

RECENT COMPLAINT

TITLE VI — COLLEGE ADMISSIONS — COMMUNITY GROUPS ARGUE HARVARD’S LEGACY AND DONOR ADMISSIONS POLICY IS ILLEGAL RACE DISCRIMINATION. — Complaint Under Title VI of the Civil Rights Act of 1964, *Chica Project v. President & Fellows of Harvard College* (Off. for C.R., U.S. Dep’t of Educ., filed July 3, 2023).

In 2004, reporters asked then-President George W. Bush if he believed colleges should eliminate the practice of preferencing children of alumni, known as legacy students, in their admissions processes.¹ President Bush, perhaps one of America’s most famous legacy students, responded succinctly: “Well, I think so, yes.”² He was not alone; support among Republican politicians for ending legacy admissions dates back at least to 1990.³ But despite strong bipartisan support for ending legacy preferences in college admissions,⁴ there has been minimal legal or legislative action toward banning the practice.⁵ Instead, courts and the public have largely focused on debating the merits of the use of race in college admissions. Recently, just days after the Supreme Court’s decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*⁶ ended race-based affirmative action,⁷ several

¹ Associated Press, *Bush Opposes “Legacy” Admissions*, NBC NEWS (Aug. 6, 2004, 3:58 PM), <https://www.nbcnews.com/id/wbna5625378> [<https://perma.cc/QS3K-P629>].

² *Id.* President Bush followed in the footsteps of his father and grandfather to attend Yale. *Id.*

³ Daniel Golden, *Admissions Preferences Given to Alumni Children Draws Fire*, WALL ST. J. (Jan. 15, 2003), https://www.wsj.com/public/resources/documents/Polk_Alumni.htm [<https://perma.cc/J9K5-59XA>] (“[O]ne of the first politicians to assail the legacy preference was a Republican, Bob Dole. In 1990, when Mr. Dole was Senate Minority Leader, he called legacy preference an ‘unfair advantage’ for children of ‘wealthy contributors’ . . .”).

⁴ Abby Springs, *Eliminating Legacy Admissions Has Bipartisan Support*, DATA FOR PROGRESS (Aug. 16, 2023), <https://www.dataforprogress.org/blog/2023/8/16/eliminating-legacy-admissions-has-bipartisan-support> [<https://perma.cc/22XK-CT2S>].

⁵ As of 2023, Colorado is the only state that has banned legacy admissions at public universities, although legislators in other states have considered similar laws. See Elliott Wenzler, *Two Years After Colorado Banned Legacy Admissions, The State’s Public Colleges and Universities Say the Only Real Change Is Perception*, COLO. SUN (Aug. 18, 2023, 3:55 AM), <https://coloradosun.com/2023/08/18/two-years-colorado-banned-legacy-admissions-colleges-universities-say-the-only-real-change-is-perception> [<https://perma.cc/DAG6-M4HJ>]. Federally, Senator Jeff Merkley and Representative Jamaal Bowman have twice introduced legislation to ban legacy admissions at colleges. See Julie Tsirkin & Liz Brown-Kaiser, *Democrats Re-introduce Legislation to End Legacy Admissions in Colleges*, NBC NEWS (July 26, 2023, 3:45 PM), <https://www.nbcnews.com/politics/congress/democrats-re-introduce-legislation-end-legacy-admissions-colleges-rcna96434> [<https://perma.cc/56WQ-PVP2>]. Several universities have ended legacy admissions of their own accord, including Texas A&M, the University of Georgia, and Johns Hopkins University. See Greg Winter, *Texas A&M Ban on “Legacies” Fuels Debate on Admissions*, N.Y. TIMES (Jan. 13, 2004), <https://www.nytimes.com/2004/01/13/us/texas-a-m-ban-on-legacies-fuels-debate-on-admissions.html> [<https://perma.cc/KU5W-XADD>]; Ronald J. Daniels, *Why We Ended Legacy Admissions at Johns Hopkins*, THE ATLANTIC (Jan. 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/why-we-ended-legacy-admissions-johns-hopkins/605131> [<https://perma.cc/R57E-2V5R>].

⁶ 143 S. Ct. 2141 (2023).

⁷ See *id.* at 2175.

Massachusetts-based groups filed a complaint with the U.S. Department of Education's Office for Civil Rights alleging that Harvard's practices of preferencing applicants whose relatives are alumni or donors in its undergraduate admissions process constitutes illegal race discrimination under Title VI of the Civil Rights Act of 1964.⁸ Shortly after, a spokesperson for the Department of Education's Office for Civil Rights confirmed that it had opened an investigation into Harvard's admissions practices.⁹ So far, the Department of Education has made no further public comment on the viability of the Title VI claim articulated in the complaint. As filed, the complaint does not clearly relay a cognizable Title VI claim, but Harvard's practices may nevertheless violate Title VI, a conclusion the Department of Education can still reach if it amasses sufficient evidence.

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding, including Harvard, from discriminating on the basis of race, color, or national origin.¹⁰ The Department of Education has promulgated regulations prohibiting not only intentional race discrimination, but also "policies that have a disparate impact."¹¹ To find that a facially neutral policy violates Title VI, the Department must first find that the challenged policy has a racially disparate impact.¹² Then, the burden shifts to the funding recipient to "demonstrate the existence of a substantial legitimate justification for the policy."¹³ Where, as here, the recipient is an educational institution, the funding recipient must show the policy is justified by "educational necessity."¹⁴ If the recipient makes that showing, the Department can conclude that Title VI was violated only if it finds that there is an alternative practice that would achieve the educational necessity while causing less of a discriminatory effect.¹⁵

On July 3, 2023, Chica Project, African Community Economic Development of New England, and Greater Boston Latino Network

⁸ 42 U.S.C. §§ 2000d to 2000d-7; Complaint Under Title VI of the Civil Rights Act of 1964 at 2–3, 5–6, Chica Project v. President & Fellows of Harvard Coll. (Off. for C.R., U.S. Dep't of Educ., filed July 3, 2023) [hereinafter Complaint], <http://lawyersforcivilrights.org/wp-content/uploads/2023/07/Federal-Civil-Rights-Complaint-Against-Harvard.pdf> [https://perma.cc/6P7N-GSSG].

⁹ See Michelle N. Amponsah & Miles J. Herszenhorn, *Dept. of Education Opens Investigation into Harvard's Donor, Legacy Admissions Preferences*, HARV. CRIMSON (July 26, 2023), <https://www.thecrimson.com/article/2023/7/26/doe-investigation-donor-legacy-admissions> [https://perma.cc/E58T-LETF].

¹⁰ 42 U.S.C. § 2000d; see Complaint, *supra* note 8, at 17.

¹¹ Complaint, *supra* note 8, at 18 (citing 34 C.F.R. § 100.3(b)(2) (2023)).

¹² See U.S. Dep't of Just., Title VI Legal Manual § 7.C, at VII-6 (2021) [hereinafter Title VI Legal Manual], <https://www.justice.gov/crt/book/file/1364106/dl?inline> [https://perma.cc/QTQ8-EL88]. This burden-shifting framework was adapted from the framework used to analyze disparate impact employment cases under Title VII. See *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995).

¹³ Title VI Legal Manual, *supra* note 12, § 7.C, at VII-6.

¹⁴ *Lucille P. ex rel. Larry P. v. Riles*, 793 F.2d 969, 982–83 (9th Cir. 1984) (citing, inter alia, *Debra P. v. Turlington*, 644 F.2d 397, 407 (5th Cir. 1981)).

¹⁵ Title VI Legal Manual, *supra* note 12, § 7.C, at VII-6.

filed their complaint with the Department of Education's Office for Civil Rights on behalf of students of color.¹⁶ Generally, the complainants challenged two of Harvard's admissions practices: (1) the practice of preferencing applicants whose relatives are Harvard alumni, and (2) the practice of preferencing applicants whose relatives are wealthy donors to Harvard.¹⁷ The complainants argued that these practices favor white applicants to the detriment of applicants of color, because legacy students and children of donors are overwhelmingly white.¹⁸ According to the complainants, these practices have a clear "disparate impact on applicants of color" and are thus impermissible under the Department of Education's regulations interpreting Title VI.¹⁹

The complaint's factual background details Harvard's admissions process.²⁰ After prospective students submit their application to Harvard, Harvard's admissions officers read the applications, scoring the strength of each applicant in six categories: "academic, extracurricular, athletic, school support, personal, and overall."²¹ After applicants are scored and interviewed, admissions subcommittees meet to make recommendations about which students should ultimately be accepted.²² Finally, applicants are passed to the full admissions committee, which cuts down the list of tentative admits until arriving at a final list of admitted students.²³ For the Class of 2026, Harvard admitted slightly more than three percent of applicants.²⁴

Throughout its admissions process, Harvard uses a system of "tips," or "plus factors that might tip an applicant into Harvard's admitted class."²⁵ Students who receive tips include athletes, legacy students, children of donors, and children of Harvard faculty and staff members.²⁶ The complaint alleged that legacy students and children of wealthy donors receive preferential treatment throughout the

¹⁶ Complaint, *supra* note 8, at 5–6, 31.

¹⁷ *Id.* at 2–3.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 18, 22–23. The Supreme Court has held that private plaintiffs do not have a right of action to enforce Title VI disparate impact violations in federal court. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). Despite this holding, regulations interpreting Title VI as barring disparate impact remain in force, and agencies retain the responsibility to enforce those regulations. *See Memorandum from Ralph F. Boyd, Jr., Assistant Att'y Gen., C.R. Div., to Heads of Dep'ts & Agencies, Gen. Couns. & C.R. Dirs.* (Oct. 26, 2001), <https://www.justice.gov/crt/federal-coordination-and-compliance-section-201> [<https://perma.cc/36ZH-YGF2>].

²⁰ Complaint, *supra* note 8, at 8–13.

²¹ *See id.* at 10 (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2154 (2023)).

²² *See id.* at 11–12 (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 169–70 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141).

²³ *See id.* at 12–13 (citing *Students for Fair Admissions*, 980 F.3d at 170).

²⁴ *See id.* at 8.

²⁵ *See id.* at 13 (quoting *Students for Fair Admissions*, 980 F.3d at 170).

²⁶ *See id.* at 13 & n.48. The complainants did not challenge the legality of Harvard's preferential treatment for athletes and children of faculty and staff. *See id.* at 13 n.48.

admissions process, ultimately resulting in admissions rates that are several times higher than the admissions rate for applicants who are not legacies or children of donors.²⁷

According to the complainants, these practices result in a racially disparate impact because admitted students in those categories are “overwhelmingly white.”²⁸ Relying heavily on a study led by Professor Peter Arcidiacono,²⁹ the complainants argued that “[s]everal configurations of the admissions data show” that Harvard’s admissions preferences result in a significant disparate impact.³⁰ Specifically, the complainants pointed to the large percentage of children of donors and legacy students who are white, nearly 70%, while students of color are “dramatically under-represented” among those groups.³¹ Of white students admitted to Harvard, 20% are legacies and 13% are children of donors; comparatively, less than 5% of Black applicants are legacies and 2% are children of donors.³² The complainants recited statistical modeling in the Arcidiacono study to argue that “substantially more” students of color would be admitted each year if Harvard ended its practice of preferencing legacy students and children of donors.³³ Further, the complainants argued that Harvard’s practices are not justified by any “educational necessity,” and so violate Title VI.³⁴

Ultimately, the complainants asked that the Department of Education “open an investigation” into Harvard’s admissions practices, “declare” that Harvard’s ongoing preferences for legacy students and children of donors are “discriminatory and violate[] Title VI,” require Harvard to end these practices, and ensure that applicants are not able to identify their familial relationships to the university at any point in the admissions process.³⁵ On July 25, 2023, news broke that the Department of Education had opened an investigation into Harvard’s practice of preferencing legacy students and children of donors in the undergraduate admissions process.³⁶

The complaint does not make out the prima facie showing required for a cognizable Title VI disparate impact claim. A facially neutral policy violates Title VI only if it causes a significant racial disparity, determined by comparing the effect of the policy across racial groups. But

²⁷ *Id.* at 14–15.

²⁸ *Id.* at 16, 20.

²⁹ Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. ECON. 133 (2022).

³⁰ Complaint, *supra* note 8, at 20.

³¹ *Id.* (citing Arcidiacono et al., *supra* note 29, at 135).

³² *Id.* at 21 (citing Arcidiacono et al., *supra* note 29, at 138 tbl.1).

³³ *Id.* at 22 (citing Arcidiacono et al., *supra* note 29, at 151).

³⁴ *Id.* at 23.

³⁵ *Id.* at 30–31.

³⁶ Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry into Harvard’s Legacy Admissions*, N.Y. TIMES (July 25, 2023), <https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html> [https://perma.cc/769P-T7KC].

the complaint as framed does not make the appropriate comparison. It fails to identify the narrower group of students affected by the challenged policy, and instead discusses all students who apply to Harvard. Despite the complaint's shortcomings, the Department of Education has opened an investigation into whether Harvard has violated Title VI. But, because the Department is not bound by the complaint's framing, it may still find that Harvard has violated Title VI.

To make out a *prima facie* case for a Title VI disparate impact claim, complainants must (1) identify a specific policy or practice that (2) causes (3) a significant racial disparity that results in (4) harm or adversity.³⁷ The complaint does clearly meet the first and fourth elements. As to the first element, it specifically identifies Harvard's practices of preferencing, or providing tips to, legacy applicants and children of donors as the challenged facially neutral practice.³⁸ As to the fourth, it establishes that each year, some number of otherwise qualified students of color are not admitted to Harvard and therefore do not receive the benefits of its educational program, an evident harm of the challenged practices.³⁹ The complaint ultimately falls short in meeting the third element: establishing that there is a significant racial disparity.⁴⁰

To find that there is a significant racial disparity, the Department of Education must find that "although neutral, the policy in question imposes a 'significantly adverse or disproportionate impact' on a protected group of individuals."⁴¹ An adverse impact exists if a challenged policy negatively affects the protected group more than it does others,⁴² a metric often measured through use of statistical evidence.⁴³ To make an appropriate statistical comparison, complainants must first determine "the subset of the population that is affected by the disputed decision," known as the population base.⁴⁴ Within that population base, the complainants must then compare the effect of the challenged policy on the protected racial group (for example, students of color) to the effect on those outside the protected group (for example, white students).⁴⁵

³⁷ See Title VI Legal Manual, *supra* note 12, § 7.C.1, at VII-9.

³⁸ See Complaint, *supra* note 8, at 20.

³⁹ See *id.* at 13-17, 22. Where an individual is "excluded from participation in . . . any program or activity receiving Federal financial assistance," they have suffered harm or adversity that may be actionable under Title VI. 42 U.S.C. § 2000d.

⁴⁰ If complainants establish a significant racial disparity, they can use statistical modeling to prove the final element, causation. See *infra* note 72.

⁴¹ *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003) (quoting *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 52-53 (2d Cir. 2002)), *superseded by regulation on other grounds*, 24 C.F.R. § 100.500(c) (2013).

⁴² See *Lucille P. ex rel. Larry P. v. Riles*, 793 F.2d 969, 982-83 (9th Cir. 1984) (finding adverse impact where Black children as a whole scored ten points lower than white children on a placement test).

⁴³ See, e.g., *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011).

⁴⁴ *Hallmark Devs., Inc. v. Fulton County*, 466 F.3d 1276, 1286 (11th Cir. 2006) (quoting *Hous. Invs., Inc. v. City of Clanton*, 68 F. Supp. 2d 1287, 1299 (M.D. Ala. 1999)).

⁴⁵ See, e.g., *Darensburg*, 636 F.3d at 520.

The complaint implies that the relevant population base is all students who apply for admission to Harvard, comparing the racial composition of applicants who are legacies or children of donors to the racial composition of the rest of the applicant pool.⁴⁶ But *applicants* to Harvard are not the correct population base. Courts have emphasized that the population base that must be used in statistical analysis for disparate impact claims is only “the subset of the population that is affected” by a particular policy.⁴⁷ Some applicants to Harvard are affected by the school’s legacy and donor admissions preferences — they are admitted, waitlisted, or rejected, when they may have otherwise received a different result. But many other applicants are not affected because they are not otherwise qualified for admission to Harvard; they would not have been admitted even if Harvard did not favor legacies and children of donors.⁴⁸ Last year, almost 57,000 students applied to Harvard; only 1,966 were admitted.⁴⁹ Even if every single one of those 1,966 students were legacies or children of donors who would not have been admitted without the policy, there are tens of thousands of students who were rejected and who would still be rejected if the challenged policy were to change.⁵⁰ Thus, the correct population base is the group of applicants that have at least the minimum qualifications for admission to Harvard.

This intuition is supported by Title VII disparate impact law. Courts analyzing Title VI disparate impact cases regularly rely on analogous Title VII cases.⁵¹ In the employment context, the Supreme Court established in *Hazelwood School District v. United States*⁵² that the correct comparison to establish a racial disparity was “between the racial composition of Hazelwood’s teaching staff and the racial composition of the

⁴⁶ Complaint, *supra* note 8, at 20 (“[N]early 70% of all donor-related and legacy applicants are white By contrast, Black, Latinx, and Asian American applicants are all dramatically under-represented among those who receive Donor or Legacy Preferences.”).

⁴⁷ *City of Clanton*, 68 F. Supp. 2d at 1299; see also *Hallmark Devs.*, 466 F.3d at 1286; *Darensburg*, 636 F.3d at 519–20.

⁴⁸ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 169 (1st Cir. 2020) (explaining that Harvard’s process identifies some applicants as “neutral” candidates or “applicant[s] with below-average credentials”), *rev’d*, 143 S. Ct. 2141 (2023).

⁴⁹ *Admissions Statistics: A Brief Profile of the Admitted Class of 2027*, HARV. COLL. (2023), <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/B3LN-VNK7>].

⁵⁰ Of course, not all 1,966 students who were admitted were legacies or children of donors. A survey of the Class of 2022 suggests that approximately 15% of students in that class are legacy students. Alexandra A. Chaidez & Samuel W. Zwickel, *Meet the Class of 2022: Makeup of the Class*, HARV. CRIMSON (2018), <https://features.thecrimson.com/2018/freshman-survey/makeup-narrative> [<https://perma.cc/HBN3-S8QV>].

⁵¹ See, e.g., *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (explaining that courts considering Title VI disparate impact claims “have looked to Title VII disparate impact cases for guidance” and collecting cases); *Lucille P. ex rel. Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984) (citing Title VII cases in analysis of Title VI disparate impact claim); *Ga. State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (same); *NAACP v. Med. Ctr., Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc) (same).

⁵² 433 U.S. 299 (1977).

qualified public school teacher population in the relevant labor market.”⁵³ Twelve years later, the Supreme Court emphasized this point again, explaining that for disparate impact employment cases, the relevant comparison is between the racial composition of those who are hired for a particular job and the racial composition of those who are *qualified* for that job.⁵⁴ Employment cases are a particularly strong analogue for the college admissions context at highly selective schools. In many Title VII cases, many more applicants apply to a particular job than are ultimately selected; some, but not all, of these applicants have the minimum qualifications for the particular job. Likewise, each year, many more students apply to Harvard than are ultimately admitted; some, but not all, of these students have the minimum qualifications that Harvard admissions officers require.⁵⁵ Just as in *Hazelwood*, to establish a racial disparity in the Harvard case, the complaint should have compared the racial makeup of students qualified for admission to the group of students actually admitted.

Although a poorly framed complaint might doom plaintiffs filing in court,⁵⁶ the same is not true for complaints filed with agencies. Agency complaints do not require the formality of complaints filed in federal court;⁵⁷ complaints to the Department of Education alleging discrimination may take the form of a letter, an email, or an online submission.⁵⁸ Once the Department of Education decides to open an investigation based on a complaint, the agency’s role is not to adjudicate a dispute between complainants and respondents, but to serve as “a neutral fact-finder” and to “collect and analyze relevant evidence,” in order to ultimately determine whether there is sufficient evidence to support a conclusion that the target of the complaint “failed to comply with the law.”⁵⁹ Even though the complaint does not clearly lay out each prong of a Title VI disparate impact claim, the Department of Education might

⁵³ *Id.* at 308 (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337–38, 337 n.17 (1977)).

⁵⁴ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–51 (1989) (“It is such a comparison — between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs — that generally forms the proper basis for the initial inquiry in a disparate-impact case.”), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k).

⁵⁵ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 178 (D. Mass. 2019) (explaining that Harvard’s class is “too small to accommodate more than a small percentage of those qualified for admission”), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *rev’d*, 143 S. Ct. 2141 (2023).

⁵⁶ See generally, e.g., William H.J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474 (2017).

⁵⁷ See OFF. FOR C.R., U.S. DEP’T OF EDUC., DISCRIMINATION COMPLAINT FORM (2023), <https://www2.ed.gov/about/offices/list/ocr/complaintform.pdf> [https://perma.cc/XL2P-Q2L2] (requiring only basic factual information about the alleged discrimination).

⁵⁸ OFF. FOR C.R., U.S. DEP’T OF EDUC., HOW TO FILE A DISCRIMINATION COMPLAINT WITH THE OFFICE FOR CIVIL RIGHTS 1, 3 (2010), <https://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf> [https://perma.cc/2VMK-Y5HH].

⁵⁹ OFF. FOR C.R., U.S. DEP’T OF EDUC., COMPLAINT PROCESSING PROCEDURES 2 (2022), <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> [https://perma.cc/U3KD-J7JF].

still amass sufficient evidence to conclude that each prong of a Title VI disparate impact claim is in fact satisfied.⁶⁰ If it does reach that conclusion, the Department of Education may “negotiate a voluntary resolution agreement,” “initiate administrative enforcement proceedings,” or “refer the case to the Department of Justice for judicial proceedings.”⁶¹

To find that Harvard violated Title VI, the Department of Education would need to compare the racial makeup of qualified students to the racial makeup of students admitted to Harvard.⁶² Of course, defining the group of “qualified” students is not an exact science; Harvard considers a variety of factors that ultimately help determine which students are qualified.⁶³ Despite this, there are multiple proxies that the Department of Education might rely on in defining the group of qualified students. For example, early in the process, Harvard assigns each student an “overall rating” from one to four.⁶⁴ The group of students qualified for admission to Harvard might be defined as the group of students that receive an overall rating of one, indicating the student is “exceptional and a clear admit,” or two, indicating the student has “strong credentials.”⁶⁵ Alternatively, the group of qualified students might be defined as the list of applicants whom the full committee votes should be admitted to the class, a “pool of more than 2,000 tentative admits,” which is ultimately whittled down to the class of roughly 1,600 students.⁶⁶ Once the Department of Education defines this group of qualified students, it must establish a racial disparity by comparing the racial makeup of qualified students to the racial makeup of admitted students. There is a racial disparity if a significantly greater proportion of white students are admitted than are qualified.⁶⁷

Although a significant racial disparity may not have previously existed, one may emerge in the years following the end to race-based

⁶⁰ Although complaints need not detail each element of a cognizable Title VI claim in order for an administrative agency to take further action, the agency still must satisfy itself that there is in fact evidence proving each element of the Title VI claim to conclude that the target of the complaint is in violation of the law. See Title VI Legal Manual, *supra* note 12, § 7.C.1, at VII-9.

⁶¹ OFF. FOR C.R., U.S. DEP’T OF EDUC., *supra* note 59, at 2–3.

⁶² Like federal courts, agencies evaluating Title VI disparate impact complaints likewise look to Title VII cases. See Title VI Legal Manual, *supra* note 12, § 7.A, at VII-3 n.2 (noting cases decided under Title VII may be instructive for agencies).

⁶³ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 144 (D. Mass. 2019) (quoting from the *Harvard Interviewer Handbook* to describe the many factors considered in the admissions process), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *rev’d*, 143 S. Ct. 2141 (2023). This comment uses the term “qualified” as it is used by the Supreme Court in cases like *Hazelwood* to refer to students who have the characteristics that Harvard has decided are necessary for entrance to the university. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 & n.13 (1977). It is not used as a value judgment about the many accomplished students who apply to study at Harvard each year, either those who are rejected or admitted.

⁶⁴ See *Students for Fair Admissions*, 397 F. Supp. 3d at 141.

⁶⁵ See *id.*

⁶⁶ *Students for Fair Admissions*, 980 F.3d at 165, 170.

⁶⁷ Although beyond this comment’s scope, whether a disparity is “significant” is typically judged on a case-by-case basis. See *Clady v. County of Los Angeles*, 770 F.2d 1421, 1428–29 (9th Cir. 1985).

affirmative action. Due to the extensive discovery into Harvard's admissions process during the *Students for Fair Admissions* litigation,⁶⁸ data from the Harvard admissions cycles conducted between 2009 and 2014 is public.⁶⁹ But the Supreme Court's decision in *Students for Fair Admissions* may render that data outdated. Between 2009 and 2014, Harvard afforded preferences to legacies and children of donors but also explicitly considered race throughout the admissions process.⁷⁰ Because of these dual preferences, it is possible that no significant racial disparity will emerge when comparing the overall groups of qualified students to admitted students in those years. However, without race-based affirmative action, it is likely that the racial makeup of future Harvard classes will change.⁷¹ Even if no significant racial disparity exists based on the 2009–2014 data, a disparity might emerge in the years after the end of affirmative action, if Harvard continues to preference legacies and children of donors, who are mostly white, without likewise preferencing students of color.⁷² The Department of Education should not be deterred if it finds that race-based affirmative action previously obscured racial disparities that occurred as a result of preferencing legacies and children of donors. Instead, it should widen the scope of its investigation to determine if racial disparities emerge in the wake of the Supreme Court's rejection of race-based affirmative action.

If the Department of Education concludes the prima facie case has been satisfied, the burden shifts to Harvard to demonstrate their practices are an educational necessity.⁷³ The complaint persuasively argues

⁶⁸ See Arcidiacono et al., *supra* note 29, at 134 (“The Students for Fair Admissions (SFFA) lawsuit against Harvard University provided unprecedented access to how Harvard makes admissions decisions and to the data underlying those decisions.”).

⁶⁹ See *id.* at 136 (relying on anonymized data about students who applied to Harvard between 2009 and 2014).

⁷⁰ *Students for Fair Admissions*, 397 F. Supp. 3d at 142, 147.

⁷¹ See Emma Bowman, *Here's What Happened When Affirmative Action Ended at California Public Colleges*, NPR (June 30, 2023, 5:01 AM), <https://www.npr.org/2023/06/30/1185226895/heres-what-happened-when-affirmative-action-ended-at-california-public-colleges> [https://perma.cc/T8BR-FUM3] (explaining that the year after California banned affirmative action at public universities, “enrollment among Black and Latino students at UCLA and UC Berkeley fell by 40%”).

⁷² See Arcidiacono et al., *supra* note 29, at 138 tbl.1 (finding that close to 70% of legacy applicants and children of donor applicants are white). Assuming, arguendo, that a significant racial disparity does or will exist between the population of students qualified for admission and the population of students admitted, the Department of Education still cannot find a prima facie case unless it concludes that the disparity was caused by Harvard's practices of preferencing legacies and children of donors in the admissions process. Statistical analysis based on the outdated data suggests that causation is provable. See *id.* The complaint draws attention to findings in the Arcidiacono study using modeling to suggest that removing legacy preferences would result in more Black, Latinx, and Asian students being admitted in each admissions cycle. See Complaint, *supra* note 8, at 22 (citing Arcidiacono et al., *supra* note 29). Once future classes are admitted to Harvard, similar statistical analyses could demonstrate that at least some percentage of the racial disparity between qualified and admitted students is attributable to Harvard's legacy and donor admissions practices.

⁷³ Title VI Legal Manual, *supra* note 12, § 7.C, at VII-6.

that Harvard lacks a viable educational necessity defense.⁷⁴ In particular, Harvard may argue, as it has in the past, that maintaining the challenged preferences is necessary to increase financial support from alumni.⁷⁵ But the Department of Education might not be convinced that legacy preferences significantly contribute to the financial well-being of the institution — empirical evidence suggests that legacy preferences do not actually cause increased alumni donations.⁷⁶ After rejecting any educational necessity arguments, the Department of Education could conclude that Harvard's admissions practices violate Title VI.

In 1990, following a two-year compliance review into Harvard's treatment of Asian Americans in admissions, the Department of Education's Office for Civil Rights concluded that Harvard had not violated Title VI.⁷⁷ The agency concluded that although Asian American applicants were admitted at lower rates than white applicants, there was a legitimate reason for the disparity: preferences given to legacies and athletes.⁷⁸ Much has changed since the 1990 compliance review and the agency's assumption that legacy preferences are legitimate; today's Department of Education seems poised to seriously consider the question of whether legacy and donor preferences in admissions violate Title VI. Although the complaint may be legally imperfect, it did the important work of drawing the issue of the legality of legacy and donor admissions to the attention of the Department of Education. From here, the Department should diligently evaluate the requisite evidence, including, if necessary, looking to data from future admissions cycles to make the case that legacy and donor preferences are illegal race discrimination.

⁷⁴ See Complaint, *supra* note 8, at 23–28 (arguing that legacy and donor preferences in admissions are not necessary for engaging alumni, encouraging alumni donations, or building community, and further emphasizing that those goals may not constitute legitimate educational goals).

⁷⁵ See Michelle N. Amponsah & Emma H. Haidar, *Could Losing Legacy Admissions Sustain Racial Diversity?*, HARV. CRIMSON (Sept. 22, 2023), <https://www.thecrimson.com/article/2023/09/22/harvard-without-legacy> [<https://perma.cc/2SPN-YDNA>].

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, 101–02 (Richard D. Kahlenberg ed., 2010). Further, even if Harvard can prove that legacy and children-of-donor preferences have some impact on donations, the Department of Education might remain unconvinced that the additional donations constitute an educational “necessity.” See, e.g., Amponsah & Haidar, *supra* note 75 (quoting the President of Wesleyan University as saying, “I do find it obscene that the richest schools in America are said to be the ones that are most worried about losing fundraising dollars”).

⁷⁷ Derek G. Xiao, *Investigating Harvard Admissions: The 1990 Education Department Inquiry*, HARV. CRIMSON (May 24, 2016), <https://www.thecrimson.com/article/2016/5/24/1991-ed-department-inquiry> [<https://perma.cc/5GTA-WHQH>].

⁷⁸ U.S. COMM'N ON C.R., NO. 135906, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S, at 120 (1992), <https://www.ojp.gov/pdffiles1/Digitization/135906NCJRS.pdf> [<https://perma.cc/DB2R-N6AN>].