CONTINUITY OVER CONFORMITY: THE CASE FOR HARVARD'S RIGHT TO CONSIDER LEGACY STATUS IN ADMISSIONS

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ABSTRACT

Harvard University's legacy admissions practices should withstand civil rights challenges because they are protected by the First Amendment's freedom of association, do not violate Title VI of the Civil Rights Act when adequately interpreted, and provide unique educational benefits. The disparate impact theory the Office for Civil Rights proffered does not overcome Harvard's expressive rights to shape its student community. Even if this theory is applied, Harvard can demonstrate that legacy preferences are legitimate and integral to its mission. Legacy admissions ensure academic continuity and strengthen alumni bonds, furthering Harvard's educational objectives.

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1. INTRODUCTION

Americans who see the American Dream as achievable through hard work and tenacity may understandably bristle when elite universities use factors other than academic merit in their undergraduate admissions. Americans nevertheless tend to condone athletics admissions preferences, which are based on nonacademic factors but at least are a proxy for the virtue of hard work.[1] Admissions preferences for the children of faculty may seem acceptable as employment perks. Most college students, however, oppose legacy admissions preferences.[2]

In July 2023, the Chica Project, the African Community Economic Development of New England, and the Greater Boston Latino Network filed a joint complaint with the U.S. Department of Education's Office for Civil Rights (OCR), alleging that legacy and donor preferences violate Title VI of the Civil Rights Act of 1964 because of their "disparate impact" on race.[3] OCR has since opened a civil rights investigation into Harvard University's use of these preferences in undergraduate admissions.[4] As of this Article's publication, the matter remains ongoing.

We contend that Harvard should prevail in the challenge against legacy admissions on two grounds: the freedom of association and the inapplicability of disparate-impact theory in this context. Even if OCR pursues a disparate-impact theory, Harvard has strong defenses. Our analysis does not address donor preferences and does not apply to public universities in states such as Colorado, Virginia, or Maryland, which have banned legacy preferences at public colleges. Although we focus on Harvard's legacy admissions case, our analysis has broader implications for universities nationwide.

Legacy preferences may offend meritocratic sensibilities and civil-rights sensibilities if they have a disparate impact on certain races. Chief

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1 William B. Morrison, *Country Club Sports: The Disparate Impact of Athlete Admissions at Elite Universities*, 46 BYU. L. REV. 883, 900–01 (2021) ("[A]thlete admissions at elite universities are earned through hard-fought mastery in a sport.").

2 *Cf.* Lexi Lonas Cochran, *Majority of College Students Do Not Support Legacy Admissions: Survey*, THE HILL (July 18, 2023, 3:42 PM), https://perma.cc/8Q9C-WPA4.

3 Chica Project v. Pres. & Fellows of Harv. Coll., U.S. Dep't of Educ., No. 01-23-2231 (July 3, 2023), https://perma.cc/LC65-ZR4F.

4 Letter from Ramzi Ajami, Reg'l Dir., U.S. Dep't of Educ. Off. for C.R., to Michael A. Kippins (July 24, 2023), https://perma.cc/JK9S-ARGH [hereinafter OCR Letter].

Justice Warren Burger proclaimed that "racial discrimination in education violates deeply and widely accepted views of elementary justice."[5] Justice Anthony Kennedy, moreover, averred, "One of the principal reasons [that] race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her merit and essential qualities."[6]

At first glance, legacy applicants do not seem to warrant a "tip" toward admission. Yet a closer look at them proves otherwise. Legacy admissions enrich the educational experience at universities and cultivate longstanding loyalties that benefit both students and universities in the long run. Additionally, legacy applicants are more likely to have enjoyed advantages that enable them to succeed in college.

2. The Civil Rights Act of 1964

Harvard is, of course, a private entity, not a state actor. Because it receives federal funding, however, it is subject to the same restrictions as in the Equal Protection Clause of the Fourteenth Amendment in matters concerning Title VI of the Civil Rights Act of 1964,[7] which binds almost all universities in the United States to nondiscrimination based on race:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[8]

OCR enforces this prohibition against institutions of higher education that participate in Federal Student Aid financial aid programs such as Pell Grants, federal student loan programs, and other programs and activities

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5 Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983).

6 Rice v. Cayetano, 528 U.S. 495, 517 (2000).

7 Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll., 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring) ("The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties. By contrast, Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not.").

8 Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964).

funded by the U.S. Department of Education.[9] This agency has promulgated regulations to guide its compliance and enforcement of civil rights laws, including Title VI.[10] Regulations specific to Title VI are published in the *Code of Federal Regulations* at 34 C.F.R. Part 100.[11] Some of these may no longer be valid following the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*).[12] There, the Supreme Court ruled that Harvard's race-conscious admissions practices violated the Fourteenth Amendment's Equal Protection Clause because the university's arguments failed to meet the strict scrutiny standard for several reasons: it did not quantifiably demonstrate compelling interests, avoid racial stereotyping, or present a clear timeline for ending race-based admissions.[13] The Court noted, however, that universities may consider an applicant's discussion of how race has influenced their experiences if it relates to the unique character qualities or capabilities they bring to the university.[14]

The Department of Education also uses a Case Processing Manual to guide its enforcement procedures.[15] The manual may not be legally binding on higher education institutions because it was promulgated without following the Administrative Procedure Act (APA) and because the agency revises it unilaterally without offering the public the opportunity for notice and comment, as the APA requires.[16]

Current regulations permit a complainant to be "[a]ny person who believes himself or any specific class of individuals to be subjected to

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9 *Education and Title VI*, U.S. DEP'T OF EDUC. (July 7, 2024), https://perma.cc/8JG6-3XVY.

10 *See* 34 C.F.R. § 100.1 (2024).

11 Notice of Investigative Guidance for Racial Incidents and Harassment Against Students at Educational Institutions, 65 Fed. Reg. No. 47 (Mar. 10, 1994).

12 *See* 143 S. Ct. at 2166 (holding that Harvard's raced-based admission did not survive strict scrutiny and thus violated the Equal Protection Clause of the Fourteenth Amendment). Courts may find that Title VI regulations conflicting with this holding—say, by treating race-based university admissions as legal—are invalid.

13 *Id.* at 2175.

14 *Id.* at 2176.

15 U.S. DEP'T OF EDUC. OFF. FOR C.R., CASE PROCESSING MANUAL 2 (2022).

16 *See id.*; Denise Marshall, *Civil Rights Groups Sue Department of Education Over Process of Dismissing Discrimination Claims*, COUNCIL OF PARENT ATT'YS & ADVOCS. (May 31, 2018), https://perma.cc/T6YY-VHBR.

discrimination prohibited by this part."[17] Although a complaint "must be filed not later than 180 days from the date of the alleged discrimination," OCR permits ongoing policies or practices to be challenged at any time.[18] Such wide latitude enabled the present civil rights complaint against Harvard University.

3. THE COMPLAINT

On July 3, 2023, the complainants formally challenged Harvard's use of donor and legacy preferences in undergraduate admissions, relying on a disparate-impact theory.[19] They argue that because admissions are zero-sum, any admissions policy with disparate impact by race violates Title VI by excluding applicants from one race in favor of applicants from another race.[20]

Harvard's admission process involves many steps.[21] It is unclear exactly how this process ensures that particularly desirable applicants, such as exceptional athletes, reach the pool of tentatively admitted applicants other than through the rating processes that Harvard applies to all and that prioritizes those exceptional athletes over other applicants.[22]

The pool of tentatively admitted athletes is usually, if not always, more significant than the number of spaces available for admission.[23] At this stage, Harvard gives applicants an additional "tip" in four categories, collectively known as "Athletes, Legacies, Donors, and Children," or ALDC.[24]

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17 34 C.F.R. § 100.7(b) (2023).

18 *Id.*

19 The complaint mentions "disparate impact" 12 times and bases its argument on the precedent set by *Guardians Ass'n v. Civ. Serv. Comm'n of N.Y.*, 463 U.S. 582, 591–93 (1983). *See* Chica Project, *supra* note 3. However, subsequent cases have significantly undermined that decision. *See, e.g.*, United States v. City of Yonkers, No. 80 Civ. 6761, 1995 WL 358746, at *4 (S.D.N.Y. June 14, 1995); Gratz v. Bollinger, 122 F. Supp. 2d 811, 835 (E.D. Mich. 2000); PAS Commc'ns, Inc. v. Sprint Corp., 139 F. Supp. 2d 1149, 1191–92 (D. Kan. 2001); Lovell v. Chandler, 303 F.3d 1039, 1057 (9th Cir. 2002); Rendelman v. Rouse, 569 F.3d 182, 188 (4th Cir. 2009); C.V. v. Dudek, 209 F. Supp. 3d 1279, 1286 (S.D. Fla. 2016); Del A. v. Edwards, 855 F.2d 1148, 1151 (5th Cir. 1988).

20 Chica Project, *supra* note 3, at 3.

21 *Id.* at 8.

22 *See id.* at 12.

23 *Id.* at 12–13.

24 *Id.* at 13 n.48.

ALDC applicants include athletes, legacies (generally, descendants of Harvard alumni), children (or perhaps other relations) of Harvard donors, and children of certain members of the Harvard community (e.g., members of the faculty).[25] The "tip" protects admission for applicants in these categories, while applicants who fall outside these categories are more likely to be "lopped" from the pool.[26]

The complainants argue that ALDC tips have a disparate impact by race:

> Several configurations of the admissions data show the magnitude of the disparate impact. For example, nearly 70% of all donor-related and legacy applicants are white, even though white applicants represent only 40% of applicants who receive no preferences.[27]
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> . . . .
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> [E]xperts found that "only one quarter of white ALDC admits would have been admitted had they been treated as white non-ALDC applicants."[28]

In other words, the complainants argue that ALDC admissions tips, particularly legacy and donor-related admissions tips, elevate some white applicants to admission spots that, but for the tips, would have gone to nonwhite students.[29]

The complainants challenge only the legacy and donor-related admissions tips,[30] which are likely a strategic choice. Legacy admission preferences are widely disliked in American culture.[31] Donor admission preferences do not seem to involve the personal merit of the applicant.[32] Challenging

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25 *Id.*

26 *Id.* at 13–15, 23.

27 *Id.* at 20.

28 *Id.* at 29.

29 *Id.* at 2–3, 16–17.

30 *Id.* at 13.

31 Cochran, *supra* note 2.

32 *See generally* DANIEL GOLDEN, THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES (2019); Gabrielle Wilson, *The Legal College Admissions Scandal: How the Wealthy Purchase College Admissions to the Nation's Elite, Private Universities Through Donations*, 2021 B.Y.U.

admissions tips for the children of Harvard faculty members would conflict with the interests of thousands of people who joined Harvard's faculty[33] with a reasonable expectation that their children would enjoy admissions advantages at Harvard. A successful challenge to admissions preferences for children of faculty could threaten colleges across the United States. Meanwhile, legacy admissions preferences are limited to a small and shrinking number of institutions.[34]

In contrast to the other ALDC preferences, athletics preferences are based on athletic merit.[35] Upending decades of special treatment for student-athletes would likely meet severe public disapproval and have significant economic consequences. One commenter, using violent imagery, notes:

> College football's only proper comparison in the New York Metropolitan Area comes from *The Godfather,* and involves five families who constantly stab each other in the back over and over again in an ever-shifting fight over new business, resources, and what constitutes the permissible and impermissible.[36]

Such claims are hyperbolic, but the point remains: the practice of athletics admissions preferences is relatively uncontroversial and unlikely to provoke a widespread backlash. Challenging only legacy and donor admissions means taking on narrower, less generally accepted slices of privilege.

EDUC. & L.J. 143 (2021). *See also* McKenna L. Thayer, *Call It What It Is: How Michigan's Public Universities Practice Affirmative Action for White Applicants*, 67 WAYNE L. REV. 639, 641 (2022) (stating that admissions policies that consider an "applicant's relationship to alumni or donors constitute affirmative action for white applicants").

33 *Harvard University Key Academic Statistics*, UNIVSTATS, https://perma.cc/3XPE-92WE.

34 *See Which Colleges Consider Legacy Status?*, SPARK ADMISSIONS, https://perma.cc/QP48-AYR4 (charting which of the top 100 universities and top 75 liberal arts colleges ranked by *U.S. News and World Report* considered legacy status in admissions practices); *see also* Jeannie Suk Gersen, *The End of Legacy Admissions Could Transform College Access*, NEW YORKER (Aug. 8, 2023), https://perma.cc/V97J-29MD; Scott Jaschik & Doug Lederman, *The 2018 Surveys of Admissions Leaders: The Pressure Grows*, INSIDE HIGHER ED (2018), https://perma.cc/QZ8P-7RAF (2018 survey showing that 46% of private institutions and 6% of public institutions use legacy preferences).

35 Morrison, *supra* note 1, at 900–01.

36 Spencer Hall, *The Floating Republic: The BCS, College Football, and Dilemmas*, SB NATION (June 29, 2011, 1:36 PM), https://perma.cc/VA33-7A5D.

4. THE INVESTIGATION

Because the complainants cited disparate outcomes by race for all ALDC preferences, OCR has a justification, if not a duty, to include "Athletes" preferences and "Children" (of Harvard faculty) preferences in its investigation. To date, OCR has not included those and is investigating only the following question: "Whether the University discriminates based on race by using donor and legacy preferences in its undergraduate admissions process in violation of Title VI and its implementing regulations."[37] To a significant extent, OCR's investigation will depend on whether it needs to find disparate-impact or disparate-treatment discrimination. Disparate-impact challenges involve policies that are facially neutral yet discriminatory in practice.[38] In contrast, disparate-treatment challenges require showing an improper intent to discriminate, including when a policy or practice treats people in different classes differently.[39] Examples of the former might include admissions criteria such as standardized test scores, which result in the disproportionate exclusion of certain racial groups.[40] By contrast, the latter would involve the denial of admissions because of an applicant's race, a direct form of discrimination.

Admissions policies considering factors like alumni relations, standardized test scores, GPA, or high school attended—potentially linked to socioeconomic status—are facially neutral and not proxies for race. Does anyone believe that a university like Harvard today aims to exclude racial

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37 OCR Letter, *supra* note 4.

38 *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

39 "Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.*

40 "For instance, if a law school were to reject a block of applicants because they failed to achieve a minimum score on the Law School Admission Test (LSAT), and that minimum score had the effect of eliminating a disproportionate number of minority applicants, the policy would be presumptively invalid." Michael G. Perez, *Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis*, 9 MICH. J. RACE & L. 467, 468 (2004). *But see* Manley v. Texas S. Univ., 107 F. Supp. 3d 712, 720–21 (S.D. Tex. 2015) (rejecting plaintiff's disparate-impact claim that Thurgood Marshall School of Law improperly discriminated against him based on race by excluding him from admissions on the grounds of his GPA and LSAT score).

minorities by implementing admissions policies that include test scores or legacy relationships? The impact of these policies on campus racial diversity is immaterial.

Suppose OCR determines that it must pursue the disparate-treatment approach. In that case, Harvard is likely to win because, if anything, Harvard intends to provide disparate treatment in favor of, rather than against, nonwhite and non-Asian applicants, as its loss in *SFFA* showed.[41] It is unlikely that OCR could find intentional disparate-treatment discrimination in Harvard's ALDC preferences. Nevertheless, for reasons explained below, to succeed in its challenge, OCR probably must use a disparate-treatment lens, not a disparate-impact lens, to evaluate the case against Harvard's legacy and donor admissions preferences.

5. Which Regulatory Provision is Relevant?

OCR's letter to the complainants regarding opening an investigation refers only to 34 C.F.R. Part 100, the whole set of regulations implementing Title VI, without determining which provision or provisions of the regulations might be violated.[42] The most apt provision is 34 C.F.R. § 100.3(b)(1)(ii), which states that a recipient of funds under a U.S. Department of Education program may not "[p]rovide any service, financial aid, or other benefit to an individual which is different, or is provided differently, from that provided to others under the program."[43]

The complainants note that Harvard "receives substantial federal funding from the Department of Education on an annual basis" but identify only one of the programs in which Harvard participates, the Federal Work-Study (FWS) Program.[44] This limited identification of programs is significant because the complainants do not cite 34 C.F.R. § 100.3(b)(1)(ii) but instead 34 C.F.R. § 100.3(b)(2), which prohibits a recipient of federal funds from discrimination under the following terms:

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41 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2168–69 (2023).

42 OCR Letter, *supra* note 4.

43 34 C.F.R. § 100.3(b)(1)(ii).

44 Chica Project, *supra* note 3, at 7.

> A recipient, in determining . . . the class of individuals to be afforded an opportunity to participate in any such program, may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.[45]

In citing this provision, the complainants confuse the regulation's reference to a U.S. Department of Education program with the Harvard University undergraduate admissions "program." The distinction is critical because the complainants do not cite any objectives of any U.S. Department of Education program that Harvard is "defeating" or "substantially impairing." The complainants are not referring to the FWS program. Instead, they allege that ALDC preferences thwart Harvard's goal of racial diversity in its own admissions program.[46] Yet, to use 34 C.F.R. § 100.3(b)(2) as the basis for a complaint, the complainants must refer to a U.S. Department of Education program.[47]

Ultimately, to prevail in their challenge, the complainants cannot rely on the "substantially impairing" provision of 34 C.F.R. § 100.3(b)(2) because OCR traditionally does not require a complainant to show that a particular government program's objectives are thwarted to reach a finding of unlawful discrimination under Title VI.[48] Therefore, the complainants must rely on the disparate-treatment provision of 34 C.F.R. § 100.3(b)(1)(ii). Resolution of many Title VI complaints that one of us (Kissel) has filed suggests that a showing of disparate *treatment* anywhere at the institution, without connecting it to any federal program, suffices to demonstrate unlawful discrimination.

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45 34 C.F.R. § 100.3(b)(2).

46 *See* Chica Project, *supra* note 3, at 4, 16–17.

47 34 C.F.R. § 100.3(b)(2).

48 *See* Flores v. Arizona, 48 F. Supp. 2d 937, 949 (D. Ariz. 1999).

6. Disparate Impact vs. Disparate Treatment and Burden of Proof

Prevailing on a disparate-impact allegation, according to the complainants, typically would require showing that the challenged action or activity has a disproportionate discriminate impact on a protected class, such as race, religion, sex, national origin, and others.[49] For this proposition, the complainants cite *Georgia State Conference of Branches of NAACP v. Georgia,* 775 F.2d 1403, 1417 (11th Cir. 1985):

> The plaintiff first must show by a preponderance of the evidence that a facially neutral practice has a racially disproportionate effect, whereupon the burden shifts to the defendant to prove a substantial legitimate justification for its practice. The plaintiff then may ultimately prevail by proffering an equally effective alternative practice which results in less racial disproportionality or proof that the legitimate practices are a pretext for discrimination.[50]

According to a recent decision, moreover,

> [T]o demonstrate that an evenhanded, facially race-neutral policy . . . is constitutionally suspect, the plaintiff pursuing an Equal Protection challenge must show (1) that the policy exacts a disproportionate impact on a certain racial group, and (2) that such impact is traceable to an "invidious" discriminatory intent. *See Arlington Heights*, 429 U.S. at 264–65, 97 S.Ct. 555; *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302 (4th Cir. 2020); *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 543–44 (3d Cir. 2011). Only then will such a policy be subject to strict scrutiny review, in which event the state entity defending the challenged policy bears the burden of showing that its policy is "narrowly tailored to serve a compelling interest." *See Hunt v. Cromartie*, 526 U.S. 541, 543, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). Otherwise, if the plaintiff is unable to demonstrate purposeful racial

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49 *See* Chica Project, *supra* note 3, at 18.

50 Chica Project, *supra* note 3, at 20 n.86.

> discrimination, the rational basis standard of review applies, where the plaintiff must establish that the challenged policy is not "rationally related to legitimate government interests." *See Feeney*, 442 U.S. at 272, 99 S.Ct. 2282; *Doe*, 665 F.3d at 544, 556.[51]

The complainants' attenuated theory of disparate *impact* is unlikely to succeed because Harvard may only need to survive rational-basis scrutiny.[52]

Furthermore, OCR does not offer complainants a theory of disparate impact in 34 C.F.R. Part 100 (outside of clause (b)(2), which is inapt to the complainants' case). OCR's omission may be decisive because *Guardians Association v. Civil Service Commission of New York*,[53] on which the complainants rely, finds no automatic provision of a disparate-impact claim in Title VI but requires that an agency positively offer such a claim.[54]

If OCR nonetheless determines that it may use a disparate-impact lens, then according to the complainants, once they have made a prima facie case that Harvard's legacy and donor admissions tips have a disparate impact by race, the burden shifts to Harvard to demonstrate that its admissions tips are "required by educational necessity,"[55] that is, "necessary to meeting an important educational goal."[56]

The "educational necessity" concept is more complex than the traditional "business necessity" model used in employment contexts.[57] Although they share similarities, such as the need for "studies-relatedness" in student selection, educational institutions face unique challenges and responsibilities: operational necessities like maintaining enrollment and financial stability, as well as broader mission-related goals such as advancing knowledge, fostering leadership, and promoting socialization.[58]

The "educational necessity" standard the complainants offer to OCR is inapt because a college admissions process is not about meeting educational goals but about determining which applicants best fit the entering

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51 Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 879 (4th Cir. 2023).

52 *See* Pers. Adm'r of Mass. v. Feeny, 442 U.S. 256, 272–73 (1979).

53 *See* Guardians Ass'n v. Civ. Serv. Comm'n of New York, 463 U.S. 582 (1983).

54 *Id.* at 590–92.

55 Chica Project, *supra* note 3, at 18.

56 *Id.* at 18–19.

57 *See* Perez, *supra* note 40, at 483–85.

58 *See id.*

class that an institution seeks.[59] The distinction is critical: an educational goal broadly involves the acquisition and dissemination of knowledge, pedagogy and teaching, and student and faculty research and study, whereas an admission decision, one goal of which might be educational, is broader because it includes business considerations regarding revenue, profit, future earnings, reputation, prestige, enrollment numbers, and, importantly, expressive conduct (i.e., it communicates a message about the values, priorities, identity, and distinctiveness of the university). Therefore, the burden in this discrimination case should not shift from the U.S. Department of Education to Harvard. To the contrary, Harvard's First Amendment right to freedom of association dictates that the burden remains with the agency to show why it should interfere.

7. Freedom of Association

Determining who joins Harvard's undergraduate community has never been purely a function of academic merit. It has also been a form of expressive association. Harvard, a private association founded in 1636, has always decided who should be admitted to its community.[60] Harvard's history of unlawful discriminatory *treatment* of applicants may finally be over.[61] Today, its ALDC preferences are facially neutral; they do not exist for a discriminatory purpose, and OCR has no good reason to use a disparate-impact lens by which to judge them.

OCR should, however, acknowledge Harvard's First Amendment right to form the entering undergraduate class it chooses. An educational institution is not situated like a company in a case such as *Griggs v. Duke Power Co.*, which involved a power company that instituted a mandatory standardized test as a condition of employment.[62] Nor is it situated like the Jaycees in

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59 Cole Claybourn, *How Colleges Choose Which Students to Admit*, U.S. News & World Report (Aug. 16, 2022), https://perma.cc/JA4E-EBNZ.

60 *See* Ronald Story, *Harvard Students, the Boston Elite, and the New England Preparatory System, 1800-1876*, 15 Hist. of Educ. Q. 281, 284, 293 (1975).

61 *See* Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll., 143 S. Ct. 2141, 2175 (2023).

62 401 U.S. 424, 427–28 (1971).

Roberts v. United States Jaycees, which addressed the admission of women into a nonprofit membership corporation designed for young men.[63]

In *Griggs*, the Supreme Court decided, among other things, that even absent discriminatory intent, a job requirement with disparate *results* is justifiable only if it involves job-related duties.[64] But Duke Power Company was deciding whom to hire for its generating plant.[65] It was not engaged in any expressive association involving a test to make its decisions.

In sharp contrast, Harvard explicitly considers factors *apart* from academic merit when it uses ALDC preferences.[66] These factors are meaningful to Harvard's identity; Harvard is far more than an academic community, and its undergraduate admissions decisions are made broadly about its entire community, not narrowly about potential success at Harvard College. For reasons that Harvard University may choose to express or reserve to itself, it is entirely free to determine that an athlete, a child of an alumnus, a donor, or a faculty member is a better fit for its community than another applicant. The First Amendment protects such expressive conduct.[67]

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63 468 U.S. 609, 612 (1984).

64 *Griggs*, 401 U.S. at 432.

65 *Id.* at 427–28.

66 *Admissions*, HARV. COLL. ADMISSIONS & FIN. AID, https://perma.cc/46ZB-Q7NT.

67 *See* Tim Cunningham, Marisa Meltebeke, Thomas C. Schroeder, Jean L. Tom & LaVerne Woods, *Ban on Affirmative Action: Implications, Risks, and Strategies for the Charitable Sector*, DAVIS WRIGHT TREMAINE LLP (Aug. 1, 2023), https://perma.cc/B8TR-BE5A. Harvard could argue that its admissions decision-making is analogous to editorial decision-making and hence constitutes expressive conduct in that it communicates a message about Harvard's values and identity. The test for determining what constitutes expressive conduct comes from *Spence v. Washington*, 418 U.S. 405, 414–15 (1974) (per curiam) (striking down a state statute regarding flag misuse as applied to a college student who flew the flag upside down to communicate protest). Adam Candeub succinctly summarizes this test as follows: "(i) the speaker intends to convey meaning through speech or expressive conduct; (ii) the audience understands the speech or expressive conduct with common language or set of understandings placed within a comprehensible context; and (iii) the speaker uses a discrete set of words or expressive conduct or acts." Adam Candeub, *Editorial Decision-Making and the First Amendment*, 2 J. FREE SPEECH L. 157, 181 (2022). University marketing and advertising highlighting class profiles and enrollment or admissions figures bolster the case for treating admissions decision-making as expressive conduct.

In *Jaycees*, the losing organizations intentionally discriminated against a protected class.[68] However, Harvard's ALDC preferences do not intentionally discriminate against a protected class.[69] The complainants argue that any discrimination by Harvard is unintended but unlawful anyway.[70] As stated above, however, Harvard is likely to succeed here if OCR applies only a disparate-treatment lens as it should.

8. HARVARD'S AVAILABLE DEFENSES OF LEGACY ADMISSIONS PREFERENCES

Suppose OCR nonetheless decides to interfere with Harvard's First Amendment right to freedom of association, requiring Harvard to overcome a disparate-impact claim by showing unique benefits as a result of its legacy and donor preferences. In that case, Harvard should still prevail because legacy preferences yield unique benefits that may be tied to Harvard's education programs.

Even the U.S. Department of Justice's *Title VI Legal Manual*, on which the complainants rely, notes that for a disparate-impact claim, an institution such as Harvard need only show that its policies for donor and legacy preferences are "legitimate, important, and integral" to its mission and that such justification bears a "manifest demonstrable relationship" to the policies.[71]

Harvard should be able to accomplish that easily. The complainants admit that Harvard has provided such a justification; they just argue that it is insufficient.[72]

What are the benefits of legacy preferences?

First, Harvard's internal report on its policies notes that legacy admissions "cement strong bonds between the university and its alumni,"

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68 *Cf.* Boy Scouts of America v. Dale, 530 U.S. 640, 656 (2000) (permitting the Boy Scouts of America to bar homosexuals from serving as troop leaders because "New Jersey's public accommodations law to require the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association").

69 *See* discussion *supra* Part 7.

70 Chica Project, *supra* note 3, at 3.

71 U.S. Dep't of Just., Title VI Legal Manual § VII(C)(2).

72 Chica Project, *supra* note 3, at 24.

producing a "vital sense of engagement and support."[73] In other words, legacy admissions provide a deep sense of continuity throughout Harvard's history and diversity that cannot be replaced with any alternative. The Saltonstall family, for example, has had a continuing relationship with Harvard for centuries, including many generations of Saltonstall undergraduates and endowed Saltonstall professorships.[74] Having students know that many classmates are connected to longstanding Harvard traditions and a centuries-old community is irreplaceable by any other admissions policy. There is no alternative means of achieving this end that Harvard finds essential.

Second, children inherit or learn from their parents some characteristics that made their ancestors successful. Putting intelligence aside, children learn business, moral, and political principles from their parents.

Third, descendants are well-positioned to know whether Harvard is the right college for them. Children hear and remember stories from their parents. When their parents tell stories about Harvard, children develop a unique understanding of whether Harvard's residential system, curriculum, extracurricular options, and location near Boston fit them. Again, no substitute policy would generate such understanding from trusted storytellers as one's own parents.

In other words, legacy preferences are effective filters for potential legacy candidates because those who already know they do not "fit" are less likely to apply. Those who apply generally have a better understanding of what they are applying for than non-legacy applicants. While such privileges are unearned, they do suggest that legacy applicants are more likely to succeed at Harvard.

Fourth, legacy families donate more in the long run than non-legacy alumni.[75] The complainants' research found that "prior to controlling for wealth . . . the results indicate that schools with legacy preference policies indeed have much higher alumni giving," suggesting that such a policy

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73 Chica Project, *supra* note 3, at 23–24 (citing Williams Fitzsimmons, Rakesh Khurana, & Michael D. Smith, *Report of the Committee to Study Race-Neutral Alternatives*, HARV. UNIV. (Apr. 2018), https://perma.cc/B2VA-4FE3).

74 Noam S. Cohen, *Saltonstalls Pepper Harvard's 350 Years*, HARV. CRIMSON (Sept. 5, 1986), https://perma.cc/5FMF-SSLV.

75 Emilio J. Castilla & Ethan J. Poskanzer, *Through the Front Door: Why Do Organizations (Still) Prefer Legacy Applicants?*, 87 AM. SOCIO. REV. 782, 789, 808 (2022).

"allows elite schools to over-select from their own wealthy alumni."[76] It is common sense that a first-generation student is less likely to give large gifts to Harvard than a graduate whose family has already benefited from one or more Harvard degrees.[77] While this consideration is minimally educationally relevant to a particular legacy applicant, donations improve Harvard's education programs in general,[78] providing Harvard a distinct defense on educational grounds (as well as a defense for its "tip" favoring children of donors).

9. CONCLUSION

Harvard University and other elite universities have solid defenses for using legacy preferences. First, Harvard's First Amendment right to freedom of association should supersede Title VI of the Civil Rights Act of 1964.[79] Even if OCR maneuvers around the First Amendment to investigate the recent third-party complaint against Harvard, its implementing regulations do not offer a route to examining facially race-neutral undergraduate admissions through a disparate-impact lens.[80] Even if OCR can maneuver around that problem, Harvard has clear arguments that its legacy preferences uniquely serve its interests.[81] It also has access to the top legal talent likely to prevail here, whereas it failed in *SFFA*. In *SFFA*, Harvard *intended* to discriminate on unlawful bases. Here, Harvard does not, so OCR should leave it alone.

Those who dislike legacy preferences because they are not closely tied to academic merit yet forgive athletics preferences—despite likely disparate impacts by race at the level of individual sports—should consider whether their arguments are consistent and will ultimately protect athletic

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76 Chad Coffman, Tara O'Neil & Brian Starr, *An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities*, *in* AFFIRMATIVE ACTION FOR THE RICH 101, 102 (Richard D. Kahlenberg, ed., 2010).

77 Castilla & Poskanzer, *supra* note 75, at 808, 810.

78 HARV., FINANCIAL REPORT: FISCAL YEAR 2024 11 (2024).

79 *See supra* Part 8.

80 *See supra* Part 5.

81 *See supra* Part 8.

preferences.[82] In any case, critics of legacy preferences should use the power of persuasion, not the coercive power of a federal agency backed by the U.S. Department of Justice, to overcome any offended sensibilities regarding prioritizing certain applicants for admission over others.

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82 Adam Kissel, *A Symposium on Legacy Admissions: Adam Kissel*, NAT'L ASSOC. OF SCHOLARS (Aug. 17, 2023), https://perma.cc/456G-Z6ZV.