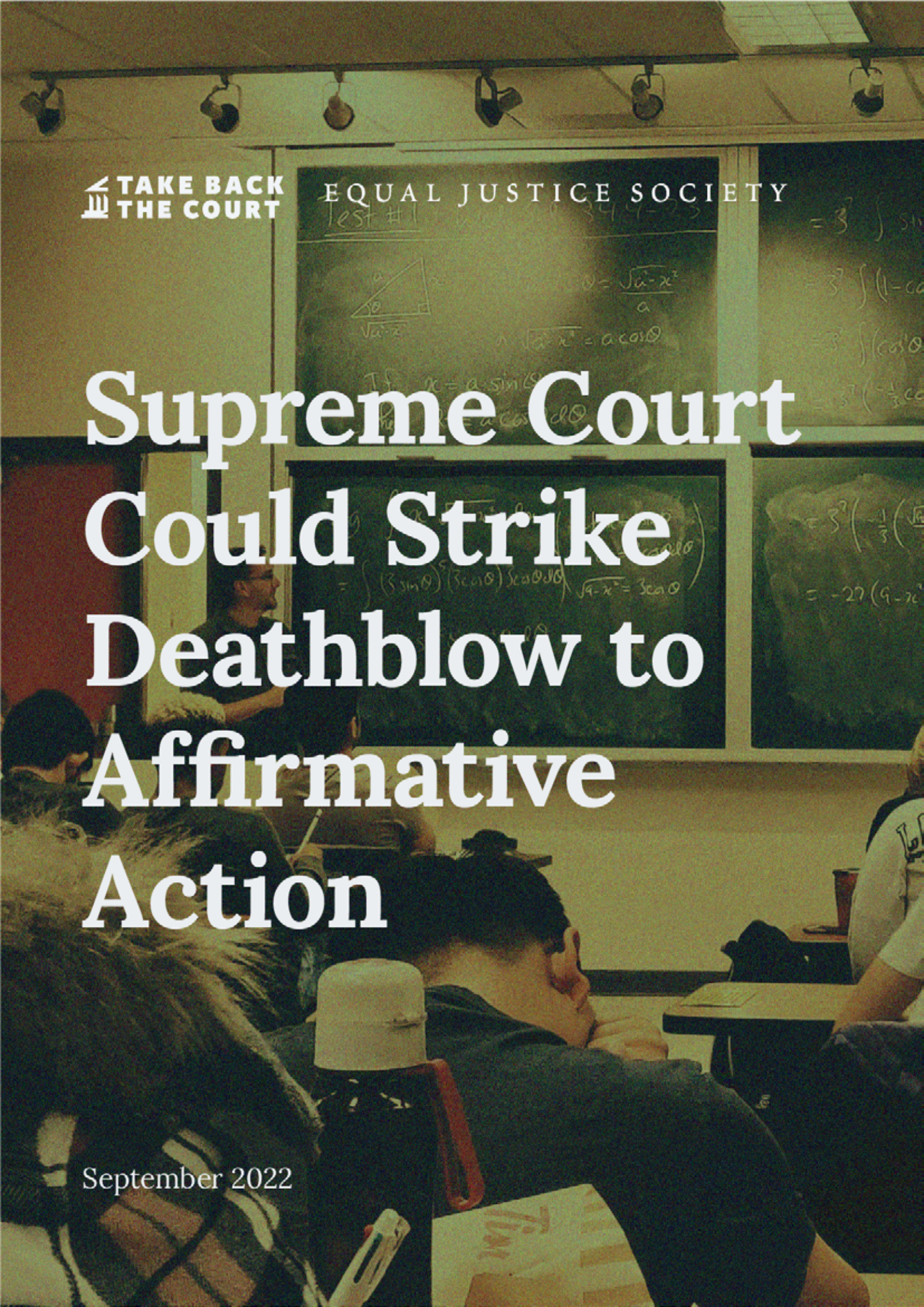

TAKE BACK THE COURT

EQUAL JUSTICE SOCIETY

Supreme Court Could Strike Deathblow to Affirmative Action

September 2022

The report has been a project of Take Back the Court and The Equal Justice Society.

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The Equal Justice Society (EJS) is transforming the nation's consciousness on race through law, social science, and the arts. Our legal strategy aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using social science, structural analysis, and real-life experience. Currently, EJS targets its advocacy efforts on school discipline, special education, the school-to-prison pipeline, race-conscious remedies, and inequities in the criminal justice system. The Oakland, California-based nonprofit also engages the arts and artists in creating work and performances that allow wider audiences to understand social justice issues and struggles.

For more information, please visit our website: https://equaljusticesociety.org

The Supreme Court Could Strike Deathblow to Affirmative Action

If there was ever a time to rally behind affirmative action, it is in this moment when the Supreme Court is poised to strike the final deathblow to the essential but beleaguered antidiscrimination policy when the Court decides the *Students for Fair Admissions v. Harvard* and *Students for Fair Admission v. University of North Carolina* cases this term. Abundant evidence shows affirmative action policies in higher education significantly offset past and ongoing racial discrimination, benefiting all students and the institutions that implement these policies. Yet the theories espoused by all six of the justices who comprise the Court's conservative supermajority endanger affirmative action and education equity. The Supreme Court appears eager to gut policies that remediate and disrupt the pervasive harms of segregation and inequality in higher education and K-12 schools.

Affirmative Action Policies Are Successful and Necessary

Diversity in education matters. Gender diverse environments are 15 percent more likely to have above-average productivity rates than homogeneous environments, and racially diverse environments are 35 percent more likely to have above-average productivity. Across disciplines, diverse teams and environments are smarter, more productive, and better able to engage in complex analysis. According to two notable professors who study the impact of diversity, "[b]y disrupting conformity, racial and ethnic diversity prompts people to scrutinize facts, think more deeply and develop their own opinions," and "benefits everyone, minorities and majority alike."[1]

Affirmative action has been the engine driving diversity in the nation's higher education system. Between 1976 and 2008, the policy helped to more than double the enrollment share of Hispanic[2] and Asian and Pacific Islander students in higher education. Over that same period, the Black enrollment share increased by 39 percent and the Indigenous share by 46 percent. Despite this remarkable success, students of color remain vastly underrepresented at selective colleges; for example, Black student enrollment disparity exists at 45 of the 50 flagship state universities.[3]

1 Sheen S. Levine and David Stark, "Diversity Makes You Brighter," The New York Times (Dec. 9, 2015).
2 The cited study measured the progress of "Hispanic" students — which generally include students with heritage from Spanish-speaking countries. Take Back the Court Foundation and Equal Justice Society use "Latinx" in our own studies and publications, which encompasses people with Latin American heritage.
3 Mark Huelsman, "Social Exclusion: The State of State U for Black Students," Demos (December 2018), 6.

White women are the greatest beneficiaries of affirmative action.[4] In the first 42 years of affirmative action policies, college enrollment for women more than doubled, and the percentage of white women with college degrees surged to more than 40 percent from less than 15 percent.[5] By 1995, 6 million women — the vast majority of whom were white — were in jobs they would not have held but for the policy.[6]

Inequalities in K-12 education create the conditions for entrenched racial disparities in higher education. From the moment children set foot in kindergarten, students in majority-white districts receive more resources than students in non-white districts — inequities that compound over time. Majority-white school districts receive $23 billion more in funding than majority-nonwhite school districts, resulting in lower student performance and lower teacher retention in the latter. Post-secondary schools' use of facially-neutral admissions practices further privilege the nation's wealthiest and whitest students: public universities focus their recruitment at wealthier, whiter high schools,[7] and elite schools give preference to wealthy and white legacy applicants.[8] Race-conscious admissions policies like affirmative action disrupt this unfairness, counteracting the burdens of past racial discrimination and ongoing systemic inequality.

The Conservative Majority on the Supreme Court Willfully Ignores the Data and is Eager to Strike Down the Core of Affirmative Action

We are not a post-racial society, and our social structures and legal institutions still perpetuate discrimination, white supremacy, anti-Black implicit and explicit bias, and systemic inequality. The racial wealth gap between white and Black households is astounding, with white households holding nearly 10 times the wealth of Black households. Employment discrimination compounds

4 Victoria M. Massie, "White women benefit most from affirmative action — and are among its fiercest opponents," Vox (June 23, 2016).
5 Connor Maxwell and Sara Garcia, "5 Reasons to Support Affirmative Action in College Admissions," Center for American Progress (Oct. 1, 2019).
6 Massie, "White women benefit from affirmative action," Vox (2016).
7 Michelle Lou and Saeed Ahmed, "Public universities focus their recruitment on wealthy and white students, a study finds," CNN (March 27, 2019).
8 Daniel A. Gross, "How elite US schools give preference to wealthy and white 'legacy' applicants," The Guardian (Jan. 23, 2019).

this wealth gap. White high school dropouts are as likely to land jobs as Black college students seeking employment.[9] Latinx women are paid 57 cents on the dollar compared to equally qualified white men,[10] while Black women are paid 63 cents on the dollar.[11] Black women are the most likely to experience gender and sexual harassment in the workplace.[12] These statistics and the lived experiences of people of color show that white supremacy — in particular, anti-Black bias — is an unrelenting impediment to achievement that must be disrupted with active anti-discrimination policies like affirmative action.

Recognizing the fallacy of a post-racial colorblind jurisprudence, Justice Harry Blackmun observed that "[i]n order to get beyond racism, we must first take account of race. There is no other way. And **in order to treat some persons equally, we must treat them differently.**"[13] This sentiment is buttressed by market economists' conclusion that **without interventions such as race-conscious policies to combat institutional racism, it will take more than 200 years to close the racial wealth gap.**[14]

Racial justice advocates have submitted dozens of briefs to the Supreme Court in the *Students for Fair Admissions v. Harvard/UNC* cases, which will both be heard on October 31. These briefs, filed by progressive lawyers, students of color, national racial justice organizations, social science and data experts, and others document the necessity of race-conscious college admissions policies and fight back against the regressive arguments on race espoused by the plaintiffs whose mission is to eliminate such policies. The data is clear: according to a brief submitted by NAACP Legal Defense Fund, an adverse outcome in this case would slash the number of Black, Latinx, Indigenous, Hawaiian, and Pacific Islander students at institutions of higher education. Black students would make up just 6% of Harvard's admitted class — less than half of the current 14% — and the enrollment of Latinx, Indigenous, Hawaiian, and Pacific Islander students would drop from 14% to 9%.[15]

The racial wealth gap is astounding, with white households holding nearly 10x the wealth of Black households.

9 Susan Adams, "White High School Drop-Outs Are As Likely To Land Jobs As Black College Student," Forbes (June 27, 2014).
10 "The Longest Time to Equal Pay: Latinas and the Wage Gap," Institute for Women's Policy Research (October 2021).
11 "Shortchanged and Underpaid: Black Women and the Pay Gap," Institute for Women's Policy Research (July 2021).
12 Maya Oppenheim, "Black women more likely to experience sexual harrassment in the workplace, study finds," The Independent (July 9, 2019).
13 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J. dissenting).
14 Christian E. Weller, Danyelle Solomon, and Connor Maxwell, "Simulating How Progressive Proposals Affect the Racial Wealth Gap," Center for American Progress (Aug. 7, 2019).
15 Brief for 25 Harvard Student and Alumni Organizations as Amici Curiae Supporting Respondent, *Students for Fair Admissions v. Harvard*, No. 20-1199.

Despite the ongoing need to combat racial discrimination through race-conscious admissions policies, the Supreme Court's conservative justices herald their desire to gut affirmative action. Chief Justice Roberts authored a 2007 landmark anti-affirmative action opinion for the Court, and has openly stated that admissions practices that consider race "may do more harm than good."[16] Roberts has dismantled such approaches, stating that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Meanwhile, Justice Thomas casts himself as a victim of affirmative action, claiming that "racial preference had robbed my [Yale Law Degree] of its true value." In a searing dissent in the 2003 landmark affirmative action case *Grutter v. Bollinger*, Thomas said, "When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement." Justice Alito equates any attempt to ameliorate conditions for Black Americans with "systematic racial discrimination" *against white Americans*, and wrote in a 2016 dissent that the majority was "simply wrong" for signing off on "affirmative action gone wild."

The Court last weighed in on affirmative action six years ago in *Fisher v. Texas*. In that case, two white women who were rejected from the University of Texas sued, claiming that race-conscious admissions practices unfairly discriminated against white applicants. The Court upheld the University of Texas's race-conscious admissions policy in a 4-3 decision, with now-former Justice Kennedy providing the swing vote.[17] Justices Roberts, Thomas, and Alito were in the minority in that case and vehemently opposed the policy. Now, Roberts, Thomas, and Alito are joined on the Supreme Court by three Trump-appointed justices who hold regressive positions on race — Justices Gorsuch, Kavanaugh, and Barrett.

Justice Gorsuch has dissented from a decision blocking the execution of a man sentenced to death by a jury tainted by egregious racism, with one juror referring to the defendant by the n-word and questioning whether "black people even have souls." To Gorsuch, a jury tainted by blatant racism was impartial enough to sentence a Black man to death. Before becoming a judge, Justice Kavanaugh worked with anti-affirmative action groups on an amicus brief in *Rice v. Cayetano* and publicly railed against affirmative action in the media. Justice Barrett opposes voting rights and employment nondiscrimination and does not believe that a white supervisor's use of the n-word creates a hostile work environment.

16 See attached appendix, "Meet the Justices Who May Eliminate Affirmative Action," for detailed quotations and citations. For further detail on the justices' positions on racial progress, see "The Supreme Court Threatens Racial Justice and Racial Progress," Equal Justice Society and Take Back the Court (February 2021).

17 In June 2016, the Supreme Court consisted of 8 members. Justice Kagan recused herself from the decision.

Majority-white school districts receive

$23 billion

more in funding than majority-nonwhite school districts, resulting in lower student performance and lower teacher retention.

Enter, *Students for Fair Admissions v. Harvard / University of North Carolina*

With a 6-3 right-wing supermajority, the Court is poised to strike at the core of race-conscious policies that have promoted education access and diversity, threatening to undo decades of progress. Specifically, the Court will hear two suits — *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*[18] — brought by the same anti-affirmative action group in 2014. Students for Fair Admissions claims that Harvard (a private university) and University of North Carolina (a public university) impermissibly used race to discriminate against Asian Americans in their admissions processes. The Court will hear oral arguments on October 31, 2022.

On September 9, the Court issued an order granting amici racial justice advocates the rare opportunity to participate in oral argument in both cases. Amici organizations Lawyers' Committee for Civil Rights, North Carolina Justice Center, and Relman Colfax PLLC will argue on behalf of students to explain the impact this issue has on students and universities.

These Cases Are The Latest Ploy to Dismantle Education Equity

In 2020, citing Supreme Court precedent in *Grutter* and *Fisher,* the First Circuit Court of Appeals upheld Harvard's admissions policies, finding that diversity is a compelling interest, that Harvard's metrics were nondiscriminatory and narrowly tailored to achieve diversity, and that race-neutral admissions alternatives would not achieve the same results in terms of diversity.[19] A federal district judge likewise upheld the University of North Carolina (UNC)'s consideration of race in its admissions process.[20] Students for Fair Admissions appealed both cases to the Supreme Court, which will issue its decisions in 2023.

The suits challenge race-conscious admissions policies under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the 14th Amendment. Choosing to take these

18 The two cases were previously consolidated, but the Court issued an order on July 22, 2022, stating that it would consider the two cases separately. Justice Ketanji Brown Jackson has recused herself from the *Harvard* case as a former member of the board of overseers, but will participate in the consideration of the *UNC* case.

19 *Students for Fair Admissions v. President and Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020).

20 *Students for Fair Admissions v. Univ. of N.C.*, 1:14CV954 (2021). There is no Fourth Circuit opinion in this case because Students for Fair Admissions sought direct review of the district court decision by the Supreme Court, and the Court granted what is known as "cert before judgment." For more about the rise of certiorari before judgment, see Steve Vladeck, "The rise of certiorari before judgment," SCOTUSblog (Jan. 25, 2022).

cases gives the Court's ultra-conservative supermajority a platform to eliminate affirmative action in education and beyond. The Court's ruling could set broad principles that affect not only college admissions, but race-conscious policies in selective K-12 schools, school zoning decisions, and transfer applications.

The background and history of these cases show they are the latest installment in a decades-long, insidious campaign by conservatives to eliminate policies that promote diversity. Students for Fair Admissions is an entity founded by conservative political legal strategist Edward Blum, whose work subverts civil rights principles, wielding them to attack education and voting rights alike.[21] Blum previously worked as legal director for Ward Connerly, who raked in millions of dollars as the face of the 1990s anti-affirmative action movement, before founding his own deeply conservative organizations focused on dismantling structural protections for minorities. Blum's organizations played a heavy role in bringing both *Shelby County v. Holder*, which slashed the Voting Rights Act, and *Fisher v. Texas*, discussed above. His organizations continue to offer free legal representation to any individual or group willing to file lawsuits aimed at dismantling affirmative action, and are funded through Donor's Trust, which is in turn funded by major wealthy donors such as the Koch brothers and the DeVos family.[22] **The conservative mission in these suits is clear:** in Blum's own words, he filed the Harvard and UNC cases in the "hope that the justices will **end the use of race as an admissions factor at Harvard, UNC and all colleges and universities**."[23] And unsurprisingly, statistical projections show that white students will be the primary beneficiaries if he succeeds in dismantling affirmative action. Meanwhile, other groups in the anti-affirmative action conservative coalition are challenging K-12 race-conscious admissions practices in federal court.[24]

Conservative Justices Deploy Racist Colorblind Narratives to Gut Reforms

Justice Harlan first characterized the Constitution as "colorblind" in the context of defending racial integration and to defeat segregationist laws in his dissent in *Plessy v. Ferguson*.[25] The term appeared again in Thurgood Marshall's Supreme Court argument in *Brown v. Board of Education*.[26] But as the tides turned with the passage of the landmark civil rights laws of the 1960s, conservative judges began to flip the colorblindness argument on its head. **White litigants argued that racially progressive policies meant to remedy the ongoing effects of centuries of slavery, violence, and segregation**

21 David G. Savage, "Conservative legal strategist has no office or staff, just a surprising Supreme Court track record," Los Angeles Times (Dec. 22, 2015).
22 Donna J. Nicol, "Activism for profit: America's 'anti-affirmative action' industry," Al Jazeera (Feb. 28, 2021).
23 Biana Quilantan, "Supreme Court will take up Harvard, UNC affirmative action challenge," Politico (Jan. 24, 2022).
24 Pacific Legal Foundation, a conservative anti-affirmative action group, has brought a case against the holistic admissions practices of a public magnet highschool in Fairfax County, VA — which admitted its most diverse class after enacting the holistic admissions process and dropping its application fee in 2020. In tandem with *Students for Fair Admissions v. Harvard/UNC*, these cases demonstrate that diversity in K-12 admissions is under attack by the conservative anti-affirmative action coalition.
25 *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting).
26 *Brown v. Board of Education*, 347 U.S. 483 (1954).

toward Black people instead represented unconstitutional discrimination *against white people*.[27] Conservative judges, including the conservative justices on the Supreme Court, adopted that argument and still deploy it today.

Racial conservatives on the Supreme Court have used colorblindness to shroud the evisceration of racial justice and progress under the veil of race neutrality.

Racial conservatives on the Supreme Court have used colorblindness to shroud the evisceration of racial justice and progress under the veil of race neutrality. Leveraging the race-neutral ideology, the Court's conservatives have been able to curtail and even destroy policies designed to level the playing field. The adherence to colorblindness runs deep in conservative legal circles, and rests on the belief that governmental choices that consider race — even choices that protect racial minorities from continuing discrimination — violate the Constitution.[28] **Conservative opponents of affirmative action posit that any attempt to offset racism discriminates against the beneficiaries of racism by removing the benefits that racism confers upon them.** This Orwellian philosophy is devastating for racial justice and threatens everything from voting rights to affirmative action, co-opting the language of fairness to perpetuate racism.

The Affirmative Action Takedown Is Part of a Broader Conservative Retrenchment Movement

The COVID-19 pandemic and the murder of George Floyd exposed structures of racial inequality and ushered in a moment of inflection — dubbed the racial reckoning — that progressives leveraged to secure broader support for racial inclusion and equity. The Court's

27 Theodore R. Johnson, "How Conservatives Turned the 'Color-Blind Constitution' Against Racial Progress," Atlantic (Nov. 9, 2019).
28 David Gans, "Roberts at 10: Turning Back the Clock on Protections for Racial Equality," Const. Accountability Ctr.

current gambit to eliminate affirmative action must be viewed within the context of the broader conservative retrenchment movement to roll back any and all of the reckoning's equity wins. This retrenchment includes politicians' attacks on norms of inclusivity such as voting rights; attacks on Critical Race Theory and honest, accurate education that enables our children to learn from the mistakes of our past to help create a better future; nationwide recalls on diversity, equity, and inclusion education; a lack of investment in community-reinvestment-restorative justice; attacks on the Black Lives Matter movement; and hostility towards reimagining public safety and progressive district attorneys.

Immediate Court Expansion Will Protect Affirmative Action and Diversity in Schools

Our country needs a Supreme Court that advances equity, not one that dismantles the structures designed and proven to level the playing field. All six justices who make up the Court's conservative supermajority oppose affirmative action and deploy a specious colorblindness jurisprudence that ignores the lived experiences of people of color and repackages as race-neutrality the decimation of legal protections for minorities. **All policies in schools that consider race as a means of redressing the harms of segregation and inequality are in jeopardy.** The Court's conservative supermajority threatens to undo decades of hard-won educational progress. We must secure diversity in our nation's schools and fight for educational equity. We must expand the Court today.

Learn more about the Judiciary Act, which would expand the Supreme Court, at takebackthecourtfoundation.org.

Meet the Justices Who May Eliminate Affirmative Action

Chief Justice Roberts is perhaps the Court's chief proponent of post-racialism and race neutrality. In his landmark anti-affirmative action opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Roberts wrote that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[29] denying the social hegemony of white supremacy and privilege. Roberts has also said admissions practices that consider race "may do more harm than good" and can reinforce doubts among minority students that they belong at an institution.[30] His position is based on a highly distorted view of affirmative action that disregards the lived experience of people of color. Roberts denies the existence of racial discrimination in the electoral and voting realm as well. In *Shelby County,* he wrote an opinion gutting the Voting Rights Act based on the premise that racial discrimination is no longer a significant factor in access to the ballot — a decision that sparked a wave of new laws aimed at making it harder for Black people to vote. Roberts dismantled Section 4(b) of the Act, which provided a formula to determine which jurisdictions — often those with histories of racist voting laws in the former Jim Crow South — needed to meet preclearance requirements before changing voting laws or practices. Under the pretense of correcting "disparate treatment of the States," Roberts wrote an opinion that enabled voter suppression and denied millions of mostly Black and Latinx voters access to the ballot box.[31]

Justice Thomas is one of two Black justices on the Court[32] but holds a deeply conservative view of race. Thomas casts himself as a victim of affirmative action, claiming in his autobiography that "racial preference had robbed my [Yale Law Degree] of its true value."[33] (When his autobiography was published in 2007, Thomas was 16 years into his service on the Supreme Court.) In a searing dissent in the 2003 landmark affirmative action case *Grutter v. Bollinger,*

29 *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.* No. 1, 551 U.S. 701, 748 (2007).
30 *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN),* 572 U.S. 291, 315 (2014).
31 *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 536 (2013) (holding unconstitutional Section 4(b) of the Voting Rights Act, which created a formula to determine which jurisdictions had a federal preclearance requirement for any changes to voting laws or practices).
32 Judge Ketanji Brown Jackson was sworn into office on June 30, 2022 as the 116th Associate Justice.
33 John Cristoffersen, "Justice Says Law Degree 'Worth 15 Cents,'" Washington Post (Oct. 21, 2007).

Thomas wrote, "When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement."[34] Moreover, according to Thomas, affirmative action harms Black students because "racial (and other sorts) of heterogeneity actually impairs learning among black students" instead of providing educational benefits.[35] Incredibly, he also directly compared affirmative action to slavery and segregation in his concurrence in the 2013 affirmative action case *Fisher I*. By using race-conscious admissions practices, he said that the University of Texas was following in the "inauspicious footsteps" of "[s]laveholders [who] argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life" and segregationists who "asserted that segregation was not only benign, but good for black students."[36] To Thomas, affirmative action "demeans us all."[37] Ginni Thomas, Justice Thomas's wife, is an advisory board member of the National Association of Scholars,[38] a conservative group that has filed amicus briefs[39] and enthusiastically supported Students for Fair Admissions in their suits against Harvard and University of North Carolina.

Justice Alito characterizes any attempt to ameliorate conditions for Black Americans as discrimination *against white Americans.* In the 2016 case *Fisher v. University of Texas (Fisher II)*, Alito claimed in his dissent that the majority was "simply wrong" for signing off on "affirmative action gone wild."[40] He also characterized the University of Texas's use of race in admissions decisions as "systematic racial discrimination" against white students.[41] Alito asserted that the University of Texas "relies on a series of unsupported and noxious racial assumptions," adding that upholding this supposed "discrimination"— against white students — was "remarkably wrong."[42] Alito was among the conservative justices who decided *Ricci v. DeStefano*,[43] a 5-4 conservative decision holding that the City of New Haven engaged in racial discrimination against white people[44] when it altered its policies to ensure that Black firemen were considered for promotions. In his concurrence, Alito wrote that the city's stated concerns about disparate impact and accompanying liability could be seen by a jury as a "pretext" covering "a simple desire to please a politically important racial constituency"[45] and that Black firemen "exacerbated racial tensions" at a town meeting by calling out white supremacy.[46]

34 *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part).
35 *Id.* at 364.
36 *Fisher v. Univ. of Texas at Austin (Fisher I),* 570 U.S. 297, 328-330 (2013) (Thomas, J. concurring)
37 *Fisher v. Univ. of Texas at Austin (Fisher II),* 579 U.S. 365, 389 (2016) (Thomas, J. dissenting).
38 "Current Board of Advisors," National Association of Scholars," (Accessed August 31, 2022).
39 Brief for National Association of Scholars as Amicus Curiae in Support of Petitioner, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199.
40 *Fisher II,* 579 U.S. at 393 and 418 (Alito, J. dissenting). *See also* Mark Walsh, "A 'View' from the Courtroom: Alito Dissents on Affirmative Action, a Deadlock on Immigration, and More," Scotusblog, (June 23, 2016).
41 *Fisher II*, 579 U.S. at 437 (Alito, J. dissenting).
42 *Id.*
43 *Ricci v. DeStefano,* 557 U.S. 557 (2009).
44 The Court found that the city violated Title VII of the Civil Rights Act of 1964 in regard to 19 white plaintiffs and one Hispanic plaintiff.
45 *Ricci*, 557 U.S. at 597.
46 *Id.* at 602.

Justice Gorsuch's record on civil rights and criminal cases strongly indicates that he will be hostile toward affirmative action policies. He consistently denies relief in death penalty cases, which disproportionately affect Black defendants. In one particularly horrific instance, Gorsuch joined Thomas and Alito in dissenting from the Court's decision to block the execution of a man sentenced to death by a jury tainted by egregious racism.[47] To Gorsuch, a juror referring to the defendant as the n-word or questioning whether "black people even have souls" did not violate the defendant's Sixth and Fourteenth Amendment rights to an impartial jury and equal protection.[48] If Gorsuch, Thomas, and Alito had their way, a victim of egregious white supremacy and anti-Black bias would have been put to death. Gorsuch's civil rights record on the Tenth Circuit includes an expressed desire to resurrect "nondelegation" — which would undermine agency enforcement of civil rights laws and disproportionately harm people of color, who suffer the most from denigration of public health and safety.[49] Gorsuch's judicial philosophy will continue to contribute immeasurable harm to racial justice progress.

Before becoming a judge, **Justice Kavanaugh** worked with anti-affirmative action groups on an amicus brief in *Rice v. Cayetano*[50] and railed against affirmative action in the media.[51] He publicly espoused beliefs in "legal colorblindness" that are deeply harmful to people of color.[52] In employment discrimination cases, Kavanaugh accepted employers' pretextual justifications for employment decisions despite evidence of discrimination, and expressed hostility toward the disparate impact theory of discrimination, a critical tool for civil rights plaintiffs.[53]

Justice Barrett opposes voting rights and employment nondiscrimination and does not believe that a white supervisor's use of the n-word creates a hostile work environment.[54] In her short tenure on the Seventh Circuit, Justice Barrett demonstrated hostility toward employment discrimination claims, including *EEOC v. AutoZone*. Her vote in that case reflects a belief that an employer's segregation of employees on the basis of race was permissible as long as the segregation did not result in unequal pay, benefits or job responsibilities.[55] This embrace of long discredited and repudiated

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47 *See Tharpe v. Sellers*, 583 U.S. ___ (2018); *Tharpe v. Sellers*, 582 U.S. ___ (2017). *See also* Mark Joseph Stern, "Like President, Like Justice," Slate, (Sept. 27, 2017)

48 *Id.*

49 *See* "The Civil Rights Record of Judge Neil M. Gorsuch," NAACP Legal Defense Education Fund.

50 "Brief of Amici Curiae, Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in Support of Petitioner," *Rice v. Cayetano*, 528 U.S. 495, 528 (2000).

51 See "The Civil Rights Record of Judge Brett Kavanaugh," NAACP Legal Defense Fund; *see also* "Are Hawaiians Indians? The Justice Department Thinks So," Wall Street Journal, Sept. 27, 1999.

52 "Report on the Record of Judge Brett Kavanaugh," Demos.

53 "The Civil Rights Record of Judge Brett Kavanaugh." *See e.g., Jackson v. Gonzales*, 496 F.3d 703 (D.C. Cir. 2007) (employment discrimination.) *See also Greater New Orleans Fair Housing Action Center v. U.S. Dept. of Housing and Development (HUD) (2011)*, 639 F.3d 1078 (D.C. Cir. 2011) (disparate impact).

54 *Smith v. Illinois Department of Transportation,* 936 F.3d 554 (7th Cir. 2019).

55 *EEOC v. AutoZone,* 875 F.3d 860, 861 (7th Cir. 2017) (per curiam decision).

separate-but-equal doctrine views suggests a willingness to dismantle tools like affirmative action that work to better integrate schools and workplaces. In her legal scholarship prior to becoming a judge, Barrett referred to the Fourteenth Amendment — the cornerstone of equal protection — as "possibly illegitimate."[56]

56 Amy Coney Barrett and John Copeland Nagle, "Congressional Originalism," 19 University of Pennsylvania Journal of Constitutional Law 1.

Compendium of Amicus Briefs Filed in Support of Affirmative Action

As of August 29, 2022

- Brief Of Professors Of Economics As Amici Curiae In Support Of Respondent
- Brief Of Empirical Scholars As Amici Curiae In Support Of Respondents
- Brief For Admissions And Testing Professionals As Amici Curiae Supporting Respondents
- Brief Of Amici Curiae Youth Advocates And Experts On Educational Access In Support Of Respondents
- Brief Of American Council On Education And 38 Other Higher Education Associations As Amici Curiae In Support Of Respondents
- Brief Of The National Education Association And Service Employees International Union As Amici Curiae In Support Of Respondents
- Brief Of Faith Organizations As Amici Curiae In Support Of Respondents
- Brief Of Amici Curiae Individual Scientists In Support Of Respondents
- Brief Of Black Women Law Scholars As Amici Curiae In Support Of Respondents
- Brief Of Adm. Charles S. Abbot, Adm. Dennis C. Blair, Gen. Charles F. Bolden, Jr., Gen. Thomas P. Bostick, Gen. Vincent K. Brooks, Adm. Walter E. Carter, Jr., Et Al., As Amici Curiae In Support Of Respondents
- Brief Of Massachusetts, California, Colorado, Connecticut, Delaware, The District Of Columbia, Hawai'i, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Washington, And The Attorney General Of Wisconsin As Amici Curiae In Support Of Respondents
- Brief Of Professors Of History And Law As Amici Curiae In Support Of Respondents
- Brief for Amici Curiae Applied Materials, Inc., Corteva Agriscience, Cummins Inc., DuPont de Nemours, Inc., Gilead Sciences, Inc., LinkedIn Corp., Mastercard Inc., Micron Technology, Inc., Microsoft Corp., Shell USA, Inc. & Verizon Services Corp. in Support of Respondents
- Brief Of Amici Curiae Brown University, California Institute Of Technology, Carnegie Mellon University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, Johns Hopkins University, Princeton University, University Of Chicago, University Of Pennsylvania, Vanderbilt University, Washington University In St. Louis, And Yale University In Support Of Respondents
- Brief For Legal Scholars Defending Race-Conscious Admissions As Amici Curiae In Support Of Respondents
- Brief For The University Of Michigan As Amicus Curiae In Support Of Respondents
- Brief Of Amici Curiae Deans Of U.S. Law Schools On Behalf Of Respondents

- Brief Of Amici Curiae The American Civil Liberties Union, American Civil Liberties Union Of Massachusetts, And American Civil Liberties Union Of North Carolina Legal Foundation In Support Of Respondents
- Brief Of The National Association Of Basketball Coaches, Women's Basketball Coaches Association, Geno Auriemma, Michael Krzyzewski, Nolan Richardson, Bill Self, Tara Vanderveer, Roy Williams, And 342 Additional Current Or Former College Head Basketball Coaches As Amici Curiae In Support Of Respondents
- Brief Of Southern Governors As Amici Curiae In Support Of Respondents
- Brief Of Robert C. "Bobby" Scott, Member Of Congress; And 64 Other Members Of Congress, As Amici Curiae Supporting Respondents
- Brief For Major American Business Enterprises As Amici Curiae Supporting Respondents
- Brief Of The Washington Bar Association And The Women's Bar Association Of The District Of Columbia As Amici Curiae In Support Of Respondents
- Brief Of American Federation Of Teachers As Amicus Curiae In Support Of Respondents
- Brief Of Amherst, Barnard, Bates, Bowdoin, Bryn Mawr, Carleton, Colby, Connecticut, Davidson, Franklin & Marshall, Hamilton, Hampshire, Haverford, Macalester, Middlebury, Mount Holyoke, Oberlin, Pomona, Reed, Sarah Lawrence, Smith, St. Olaf, Swarthmore, Trinity, Union, Vassar, Wellesley, And Williams Colleges, And Bucknell, Clark, Tufts, Washington & Lee, And Wesleyan Universities, Amici Curiae, Supporting Respondents
- Brief Of The Law Firm Antiracism Alliance As Amicus Curiae In Support Of Respondents
- Brief Of Amici Curiae Asian American Legal Defense And Education Fund Et Al. In Support Of Respondents
- Brief In Support Of Respondents Of Amici Curiae Multicultural Media, Telecom And Internet Council, Inc., National Association Of Black Owned Broadcasters, National Hispanic Foundation For The Arts, Emma Bowen Foundation For Minority Interests In Media, And National Newspaper Publishers Association
- Brief For The President And Chancellors Of The University Of California As Amici Curiae Supporting Respondents
- Brief For Students And Alumni Of Harvard College As Amici Curiae In Support Of Respondent
- Brief Of Amici Curiae United States Senators And Former Senators Supporting Respondents
- Brief Of Amici Curiae College Board, National Association For College Admission Counseling, American Association Of Collegiate Registrars And Admissions Officers, And Act, Inc. In Support Of Respondents
- Brief For The United States As Amicus Curiae Supporting Respondent
- Brief Of Constitutional Accountability Center As Amicus Curiae In Support Of Respondents

- Brief Of Georgetown University, Boston College, The Catholic University Of America, College Of The Holy Cross, Depaul University, Fordham University, Marquette University, University Of Notre Dame, Villanova University And 48 Additional Catholic Colleges And Universities As Amici Curiae In Support Of Respondents
- Brief Of Amici Curiae Deborah Cohen And 67 Other Professors In Support Of Respondents
- Brief Of Amici Curiae American G.I. Forum, Et Al. Supporting Respondents
- Brief Of The National Academy Of Education As Amicus Curiae In Support Of Respondents
- Brief For Massachusetts Institute Of Technology, Stanford University, International Business Machines Corp., And Aeris Communications, Inc. As Amici Curiae In Support Of Respondents
- Brief For Amici Curiae Hbcu Leaders And National Association For Equal Opportunity In Higher Education In Support Of Respondents
- Brief For Amici Curiae American Association For Access, Equity And Diversity And Fund For Leadership, Equity, Access And Diversity In Support Of Respondents
- Brief Of Asian Americans Advancing Justice And 37 Organizations As Amici Curiae In Support Of Respondents
- Brief Of Amici Curiae National Women's Law Center And 37 Additional Organizations Committed To Race And Gender Equality In Support Of Respondents
- Brief Of Amici Curiae National Black Law Students Association In Support Of Respondents
- Brief For Admissions And Testing Professionals As Amici Curiae Supporting Respondents
- Brief Of The American Educational Research Association, Et Al. As Amici Curiae In Support Of Respondents
- Brief Of National School Boards Association, National Association Of Elementary School Principals, American Association Of School Administrators, And American School Counselors Association As Amici Curiae In Support Of Respondents
- Brief For Amici Curiae American Psychological Association, Massachusetts Psychological Association, And North Carolina Psychological Association In Support Of Respondents
- Brief Amicus Curiae Of Anti-Defamation League In Supportof Respondent
- Brief For The American Bar Association As Amicus Curiae In Support Of Respondents
- Brief Of Amici Curiae National Asian Pacific American Bar Association And National Lgbtq+ Bar Association In Support Of Respondents
- Brief Of Professor F. Andrew Hessick As Amicus Curiae In Support Of Respondents
- Brief For The Council Of The Great City Schools As Amicus Curiae In Support Of Respondent
- Brief For Amicus Curiae HR Policy Association In Support Of Respondents
- Brief For 25 Diverse, California-Focused Bar Associations, Lawyers Associations, Civil Rights Organizations, And Community Foundations As Amici Curiae In Support Of Respondents

- Brief Of 1,241 Social Scientists And Scholars On College Access, Asian American Studies, And Race As Amici Curiae In Support Of Respondent
- Brief For Amici Curiae Association Of American Medical Colleges Et Al. In Support Of Respondents
- Brief Of Amici Curiae Human Rights Advocates, Et Al., In Support Of Respondents
- Brief Of Amici Curiae 25 Harvard Student And Alumni Organizations In Support Of Respondent President And Fellows Of Harvard College
- Brief Of Amicus Curiae David Boyle In Support Of Respondents