Nos. 20-1199 & 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND FOURTH CIRCUITS

BRIEF FOR PETITIONER

William S. Consovoy
Counsel of Record
Thomas R. McCarthy
J. Michael Connolly
Cameron T. Norris
Bryan Weir
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com

Adam K. Mortara
125 S. Wacker Dr., Ste. 300
Chicago, IL 60606

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109

Alan M. Ruley
BELL, DAVIS & PITT, P.A.
P.O. Box 21029
Winston-Salem, NC 27120

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Counsel for Petitioner

QUESTIONS PRESENTED

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

3. The Constitution and Title VI ban race-based admissions unless they are "'necessary'" to achieve the educational benefits of diversity. *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 312 (2013). Can the University of North Carolina reject a race-neutral alternative because the composition of its student body would change, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

PARTIES TO THE PROCEEDING

Petitioner in both cases is Students for Fair Admissions. SFFA was plaintiff-appellant in No. 20-1199 and plaintiff in No. 21-707.

Respondent in No. 20-1199, and defendant-appellee below, is President & Fellows of Harvard College.

Respondents in No. 21-707, and defendants below, are the University of North Carolina; the University of North Carolina at Chapel Hill; the University of North Carolina Board of Governors; John C. Fennebresque; W. Louis Bissette, Jr.; Joan Templeton Perry; Roger Aiken; Hannah D. Gage; Ann B. Goodnight; H. Frank Frainger; Peter D. Hans; Thomas J. Harrelson; Henry W. Hinton; James L. Holmes, Jr.; Rodney E. Hood; W. Marty Kotis, III; G. Leroy Lail; Scott Lampe; Steven B. Long; Joan G. Macneill; Mary Ann Maxwell; W. Edwin McMahan; W.G. Champion Mitchell; Hari H. Math; Anna Spangler Nelson; Alex Parker; R. Doyle Parrish; Therence O. Pickett; David M. Powers; Robert S. Rippy; Harry Leo Smith, Jr.; J. Craig Souza; George A. Sywassink; Richard F. Taylor; Raiford Trask, III; Phillip D. Walker; Laura I. Wiley; Thomas W. Ross; Carol L. Folt; James W. Dean, Jr.; and Stephen M. Farmer. Respondents in No. 21-707 include, as intervenor-defendants below, Cecilia Polanco; Luis Acosta; Star Wingate-Bey; Laura Ornelas; Kevin Mills, on behalf of Q.M.; Angie Mills, on behalf of Q.M.; Christopher Jackson, on behalf of C.J.; Julia Nieves, on behalf of I.N.; Tamika Williams, on behalf of A.J.; Ramonia Jones, on behalf of R.J.; and Andrew Brennen.

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INTRODUCTION

"It is a sordid business, this divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part). "'[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in judgment). "'[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.'" *Fisher I*, 570 U.S. at 316 (Thomas, J., concurring).

"Our nation gave its word over and over again: it promised in every document of more than two centuries of history that all persons shall be treated Equally." *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1390 (Cal. 1980) (Mosk, J., dissenting). "Our constitution," as Justice Harlan recognized, "is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissent). The Court vindicated the promise of the Fourteenth Amendment in *Brown v. Board of Education*, 347 U.S. 483 (1954), rejecting "'any authority … to use race as a factor in affording educational opportunities.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (plurality). Ten years later, Congress passed Title VI of the Civil Rights Act to extend *Brown*'s command to private universities that accept federal funds.

Yet *Grutter v. Bollinger* abandoned the principle of racial neutrality that *Brown* and Title VI vindicated. *Grutter* did so by improperly affording broad deference to university administrators to pursue a diversity interest that is far from compelling. It endorsed racial objectives that are amorphous and unmeasurable and thus incapable of narrow tailoring. Unsurprisingly then, universities have used *Grutter* as a license to engage in outright racial balancing. These cases show that judicial scrutiny under *Grutter* is anything but strict.

Grutter should be overruled, as it satisfies every factor that this Court considers when deciding to overrule precedent. It was wrong the day it was decided, has spawned significant negative consequences, and has generated no legitimate reliance interests. In fact, in the admissions offices of elite universities, *Grutter* is already a dead letter.

Both Harvard and UNC—the oldest private and public colleges in America—have long ignored *Grutter*'s commands. Harvard's mistreatment of Asian-American applicants is particularly striking: Its admissions process penalizes them for supposedly lacking as much leadership, confidence, likability, or kindness as white applicants. That Harvard engages in admitted racial balancing and ignores race-neutral alternatives further proves that Harvard does not use race as a last resort.

Like Harvard, UNC rejects any race-neutral alternative that would change the composition of its

student body, even if those alternatives would improve overall student body diversity. But schools have no legitimate interest in maintaining a precise racial balance, and they have no compelling interest in preventing minor dips in average SAT scores. The same Fourteenth Amendment that required public schools to dismantle segregation after *Brown* cannot be defeated by the whims of university administrators.

In short, *Grutter* should be overruled; and neither Harvard nor UNC complies with it in any event. The Court should reverse the judgments below.

OPINIONS BELOW

The First Circuit's opinion is reported at 980 F.3d 157 and reproduced at Harv.Pet.App.1-98. The District of Massachusetts' opinion is reported at 397 F. Supp. 3d 126 and reproduced at Harv.Pet.App.99-270. The Middle District of North Carolina's post-trial findings of fact and conclusions of law are not yet reported but are reproduced at UNC.Pet.App.1-186.

JURISDICTION

The First Circuit's judgment was entered on November 12, 2020. SFFA timely petitioned for certiorari on February 25, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

The Middle District of North Carolina's final judgment was entered on November 4, 2021. SFFA timely petitioned for certiorari before judgment on November 11, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1) and §2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASES

A. Legal Background

Though *Grutter* cites it only once in passing, *see* 539 U.S. at 331, any discussion of racial classifications in education must start with *Brown*. Prior to *Brown*, this Court declared that segregated schools were constitutional. *Plessy* not only upheld the fiction of "separate but equal," but also cited segregated schools

as a particularly lawful application. 163 U.S. at 544-52. Only Justice Harlan dissented, famously observing that "[o]ur constitution is color-blind." *Id.* at 559. But seven of his colleagues disagreed, and *Plessy* was the law of the land for nearly sixty years. *See Gong Lum v. Rice*, 275 U.S. 78, 86-87 (1927) (explaining that *Plessy* had settled the legality of segregated schools).

Before rejecting it in *Brown*, this Court applied *Plessy*'s separate-but-equal doctrine several times. It held that Kentucky could ban integrated schools, both public and private. *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908). And it held that Mississippi could segregate white students from both their black peers and "the yellow races." *Gong Lum*, 275 U.S. at 86-87. This Court also found that certain jurisdictions were violating *Plessy*—either by refusing to provide a nonwhite school, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948), or by providing a nonwhite school that was grossly inferior, *e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950). In *Brown*, the United States initially suggested that the Court should continue this case-by-case approach. *See* U.S.-*Brown*-Br. 13-14, 1952 WL 82045.

Instead of continuing to apply *Plessy*, *Brown* overruled it. Separate but equal has "no place" in education, *Brown* explained, because separate is "inherently unequal." 347 U.S. at 495. The Court was not deterred by stare decisis. It openly acknowledged that its decision would have "wide applicability" and present enforcement "problems of considerable complexity."

Id. In terms of analysis, the Court simply observed that *Plessy* contradicted its "first cases" interpreting the Fourteenth Amendment, and denied that its cases applying *Plessy* somehow reaffirmed that precedent. *Id.* at 490-92.

Though *Brown* cited social-science evidence about the negative effects of segregation, *id.* at 494, the constitutional violation was the "government classification" itself—the failure to "'determin[e] admission to the public schools *on a nonracial basis*,'" *Parents Involved*, 551 U.S. at 746-47 (plurality). The "position that prevailed" in *Brown* is that the Constitution denies "'any authority … to use race as a factor in affording educational opportunities.'" *Id.* at 747. That position is "correct … as a matter of original public meaning." *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1835 n.10 (2020) (Kavanaugh, J., dissenting).

But *Grutter* carved out an exception to *Brown* for universities that use race to pursue "diversity." Before *Grutter* upheld this practice in 2003, this Court considered the legality of race-based admissions two other times. In *DeFunis v. Odegaard*, it dismissed the case as moot because the plaintiff was set to graduate. 416 U.S. 312, 319-20 (1974). Four Justices would have reached the merits, observing that "[f]ew constitutional questions in recent history have stirred as much debate." *Id.* at 350 (Brennan, J., dissenting).

This Court again tried to resolve the legality of race-based admissions in *Regents of University of California v. Bakke*, but its fractured decision resolved

nothing. Allan Bakke challenged the admissions process at a California medical school, where racial minorities were screened under a separate process and guaranteed 16 seats. 438 U.S. 265, 275, 277-78 (1978) (op. of Powell, J.). Four Justices thought this program violated neither Title VI nor the Constitution because policies designed to offset societal discrimination receive only intermediate scrutiny. *Id.* at 362-79 (Brennan, J., concurring in judgment in part and dissenting in part). Another four thought that Title VI prohibits all race-based admissions. *Id.* at 412-21 (Stevens, J., concurring in judgment in part and dissenting in part). And Justice Powell thought this program violated strict scrutiny, though a "holistic" admissions policy that pursued "diversity" would not. *Id.* at 305-20 (op. of Powell, J.). Justice Powell pointed to Harvard as a model, even appending a description of its admissions process to his opinion. *Id.* at 321-24 & n.55. (The record contained no evidence about Harvard's admissions process; Justice Powell simply accepted Harvard's description in its amicus brief.) But no opinion received five votes, so *Bakke* affirmed the California Supreme Court's judgment that the medical school's program was unlawful and that Bakke must be admitted. *Id.* at 271.

In his description of the Court's judgment, Justice Powell claimed that *Bakke* also reversed the "judgment enjoining" the medical school from "according any consideration to race in its admissions process." *Id.* at 272. But as Justice Stevens noted, this assertion confused judgments with opinions. *See id.* at 408-11 & n.2 (Stevens, J., concurring in judgment in part and dissenting in part). No court in *Bakke* had enjoined

the medical school from ever considering race in admissions: The trial court declared the school's *existing* program unlawful, and the state supreme court added that the school must admit Bakke. *Id.* This Court affirmed both of those judgments. That five Justices thought portions of the state supreme court's *opinion* were too broad, *id.* at 270 n.**, has nothing to do with the judgment, *see Black v. Cutter Lab'ys*, 351 U.S. 292, 297 (1956) ("This Court … reviews judgments, not statements in opinions.").

The Court's "failure to produce a majority opinion in *Bakke*" left the legality of racial preferences "unresolved," even on basic questions like the proper level of scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 221 (1995). Unsurprisingly, the circuits split on whether Justice Powell's opinion was binding. *Compare Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *and Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001), *with Smith v. Univ. of Wash.*, 233 F.3d 1188 (9th Cir. 2000), *and Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc). The Fifth Circuit, for example, held that "Justice Powell's view in *Bakke* is not binding" and that a university's interest in "diversity" cannot sustain race-based admissions. *Hopwood*, 78 F.3d at 944-48. This Court granted certiorari in *Grutter* to resolve the circuit split. 539 U.S. at 322.

Grutter held, for the first time, that diversity was a compelling interest that could sustain race-based admissions. *Id.* at 325. It did not resolve whether Justice Powell's opinion in *Bakke* was binding because five Justices now agreed that his analysis was correct.

Id. Specifically, universities can use race to pursue the "educational benefits" of diversity, broadly defined. *Id.* at 330. These educational benefits include better "'classroom discussion'" and better preparation for a diverse workforce. *Id.* at 330-32. Racial diversity achieves these benefits, according to *Grutter*, because the "experience of being a racial minority" is "likely to affect an individual's views." *Id.* at 333. At the same time, race does not dictate a person's views "'on any issue,'" so racial diversity combats "stereotypes." *Id.* In all events, this Court would "defer" to universities' "educational judgment that such diversity is essential" and "'presum[e]'" they are acting in "'good faith.'" *Id.* at 328-29. The Court grounded this deference in the "First Amendment" principle of "educational autonomy." *Id.* at 329.

Grutter also clarified that strict scrutiny applies, meaning race-based admissions must be narrowly tailored to achieve the educational benefits of diversity. *Id.* at 333-34. Race can "only [be] a 'plus,'" cannot "unduly harm" the majority, cannot be applied mechanically, must be considered alongside "all" forms of diversity, and cannot be an application's "defining feature." *Id.* at 334-39. Universities also must consider race-neutral alternatives in good faith and ensure that their race-based policies are "limited in time." *Id.* at 339-43. This "durational requirement" is important because the "'acid test'" of racial preferences is "'their efficacy in eliminating the need for any racial or ethnic preferences at all.'" *Id.* at 342-43. That principle led the Court to express its expectation that "25 years from now, the use of racial preferences will no

longer be necessary." *Id.* at 343. *Grutter* thus appeared to be the first constitutional precedent with "its own self-destruct mechanism." *Id.* at 394 (Kennedy, J., dissenting).

This Court has applied *Grutter* to the race-based admissions of three institutions: Michigan Law in *Grutter*, the University of Michigan in *Gratz*, and the University of Texas in *Fisher*. Michigan Law's program passed *Grutter*'s understanding of strict scrutiny. The law school sought "a critical mass of underrepresented minority students," a goal that this Court distinguished from a quota or outright racial balancing. *Id.* at 335-36. Over a six-year period, the number of underrepresented minorities at the law school "varied from 13.5 to 20.1 percent." *Id.* at 336. And though the law school received "'daily reports'" showing the racial composition of the admitted class, it "never gave race any more or less weight based on [this] information." *Id.* Nor did the law school need to try race-neutral alternatives that would require a "dramatic sacrifice" of diversity or academic quality, like a lottery or deemphasizing LSATs. *Id.* at 340. Throughout, *Grutter* compared the law school to Harvard, referencing the latter's description of its admissions process in *Bakke* as a model. *Id.* at 335-39.

While *Grutter* was a 5-4 decision for the university, *Gratz* was a 6-3 decision against. The University of Michigan's policy was not narrowly tailored because it mechanically gave every underrepresented minority "one-fifth of the points needed to guarantee admission." 539 U.S. at 270. As in *Grutter*, the Court again used Harvard as its yardstick. *Id.* at 269-73. Yet

several Justices from the majority in *Grutter* dissented in *Gratz*. Two noted that, except for its "candor," the university's point system differed little from what the law school was doing in *Grutter*. *Id.* at 295-98 (Souter, J., dissenting); *accord id.* at 303-05 (Ginsburg, J., dissenting). And three reiterated their view that, contrary to *Grutter*, racial preferences should not receive ordinary strict scrutiny. *See id.* at 298-302 (Ginsburg, J., dissenting); *id.* at 282 (Breyer, J., concurring in judgment).

This Court applied *Grutter* a third time in *Fisher*. The Court first remanded because the Fifth Circuit misapplied strict scrutiny. *Fisher I*, 570 U.S. at 314-15. Despite language in *Grutter* about deferring to universities and presuming good faith, this Court clarified that universities receive "no deference" on whether their race-based admissions are narrowly tailored. *Id.* at 311; *see Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 579 U.S. 365, 377 (2016) (*Fisher I* "clarified" *Grutter*). A seven-Justice majority agreed that "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts." *Fisher I*, 570 U.S. at 314.

When the Fifth Circuit ruled for the university again, this Court affirmed. In a 4-3 decision, this Court credited the university's assertion that it could not obtain a "critical mass" of underrepresented minorities without racial preferences. *Fisher II*, 579 U.S. at 382-83. It did not matter that almost all underrepresented minorities were admitted under Texas's top ten percent plan, not the university's "holistic" race-

based admissions. *Id.* at 382-85. And though the university could have increased minority enrollment by expanding that plan, this Court concluded that *Grutter* didn't require it to try. The top ten percent plan was not truly race neutral, this Court reasoned, because its "basic purpose" was "to boost minority enrollment." *Id.* at 385-86. And focusing on class rank might "compromise the University's own definition of the diversity it seeks." *Id.* at 386-87.

Beyond those holdings, however, *Fisher* broke no new ground. This Court repeatedly stressed that no party had asked it to reconsider *Grutter*. *E.g.*, *Fisher I*, 570 U.S. at 311, 313. And it warned that the case was "*sui generis*," "artificial," "narrow," and limited in terms of its "prospective" value. *Fisher II*, 579 U.S. at 377-79. The Court said it was resolving the legality of Texas's policy only as of "2008"—the year that Abigail Fisher was rejected, and only five years into *Grutter*'s 25-year grace period. *Id.* at 378-79. The Court was not resolving the legality of Texas's policy as of 2016, let alone going forward. *Id.* at 379-80, 388.

B. Harvard

1. History of Harvard Admissions

For much of its existence, Harvard admitted students who passed a required exam. Harv.JA1130. In the early 1920s, however, Harvard's leaders became alarmed by the growing number of Jewish students who were testing in. Harv.JA1131-32. Harvard "prefer[red] to state frankly" that it was "directly excluding all [Jews] beyond a certain percentage." Harv.

JA1132 But it recognized that an explicit quota would "cause at once some protest." Harv.JA1132.

Harvard thus created a new system of "holistic admissions"—the same kind of system it uses today. Harvard's new system was designed to "reduce the number of Jews" by "talking about other qualifications than those of admission examinations." Harv.JA1134. Instead of test scores, Harvard placed "greater emphasis" on "character," "fitness," and other subjective criteria. Harv.JA1107. By making its admissions priorities "less obvious," Harvard believed it could hide its true motives. Harv.JA1132. To the public, Harvard insisted that it used race in a narrow and responsible way: "[r]ace is a part of the record [but] by no means the whole record," and "no man will be kept out on grounds of race." Harv.JA542. If Jewish admissions declined, Harvard insisted, it would not be due to "race discrimination," but to "the failure of particular individuals to possess ... evidences of character, personality, and promise." Harv.JA543. And decline they did. As a result of Harvard's new admissions process, "the proportion of Jews in the freshman class … plunged" from "28 percent" to "under 15 percent." Karabel, *The Chosen: The Hidden History of Admission & Exclusion at Harvard, Yale, & Princeton* 172 (2005); *see* Harv.JA1570.

Fast forward to *Bakke*, where Harvard submitted an amicus brief touting its process as a blueprint for how to use race. Known as the "Harvard Plan," Harvard said its admissions process "treats each applicant as an individual." *Bakke*, 438 U.S. at 318 (op. of

Powell, J.). In reality, the Harvard Plan was "*inherently capable* of gross abuse" and had "*in fact been deliberately* manipulated for the specific purpose of perpetuating religious and ethnic discrimination." Dershowitz & Hanft, *Affirmative Action & the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385 (1979). After denying it for years, Harvard now admits that it used holistic admissions to discriminate against Jews. Harv. JA549, 785-86, 1570.

Yet Harvard makes the same claims about its use of race today as it did over the past century. According to Harvard, a student's race remains "one part of [a] whole-person review." Harv.JA567. And Harvard continues to consider wholly subjective criteria like an applicant's "personal qualities." *Compare* Harv. JA1126-27, *with* Harv.JA1559. But unlike other diversity factors, Harvard gives racial preferences to applicants who simply check the box for "African American" or "Hispanic" on their application. Harv. Pet.App.116; Harv.JA568-71, 900-01, 1071-72. In other words, Harvard awards racial preferences to African Americans and Hispanics "regardless of whether [they] write about that aspect of their backgrounds [in their applications] or otherwise indicate that [their race] is an important component of who they are." Harv.Pet.App.116. Though it "defies the law of mathematics," *Fisher II*, 579 U.S. at 410 n.4 (Alito, J., dissenting), Harvard insists that being white or Asian American is "never a negative" in its process, Harv.

JA784.[1] And despite the crucial role that it played in both *Grutter* and *Fisher*, Harvard denies that it uses race to achieve a "critical mass" of underrepresented minorities. Harv.JA1137. Harvard "never use[s]" the term critical mass, has no "definition of what constitutes critical mass," and "can't provide any range or quantification of what level of racial diversity is sufficient to achieve [its] educational goals." Harv.JA1137-38.

When evaluating applications, Harvard assigns scores in four "profile" ratings—academic, extracurricular, athletic, and personal—plus an "overall" rating. Harv.Pet.App.123-26. The academic, extracurricular, and athletic ratings are largely objective measures of performance that are based on detailed scoring instructions. Harv.JA1143-44. The "personal" rating, by contrast, is largely subjective. Until 2018, the sole instructions for assigning this score were:

1. Outstanding.
2. Very strong.
3. Generally positive.
4. Bland or somewhat negative or immature.
5. Questionable personal qualities.
6. Worrisome personal qualities.

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[1] SFFA uses the term "Asian American" only because Harvard does. Harv.JA1139. The term is incoherent, sweeping in "wildly disparate national groups" with little in common. Bernstein, *The Modern American Law of Race*, 94 S. Cal. L. Rev. 171, 182 (2021).

Harv.JA1144-45; *see* Harv.JA1358. For decades, the instructions were silent on whether admissions officers should consider an applicant's race when assigning the personal rating. Harv.Pet.App.138. During a 1990s investigation into Harvard's admissions practices, several admissions officers admitted that they considered race when assigning the personal rating. Harv.JA1358-59. And still today, the personal ratings assigned by Harvard reveal a clear racial hierarchy—with African Americans consistently getting the best personal ratings and Asian Americans consistently getting the worst. Harv.JA1790; *see* Harv.JA883-85.

The personal rating is supposed to measure qualities like "leadership," "self-confidence," "likeability," and "kindness." Harv.Pet.App.19. Yet Harvard determines whether applicants have these qualities based on the cold file: the application, essays, recommendation letters, writeups from alumni interviewers, and the like. Harv.Pet.App.112. Harvard's admissions office rarely meets applicants. Less than three percent of applicants (typically the most "well-connected") receive an in-person interview with the admissions office. Harv.Pet.App.118-119 & n.15.

Harvard gives especially large preferences to four groups: recruited athletes, legacies (the children of Harvard alumni), the children and relatives of large donors, and the children of Harvard faculty and staff. Harv.Pet.App.119; Harv.JA583-87, 1247-48, 1784. The parties refer to these applicants as "ALDCs." Harv.Pet.App.119. ALDCs receive "significant" preferences. Harv.Pet.App.168. Although they represent "only a small portion of applicants," they "account for

approximately 30% of Harvard's admitted class." Harv.Pet.App.169. ALDCs are overwhelmingly white. Harv.JA763-64, 1776.

2. Harvard's Response to SFFA's Lawsuit

In November 2014, SFFA sued Harvard in the District of Massachusetts for violations of Title VI. A 501(c)(3) voluntary membership organization, SFFA is dedicated to defending the right to racial equality in college admissions. Harv.Pet.App.55, 330. SFFA sued on behalf of its members, including Asian-American students who were denied admission to Harvard and who stand ready and able to apply to transfer if Harvard stops discriminating. Harv.Pet.App.330 & n.4.[2] The United States supported SFFA below, agreeing that the evidence proved Harvard is violating Title VI.

SFFA's lawsuit precipitated a flurry of activity at Harvard. Almost immediately, Harvard started admitting Asian-American applicants at a higher rate. In the five years before this suit, Harvard had never admitted Asian Americans at a materially higher rate than whites. Harv.Pet.170-71. But Harvard did so for the class of 2019—the first admissions cycle "after the allegations of discrimination that led to this lawsuit emerged." Harv.Pet.App.171 & n.44; Harv.JA886. As this case progressed toward trial, Harvard repeatedly announced that it had admitted record numbers of

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[2] SFFA still has such members for both Harvard and UNC, as explained in the Rule 32.3 motion it submitted today. *See generally Parents Involved*, 551 U.S. at 718.

Asian Americans compared to the year before. Harv. Dkt.452 at 29.

The litigation also revealed Harvard's longtime defiance of this Court's precedent. Despite *Grutter*'s command in 2003, Harvard had *never* examined "the viability of race-neutral alternatives." Harv.Pet.App. 153. It was not until June 2017—nearly three years into this litigation—that Harvard formed a committee that purported to consider eliminating race. Harv.Pet. App.152-53. That committee (comprised of three senior Harvard officials) did not collect new admissions data, take testimony, or run simulations. Harv.Pet. App.153. It instead "worked with Harvard's [litigation] attorneys," reviewed "the analyses done by the experts in this case," and issued a report "drafted by Harvard's [litigation] attorneys." Harv.Pet.App.153. Unsurprisingly, it found that Harvard had no workable race-neutral alternatives and approved Harvard's continued use of race. Harv.Pet.App.153. Harvard has not imposed an automatic sunset on its use of race or identified a date when it thinks racial preferences will no longer be necessary. Harv.JA1136, 1325. Harvard believes that an applicant's race is a critical component of understanding the "whole person." Harv.JA708, 997.

Finally, shortly before trial, Harvard amended its "reading procedures," its formal guidance for reviewing applications. Harv.JA1394. In the new procedures, Harvard provided—for the first time ever—"written guidance on how to consider race in the admissions process." Harv.Pet.App.121-22. Notably, the new procedures told admissions officers to use

race *only* when the application revealed "the effect an applicant's race or ethnicity has had on the applicant" and "not simply [because] an applicant has identified as a member of a particular race or ethnicity." Harv. JA1397. But the following month Harvard reversed itself, issuing new procedures that eliminated this instruction. Harv.JA1414, 1417. Harvard deleted this provision because this more limited use of race was "incorrect" and did "not reflect our practice." Harv. JA1070-72.

Harvard's amended procedures also created new guidelines for assigning the personal rating. The new procedures told admissions officers, for the first time ever, not to use race when assigning that rating. Harv.Pet.App.138. And it gave more detailed instructions on how to assign the personal rating, swapping Harvard's conclusory adjectives ("outstanding," "very strong," "bland") for lengthier descriptions. *Compare* Harv.JA1144-45, *with* Harv.JA1419. Harvard also warned its officers that "characteristics not always synonymous with extroversion are similarly valued" and so students who are "reflective, insightful and/or dedicated should receive higher personal ratings as well." Harv.JA1419. According to Harvard, these changes would "make sure [its] admissions officers do

not fall prey to implicit bias or racial stereotyping about Asians." Harv.JA1076-78.[3]

3. Trial Evidence

The district court held a three-week bench trial in late 2018.[4] The court heard from eighteen Harvard employees, four experts, and eight students. Harv. Pet.App.106. SFFA's experts were Peter Arcidiacono, a "highly respected economis[t]," and Richard Kahlenberg, a leading expert on race-neutral alternatives. Harv.Pet.App.166 n.40, 208-09 n.50. Until this case, Harvard had described its admissions process only in untested amicus briefs. The trial exposed how Harvard actually uses race.

a. Harvard's Constant Focus on Race

Harvard uses race at every stage of the admissions process. To begin, it recruits high-school students differently based on race. Harv.Pet.App.154-56.

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[3] SFFA never would have discovered these new procedures, except one of Harvard's witnesses inadvertently mentioned them at trial. That slip forced the district court to reopen discovery and recall the University's director of admissions to explain her "contradictory testimony." Harv.Pet.App.106 n.2; *see* Harv. JA1066-69.

[4] In the early stages of this case, the district court granted Harvard judgment on the pleadings on SFFA's claim that this Court should overrule *Grutter* and outlaw race-based admissions. Harv.Pet.App.326-27. In its motion, Harvard argued that "Supreme Court precedent ... left no doubt that diversity remains a compelling interest" and so the benefits of diversity were "not appropriate topics for litigation in this case." Harv.Dkt.186 at 10-11. Harvard conceded that "SFFA … may, at the appropriate time, ask the Supreme Court to overrule … *Grutter*." *Id.* at 10.

African-American and Hispanic students with PSAT scores of 1100 and up are invited to apply to Harvard, but white and Asian-American students must score at least 1310 to get an invitation. Harv.Pet.App.154; Harv.JA555-56, 1157. In some states (which Harvard calls "sparse country"), Asian-American applicants must score *higher* than all other racial groups, including whites, to be recruited by Harvard. Harv.Pet. App.154-55; Harv.JA563-65, 1157. When asked about that disparity, Harvard's long-serving dean of admissions, William Fitzsimmons, deployed a stereotype: Harvard preferred the white students who probably "lived [in sparse country] for their entire lives," not the Asian-American students who lived there for only "a year or two." Harv.JA562.

As admissions decisions are made, Harvard monitors the racial makeup of each class through "one-pagers." Harv.Pet.App.135-36. A one-pager is a document that compares admissions statistics in a handful of categories, one of which is race, from the current year to the prior year. *E.g.,* Harv.JA1280. A one-pager provides a real-time assessment of the class's current racial makeup. Harv.Pet.App.135-36; Harv.JA1777. Admissions leaders receive and review one-pagers throughout the admissions cycle, most frequently during the full-committee meetings where the ultimate admissions decisions are made. Harv.Pet. App.136; Harv.JA831-43, 1250-83, 1777. During the 2013-14 admissions cycle, for example, Harvard's admissions office generated 21 one-pagers, ten of which were reviewed during or in anticipation of full-committee meetings. Harv.JA843, 1777.

Dean Fitzsimmons regularly informs the entire office of the racial makeup of the class and how it compares to the year before. Harv.Pet.App.136-37; Harv.JA.744-45, 849-50, 901-02, 1244-45. If he believes a racial group is "underrepresented" compared to prior years, he will "talk about it and give it attention." Harv.JA745-46; Harv.Pet.App.136-37. If the process is nearing the end and a certain racial group is "surprisingly or notably underrepresented," the admissions office may "go back and look at those cases." Harv.JA.746; Harv.Pet.App.136-37. Harvard's "goal is to make sure" that there is not a "dramatic drop-off" in minority admissions from the prior year. Harv. JA747-49; Harv.Pet.App.136-37.

Harvard's focus on the class's racial makeup continues until final decisions are made. Harv.JA1275-83; *see* Harv.JA1243. Harvard uses race during the "lop" process—the winnowing of the tentatively admitted class to the final number. Harv.Pet.App.133. Before this process starts, Dean Fitzsimmons again tells admissions officers the class's current racial composition. Harv.Pet.App.133; Harv.JA861-62. Applicants on the bubble are placed on a "lop list" that includes only four datapoints: legacy status, recruited-athlete status, financial-aid eligibility, and race. Harv.Pet.App.133; Harv.JA853-54; Harv.JA1284. An applicant's race is a factor in whether he or she gets lopped. Harv.Pet.App.133. As the admissions process neared conclusion in 2013, for example, Fitzsimmons asked an admissions officer to bring him "his ethnic stats" (what he calls one-pagers) because the full committee needed to lop 28 more applicants. Harv.JA829-830, 1249.

With its meticulous attention to race, Harvard kept the racial makeup of its classes remarkably stable for the decade before this lawsuit.

Share of Students Admitted to Harvard by Race			
	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%
Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Harv.JA1770. This "manifest steadiness" in "the racial composition of successive admitted classes," the United States observed below, "speaks for itself." CA1. U.S.Br. 8-9, 2020 WL 1329780.

b. Harvard's Preferences for Underrepresented Minorities

Harvard's data revealed astonishing racial disparities in admission rates among similarly qualified applicants. SFFA's expert testified that applicants with the same "academic index" (a metric used by Harvard based on test scores and GPA) had widely different admission rates by race.

Admit Rates by Race/Ethnicity and Academic Decile

Academic Decile	White	Asian American	African American	Hispanic	All Applicants
10	15.3%	12.7%	56.1%	31.3%	14.6%
9	10.8%	7.6%	54.6%	26.2%	10.4%
8	7.5%	5.1%	44.5%	22.9%	8.2%
7	4.8%	4.0%	41.1%	17.3%	6.6%
6	4.2%	2.5%	29.7%	13.7%	5.6%
5	2.6%	1.9%	22.4%	9.1%	4.4%
4	1.8%	0.9%	12.8%	5.5%	3.3%
3	0.6%	0.6%	5.2%	2.0%	1.7%
2	0.4%	0.2%	1.0%	0.3%	0.5%
1	0.0%	0.0%	0.0%	0.0%	0.0%

Harv.JA1793-94; Harv.Pet.App.179-80. For example, an Asian American in the fourth-lowest decile has virtually no chance of being admitted to Harvard (0.9%); but an African American in that decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%). Harv.JA1793.

SFFA's detailed regression analysis showed that Harvard gives "substantial" preferences to African-American and Hispanic applicants. Harv.JA893-94, 1797. Harvard's expert, David Card, agreed. If Harvard eliminated racial preferences and adopted no race-neutral alternatives, Card found that the African-American share of the class would fall from 14% to 6% and the Hispanic share would fall from 14% to 9%. Harv.Pet.App.209-10; Harv.JA1821. In absolute terms, race was "determinative" for at least "45% of all admitted African American and Hispanic applicants"—or "nearly 1,000 students" over a four-year period. Harv.Pet.App.209-10.

Harvard's expert also testified that race gives the African-American and Hispanic applicants who have a real shot at getting into Harvard a "big increase in the probability of admission." Harv.JA1773, 1816; *see* Harv.JA1046-55. For competitive African-American applicants, the boost they get for race is comparable to the boost an applicant would get for scoring a "1" on the academic, extracurricular, or personal rating. Harv.JA1773, 1816. Scoring a "1" is incredibly rare. Only 0.45% of applicants receive a "1" on the academic rating; 0.31% receive a "1" on the extracurricular rating; and 0.03% receive a "1" on the personal rating. Harv.JA1393; *see also* Harv.JA1392. These scores are awarded for rare feats like authoring "original scholarship," obtaining "near-perfect scores and grades," or winning "national-level" awards. Harv.JA1143-44.

c. Harvard's Penalties for Asian Americans

Asian Americans have been the victims of horrific racial discrimination in this country. *E.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Korematsu v. United States*, 323 U.S. 214 (1944). Today, Asian Americans continue to face explicit and implicit bias. Harv.Pet. App.160; Harv.JA858, 923-24. They are stereotyped as timid, quiet, shy, passive, withdrawn, one-dimensional, hard workers, perpetual foreigners, and "model minorities." Harv.Pet.App.160; Harv.JA1076, 1367-68.

Asian Americans applying to college have not escaped this discrimination. Harv.JA916-22. Many universities, like Harvard, have employed some form of

"personal rating" that "hinges on the subjective evaluation of a particular admissions officer." Harv.JA918. These subjective evaluations have been the "downfall of many Asian-American applicants" because "many admissions officers believe in stereotypes that work against Asian-American[s]." Harv.JA918. Universities believe that Asian Americans are "over-represent[ed]," have "narrow career interests" like medicine and science, and are overly "passive." Harv. JA919-21. Asian Americans are told that "writing an Asian immigrant story" is "overdone, … not compelling, not interesting." Harv.JA968.

For decades, Harvard has faced criticism that its process discriminates against Asian Americans. In 1990, the U.S. Department of Education's Office of Civil Rights investigated Harvard and found that similarly qualified Asian Americans were admitted to Harvard at a "significantly lower" rate than whites. Harv.JA1374-77. OCR also found that Harvard had no "specific criteria for measuring or assessing" race, no "instructions for determining how much weight" race should receive, and no instructions for "where the weight [of race] is to be applied in the admissions process." Harv.JA1351. As a consequence, although some admissions officers claimed that race affected only the overall rating, others admitted that race affected how they scored all four profile ratings, including the personal rating. Harv.JA1358-59. Most concerning, OCR found that Harvard's officers were deploying "recurring characterizations attributed to Asian-American applicants," such as "'quiet/shy, science/math oriented, and hard workers.'" Harv.JA

1367; *e.g., id.* ("He's quiet and, of course, wants to be a doctor.").

Yet Harvard felt vindicated by the investigation because OCR ultimately concluded that the difference in admissions rates between whites and Asian Americans could be explained by Harvard's legacy and athlete preferences, which largely benefited white applicants. Harv.JA1389. Harvard thus did nothing to remedy OCR's other troubling findings. It "did not hold a meeting or otherwise require that its admissions officers modify their evaluation practices." Harv. Pet.App.158. Harvard instead worried about optics: it warned its admissions officers to be more careful because their "comments may be open to public view at a later time." Harv.JA1151; *see* Harv.JA696-97.

The issue arose again in December 2012 after David Brooks published an article in the New York Times suggesting that Harvard has an Asian quota. Harv.Pet.App.140-41. In response, Harvard asked its Office of Institutional Research to research Brooks' claims. Harv.Pet.App.141. OIR is a "university-wide office that provides statistical analysis." Harv.Pet. App.141 n.26. Its objective is "to offer accurate, timely, and digestible research ... with the goal of promoting informed decision-making and furthering the core missions of the university." Harv.Pet.App.141 n.26.

In 2013, OIR created a report entitled "Admissions and Financial Aid at Harvard College." Harv. JA1175-1217. The report sought to answer the question, "Does [Harvard's] admissions process disadvan-

tage Asians?" Harv.JA1177. Examining Harvard's admissions data, OIR found that "predicted Asian admission to Harvard" is lower because of the personal rating. Harv.JA612-13, 1208. OIR's report suggested possible "next steps" to "further address the question of bias," including sharing the report with Harvard's leadership and performing additional research "around the personal rating." Harv.JA1210-12. OIR presented this report to Fitzsimmons and to other members of the admissions office. Harv.Pet.App.144-45; Harv.JA612-13. But Dean Fitzsimmons did not show it to anyone else; nor did he discuss the report with any other Harvard leaders. Harv.Pet.App.145; Harv.JA621-22, 628-29.[5]

A few weeks later, Fitzsimmons asked OIR to investigate a different issue: whether OIR could provide "empirical proof" that Harvard gives an admissions "tip" to low-income applicants Harv.JA624; Harv.Pet.App.145-46. About a month later, OIR sent its findings to Fitzsimmons. Harv.App.146. Although OIR found that Harvard did provide a preference for low-income students, it warned Fitzsimmons not to "shar[e] these results publicly." Harv.JA1227; *see also* Harv.JA624-26, 1390-91 (issuing a similar warning to Harvard public relations). According to OIR, "[w]hile we find that low income students clearly receive a 'tip'

[5] Around the same time, OIR created a second draft report, which found "evidence that Asians are disadvantaged in the admissions process" and that Harvard's "personal rating" was "driv[ing] some of the demographic differences we see." Harv. JA846, 1159. The district court thought this report was likely never shared with the admissions office. Harv.Pet.App.142 n.28.

in the admissions process, our descriptive analysis and regression models also sho[w] that the tip for legacies and athletes is larger and that there are demographic groups that have negative effects." Harv. JA1227. OIR included a chart showing that Asian Americans were the only "demographic group" with "negative effects":

Table: Logistic Regression Predicting Admission from Classes 2009 through 2016

Variable	Coefficient Estimate	P-value
Athletic rating of 1	6.33	0.00
Personal Rating 1 or 2	2.41	0.00
Legacy	2.40	0.00
African American	2.37	0.00
Native American	1.73	0.00
Extracurricular 1 or 2	1.58	0.00
Academic 1 or 2	1.31	0.00
Standardized Academic Index	1.29	0.00
Hispanic	1.27	0.00
CSS self-reported income less than or equal to $60K	0.98	0.00
International	0.24	0.00
Asian	-0.37	0.00
Constant	-6.23	0.00
Unknown/Other	-0.03	0.41
Female	0.00	0.87

N = 192,359; Pseduo R2 = 0.45

Harv.JA1226-27 (page break omitted). OIR officials later confirmed that this memorandum provided significant evidence that being Asian American is "negatively correlated" with admission to Harvard. Harv. JA716.[6]

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[6] Earlier drafts of the memorandum were even blunter. *See* Harv.JA1223 ("On the flip side, we see a negative effect for Asian applicants."); Harv.JA1220 (similar).

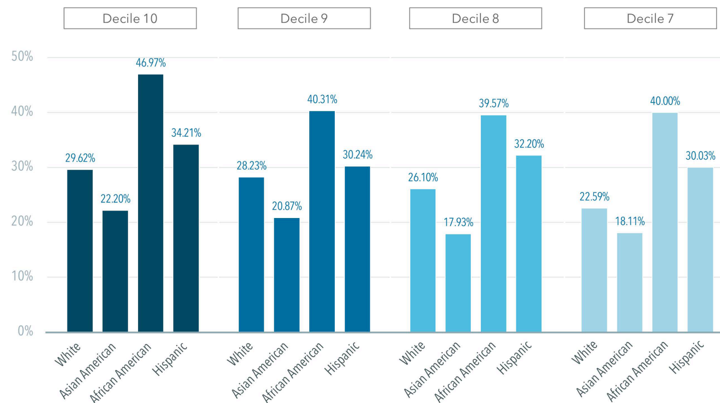
Shortly thereafter, OIR sent Dean Fitzsimmons a follow-up report, which again showed a "negative chance of getting into Harvard by virtue of being Asian." Harv.JA.651; *see* Harv.JA1239-40; Harv.Pet. App.148-49. Despite OIR's findings, Harvard ordered no additional research and made no changes to its admissions process. Harv.Pet.App.150. Based on his "experience" and "review of the data," Dean Fitzsimmons felt confident "that the Admissions Office was [not] biased." Harv.Pet.App.150.

The undisputed expert testimony at trial confirmed OIR's findings. Harvard admits Asian Americans at similar or lower rates than whites, even though Asian Americans receive higher academic scores, higher extracurricular scores, and higher alumni-interview scores. Harv.Pet.App.170-72; Harv. JA1787. This anti-Asian penalty is starkest in the personal rating. According to an unrebutted model of that rating, Asian Americans receive the lowest personal ratings among all races, and the "negative relationship between Asian American identity and the personal rating" is "statistically significant." Harv. Pet.App.189-90; *see* Harv.Pet.App.172-73; Harv.JA 1787. Given that this racial penalty weighs heavily in the admissions process, a statistical model accepted by the district court showed a "statistically significant" penalty against Asian Americans in admissions outcomes too. Harv.Pet.App.203.

Despite the data, Harvard maintained throughout this case that it does not consider race when assigning the personal rating. Harv.Pet.App.159. But until

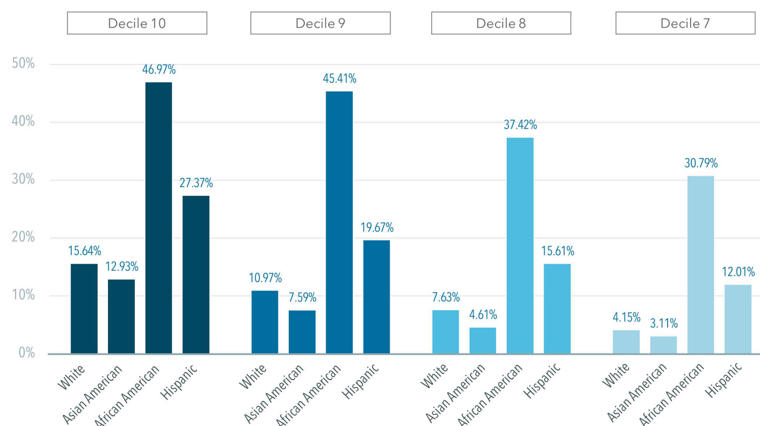
2019, Harvard's reading procedures never told admissions officers how to use race, let alone told them not to consider race when assigning the personal rating. Harv.Pet.App.121-22. Some admissions officers have admitted they consider race when assigning the personal rating, both during the federal investigation in the 1990s and during a deposition in this case (that was later recanted at trial). Harv.JA1358-59, 708-09; *see also* Harv.JA697-707. And year after year, Harvard's personal ratings reflect a clear racial hierarchy, where African Americans receive the best personal ratings, followed by Hispanics, followed by whites, with Asian Americans in last place.

Percentage of Applicants Receiving a 1 or 2 on the Personal Rating
by Race/Ethnicity for Top 4 Academic Deciles



Harv.JA1790; *see* Harv.JA883-85. That same racial hierarchy appears in the overall rating, where Harvard admits that it uses race.

Percentage of Applicants Receiving a 1 or 2 on the Overall Rating by Race/Ethnicity for Top 4 Academic Deciles



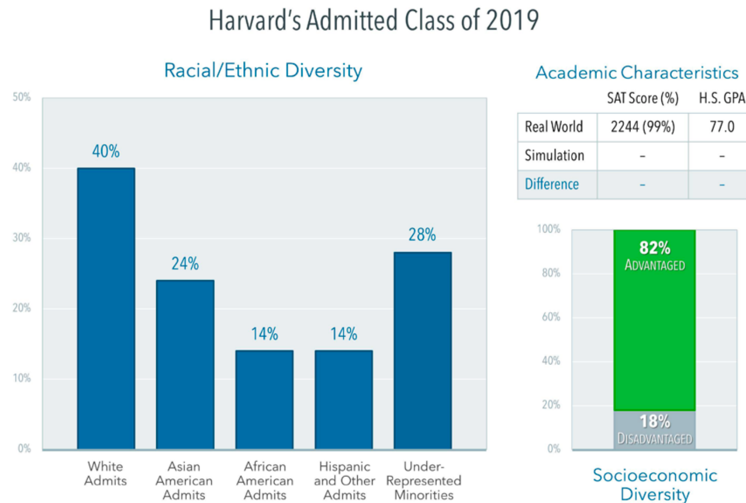
Harv.JA1789; *see* Harv.JA879-82.

Harvard has never been willing to say that Asian-American applicants *deserve* lower personal scores—that this group is actually less likely to exhibit "leadership," "self-confidence," "likeability," or "kindness." Harv.Pet.App.19. It repeatedly disavowed that (obviously racist) claim. *E.g.*, Harv.JA753. In fact, when Harvard's volunteer alumni interviewers meet applicants in person, they assign Asian Americans and whites similar personal ratings. Harv.Pet.App.172-73. Nor has Harvard ever offered a race-neutral explanation for why it consistently gives African Americans and Hispanics the highest personal ratings.

d. Harvard's Rejection of Race-Neutral Alternatives

At trial, SFFA (through its expert Kahlenberg) presented projections of Harvard's admitted class

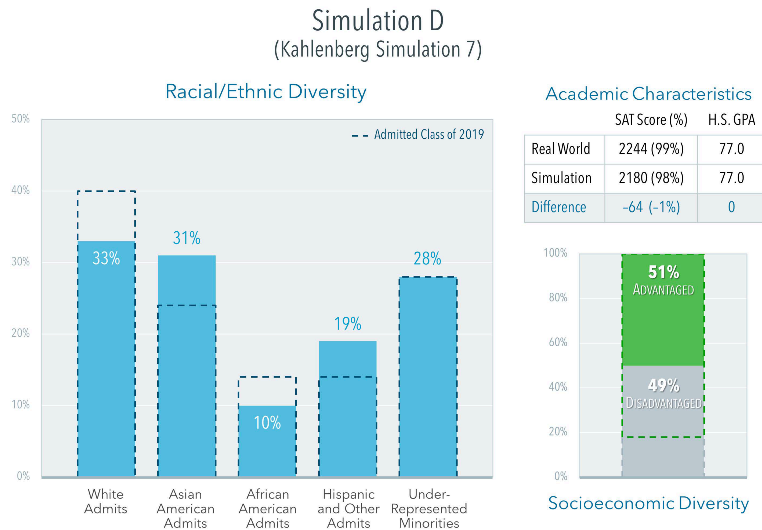
under various race-neutral alternatives. Harv.Pet. App.217-20; Harv.JA1779-83. The baseline was Harvard's actual class of 2019, which was 40% white, scored in the 99th percentile on the SAT, and was only 18% socioeconomically disadvantaged.



Harv.JA1778.

One of SFFA's alternatives eliminates Harvard's racial preferences; eliminates Harvard's preferences for legacies and the children of donors, faculty, and staff; and increases Harvard's socioeconomic boost to roughly one-half the size of what a recruited athlete gets. Harv.JA763-65, 774-75, 1782. Under this simulation, white admissions would decrease, combined African-American and Hispanic admissions would rise slightly, Asian-American admissions would increase, and socioeconomic diversity would dramatically improve. Harv.JA774-75, 1775, 1783. Academic characteristics would remain superb, with high-school

GPAs remaining the same and SAT scores falling only slightly to the 98th percentile.



Harv.JA1783.

Harvard did not dispute the accuracy of SFFA's simulation. Instead, university witnesses insisted it was "very important" to continue giving preferences to the children of donors, alumni, and Harvard faculty/staff. Harv.JA1002-06; *e.g.*, Harv.JA1246 (applicant's relative "had an art collection which conceivably could come our way"). Harvard wants to keep these preferences even though they disproportionately benefit white and wealthy applicants, Harv.JA764, 1776, and even though Harvard's $37 billion endowment makes it "the richest university in the entire country," Harv. JA780-81. Harvard also objected to the slight decrease in average SAT scores. Harv.Pet.App.219. Notably,

since the trial, Harvard has temporarily stopped requiring applicants to submit those scores. *See Admissions Update for the 2023-2026 Application Cycles*, Harvard College, bit.ly/3OuVPtq (last visited May 2, 2022).

4. Lower Courts' Rulings

In September 2019, the district court entered judgment for Harvard. The district court held (for the third time in the litigation) that SFFA has Article III standing. Harv.Pet.App.222, 298-301, 330-50. But it ruled for Harvard on the merits. The court concluded that Harvard's use of race was consistent with this Court's precedents. Harv.Pet.App.234-66.

The district court declined to hold that Harvard penalizes Asian Americans. It credited SFFA's models showing statistically significant discrimination. Harv.Pet.App.203. The court conceded there "may be … discrimination or implicit bias at work to the disadvantage of Asian American applicants." Harv.Pet.App.245. But the court deemed the evidence "inconclusive" because Harvard's witnesses said they did not discriminate, the observed discrimination in admissions outcomes did not affect too many Asian Americans, and the court could imagine other "conceivable" explanations for the disparities. Harv.Pet.App.188, 203, 245, 265-66.

For example, the court noted that Asian Americans do worse than whites on the "school support" ratings—a score that gauges applicants' support from their high-school teachers and guidance counselors. Harv.Pet.App.126, 173. Because Harvard insisted it

did not discriminate when assigning this score, the district court "[s]peculat[ed]" that the disparity could be attributed to "biased teachers and guidance counselors" or real differences between white and Asian-American applicants. Harv.Pet.App.188, 191 & n.48. The court acknowledged, though, that "it is not clear that these sorts of considerations adequately explain the difference in personal ratings." Harv.Pet.App.193.

The First Circuit affirmed. It agreed that SFFA has standing. Harv.Pet.App.51-55. But it held that Harvard's admissions program satisfies strict scrutiny because it does not penalize Asian Americans, engage in racial balancing, overuse race, or neglect race-neutral alternatives. Harv.Pet.App.61-98.

C. UNC

1. History of UNC Admissions

As Harvard is the nation's oldest private college, UNC is the nation's oldest public college. UNC.Pet. App.3. UNC's admissions process is highly competitive. UNC.Pet.App.23. It receives more than 43,000 applications each year for a class of about 4,200 students. UNC.Pet.App.23. State law requires that no more than 18% of each class be from out of state (or UNC suffers major financial penalties); but about twice as many out-of-staters apply each year as in-staters. UNC.Pet.App.23 & n.8. Out-of-state applicants thus are admitted at a far lower rate (12-14%) than in-state applicants (47-50%). UNC.Pet.App.23.

For more than three decades, UNC has awarded racial preferences to "underrepresented minorities,"

which UNC defines as African Americans, Hispanics, and Native Americans. UNC.Pet.App.15 & n.7, 37; *see also* UNC.JA690. Asian Americans and whites don't receive a racial preference; UNC doesn't consider them "underrepresented" because their percentage at UNC is higher "'than their percentage within the general population in North Carolina.'" UNC.Pet.App.15, n.7, 37; *see* UNC.Pet.App.21 (Asian Americans not "underrepresented" because they are 3% of the North Carolina population but 12% of the UNC student body). Although a student's race is often "determinative" and there are "only a certain number of seats," UNC.Pet.App.112; UNC.JA402, UNC insists that race is never a "negativ[e]" in its process, UNC.JA638. Like Harvard, UNC gives racial preferences when underrepresented minorities "disclose" their race in their application; they need not write about race in their essay or indicate that their race is an important part of who they are. UNC.JA632.

When awarding racial preferences, UNC doesn't seek a "critical mass" of underrepresented minorities. UNC does not "discuss the concept of 'critical mass' in its Admissions Office, has not determined if it has achieved a critical mass of underrepresented students, and has not defined the term." UNC.Pet.App. 54-55; *see* UNC.JA401-02 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is."). UNC has never "set forth a proposed time period in which it believes it can end all race-conscious admissions practices." UNC.Pet. App.62. UNC instead believes that using race is essential to "treat[ing] students as whole people," UNC.

JA632, and it stresses "how hard it [can be] to separate race out from other things that we know about a student," UNC.JA639.

2. UNC's Response to SFFA's Litigation

On November 17, 2014—the same day that SFFA sued Harvard—SFFA sued UNC in the Middle District of North Carolina for violating the Fourteenth Amendment and Title VI. SFFA sued on behalf of its members, including students who were denied admission to UNC and who stand ready and able to apply to transfer if UNC stops racially discriminating. UNC. Pet.App.234-35, 243-44.

Like Harvard, UNC revised its policies in response to SFFA's lawsuit. Before SFFA sued, UNC used "core reports" and "core report comparisons" to monitor the racial makeup of its incoming class. UNC. JA1228-29. Like Harvard's one-pagers, these reports provide a snapshot of the admitted class's current racial composition and compare it to the prior year. UNC.JA1228-29; *e.g.,* UNC.JA1232-41. Leadership received these reports on a daily basis, and staff received them biweekly. UNC.JA1229. The numbers were also discussed at admissions office meetings. UNC.JA386-87. UNC stopped all of these practices after SFFA sued because it wasn't "confident in how others would interpret what [it was] doing." UNC. JA690-91.

SFFA's lawsuit also revealed UNC's sporadic and unserious efforts to examine the availability of race-neutral alternatives, consisting primarily of a "literature review" and a committee that met only a handful

of times before being disbanded. UNC.JA428-30, 433-34, 694-96, 1230-31. In the 11-plus years following *Grutter*, UNC had "never conducted any studies ... to determine the effect that race was having on the likelihood of admissions at UNC." UNC.JA420-21. Its most thorough analysis was its 2012 amicus brief in *Fisher I*. There, UNC told this Court that, if it adopted a race-neutral percentage plan like Texas's, the percentage of underrepresented minorities admitted to UNC would *increase* (from 15% to 16%). *See* UNC-*Fisher*-Br. 33-34, 2012 WL 3276512. But UNC insisted that this plan was unworkable because average SAT scores would decline by 55 points (from the 91st percentile to the 86th) and first-year GPAs would drop by 0.1 points (from 3.26 to 3.16). *Id.* at 34; *see* UNC.JA1296.

In February 2016, more than a year after SFFA sued, UNC formed the "Committee on Race-Neutral Strategies." UNC.Pet.App.117. UNC's attorneys attended this committee's meetings. UNC.JA404. In May 2018, more than three years after SFFA sued, the committee released an "interim report" concluding that it had not found a workable race-neutral alternative. UNC.JA684-85. To this day, though, UNC claims that it cannot "say how often race makes the difference in whether or not a student is admitted." UNC.JA692.

3. Trial Evidence

In November 2020, the district court held an eight-day bench trial on SFFA's remaining claims.[7] The court heard testimony from five UNC employees, eight UNC students, and the parties' "highly qualified" experts. UNC.Pet.App.7, 63-65, 120 n.39. The district court also allowed a group of UNC students to intervene and participate in a limited fashion. UNC. Pet.App.4-5. As in its case against Harvard, SFFA's primary experts were Arcidiacono and Kahlenberg. The trial exposed how UNC actually uses race.

a. UNC's Constant Focus on Race

Like Harvard, UNC considers an applicant's race at "'every stage'" of the review process. UNC.Pet. App.51; UNC.JA407. To begin, UNC recruits high-schoolers differently based on race. Out-of-state African-American, Hispanic, and Native American students with SAT scores of 1250 and up are invited to apply to UNC, but out-of-state Asian-American and white students must score a 1400 or higher. UNC. Pet.App.47. Asian-American and white students must score higher because, according to UNC, they aren't

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[7] Before trial, the court granted UNC judgment on the pleadings on Count III of SFFA's complaint, which alleged that this Court should overrule *Grutter* and outlaw race-based admissions. UNC.Pet.App.187-90. In its motion, UNC argued that "the resolution of Count III does not involve any questions of fact" and so could be "decided as a matter of law." UNC.Dkt.209 at 3. Like Harvard, UNC "acknowledg[ed] that SFFA has preserved its right to appeal on Count III." *Id.* at 4.

"priority populations for recruitment." UNC.Pet.App. 47-48; UNC.JA717-19.

Race is the focus during the actual review process as well. A student's race can affect every rating that UNC assigns to applicants, including the academic, extracurricular, and "personal qualities" ratings. UNC.JA410-15. For example, admissions officers know that "Asian Americans ... test higher" than other minority groups and so they "take that into account when ... reading applications from Asian-American students." UNC.JA399; *see also* UNC.JA1252.

In reviewing applications, admissions officers focus intently (and sometimes crudely) on an applicant's race, as revealed by online chats among admissions officers.

- "I just opened a brown girl who's an 810 [SAT]."
- "If its brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."
- "Still yes, give these brown babies a shot at these merit $$."
- "I am reading an Am Ind."
- "[W]ith these URM ... kids, I'm trying to at least give them the chance to compete even if the [extracurriculars] and essays are just average."
- "I don't think I can admit or defer this brown girl."

- "perfect 2400 SAT All 5 on AP one B in 11th"
  "Brown?!"
  "Heck no. Asian."
  "Of course. Still impressive."
- "I just read a blk girl who is an MC and Park nominee."

UNC.JA1244-51; *see also* UNC.JA1242 ("Stellar academics for a Native Amer/African Amer kid."); UNC.JA1243 ("I'm going through this trouble because this is a bi-racial (black/white) male.").

In the final "school group review" stage, an admissions officer reviews the provisional admissions decisions for each applicant, arranged by high school, and determines whether to keep or change the final decision. UNC.Pet.App.31-33. Here, too, UNC takes a student's race into account. UNC.JA382, 415-17. A student's race is often the "determinative" factor in whether the student is admitted or denied. UNC.Pet. App.112-13; UNC.JA385.

b. UNC's Preferences for Underrepresented Minorities

UNC's admissions data revealed stark racial disparities in admission rates among similarly qualified applicants. SFFA's expert testified that applicants with the same "academic index"—the combination of test scores and GPA—had widely different admission rates by race. UNC.Pet.App.75-77; UNC.JA440.

Out-of-State Admission Rates by Academic Index Decile and Race/Ethnicity

Academic Decile	White	Asian American	African American	Hispanic	All Applicants
10	41.58%	52.89%	73.17%	61.44%	**46.97%**
9	26.51%	27.66%	69.12%	42.41%	**28.87%**
8	15.87%	15.51%	57.87%	33.63%	**18.45%**
7	9.24%	6.51%	57.74%	30.35%	**12.27%**
6	5.34%	4.56%	46.10%	22.20%	**8.43%**
5	2.90%	1.38%	39.61%	15.97%	**6.06%**
4	1.52%	1.04%	29.85%	9.28%	**4.64%**
3	0.89%	0.25%	14.36%	3.61%	**2.65%**
2	0.52%	0.28%	5.71%	1.27%	**1.54%**
1	0.49%	0.00%	0.45%	0.12%	**0.40%**
TOTAL	**10.56%**	**16.16%**	**16.67%**	**19.64%**	**12.91%**

+ 18.10%
+ 10.42%
+ 6.18%
+ 3.84%
+ 2.37%
+ 1.42%
+ 1.99%
+ 1.11%
+ 1.14%

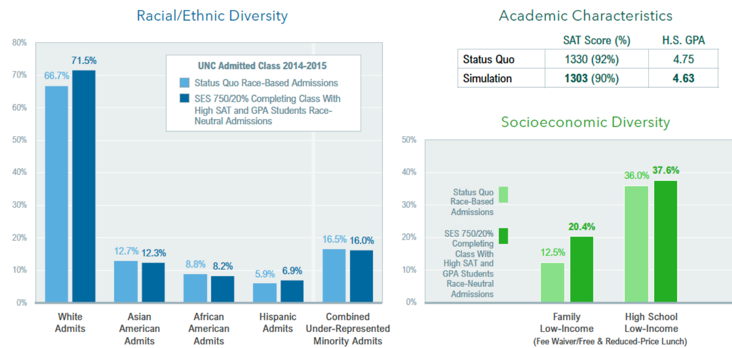
UNC.JA1083; UNC.JA454-57. For example, an out-of-state Asian American in the fourth-highest decile has only a 6.51% chance of admission; but an African American in that same decile has a higher chance of admission (57.74%) than an Asian American in the *top* decile (52.89%). UNC.JA1083. The in-state applicant pool showed similar racial disparities. UNC.JA1080; *see* UNC.JA451-54.

SFFA's regression analyses revealed substantial preferences for African-American and Hispanic applicants. Under one analysis, SFFA's expert showed that the likelihood of certain white applicants being admitted would increase substantially if UNC treated them as underrepresented minorities. UNC.JA466-76; UNC.Pet.App.97-98. For example, a white, out-of-state male who had only a 10% chance of admission would have a 98% chance if UNC treated him as an African American and a 69% chance if UNC treated him as a Hispanic. UNC.JA1102; *see also* UNC.JA 1104-07.

UNC's expert, Caroline Hoxby, testified that, under her analysis, an applicant's race "explain[s]" 5.1% of out-of-state admissions decisions and 1.2% of in-state decisions. UNC.Pet.App.111. Although UNC receives more than 43,000 applications each year (two-thirds of which are out of state), UNC.Pet. App.23, Hoxby concluded that race "plays a very small role," UNC.JA814-15.

c. UNC's Rejection of Race-Neutral Alternatives

At trial, SFFA proposed a number of race-neutral alternatives for UNC. One simulation was called the "Modified Hoxby Simulation" because SFFA's expert (Kahlenberg) made small modifications to a simulation created by UNC's expert (Hoxby). Under the Modified Hoxby Simulation, UNC would set aside 750 seats in the class for high-scoring, socioeconomically disadvantaged applicants, and the remainder of the class would be filled with the most academically qualified students remaining in the applicant pool. UNC.JA574-76; UNC.Pet.App.134 n.43. This simulation improved socioeconomic diversity, decreased average SAT scores and high-school GPAs only slightly, increased Hispanic admissions, and decreased African-American admissions only slightly.



UNC.JA1157; UNC.JA576-79. Other race-neutral alternatives produced similar results. *See* UNC.JA556-74, 1145-55.

UNC's expert found that no race-neutral alternative existed that could achieve UNC's "actual levels" of racial diversity and academic preparation (as measured by test scores). UNC.JA883. Hoxby had no opinion on whether UNC "could or should adopt a plan that might be slightly lower ... than its actuals." UNC.JA884. Nor did Hoxby assess the impact of any race-neutral alternative on other forms of diversity, such as socioeconomic diversity. UNC.JA890-91.

4. The District Court's Ruling

In October 2021, nearly seven years after SFFA filed its complaint, the district court ruled for UNC, holding that its use of race satisfies strict scrutiny. The court held that UNC's use of race was narrowly tailored because the university uses race "flexibly as a 'plus' factor." UNC.Pet.App.165-75. The court dismissed SFFA's non-statistical evidence, including the

admissions officers' crude racial discussions, as consistent with "the type of holistic process UNC describes." UNC.Pet.App.40-41, 169. Examining the statistical evidence, the court found that both parties' experts were "highly qualified," UNC.Pet.App.63-65, but that UNC's expert's analysis was "more probative on the issue of whether race is a dominant factor," UNC.Pet.App.171-75. The court ruled that UNC's use of race was constitutional because race "play[s] a determinative role for [only] a small number of URM students." UNC.Pet.App.112-13.

Second, the court held that UNC had no viable race-neutral alternative that would allow it to "achieve the educational benefits of diversity about as well as its current race-conscious policies." UNC.Pet. App.176-83. It rejected alternatives that would give preferences based on socioeconomic status rather than race, reasoning that "the majority of low-income students are white" and so UNC would just "'be choosing more white students.'" UNC.Pet.App.136-37. In addition, the court rejected any race-neutral alternative that would change the admitted class, even in small ways. UNC.Pet.App.134-35, 139-40. For example, the court deemed the Modified Hoxby Simulation unworkable because underrepresented minority admissions would decline from 16.5% to 16.0%, average SAT scores would be in the 90th percentile instead of the 92nd percentile, and UNC would have to admit some students based solely on academic criteria. UNC.Pet.App.134 n.43; *see* UNC.JA1157.

The district court also endorsed UNC's most open-ended justifications for using race. Because race is "interwoven in every aspect of the lived experience of minority students," it cannot be "ignore[d]" or "reduce[d] [in] importance." UNC.Pet.App.185. Until the nation ends its "struggle with racial inequality," minority students will continue to be "less likely to be admitted in meaningful numbers on [race-neutral] criteria." UNC.Pet.App.186. Thus, despite UNC's decades-long use of racial preferences, the university was "far from creating [a] diverse environment" and still had "much work to do." UNC.Pet.App.184-86.

SUMMARY OF ARGUMENT

Brown is widely considered "the single most important and greatest decision in this Court's history." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring in part); *see Parents Involved*, 551 U.S. at 842-43 (Breyer, J., dissenting) (collecting authorities). The holding of *Brown*, as this Court has explained, is that the Constitution denies "'any authority … to use race as a factor in affording educational opportunities.'" *Parents Involved*, 551 U.S. at 747 (plurality). Yet because of *Grutter*, universities exercise that authority every day.

Because *Brown* is our law, *Grutter* cannot be. Just as *Brown* overruled *Plessy*'s deviation from our "colorblind" Constitution, *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting), this Court should overrule *Grutter*'s. That decision has no more support in constitutional text or precedent than *Plessy*. Its assertion that *racial* preferences are necessary to achieve largely *nonracial* diversity is stereotyping, backed by no real evidence,

and based on a kind of deference to universities that not even prisons or the military would get. As racial preferences inevitably do, *Grutter* has spawned negative consequences: anti-Asian stereotyping, race-obsessed campuses, declines in ideological diversity, and more. And *Grutter* cannot generate serious reliance interests, especially since it predicts its own demise.

Universities themselves do not believe in *Grutter*. SFFA sued UNC, the oldest public college, and Harvard, the oldest private college and the supposed model for how to use race. These cases were the first to uncover—after full-blown discovery and trials—whether and how universities are following *Grutter*. And what SFFA found is disturbing. Both universities award mammoth racial preferences to African Americans and Hispanics. Neither university plans to stop using race, or even decrease the size of their racial preferences. Until they were sued, neither university had given serious consideration to race-neutral alternatives. And once they were sued, both universities were willing to reject any alternative that would cause the slightest change in their student body. Worse, Harvard uses race *against* Asian Americans—putting the lie to the notion that this discrimination is somehow "benign." And Harvard finetunes its admitted class to meet narrow racial ranges, achieving the kind of precision that cannot be squared with its assertions of "individualized," "whole-person" review in *Bakke*.

That Harvard and UNC are violating existing precedent certainly makes them liable under Title VI and the Constitution; but a ruling on that ground alone would miss the forest for the trees. Harvard's

and UNC's violations are basic and blatant. And other elite universities are likely no different. Indeed, Harvard is supposed to be the model for how to use race in a narrowly tailored way. If *this* is the model, then the whole enterprise should be abandoned.

No one is under the illusion that we live in a post-racial society, or that racial discrimination is a thing of the past. But when elite universities place high-schoolers on racial registers and tell the world that their skin color affects what they think and know, the universities are hurting, not helping. The only realistic way "to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748 (plurality). And that is what the Constitution and Title VI require.

ARGUMENT

I. *Grutter* should be overruled.

Overruling precedent is serious, "[b]ut *stare decisis* is not an inexorable command." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485, 1499 (2019) (cleaned up). This Court considers overruling a precedent virtually every Term, many of this Court's "most notable and consequential decisions" overruled precedent, and almost "every current Member of this Court" voted to overrule "multiple constitutional precedents" in "just the last few Terms." *Ramos*, 140 S.Ct. at 1411 (Kavanaugh, J., concurring in part) (collecting cases). Stare decisis "'is at its weakest when [this Court] interpret[s] the Constitution,'" as it did in *Grutter*. *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2177 (2019).

When deciding whether to overrule a precedent, this Court considers "a number of factors." *Hyatt*, 139 S.Ct. at 1499. Those factors can be organized into "three broad considerations":

1. Is the prior decision "not just wrong, but grievously or egregiously wrong"?
2. Has the prior decision "caused significant negative jurisprudential or real-world consequences"?
3. Would overruling the prior decision "unduly upset reliance interests"?

Ramos, 140 S.Ct. at 1414-15 (Kavanaugh, J., concurring in part). These considerations all point in the same direction here: *Grutter* should be overruled.

A. *Grutter* is grievously wrong.

Grutter was wrong the day it was decided. Despite reaffirming that "all" racial classifications must satisfy strict scrutiny, *Grutter* held that "student body diversity" can "justify the use of race in university admissions." 539 U.S. at 325-26. That holding departs from the Constitution's original meaning, contradicts other precedents, has eroded over time, and has no true defenders.

Grutter has no support in the Fourteenth Amendment's "historical meaning." *Ramos*, 140 S.Ct. at 1405. As written, the Fourteenth Amendment contains no exceptions. According to its framers, it enshrines the principle that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). That principle was not

new: the self-evident truth that "all men are created equal" was a cornerstone of the American founding. Decl. of Indep., 1 Stat. 1 (July 4, 1776). While this country long violated that principle in practice, *e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy*, 163 U.S. 537, those violations did not alter or diminish the principle itself. As Justice Harlan recognized in *Plessy*, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. at 559. His dissent was ultimately vindicated in *Brown*, where this Court denied "'any authority … to use race as a factor in affording educational opportunities.'" *Parents Involved*, 551 U.S. at 747 (plurality). Because *Brown* is right, *Grutter* is wrong.

Grutter also "conflicted with" this Court's broader equal-protection jurisprudence. *Knick*, 139 S.Ct. at 2178. Despite the absolutism of the constitutional text, this Court has held that racial classifications are legal if they satisfy strict scrutiny. But the Court has rejected many interests as not compelling enough to justify racial classifications—interests that are often *more* compelling than "student body diversity." Protecting a child's best interests isn't compelling enough. *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984). Neither is remedying societal discrimination. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996). Nor is providing "role models" for minority students. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (plurality). *Grutter* does not explain how these interests are not compelling, yet "'cross-racial understanding'" and "'livelier'" classroom discussion are. 539 U.S. at 330. *Grutter* should have rejected this all-too-familiar attempt to use nebulous educational benefits

to justify classifying students based on race. *See Fisher I*, 570 U.S. at 320-30 (Thomas, J., concurring).

Grutter's diversity rationale is not only uncompelling; it flouts basic equal-protection principles. Although *Grutter* praised the "educational benefits" of student body diversity writ large, its assumption that a university can predict, based solely on race, an applicant's "views" or "experience[s]" is pure racial stereotyping. 539 U.S. at 333; *see Hopwood*, 78 F.3d at 946. The Fourteenth Amendment forbids "the assumption that race or ethnicity determines how [individuals] act or think." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting); *see Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (op. of O'Connor, J.). If a university wants to admit students with certain experiences (say, overcoming discrimination), then it can evaluate whether individual applicants have that experience. It cannot simply use "race as a proxy" for their experiences or views. *Miller v. Johnson*, 515 U.S. 900, 914 (1995).

Grutter's crude stereotyping makes even less sense today, "in a society in which [racial] lines are becoming more blurred." *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (op. of Kennedy, J.); *see* Jones et al. *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. Census Bureau (Aug. 12, 2021), bit.ly/37LJWyG ("The Multiracial population … was measured at 9 million people in 2010 and is now 33.8 million people in 2020, a 276% increase."). Applicants who check the box for African American at Harvard and UNC, for example, receive a preference because of their race whether they grew up in poverty

and went to failing schools, have parents who were multimillionaire executives, spent their formative years in Europe, are the direct descendants of slaves, or are second-generation immigrants from Africa. What experiences and views do these wildly different individuals share? *Grutter* says it is the "experience of being a racial minority in a society, like ours, in which race unfortunately still matters." 539 U.S. at 333. But this reasoning is circular: that people of a particular race have the experience of being that race is a truism that cannot possibly satisfy strict scrutiny.

Grutter is also internally contradictory. It claims that racial preferences improve diversity because race is a proxy for certain views and experiences. *Id.* Then it claims that racial preferences break down stereotypes because race is *not* a proxy for any views or experiences. *Id.* at 319-20, 330. The latter is, of course, true: A person's skin color says nothing about who they are, what they think, or where they've been. Yet this is a "lesson of life" learned by most at an early age. *Id.* at 347 (Scalia, J., concurring in part and dissenting in part). And if a student's views aren't tied to his or her race, then why would the racial makeup of a class predictably change what students learn or discuss? *Grutter* has no answers.

The educational benefits that *Grutter* identified are similarly unpersuasive. *Grutter* insists that race-based admissions will "break down racial stereotypes" and "'prepar[e] students for an increasingly diverse workforce and society.'" *Id.* at 330 (majority). *Grutter* thus treats underrepresented minorities not as the beneficiaries of racial preferences, but as *instruments*

to provide educational benefits for other, mostly white students. *See* Blumstein, *Grutter and Fisher: A Reassessment and a Preview*, 65 Vand. L. Rev. En Banc 57, 66 (2012). "This is affirmative action gone wild." *Fisher II*, 579 U.S. at 419 (Alito, J., dissenting).

Grutter's prediction that racial preferences will combat stereotyping is also directly contrary to this Court's precedent. This Court has explained that racial classifications "exacerbate rather than reduce racial prejudice." *Adarand,* 515 U.S. at 229. That predictable consequence does not disappear simply because the racial classifiers are university admissions officers. Indeed, the Middle District of North Carolina concluded that minority students at UNC are "*still* … isolated, ostracized, stereotyped and viewed as tokens." UNC.Pet.App.185 (emphasis added); *see also* Harv.JA823 (same for Harvard). And Harvard asked this Court to deny certiorari because race relations are particularly fraught "at this moment in our Nation's history." Harv.BIO.34. But if *Grutter* has been the law for two decades and things are the same or worse, then the answer is not to keep *Grutter*. The answer is to try something else because racial preferences have failed their own "'acid test.'" 539 U.S. at 343.

Even accepting its backwards logic, *Grutter* required no proof that "a 'critical mass' of underrepresented minorities" was actually "necessary" to secure any educational benefits. *Id.* at 333. Using *race* as an admissions factor yields *racial* diversity. *See Hopwood*, 78 F.3d at 945. But there was no evidence in *Grutter* that racial diversity yielded the benefits of

student body diversity in the broader sense—meaning a diversity of backgrounds, experiences, and viewpoints. *See* 288 F.3d at 804-05 (Boggs, J., dissenting).

More precisely, the evidence would need to show that the *marginal difference in racial diversity* between race-based admissions and race-neutral alternatives is necessary to achieve these educational benefits. Yet that evidence does not exist, and the assertion is facially implausible. Universities in States where racial preferences are banned still provide their students with a high-quality education. As do historically black colleges and universities, despite their far lower levels of racial diversity. *See Grutter*, 539 U.S. at 364-65 (Thomas, J., concurring in part and dissenting in part). At a minimum, any marginal loss in "cross-racial understanding" could be remedied with alternatives far narrower than racial preferences, like making students take a class on the topic.

Instead of requiring proof that racial preferences are necessary to secure educational benefits, *Grutter* largely deferred to universities' "experience and expertise." *Id.* at 333 (majority). But that logic "exhumes *Plessy*'s deferential approach to racial classifications." *Metro Broad.*, 497 U.S. at 632 (Kennedy, J., dissenting). The schools defending segregation, after all, also wanted courts to defer to their experience and expertise. *Fisher I*, 570 U.S. at 320-30 (Thomas, J., concurring). But the *Brown* Court rightly refused. "[S]uch deference is fundamentally at odds" with the strict scrutiny that governs "race-based policies." *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005). *Grutter*'s reference to the "First Amendment" does not

justify a different approach. 539 U.S. at 324. As the government, state universities themselves have no First Amendment rights. *See Hopwood*, 78 F.3d at 943 n.25; *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring). Private universities do, but they have no right to force the federal government to subsidize their racial discrimination. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991).

Grutter's narrow-tailoring reasoning cannot "'withstand careful analysis'" either. *Janus v. AFSCME*, 138 S.Ct. 2448, 2481 n.25 (2018). Narrow tailoring normally demands proof that racial classifications are "necessary" to achieve the compelling interest—that race was a "'last resort.'" *Parents Involved*, 551 U.S. at 734-35. But *Grutter* demands much less. Race need only have a "minor" impact on diversity. *Fisher II*, 579 U.S. at 384-85. Universities can reject race-neutral alternatives that, quite circularly, "may well compromise [their] own definition of … diversity." *Id.* at 387. Universities can also reject alternatives that would compromise their "reputation for academic excellence." *Id.* at 385. And universities can reject facially neutral alternatives, like percentage plans, that would knowingly "boost minority enrollment." *Id.* at 386.

This last holding is particularly indefensible. Facially neutral policies are, at the very least, *more narrowly tailored* than "individual racial classifications." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in judgment).

They "are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race." *Id.* Strict scrutiny requires universities to try them "before turning to racial classifications." *Fisher I*, 570 U.S. at 312. And race consciousness does not necessarily doom preferences that rely on, say, socioeconomic status instead of race. Mere awareness of racially disparate impacts is not evidence of racially discriminatory intent. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *cf.* UNC.Pet.App.136-37 (noting that UNC would just "'be choosing more white students'" under a system based on socioeconomic preferences because "the majority of low-income students are white"). And universities have perfectly valid, race-neutral reasons for supporting race-neutral alternatives that focus on actual disadvantage, rather than using race as a proxy for it. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (even racially motivated policies are constitutional if they would have been passed anyway for race-neutral reasons).

Grutter's "foundations" have also "sustained serious erosion." *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). Legally speaking, *Grutter* has no foundations, "[g]iven how unmoored it was from the start." *Ramos*, 140 S.Ct. at 1405. But to the extent "later developments could have done more to undermine" *Grutter*, "they have." *Id.*

Every time the lower courts have extended *Grutter*, this Court has reversed. *Grutter* cannot be applied to K-12 students. *Parents Involved*, 551 U.S. at 722-25. *Grutter* creates no right to race-based admissions.

Schuette, 572 U.S. at 300-14 (op. of Kennedy, J.). And this Court "clarified" that *Grutter* does not weaken the narrow-tailoring standard that applies to other racial classifications. *Fisher II*, 579 U.S. at 377; *see Fisher I*, 570 U.S. at 312-14. Even in the one case that upheld an admissions policy under *Grutter*, this Court stressed that its decision was "*sui generis*" and had "limit[ed] value for prospective guidance." *Fisher II*, 579 U.S. at 377, 379.

In terms of factual foundations, this litigation revealed that *Grutter* rests on a lie. *Grutter* used Harvard as its model for how to use race. 539 U.S. at 335-39. But while Harvard insinuated that it uses race as one small factor to break ties between qualified candidates, *Bakke*, 438 U.S. at 323-24, it actually obsesses over race throughout its process and awards massive preferences to certain groups. Harvard also never disclosed that its holistic admissions process itself was specifically designed to screen out disfavored minorities—first Jews, now Asian Americans.

And while this Court was tying its precedent to Harvard's admissions program, Harvard was never tying its admissions program to this Court's precedent. Harvard does not use race to enroll "a 'critical mass' of underrepresented minorities." *Grutter*, 539 U.S. at 333. Though critical mass is the only concept this Court has ever approved, Harvard does not share that goal, use that metric, or even understand what "critical mass" means. Harvard also disagrees that race-based admissions are "'a temporary matter'" that should "terminate … as soon as practicable." *Id.* at 342-43. Since *Grutter*, Harvard has not decreased its

use of race at all. And Harvard thumbed its nose at even the most minimal requirements from *Grutter*. Until SFFA brought this suit, Harvard had never even attempted any "consideration of workable race-neutral alternatives"—much less a "serious, good faith" consideration. *Id.* at 339. So too with UNC. *Supra* 40-45.

Respondents' disregard for *Grutter* is not unusual; essentially no defenders of race-based admissions "support the line that it has taken this Court over 40 years to draw." *Janus*, 138 S.Ct. at 2482. Several Justices have stated, contrary to *Grutter*, that policies meant to "benefit" racial minorities should receive less scrutiny. *E.g.*, *Fisher I*, 570 U.S. at 336-37 (Ginsburg, J., dissenting); *Schuette*, 572 U.S. at 373-74 (Sotomayor, J., dissenting); *Parents Involved*, 551 U.S. at 836-37 (Breyer, J., dissenting). Elite universities agree. Shortly after *Grutter* was decided, the defendant in that case confessed that he had pressed "the 'diversity' rationale" as a litigation strategy. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 Colum. L. Rev. 1589, 1590-91 (2003). Bollinger bemoaned that he could not defend racial preferences as "a 'remedy' for past societal discrimination"—what everyone in higher education "really believed." *Id.*

Bollinger is hardly alone. Shortly before *Grutter* was decided, Harvard's Randall Kennedy said, "Let's be honest: Many who defend affirmative action for the sake of 'diversity' are actually motivated by … social justice." Kennedy, *Affirmative Reaction*, Am. Prospect (Feb. 19, 2003), bit.ly/3EJc5To. They would defend racial preferences "even if social science demonstrated

uncontrovertibly that diversity (or its absence) has no effect (or even a negative effect) on the learning environment." *Id.* NYU's Samuel Issacharoff likewise knows "'[t]he commitment to diversity is not real,'" and Columbia's Kent Greenawalt has "'yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity.'" Fitzpatrick, *The Diversity Lie*, 27 Harv. J.L. & Pub. Pol'y 385, 395-96 (2003). The list goes on. *See id.*; Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34-36 (2002); Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 601 (2000).

No one believes in *Grutter* because *Grutter* is not worth believing in. *Grutter*'s "defenders" are no doubt entitled to "base it on [other] concerns … rather than the reasoning of the opinion itself." *Knick*, 139 S.Ct. at 2178. But they are not entitled to do so while also claiming the mantle of stare decisis. *Citizens United v. FEC*, 558 U.S. 310, 384-85 (2010) (Roberts, C.J., concurring).

B. *Grutter* has spawned significant negative consequences.

Grutter has also proven "unworkable in practice." *Knick*, 139 S.Ct. at 2178. While the Fourteenth Amendment contains no exceptions to the rule of racial neutrality, this Court has applied a "case-by-case" approach that reviews each racial classification under "strict scrutiny." *Croson*, 488 U.S. at 518-19 (Kennedy, J., concurring in part and concurring in judgment). But "the assumption" underlying this approach is that, in practice, "the strict scrutiny standard will

operate in a manner generally consistent with the imperative of race neutrality." *Id.* at 519. Strict scrutiny is supposed to approximate an outright ban "because [the standard] forbids the use even of narrowly drawn racial classifications except as a last resort." *Id.*

As it turns out, *Grutter*'s version of narrow tailoring does not meaningfully limit universities' use of race. It encourages universities to "resort to camouflage"—to use "winks, nods, and disguises" instead of explicit racial quotas. *Gratz*, 539 U.S. at 304-05 (Ginsburg, J., dissenting). Obscurity, after all, is the only way a university could navigate *Grutter*'s Delphic instructions. How else could a university seek a "critical mass" of racial minorities without seeking "'some specified percentage'"? 539 U.S. at 329-30. Or make race "'outcome determinative'" for minorities without making it the "defining feature" of their application? *Id.* at 337-39.

Universities, if they were given truth serum, would agree that this Court's precedent is impossible to navigate. UNC called this Court's guidance "amorphous." UNC.JA390. And it could not say whether it could attain the educational benefits of diversity even if "all of the major racial groups" constituted "the same share of the campus population." UNC.JA755. Far from scientific or objective, the only way UNC knows how to measure these benefits on campus is by "talk[ing] with students [and] faculty ... as to how people feel." UNC.JA388; *see* UNC.JA379-80. Harvard, too, could not identify any metric to determine when it has achieved the educational benefits of diversity. Harv.JA820-22.

The only way to test whether universities' obscure policies satisfy *Grutter*'s vague boundaries is through "prolong[ed]" litigation, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part)—an increasingly unrealistic option. These two cases alone have required more than seven years of expensive, cumbersome litigation. A few individual applicants (like Allan Bakke, Jennifer Gratz, Barbara Grutter, and Abigail Fisher) have brought these cases in the past. But individuals' claims for prospective relief expire once they graduate, and their claims for damages greatly "narrow" the scope of judicial review. *Fisher II*, 539 U.S. at 380. And nowadays, an individual plaintiff would risk the unspeakable cruelty that Ms. Fisher faced when she sued the University of Texas. *See* Harv.Dkt.150-4 (documenting the threats, insults, and harassment against Abigail). These costs make narrow tailoring an illusory check on universities' use of race.

In addition to these "jurisprudential consequences," *Grutter* has had significant "real-world consequences." *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring in part). Most acutely, *Grutter* sustains admissions programs that intentionally discriminate against historically oppressed minorities. Jewish students were the first victims of holistic admissions, and Asian Americans are the main victims today. Asians have faced enormous racial discrimination in this country, from the Chinese Exclusion Act, to the internment of Japanese Americans, to modern scapegoating over COVID-19. Weybright, *Study Finds Increasing Discrimination Against Asians and Asian Americans*, WSU Insider (Nov. 4, 2020), bit.ly/

39rc9YI. Every day, Asian Americans are stereotyped as shy, passive, perpetual foreigners, and model minorities who are interested only in math and science. Harv.Pet.App.160-61; Harv.JA919-24, 1076.

By considering race alongside subjective criteria like "self-confidence," "likability," and "courage," Harv.Pet.App.19, universities invite admissions officers to rely on anti-Asian stereotypes. These subjective criteria also conceal ceilings on Asian-American admissions. The disparities that Asian Americans face compared to their white peers are so stark that, when SFFA showed the data to a high-school counselor, she started crying in her deposition. *See* Harv. Dkt.414-3 at 150-51 (explaining that she was crying "[b]ecause these numbers make it seem like there's discrimination, and I love these kids and I know how hard they work. So these just look like numbers to you guys, but I see their faces.").

This discrimination is not news to Asian-American high-schoolers: An entire industry exists to help them appear "less Asian" on their college applications. *E.g.,* Asian Advantage College Consulting LLC: Beat the Asian Quotas!, bit.ly/3rSYJ1D. As the popular Princeton Review has warned, "If you are an Asian American—or even if you simply have an Asian or Asian-sounding surname—you need to be careful about what you do and don't say in your application." *Cracking College Admissions* 174 (2d ed. 2004). It warns Asian Americans: Don't "write your application essay about the importance of your family," "[d]on't say you want to be a doctor," "don't say you want to

major in math or the sciences," "don't attach a photograph," "don't answer the optional question about your ethnic background," and don't do anything that makes you look like "other Asian applicants with similar characteristics." *Id.* at 174-76. Not surprisingly, the uneven playing field contributes to Asian-American students' unusually high levels of anxiety, depression, and suicide. Asian-Amer.-Coalition-*Harvard*-Cert.-Br. 19-23. These ongoing "effects," combined with the "racist origins" of holistic admissions, "strongly support overruling" *Grutter*. *Ramos*, 140 S.Ct. at 1417 (Kavanaugh, J., concurring in part).

More broadly, *Grutter* tells universities that it's okay to treat students differently based on race—a legal imprimatur with well-known repercussions. Racial preferences, this Court has explained, are poisonous. They "'stimulate our society's latent race consciousness,'" "delay the time when race will become … truly irrelevant," and "perpetuat[e] the very racial divisions the polity seeks to transcend." *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *Adarand*, 515 U.S. at 227-29; *Schuette*, 572 U.S. at 308 (op. of Kennedy, J.).

These repercussions are precisely what has reverberated in *Grutter*'s wake. Far from pursuing "'integration of [their] classrooms and residence halls,'" *Grutter*-Resp'ts'-Br. 5, 2003 WL 402236, universities are now openly embracing segregation—encouraging race-specific graduations, housing, orientations, networking, and more. *See* Piro, *Trend of Ra-*

cially Segregated Campus Events Is Putting Institutions on Dangerous Legal Ground, Found. for Individual Rights in Educ. (Apr. 22, 2022), bit.ly/3vfbq8Y.

And universities' obsession with race has impeded their progress toward *Grutter*'s true aim: obtaining a diversity of *viewpoints*. 539 U.S. at 330. Since *Grutter*, faculties have become far less ideologically diverse, and students feel far less comfortable expressing minority viewpoints on campus. *See* Haidt, *Viewpoint Diversity in the Academy*, bit.ly/2LOGnfM (last visited May 2, 2022); College Pulse, *College Free Speech Rankings: What's the Climate for Free Speech on America's College Campuses?* (2021), bit.ly/3vfF65T. As former Harvard president Lawrence Summers recently lamented, universities now "resist intellectual diversity, including conservative and non-coastal viewpoints," and have "creat[ed] a stifling orthodoxy … as oppressive as McCarthyism." Hoffman, *Summers Tells Sun He Worries Economic Policy Being Driven by 'Sentiment,' 'Politics,'* N.Y. Sun. (Mar. 4, 2022), bit.ly/36w887a. The aims of *Grutter* are thus not helped, and seem to be impeded, by *Grutter* itself.

C. *Grutter* has generated no legitimate reliance interests.

Grutter cannot be sustained in the name of reliance interests. This Court puts little stock in reliance interests when it overrules precedents, like *Grutter*, that authorize racial classifications. *E.g.*, *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) (overruling *Grovey v. Townsend*); *Batson v. Kentucky*, 476 U.S. 79, 95-96 (1986) (overruling *Swain v. Alabama*); *Trump v. Hawaii*, 138 S.Ct. 2392, 2423

(2018) (overruling *Korematsu*). Reliance interests did not deter this Court from dismantling segregation, even though it recognized *Brown*'s "wide applicability" and the "considerable complexity" of enforcement. 347 U.S. at 495; *see Fisher I*, 570 U.S. at 321-22 (Thomas, J., concurring).

These cases were not concerned with reliance interests because no one has a legitimate interest in treating people differently based on skin color. Certainly not an interest that could "outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Ramos*, 140 S.Ct. at 1408 (plurality). When a decision of this Court "undermines the fundamental principle of equal protection as a personal right," it is "the principle," not the decision, that "must prevail." *Adarand*, 515 U.S. at 235 (op. of O'Connor, J.).

Because *Grutter* departs so far from our basic ideals, the decision has not "'become part of our national culture.'" *Ramos*, 140 S.Ct. at 1406. *Grutter* "is only two decades old"—a lack of "antiquity" that "cut[s] in favor of abandoning [it]." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). And Americans by large margins believe that colleges and universities should not consider race at all when making admissions decisions (74%), including strong majorities of African-Americans (59%) and Hispanics (68%). Gómez, *U.S. Public Continues to View Grades, Test Scores as Top Factors in College Admissions*, Pew Research Ctr. (Apr. 26, 2022), pewrsr.ch/3MB2vVa. Several States have expressly banned their universities from considering race—including Michigan, the

State that prevailed in *Grutter*. *Schuette*, 572 U.S. at 298-99 (op. of Kennedy, J.). California, too, has long prohibited racial preferences. In 2020, despite an expensive and visible campaign to reinstate racial preferences, Californians voted by double digits to retain their ban. Ting, *'They Lost Partly Because of That Ad': How No on Prop. 16 Organizers Knew the Measure Would Fail*, S.F. Gate (Dec. 1, 2020), bit.ly/2XBrmAZ.

Further reducing any reliance interests is the sharp division in this Court's decisions. *Bakke* was 4-1-4, had no controlling rationale, and created a circuit split. *Grutter* was 5-4. And *Fisher II* was 4-3. That this Court upheld race-based admissions "by the narrowest of margins, over spirited dissents challenging [their] basic underpinnings" both there and "in later decisions," weakens any stare decisis concerns. *Payne v. Tennessee*, 501 U.S. 808, 828-30, (1991).

Nor did this Court "reaffirm" *Grutter* by applying it in *Fisher II*. Ms. Fisher did not "as[k]" the Court "to overrule [*Grutter*]," so this Court did not "consider how much weight to give *stare decisis* in assessing [*Grutter*'s] continued validity." *Citizens United*, 558 U.S. at 376-77 (Roberts, C.J., concurring). "The Court's unwillingness to overturn [*Grutter*]" in *Fisher II* thus "cannot be understood as a *reaffirmation* of that decision." *Id.* at 377; *see also Brown*, 347 U.S. at 491-92 (making the same point about this Court's applications of *Plessy*).

Among this Court's precedents, *Grutter* has a uniquely weak claim to reliance interests because "the opinion contains its own self-destruct mechanism."

539 U.S. at 394 (Kennedy, J., dissenting). *Grutter* concludes with a warning that the Court expects "racial preferences will no longer be necessary" in "25 years." *Id.* at 343 (majority); *accord id.* at 350-51 (Thomas, J., concurring in part and dissenting in part). This statement was not wishful thinking, but rather stemmed from a legal principle: "all race-conscious admissions programs" must have "a termination point," *Grutter* stressed, to ensure that their "'deviation from the norm of equal treatment'" serves "'the goal of equality itself.'" *Id.* at 342 (majority) (quoting *Croson*, 488 U.S. at 510). The "'acid test of their justification,'" *Grutter* noted, is "'their efficacy in eliminating the need for any racial or ethnic preferences at all.'" *Id.* at 343.

If *Grutter* is right—if all race-based admissions must end and universities must decrease their reliance on race over time—then *Grutter* cannot create meaningful reliance interests. Anyone treating *Grutter* as a permanent blessing of race-based admissions is failing to heed the opinion itself. No one should be structuring affairs around a practice that federal law "barely—and only provisionally—permits." *Schuette*, 572 U.S. at 317 (Scalia, J., concurring in judgment).

Now is the time to overrule *Grutter*. This Court refused pleas for more time in *Brown*. *See Fisher I*, 570 U.S. at 325 (Thomas, J., concurring). Rightly so: As with *Plessy*, history will remember every day of *Grutter*'s deviation from racial neutrality as a mistake. The whole point of *Grutter*'s 25-year deadline, moreover, was to give universities time to wind down

their racial preferences. But universities aren't doing that. Harvard and UNC have not decreased the size of their racial preferences since 2003, and both insist that *Grutter*'s deadline is not influencing their behavior. Nor is there any reason to expect that racial preferences will close racial gaps in "grades and test scores." 539 U.S. at 343. Disparities at the K-12 level must be solved at the K-12 level. Lowering academic standards at the university level comes too late and, if anything, creates a false sense of complacency about the real disparities in K-12 education. *See id.* at 376-77 (Thomas, J., concurring in part and dissenting in part).

While overturning *Grutter* will mean that universities can no longer use race in admissions, the burden of changing illegal policies "'is not a compelling interest for *stare decisis*.'" *Janus*, 138 S.Ct. at 2485 n.27. And the changes here need not be "'extensive.'" *Id.* Most universities "can keep their [admissions] systems exactly as they are"—with holistic, individualized review that considers all legitimate factors—"only they cannot" use race itself as a factor. *Id.*; *see* UNC.JA382 (admitting that UNC could do holistic admissions without race). After all, state universities in California, Washington, and seven other States already conduct colorblind admissions. And it is not too much to ask Harvard to act like many others who cannot consider race, including employers, landlords, businesses, lenders, lawyers, and judges. *See* 42 U.S.C. §2000e-2; §3604; §§1981-82; 15 U.S.C. §1691 et seq.; *Batson*, 476 U.S. at 100; *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017).

Nor would overturning *Grutter* upset any reliance interests of students. No one chooses their race, so no prospective student is "relying" on the future availability of racial preferences. And no admitted or current student's admission would be affected by SFFA's forward-looking relief.

Besides, real diversity would not decline (and would likely improve) after *Grutter* is overruled, given the availability of race-neutral alternatives. The University of California, for example, boasts that it just admitted its "most diverse class ever," despite the State's ban on racial preferences. Watanabe, *UC Admits Largest, Most Diverse Class Ever, But It Was Harder to Get Accepted*, L.A. Times (July 19, 2021), lat.ms/3Cn77JZ. So did the University of Michigan, whose 2021 incoming class "is among the university's most racially and ethnically diverse classes" ever, with "37% of first-year students identifying as persons of color." Dodge, *Largest Ever Student Body at University of Michigan This Fall, Officials Say*, MLive.com (Oct. 22, 2021), bit.ly/3EgLAD2.

Universities in other States that ban racial preferences are likewise enrolling racially diverse classes. UNC.JA551-52, 580-81, 1261-65, 1269-70. They do it even though they are currently competing against "universities [that] still use racial preferences"—a disadvantage that will lessen once universities must "play[] by the same set of rules." Kahlenberg, *A New Era of Civil Rights* 15-16 (2015), bit.ly/3IoFH8F. According to one study, if the most selective 193 institutions all used socioeconomic preferences instead of racial preferences, the combined African-

American and Hispanic admissions, socioeconomic diversity, and mean SAT scores at these universities would all increase. *See* UNC.JA1266-67.

And if they wanted to, private institutions like Harvard could keep their admissions policies exactly the same. They can avoid Title VI's ban on racial discrimination altogether by simply declining to accept federal funds. 42 U.S.C. §2000d. Perhaps that price is too high for Harvard to pay, despite having an endowment that is larger than the GDP of half the countries in the world. Harv.JA780-81. So be it. The price for racial discrimination *should be* high. *See Bob Jones Univ.*, 461 U.S. at 592.

* * *

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748 (plurality). This Court should hold that the Fourteenth Amendment and Title VI forbid institutions of higher education from using race as a factor in admissions. *Grutter* and any other precedent that holds otherwise should be overruled.

II. Harvard's admissions process fails strict scrutiny.

Even under this Court's existing precedent, Harvard's race-based admissions program must withstand strict scrutiny. As the lower courts recognized, Title VI is coextensive with the Equal Protection Clause. Harv.Pet.App.56, 235; UNC.Pet.App.144-45 n.46; *accord* UNC.BIO.23; U.S.-*Harvard*-CVSG-Br.

21. Because the Equal Protection Clause requires race-based admissions to satisfy strict scrutiny, Harvard must prove that its admissions program is "narrowly tailored" to achieve "the only interest that this Court has approved in this context": the educational benefits of "student body diversity." *Fisher I*, 570 U.S. at 314-15.

Harvard fails strict scrutiny. It penalizes Asian Americans, engages in racial balancing, overemphasizes race, and rejects workable race-neutral alternatives.

A. Harvard penalizes Asian Americans.

Grutter (to its discredit) allows universities to discriminate against other races in favor of "underrepresented" minorities, so long as the discrimination is not "undu[e]." 539 U.S. at 341. But universities cannot discriminate against any group *in favor of whites*. *Id.* at 375 (Thomas, J., concurring in part and dissenting in part). To survive narrow tailoring, universities can use race "only as a 'plus.'" *Id.* at 334 (majority). Race cannot be a *minus* for any applicant, as such a "divisive" use of race would serve no legitimate purpose. *Fisher II*, 579 U.S. at 380. Nor can universities engage in "'impermissible racial stereotypes.'" *Schuette*, 572 U.S. at 308 (op. of Kennedy, J.).

As the United States previously found, Harvard "has repeatedly penalized one particular racial group: Asian Americans." CA1.U.S.Br. 3. Asian-American applicants should be admitted at a *higher* rate than whites. They are substantially stronger than white applicants on nearly every measure of academic

achievement, including SAT scores, GPA, and the academic rating. Harv.JA872-74, 1785-87. They perform better on the extracurricular rating and in alumni interviews. Harv.JA874, 1787. And they perform similarly on nearly every other rating that matters. Harv.879, 1392-93, 1787. Yet except for 2019 (the only year in the data that postdates SFFA's suit), non-ALDC Asian Americans were admitted at the *same* rate as non-ALDC white applicants. Harv.Pet.App. 170-72.

The personal rating explains why. The personal rating measures highly subjective qualities like "integrity," "courage," "kindness," and "empathy." Harv. Pet.App.125. Although these personal qualities have nothing to do with race, Asian Americans receive by far the worst scores. Harv.Pet.App.172-73; Harv. JA878, 1787. Nor are those scores an innocent coincidence. The district court found "a statistically significant and negative relationship between Asian American identity and the personal rating assigned by Harvard admissions officers." Harv.Pet.App.190; *see* Harv.JA887-88, 1795. Harvard has never denied, explained, or justified this anti-Asian penalty.

While Harvard's anti-Asian penalty on the personal rating shows discrimination *during* the admissions process, Harvard also discriminates against Asian Americans in actual admissions outcomes. As the district court recognized, every regression model—including Harvard's—shows a statistically significant admissions penalty against Asian-American applicants when the personal rating is excluded. Harv.JA895, 1064-65; Harv.Pet.App.203.

While Harvard objects to any admissions model that omits the personal rating, the district court found that such models are "econometrically reasonable" and "probative." Harv.Pet.App.199. Because the personal rating is plainly influenced by race, it must come out of any model that is trying to measure the effect of race on Harvard admissions—just like the overall rating, which the parties agree is influenced by race and thus must be removed from the models. Harv. Pet.App.195

The district court nevertheless sided with Harvard because, in its view, the causes of the penalty were unclear, the court could imagine non-racial explanations, and Harvard denied liability. Harv.Pet. App.194. But Harvard's admissions system is not subject to rational-basis review, where Harvard wins so long as "'there is any reasonably conceivable state of facts'" supporting its position. *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993). Strict scrutiny requires Harvard to carry the burden on every question—including whether it penalizes Asian Americans. *Fisher*, 570 U.S. at 310; *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817-18 (2000). The point of strict scrutiny, after all, is to "'smoke out'" any "'racial prejudice or stereotype.'" *Adarand*, 515 U.S. at 226. Harvard is not entitled to "the benefit of the doubt." *Playboy*, 529 U.S. at 818. If two "possibilities were 'equally consistent' with the record" or if "the record was 'not clear,'" then Harvard should have lost. *Id.* at 819. The "burden imposed by [the] strict-scrutiny test" is far too heavy for Harvard to prevail on "'little more than assertion and conjecture.'" *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002).

If the district court had applied strict scrutiny, it would have found Harvard liable for penalizing Asian Americans. There is no evidence that Asian-American applicants actually have less desirable personal qualities. While Harvard's witnesses "assert[ed]" that they "use[] race in a permissible way," *Fisher I*, 570 U.S. at 313, this self-serving testimony is insufficient to carry Harvard's burden, *Castaneda v. Partida*, 430 U.S. 482, 498 n.19 (1977). Harvard's burden is particularly high here because it penalizes Asian Americans in the most "subjective" parts of its process. *Id.* at 497.

And the burden is higher still because Harvard is a recidivist. Any "accounting" of Harvard's admissions process must include "the racially discriminatory *reasons*" that led Harvard to adopt that process "in the first place." *Ramos*, 140 S.Ct. at 1401. Harvard has maintained the same admissions program despite its "sordid history" of discrimination against Jews, a federal investigation uncovering anti-Asian stereotyping, and internal reports revealing anti-Asian penalties. *Id.* at 1410 (Sotomayor, J., concurring). By instead giving Harvard every benefit of the doubt, the lower courts erred.

B. Harvard engages in racial balancing.

This Court's cases flatly prohibit "'racial balancing.'" *Fisher I*, 570 U.S. at 311. Universities racially balance when they seek "'some specified percentage'" of a particular race. *Grutter*, 539 U.S. at 329. Racial balancing is forbidden because "'racial diversity'" is not a compelling interest; *Grutter*'s only sanctioned interest is unlocking "the benefits of [broader] student body diversity." *Parents Involved*, 551 U.S. at 733;

Fisher I, 570 U.S. at 314-15. When universities pay "'[s]ome attention'" to the racial numbers, they must be "working forward from some demonstration of the level of diversity that provides the purported benefits"—not "working backward to achieve a particular type of racial balance." *Grutter*, 539 U.S. at 336; *Parents Involved*, 551 U.S. at 729 (plurality).

As the United States recognized below, Harvard engages in "deliberate racial balancing." CA1.U.S.Br. 12. Four Justices found impermissible racial balancing in *Grutter* when the number of underrepresented-minority admissions varied 7% over a six-year period. *See* 539 U.S. at 336. Harvard's range is much tighter, moving less than 4% during the six years before SFFA filed suit. Harv.JA1770. Such precision is particularly unacceptable for Harvard—a school that admits it is not pursuing critical mass. And it is facially implausible if Harvard were truly aggregating tens of thousands of "individualized, case-by-case" decisions. *Bakke*, 438 U.S. at 319 n.53 (op. of Powell, J.).

The lower courts found no racial balancing because admit numbers varied over a *forty-year* period. Harv.Pet.App.64, 205-08. But that approach contradicts *Grutter*, which evaluated a shorter, six-year period; and it lets Harvard escape liability for racial balancing in admissions based on long-term changes in the applicant pool. And even if the variance between the applicant and admitted pools mattered, the lower courts' chosen metric cuts the other way: the variance in the admitted class of African Americans during the ten-year period before SFFA sued (10.0%

to 11.7%) is about half the variance in the African-American applicant pool over the same ten years (7.5% to 10.4%). Harv.JA1769-70.

But no inferences from the numbers are necessary because Harvard has confessed to racial balancing. The reason its admissions officers consult their "ethnic stats" throughout the process is because they won't tolerate "a dramatic drop-off in some group [from] last year," even if the total number of under-represented minorities is increasing. Harv.Pet.App. 136-37; Harv.JA747-49, 822-23, 829-30, 1249. Contrary to *Grutter*, Harvard *does* give race "more or less weight based on the information contained in [the one-pagers]." 539 U.S. at 336. It will "go back and look at those cases" again if a racial group is "under-represented." Harv.JA.746; Harv.Pet.App.136-37. Indeed, Harvard must achieve a precise racial balance before it makes offers because it has a limited number of beds and, according to Harvard, different races enroll at different rates. Harv.Pet.App.137. Contrary to the lower courts' assumption, Harv.Pet.App.65-67, the Court has never endorsed this kind of racial engineering, *see Parents Involved*, 551 U.S. at 726-27 (plurality).

C. Harvard does not use race as a mere plus to achieve overall diversity.

Because all racial classifications must be narrowly tailored, universities must limit their use of race. Racial preferences must be limited in degree: race cannot be "the defining feature" of an applicant's file, and universities must give "serious consideration to all the ways" an applicant contributes to diversity.

Grutter, 539 U.S. at 337. Racial preferences also "must be limited in time." *Id.* at 342. Universities cannot endorse a "permanent justification for racial preferences," or fail to use both "sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary." *Id.*

At Harvard, race matters more than every other diversity factor and all but the most elusive academic and extracurricular factors. Consider how Harvard treats religious diversity. A person's religious faith is often "'the most fundamental part of his identity.'" *Hassan v. N.Y.C.*, 804 F.3d 277, 302 n.14 (3d Cir. 2015). Yet when applicants self-report their religion, Harvard *blinds itself* to this information; admissions officers thus usually have no idea whether an applicant is Catholic, Protestant, Buddhist, Muslim, Jewish, Daoist, atheist, or something else. Harv.JA 734-43. Similarly, Harvard claims to value socio-economic and geographic diversity, yet both are sorely missing. There are 23 times as many wealthy students on campus as poor students, for example. Harv.JA756; *accord* Harv.JA787-91.

Unlike these other measures of diversity, Harvard is obsessed with race. Harvard awards preferences to applicants who check the box for "Black" or "Hispanic," whether or not they write about their race or otherwise indicate that it's important. Harv.Pet.App. 116; Harv.JA568-71, 900-01, 1071-72. And Harvard never verifies whether applicants are really the race that they check, Harv.Dkt.619 at 16 ¶57, despite obvious concerns with leaving this supposedly crucial

metric up to self-reporting, *cf*. Korn, *Students Were Advised to Claim to Be Minorities in College Admissions Scandal*, Wall St. J. (May 19, 2019), on.wsj.com/3rTh5j4. There's only one reason to run admissions this way: because the goal is to get the right racial numbers, not to "examine[]" the "file of a particular [minority] applicant … for his potential contribution to diversity." *Bakke*, 438 U.S. at 317 (op. of Powell, J.).

Harvard's racial preferences are enormous. In absolute terms, race is "determinative" for at least "45% of all admitted African American and Hispanic applicants," or "nearly 1,000 students" over a four-year period. Harv.Pet.App.209-10. This is not "a small portion of admissions decisions." *Fisher II*, 579 U.S. at 384-85. And the size of Harvard's racial preferences dwarfs Texas's in 2008 and mirrors Michigan Law's in 2000, even though universities are supposed to be *decreasing* their use of race over time. *Compare* Harv.Pet.App.209-10, *with Fisher II*, 579 U.S. at 427-28 (Alito, J., dissenting); *Grutter*, 539 U.S. at 320. Harvard's preference is far from "modest," Harv.Pet. App.255, and is certainly not "'a factor of a factor of a factor,'" *Fisher II*, 575 U.S. at 375.

Race predominates in relative terms as well. For students who have a real shot at getting into Harvard—essentially the top quarter of applicants—the boost for being African American is comparable to getting a 1 on the academic, extracurricular, or personal rating. Harv.JA1773, 1816; *see* Harv.JA1046-55. These "1" ratings are incredibly rare, with only 0.45%, 0.31%, and 0.03% of applicants receiving them,

respectively. Harv.JA1393. Harvard thus equates having the right race with obtaining "near-perfect scores and grades" and authoring "original scholarship"; winning "national-level" awards in extracurricular activities; and having an "outstanding" personality. Harv.JA1143-44.

Finally, Harvard has no plans to stop—or even decrease—its use of race. Harv.JA1136. Harvard boasts that it uses race the same way it did in the 1970s. Harv.JA678-82; *see* Harv.JA580; CA1.JA1391-92. And Harvard made no effort to even consider a race-neutral alternative until SFFA sued it. Harv. Pet.App.153. Harvard also does not use the concept of "critical mass," does not have a sunset date for its use of race, and does not even accept *Grutter*'s deadline of June 2028. Harv.Pet.App.72-73; Harv.JA1136-38. Harvard has never articulated another "sufficiently measurable" yardstick that ensures its use of race will end. *Fisher II*, 579 U.S. at 381. When asked to identify one at trial, it came up empty. Harv.JA572, 820. By holding that Harvard need not adopt any of these limitations, the lower courts fundamentally misread this Court's precedent.

D. Harvard has workable race-neutral alternatives.

Race-based admissions must be "'necessary.'" *Fisher I*, 570 U.S. at 312. Race is not necessary when a "workable race-neutral alternativ[e]" is available. *Id.* "Workable" does not mean perfect; it means an alternative that achieves the educational benefits of diversity "'about as well and at tolerable administrative expense.'" *Id.*

Harvard has at least one workable race-neutral alternative. At trial, SFFA simulated an alternative where Harvard eliminates its preferences for the children of donors, alumni, and Harvard faculty—who are overwhelmingly white and wealthy—and increases its preference for the socioeconomically disadvantaged. Harv.JA763-65, 774-75. Under this simulation, underrepresented minority admissions rise slightly, Asian-American admissions increase, Harvard becomes more socioeconomically diverse, and academic characteristics remain excellent. Harv.JA774-75, 1775, 1783.

Contrary to the lower courts' reasoning, a university cannot distribute benefits and burdens based on race—the most odious classification known to American law—because race neutrality would cause the university to *change*. Harv.Pet.App.75-79. Desegregation required radical changes, but those real and threatened consequences rightly did not deter the judiciary from enforcing the Constitution's demands. *E.g.*, *Allen v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 249 F.2d 462, 465 (4th Cir. 1957) (that "the schools might be closed" could not justify continued segregation); *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966) ("no consideration of prison security or discipline" could justify continued segregation of Alabama penal facilities), *aff'd*, 390 U.S. 333 (1968). The question is not whether race-neutral alternatives will change an institution, or whether the university finds them painful or philosophically disagreeable. The question is whether race-neutral alternatives "'could promote the substantial

interest about as well and at tolerable administrative expense.'" *Fisher I*, 570 U.S. at 312.

None of the lower courts' reasons for rejecting Harvard's available race-neutral alternative are compelling. An alternative is not "unworkable" because Harvard might see changes to its desired racial percentages; dips in its record-breaking endowment; negligible differences in chosen majors, SAT scores, or profile ratings; or ruffled feathers from a few professors whose children were denied admission. Harv.Pet. App.75-79; *see Grutter*, 539 U.S. at 340; *Fisher I*, 570 U.S. at 312. Harvard would have to prove that these minor changes would prevent it from achieving *student-body diversity* writ large, not merely "'racial diversity.'" *Fisher I*, 570 U.S. at 311-12. That robust evidentiary showing was not made here. Nor could it possibly be made given the sizable increase in *socio-economic* diversity that would occur, which Harvard has long claimed to prize. Harv.JA665-66.

The First Circuit's focus on SAT scores is particularly odd given that many high-quality universities are abandoning this metric. *See University of California Will No Longer Consider SAT and ACT Scores*, N.Y. Times (May 15, 2021), nyti.ms/3ojysqv (noting that "[m]ore than half of the country's four-year colleges and universities dismissed the ACT or SAT for fall 2021 admission[,] including top universities like Brown, Caltech, Carnegie Mellon, Columbia, the University of Virginia and Yale"). Indeed, Harvard itself no longer requires the SAT or the ACT. *See Harvard Won't Require SAT or ACT Through 2026 as Test-Optional Push Grows*, Wash. Post. (Dec. 16,

2021), wapo.st/3qdwpWI. And Harvard is perfectly willing to sacrifice this metric to meet its racial goals. Harv.JA659-60; *e.g.*, Harv.JA1342. Slight dips in average SAT scores are a small price to pay to stop discriminating against children based on race.

III. UNC's admissions process fails strict scrutiny.

UNC is not complying with existing precedent either. UNC has "workable race-neutral alternatives" that could achieve the educational benefits of diversity "'about as well and at tolerable administrative expense.'" *Fisher I*, 570 U.S. at 312. Its use of race thus fails strict scrutiny.[8]

Like Harvard, UNC could achieve the benefits of diversity by increasing the preferences it gives to socioeconomically disadvantaged students while eliminating the preferences that largely benefit white, wealthy applicants. For example, under the "Modified Hoxby Simulation"—an approach initially proposed by UNC's expert—the university could set aside 750 seats in the class for high-scoring, socioeconomically disadvantaged applicants and fill the rest of the class with the most academically qualified students. UNC.Pet.App.134 n.43; UNC.JA574-79, 1156. This alternative would increase socioeconomic diversity while

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[8] In Count I of its complaint, SFFA also alleged that UNC fails strict scrutiny because it does not use race as a mere "plus" to achieve overall diversity. UNC.Pet.App.145. SFFA's petition for certiorari before judgment did not ask the Court to resolve that claim. That claim remains for the Fourth Circuit to consider, if necessary, on remand.

maintaining racial diversity and academic excellence. UNC.JA576-79, 1157.

The district court rejected this alternative primarily because it would "prevent UNC from pursuing any other types of diversity." UNC.Pet.App.134 n.43. But UNC bears the burden of showing that alternative approaches would somehow deprive its students of the *educational benefits* of diversity. It made no such showing. UNC.Pet.App.134 n.43. The district court's other criticism—that the plan would "lead to a drop in URM admissions and SAT scores," UNC.Pet.App.134 n.43—is even weaker. Under the Modified Hoxby Simulation, underrepresented minority admits would be 16.0% (instead of 16.5%), average GPAs would be 4.63 (instead of 4.75), and SAT scores would be in the 90th percentile (instead of the 92nd). UNC.JA1157. If strict scrutiny has any teeth, then these tiny dips cannot justify the use of explicit racial classifications.

On top of that, the trial demonstrated that UNC has other workable race-neutral alternatives—including several that utilized UNC's holistic admissions process. SFFA presented three race-neutral alternatives that maintained UNC's existing holistic review process, increased socioeconomic preferences in various ways, and eliminated preferences that benefit the white and wealthy, such as legacy preferences. UNC.JA556-70, 1144-51. Under these alternatives, African-American and Hispanic admits hold steady or improve, socioeconomic diversity dramatically improves, and grades and SAT scores remain excellent. UNC.JA1147, 1149, 1151. SFFA also presented two alternatives that adopted versions of "percentage plans,"

under which a certain percentage of the top students from each North Carolina high school are admitted to UNC. UNC.JA570-74, 1152-55. These alternatives, too, maintained or increased African-American and Hispanic admissions, improved socioeconomic diversity, and maintained academic excellence. UNC.JA 1153, 1155.

None of the district court's reasons for rejecting these race-neutral alternatives are consistent with strict scrutiny. UNC cannot reject an alternative because the university would need to admit fewer minority students from wealthier families, UNC.Pet. App.131-32; more white students from poorer families, UNC.Pet.App.136-37; slightly fewer underrepresented minorities, UNC.Pet.App.134 & n.43, 139-40; or 0.5% Native Americans instead of 1.8%, UNC.Pet. App.139; UNC.JA1198, 1550. Nor can UNC reject an alternative simply because it would create minor administrative burdens, UNC.Pet.App.141, require a larger socioeconomic preference, UNC.Pet.App.135; UNC.JA559-60, or be the first of its kind, UNC.Pet. App.141.

That universities in California and Michigan are more racially diverse than ever before means that the evidence UNC needs almost certainly doesn't exist. Indeed, public universities from across the country have eliminated the use of race and maintained diversity. *See* UNC.JA551-52, 580-81, 1260-71. These universities have, among other things, increased socioeconomic preferences; increased financial aid; adopted policies promoting geographic diversity, including percentage plans; eliminated preferences

for legacies; eliminated early action; increased recruitment efforts; increased admission of community college transfers; and developed partnerships with disadvantaged high schools. UNC.JA555, 1260-71, 1318. These institutions remain elite and, by their telling, diverse. There is no reason why UNC cannot do the same. In fact, the myriad race-neutral alternatives available to universities led the United States to conclude in *Grutter* that racial preferences are *never* necessary. *See* U.S.-*Grutter*-Br. 10-21, 2003 WL 176635. It was right.

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For all these reasons, the lower courts violated this Court's precedent. If their decisions stand, then universities can use race even if they impose racial penalties, make backward-looking racial adjustments, ignore critical mass, eschew sunset provisions, and identify no substantial downsides to available race-neutral alternatives. The Court's precedent does not allow this unbridled use of race.

While correcting these errors is necessary, it is not sufficient. The violations of this Court's precedent at Harvard and UNC are fundamental. They reveal either that universities cannot comply with this Court's cryptic commands, or that those commands simply do not influence how universities use race. Either way, the facts in these cases are a damning indictment of the *Grutter* regime. If the oldest public and private universities in the country cannot follow *Grutter*, then no one can. That decision deserves its place beside *Plessy* in the dustbin of failed racial experiments. "In the eyes" of the Constitution and

Title VI, "we are just one race here. It is American." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in judgment).

CONCLUSION

This Court should reverse the decisions below.

Adam K. Mortara
125 South Wacker Drive,
Ste. 300
Chicago, IL 60606

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109

Alan M. Ruley
BELL, DAVIS & PITT, P.A.
P.O. Box 21029
Winston-Salem, NC 27120

William S. Consovoy
Counsel of Record
Thomas R. McCarthy
J. Michael Connolly
Cameron T. Norris
Bryan Weir
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com

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Counsel for Petitioner