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MEMORANDUM

TO: UNIVERSITY AND COLLEGE COLLEAGUES

FROM: OHIO ATTORNEY GENERAL DAVE YOST

DATE: JUNE 30, 2023

SUBJECT: SUPREME COURT'S RECENT OPINION IN *STUDENTS FOR FAIR ADMISSION V. HARVARD*

I am writing to address the Supreme Court's recent opinion in *Students for Fair Admission v. Harvard*. More precisely, I am writing to stress the need to comply strictly with the decision's holding—and to warn the higher education community about the dangers that institutions of higher education and institutional employees face by failing to do so.

In *Harvard*, the Supreme Court held that race-conscious admissions violate the Equal Protection Clause. Race-conscious admissions must satisfy strict scrutiny. Because such policies do not advance any compelling government interest—and because such policies are not "necessary" to furthering whatever interests a school might point to—race-conscious admissions policies cannot be justified under a strict-scrutiny framework. They are, in other words, unconstitutional.

In light of *Harvard*, institutions of higher education and institutional employees must immediately cease considering race when making admissions decisions. To consider race would violate the Equal Protection Clause. And it would also violate Title VI, which provides that no "person in the United States shall, on the ground of race … be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Race-conscious admissions policies violate this statute, which applies to all institutions that take federal funding. After all, such policies constitute discrimination on the ground of race. Regardless, as the Supreme Court explained in *Gratz v. Bollinger*, "discrimination that violates the Equal Protection Clause … committed by an institution that accepts federal funds also constitutes a violation of Title VI." Since race-conscious admissions policies violate the Equal Protection Clause, they violated Title VI, also.

I conclude with two points of emphasis.

First, institutions of higher education may not evade *Harvard* with subterfuge. The majority opinion expressly holds that *disguised* race-conscious admissions policies are race-conscious admissions policies all the same—disguised and naked race-based admissions violate the Equal Protection Clause equally." This means, to take but one example, that "universities may not simply establish through application essays or other means" a race-conscious admissions policy of the sort *Harvard* struck down.

Second, employees of institutions of higher education will face personal risk should they consider race during the admissions process. Federal law empowers plaintiffs to sue state actors who violate their constitutional rights. And plaintiffs may bring these suits against state employees in the employees' personal capacities—that is, plaintiffs may seek damages from the employees rather than from the institution for which the employees work. In *Pearson v. Callahan*, the Supreme Court explained that "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." But in light of *Harvard*, any use of race in the admissions process *will* violate the applicants' clearly established constitutional rights. This means employees who use race when making admissions decisions may not be entitled to qualified immunity, any attempt to invoke that doctrine would likely be frivolous, and my office may be unable to raise any qualified-immunity defense on your employees' behalf. If the employee is ultimately found liable, he or she may be personally liable for any damages.