

Enforcing the Law on Colorblind Admissions: Stop Unconstitutional Discrimination and Fund Better Alternatives

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Introduction

Incentives matter.

About Us

The Manhattan Institute is a think tank whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility.

Despite the U.S. Supreme Court's recent decision in *Students for Fair Admissions v. President and Fellows of Harvard College*,¹ the federal government continues, through Minority Serving Institution (MSI) programs,² to deny American students the equal protection of the law and to incentivize colleges and universities to violate the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.³ Through MSI programs, at least 10 federal agencies distribute hundreds of millions of dollars annually in grants conditioned on recipient schools' annual certification that they have obtained and maintained the required, arbitrary racial balances for the various MSI programs. For example, to qualify as a Hispanic Serving Institution, a school must certify that at least 25% of its student population is Hispanic; for the Alaska Native-Serving Institutions program, it must certify that at least 20% is Alaskan Native; for the Native Hawaiian-Serving Institutions program, that 10% is Native Hawaiian.⁴



That means MSI programs intentionally treat colleges and universities differently based on the races of their students (and the imputed race of the institution), which the federal government has lacked the power to do since 1954.⁵ Under modern jurisprudence, such intentional disparate treatment by a state can only ever be constitutional when narrowly tailored to achieve a compelling purpose;⁶ at least seven of the current nine Justices have agreed that the Constitution contains a parallel constraint on federal action.⁷ As constituted, there is no conceivable argument that MSI programs could meet that strict scrutiny standard.⁸

MSI programs' millions entice administrators to do what they must in order to qualify for funds. Following *Harvard*, most, if not all, recipient actions undertaken to intentionally pursue or maintain those racial balances are unambiguously unlawful. Moreover, the federal government's incentivizing those illegal and unconstitutional recipient actions through MSI programs exceeds Congress's spending power.⁹

Expressly, MSI programs do not include either federal support for Historically Black Colleges and Universities (HBCUs), for which the federal government does not dictate required student demographics, or for Tribal Colleges and Universities (TCUs), which are defined by their control and operation by sovereign, recognized tribes.

This issue brief presents four proposals for how Congress could fix this morass while better serving the apparent purposes of MSI programs. These proposals would amend the Higher Education Act to address the core version of the MSI programs. To the extent that the federal government provides MSI funding through separately codified statutes, full compliance with the Constitution will require parallel amendments to other provisions of the U.S. Code.

Proposal I: Abolish MSI Programs and Enhance the Pell Grant Program

Purpose

While MSI programs, conditioned as they are on schools obtaining and maintaining prescribed racial balances, violate the Constitution, one of their primary purposes—improving the educational options available to members of historically underserved communities—could be better served by shifting existing MSI program funding to a better-conceived, already-existing, perfectly legal federal program.

Since 1973, the federal government has provided need-based grants to students through the race-neutral Pell Grant program. Meanwhile, Congress's federal student loan program triggered decades of increases to the cost of higher education far outstripping inflation in the rest of the economy,¹⁰ and—in turn—the modern student-debt crisis. Over time, that student-debt-fueled explosion in the costs of higher education dramatically decreased the percentage of tuition covered by a maximum Pell Grant.¹¹ An increase in Pell Grant funding (and of the maximum Pell Grant award) would dramatically improve the degree to which the program makes higher education affordable for its needy recipients, while simultaneously reducing the student-debt our neediest students must incur to pay for higher education.

If the communities that MSI programs currently seek to assist remain comparatively economically disadvantaged, shifting funding from MSI programs (which can flow to institutions regardless of how well-to-do their students of any and all demographics may be) to the Pell Grant program (which provides grants directly to students and only to the needy students in *any* demographic) would disproportionately benefit those communities. The result should disproportionately improve the educational opportunities available to the neediest students in those demographic groups.

For these reasons, Proposal I would abolish the unconstitutional MSI programs and shift their funding into an expansion of the Pell Grant program.

Model Legislative Text

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Supercharge America’s Need-Based Tuition Authorization” (“SANTA”) Act of 2024.

SECTION 2. FINDINGS.

Congress makes the following findings:

- (a) For decades, Congress has funded a series of grant programs qualifying institutions of higher learning based on the certified racial or ethnic balance of their student bodies.
- (b) These programs intentionally treat colleges and universities differently based on the races of their students (and the imputed race of the institution).
- (c) The Supreme Court has held for 70 years that the federal government lacks the power to so discriminate, anywhere it cannot satisfy strict scrutiny.
- (d) These programs incentivize institutions of higher learning to engage in precisely the race-balancing that the Supreme Court has held to violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (as amended).
- (e) Decades of Supreme Court precedent have held that Congress’s spending power, while broad, is not unlimited. These cases have held that it would exceed the constitutional authority of Congress to condition federal funding on a violation of the Equal Protection Clause.
- (f) As constituted, these programs are not narrowly tailored to achieve any compelling federal interest, so they fail to comply with the Constitution’s constraint on federal power, which at least seven of the nine current Justices have found to mirror the Fourteenth Amendment’s Equal Protection Clause. They also condition federal funding on public recipients’ violation of the Equal Protection Clause, so exceed the spending power of Congress and cannot legally continue.
- (g) Meanwhile, rampant educational inflation has devalued the impact of the maximum grants available to needy American students through the federal government’s long-established, constitutionally sound, Pell Grant program.

- (h) Increasing both the funding available for Pell Grants and the maximum amount of a Pell Grant award promises to constitutionally increase the educational opportunities available to all needy Americans, regardless of race or ethnicity, including, specifically, the educational opportunities of Americans in those historically disadvantaged communities whose members continue to have—on average—comparatively lower socioeconomic statuses.
- (i) The SANTA Act of 2024 is revenue neutral.

SECTION 3. REPEAL OF AUTHORIZATION OF UNCONSTITUTIONAL GRANT PROGRAMS.

- (a) Congress, therefore, repeals the following sections of the Higher Education Act in their entirety:
 - (1) 20 U.S.C. §§1051–1059(b)
 - (2) 20 U.S.C. §§1059(d)–1059(g)
 - (3) 20 U.S.C. §1065(a)(2)(D)(i), subpart (I)
 - (4) 20 U.S.C. §§1067–1067d
 - (5) 20 U.S.C. §1067i
 - (6) 20 U.S.C. §1067j
 - (7) 20 U.S.C. §1101–1103g
- (b) Congress further amends the following sections of the Higher Education Act as follows:
 - (1) Existing subparts 20 U.S.C. §1065(a)(2)(D)(i)(II) and (III) are renumbered as subparts 20 U.S.C. §1065(a)(2)(D)(i)(I) and (II).
 - (2) 20 U.S.C. §1065(f)(1) is amended to read:

“give priority to an applicant who is receiving assistance under part B or has received a grant under part B of this subchapter within the five fiscal years preceding the fiscal year in which the applicant is applying for a grant under this section”
 - (3) 20 U.S.C. §1067e is amended to read:

Subject to the availability of appropriations to carry out this subpart, the secretary shall make grants to eligible partnerships (as described in Subsection (f)) to support the engagement of youth who are low-income individuals (with such term defined as an individual from a family whose taxable income for the preceding year did not exceed 150% of an amount equal to the poverty level determined by using criteria of poverty established by the Bureau of the Census) in science, technology, engineering, and mathematics through outreach and hands-on, experiential-based learning projects that encourage students in kindergarten through grade 12 who are low-income individuals to pursue careers in science, technology, engineering, and mathematics.
 - (4) 20 U.S.C. §1067g is amended as follows:
 - (A) In subpart (1), Congress repeals the word “and” from (1)(A) and repeals all of subpart (1)(B).
 - (B) In subpart (2), Congress repeals the words “are minority institutions” from (1)(B).



- (C) In subpart (3), Congress repeals the em-dash from subpart (3), repeals all of subpart (3)(A), repeals from subpart (3)(B) the “(B)” and all words following “engineers.”
 - (D) In subpart (4), Congress amends the language before subpart (4)(A) to read: “consortia of organizations that provide needed services to one or more institutions of higher learning, the membership of which may include...”
 - (E) In subpart (5), Congress amends subpart (5)(A) to read: “(A) at least one institution of higher education”;
- (5) 20 U.S.C. §1067k is amended as follows:
- (A) The following existing subparts are repealed:
 - 1. 20 U.S.C. §1067k(2)
 - 2. 20 U.S.C. §1067k(3)
 - 3. 20 U.S.C. §1067k(5)
 - (B) In 20 U.S.C. §1067k(6), Congress repeals the word “minority”;
 - (C) 20 U.S.C. §1067k(8) is amended to read: “The term ‘design projects’ means projects that assist institutions of higher learning that do not have their own appropriate resources or personnel to plan and develop long-range science improvement programs.”
 - (D) 20 U.S.C. §1067k(9)(A) is amended to read: “(A) a special project grant to an institution of higher learning that supports activities that: (i) improve the quality of training in science and engineering; or (ii) enhance the institutions’ general scientific research capabilities; or”
 - (E) 20 U.S.C. §1067k(9)(B) is amended to read: “(B) a special project grant to any eligible applicant that supports activities that: (i) provide a needed service to a group of eligible institutions of higher learning; or (ii) provide in-service training for project directors, scientists, and engineers from eligible institutions of higher learning”
- (6) 20 U.S.C. §1067q is amended to read:
- 20 U.S. Code §1067q—Investment in Historically Black Colleges
and Universities and Tribal Colleges and Universities
- (a) Eligible Institution. An institution of higher education is eligible to receive funds from the amounts made available under this section if such institution is:
 - (1) A part B institution (as defined in Section 1061 of this title); or
 - (2) A Tribal College or University (as defined in Section 1059c of this title).
 - (b) New Investment of Funds.
 - (1) In General
 - (A) Provision of Funds
- There shall be available to the secretary to carry out this section, from funds in the Treasury not otherwise appropriated, \$130 million for fiscal year 2020 and each fiscal year thereafter.



(B) Availability

Funds made available under subparagraph (A) for a fiscal year shall remain available for the next succeeding fiscal year.

(2) Allocation and Allotment

(A) Historically Black Colleges and Universities

\$100 million of the amounts made available under paragraph (1) for each fiscal year shall be available to eligible institutions described in Section (a)(1) and shall be made available as grants under Section 1062 of this title and allotted among such institutions under Section 1063 of this title, treating such amount, plus the amount appropriated for such fiscal year in a regular or supplemental appropriation act to carry out part B of this subchapter, as the amount appropriated to carry out part B of this subchapter for purposes of allotments under Section 1063 of this title, for use by such institutions with a priority for:

- (i) Activities described in paragraphs (1), (2), (4), (5), and (10) of Section 1062(a) of this title; and
- (ii) Other activities, consistent with the institution's comprehensive plan and designed to increase the institution's capacity to prepare students for careers in the physical or natural sciences, mathematics, computer science or information technology or sciences, engineering, language instruction in the less commonly taught languages or international affairs, or nursing or allied health professions.

(B) Tribal Colleges and Universities

\$30 million of the amounts made available under paragraph (1) for each fiscal year shall be available to eligible institutions described in Section (a)(2) and shall be made available as grants under Section 1059c of this title, treating such amount as part of the amount appropriated for such fiscal year in a regular or supplemental appropriation act to carry out such section, and using such amount for purposes described in Subsection (c) of such section.¹²

(7) In 20 U.S.C. §1068, Congress repeals:

- (A) from §1068(b)(2) the words "section 1057(b) or"; and
- (B) the entirety of §1068(d).

(8) In 20 U.S.C. §1068a:

- (A) Congress amends the title of §1068a to read: "Waiver authority with respect to institutions located in an area affected by a Gulf hurricane disaster"
- (B) Congress repeals existing Subsections (a) and (b).
- (C) Congress repeals existing subparts §1068a(c)(1)(A)(i) and (ii).



- (D) Congress amends the remainder of existing §1068a to begin with the remaining current text of §1068a(c)(1), relabeled as §1068a(a), with existing subparts (A), (B), and (C) relabeled as Subsections (a)(1)–(3) and with the remaining subparts of existing §1068a(c)(1)(A) relabeled as Subsections 1068(a)(1) and (2).
 - (E) Congress amends existing §1068a(c)(2)(A) to read as follows: “Affected institution. The term ‘affected institution’ means an institution of higher education that is a part B institution, as such term is defined in §1061(2) of this title, or as identified in §1063b(e) of this title.”
 - (F) Congress relabels the remainder of existing subpart §1068a(c)(2) as §1068a(b) (and relabels its subparts accordingly).
- (9) In 20 U.S.C. §1068b:
- (A) 20 U.S.C. §1068b(a)(2) is amended to read: “The secretary shall take care to ensure that representatives of Historically Black Colleges and Universities and Tribal Colleges and Universities are included as readers.”
 - (B) 20 U.S.C. §1068b(a)(3)(A) is amended to read: “explanations and examples of the types of activities referred to in §1062 of this title that should receive special consideration for grants awarded under part B”

(10) 20 U.S.C. §1068c(a) is amended to read:

“General Authority. The secretary may make grants to encourage cooperative arrangements with funds available to carry out part B, between institutions eligible for assistance under part B and institutions not receiving assistance under this subchapter; for activities described in §1062 of this title, so that the resources of the cooperating institutions might be combined and shared to achieve the purposes of such part and avoid costly duplicative efforts and to enhance the development of part B eligible institutions.”

(11) 20 U.S.C. §1068d(a) is amended to read: “Each institution that the secretary determines to be an institution eligible under part B may be eligible for waivers in accordance with Subsection (b).”

(12) 20 U.S.C. §1068h(a)(1) is repealed.

(13) 20 U.S.C. §1161j(f) is repealed.

(14) 20 U.S.C. §1161aa-1 is repealed.

SECTION 4. EXPANSION OF THE PELL GRANT PROGRAM.

(a) 20 U.S.C. §1070a(b)(7)(A)(iv) is amended as follows:

- (1) 20 U.S.C. §1070a(b)(7)(A)(iv)(XI) is amended to read: “\$1.17 billion for fiscal year 2021 and each succeeding fiscal year through and including fiscal year 2024.”
- (2) A new 20 U.S.C. §1070a(b)(7)(A)(iv)(XII) is added, reading: “For fiscal year 2025 and each succeeding fiscal year, the amount available in the preceding fiscal year, plus any additional amounts specifically appropriated for such fiscal year, plus all amounts whose authorization was terminated through the SANTA Act of 2024.”

(b) 20 U.S.C. §1070a(b)(7)(C)(iii) is amended to read:

“Award year 2018–19 through 2024–25: For each of the award years 2018–19 through 2024–25, the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall be equal to the amount determined under clause (ii) for award year 2017–18.”

(c) A new 20 U.S.C. §1070a(b)(7)(C)(iv) is enacted, reading:

“For award year 2025–26 and each subsequent award year, to the extent that sufficient funds are available to allow award amounts exceeding the amount determined under subparagraph (C)(iii) for purposes of subparagraph (B)(iii), the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall equal twice the amount determined under clause (ii) for award year 2017–18. To the extent that sufficient funds are not available to allow this adjustment in any school year, the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall remain equal to the amount determined under clause (ii) for award year 2017–18.”

(d) Existing 20 U.S.C. §1070a(b)(7)(C)(iv) is relabeled as §1070a(b)(y)(C)(v).

Proposal II: Abolish MSI Programs and Replace Them with Grants for Higher-Education Students Learning English

Purpose

The relevant statutes suggest that, through at least some MSI programs (including the oldest MSI program—the Developing Hispanic Serving Institutions [HSI] program),¹³ Congress seeks to support institutions of higher learning in developing programs that address specific needs of particular ethnic groups.¹⁴ Without relying on unconstitutional racial stereotyping, it is difficult to imagine how the “higher-education opportunities appropriate to the needs of” particular ethnicities might differ from those of any other Americans.

A charitable interpretation might hypothesize that a secondary congressional goal in crafting at least the HSI program (and likely in crafting the other, parallel MSI programs that Congress based on it) might have been rooted in the history of Hispanics living in non-English-speaking lands, and therefore often requiring greater resources as English-language learners. If Congress had such an intention, it might have intended these programs to fund the development of such resources at U.S. institutions of higher learning. However, that interpretation runs hard against historical development: most modern American Hispanics are fluent English speakers.¹⁵

To the extent that MSI programs are intended to serve such a secondary purpose, it could be better (and constitutionally) met through alternative means. MSI programs often appear to fund programming that fails to address any specific needs of their relevant populations.¹⁶ A recrafted program focusing directly on funding services addressing such needs of nonnative English speakers, instead of one funding schools that may or may not have substantial non-English-speaking populations among their racially balanced student bodies, would be far more likely to benefit target populations.¹⁷

For these reasons, Proposal II would abolish the unconstitutional MSI programs and shift their funding toward grants directly addressing the higher-educational needs of nonnative English speakers.

Model Legislative Text

Given the overlap of this proposal with that above, much of the necessary legislative text would mirror that of Proposal I. Specifically, Proposal II would make use of precisely the same language in Section 3 as does Proposal I. Accordingly, here, we provide only the alternate language for Sections 1, 2, and 4.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Support Provision for English-Learning Americans in Colleges and Universities” (“SPEAC”) Act of 2024.

SECTION 2. FINDINGS.

Congress makes the following findings:

- (a) For decades, Congress has funded a series of grant programs qualifying institutions of higher learning based on the certified racial or ethnic balance of their student bodies.
- (b) These programs intentionally treat colleges and universities differently based on the races of their students (and the imputed race of institution).
- (c) The Supreme Court has held for 70 years that the federal government lacks the power to so discriminate, anywhere it cannot satisfy strict scrutiny.
- (d) These programs incentivize institutions of higher learning to engage in precisely the race-balancing that the Supreme Court has held to violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (as amended).
- (e) Decades of Supreme Court precedent have held that Congress’s spending power, while broad, is not unlimited. These cases have held that it would exceed the constitutional authority of Congress to condition federal funding on a violation of the Equal Protection Clause.
- (f) As constituted, these programs are not narrowly tailored to achieve any compelling federal interest, so they fail to comply with the Constitution’s constraint on federal power, which at least seven of the nine current Justices have found to mirror the Fourteenth Amendment’s Equal Protection Clause. They also condition federal funding on public recipients’ violation of the Equal Protection Clause, so exceed the spending power of Congress and cannot legally continue.

- (g) Some of these unconstitutional programs were designed to use racial and ethnic metrics as a shorthand to identify the institutions at which large numbers of qualifying English-learning U.S. students confronted linguistic difficulties in pursuing higher education in predominantly English-speaking institutions.
- (h) That shorthand is no longer defensible (if it ever was) in a modern America where English proficiency no longer closely correlates with racial or ethnic identity.
- (i) Such concerns are better addressed directly than through institutional supports provided through a poorly targeted, clumsy, overinclusive demographic proxy.
- (j) The SPEAC Act of 2024 is revenue neutral.

SECTION 4. LAUNCH OF ENGLISH-LEARNING AMERICANS GRANT PROGRAM.

- (a) (1) Within 90 days of the enactment of this SPEAC Act of 2024, the secretary shall determine and report to Congress the cumulative amount of previously authorized programming whose authorization was terminated through this SPEAC Act of 2024.

(2) In succeeding years, annually, the secretary shall determine and report to Congress the amount available for the next fiscal year to fund English-Learning Americans Grants as provided by this SPEAC Act of 2024 (subject to any additional appropriations by Congress).
- (b) In addition to the findings in Section 2 above, Congress enacts the following as a replacement for Title V of the Higher Education Act, to be titled “English-Learning Americans Grant Program”:

20 U.S.C. §1101a—Purpose and Program Authority

- (1) Purpose. The purpose of this subchapter is to better support the academic needs of American English learners pursuing higher education.
- (2) The secretary shall provide grants and related assistance to institutions of higher education to enable such institutions to better support the academic needs of American English learners pursuing higher education.

20 U.S.C. §1101a—Definitions; Eligibility

- (3) Definitions

For the purposes of this subchapter:

- (A) The term “eligible institution” means an institution of higher education:
 - (I) that has an enrollment of qualifying English-learning American students as required by Subsection (b);
 - (II) that is—
 - 1. legally authorized to provide, and provides within a state, an educational program for which the institution awards a bachelor’s degree; or
 - 2. a junior or community college

- (III) that is accredited by a nationally recognized accrediting agency or an association determined by the secretary to be a reliable authority as to the quality of training offered; or that is, according to such an agency or association, making reasonable progress toward accreditation; and
 - (IV) that meets such other requirements that turn on no demographic factors of students, faculty, or administrators as the secretary may prescribe.
- (B) The term “full-time-equivalent students” means the sum of the number of students enrolled full-time at an institution plus the full-time equivalent of the number of students enrolled part-time (determined on the basis of the quotient of the sum of the credit hours of all part-time students divided by 12) at such an institution.
- (C) The term “junior or community college” means an institution of higher education that:
- (I) admits as regular students persons who are beyond the age of compulsory school attendance in the state in which the institution is located and who have the ability to benefit from the training offered by the institution;
 - (II) does not provide an educational program for which the institution awards a bachelor’s degree (or an equivalent degree) and
 1. provides an educational program of not less than two years in duration that is acceptable for full credit toward such a degree; or
 2. offers a two-year program in engineering, mathematics, or the physical or biological sciences, designed to prepare a student to work as a technician or at the semiprofessional level in engineering, scientific, or other technological fields requiring the understanding and application of basic engineering, scientific, or mathematical principles of knowledge.
- (D) The term “qualifying English-learning American students” means individuals counted toward an enrollment of qualifying English-learning American students for the purposes of Subsection (b).
- (4) Enrollment of Qualifying English-Learning American Students.

For the purposes of this subchapter, the term “enrollment of qualifying English-learning American students” means an enrollment at an institution at which:

- (A) at least 25% of the full-time-equivalent students enrolled meet the relevant elements to qualify as an English learner for the purposes of the E.S.S.A. (specifically, those meeting the requirements found in 20 U.S.C. §7801(20)(C) or (D));
- (B) all students count toward the 25% enrollment required by subpart (1) meeting the eligibility requirements found in 20 U.S.C. §1091(a).



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- (5) The secretary shall implement a system to verify an institution's enrollment of qualifying English-learning American students as a condition of any grant to be issued under this subchapter.

20 U.S.C. §1101b—Authorized Activities

- (6) Types of Activities Authorized

Recipients shall use grants awarded under this subchapter solely to fund educational programming designed to ease the educational difficulties faced by qualifying English-learning American students.

- (7) Authorized Activities

Grants awarded under this section shall be used for one or more of the following activities:

- (A) Tutoring, counseling, and academic student service programs designed to improve the academic success of qualifying English-learning American students (which may include remedial education and English-language instruction);
- (B) Acquiring software or hardware to assist qualifying English-learning American students' comprehension of English-language course materials; or
- (C) Other activities proposed in the application pursuant to §1101c of this title that:
 - (I) contribute toward carrying out the purposes of this subchapter; and
 - (II) are approved by the secretary as part of reviewing and accepting such applications.

20 U.S.C. §1101c—Duration of Grant

- (8) Award Period

The secretary may award a grant under this subchapter for five years.

- (9) Planning Grants

Notwithstanding Subsection (a), the secretary may award a grant under this subchapter for a period of one year for the purpose of preparation of plans and applications for a grant under this subchapter.

20 U.S.C. §1101d—Funding for English-Learning Americans Grants

For fiscal year 2025 and each succeeding fiscal year, the amount available to fund English-Learning Americans Grants shall be the amount available to fund such grants in the preceding fiscal year, plus any additional amounts specifically appropriated for such fiscal year, plus all amounts whose authorization was terminated through the SPEAC Act of 2024.

- (c) The provisions of the SPEAC Act of 2024 shall become effective for fiscal year 2025.

Proposal III: Replace MSI Programs with Block Grants to the States

Purpose

Congress appears to have intended MSI programs to serve multiple purposes, including broadening the educational opportunities of the disadvantaged and providing enhanced support to those learning English. We propose that Congress serve those ends by replacing MSI programs with block grants to the states, which would allow for greater flexibility in balancing the existing programs' purported ends and be legal. Congress could structure such block grants to flow to the same states where institutions currently receive MSI program funding or to a broader range of states, allowing the reallocated dollars to expand the educational opportunities of additional populations of economically disadvantaged Americans.

Model Legislative Text(s)

Much of the necessary legislative text would necessarily mirror that of Proposal I above. This proposal would make use of precisely the same language in Section 3 of Proposal I. Therefore, we provide here only the alternate language for Sections 1, 2, and 4.

Recognizing that a potential legislator could embrace different allocative goals for the potential block-grant program, we provide alternative versions of Sections 2 and 4, in order to: (a) maintain the existing allocation among the states of funds from MSI programs that the proposed block grants would replace; or (b) reapportion that allocation to reflect the relative neediness of the existing student populations of all the states.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "De-Classified Block Grant" Act of 2024.

SECTION 2. FINDINGS. [OPTION 1]

Congress makes the following findings:

- (a) For decades, Congress has funded a series of grant programs qualifying institutions of higher learning based on the certified racial or ethnic balance of their student bodies.
- (b) These programs intentionally treat colleges and universities differently based on the races of their students (and the imputed race of the institution).
- (c) The Supreme Court has held for 70 years that the federal government lacks the power to so discriminate, anywhere it cannot satisfy strict scrutiny.

- (d) These programs incentivize institutions of higher learning to engage in precisely the race-balancing that the Supreme Court has held to violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (as amended).
- (e) Decades of Supreme Court precedent have held that Congress's spending power, while broad, is not unlimited. These cases have held that it would exceed the constitutional authority of Congress to condition federal funding on a violation of the Equal Protection Clause.
- (f) As constituted, these programs are not narrowly tailored to achieve any compelling federal interest, so they fail to comply with the Constitution's constraint on federal power, which at least seven of the nine current Justices have found to mirror the Fourteenth Amendment's Equal Protection Clause. They also condition federal funding on public recipients' violation of the Equal Protection Clause, so exceed the spending power of Congress and cannot legally continue.
- (g) In America's federal system, the federal government is one of limited powers. Setting national educational policy has never properly been among them.
- (h) American education will be best served by restoring to the states greater control over education, including greater control over how best to use federal funds to improve the higher-educational opportunities available to needy Americans interested in pursuing higher education at institutions located in any particular state.
- (i) Nonetheless, it is perhaps best to recognize that the needs of the higher-educational systems maintained in particular states are unlikely to change dramatically year-over-year in any given year. Accordingly, it may be best to minimize unnecessary disruptions in the expected funding streams of America's institutions of higher education by allocating such funds among the states by reference to funding the institutions of higher education in each state cumulatively previously received through the unconstitutional programs terminated by this De-Classified Block Grant Act of 2024.
- (j) The De-Classified Block Grant Act of 2024 is revenue neutral.

SECTION 2. FINDINGS. [OPTION 2]

Congress makes the following findings:

- (a) For decades, Congress has funded a series of grant programs qualifying institutions of higher learning based on the certified racial or ethnic balance of their student bodies.
- (b) These programs intentionally treat colleges and universities differently based on the races of their students (and the imputed race of the institution).
- (c) The Supreme Court has held for 70 years that the federal government lacks the power to so discriminate, anywhere it cannot satisfy strict scrutiny.
- (d) These programs incentivize institutions of higher learning to engage in precisely the race-balancing that the Supreme Court has held to violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (as amended).
- (e) Decades of Supreme Court precedent have held that Congress's spending power, while broad, is not unlimited. These cases have held that it would exceed the constitutional authority of Congress to condition federal funding on a violation of the Equal Protection Clause.

- (f) As constituted, these programs are not narrowly tailored to achieve any compelling federal interest, so they fail to comply with the Constitution’s constraint on federal power, which at least seven of the nine current Justices have found to mirror the Fourteenth Amendment’s Equal Protection Clause. They also condition federal funding on public recipients’ violation of the Equal Protection Clause, so exceed the spending power of Congress and cannot legally continue.
- (g) In America’s federal system, the federal government is one of limited powers. Setting national educational policy has never properly been among them.
- (h) American education will be best served by restoring to the states greater control over education, including greater control over how best to use federal funds to improve the higher-educational opportunities available to needy Americans interested in pursuing higher education at institutions located in any particular state.
- (i) Nonetheless, a national interest continues to be served by the federal government funding state experiments in how best to meet those educational needs of needy Americans. That national interest will be best served by an allocation of funds among the states pegged to the relative number of needy students attending the institutions of higher learning in each state.
- (j) The De-Classified Block Grant Act of 2024 is revenue neutral.

...

**SECTION 4. LAUNCH OF DE-CLASSIFIED BLOCK GRANT PROGRAM.
[OPTION 1: Maximizing Predictability]**

- (a) In addition to the findings in Section 2 above, Congress enacts the following as a replacement for Title V of the Higher Education Act, to be titled “De-Classified Block Grant Program”:

20 U.S.C. §1101a—Purpose and Program Authority

- (1) Purpose. The purpose of this subchapter is to improve the educational opportunities available to Americans through a consistent system of federal aid, which avoids demeaning Americans through reducing them to nothing more than representatives of demographic categories.
- (2) The secretary shall provide block grants to the states to fund their public and/or private institutions of higher education’s efforts to improve the educational opportunities of students who are needy, lacking English proficiency, or both.

20 U.S.C. §1101b—Quantification and Allocation of De-Classified Block Grant Funds Among the States

- (A) (1) Within 90 days of the enactment of this De-Classified Block Grant Act of 2024, the secretary shall determine and report to Congress the cumulative amount of previously authorized programming whose authorization was terminated through this De-Classified Block Grant Act of 2024.
- (2) In succeeding years, annually, the secretary shall determine and report to Congress the cumulative amount of all De-Classified Block Grants funded in the preceding fiscal year, and thus available for the next fiscal year to fund De-Classified Block Grants as provided by this De-Classified Block Grant of 2024 (subject to any additional appropriations by Congress).

(3) For each fiscal year, for the purposes of this subchapter, the amounts that the secretary reports pursuant to either (1) or (2) of this subsection, plus any amounts newly appropriated by Congress for the purpose, shall constitute the authorized total amount of De-Classified Block Grant funding.

- (B) (1) Within 90 days of the enactment of this De-Classified Block Grant Act of 2024, the secretary shall determine and report to Congress the cumulative amount of previously authorized funding whose authorization was terminated through this De-Classified Block Grant Act of 2024 that flowed to institutions of higher education in each of the states in the last fiscal year preceding passage of the De-Classified Block Grant Act of 2024 (and the relative proportion in each of the states of the whole of all such funding flowing to institutions of higher education nationwide in the last fiscal year preceding passage of the De-Classified Block Grant Act of 2024). (2) In succeeding years, annually, the secretary shall determine and report to Congress the cumulative amount of De-Classified Block Grant funds sent to each state in the prior year (and the relative proportion in each of the states of the whole of all such funding flowing to institutions of higher education nationwide).

(C) Allocation of De-Classified Block Grants Among the States

For each fiscal year, the secretary shall allocate to each of the states the relative proportion reported by the secretary pursuant to Subsection (b) of the authorized funding for De-Classified Block Grants reported pursuant to Subsection (a).

- (b) The provisions of the De-Classified Block Grant Act of 2024 shall become effective for fiscal year 2025.

**SECTION 4. LAUNCH OF DE-CLASSIFIED BLOCK GRANT PROGRAM.
[OPTION 2: Equalizing Support for Needy Americans Across States]**

- (a) In addition to the findings in Section 2, above, Congress enacts the following as a replacement for Title V of the Higher Education Act, to be titled “De-Classified Block Grant Program”:

20 U.S.C. §1101a—Purpose and Program Authority

- (1) Purpose. The purpose of this subchapter is to improve the educational opportunities available to Americans through a consistent system of federal aid, which avoids demeaning Americans through reducing them to nothing more than representatives of demographic categories.
- (2) The secretary shall provide block grants to the states to fund their public and/or private institutions of higher education’s efforts to improve the educational opportunities of students who are needy, lacking English proficiency, or both.

20 U.S.C. §1101b—Quantification and Allocation of De-Classified Block Grant Funds Among the States

- (A) (1) Within 90 days of the enactment of this De-Classified Block Grant Act of 2024, the secretary shall determine and report to Congress the cumulative amount of previously authorized programming whose authorization was terminated through this De-Classified Block Grant Act of 2024.

(2) In succeeding years, annually, the secretary shall determine and report to Congress the cumulative amount of all De-Classified Block Grants funded in the preceding fiscal year, and thus available for the next fiscal year to fund De-Classified Block Grants as provided by this De-Classified Block Grant of 2024 (subject to any additional appropriations by Congress).

(3) For each fiscal year, for the purposes of this subchapter, the amounts that the secretary reports pursuant to either (1) or (2) of this subsection, plus any amounts newly appropriated by Congress for the purpose, shall constitute the authorized total amount of De-Classified Block Grant funding.

(B) (1) Within 90 days of the enactment of this De-Classified Block Grant Act of 2024, the secretary shall determine and report to Congress for each of the states the total number of students then enrolled in institutions of higher education located in such state qualifying, based on demonstrated financial need for a Pell Grant in the maximum amount (and the relative proportion in each of the states of the whole of all such students attending institutions of higher education nationwide).

(2) In succeeding years, annually, the secretary shall determine and report to Congress for each of the states the total number of students then enrolled in institutions of higher education located within such state qualifying, based on demonstrated financial need for a Pell Grant in the maximum amount (and the relative proportion in each of the states of the whole of all such students attending institutions of higher education nationwide).

(3) Allocation of De-Classified Block Grants Among the States

For each fiscal year, the secretary shall allocate to each of the states the relative proportion reported by the secretary pursuant to Subsection (b) of the authorized funding for De-Classified Block Grants reported in accordance with Subsection (a).

(b) The provisions of the De-Classified Block Grant Act of 2024 shall become effective for fiscal year 2025.

Proposal IV: Replace MSI Programs with Sunset Block Grants to the States

Purpose

Congress could blend the proposals outlined above, including redirecting funding to Pell Grants over time while winding down over a transition period any existing reliance on illegal MSI programs. For example, it could pass legislation: (i) abolishing MSI programs; (ii) replacing them *in the first instance* with sunset block grants scheduled to diminish over a transitional period; and (iii) over that transitional period, gradually shifting funding from such block grants into the Pell Grant program.

Model Legislative Text(s)

Given the overlap of this proposal with those above, much of the necessary legislative text would necessarily mirror that of Proposal III. This proposal would make use of precisely the same language in Section 3 of Proposal III above. Therefore, we provide here only the alternate language for Sections 1, 2, and 4.

We provide multiple alternative versions of Section 4, reflecting various potential legislative allocation preferences.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Supercharge America’s Need-Based Tuition Authorization, But After Block-Grant Years” Act of 2024 or the “SANTA BABY” Act of 2024.

SECTION 2. FINDINGS.**[OPTION 1: Initially Maximizing Predictability]**

Congress makes the following findings:

- (a) For decades, Congress has funded a series of grant programs qualifying institutions of higher learning based on the certified racial or ethnic balance of their student bodies.
- (b) These programs intentionally treat colleges and universities differently based on the races of their students (and the imputed race of the institution).
- (c) The Supreme Court has held for 70 years that the federal government lacks the power to so discriminate, anywhere it cannot satisfy strict scrutiny.
- (d) These programs incentivize institutions of higher learning to engage in precisely the race-balancing that the Supreme Court has held to violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (as amended).
- (e) Decades of Supreme Court precedent have held that Congress’s spending power, while broad, is not unlimited. These cases have held that it would exceed the constitutional authority of Congress to condition federal funding on a violation of the Equal Protection Clause.
- (f) As constituted, these programs are not narrowly tailored to achieve any compelling federal interest, so they fail to comply with the Constitution’s constraint on federal power, which at least seven of the nine current Justices have found to mirror the Fourteenth Amendment’s Equal Protection Clause. They also condition federal funding on public recipients’ violation of the Equal Protection Clause, so exceed the spending power of Congress and cannot legally continue.
- (g) In America’s federal system, the federal government is one of limited powers. Setting national educational policy has never properly been among them.
- (h) American education will be best served by restoring to the states greater control over education, including greater control over how best to use federal funds to improve the higher-educational opportunities available to needy Americans interested in pursuing higher education at institutions located in any particular state.

- (i) Nonetheless, it is perhaps best to recognize that the needs of the higher-educational systems maintained in particular states are unlikely to change dramatically year-over-year in any given year. Accordingly, it may be best to minimize unnecessary disruptions in the expected funding streams of America's institutions of higher education by allocating such funds among the states by reference to funding the institutions of higher education in each state cumulatively previously received through the unconstitutional programs terminated by this SANTA BABY Act of 2024.
- (j) Meanwhile, rampant educational inflation has devalued the impact of the maximum grants available to needy American students through the federal government's long-established, constitutionally sound, Pell Grant program.
- (k) Increasing both the funding available for Pell Grants and the maximum amount of a Pell Grant award promises to constitutionally increase the educational opportunities available to all needy Americans, regardless of race or ethnicity, including, specifically, the educational opportunities of Americans in those historically disadvantaged communities whose members continue to have—on average—comparatively lower socioeconomic statuses.
- (l) The SANTA BABY Act of 2024 is revenue neutral.

SECTION 2. FINDINGS.

[OPTION 2: Initially Equalizing Support for Needy Americans Across States]

Congress makes the following findings:

- (a) For decades, Congress has funded a series of grant programs qualifying institutions of higher learning based on the certified racial or ethnic balance of their student bodies.
- (b) These programs intentionally treat colleges and universities differently based on the races of their students (and the imputed race of the institution).
- (c) The Supreme Court has held for 70 years that the federal government lacks the power to so discriminate, anywhere it cannot satisfy strict scrutiny.
- (d) These programs incentivize institutions of higher learning to engage in precisely the race-balancing that the Supreme Court has held to violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (as amended).
- (e) Decades of Supreme Court precedent have held that Congress's spending power, while broad, is not unlimited. These cases have held that it would exceed the constitutional authority of Congress to condition federal funding on a violation of the Equal Protection Clause.
- (f) As constituted, these programs are not narrowly tailored to achieve any compelling federal interest, so they fail to comply with the Constitution's constraint on federal power, which at least seven of the nine current Justices have found to mirror the Fourteenth Amendment's Equal Protection Clause. They also condition federal funding on public recipients' violation of the Equal Protection Clause, so exceed the spending power of Congress and cannot legally continue.
- (g) In America's federal system, the federal government is one of limited powers. Setting national educational policy has never properly been among them.

- (h) American education will be best served by restoring to the states greater control over education, including greater control over how best to use federal funds to improve the higher-educational opportunities available to needy Americans interested in pursuing higher education at institutions located in any particular state.
- (i) Nonetheless, a national interest continues to be served by the federal government funding state experiments in how best to meet those educational needs of needy Americans. That national interest will be best served by an allocation of funds among the states pegged to the relative number of needy students attending the institutions of higher learning in each state.
- (j) Meanwhile, rampant educational inflation has devalued the impact of the maximum grants available to needy American students through the federal government’s long-established, constitutionally sound, Pell Grant program.
- (k) Increasing both the funding available for Pell grants and the maximum amount of a Pell Grant award promises to constitutionally increase the educational opportunities available to all needy Americans, regardless of race or ethnicity, including, specifically, the educational opportunities of Americans in those historically disadvantaged communities whose members continue to have—on average—comparatively lower socioeconomic statuses.
- (l) The SANTA BABY Act of 2024 is revenue neutral.

**SECTION 4. SUNSET DE-CLASSIFIED BLOCK GRANT PROGRAM.
[OPTION 1: Initially Maximizing Predictability]**

- (a) In addition to the findings in Section 2, above, Congress enacts the following as a temporary, sunset replacement for Title V of the Higher Education Act, to be titled “De-Classified Block Grant Program”:

20 U.S.C. §1101a—Purpose and Temporary Program Authority

- (1) Purpose. The purpose of this subchapter is to immediately improve the educational opportunities available to Americans through a consistent system of federal aid, which avoids demeaning Americans through reducing them to nothing more than representatives of demographic categories, and to eventually expand the higher-educational opportunities of all Americans.
- (2) For a period of five years following the effective date of this SANTA BABY Act, the secretary shall provide block grants to the states for use in funding their public and/or private institutions of higher education’s efforts to improve the educational opportunities of students who are needy, lacking English proficiency, or both.

20 U.S.C. §1101b—Quantification and Allocation of De-Classified Block Grant Funds Among the States

- (A) (1) Within 90 days of the enactment of this SANTA BABY Act of 2024, the secretary shall determine and report to Congress the cumulative amount of previously authorized funding whose authorization was terminated through this SANTA BABY Act of 2024.
- (2) In succeeding years, annually, the secretary shall determine and report to Congress the cumulative amount of all funding provided through the SANTA BABY Act of 2024 in the preceding fiscal year, and thus available for the next fiscal year as SANTA BABY Act of 2024 funding (subject to any additional appropriations by Congress).

- (3) For each fiscal year, for the purposes of this subchapter, the amounts that the secretary reports pursuant to either (1) or (2) of this subsection, plus any amounts newly appropriated by Congress for the purpose, shall constitute the authorized total amount of SANTA BABY Act of 2024 funding.
- (B) Following the effective date of this SANTA BABY Act of 2024, the authorized total amount of SANTA BABY Act of 2024 funding will be divided for authorized use as follows:
- (I) For fiscal year 2025, 100% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program.
 - (II) For fiscal year 2026, 80% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program, while 20% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
 - (III) For fiscal year 2027, 60% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program, while 40% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
 - (IV) For fiscal year 2028, 40% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program, while 60% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
 - (V) For fiscal year 2029, 80% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program, while 20% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
 - (VI) For all successive years, 100% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
- (C) (1) Within 90 days of the enactment of this SANTA BABY Act of 2024, the secretary shall determine and report to Congress the cumulative amount of previously authorized funding whose authorization was terminated through this SANTA BABY Act of 2024 that flowed to institutions of higher education in each of the states in the last fiscal year preceding passage of the SANTA BABY Act of 2024 (and the relative proportion in each of the states of the whole of all such funding flowing to institutions of higher education nationwide in the last fiscal year preceding passage of the SANTA BABY Act of 2024).
- (2) In succeeding years, annually, the secretary shall determine and report to Congress the cumulative amount of De-Classified Block Grant funds sent to each state in the prior year (and the relative proportion in each of the states of the whole of all such funding flowing to institutions of higher education nationwide).
- (D) Allocation of De-Classified Block Grants Among the States
- For each fiscal year in which Subsection (b) authorizes and makes available funding for the issuance of De-Classified Block Grants, the secretary shall allocate to each of the states the relative proportion reported by the secretary pursuant to Subsection (c) of the authorized funding for De-Classified Block Grants reported pursuant to Subsection (b).

(b) To enhance the Pell Grant program as contemplated in Subsection (a), Congress enacts the following further amendments to the Higher Education Act:

(1) 20 U.S.C. §1070a(b)(7)(A)(iv) is amended as follows:

(A) 20 U.S.C. §1070a(b)(7)(A)(iv)(XI) is amended to read: “\$1.17 billion for fiscal year 2021 and each succeeding fiscal year through and including fiscal year 2025.”

(B) A new 20 U.S.C. §1070a(b)(7)(A)(iv)(XII) is added, reading: “For each fiscal year following fiscal year 2025, the amount available in the fiscal year 2025, plus any additional amounts specifically appropriated for such fiscal year, plus all amounts made available for such fiscal year by 20 U.S.C. §1101b.”

(2) 20 U.S.C. §1070a(b)(7)(C)(iii) is amended to read:

“Award year 2018–19 through 2024–25: For each of the award years 2018–19 through 2024–25, the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall be equal to the amount determined under clause (ii) for award year 2017–18.”

(3) A new 20 U.S.C. §1070a(b)(7)(C)(iv) is enacted, reading:

“For award year 2025–26 and each subsequent award year, to the extent that sufficient funds are available to allow award amounts exceeding the amount determined under subparagraph (C)(iii) for purposes of subparagraph (B)(iii), the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall equal twice the amount determined under clause (ii) for award year 2017–18. To the extent that sufficient funds are not available to allow this adjustment in any school year, the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall remain equal to the amount determined under clause (ii) for award year 2017–18.”

(4) Existing 20 U.S.C. §1070a(b)(7)(C)(iv) is relabeled as §1070a(b)(y)(C)(v).

(c) The provisions of the SANTA BABY Act of 2024 shall become effective for fiscal year 2025.

**SECTION 4. SUNSET DE-CLASSIFIED BLOCK GRANT PROGRAM.
[OPTION 2: Initially Equalizing Support for Needy Americans Across States]**

(a) In addition to the findings in Section 2, above, Congress enacts the following as a temporary, sunset replacement for Title V of the Higher Education Act, to be titled “De-Classified Block Grant Program”:

20 U.S.C. §1101a—Purpose and Temporary Program Authority

(1) Purpose. The purpose of this subchapter is to immediately improve the educational opportunities available to Americans through a consistent system of federal aid, which avoids demeaning Americans through reducing them to nothing more than representatives of demographic categories, and to eventually expand the higher-educational opportunities of all Americans.

- (2) For a period of five years following the effective date of this SANTA BABY Act, the secretary shall provide block grants to the states for use in funding their public and/or private institutions of higher education's efforts to improve the educational opportunities of students who are needy, lacking English proficiency, or both.

20 U.S.C. §1101b—Quantification and Allocation of De-Classified Block Grant Funds Among the States

- (A) (1) Within 90 days of the enactment of this SANTA BABY Act of 2024, the secretary shall determine and report to Congress the cumulative amount of previously authorized funding whose authorization was terminated through this SANTA BABY Act of 2024.
(2) In succeeding years, annually, the secretary shall determine and report to Congress the cumulative amount of all funding provided through the SANTA BABY Act of 2024 in the preceding fiscal year, and thus available for the next fiscal year as SANTA BABY Act of 2024 funding (subject to any additional appropriations by Congress).
(3) For each fiscal year, for the purposes of this subchapter, the amounts that the secretary reports pursuant to either (1) or (2) of this subsection, plus any amounts newly appropriated by Congress for the purpose, shall constitute the authorized total amount of SANTA BABY Act of 2024 funding.
- (B) Following the effective date of this SANTA BABY Act of 2024, the authorized total amount of SANTA BABY Act of 2024 funding will be divided for authorized use as follows:
 - (I) For fiscal year 2025, 100% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program.
 - (II) For fiscal year 2026, 80% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program, while 20% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
 - (III) For fiscal year 2027, 60% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program, while 40% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
 - (IV) For fiscal year 2028, 40% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program, while 60% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
 - (V) For fiscal year 2029, 80% of authorized SANTA BABY Act of 2024 funding shall be made available to fund the De-Classified Block Grant Program, while 20% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
 - (VI) For all successive years, 100% of authorized SANTA BABY Act of 2024 funding will be made available to the Pell Grant program.
- (C) (1) Within 90 days of the enactment of this SANTA BABY Act of 2024, the secretary shall determine and report to Congress for each of the states the total number of students then enrolled in institutions of higher education located within such state qualifying, based on demonstrated financial need for a Pell

Grant in the maximum amount (and the relative proportion in each of the states of the whole of all such students nationwide attending institutions of higher education).

(2) In succeeding years, annually, the secretary shall determine and report to Congress for each of the states the total number of students then enrolled in institutions of higher education located within such state qualifying, based on demonstrated financial need for a Pell Grant in the maximum amount (and the relative proportion in each of the states of the whole of all such students nationwide attending institutions of higher education).

(3) Allocation of De-Classified Block Grants Among the States

For each fiscal year in which Subsection (b) authorizes and makes available funding for the issuance of De-Classified Block Grants, the secretary shall allocate to each of the states the relative proportion reported by the secretary pursuant to Subsection (c) of the authorized funding for De-Classified Block Grants reported in accordance with Subsection (b).

(b) To enhance the Pell Grant program as contemplated in Subsection (a), Congress enacts the following further amendments to the Higher Education Act:

(1) 20 U.S.C. §1070a(b)(7)(A)(iv) is amended as follows:

(A) 20 U.S.C. §1070a(b)(7)(A)(iv)(XI) is amended to read: “\$1.17 billion for fiscal year 2021 and each succeeding fiscal year through and including fiscal year 2025.”

(B) A new 20 U.S.C. §1070a(b)(7)(A)(iv)(XII) is added, reading: “For each fiscal year following fiscal year 2025, the amount available in the fiscal year 2025, plus any additional amounts specifically appropriated for such fiscal year, plus all amounts made available for such fiscal year by 20 U.S.C. §1101b.”

(2) 20 U.S.C. §1070a(b)(7)(C)(iii) is amended to read:

“Award year 2018–19 through 2024–25: For each of the award years 2018–19 through 2024–25, the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall be equal to the amount determined under clause (ii) for award year 2017–18.”

(3) A new 20 U.S.C. §1070a(b)(7)(C)(iv) is enacted, reading:

“For award year 2025–26 and each subsequent award year, to the extent that sufficient funds are available to allow award amounts exceeding the amount determined under subparagraph (C)(iii) for purposes of subparagraph (B)(iii), the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall equal twice the amount determined under clause (ii) for award year 2017–18. To the extent that sufficient funds are not available to allow this adjustment in any school year, the amount determined under this subparagraph for purposes of subparagraph (B)(iii) shall remain equal to the amount determined under clause (ii) for award year 2017–18.”

(4) Existing 20 U.S.C. §1070a(b)(7)(C)(iv) is relabeled as §1070a(b)(y)(C)(v).

(c) The provisions of the SANTA BABY Act of 2024 shall become effective for fiscal year 2025.

Endnotes

- ¹ *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. _ (2023).
- ² As used in this piece, MSI programs so incentivizing discrimination include the Developing Hispanic Serving Institutions Program, the Promoting Postbaccalaureate Opportunities for Hispanic Americans Program, the Alaska Native-Serving and Native Hawaiian-Serving Institutions Program, the Asian American or Native American Pacific Islander-Serving Institutions Program, the Native American-Serving Nontribal Institutions Program, the Predominantly Black Institutions Program, and the Master’s Degree Programs at Predominantly Black Institutions. They expressly do not include either Historically Black Colleges and Universities or Tribal Colleges and Universities, as those programs, unlike MSI programs, do not make funding contingent on the race or ethnicity of an institution’s students.
- ³ For more information on the structure and history of MSI programs, see Alexander M. Heideman, “Hispanic-Serving Institutions and Emerging Constitutional Issues,” *Federalist Society Review* 24 (July 24, 2023).
- ⁴ 20 U.S.C. § 1101a; 20 U.S.C. §§ 1059d(b)(2); 20 U.S.C. §§ 1059d(b)(4).
- ⁵ *Bolling v. Sharpe*, 347 U.S. 497 (1954).
- ⁶ *Harvard*, 143 S.Ct. at 2162 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), and *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 311 (2013)).
- ⁷ The Chief Justice said so, at least, in *Sessions v. Morales-Santana*, 198 L.Ed.2d 150, 159 n. 1 (2017), and (with Justice Alito) in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Justices Sotomayor and Kagan have done so repeatedly, including in *Sessions*. In *U.S. v. Madero*, 142 S.Ct. 1439, 1544 (2022), Justice Thomas agreed, anchoring this constraint in the Fourteenth Amendment’s citizenship clause. Justice Gorsuch’s concurrence in *Madero*, slightly less explicitly, does the same. In 2021, Justice Kavanaugh joined a concurrence to a denial of certiorari, which agreed that the “Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating” in terms paralleling the Court’s application of the Equal Protection Clause of the Fourteenth Amendment. *Nat’l Coal. for Men v. Selective Srv. Sys.*, 141 S.Ct. 1815, 1815 (2021).
- ⁸ To address only the flaws of only the three most likely candidates: (a) their structure is not narrowly tailored to advance any pedagogical benefit of diversity—each MSI program imposes a floor, but no ceiling, for the proportion of a student body that must have the dictated demography to qualify; (b) MSI programs fail to remedy any specific harms caused by recipient institutions’ history of discrimination—new schools with the dictated demography qualify for MSI grants without any such history; and (c) MSI programs cannot meet strict scrutiny as supporting the greater costs of educating in English those students learning the language, when eligibility turns on race and ethnicity, without regard to the English proficiency of any student.

- ⁹ *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (note the “unexceptionable proposition that the [spending] power may not be used to induce the states to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action ... would be an illegitimate exercise of Congress’ broad spending power”).
- ¹⁰ Elizabeth Tandy Shermer, “Policymakers Created the Student Loan Industry—and the Debt Crisis,” *Washington Post*, Aug. 5, 2021
- ¹¹ Cassandra Dortch, “Federal Pell Grant Program of the Higher Education Act: Primer,” Congressional Research Service (Sept. 9, 2021), p. 15, fig. 3.
- ¹² The disparity between this provision and that in subpart (A) is notable. While addressing it is beyond the purview of this proposal, when Congress amends the Higher Education Act, it may want to consider equalizing the treatment of Tribal Colleges and Universities with that of Historically Black Colleges and Universities.
- ¹³ Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992).
- ¹⁴ E.g., 20 U.S.C. 1103a(a)(5) (allowing secretary of education to waive the HSI program’s eligibility criteria pegged to a recipient’s percentage of enrolled students receiving “need-based assistance” if this will “substantially increase [the] higher-education opportunities appropriate to the needs of Hispanic Americans”).
- ¹⁵ “English Proficiency of Hispanic Population in the U.S., 2021,” Pew Research Center, Aug. 16, 2023.
- ¹⁶ E.g., Rachel F. Moran, “Diversity’s Distractions Revisited: The Case of Latinx in Higher Education,” *South Carolina Law Review* 73 (2022), UC Irvine School of Law Research Paper, no. 20 (2022), Texas A&M University School of Law Legal Studies Research Paper no. 23-10 (“the funds can be used for buildings and programs that serve all students and confer only incidental and uncertain benefits on Latinx students”). Moran cites Nicole Vargas and Julio Villa-Palomino, “Racing to Serve or Race-ing for Money? Hispanic-Serving Institutions and the Colorblind Allocation of Racialized Federal Funding,” *Sociology of Race and Ethnicity* 5, no. 3 (2019): 401–15 (“describing how successful HSI grant applications sought money ‘to fund new programs, infrastructure, distance-learning tools, endowments, and other causes’ that benefited the campus generally and did not mention Latinx students in particular”).
- ¹⁷ Whether MSI programs have *any* positive impact has been questioned, even by supporters of MSI programming. See William Casey Boland, “The Higher Education Act and Minority Serving Institutions: Towards a Typology of Title III and V Funded Programs,” *Education Sciences* 8, no. 1 (2018): 33. Note: (a) “there was no statistically significant difference after controlling for institutional selectivity between graduation rates [of] MSIs and non-MSIs” among “Hispanic and Black Students”; and (b) “Latino graduates of HSIs have earnings comparable to Latinos from non-HSIs, after controlling for institutional selectivity.” Boland cites Stella M. Flores and Toby J. Park, “The Effect of Enrolling in a Minority-Serving Institution for Black and Hispanic Students in Texas,” *Research in Higher Education* 56 (2015): 247–76; and Toby J. Park, Stella M. Flores, and Christopher J. Ryan Jr., “Labor Market Returns for Graduates of Hispanic Serving Institutions,” *Research in Higher Education* 59 (2018): 29–53.