NOS. 20-1199 & 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & 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 Court of Appeals for the First and Fourth Circuits

BRIEF OF AMICI CURIAE OKLAHOMA AND 18 OTHER STATES IN SUPPORT OF PETITIONER

JOHN O'CONNOR
OKLAHOMA ATTORNEY GENERAL
MITHUN MANSINGHANI
SOLICITOR GENERAL
COUNSEL OF RECORD
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 N.E. TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 521-3921
MITHUN.MANSINGHANI@OAG.OK.GOV

MAY 9, 2022 *COUNSEL FOR AMICI CURIAE*

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INTERESTS OF THE AMICI CURIAE[1]

The *Amici* States are home to thousands of Asian-American students who are subject to the discriminatory policies challenged in these actions. It is important to *Amici* that their students have equal access to the Nation's educational institutions, including Harvard College and the University of North Carolina. Indeed, discriminatory practices of such institutions often fall especially hard on out-of-state students. *See* UNC.Pet.App.69-70, 77, 95-96. If allowed to attend, students will be able to support their families in the *Amici* States and to bring back to the States the acquired skill, knowledge, and credentials that further enable them to be leaders of and economic contributors to our States.

For example, Oklahoma City is home to one of the country's largest Vietnamese-American communities. Tulsa has the largest concentration of Burmese-Americans of Chin ethnicity. Clarkston, Georgia has the most concentrated Bhutanese-American population in the United States. Alabama has thriving Chinese and Korean communities. Dublin, Ohio, is nearly a quarter Asian-American. Louisiana was the site of one of America's first Asian communities after Filipinos settled in Saint Malo prior to the Founding.

Many of these Asian ethnic groups have below-average educational attainment or economic privilege. More than a third of Burmese-Americans live below the poverty level—a rate higher than Black or Hispanic

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[1] Amici submit this brief pursuant to Sup. Ct. R. 37.4. All parties have filed blanket consent to the filing of *amici* briefs.

Americans.[2] Two-thirds of Bhutanese-Americans receive SNAP benefits.[3] Only 9% of Bhutanese-Americans have a bachelor's degree or higher.[4] In fact, while stereotypes portray Asian-Americans as broad group that is upwardly mobile, the reality is that Asian-Americans have the largest and fastest growing intra-group income inequality in the country.[5] But because they are classified as "Asian," Americans from these less-privileged ethnic backgrounds have a lower chance of admission to universities like respondents than other minorities. These Americans face especially high hurdles because respondents have rejected race-neutral alternatives that would seek to instead place greater focus on socioeconomic diversity.

Ending unequal treatment of our Asian-American citizens does not diminish equal opportunity for our other racial minority communities. As further explained below, some of *Amici* States have prohibited racial classifications in university admissions and yet successfully maintain diverse campuses that are inclusive and equally open to students of any race. Respondents' claim in this case that such diversity is

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[2] Victoria Tran, *Asian Americans Are Falling Through the Cracks in Data Representation and Social Services*, The Urban Institute (June 19, 2018), https://www.urban.org/urban-wire/asian-americans-are-falling-through-cracks-data-representation-and-social-services.

[3] *Id.*

[4] Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, Pew Research Center (July 12, 2018), https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/.

[5] *Id.*

impossible without engaging in racial discrimination is contradicted by the experience of our public universities that provide the highest quality education to all without regard to skin color or ethnicity.

SUMMARY OF THE ARGUMENT

Grutter's sanction of racial discrimination in university admissions should be overruled. In addition to the reasons offered by petitioner, overturning *Grutter* is justified by several factors that weigh against *stare decisis*: the experience of *Amici* States that have banned affirmative action yet achieve diverse and thriving campuses, *Grutter*'s inconsistency with related decisions on equal protection and strict scrutiny, the unworkability of the rule *Grutter* established, and the harm *Grutter* has imposed on Asian-Americans.

I. Data from the *Amici* states that have prohibited race-conscious admissions shows that universities can remain both diverse and academically competitive without resorting to racial discrimination. Unlike when *Grutter* was decided, nine states now prohibit racial distinctions in university admissions. The University of Oklahoma, for example, remains just as diverse today (if not more so) than it was when Oklahoma banned affirmative action in 2012. States like Oklahoma and Nebraska have similar Hispanic populations as North Carolina, Massachusetts, and Maryland, and all five states' flagship public universities—including respondent UNC—have similar Hispanic enrollment despite the former two states prohibiting race-consciousness and the latter three

not doing so. The same is true of universities in states that have high Hispanic populations like Florida and Arizona, which have banned affirmative action, when compared with universities in states like Nevada and Colorado, which have not. Nor does the University of Oklahoma have a meaningfully lower African-American student population than universities in comparable discriminating states like Massachusetts, Minnesota, and Wisconsin.

Grutter also was concerned about preparing students for the workforce, but public universities in states that have prohibited affirmative action produce student success at rates comparable to universities in states that permit it. And some of the most successful schools at promoting the economic mobility of minority students—like Historically Black Colleges and Universities—are not very diverse at all. These factual developments since *Grutter* justify overruling *Grutter*'s assumption that there is no workable alternative to maintaining campus diversity and student success other than open racial discrimination.

II. While *Grutter* claimed fidelity to strict scrutiny, the deference it affords to university decisions to discriminate based on race is inconsistent with how the Court applies strict scrutiny in other contexts. The decisions below highlight that inconsistency. Specifically, the courts below applied something markedly less than strict scrutiny's narrow tailoring when evaluating respondents' need to engage in race-based evaluation of applicants. They rejected petitioner's race-neutral alternatives for reasons that are not compelling enough to justify continued race-based decisionmaking, including: potential difficulties in attracting faculty, possible loss of donors, marginal

decreases in some (but not other) academic averages, the chance that the distribution of student majors will be different, and attendant administrative costs. These would not pass strict scrutiny in any other area of law outside of *Grutter*'s outlier standard.

Harvard also complained that petitioner's race-neutral alternative would result in fewer African-Americans being admitted. Meanwhile, Asian and Hispanic admissions would increase. Similarly, UNC refused race-neutral alternatives that would result in marginal changes in racial composition. Such refusals amount to nothing more than departures from Harvard's and UNC's preferred racial quota. Respondents have no compelling interest in maintaining their racial balance without proving that each of those new Asian (and Hispanic) admittees *as individuals* would contribute less to diversity than their African-American peers. If any of respondents' reasons for rejecting petitioner's race-neutral alternatives were enough to satisfy strict scrutiny, it is hard to see how any plaintiff would prevail when their individual rights have been violated. But this is precisely the sort of lax scrutiny *Grutter* permits.

III. *Grutter* should also be overruled because it has proven unworkable, as the decisions below demonstrate. Respondents in this case were forced to take multiple contradictory positions because *Grutter* requires a delicate dance to justify engaging in some—but not too much—racial discrimination. Harvard, for example, makes the puzzling assertion that for many applicants its consideration of race is somehow "determinative" but not "decisive." Respondents also claim they consider each applicant holistically and individually, yet Harvard carefully monitors its racial balance

throughout its admissions process and takes race into account even if not individually relevant. And both schools reject race-neutral alternatives that would change their current racial balance without first taking into account individualized considerations, undermining their claims about holistic decisionmaking. All of this is because *Grutter* allows respondents to engage in racial discrimination to advance a "compelling" interest but then forces respondents to pretend they are not actually divvying up students based on race at all. Finally, *Grutter*'s 25-year expiration date has proven unworkable since, short of this Court's overturning *Grutter*, there appears to be no voluntary end in sight for university race-based admission practices.

IV. The facts of these cases confirm the intolerable harm imposed by *Grutter*: outright discrimination against Asian-Americans. The evidence here shows that Asian-Americans are not competing on a level playing field with African-American and Hispanic applicants. An Asian student with even the most stellar academic credentials is less likely to be admitted than a student of another race with relatively middling grades. It is the functional equivalent of the quota invalidated in *Bakke* or the point system struck down in *Gratz*, but it is the inevitable result of almost every affirmative action policy.

The First Circuit's reasons for turning a blind eye towards this discrimination—Asians are still competitive with Whites and their lower admissions may be explained by lower "personal ratings" caused by uncertain or unknowable factors—are inconsistent with the exacting scrutiny required for violations of equal protection and nondiscrimination laws. Accepting every nondiscriminatory explanation at face value,

as the courts below did, whistles past the obvious discriminatory effect of explicitly race-conscious policies on Asian-Americans. This only incentivizes respondents to make their admissions processes more opaque to mask any discrimination while engaging in racial balancing. This Court should overrule *Grutter* to ensure these practices end—at Harvard, UNC, and everywhere else.

ARGUMENT

The language of Title VI, "like that of the Equal Protection Clause, is majestic in its sweep." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 284 (1978). *Grutter* fails to live up to that majesty.

The experience in *Amici* States shows that racial discrimination is not strictly necessary to advance the interests *Grutter* endorsed. States that have legally prohibited affirmative action boast diverse campuses that consistently yield student success on par or greater than comparable schools that consider race in admissions. This experience since *Grutter* undermines one of its key factual assumptions—the unavailability of race-neutral alternatives—and shows *Grutter* cannot survive the searching inquiry normally provided to racial distinctions.

Thus, while *Grutter* claimed that affirmative action is subject to the same strict scrutiny given to other acts of *de jure* racial discrimination, both *Grutter* and the decisions below show that its standard is strict in name only. *Grutter*'s attempt to craft a standard that is simultaneously "strict scrutiny" and deferential to a university's attempts at social engineering has also left the law completely unworkable. Meanwhile, maintaining *Grutter* comes at an enormous cost to Asian-Americans, who bear the brunt of this Court's erroneous decision.

Because this case and our experience since *Grutter* shows *Grutter*'s inconsistency with strict scrutiny, its inability to be consistently applied, the race-neutral alternatives available to universities, and the signif-

icant harms inflicted on minority communities, this Court should overrule *Grutter*.

I. THE EXPERIENCE OF *AMICI* STATES SINCE *GRUTTER* DEMONSTRATES *GRUTTER*'S ERRONEOUS ASSUMPTIONS ABOUT RACE-BASED POLICIES.

Nine states have resisted the temptations of race-based admissions and, often by popular referendum, legally barred universities in their state from engaging in such discrimination.[6] Data from these states, many of which banned affirmative action after *Grutter* was decided, undermines *Grutter*'s assumption that diversity cannot be achieved by any other means or only by alternatives that come at an intolerable educational cost. It also undermines respondent's claim that no similar schools have been able to implement any race-neutral alternatives "that worked well." UNC.Pet.App.115. Accordingly, the experiences in the states that have committed themselves to equal-opportunity admissions both disproves respondents' rejection of race-neutral alternatives and undermines the factual assumptions that led the court in *Grutter* to (temporarily) endorse race-conscious admissions. Such developments counsel in favor of overruling *Grutter*. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448, 2482-83 (2018); *S. Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2096-98 (2018).

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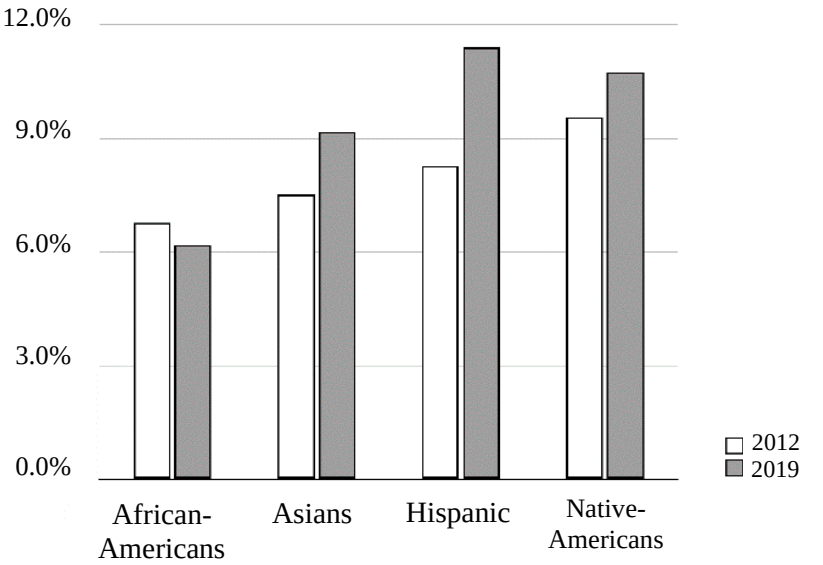
[6] *See* Idaho Code Ann. § 67-5909A (2020); Okla. Const. art. II, § 36A (2012); N.H. Rev. Stat. Ann. § 187-A:16-a (2012); Ariz. Const. art. II, § 36 (2010); Neb. Const. art. I, § 30 (2008); MI Const. art. 1, § 26 (2006); Fla. Executive Order 99-281 (1999); Wash. Rev. Code Ann. § 49.60.400 (1998); Cal. Const. art. I, § 31 (1996).

1. The voters of *Amicus* Oklahoma, for example, amended their Constitution via referendum in November 2012 to say: "The state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting." Okla. Const. art. II, § 36A. Since that time, there has been no long-term severe decline in minority admissions at the University of Oklahoma:[7]

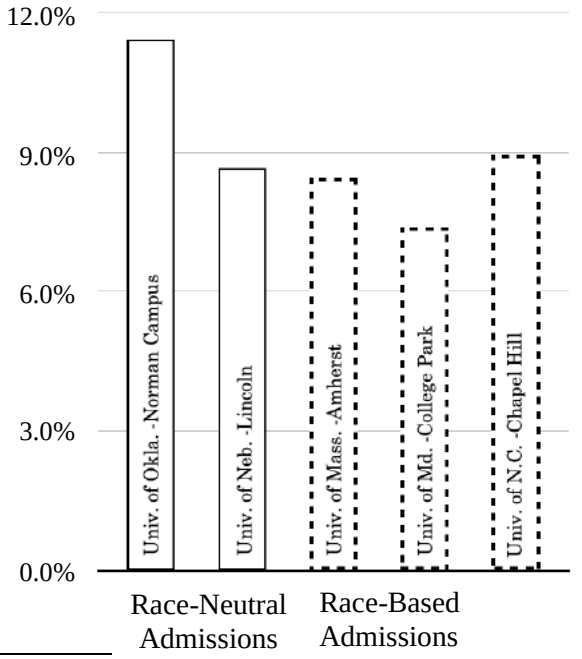
Percentage of Freshman Enrolled at the Univ. of Okla. For the Years 2012 and 2019



[7] Institutional Research and Reporting, *Annual Reports: First-Time Freshman Analysis*, University of Oklahoma, https://www.ou.edu/irr/data-center/annual-reports. Students that enrolled in 2012 were the last cohort to have been admitted under race-conscious policies. This data reflects self-identified race that includes students that identify with the listed race alone or in combination with one or more other race.

The flagship public universities of states that have banned consideration of race in university admissions are no less diverse than comparable universities in states that still permit such discrimination, including UNC. For example, the Hispanic population in Oklahoma (11.9%) and Nebraska (12%)—states that have banned race-based admissions—is similar to that of North Carolina (10.7%), Maryland (11.8%) and Massachusetts (12.6%), and the share of Hispanic students in each of those state's flagship public universities is also similar:[8]

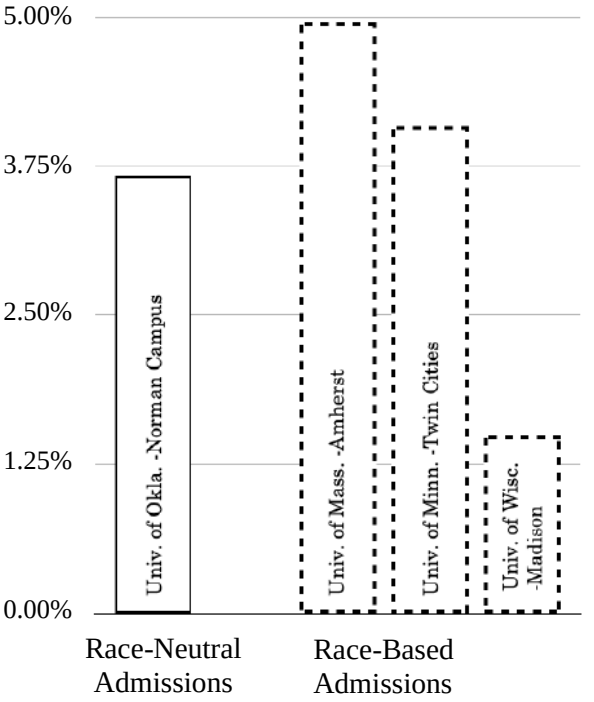
Percentage of Freshman Enrolled in 2019 Identifying as Hispanic



[8] Unless otherwise noted, data for university admissions for a state's flagship university was obtained from the Integrated Postsecondary Education Data System. https://nces.ed.gov/ipeds/ . This data does not include students that identify with two or more races, and is limited to first-time freshman who enrolled in 2019.

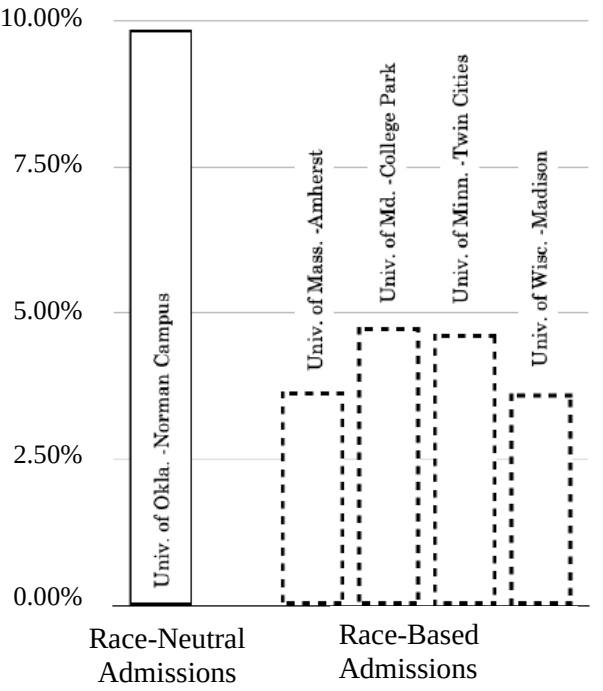
Similarly, States with similar African-American populations as Oklahoma (8.8%) that have not prohibited race-conscious admissions, like Massachusetts (7.9%), Minnesota (8%), and Wisconsin (7.2%), do not admit substantially more African-American students:

Percentage of Freshman Enrolled in 2019 Identifying as African American



Notably, this data underreports representation at the University of Oklahoma because OU has a high number of students reporting more than one race:

Percentage of Freshman Enrolled in 2019 Identifying with More than one Race



Thus, when African-Americans who report two or more races are included, the share of 2019 freshman enrollment identifying as African-American at the University of Oklahoma increases to 6.2%.[9]

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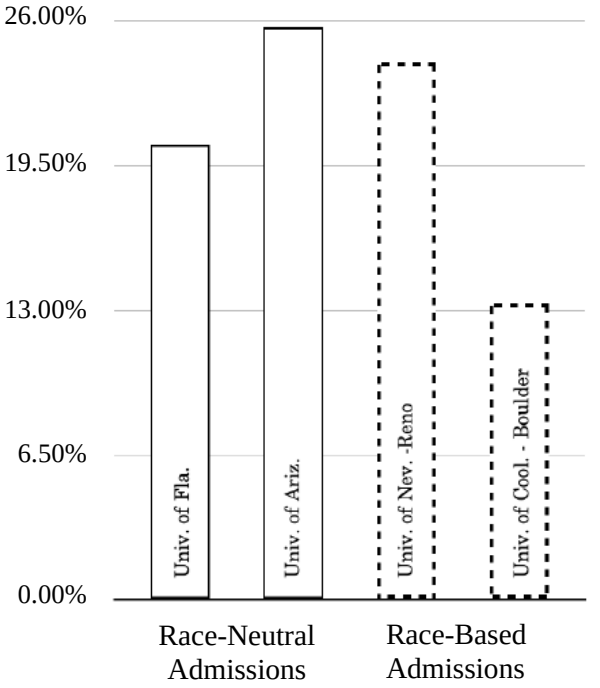
[9] Institutional Research and Reporting, *First-Time Freshman Analysis Fall 2019*, University of Oklahoma, https://www.ou.edu/content/dam/irr/docs/Annual%20Reports/First%20Time%20Freshmen/FTF_Analysis_Fall_2019_revised%2010-15-20.pdf.

The same ability to maintain racial diversity shows when looking at states with very high Hispanic populations, *e.g.* comparing Florida (26.5%) and Arizona (30.7%), which have prohibited affirmative action, with Nevada (28.7%) and Colorado (21.9%), which have not:

Percentage of Freshman Enrolled in 2019 Identifying as Hispanic



In all, the data shows that universities are no less capable of maintaining and growing diverse student bodies when they give up race-conscious admissions and instead adopt race-neutral alternatives.

2. Nor have the educational missions been undermined in any measurable way in universities that are prohibited from considering race in admissions. *See*

Br.70. Even elite universities need not sacrifice academic excellence when giving up race-based policies. As Justice Thomas noted, the University of California at Berkeley has not lost its luster after it was prohibited from considering race in admissions by the voters. *See Grutter*, 539 U.S. at 367 (Thomas, J., concurring in part). In *Grutter*, the University of Michigan Law School entering class of 2000 was 14.5% "underrepre sented minority," 539 U.S. at 320; today, after Michigan voters outlawed race-based admissions, underrepresented minorities are 25% of the law school's class of 2024.[10] Yet Michigan Law School has somehow managed to remain one of the best law schools in the country without indulging in racial discrimination.

Grutter also endorsed race-based admissions on the belief that such practices are necessary to prepare students for the workforce, crediting the views of some businesses that affirmative action in universities is essential to produce graduates for the jobs employers are seeking to fill. 539 U.S. at 330-31. But again, the data since *Grutter* disproves the notion that students who graduate from race-neutral universities fare any worse when they enter the economy.

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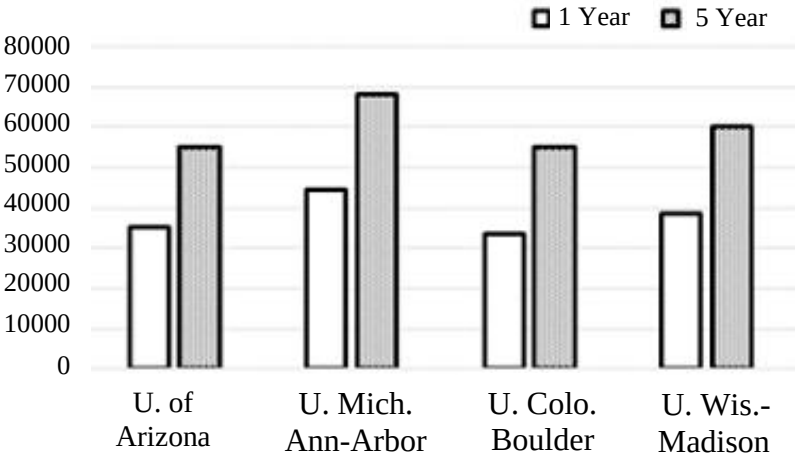
[10] Michigan Law, *JD Admissions Statistics*, https://www.law.umich .edu/prospectivestudents/Pages/classstatistics.aspx.

For example, incomes for graduates one and five years after graduation are not meaningfully lower for public universities in states that have prohibited affirmative action (like Michigan and Arizona) than in states in the same region that allow it (like Wisconsin and Colorado).[11]

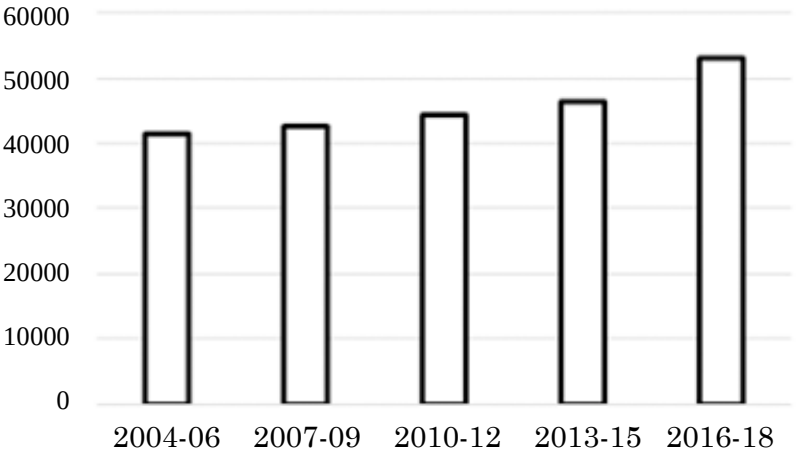
Earning (*50th percentile*) for 1 Year and 5 Year Post-Graduation for 2010-2012 Graduates



11 U.S. Census Bureau, *Post-Secondary Employment Outcomes*, https://lehd.ces.census.gov/data/pseo_experimental.html.

Similarly, incomes from students graduating from the University of Michigan rose—not fell—after the state prohibited race-conscious admissions in 2006:

Earnings (*50th percentile*) for 1 Year Post-Graduation for University of Michigan-Ann Arbor



Wolverines are no less desirable to businesses and employers now that they are graduating from a school with race-neutral admissions, as opposed to one that discriminates.

The ability of students to thrive in the workforce without attending schools that racially balance their student body is further demonstrated by the success of Historically Black Colleges and Universities (HBCUs). *See Grutter*, 539 U.S. at 364-66 (Thomas, J., concurring in part). These schools, many of which are located in *Amici* States, do not have an immense amount of racial diversity, but demonstrate a marked ability to improve the lives of their students. Respondents' view would denigrate these institutions as incapable of producing

graduates with a stellar education and a readiness for our economic life.

HBCUs "have proven to be extremely effective in graduating Black students, particularly in STEM," where "HBCUs represent seven of the top eight institutions that graduate the highest number of Black undergraduate students who go on to earn [science and engineering] doctorates."[12] "Additionally, HBCUs account for 80% of Black judges, 50% of Black doctors, and 50% of Black lawyers."[13] And some HBCUs, like Xavier University in *Amicus* Louisiana, are more successful in moving their low-income students into the middle class than even Harvard.[14]

Yet these institutions don't exactly meet respondents' definition of "diversity," which respondents contend is necessary for minority student success. Only 2% of incoming freshman in 2019 at Xavier University were White. Langston University in *Amicus* Oklahoma enrolled only two Asian-American freshman and four Hispanic freshman in 2019. At Tuskegee University, in *Amicus* Alabama, the combined 2019 freshman class of American Indians, Asians, Hispanics, and Whites was less than 3% of the class. And at Tougaloo College in *Amicus* Mississippi, every single enrolled freshman in 2019 identified as Black. Despite not doggedly pursuing racial diversity like respondents, these

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[12] Wayna Wondwossen, *The Science Behind HBCU Success*, Nat'l Science Found., https://beta.nsf.gov/science-matters/science-behind-hbcu-success (Sept. 24, 2020).

[13] Hammond et al., *Social Mobility Outcomes for HBCU Alumni*, p.4, United Negro College Fund (2021), https://cdn.unc*f*.org/wp-content/uploads/Social-Mobility-Report-FINAL.pdf.

[14] *Id.* at 14.

institutions are key drivers of minority achievement in the workforce.

The experience in *Amici* States that have banned affirmative action in university admissions show academic institutions need not evaluate their applicants based on race in order to thrive. *Grutter* itself pointed to three states "where racial preferences in admissions are prohibited by state law" and in which universities "are currently engaged in experimenting with a wide variety of alternative approaches." 539 U.S. at 342. Since then, six more states have been added to the list, each with their own race-neutral approaches and degree of on-campus diversity. Even on *Grutter*'s own terms, these developments end the need for affirmative action because "[u]niversities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." *Id.* That race-neutral alternatives have now been demonstrated to be available and workable justifies ruling that the Constitution and Title VI can no longer abide by racial discrimination in university admissions.

II. *GRUTTER* HAS PROVEN INCONSISTENT WITH EQUAL PROTECTION JURISPRUDENCE.

In *Grutter*, the Court decided to "defer" to the university's judgment on the need for its race-conscious admissions practices, noting that "universities occupy a special niche in our constitutional tradition," and that despite making racial distinctions among applicants, "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" 539 U.S. at 328-29 (quoting *Bakke*, 438 U.S. at 318-19). Justice Powell's opinion in *Bakke*, which *Grutter* endorsed, similarly granted a "presumption of legality" to university admissions where race is taken into account. 438 U.S. at

319 n.53. Meanwhile, *Grutter* endorses the idea that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but necessitates only "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339.

This deferential review is in stark contrast with how the Court approaches strict scrutiny in other contexts. *See Grutter*, 539 U.S. at 361-67 (Thomas, J., concurring in part); *id.* at 380 (Rehnquist, J., dissenting); *id.* at 387-89, 394 (Kennedy, J., dissenting). That "[in]consistency with related decisions" on strict scrutiny, which "sits uneasily" with this Court's other precedents on racial equality, warrants *Grutter*'s reconsideration. *See Ramos v. Louisiana*, 140 S.Ct. 1390, 1404-05 (2020).

1. Whether campus diversity is a compelling interest that justifies open racial discrimination has been dubious from the start. *See* Br.51-56; *Grutter*, 539 U.S. at 347-48 (Scalia, J., concurring in part); *id.* at 351-61 (Thomas, J., concurring in part); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring). But perhaps most problematic is *Grutter*'s narrow tailoring *lite*. It looks nothing like how this Court has scrutinized impositions on free speech or free exercise of religion, or even how this Court has evaluated racial classifications in other contexts.

This is evident from the opinions below: while paying lip-service to strict scrutiny, *e.g.*, Harvard.Pet. App.61-63, the courts below gave respondents deference and the benefit of the doubt at every turn. In showing Harvard's program is not narrowly tailored, petitioner proposed an alternative that would eliminate racial preferences, as well as preferences for children of

donors, alumni, and faculty, while increasing preferences for those who are socioeconomically disadvantaged. *See* Br.33-34. But applying *Grutter*, the First Circuit accepted every excuse Harvard gave for rejecting this alternative, no matter how minor, because the proposed alternative would require some modifications in Harvard's operations. *See* Harvard.Pet.App. 75-77. Similarly, the district court in North Carolina accepted every excuse UNC gave for rejecting race-neutral alternatives, no matter how minor, because the proposed alternative would require some modifications in UNC's operations. *See, e.g.*, UNC.Pet.App.141-144, 158-161, 182. *Cf. Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting) (criticizing *Grutter*'s scrutiny as "nothing short of perfunctory").

True strict scrutiny would not permit racial discrimination merely because abandoning discrimination would require some attendant changes. There is no compelling interest in ensuring that everything else remains the same when giving up racial discrimination. *See Grutter*, 539 U.S. at 362 (Thomas, J., concurring in part); *Gratz*, 539 U.S. at 275; *J.A. Croson*, 488 U.S. at 508. Indeed, in our Nation's history, ending racial discrimination has always been accompanied by adjustments some found difficult.

If institutions were able to avoid such changes, the narrow tailoring requirement would become dead-letter because *any* race-neutral alternative will inevitably have ripple effects. Instead, strict scrutiny requires the university to prove that it has a compelling interest in avoiding the changes that it believes make the alternative to racial discrimination infeasible. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279 (1986); *J.A.*

Croson, 488 U.S. at 519 (Kennedy, J., concurring in part).

2. For example, Harvard bemoans that giving up preferences to children of donors, alumni, and faculty might impact its ability to draw top faculty and high-dollar donations. Harvard.Pet.App.76-77. But beyond conclusory testimony that is insufficient for strict scrutiny,[15] which specific faculty member would have refused a professorship at Harvard because his daughter might have to attend Cornell instead? How many such professors are there? And by how much would Harvard's $37 billion endowment decrease because it no longer gave preferences to the privileged kids of wealthy donors? This is the sort of "skepticism" and "most searching examination" that true strict scrutiny requires, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995) (citation omitted), but the First Circuit believed *Grutter* does not demand. Regardless, these interests fall woefully short of compelling enough to justify racial discrimination. In no other field would decreased revenue or ability to attract employees be sufficient to meet the demanding standard of strict scrutiny. *See Fisher v. Univ. of Texas at Austin* ("*Fisher I*"), 570 U.S. 297, 320-22 (2013) (Thomas, J., concurring); *Grutter*, 539 U.S. at 366 (Thomas, J., concurring in part) (citing *United States v. Virginia*, 518 U.S. 515 (1996)). That the First Circuit held these excuses satisfy *Grutter* shows just how wrong *Grutter* is.

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[15] *Cf. J.A. Croson*, 488 U.S. at 500-01; *see also Fisher v. Univ. of Texas at Austin* ("*Fisher II*"), 136 S.Ct. 2198, 2223 (2016) (Alito, J., dissenting).

Harvard's other reasons for rejecting the alternatives to race-based admissions are similarly uncompelling. Fewer students interested in intercollegiate sports or that score high on the problematic "personal rating" cannot be sufficient to compel racial discrimination. Harvard.Pet.App.76; *see* Br.72-75. And the fact that ending discrimination against Asian-Americans would mean a few more students major in electrical engineering rather than creative writing hardly justifies race-based decisionmaking, *see* Harvard.Pet.App.77, especially because Harvard's desire for fewer engineers could be a proxy for excluding Asian-Americans.[16] Nor can "administrative expenses" from such academic shifts, Harvard.Pet.App.77, satisfy the sort of strict scrutiny this Court regularly imposes on burdens to fundamental rights. *See Gratz*, 539 U.S. at 275 (presence of "administrative challenges does not render constitutional an otherwise problematic system"); *J.A. Croson*, 488 U.S. at 508 ("administrative convenience" and "avoiding the bureaucratic effort necessary" to implement race-neutral alternative does not pass strict scrutiny).

Harvard also notes that petitioner's alternative would lead to a 2.9% decline in average SAT scores (with no change in average high school GPA). Harvard. Pet.App.76. But the court below never seriously examined whether such modest decreases satisfy strict

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[16] *See* Peter L. Hinrichs, *Racial and Ethnic Differences in College Major Choice*, Federal Reserve Bank of Cleveland (Mar. 31, 2015), https://www.clevelandfed.org/newsroom-and-events/publications/economic-trends/2015-economic-trends/et-20150331-racial-and-ethnic-differences-in-college-major-choice.aspx (showing while "about 16 percent of white bachelor's degree recipients had a major in a STEM subject, . . . over 30 percent of Asian students did").

scrutiny—it is hardly a "dramatic sacrifice of . . . the academic quality of all admitted students" that would force Harvard "to abandon [its] academic selectivity." *Grutter*, 539 U.S. at 340. Nor did the First Circuit ask what effects on academic excellence are imposed by Harvard's race-conscious policy given "Asian American applicants' stronger academic ratings" in general and higher test scores in particular. Harvard.Pet.App.68-69, 172; *see also* Br.83. In other words, Harvard is willing to make academic sacrifices for the sake of racial discrimination, but not for the sake of racial neutrality. This is precisely the opposite of what our antidiscrimination law requires.

Similarly, the district court in North Carolina accepted testimony that 60 points on the SAT "isn't a material difference" when UNC treats candidates of different races differently, *see* UNC.Pet.App.73-78, 73 n.25, but then held that a race-neutral alternative was unacceptable because it would lower average SAT scores of admittees by about 60 points, accepting conclusory statements about why the law should tolerate this incongruity, *see* UNC.Pet.App.115-116. In any event, again, avoiding such small decreases in academic achievement does not satisfy strict scrutiny. Indeed, the district court blessed UNC's rejection of another race-neutral alternative that "resulted in the same percentage of in-state underrepresented minorities (16.0%), including an increase in African American students from 9% to 10%," while decreasing average SAT scores by only around 30 points ("and GPA dropped marginally"). UNC.Pet.App.139-140. Why? Because with little analysis it deemed that race-neutral alternative "largely impractical" and "unprecedented . . . in higher education." UNC.Pet.App.141.

That is not strict scrutiny. *See J.A. Croson*, 488 U.S. at 493; *Wygant*, 476 U.S. at 279.

Finally, both schools rejected race-neutral alternatives for fear of upsetting their preferred racial balance. Harvard points to the estimation that under one of petitioner's alternatives, the African-American student population would be expected to drop by four percentage points, while the proportion of Asian-American and Hispanic students would rise by seven and five percentage points, respectively. Harvard.Pet. App.75, 77-79; Br.33-34. The share of White students would drop by seven percentage points under this alternative. Similarly, UNC rejects the proposed race-neutral alternatives because, at the margins, they might "meaningfully change[] the [racial] composition of the income class." UNC.Pet.App.141. But if respondents are truly committed to an *individualized* diversity focusing on *holistic* measures, *e.g.* UNC.Pet. App.9, 12, 28—and not raw quotas or racial balancing—how do they know that the increased Hispanic and Asian-American students will not *as individuals* "have greater potential to enhance student body diversity over" their White and African-American peers? *Grutter*, 539 U.S. at 341.

So while the district court found compelling UNC's interest in the "educational benefits of diversity" rather than in a specified racial distribution, it rejected race-neutral alternatives not because there was any specific finding they would cause greater racial isolation and harassment or lessened cross-racial understanding and diversity of viewpoints, but instead because of the unvarnished conclusion race-neutral alternatives would impact the racial composition of the class. *See* UNC.Pet.App.141-44, 182. The benefits of diversity

in this context is not a binary choice: even if there is a marginal decrease in representation of some populations by embracing race-neutral alternatives, respondents put forward no evidence that they would still not obtain most, if not all, of the benefits of diversity they seek. Refusing race-neutral alternatives merely because they would fail "to assure within its student body some specified percentage of a particular group" can only be called "racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 329-30 (quoting *Bakke*, 438 U.S. at 307). The shunning of nondiscriminatory options without individualized consideration thereby impermissibly deems the "single characteristic" of race as "automatically ensur[ing] a specific and identifiable contribution to a university's diversity." *Gratz*, 539 U.S. at 271. That is unlawful.

In short, respondents' rejection of race-neutral alternatives based on racial bean-counting fails strict scrutiny and reveals where their commitments lie. Those commitments are inconsistent with our laws and Constitution. Because these practices are sanctioned by *Grutter*, *Grutter* should be overruled.

III. THE DECISIONS BELOW, WHICH RELY ON NUMEROUS CONTRADICTORY RATIONALES AND CONCLUSIONS, CONFIRM *GRUTTER* IS UNWORKABLE.

Overruling *Grutter* is also warranted because it has proven unworkable, as demonstrated by the decisions below. *See Janus*, 138 S.Ct. at 2481-82; *Knick v. Township of Scott*, 139 S.Ct. 2162, 2178-79 (2019).

The First Circuit acknowledged the "tension" in *Grutter*'s demand that consideration of race not be "too extensive," and instead be only a "'factor of a factor of a factor' in the holistic review process," while also re-

quiring that such consideration significantly advance the diversity goals. Harvard.Pet.App.62 n.27 (citations omitted). So it was forced to find that race is not "decisive in practice," Harvard.Pet.App.68, while also finding race determinative for nearly *half* of African American and Hispanic admittees, *id.* at 46. Perhaps some convoluted reasoning can explain how race is "determinative" without being "decisive."[17] Or perhaps *Grutter*'s standard is a hopeless contradiction. *See Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part).

The decision in the UNC case is no more successful in working out *Grutter*'s inherent internal tensions. The district court, for example, found that UNC's use of race was permissible because it was not a "predominant" factor nor does it even "meaningfully drive" admissions decisions, UNC.Pet.App.53 n.16, 80, although it was "determinative" for some number of applicants, *id.* at 96, 101-106, 110-113, 175.

Moreover, if engaging in racial discrimination yields only the smallest and most imperceptible of benefits, as UNC argues, how can UNC show it "actually advance[s]" its purported compelling interests, as strict scrutiny requires? *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). Indeed, UNC admits that it still has "much work to do" in promoting diversity given the high amounts of bias, isolation, and racial harm occurring on its campus. UNC.Pet.App.19-22, 60-62, 186. This is even true among Asian-Americans despite being overrepresented in UNC's view. *See id.* Clearly, their race-based practices are not making a

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[17] *But see* ROGET'S 21ST CENTURY THESAURUS, "determinative" (3d. ed. 2013) (listing "decisive" as a synonym).

meaningful enough difference in advancing the benefits of diversity to be maintained under a strict scrutiny regime. But such contradictory arguments are a necessary result of *Grutter*.

Examples of these paradoxes abound. Both Harvard and UNC stress that each applicant is evaluated holistically as an individual rather than as a means to achieve a racial quota, but also: (1) reject proposed race-neutral alternatives because of their effects on racial balance without any evaluation about how the individuals who would and would not be admitted in the proposed alternatives would contribute to the community, *see supra* 25; (2) gives "additional attention" to certain groups "if at some point in the admissions process it appears that a group is notably underrepresented," Harvard.Pet.App.136-137; and (3) takes "race into account, regardless of whether applicants write about that aspect of their backgrounds or otherwise indicate that it is an important component of who they are," *id.* at 116. Their affirmative action policy therefore devolves into the very tokensim that respondents claim to be trying to combat. *See* UNC.Pet.App.20, 61-62. This is likely because *Grutter* allows respondents to engage in racial discrimination to achieve a "critical mass," but paradoxically forbids them from using racial quotas or balancing. *See Grutter*, 539 U.S. at 354-55 (Thomas, J., concurring in part).

This tension only becomes worse as one walks forward in the strict scrutiny analysis to narrow tailoring, where UNC's claims that its racialized admissions policies have little import do not square with its rejection of racial-neutral alternatives based on an alleged unacceptably large change in the racial makeup of its student body. *See* UNC.Pet.App.115-117, 134-136, 141. UNC's contradictory arguments are a direct result of *Grutter*'s hopelessly contradictory standard. *See Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part).

These contradictions further compound when looking beyond who respondents' policies purports to help and examining who they hurt. Harvard disclaims treating Asian-American race negatively but admits that, without taking race into account, Asian-American admissions would increase. *See* Harvard.Pet.App.210 n.51. Harvard says it does not believe that Asian-Americans are less personable, *id.* at 83-84, but Asian-American admissions are suppressed, at least in part, because that race is given the lowest "personal ratings" year after year, Br.30-32. Harvard rejects race-neutral alternatives because they might decrease average test scores, *supra* 24, but claims elsewhere that test scores are not all that important—as a means to explain why high-testing Asians are admitted at lower rates. Harvard.Pet.App. at 68-69.

The situation at UNC is not much better. UNC does not explicitly pursue any given "critical mass," instead focusing on vaguer notions of "the educational benefits of diversity," such as making sure students don't feel isolated or tokenized. UNC.Pet.App.2, 54-56. But Asian-American students at UNC report feeling isolated, tokenized, and the victims of bias, as well as

report feeling the need to suppress their racial identity. *See id.* at 21. Despite this, UNC's "diversity" policies show no preference for admitting more Asian-American students, instead prioritizing only "underrepresented minorities." *Id.* at 37-41. Their actions belie their justifications.

Similarly, UNC claims to specifically face challenges admitting sufficient African-American males, but not females, and yet there is no indication that its racial preferences towards African Americans are limited to males. *See* UNC.Pet.App.19-20. Indeed, UNC's singular preference for underrepresented minorities—defined as those "whose percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina," *id.* at 15 n.7—shows that their efforts at racial discrimination are targeted more towards racial quotas than towards the educational benefits of diversity. After all, there is no evidence in the record to show that admitting more Asian students would not increase the benefits of diversity or make other Asian students feel less isolated.

This illustrates *Grutter*'s conceptual incoherence. *Grutter* somehow simultaneously claims "diversity" is an interest of the highest order and yet also categorically limits the means by which that interest can be pursued. That is, *Grutter* forbids universities from pursuing diversity through quotas, racial balancing, and other systems of mechanical, non-individualized treatment. But if diversity were truly compelling, and a university could show that adequate diversity can only be achieved by these means (*e.g.* a quota), why would strict scrutiny nonetheless disallow such practices? That is not how strict scrutiny normally

works. This tension in *Grutter*, like so many others, is not easily resolved.

Finally, *Grutter*'s unworkability is perhaps most obviously revealed by its hope that race-conscious admissions will soon fade away. *Grutter*, 539 U.S. at 342-43. Our national experience has since proven *Grutter*'s optimism grievously wrong. As we near *Grutter*'s 25-year expiration date, any honest observer will acknowledge there is no prospect that universities will voluntarily give up racial discrimination in admissions. Affirmative action programs, in other words, have failed "the acid test of their justification," which is "their efficacy in eliminating the need for any racial or ethnic preferences at all." *Id.* at 343 (citation omitted).

Indeed, while the University of Michigan at least feigned that its race-based program was temporary, *id.*, respondents give up any pretense that they have a sunset provision, a termination date, or any other concrete plans to eliminate it, Harvard.Pet.App.72-73; UNC.Pet.App.164-165. Racial classifications have cemented as a chronic feature of our academic system, without "logical stopping point." *Wygant*, 476 U.S. at 275. As a result of a "deferential" and "watered-down version of equal protection review," *Grutter* "effectively assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." *J.A. Croson*, 488 U.S. at 495 (cleaned up); *see also Adarand Constructors*, 515 U.S. at 229.

So it will remain until this Court overrules *Grutter*. *See Grutter*, 539 U.S. at 394-95 (Kennedy, J., dissenting). To the extent that our laws and Consti-

tution tolerate a timeline for considering race in education, it is this: such considerations must end with "all deliberate speed." *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 301 (1955). History has taught us even that is not fast enough.

IV. THE HARM IMPOSED ON ASIAN-AMERICANS BY *GRUTTER* WARRANTS ITS OVERRULING.

The myth that Harvard's program is benignly individualized has undergirded this Court's precedent. *See Bakke*, 438 U.S. at 316-18; *see also Gratz*, 539 U.S. at 272-73; *Grutter*, 539 U.S. at 335, 337. This case shows that foundational assumption was not well-taken. In fact, post-*Grutter*, affirmative action policies in education almost uniformly lead to one thing: discrimination against Asian-Americans. Stopping this harm means overruling *Grutter*.

1. That Harvard engages in unlawful discrimination is shown by (1) its admitted consideration of race in admissions and (2) the negative effects of such consideration on Asian-American admission. UNC's race-based policies also disproportionately harm Asian-American students that have higher academic credentials than their admitted peers of other races, despite the attempt to mask that discrimination behind lower ratings on "personal" measures for these students. *See* Br. 41-44; UNC.Pet.App.71, 76-77, 98. It is hard to see how the courts below could avoid the conclusion that Asian-Americans are discriminated against when it is uncontested that, at the very least, respondents' race-conscious policies benefit African-American and Hispanic students, and do so at the expense of admission for Asian (and White) students. "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Adarand*

Constructors, 515 U.S. at 241 n.* (Thomas, J., concurring in part); *see also Fisher II*, 136 S.Ct. at 2227 n.4 (Alito, J., dissenting).

The effects on Asian-American students is almost indistinguishable from the results seen in the racial quotas invalidated in *Bakke* and the point system struck down in *Gratz*. Take a look at the chart Petitioner's present (at Br.24) showing admission rates for various racial groups with the same academic ratings:

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%

An Asian student in the bottom half of applicants for academics has a barely 2% chance of admission, while an African American student in the same position has a nearly one in four chance—almost twice as high as even the *top 10%* of Asian-American applicants. At the fourth-to-lowest decile, an African-American is *fourteen times* more likely to be admitted than an Asian-American; even similar White students are twice

as likely to be admitted than their Asian peers. That African-Americans with below-median academics are more likely to be admitted than the highest-achieving Asian-Americans belies Harvard's repeated assertion that race benefits only "highly qualified candidates." *Harvard* B.I.O. at 1, 16.

Such an Asian student knows his chance of admission is one in a hundred but a similarly-situated peer has a one in eight chance *because he is of a different race*. This system is not meaningfully different from a quota or point system that makes it near-impossible for Asians to compete with those of other races for spots given to students with relatively lower academic scores. In *Gratz*, for example, the Court condemned the fact that "extraordinary artistic talent" did not increase chances of admission more than being of the preferred race. 539 U.S. at 272-73. Here, the chart above shows that even extraordinary *academic* talent does not give an Asian student a greater chance of admission than if she was of a different race. *See also id.* at 279 (O'Connor, J., concurring); *Bakke*, 438 U.S. at 318-19, 319 n.53 (although court would not presume that an individualized policy "would operate [] as a cover for the functional equivalent of a quota system," this could be overcome by showing that "a systematic exclusion of certain groups results").

The First Circuit found this reality uncompelling because, relying on a model that held other variables as a constant (including an applicant's "personal rating"), it found that "an Asian American student has a .08% lower chance of admission to Harvard than a similarly situated White student and that this effect is statistically insignificantly different from zero."

Harvard.Pet.App.95. But this is problematic on several levels.

First, it assumes that the appropriate comparator to Asian students is White students, while ignoring whether Asian-American race statistically decrease chances of admission as compared to other minority races, such as African-Americans. Nowhere in the text of our equal protection laws do we countenance the concept that minorities are only due the same treatment as Whites, but can be discriminated against in favor other non-White races.

Second, the courts below relied on a statistical model that held the "personal rating" as constant, thereby adopting an approach that guaranteed racial discrimination would not be discovered if the negative effects of Asian-American race were imposed on applicants through their personal rating. By putting aside race's effect on the personal rating, the First Circuit likely adopted a method calculated to obscure discrimination. *See* Brief of *Economists* at 24-29.

Moreover, the First Circuit's reasons for doing so are uncompelling. The courts below acknowledged that being Asian is correlated with receiving a lower "personal rating" from Harvard's admissions officers. *See* Harvard.Pet.App.89. But they held that such correlation does not imply racial discrimination because there may be other factors that influence personal rating. For example, Harvard suggested that maybe Asians just write worse personal essays than their peers. *Id.* at 90. But are we really to believe that Asians as a class write essays that are fourteen times worse than their African-American counterparts having the same academic scores? The First Circuit obliquely suggests that perhaps differences in personal essay

scores are because of how applicants write about race, *id.* at 91, but that either means Asian students don't face "obstacles" in their life because of their race, *cf. id.* at 91, 91 n.40, or—more believable—that reviewers don't find such obstacles as compelling for Asians as they do for other races. In the end, regardless of how many speculative explanations Harvard musters, two facts are unquestionable: Harvard openly takes race into account in admissions processes and those processes systematically favor certain races and therefore disfavor others, most acutely, Asian-Americans. That runs afoul of the Equal Protection Clause and Title VII.

The courts below also propose that the lower personal rating given to Asians is because teacher and guidance counselor recommendations "seemingly presented Asian Americans as having less favorable personal characteristics than similarly situated non-Asian American applicants" as a result of Asians coming from less privileged backgrounds than Whites. Harvard.Pet.App.91-92. But that would not explain why Asian students have a lower personal rating than Hispanic or African-American students, *see* Br.30-32, who presumably come from as underprivileged (if not more underprivileged) backgrounds as the average Asian-American pupil. Again, the First Circuit just assumed that Whites were the only proper comparator. In short, the courts below found Harvard's various explanations reasonable enough, and moved on. That is not strict scrutiny, *see Wygant*, 476 U.S. at 279, which instead seeks "to 'smoke out' illegitimate uses of race" by a test that requires Harvard to show "there is little or no possibility that the motive for the class-

ification was illegitimate racial prejudice or stereotype," *J.A. Croson*, 488 U.S. at 493.

More broadly, requiring petitioners to disprove every conceivable nondiscriminatory reason why Asians are consistently rated less personable and consistently less likely to be admitted—in a system that openly considers race throughout—allows Harvard to obscure discrimination by having a convoluted and opaque admissions process. Justices Souter and Ginsburg noted the dangers of allowing universities to "resort to camouflage" via "winks, nods, and disguises" and pursue race-based ends "without saying directly what they are doing or why they are doing it." *Gratz*, 539 U.S. at 298 (Souter, J., dissenting); *id.* at 304-05 (Ginsburg, J., dissenting). Thus, any alternatives adopted by educational institutions that are facially neutral cannot be upheld if they are adopted with the purposeful intent to discriminate or achieve a certain racial quota or balance. But *Grutter*, by allowing lax scrutiny to persist rather than placing the burden of proving nondiscrimination on institutions that are explicitly making racial distinctions, makes Title VI and the Fourteenth Amendment far too easy to circumvent.

2. *Grutter* thus allows universities to pursue diversity through discrimination without requiring them to be questioned about how the costs of such pursuits undermine the interests sought to be advanced. *See Fisher II*, 579 U.S. at 410-12 (Alito, J., dissenting). In other words, *Grutter* accepts a university's characterizations of the benefits of diversity without considering the costs of the university's chosen course to determine whether that interest is compelling. *Cf. Wygant*, 476 U.S. at 283 (examining under

strict scrutiny policies that "impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives"); *J.A. Croson*, 488 U.S. at 527 ("[I]t is important not to lose sight of the fact that even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race.") (Scalia, J., concurring).

This has always been problematic. Now its heavy toll on Asian-Americans is clear. The discussion above shows how Asian-American admissions are suppressed in practice by *Grutter*-endorsed policies. This impacts not only their future success, but also their well-being as they prepare and apply for college. *See* Br.63-64; *Harvard* Cert. Br. of *Asian Am. Coal.* at 19-23. Young Asian-American minds have now come to expect being discriminated against by higher education, waking up every morning realizing they must achieve more than their peers of other races in order to have a hope of being admitted to elite schools. Those are not the sort of negative reliance interests that weigh in favor of *stare decisis*.

Meanwhile, top schools that reject race-based admissions have student bodies with some of the highest Asian-American representation, like the Berkley (39%) and Irvine (36%) campuses of the University of California. This shows Asian-Americans' enormous capacity for success and the heights to which members of this minority community can rise without the boot of race-based admissions on their necks.[18]

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[18] To be sure, some Asian students actually admitted to Harvard may be perfectly content with the system as-is. But that is ulti-

Even with respect to non-Asian minority students, affirmative action policies are not without their costs. *See, e.g.*, *Fisher I*, 570 U.S. at 331-34 (Thomas, J., concurring); *Grutter*, 539 U.S. at 364-65, 371-73 (Thomas, J., concurring in part). As Justices of this Court have long recognized, "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 438 U.S. at 298 (citing *DeFunis v. Odegaard*, 416 U.S. 312, 343 (Douglas, J., dissenting)); *see also Adarand Constructors, Inc.*, 515 U.S. at 229; *J.A. Croson*, 488 U.S. at 493-94; *id.* at 516-17 (Stevens, J., concurring in part); *id.* at 527 (Scalia, J., concurring). Indeed, Harvard admits that even its current aggressive efforts are insufficient to meet its diversity goals, since "alienation and isolation is already a problem among African American students at Harvard." Harvard.Pet.App.77 n.32.

Race-based admissions policies come at a steep price for *Amici* States' Asian-American students. It is a price that our laws and Constitution do not permit universities to exact. *Grutter* must be overruled.

CONCLUSION

For the reasons stated, this Court should reverse the decisions below.

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mately irrelevant in examining whether the *individual* rights of rejected Asian students have been violated. *See Wygant*, 476 U.S. at 281 n.8.

Respectfully submitted,

JOHN O'CONNOR
OKLAHOMA ATTORNEY GENERAL
MITHUN MANSINGHANI
SOLICITOR GENERAL
COUNSEL OF RECORD
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 NE TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 521-3921
MITHUN.MANSINGHANI@OAG.OK.GOV

STEVE MARSHALL
ALABAMA ATTY. GENERAL

MARK BRNOVICH
ARIZONA ATTY. GENERAL

LESLIE RUTLEDGE
ARKANSAS ATTY. GENERAL

ASHLEY MOODY
FLORIDA ATTY. GENERAL

CHRIS CARR
GEORGIA ATTY. GENERAL

DEREK SCHMIDT
KANSAS ATTY. GENERAL

DANIEL CAMERON
KENTUCKY ATTY. GENERAL

JEFF LANDRY
LOUISIANA ATTY. GENERAL

LYNN FITCH
MISSISSIPPI ATTY. GENERAL

ERIC SCHMITT
MISSOURI ATTY. GENERAL

AUSTIN KNUDSEN
MONTANA ATTY. GENERAL

DOUG PETERSON
NEBRASKA ATTY. GENERAL

DREW H. WRIGLEY
NORTH DAKOTA ATTY. GEN.

DAVE YOST
OHIO ATTY. GENERAL

ALAN WILSON
SOUTH CAROLINA ATTY. GEN.

SEAN D. REYES
UTAH ATTY. GENERAL

JASON S. MIYARES
VIRGINIA ATTY. GENERAL

PATRICK MORRISEY
WEST VIRGINIA ATTY GEN.

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