STATE OF TENNESSEE

Office of the Attorney General

JONATHAN SKRMETTI
ATTORNEY GENERAL AND REPORTER

P.O. BOX 20207, NASHVILLE, TN 37202
TELEPHONE (615)741-3491
FACSIMILE (615)741-2009

January 6, 2025

Submitted via email to NoticeandComment@AmericanBar.org

David A. Brennen
Council Chair
Council of the American Bar Association
Section of Legal Education and Admissions to the Bar
321 North Clark Street
Chicago, IL 60654

Re: Standard 206: Access to Legal Education and the Profession (previously titled "Diversity and Inclusion")

Dear Chair Brennen:

A coalition of State Attorneys General previously wrote to raise concerns about your 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*]. We pointed out that Standard 206, Diversity and Inclusion, fails to account for the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), 600 U.S. 181 (2023) and, by all appearances, directs law-school administrators to violate both the Constitution and Title VII. In the months that followed our letter, you proposed revisions to the standard that remedied many of our concerns. But when those revisions received pushback, the Council retreated and once again proposed a Standard that appears to perpetuate unlawful racial discrimination. The proposed revisions, much like the current Standard, impermissibly impose race-based admissions and hiring requirements as a condition of accreditation while leaving law schools in the dark about how to reconcile the Standard's dictates with their legal obligations. We appreciate that the Council has endeavored to make improvements to the current version of the Standard and

attempted to harmonize feedback from a variety of groups. But the law is clear, even as the new proposed Standard is not. We thus once again urge the Council to bring Standard 206 in line with federal law and with the ABA's purported commitment to set the legal and ethical foundation for the nation's attorneys and educational institutions. No law school should be confused about whether it should engage in race-based decisionmaking.

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

As you well know, the Supreme Court held in *SFFA* that the use of race in the admissions process at Harvard and the University of North Carolina 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 programs and decisions in higher education, the Court explained, simply cannot satisfy that standard. They "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" that 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

Our previous letter detailed how Standard 206 seemingly asks law schools to defy the Court's clear no-race-discrimination 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. 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. Yet in several respects, Standard 206 expressly and impermissibly calls on schools to calibrate classes and faculty based on race.

Take section (a)'s requirement of "concrete action" showing "a commitment to diversity and inclusion." That requirement 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. To do so, schools should show "special concern" for determining the "potential of" underrepresented "applicants through the admission process," undertake "special recruitment efforts" for such students, and develop "programs that assist in meeting the . . . financial needs" of students from underrepresented groups. *Id.* But 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) is plain: 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* Kan. & Tenn. Att'y Gen. Ltr. to Fortune 100 CEOs (July 13, 2023), https://perma.cc/88AY-QVDQ.

The interpretations accompanying Standard 206's provisions compound the problem. They flout *SFFA* and Title VII by 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). It is difficult to read this as anything other than a declaration that ABA preferences trump the Constitution and that law schools must defy federal statutes to obtain or maintain accreditation. But ABA standards cannot shield schools from governing federal law, nor does the ABA enjoy immunity from following the laws binding it as an accreditor. By requiring explicitly illegal consideration of race, the ABA risks exposing America's law schools to disruptive and potentially expensive civil rights litigation. The current standard creates tremendous risk for every law school, and its inconsistency with the Constitution and laws of the United States is particularly egregious given the context of legal education.

3. The Proposed Revisions

This latest round of proposed revisions to Standard 206 does little to solve these problems. As revised, the Standard would read:

> For purposes of promoting the legitimacy of the justice system, a law school shall demonstrate by concrete actions, a commitment to:
>
> (a) diversity, inclusion, and access to the study of law and entry into the legal profession for all persons including those with identities that historically have been disadvantaged or excluded from the legal profession due to race, color, ethnicity, religion, national origin, gender, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship, and/or socioeconomic background.
>
> (b) providing a supportive learning environment for all students, in part by working to achieve 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/or socioeconomic background. A supportive learning environment is one that promotes professionalism, mutual respect, and belonging for everyone in the law school community.

ABA, Mem., *Re: Matters for Notice and Comment: Standard 206* at 4–5 (Nov. 18, 2024), https://perma.cc/XWH9-TXRU [hereinafter *Proposed Revisions*]. The Proposed Revisions soften some of the problematic language in the current Standard. Yet as proposed, just as now, the revised Standard would require law schools to take

"concrete actions" based—at least in part—on race with respect to both its student body and its faculty.

Start with the student body. Revised Interpretation 206-1 sets out a range of ways that schools "typically" show their "commitment to providing access to the study of law and entry into the profession." *Proposed Revisions* at 5. The list includes: "admissions policies, processes, and practices aimed at evaluating each applicant's potential holistically"; "recruitment efforts targeted at groups that have been disadvantaged in or excluded from the legal profession"; "programs aimed at meeting the academic and financial needs of all students"; and "efforts aimed at creating a supportive learning environment for all students in the law school." *Id.* Finally, the Interpretation assures law schools that "[c]ompliance with Standard 206(a) does not require [them] to take race or any other identity characteristic into account in making an individual admissions decision." *Id.* And rightly so, since the Supreme Court has made it abundantly clear that this would violate the Constitution. *See SFFA*, 600 U.S. at 204. But while Interpretation 206-1 includes this caveat for admissions, it says nothing about the other "concrete actions" that Standard 206(a) "typically" entails. That silence is a problem. Because the Supreme Court has unambiguously declared that achieving racial diversity is not a "compelling interest" that authorizes race-based admissions, *see id.* at 214, it follows that this interest cannot support race-based recruitment or financial-aid decisions either.

Now consider employment. Revised Interpretation 206-2 notes that "[c]ompliance with Standard 206(b) does not require a law school to have faculty and staff members from every identity category listed in the Standard, nor does it require law schools to take race or any other identity characteristic into account in making individual employment decisions." *Proposed Revisions* at 5. Moving away from the current Standard's quota-like approach to composing faculties is a step in the right direction. But the revised Standard's race-directed language would still leave law-school administrators in a bind. On the one hand, they are required to "work[] to achieve a faculty and staff that are diverse with respect to race." *Id.* But on the other, they need not—and per constitutional and statutory law, *cannot*—consider race when hiring faculty or staff in any individual case. Absent is any explanation from the ABA about how schools can both aim to achieve racial diversity of faculty in the aggregate and disregard race when considering faculty. Schools deserve sound and lawful guidance from the ABA, not vague standards that conflict with themselves and the law.

4. The Need for Clarity

Standard 206, in both current and revised forms, forces law schools to play a 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—prompted questions from administrators. *See, e.g.*, ABA J., *How can law schools comply with faculty diversity*

accreditation standards? Some deans have questions (Apr. 10, 2023), https://perma.cc/7Y48-M8V6. And in the wake of that decision, many more questions are sure to come.

The Proposed Revisions, though, make no attempt to answer these questions. Far from clarifying how schools can comply with both the Standards and the law, these latest revisions double down on vagueness. "[S]o as not to unduly restrict schools' concrete actions," the revised Interpretations decline to "list" the "[s]pecific concrete actions required by a law school to satisfy the obligations of" Standard 206. *Proposed Revisions* at 5. And to make matters worse, "[t]he determination of a law school's satisfaction of such obligations" is not judged by any clear rubric, but instead "is based on the totality of the law school's actions." *Id.*

In practice, then, law schools must guess both at *what* concrete actions might satisfy Standard 206 and at *how many* of those actions they must take to ensure compliance. Guessing wrong could mean losing the Council's approval—the sole route to accreditation for our nation's law schools. And the stakes of this guessing game are high: loss of accreditation may mean a significant hit to prestige and to the availability of student loans, while an institutional violation of student or faculty civil rights may prompt litigation by private lawyers and federal enforcers, endanger an institution's compliance with Title VI and thus its ability to continue receiving federal funding, and even open the door to criminal prosecution under 18 U.S.C. §§ 241–242.

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 vague 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, 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).

The Council's continued refusal to simply and explicitly abandon race-based decisionmaking in light of *SFFA* threatens to further undermine the ABA's authority as an institution that purports to support the rule of law. At some point, too, it becomes difficult to square the federal government's trust in the Council to serve as the exclusive accreditor of law schools with the Standards' ambiguous posture toward compliance with federal law. We understand that many vocal and influential actors do not like the *SFFA* decision and would prefer to see continued race-based admissions and employment policies. But *SFFA* is the law, and it makes clear that race-based policies are illegal. If the Council continues to prevaricate, it will burn

the ABA's credibility, jeopardize the educational institutions it evaluates, and diminish the legitimacy of the law and the legal profession.

* * *

The bottom line: Whatever the intent behind Standard 206, 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 revise Standard 206 to unambiguously reflect 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.

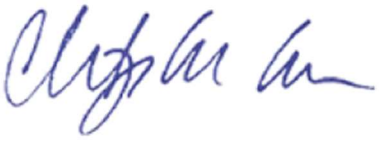
Sincerely,

Jonathan Skrmetti
Tennessee Attorney General and Reporter

Steve Marshall
Alabama Attorney General

Tim Griffin
Arkansas Attorney General

Ashley Moody
Florida Attorney General



Chris Carr
Georgia Attorney General

Raúl Labrador
Idaho Attorney General

Todd Rokita
Indiana Attorney General

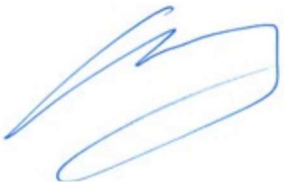
Brenna Bird
Iowa Attorney General

Kris W. Kobach
Kansas Attorney General

Russell Coleman
Kentucky Attorney General

Liz Murrill
Louisiana Attorney General

Lynn Fitch
Mississippi Attorney General



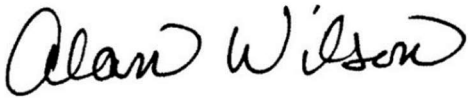
Andrew Bailey
Missouri Attorney General

Austin Knudsen
Montana Attorney General

Mike Hilgers
Nebraska Attorney General

Dave Yost
Ohio Attorney General

Gentner Drummond
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General

Marty Jackley
South Dakota Attorney General

Ken Paxton
Texas Attorney General

Patrick Morrisey
West Virginia Attorney General