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Council of the American Bar Association
Section of Legal Education and Admissions to the Bar
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Dear Council Members:

The Supreme Court's decision last term in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), 600 U.S. 181 (2023), changed the constitutional landscape when it comes to the consideration of race in higher education. We the Attorneys General of Tennessee, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Virginia write because that decision requires significant adjustments to your current Standards and Rules of Procedure for Approval of Law Schools. *See* ABA, *Standards and Rules of Procedure for Approval of Law Schools 2023–2024* (2023), https://perma.cc/6XF5-SN8L [hereinafter *ABA Standards*]. One standard in particular—Standard 206, Diversity and Inclusion—fails to account for *SFFA* and, by all appearances, directs law-school administrators to violate both the Constitution and Title VII. We understand that the Council is considering revisions to that Standard in light of *SFFA*. While we support the Council's willingness to modify Standard 206, the proposed revisions reemphasize Standard 206's problematic requirement that law schools engage in race-based admissions and hiring. We urge the Council to modify its standards in a way that comports with federal law and with the ABA's purported commitment to set the legal and ethical foundation for the nation.

1. The Supreme Court's Decision in *SFFA*

In *SFFA*, the Supreme Court held that Harvard's and the University of North Carolina's use of race in the admissions process violated the Fourteenth Amendment's Equal Protection Clause. The Court rooted its holding in a fundamental principle: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *SFFA*, 600 U.S. at 208 (quotations omitted). That being so, *all* racial classifications—benign or malevolent—face the "daunting" strict-scrutiny standard. *Id.* at 206. And race-based affirmative-action programs in higher education, the Court explained, simply cannot satisfy that standard. Programs of that sort "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, [and] involve racial stereotyping." *Id.* at 230. It follows that educational institutions cannot "use race as a factor in affording educational opportunities." *Id.* at 204 (quotations omitted).

But the Court didn't stop there. Anticipating attempts to evade its holding, the Court stressed that "[w]hat cannot be done directly" under the Constitution likewise "cannot be done indirectly." *Id.* at 230 (quotations omitted). Strict scrutiny, the Court has long held, also governs "a classification that is ostensibly neutral but is a[] . . . pretext for racial discrimination." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). As elsewhere, then, "facially neutral" admissions and hiring policies "warrant[] strict scrutiny" if undertaken with the aim to achieve particular racial outcomes. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (quotations omitted). Schools of course remain free to implement race-neutral policies that further other kinds of diversity (geographic, socioeconomic, etc.). But they cannot "simply establish through . . . other means"—even facially neutral ones—the sort of race-focused "regime" the Court held unlawful in *SFFA*. 600 U.S. at 230. In short, "[e]liminating racial discrimination means eliminating all of it." *Id.* at 206.

2. The Current ABA Standards

Standard 206 seemingly asks law schools to defy the Court's clear directive. In its current form, the Standard all but *compels* law schools to consider race in both the admissions and employment contexts. The Standard reads, in full:

> (a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

> (b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.

ABA Standards at 15. Diversity is not without benefit, but the Constitution squarely rejects racial diversity as a legally sufficient justification for treating people differently because of the color of their skin. *SFFA*, 600 U.S. at 224. Standard 206's express calls to calibrate classes and faculty based on race fly in the face of the Constitution.

Take section (a)'s requirement of "concrete action" showing "a commitment to diversity and inclusion." That requirement seems reasonable standing alone, but the section then directs law schools to focus "particularly" on "racial and ethnic minorities" and show "a commitment to having a student body that is diverse with respect to . . . race[] and ethnicity." *ABA Standards* at 15. What sort of "concrete action" does the ABA have in mind? Standard 206 and its accompanying "[i]nterpretation[s]" provide some clues. Law schools should give "special concern [to] determining the potential of [underrepresented] applicants through the admission process"; undertake "special recruitment efforts"; and develop "programs that assist in meeting the . . . financial needs" of students from underrepresented groups. *Id.* But the Standard and its interpretations say nothing about how schools can lawfully implement "concrete action[s]" to achieve racial ends without unlawfully using race-based means. Nor could the ABA walk that line: If race-based admissions cannot satisfy strict scrutiny, *see SFFA*, 600 U.S. at 230, then neither can racially motivated recruitment or financial aid. Changing where or when racial discrimination happens does not shield it from constitutional review.

Section (b), Standard 206's employment provision, goes further still. While section (a) hints at a requirement of "achiev[ing]" diversity in some abstract sense, section (b) minces no words: It demands that law schools show their "commitment to diversity and inclusion" not simply by welcoming diversity, but by actually "*having* a faculty and staff that are diverse with respect to . . . race[] and ethnicity." *ABA Standards* at 15 (emphasis added). That explicit demand to make hiring decisions based on race is irreconcilable with the Fourteenth Amendment's command to "eliminate racial discrimination." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Section (b)'s race-based regime also runs headlong into Title VII of the Civil Rights Act of 1964, which outlaws race-based decisionmaking in employment. *See* 42 U.S.C. § 2000e-2(a). That sort of decisionmaking is just as illegal today as it was when Title VII was enacted. *See, e.g.*, Kan. & Tenn. Att'y Gen. Ltr. to Fortune 100 CEOs (July 13, 2023), https://perma.cc/88AY-QVDQ. As the U.S. Solicitor General's Office recently reaffirmed to the Supreme Court, "when an employment decision is made on the basis of race, that is [a] denial of equal treatment" and a violation of Title VII. Tr. of Oral Arg. at 46, *Muldrow v. City of St. Louis*, 144 S. Ct. 967 (2024) (No. 22-193).

The interpretations accompanying Standard 206's provisions only make matters worse. They double down on the Standard's obvious incompatibility with *SFFA* and Title VII, proclaiming that "[t]he requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is *not* a justification for a school's non-compliance with Standard 206." *ABA Standards* at 15 (emphasis added). The ABA—the accreditor of legal-education programs—thus directs law schools to consider race in a manner prohibited by the United States Constitution and federal and state law. The *American Bar Association*—an institution that publicly touts its commitment to setting the legal and ethical foundation for the American nation and celebrates its work advancing respect for the rule of law—tells law schools that if they follow the controlling law, they are not worthy of educating future lawyers. I cannot fathom how this anarchic language made its way into the standards for law-school accreditation. Its inclusion betrays a serious failure within the ABA. ABA standards do not carry get-out-of-federal-law-free status, nor does the ABA enjoy immunity from following the laws binding it as an accreditor. By requiring explicitly illegal consideration of race, the ABA is working hard to burden every law school in America with punitive civil-rights litigation. Further, if American legal culture internalizes the ABA's determination to ignore unwanted legal obligations, our profession, and our country, may never recover.

3. The Proposed Revisions

The proposed revisions to Standard 206 do little to solve these problems. As revised, the Standard would read:

> (a) A law school shall demonstrate by concrete actions a commitment to access to the study of law and entry into the profession to all persons, including those with identity characteristics that have led to disadvantages in or exclusion from the legal profession on the basis of race, color, ethnicity, religion, national origin, gender, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship, or socioeconomic background.
>
> (b) A law school shall demonstrate by concrete actions a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to race, color, ethnicity, religion, national origin, gender, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship, and socioeconomic background.

ABA, *Proposed Revisions to Standard 206 – Discussion Draft for February 2024 Meeting* at 1–2 (Feb. 21, 2024), https://perma.cc/FA64-4H2K (cleaned up) [hereinafter *Proposed Revisions*]. Just like the current Standard, the proposed revisions require

law schools to take "concrete actions" based on race—among other preferred "identity characteristics"—in both the admissions and employment contexts. But bundling race with other permissibly considered characteristics does not somehow make Standard 206's requirements any more constitutionally sound.

A narrow reading of the proposed revisions to 206(a) might suggest that the Standard simply prohibits discrimination against underrepresented groups, but revised Interpretation 206-1 makes clear that the Standard should be read broadly. The interpretation asserts that "[a]ny law that purports to prohibit consideration of any of the identity characteristics listed in Standard 206(a) and (b) in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206." *Proposed Revisions* at 2. It appears that the ABA is once again telling law schools that if they comply with binding nondiscrimination law, their accreditation is in jeopardy. Law schools are required to work around "legal constraints" by finding "means other than those prohibited by law" to achieve the goal, *id.*, but this seems like an impossible order when race is both the first identity characteristic listed for consideration by the Standard and flatly prohibited from consideration by the law.

The revised interpretations, presumably anticipating pushback, also provide that "[c]ompliance with Standard 206(b)"—the employment provision—"does not require a law school to have faculty and staff members from every identity category listed in the Standard." *Id.* But that language simply says that law schools need not meet certain quotas; it does nothing to relieve law schools from Standard 206's requirement to consider race in the hiring process. And neither the Standard nor the interpretations suggest how many "identity" boxes a law school must check to comply with the Standard. The Council needs to make clear that the consideration of race in hiring or admissions violates the Constitution and federal law, and that a law school's compliance with the Constitution and federal law will not adversely impact its accreditation.

4. The Need for Clarity

Standard 206, in both current and revised forms, forces law schools to play a high-stakes guessing game about how to pass ABA muster without violating the law. Even before *SFFA*, Standard 206's inscrutable requirements—which expressly do not "specif[y]" how schools are to comply, *ABA Standards* at 15; *Proposed Revisions* at 2—prompted questions from administrators. *See* ABA J., *How can law schools comply with faculty diversity accreditation standards? Some deans have questions* (Apr. 10, 2023), https://perma.cc/7Y48-M8V6. In the wake of that decision, many more questions are sure to come. Answering them wrong could mean losing the Council's approval—the sole route to accreditation for our nation's law schools. That outcome, in turn, has steep costs for the schools and their students. And of course, those costs are nothing compared to the harms suffered by those deprived of

educational and employment opportunities solely because their skin is the wrong color.

Anyone with an interest in the legal profession and students' well-being should be concerned that accreditation rests—and seemingly will continue to rest—on a tightrope walk between federal law, on one hand, and Section 206's contrary demands on the other. These concerns are all the more justified because schools' balancing acts will be judged behind closed doors, according to uncertain criteria, *see ABA Standards* at 15 (alluding to a handful of actions that will "typically" show a "commitment" to diversity); *Proposed Revisions* at 2 (same), by a Council that has not been shy about enforcing Standard 206 in the past, *see, e.g.*, ABA, *Notice of Finding of Significant Noncompliance with Standard 206* (Dec. 14, 2022), https://perma.cc/U9M2-4RJY (Hofstra University); ABA, *Notice of Finding of Significant Noncompliance with Standard 206* (Dec. 14, 2022), https://perma.cc/G92D-B7SB (University of Oregon).

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The bottom line: Whatever the intent behind Standard 206 might be, it cannot lawfully be implemented in its current or revised forms. The Supreme Court has made clear that well-intentioned racial discrimination is just as illegal as invidious discrimination. The "argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, and has been repeatedly rejected." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742 (2007) (citations omitted); *see also SFFA*, 600 U.S. at 213–14. We thus urge the Council to bring Standard 206 in line with federal law's prohibition of race-based admissions and hiring. Doing so will provide much-needed clarity for the law-school administrators who work hard to train future members of our profession.

Sincerely,

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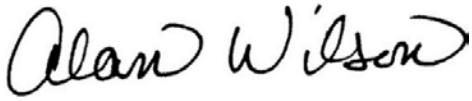

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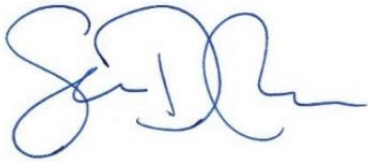

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