COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KY 40601
(502) 696-5300
FAX: (502) 564-2894

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OAG 24-1

Subject: Whether the Kentucky Council for Postsecondary Education may lawfully define "underrepresented minority" in race-exclusive terms.

Requested by: Jennifer Decker,
Kentucky State Representative

Written by: Lindsey Keiser,
Assistant Attorney General

Syllabus: Defining "underrepresented minority" in race-exclusive terms discriminates on the basis of race and, therefore, violates both the Equal Protection Clause and the Civil Rights Act of 1964.

Opinion of the Attorney General

There is an "inherent folly" in "trying to derive equality from inequality." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 203 (2023). Yet, that is what Kentucky public postsecondary institutions are being asked to accomplish under the current statutory and regulatory system that mandates they demonstrate progress toward equal opportunity by meeting race-based enrollment and graduation targets.

Funding and Programming Dependent on Adhering to Race-Based Policies

Under the current statutory and regulatory system in Kentucky, funding for public postsecondary institutions and approval for programming is dependent on the institutions demonstrating progress toward exclusively race-based policies.

The General Assembly has established a funding scheme for Kentucky public universities and the Kentucky Community and Technical College System ("KCTCS"). KRS 164.092. Under that scheme, thirty-five percent of total resources shall be distributed based on whether the institution can demonstrate success outcomes according to the factors laid out in the statute. KRS 164.092(6), (8). One of these

factors is how many Bachelor's degrees or credentials are earned by "underrepresented minority students." *Id*. at (6)(a), (8)(a). Additionally, the approval of any new program at a public postsecondary institution will be postponed "unless the institution has met its equal educational opportunity goals." KRS 164.020(19).

The Council on Postsecondary Education ("CPE") is tasked with establishing policies to make recommendations for postsecondary institution appropriations, KRS 164.020(9), and with establishing the equal educational opportunity goals that public postsecondary institutions must meet, KRS 164.020(19). CPE promulgated 13 KAR 2:060 to establish the equal opportunity goals. The regulation requires all state-supported postsecondary education institutions to develop a diversity plan that must be submitted to the CPE for approval. The 2016 Kentucky Postsecondary Education Policy for Diversity, Equity, and Inclusion ("2016 Policy") is incorporated by reference into the regulation, 13 KAR 2:060 § 5(1)(a), and serves as the current[1] policy. As such, the 2016 Policy "shall provide the framework and guidelines for developing" the public postsecondary institutions' diversity plans. 13 KAR 2:060 § 2.

The 2016 Policy defines "underrepresented minority" as "Students who categorized themselves as a) Hispanic or Latino, b) American Indian or Alaska Native, c) Black or African American, d) Native Hawaiian or Other Pacific Islander, or e) Two or more Races."[2] CPE uses this exclusively race-based definition to determine the progress of the state-supported postsecondary institutions. CPE's 2023 review of the progress made by Kentucky public postsecondary institutions explained, "[c]ampuses negotiate targets with CPE staff for the percentage of first-year students who are Black/African American and Hispanic; they also may establish targets for students who are classified as two or more races, American Indian or Alaskan Native, Native Hawaiian or other Pacific Islander, Asian, or for international students."[3] As a result, reportedly, all Kentucky public universities consider race in the admission process.[4]

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[1] Despite at least one news article suggesting the policy was revised in 2018, a staff member at CPE confirmed that the 2016 version is the current policy.

[2] *Kentucky Public Postsecondary Education Policy for Diversity, Equity and Inclusion*, KENTUCKY COUNCIL ON POSTSECONDARY EDUCATION (2016), *available at* https://cpe.ky.gov/policies/academicaffairs/diversitypolicy.pdf [hereinafter "2016 Policy"].

[3] *Best Practices in Diversity, Equity and Inclusion – A Review of Progress Made by Kentucky Public Postsecondary Institutions*, KENTUCKY COUNCIL ON POSTSECONDARY EDUCATION (July 2023) at 26, *available at* https://cpe.ky.gov/data/reports/2023DEIAssessment.pdf.

[4] There is no reason to believe KCTCS institutions are not doing the same. The CPE is monitoring the progress of all postsecondary institutions (universities and KCTCS) on their consideration of race in the admission process. *See id*. at 9 (explaining that a "key performance indicator[]" is the "percentage of total undergraduate enrollment that is African American or Black, Hispanic or Latino, and part of an underrepresented minority population. URM students also include American Indian or Alaskan natives, native Hawaiian or other Pacific Islanders, and students identifying as two or more races"). CPE's review breaks out the races into Black, Hispanic, and all other "underrepresented minorities." *See id*. at 12–24.

The Supreme Court's Decision in *Students for Fair Admissions*

The U.S. Supreme Court's 2023 decision in *Students for Fair Admissions* makes clear that the CPE defining "underrepresented minority" exclusively in terms of race, and accordingly requiring that Kentucky's state-funded postsecondary institutions set targets for how many students of a particular race they will enroll, retain, and graduate, violates the U.S. Constitution and the Civil Rights Act.

In *Students for Fair Admissions*, the Court explained that "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." 600 U.S. at 204 (citation omitted). Accordingly, the Court held that two prominent universities had engaged in unlawful racial discrimination by considering race as a factor in their admissions processes. *See id.* at 213–14. The Court rejected the universities' argument that there is "an inherent benefit in race *qua* race—in race for race's sake[,]" as based on the demeaning assumption that all minority students think alike. *Id.* at 220–21; *see also id.* at 254 (Thomas, J., concurring) ("Two white students, one from rural Appalachia and one from a wealthy San Francisco suburb, may well have more diverse outlooks . . . than two students from Manhattan's Upper East Side [who attended] its most elite schools, one of whom is white and the other of whom is black."). Indeed, the Court has "time and again forcefully rejected the notion that government actors may intentionally allocate preference to those 'who may have little in common with one another but the color of their skin.'" *Id.* at 220 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). "The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well." *Id.*

And while the Supreme Court has recognized that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" is one of two compelling interests[5] that may permit resorting "to race-based government action," *id.* at 207, that is not the interest motivating the current race-based targets in Kentucky. More than 40 years ago, the U.S. Department of Education's Office for Civil Rights (OCR) found that "the Commonwealth of Kentucky, in violation of Title VI of the Civil Rights Act of 1964, ha[d] failed to eliminate the vestiges of its former de jure racially dual system of public higher education."[6] To respond, in 1982, the Council on Higher Education ("CHE") developed

[5] The other is "avoiding imminent and serious risks to human safety in prisons, such as a race riot." *Students for Fair Admissions,* 600 U.S. at 207.

[6] 2016 Policy, *supra* note 2 at "Background"; *see also Final Report on the Commonwealth of Kentucky's Implementation of the Partnership Agreement between the Commonwealth of Kentucky and the U.S. Department of Education Office for Civil Rights* (Jan. 2, 2009) at 2, *available at*

The Commonwealth of Kentucky Higher Education Desegregation Plan. As explained in the 2016 Policy: "For the next 25 plus years, CHE and CPE focused the Desegregation Plan and its subsequent revisions on increasing the enrollment and success of African American students, increasing the number of African-American employees on campus, and enhancing Kentucky State University, with later versions also focusing on improving campus climate."[7] As a result, in 2009, the OCR released Kentucky from the remedial planning process.[8]

Thus, even if exclusively race-based enrollment and graduation quotas may have been permissible during the remediation period that was undertaken decades ago, they are certainly no longer justified because the OCR has long since determined that Kentucky made sufficient progress to eliminate the segregated systems.[9] Accordingly, there is no recognized compelling interest that can be asserted to justify the CPE's definition of underrepresented minority in race-exclusive terms and corresponding demand that Kentucky's public postsecondary institutions adhere to that definition to set race-based targets in order to receive funding and have new programs approved. Therefore, the CPE has violated the Equal Protection Clause.[10]

Similarly, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other financial assistance from the federal government. *See* 42 U.S.C. § 2000d *et seq*.[11] "Under Title VI, it is never permissible 'to say "yes" to one person . . . but to say "no" to another person' even in part 'because of the color of his skin.'" *Students for Fair Admissions*, 600 U.S. at 310 (Gorsuch, J., concurring) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 418 (1978) (Stevens, J., concurring in part and dissenting in part)). And, as this Office said when opining on a similar question, "never" means *never*. OAG 23-06. The prohibition on race-based discrimination under Title VI of the Civil Rights Act applies regardless of motivation or intention. *See Students for Fair Admissions*, 600 U.S. at 289 (Gorsuch, J., concurring). Accordingly, the CPE's race-exclusive definition of underrepresented

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https://cpe.ky.gov/documents/eeo-historicaldocs/compliance1964civilrightsact.pdf [hereinafter "Final Report"].

7 2016 Policy, *supra* note 2 at "Background."

8 *Id*.; Final Report, *supra* note 6 at 1 ("Through [OCR's] monitoring activities . . . , OCR has determined that the Commonwealth has met its commitments under the Agreement and is closing its monitoring of the Agreement as of the date of this report.").

9 *See id*. at 32.

10 That CPE urges postsecondary institutions to adopt "[r]ace-conscious enrollment and recruitment policies *that adhere to any and all applicable constitutional limitations,*" 2016 Policy, *supra* note 2 at "Focus Areas," does not alter this conclusion. CPE's race-exclusive definition of "underrepresented minority" and demand for race-based targets clearly puts the postsecondary institutions in a position where they must violate the constitutional limitations as explained in *Students for Fair Admissions*.

11 All of Kentucky's public universities receive federal funding.

minority—which demands public postsecondary institutions consider the race of students—violates Title VI of the Civil Rights Act.[12]

This is not to say that the Commonwealth does not have a legitimate interest in promoting diversity of perspective, experience, and opportunity within its colleges and universities. Moreover, there are appropriate and lawful ways to do so without resorting to the "sordid business" of "divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part). For example, postsecondary institutions may consider factors such as an applicant's socioeconomic background, whether an applicant is a first-generation college student, and whether an applicant is from underrepresented geographic areas. So long as "the student [is] treated based on his or her experiences as an individual," *Students for Fair Admissions*, 600 U.S. at 231, these are all tools legally available to promote meaningful diversity while broadening access to educational advancement.[13]

Conclusion

Equality will not arise out of inequality. Kentucky public postsecondary institutions will not achieve equality by being forced to treat students of different races differently. The CPE must no longer define "underrepresented minority" in race-exclusive terms.[14]

Russell Coleman
ATTORNEY GENERAL

Lindsey R. Keiser
Assistant Attorney General

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[12] Kentucky's Civil Rights Act demands that state agencies have a Title VI implementation plan and submit annual Title VI compliance reports. KRS 344.015. Therefore, a violation of Title VI of the federal Civil Rights Act is also a violation of the Kentucky Civil Rights Act.

[13] Of course, these or other factors cannot be used in a way that is intentionally a proxy for race. *See Students for Fair Admissions,* 600 U.S. at 230 ("'[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" (*quoting Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

[14] Indeed, there is nothing in KRS 164.092 that indicates the term was meant to be limited to racial minorities—and certainly not to only the races chosen by the CPE.