶ 220 ("[Israel] should ensure that access to higher education is ensured for all without discrimination, whether direct or indirect, based on race, colour, descent, or national or ethnic origin."); CERD Comm., *Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru*, ¶ 29(d), U.N. Doc. No. CERD/C/PER/CO/22-23 (May 23, 2018), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/138/59/PDF/G1813859.pdf (urging Peru to "redouble its efforts to ensure the availability, accessibility and quality of education for Montubio, Afro-Ecuadorian and indigenous peoples and migrants, especially at the higher education level").

The United States' policies on education have been the subject of concern for the CERD Committee as well. In its report to the Committee in 2007, the U.S. cited "race-conscious educational admission policies and scholarships" as evidence of its *compliance* with article 2(2) and specifically mentioned the *Grutter* decision as an example of that compliance. CERD Comm., *Reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of all Forms of Racial Discrimination: 6th periodic reports of States parties due in 2005: United States of America* ¶¶ 128, 131, U.N. Doc. CERD/C/USA/6 (Oct. 24, 2007), http://www.unhcr.org/refworld/docid/4785e8be2.html. Nevertheless, in the Concluding Observations commenting on its review of the United States' report, the Committee responded that the United States had not done enough to enact special measures to eradicate *de facto* discrimination in schools, recommending that the United States:

> undertake further studies to identify the underlying causes of de facto segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school desegregation and providing equal educational opportunity in integrated settings for all students. In this regard, the Committee recommends that the State party take all appropriate measures . . . [to allow] school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2, of the Convention.

CERD Comm., *Consideration of reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America* ¶ 17, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), http://www.unhcr.org/refworld/docid/4885cfa70.html. Although the Concluding Observations referred specifically to Supreme Court decisions that limit the consideration of individual students' race in K-12 school assignments, it is clear that the CERD Committee is cognizant and concerned about racial equality in American schools generally, and that it frames the issue in terms that echo "strict scrutiny" standards under the Constitution.

In its report to the CERD Committee in 2013, the United States specifically referred to *Fisher v.*

Univ. of Tex. at Austin, 579 U.S. 365 (2016) ("*Fisher II*"):

> The United States legal system provides for special measures when circumstances so warrant. See the discussion under article 2 below and the discussion in paragraphs 197 to 206 of the common core document. Recently, DOJ actively defended the undergraduate admission program of the University of Texas, which was challenged by two unsuccessful White candidates for undergraduate admission. The Texas program adopts a holistic approach – examining race as one component among many – when selecting among applicants who are not otherwise eligible for automatic admission by virtue of being in the top ten percent of their high school classes. The U.S. Court of Appeals for the Fifth Circuit upheld the University's limited use of race as justified by a compelling interest in diversity and as narrowly tailored to achieve a critical mass of minority students. The Supreme Court heard arguments in the case, Fisher v. Texas, in October 2012, and is expected to decide the case by June 2013. In its amicus curiae brief, the Solicitor General argued, on a brief signed by several federal agencies, that, like the University, the United States has a compelling interest in the educational

> benefits of diversity, and that the University's use of race in freshman class admissions to achieve the educational benefits of diversity is constitutional.

Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination ¶ 16 (June 12, 2013), https://2009-2017.state.gov/documents/organization/210817.pdf. The 2014 review of the United States by the CERD Committee again expressed concern about state measures adopted against the use of affirmative action in school admissions. CERD Comm., *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, ¶ 7, U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014) https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf. The CERD Committee reiterated its previous recommendations that the United States adopt and strengthen the use of special measures. *Id.*

Compounded with the numerous recommendations for special measures in higher education throughout CERD Committee's evaluations of other nations, it is clear that parties to CERD, including the United States, are obligated under the treaty to take all necessary measures, including positive action, to end *de facto* segregation—and thus to promote equal opportunity—in all levels of education, as part of the parties' legal obligations.

Thus, holistic considerations of race in higher education admissions decisions are consistent with the United States' international legal obligations under CERD, and indeed can be defended on the grounds that they implement the United States' treaty obligations. Such considerations promote a compelling state interest, and consistent with strict scrutiny analysis, they are closely tailored to that compelling interest.

2. Considerations of Race Are Permissible and Encouraged under The International Covenant on Civil and Political Rights

The United States ratified the ICCPR in 1992. ICCPR, *adopted*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171. The treaty obligates member states to protect the human dignity of individuals by upholding "equal and inalienable rights" within their territories. *Id.*, Preamble. The ICCPR requires states parties to protect individual rights "without distinction of any kind, such as race, colour, sex, language, religion," *id.* art. 2(1), and provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground." *id.* art. 26.

In its 2006 review of the United States' compliance with the ICCPR, the U.N. Human Rights Committee (HRC) expressed concern over "de facto racial segregation in public schools," and reminded the United States of its obligations under articles 2 and 26 to guarantee effective protection against practices with discriminatory *effects*. HRC, *Consideration of reports submitted by States parties*

under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: United States of America ¶ 23, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), https://www.refworld.org/docid/45c30bec9.html. The Committee recommended that the United States conduct investigation into racial segregation in schools and "take remedial steps." *Ibid.*

In the United States' report to the HCR in 2011 regarding its compliance with the ICCPR, the State Department highlighted the Court's consideration of education-specific affirmative action plans and guidance issued by the Departments of Education and Justice to assist educational institutions in pursuing policies to achieve diversity and avoid racial isolation, as evidence of the United States' compliance with ICCPR article 2. *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, ¶ 39, U.N. Doc. CCPR/C/USA/4 (Dec. 30, 2011), https://2009-2017.state.gov/j/drl/rls/179781.htm. In doing so, the government acknowledges, and indeed asserts, that special measures in higher education serve to uphold the "equal and inalienable rights" championed in the ICCPR, and to further the United States' compliance with its international obligations under that treaty.

B. Other Independent Human Rights Experts Have Recommended Considerations of Race in Higher Education to Address Inequality

The United Nations Working Group of Experts on People of African Descent[5] (the "Working Group") has also raised concerns about minority access to higher education in the United States. In a report to the U.N. Human Rights Council concerning its visit to the United States in January 2010, the Working Group found that "the challenges faced by people of African descent in this country related mainly to disproportionately high levels of unemployment, generally lower income levels than the rest of the population, access to education (especially to higher levels of education) and quality of education." HRC, *Report of the Working Group of experts on people of African Descent: Visit to the United States of America (25 to 29 January 2010)*, Summary, U.N. Doc A/HRC/15/18 (Aug. 6, 2010), https://undocs.org/en/A/HRC/15/18. The Working Group suggested that the United States continue the initiatives already in place to remedy inequality in the education system, and also create "positive action policies to achieve parity of educational conditions among students of

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[5] The Working Group is a panel of independent experts established by the UN Commission on Human Rights in 2002 to study and make recommendations and programs to combat issues of racial discrimination, xenophobia, and related intolerance. U.N. Office of the High Commissioner for Human Rights, *Racism, racial discrimination, xenophobia and related intolerance*, CHR Res. 2002/68, U.N. Doc. No. E/CN.4/2002/200 at 287, 290-91 (Apr. 25, 2002), https://ap.ohchr.org/documents/alldocs.aspx?doc_id=4940.

African descent and those of the majority population." *Id.* ¶ 83.

The Human Rights Council reaffirmed the value of affirmative action in its August 2016 report, based on findings from a visit to the United States from January 19, 2016 to January 29, 2016. The Working Group recognized the value of affirmative action policies but also acknowledged the implications of ongoing historical, racial discrimination through numerous references to "institutional and structural" discrimination. U.N. Human Rights Council, *Report of the Working Group of Experts on People of African Descent on its missions to the United States of America*, U.N. Doc A/HRC/33/61 (Aug. 18, 2016), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/183/30/PDF/G1618330.pdf. The Working Group specifically endorsed the Court's holding in *Fisher II*, 579 U.S. 365, but reported that "civil rights laws are not being fully implemented, and even if fully implemented, they are insufficient to overcome and transform the institutional and structural racial discrimination and racism against people of African descent." *Id.* ¶ 11.

C. Racial Discrimination and Inequality Still Persist in the United States

The racial discrimination and inequality contemplated by the CERD and ICCPR remain evident in numerous areas of American life. For example, vast disparities continue to exist in the median household income for households of different races. In 2020, the median household income was $45,870 for Black households, $55,321 for Hispanic households, $74,912 for non-Hispanic White

households, and $94,903 for Asian households. *See* U.S. Census Bureau, *Income and Poverty in the United States: 2020,* https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf. These disparities also exist in household wealth, with the median White family owning $184,000 in family wealth, the median Hispanic family owning less than $38,000 in family wealth, and the median Black family owning $23,000 in family wealth. *See* Ana Hernández Kent & Lowell Ricketts, *Wealth Gaps between White, Black and Hispanic Families in 2019*, Federal Reserve Bank of St. Louis (Jan. 5, 2021), https://www.stlouisfed.org/on-the-economy/2021/january/wealth-gaps-white-black-hispanic-families-2019.

Inequalities also exist in employment rates among different races: in 2020, while the overall unemployment rate in the U.S. averaged 8.1%, the average unemployment rates were higher for American Indians and Alaska Natives (11.7%), people categorized as being of Two or More Races (11.6%), and Blacks or African Americans (11.4%). *See* Bureau of Lab. Stat., 1095, *Labor force characteristics by race and ethnicity, 2020* (2021). The average unemployment rate for Whites (7.3%) was lower than the national average in 2020. *See id.* These inequalities persist even in a relatively strong economy. In June 2022, while the overall unemployment rate was 3.6%, the unemployment rate was 3% for Asian workers, 3.3% for White workers, 4.3% for Hispanic workers, and 5.8% for Black workers. *See* Bureau of Lab. Stat., *The Employment Situation—June 2022* (July 8, 2022), https://www.bls.gov/news.release/pdf/empsit.pdf.

Large disparities in educational attainment also persist today. In 2020, 20.9% of Hispanics, 27.9% of Blacks, 41.3% of non-Hispanic Whites, and 61.1% of Asians had a bachelor's degree or higher. *See* U.S. Census Bureau, *Educational Attainment in the United States: 2020,* https://www.census.gov/data/tables/2020/demo/educational-attainment/cps-detailed-tables.html. In the 2018–2019 school year, the national adjusted cohort graduation rate was 86%, but the rates varied for Asian/Pacific Islander Students (93%), White Students (89%), Hispanic students (82%), Black students (80%), and American Indian/Alaska Native students (74%). *See* National Center for Education Statistics, *Public High School Graduation Rates* (May 2021), https://nces.ed.gov/programs/coe/indicator/coi/high-school-graduation-rates.

These inequalities are also directly impacted by American's access to college education. For example, there are stark inequalities in the racial backgrounds in educated professions. In the medical field, 56.2% of active physicians identify as White, 17.1% identify as Asian, 5.8% identify as Hispanic, and 5% identify as Black or African American. *See* Association of American Medical Colleges, *Diversity in Medicine: Facts and Figures 2019, Figure 18. Percentage of all active physicians by race/ethnicity, 2018*, https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018. There are also inequalities in the demographics of college professors: in 2020, over 74% of full-time faculty were White, while only 12% were Asian, 7% were black, and 6% were Hispanic. *See* National Center for Education

Statistics, *Characteristics of Postsecondary Faculty* (May 2022), https://nces.ed.gov/programs/coe/indicator/csc. The legal profession remains one of the professions most lacking in diversity: in 2021, White lawyers made up 85% of the profession, while 4.8% of lawyers were Hispanic, 4.7% were Black, and 2.5% were Asian. American Bar Association Profile of the Legal Profession, *Demographics*, https://www.abalegalprofile.com/demographics/.

D. Harvard University and The University of North Carolina's Holistic, Race-Conscious Approach to Admissions is Consistent with International Treaty Obligations and Recommendations

Both Harvard and UNC prioritize the diversity of their student bodies when selecting which students to admit as undergraduates. Harvard has explained throughout this case that its mission is "to educate … citizens and citizen leaders for our society," and that essential to that mission is "a diverse living environment, where students live with people who are studying different topics, who come from different walks of life and have evolving identities." No. 20-1199, Joint Appendix 1762. Likewise, UNC's mission statement includes a declaration that it exists "to serve as the center for research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders." The University of North Carolina at Chapel Hill, *Mission and Values* (Feb. 2014) https://www.unc.edu/about/mission/; No. 21-707, Joint Appendix 1371. Both universities further this goal of creating a diverse student body by performing a holistic

evaluation of each applicant, and both universities consider each applicant's race as one of many factors in their holistic application. The universities' race-conscious student admissions programs also survived strict scrutiny under the Constitution's Equal Protection Clause in the lower courts. That these admissions programs follow the dictates of international law applicable to the United States can only bolster their permissibility under the Constitution.

Along with adhering to constitutional requirements under the Equal Protection Clause, Harvard and UNC's admissions programs further the United States' compliance with its international treaty obligations, including those of CERD articles 1(4) and 2(2) concerning special measures to eliminate racial discrimination. As explained above, under CERD, special measures must be "goal-directed programmes which have the objective of alleviating and remedying the disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination." *Gen. Recommendation No. 32*, *supra*, ¶ 22. These criteria are consistent with Fourteenth Amendment jurisprudence. Both Harvard and UNC seek to promote equal opportunity in higher education for students of all races by ensuring that they admit racially diverse student bodies, in addition to improving the overall quality of the education provided to their students by creating a diverse learning environment.

Moreover, CERD requires that states parties implement special and concrete measures, "when the

circumstances so warrant," in order to ensure that all racial groups are granted full and equal human rights. CERD, art. 2(2). Thus, CERD does not require a finding of purposeful discrimination, only discriminatory effects. The District Court for the Middle District of North Carolina specifically found that UNC's admissions policy sought to remedy the "vestiges of [prior] discrimination, by [UNC] and society at large" that remain today. *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 567 F. Supp. 3d 580, 590 (M.D.N.C. 2021). Among these vestiges are the underrepresentation of certain racial groups in American universities, which in turn inhibit the access of these racial groups to the benefits of elite education at institutions like Harvard and UNC. Both universities' consideration of race along with other holistic factors in their admissions programs help remedy this discriminatory effect by building a diverse student body. Thus, the admissions program complies with CERD's requirements that special measures be "appropriate to the situation to be remedied, be legitimate . . . [and] respect the principles of fairness and proportionality." *Gen. Recommendation No. 32*, ¶ 16. The treaty standards thus provide additional support for the University's admission program.

Harvard too has demonstrated that its consideration of race in admissions is necessary to enhance the diversity of its student body and achieve the corresponding benefits of diversity for its student body. The First Circuit specifically found that race-conscious admissions were intended to support at least four goals articulated in the Khurana Report, including (1) training future leaders in the public and

private sectors as Harvard's mission statement requires; (2) equipping Harvard's graduates and Harvard itself to adapt to an increasingly pluralistic society; (3) better educating Harvard's students through diversity; and (4) producing new knowledge stemming from diverse outlooks. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 173–74 (1st Cir. 2020). These measures are not discriminatory: the CERD Committee has explained that measures that take into account individuals who are in disadvantaged situations, like the measures at issue here, are "not an exception to the principle of non-discrimination but are integral to its meaning and essential to the [CERD] project of eliminating racial discrimination and advancing human dignity and effective equality." *Gen. Recommendation No. 32*, *supra*, ¶ 20. Harvard and UNC's consideration of race in university admissions comprise a necessary component of instituting nondiscrimination in the United States, as required by the CERD.

Harvard's holistic, race-conscious admissions policies also further the United States' compliance with international law despite the fact that the university is a private institution. Neither CERD, the U.N. Human Rights Committee, nor the U.N. Human Rights Council address distinctions between public and private universities when discussing special measures to address racial and ethnic discrimination. U.S. courts have analyzed Harvard's compliance with the Equal Protection Clause and anti-discrimination laws with the same scrutiny applied to public universities because it is a recipient of federal public funding. *See Students for Fair Admissions, Inc.*, 980

F.3d at 184 ("Because Harvard accepts federal funds, it is subject to Title VI."). Furthermore, allowing Harvard to consider race in building a diverse student body furthers the United States' compliance with international law, which requires member states to take special measures to eliminate all impacts of racial discrimination.

Finally, although there is no established end date to the universities' undergraduate admissions programs, informal and formal review processes adopted by both universities, as well as judicial requirements that race-conscious admissions be narrowly tailored to address a compelling state interest, *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013) ("*Fisher I*"), ensure that the policy adheres to CERD's mandate that special measures last no longer than required, *Gen. Recommendation No. 32*, *supra*, ¶ 16.

III.
OTHER JURISDICTIONS AFFIRM THE PROPRIETY AND BENEFITS OF RACE-CONSCIOUS APPROACHES TO ADVANCE EQUALITY AND NON-DISCRIMINATION

In addition to furthering the United States' compliance with its international legal obligations, Harvard and UNC's holistic, race-conscious admissions programs comport with affirmative action measures permitted in, and endorsed by, other

jurisdictions that have the same or similar obligations under international or domestic law.[6]

The European Court of Justice, for instance, has endorsed "positive action" programs to promote equality between men and women. In two cases, the European Court has upheld German initiatives that give priority to women in promotion decisions in positions where women were underrepresented. *See* Case C-158-97, *Badeck & Others*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6, 2000 All ER (EC) 289, 2000 WL 281317 (E.C.J. 2000); Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, 1997 All ER (EC) 865 (E.C.J. 1997) (*available on* Westlaw). The programs under review in *Badeck* and *Marschall* were intended to counteract unequal opportunities for a disadvantaged group, regardless of the presence of intentional discrimination. The European Court found that the German policies lawfully pursued this legitimate social objective and utilized means that were proportionate in relation to the real needs of the disadvantaged group. *Badeck,* 2000 E.C.R. I-1875, Operative Part.

Along with the European Court of Justice, national courts in other jurisdictions have upheld affirmative action measures, specifically in relation to racial disparities in higher education. In 2012, the Federal Supreme Court of Brazil, Brazil's highest

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[6] As noted by Justice Breyer, the practices of other countries bound by the same treaty obligations provide valuable guidance to the Court in construing and applying treaties of the United States. *See* Stephen Breyer, The Court and the World: American Law and the New Global Realities 169 (2015).

court of appeals on constitutional matters, declared a race-conscious policy in student admissions at the University of Brasília (UNB) to be constitutional. S.T.F. ADFP 186, April 26, 2012. Just as the programs at issue here aim to promote diversity in the university setting, the Brazilian court found that UNB's affirmative action program was necessary to "set a plural and diversified academic environment." *STF declared the constitutionality of the quota system at the University of Bras*ília, Supremo Tribunal Federal Portal Internacional (Apr. 26, 2012), http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us &idConteudo=207138. Courts in South Africa have also upheld race-conscious measures in higher education. In one case, an Indian woman who was denied admission to a medical school challenged the school's affirmative action program that was aimed at benefiting historically-disadvantaged African students. *Motala & Another v. Univ. of Natal*, 1995 (3) BCLR 374(D) (Durban Sup. Ct.), 1995 SACLR LEXIS 256, at *16-*17 (S. Afr. Feb. 24, 1995). The court rejected the challenge, stating that the experience of African students in the country required specific compensation and thus the program was not discriminatory under the South African constitution. *Id*. at *28.

Other countries permit affirmative action programs as a matter of law. For instance, India's national constitution was amended in 2005 to decree that the nation would allow affirmative action in higher education: "Nothing in [the constitution's anti-discrimination provisions] shall prevent the State from making any special provision, by law, for the

advancement of any socially and educationally backward classes of citizens or for [disadvantaged castes and tribes].” India Const. art. 15, cl. 5. Similarly, the Canadian constitution guarantees equal protection under the law, and explains that this guarantee “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 § 15(2), being Schedule B to the Canada Act, 1982, c.11 (U.K.). In addition, statutes in New Zealand and Australia permit affirmative action measures in those countries. *See* New Zealand Bill of Rights Act 1990, § 19, 1990, S.N.Z. No. 109-Human Rights Act 1993, 1993 S.N.Z. No. 82 §§ 58, 73(1); Racial Discrimination Act 1975, § 8(1) (Austl.). These examples evidence the willingness by other countries that, like the United States, are parties to the CERD and the ICCPR to endorse race-conscious programs.[7] The practice of other nations should inform the Court's consideration here.

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[7] For parties to CERD, *see*, U.N.T.C., International Convention on the Elimination of All Forms of Racial Discrimination, Status as of 26-07-2022, Chapter IV Human Rights, No. 2, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en. For parties to the ICCPR, *see* U.N.T.C., International Covenant on Civil and Political Rights, Status as of 26-07-2022, Chapter IV Human Rights, No. 4, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

CONCLUSION

Harvard and UNC's holistic, race-conscious admissions policies comport with international human rights standards guaranteeing the full freedom from racial discrimination for all, and they further the United States' compliance with its international treaty commitments. Furthermore, the admissions programs comport with the law of other jurisdictions upholding and endorsing race-conscious measures in admissions in higher education. This international context should inform the Court's analysis of the constitutionality of Harvard and UNC's consideration of race in their admissions processes.

Respectfully submitted,

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