No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

PETITIONER,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. Whether institutions of higher education violate Title VI of the Civil Rights Act by penalizing Asian-American applicants on the basis of race.

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INTEREST OF AMICUS CURIAE

This May, thousands of students will graduate from the State of Texas's 118 higher-education institutions, which enroll roughly 1.5 million students.[1] The admissions practices of Texas's public colleges and universities have frequently been challenged on equal-protection grounds. For years, the State has struggled to comply with this Court's sometimes-conflicting guidance. The State of Texas has a unique perspective on the ongoing impact of race in American colleges and universities.

This May also marks the 125th anniversary of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which is now rightly derided for endorsing a view of racial inequality that has no place in a free society. Standing alone, Justice Harlan exhorted that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Justice Harlan's view now holds sway in all contexts, except one: higher-education admissions.

This case provides the opportunity to correct that shameful anomaly. Texas's experience demonstrates why this Court should revisit its prior decisions and hold that racial discrimination has no more place on a college campus than it does in any other area of our public life.

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[1] *Enrollment Forecast 2021-2035*, TEXAS HIGHER EDUCATION COORDINATING BOARD (Jan. 2021), https://tinyurl.com/njn8d98w. No counsel for any party authored any part of this brief. No person or entity contributed monetarily to its preparation or submission. On March 19, 2021, counsel of record for all parties received notice of Texas's intention to file this brief.

INTRODUCTION

Abigail Fisher was right. Over seventy years ago, Justice Marshall wrote on behalf of a different applicant to the University of Texas that "[t]he basic law of our land, as crystallized in our Constitution, rejects any distinctions made by government on the basis of race, creed, or color." Brief for Petitioner at 75, *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44). The Court agreed, 339 U.S. at 631, paving the way to overturning *Plessy* in *Brown v. Board of Education*, 347 U.S. 483 (1954).

In 2008, relying on that basic law, Fisher sought admission to "the most renowned campus of the Texas state university system." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 304 (2013) (*Fisher II*). She was considered less valuable because of her race. *Id.* at 305. But applying a line of decisions culminating in *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court permitted the University's administrators to deny Fisher the Constitution's promise of racial equality in favor of the administrators' subjective views of racial equity. *Fisher II*, 570 U.S. at 305.

The University of Texas was wrong. And Harvard, respondent here, has been wrong for a century—first denying Jews an equal admissions process, and now Asian-Americans. *See Grutter*, 539 U.S. at 369 (Thomas, J., dissenting in relevant part).[2] "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring). Because Harvard has chosen to accept federal funding, it is held to the same standard. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). That standard would not permit racial

[2] Like petitioner, Texas uses the term "Asian-Americans" only because that is what Harvard does. Pet. 7 n.1.

preferences in any other context, and it should not do so here. This Court should grant review, overrule *Grutter*, and finally put into practice its statement in *Fisher II* that "[t]he higher education dynamic does not change the narrow tailoring analysis" applicable to racial discrimination. 570 U.S. at 314.

SUMMARY OF ARGUMENT

This Court sometimes reconsiders one of its decisions when it implicates constitutional rights, deviates substantially from this Court's other decisions, proves unworkable, rests on later-discredited doctrines, or generates few cognizable reliance interests. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (citing *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478-79 (2018); *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

Wrong the day it was decided, *Grutter* suffers from each of these flaws and more. *First*, *Grutter* defers to university officials in a way that was always an unprincipled departure from this Court's rule that the proponent of a racial classification must prove *both* that it serves a compelling state function *and* that no race-neutral option is available. *Second*, at best, *Grutter* has led to confusion. At worst, it has given a thin film of judicial respectability to "patently unconstitutional" practices that "amount to outright racial balancing." *Fisher II*, 570 U.S. at 311. *Third*, this Court severely undercut *Grutter*'s key premise that a State has a compelling interest in promoting the educational benefits that many associate with "diversity." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007). *Fourth*, there are no significant reliance interests implicated. *Grutter* was always intended to be a temporary measure, and its self-imposed lifespan has almost expired. Meanwhile, the

interim experience has demonstrated that universities can survive—indeed, thrive—without racially profiling their applicants.

ARGUMENT

I. *Grutter* Was an Unprincipled Departure from this Court's Rule that Racial Preferences Are Unacceptable.

Grutter was not merely wrong the day it was decided; it placed this Court's imprimatur on state-imposed and state-funded race discrimination. 539 U.S. at 378 (Thomas, J., dissenting). It permitted racial balancing, *id.* at 385-86 (Rehnquist, C.J., dissenting), to further an interest that the perpetrators have not been able to clearly articulate in two decades, *see Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2222-24 (2016) (*Fisher IV*) (Alito, J., dissenting). That amorphous interest in "diversity" is not considered "compelling" in any other context, and it should not be here.

A. This Court has recognized in every context save higher-education admissions that the Constitution forbids racial discrimination.

1. Until 2003, this Court consistently held that "[r]acial discrimination [is] invidious in all contexts." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). For decades, the Court stressed that racial preferences are "by their very nature odious to a free people." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). They are "contrary to our traditions and hence constitutionally suspect." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

This suspicion did not "depen[d] on the race of those burdened or benefited by a particular classification." *Gratz*, 539 U.S. at 270. Though the Fourteenth Amendment was indisputably passed to ensure full legal

equality for African-Americans in the wake of the Civil War, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019), it is well established that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any classification subjecting that person to unequal treatment." *Gratz*, 539 U.S. at 270.

And the analysis did not depend on whether proponents considered the discrimination "benign." Indeed, "'benign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting); *see Parents Involved*, 551 U.S. at 742.

Race therefore "seldom provide[s] a relevant basis for disparate treatment." *Croson*, 488 U.S. at 505. Instead, "[p]urchased at the price of immeasurable human suffering," the Equal Protection Clause and Title VI "reflect[] our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring). That is, "the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Id.* at 227 (majority op.). The existence of preferences creates a "stigma" towards the preferred class, which "unfairly marks those . . . who would succeed without discrimination." *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting). As a result, even the most nominally benign racial classification "demeans us all." *Id.* at 353. And until 2003, *all* distinctions based on race were subjected to the "most rigid scrutiny." *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

2. Even now, outside the university-admissions context, "[i]t is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved*, 551 U.S. at 720. The proponent of a racial classification must *prove* "that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate." *Fisher II*, 570 U.S. at 310. Generally, there is only one constitutionally viable reason for state-sponsored racial classifications: remedying past acts of *de jure* segregation. *See Croson*, 488 U.S. at 500. Protecting the best interest of a child is insufficient. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Even remedying *de facto* discrimination will not do, absent past *de jure* segregation. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). Outside higher education, this Court has taken the view that the best "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.

3. Until *Grutter*, the Court also required the proponent of racial stereotyping to have a "strong basis in evidence for its conclusion that remedial action [is] necessary." *Id.* at 754. Specifically, this Court held that the governmental entity who sought to use a racial distinction must show that "the means chosen to accomplish the State's asserted purpose [is] specifically and narrowly framed to accomplish [the specified] purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986). To be narrowly tailored, "the classification at issue must 'fit' with greater precision than any alternative means." *Id.* at 280 n.6; *accord Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). That is, the Constitution "forbids the use even of narrowly drawn racial classifications except as a last

resort." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring).

B. Higher-education admissions is the only context where a party accused of discrimination may determine whether discrimination is necessary.

Grutter represents a stark departure from this Court's long-held skepticism toward policies that racially discriminate. Though purporting to apply strict scrutiny, *Grutter* departed from prior precedent in three ways: (1) distinguishing between so-called benign and malicious discrimination; (2) accepting a justification for racial discrimination untethered to curing past *de jure* discrimination; and (3) deferring to the perpetrator's determination that the discrimination is necessary to serve the nominally benign goal.

1. As an initial matter, *Grutter* was the first time the Court countenanced the concept of "benign" racial discrimination, allowing universities to consider race in admissions so long as race was a "plus" factor in an admissions file. *Grutter*, 539 U.S. at 334. Such an admissions policy constitutes overt racial discrimination: Universities have only so many beds in their dormitories and seats in their classrooms. *See* Pet. App. 66. Giving an advantage to one applicant based on skin color necessarily disadvantages all other applicants. *Cf. id.* at 133 (describing Harvard's "lop process").

Harvard's racial preferences are currently designed to benefit traditionally underrepresented minority populations. *E.g.*, *id.* at 68-69. But the same arguments that "racial discrimination may produce educational benefits" were made to justify segregation in the era before *Brown*. *Fisher IV*, 136 S. Ct. at 2215 (Thomas, J., dissenting). This Court rejected these arguments when

they were used to benefit Caucasians. *Id.* And it has rejected similar justifications for discrimination when it has been designed to benefit racial minorities in other contexts. *Croson*, 488 U.S. at 501.

2. *Grutter* was also the first time that the Court concluded that the "educational benefits that flow from a diverse student body" represent a compelling state interest, even without evidence of past *de jure* discrimination. 539 U.S. at 317-19. This was an abrupt break given that the Court had explicitly rejected a nearly identical argument to justify racial differentiation in faculty hiring. *Wygant*, 476 U.S. at 275-76. Lower courts understood this rejection in the faculty context as applying to student admissions as well. *E.g.*, *Hopwood v. Texas*, 78 F.3d 932, 935-38 (5th Cir. 1996). Since *Grutter*, this Court has even rejected diversity as a compelling state interest in assigning students to elementary and secondary schools. *Infra* at 20-21. College admissions departments stand alone.

Grutter never provided a principled reason for why diversity is sufficiently compelling in higher-education admissions but nowhere else. As Justice Scalia noted in his separate opinion in *Grutter*, universities seek to promote "cross-racial understanding and better preparation of students for an increasingly diverse workforce and society." 539 U.S. at 347 (cleaned up). Nothing about these claimed benefits is unique to collegiate lecture halls—yet this Court has never extended *Grutter* to other contexts.

Instead, the *Grutter* majority pointed to Justice Powell's solo opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Grutter* relied on Justice Powell's observation that "academic freedom ... long has been viewed as a special concern of the First Amendment." 539 U.S. at 324 (quoting *Bakke*, 438 U.S.

at 312 (opinion of Powell, J.)). *Grutter*, however, left out an important part of Justice Powell's statement: a recognition that this academic freedom is "not a specifically enumerated constitutional right." *Bakke*, 438 U.S. at 312. "[E]qual protection of the laws" is. U.S. CONST. amend. XIV. The right to bring a lawsuit is generally understood to fall within the First Amendment's Petition Clause, *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011), but no one would imagine that a State could racially discriminate among whom it allows to sue in its courts. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 12-14 (1948). Discrimination in the name of "academic freedom" fares no better. *Grutter*, 539 U.S. at 362-64 (Thomas, J., dissenting).

Indeed, the very justifications for "diversity" require invidious racial stereotyping. Proponents have admitted that affirmative-action policies like those in this case are an exercise in "social engineering." *Fisher IV*, 136 S. Ct. at 2220 (Alito, J., dissenting) (quoting Bill Powers, *Op. Ed.: Why Schools Still Need Affirmative Action*, NAT'L L.J., at 22 (Aug. 4, 2014)). In *Bakke*, Justice Powell described it somewhat differently: By ensuring that students have different backgrounds, a university promotes "the robust exchange of ideas." 438 U.S. at 313. But this rationalization "promotes the noxious fiction" that a person's skin color is a proxy for personal experience. *Schuette v. BAMN*, 572 U.S. 291, 324 (2014) (Scalia, J., concurring). Outside the higher-education context, the Court has stated that it cannot "accept as a defense to racial discrimination the very stereotype the law condemns." *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

3. Finally, *Grutter* represents the only time in this Court's history that it has deferred to an actor engaged in race discrimination regarding whether race

discrimination is justified. Ordinarily, this Court has required the proponent of the law to prove that racial discrimination is necessary. *Croson*, 488 U.S. at 500.

Grutter requires no such thing. It takes at face value the testimony of various university witnesses that "a critical mass of underrepresented minority students would [need to] be reached" in order "to realize the educational benefits of a diverse student body." 539 U.S. at 318. The term, however, "lacks a substantive, clearly defined meaning," and "means different things to different people." Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 176 (2005).

As a result, *Grutter* applied a supposed "tradition of giving a degree of deference to a university's academic decisions" to acquiesce in the university's self-serving conclusion that its racial policies serve its ill-defined goal. 539 U.S. at 328. That is an unprecedented level of deference to the very actors accused of racial discrimination. *Fisher IV*, 136 S. Ct. at 2222 (Alito, J., dissenting). Indeed, *Grutter*'s contentless test for what constitutes a "critical mass" has been intensely criticized not just by members of this Court, *cf. Parents Involved*, 551 U.S. at 735, but by commentators on both sides of the affirmative-action debate, *e.g.*, Mark T. Terrell, *Bucking Grutter: Why Critical Mass Should Be Thrown Off the Affirmative-Action Horse*, 16 TEX. J. C.L. & C.R. 233, 251 & n.152 (2011) (discussing criticism by Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 650 (2006)).

At bottom, "diversity" is insufficiently defined to constitute a compelling state interest to satisfy the Equal Protection Clause. And if diversity is pursued merely to engage in racial balancing for its own sake, then it is not even a legitimate one. This Court has stated that "[t]he

higher education dynamic" is not supposed to "change the narrow tailoring analysis of strict scrutiny applicable in other contexts." *Fisher II*, 570 U.S. at 314. But even members of the *Grutter* majority admit that it applies a "standard of review that is not 'strict' in the traditional sense of that word." *Parents Involved*, 551 U.S. at 837 (Breyer, J., dissenting). This paradox has never been explained because it is inexplicable—at least based on any legal doctrine.

II. Experience Demonstrates That the *Grutter* Standard Is Unworkable.

The last eighteen years have shown that *Grutter* cannot be applied with any sort of consistency—either by this Court or by universities. Since it was decided, this Court has had to assess how to apply *Grutter*'s logic in at least three major opinions. Two of these opinions either cut back (*Fisher II*) or cut off (*Parents Involved*) *Grutter*. The third (*Fisher IV*) applied *Grutter* wholesale. The result is a muddle that only this Court can clarify.

A. Texas's experiences with affirmative action demonstrate that *Grutter* is unworkable.

Abigail Fisher brought this Court a chance to clarify *Grutter*. The first time her case came before the Court, the Court applied the ordinary equal-protection standards and concluded that the Fifth Circuit had not held the University of Texas to its burden to show that the manner in which it considered the race of applicants was justified. *Fisher II*, 570 U.S. at 312-13. Following remand, the Court reversed course: Though it acknowledged that the record was "almost devoid of information about the [number of] students who secured admission" based on racial preferences, the Court nonetheless upheld the University's overt use of race in admissions.

Fisher IV, 136 S. Ct. at 2209. Texas's past experience with race-based admissions practices demonstrates just how foreign this tie-goes-to-the-government approach is to equal-protection jurisprudence. *See id.* at 2215 (Alito, J., dissenting). Moreover, it demonstrates that *Grutter*'s acceptance of race preferences in admissions is self-defeating if its true goal is, as claimed, to end the need for race-based admissions by 2028. *See* 539 U.S. at 343.

1. Like many other States, Texas has a troubled history with racial discrimination in higher-education admissions. In the early twentieth century, its flagship university practiced a policy of *de jure* segregation—a policy that led it to deny Heman Marion Sweatt, an African-American, admission to the University of Texas School of Law because of the color of his skin. *Sweatt*, 339 U.S. at 631. Since then, Texas universities have tried several practices to increase minority admissions—some race-based, some race-neutral. The University of Texas still accords benefits based on an applicant's skin color. *E.g.*, *Fisher IV*, 136 S. Ct. at 2205-06.

For years following *Sweatt*, the University of Texas "considered two factors" in examining applications: an "Academic Index" and the applicant's race. *Fisher II*, 570 U.S. at 304. Though that policy was defended on many of the same state interests promoted here, the Fifth Circuit concluded it did *not* further a compelling state interest. *Hopwood*, 78 F.3d at 955. *Hopwood* examined the University's "segregated application evaluation process" and "segregated waiting lists," which were designed to help African-American and Hispanic applicants. *Id.* at 935-38. The Fifth Circuit held that considering an applicant's race "for the purpose of achieving a diverse student body" did not satisfy strict scrutiny. *Id.* at 944. The Court's subsequent decision in *Gratz* confirmed

that *Hopwood* was correctly decided (albeit not necessarily on the correct grounds). 539 U.S. at 245.

2. The Texas Legislature responded to *Hopwood* by enacting the "Top Ten Percent Law," which gave high-school students in Texas in the top 10% of their respective classes automatic admission to any state university. Tex. Educ. Code § 51.803. This provided a "facially race-neutral" solution that benefited students in poorer areas, including minority students who were "often trapped in inferior public schools." *Fisher IV*, 136 S. Ct. at 2218 (Alito, J., dissenting).

The University of Texas, which largely sets its own admissions standards for applicants who are not automatically admitted, also substituted its sole focus on race for considering the applicant's "leadership and work experience, awards, extracurricular activities, community service, and other special circumstances." *Fisher II*, 570 U.S. at 304. During eight years of race-neutral admissions, the University saw the percentage of minority enrollees increase. *Id.* at 305. The University boasted in 2003 that it had "effectively compensated for the loss of affirmative action." *Fisher IV*, 136 S. Ct. at 2218 (Alito, J., dissenting).

3. Then came *Grutter*. The University, which prided itself on achieving greater minority attendance through race-neutral means, immediately announced an about-face. *Id.* at 2218 & n.1. The University's President announced the day *Grutter* was decided that it would modify its admissions procedures: Though the Top Ten Percent Law had already achieved the same result as previous race-conscious programs, the University would once again consider race as a "meaningful factor" in admissions. *Id.* at 2218-19. Though its proponents would later claim that race was used only as a "factor of a factor of a

factor of a factor," race was the only "holistic factor" that the University put on the cover of *every* application. *Id.* at 2220, 2238.

4. The cover of Abigail Fisher's application read "Caucasian." *Cf. id.* at 2207 (majority op.). Because she did not finish in the top 10% of her high-school class, the University held her race against her in its admissions process, and she sued. *See id.* The lower courts granted summary judgment to the University based on *Grutter*'s "deference to a university's academic decisions." *Fisher v. Univ. of Tex.*, 631 F.3d 213, 231 (5th Cir. 2011) (*Fisher I*). *Fisher I* deferred to the University's judgment about how much diversity was necessary to promote the ideal educational environment. *See id.* at 244-45. And, though it found "UT's claim ... less convincing when viewed against the backdrop of the Top Ten Percent Law," it likewise deferred to the University's determination that it could only obtain diversity through racial discrimination. *Id.* at 245.

This Court reversed on the grounds that the Fifth Circuit had not held the University even to the strict-scrutiny-lite test adopted in *Grutter*. *Fisher II*, 570 U.S. at 313-14. It remanded to allow the Fifth Circuit to try again. *Id.*

On remand, the Fifth Circuit again held in favor of the University. *Fisher v. Univ. of Tex.*, 758 F.3d 633, 659-60 (5th Cir. 2014) (*Fisher III*). Judge Garza dissented on the grounds that the Court was still taking the University's self-assessment at face value when the law clearly requires that "reviewing courts cannot defer to a state actor's argument that its consideration of race is narrowly tailored to achieve its diversity goals." *Id.* at 661.

Judge Garza was right. Between *Fisher II* and *IV*, the University proffered no evidence demonstrating

which students benefitted from its race-conscious plan and made no attempt to more narrowly define its interest in a "critical mass" of diversity. *Fisher IV*, 136 S. Ct. at 2215 (Alito, J., dissenting). The majority recognized this. *Id.* at 2209. And it recognized that "[i]n an ordinary case," remand would have been deemed necessary to fill "this evidentiary gap." *Id.* The Court nonetheless upheld the University's admissions practices because of the length of the litigation, *id.*, often faulting Fisher for not showing why it was impermissible for the University to discriminate against her, *id.* at 2220-25 (Alito, J., dissenting). As a result, this Court blessed the University's use of racial preferences even absent the robust evidence that a party engaged in racial discrimination is expected to provide.

5. Today, the University's admissions practices stand as a testament to failures by this Court and lower courts to enforce *Grutter*'s admonition that "race-conscious admissions policies must be limited in time." 539 U.S. at 342-43. And while *Grutter* expressed the hope that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," *id.* at 343, the zeal with which the University of Texas has embraced systematic racial discrimination in admissions illustrates how elite universities will not stop discriminating based on race without this Court's intervention.

Since *Grutter* and *Fisher IV*, the University of Texas has pursued a policy of racial preferences for their own sake. Its President extolled the University's decision to racially discriminate the day *Grutter* was decided. *Fisher IV*, 136 S. Ct. at 2218-19 (Alito, J., dissenting). Thirteen years later, just after *Fisher IV*, its President showed no greater reluctance, announcing that "race

continues to matter in American life," and that this Court "affirm[ed] the [U]niversity's right to continue using race and ethnicity" in its admissions process.[3] Far from desiring to end racial preferences, the University says that this policy is "central" to its "constitutional mandate to serve the state of Texas."[4]

Since *Fisher IV*, most African-American and Hispanic students admitted to the University of Texas are admitted through the Top Ten Percent Law.[5] And even with racial preferences, an average of 4.5% of each enrolling class has been African-American in the interim years—the exact same proportion of African-American students that enrolled in the University during the fall of 2004, the last admissions cycle governed by a race-neutral scheme.[6] Increased enrollment of Asian-American and Hispanic students at the University is traceable to the passage of the Top Ten Percent Law.[7] Almost two decades of racial discrimination have garnered the

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[3] Press Release, UT NEWS, *University of Texas at Austin President Responds to Supreme Court Ruling* (June 23, 2016), https://tinyurl.com/9jkux5u5.

[4] Press Release, UT NEWS, *Statement on Admissions Policies* (July 3, 2018), https://tinyurl.com/3p296ck8.

[5] *Report on the Implementation of SB 175, 81st Legislature, for the period ending Fall 2020*, University of Texas at Austin, at 35, https://tinyurl.com/d8jve84k; *Report on the Implementation of SB 175, 81st Legislature, for the period ending Fall 2018*, University of Texas at Austin, at 33, https://tinyurl.com/yynzcf95; *see Fisher IV*, 136 S. Ct. at 2218 (Alito, J., dissenting).

[6] *2020-21 Statistical Handbook*, UNIVERSITY OF TEXAS INSTITUTIONAL REPORTING, RESEARCH, AND INFORMATION STUDIES, at 24, https://tinyurl.com/622shuuv.

[7] *Id.*

University of Texas nothing, while disadvantaging countless young adults based on the color of their skin.

This stands in sharp contrast to the law school in *Grutter*, which wanted nothing more "than to find a race-neutral admissions formula." 539 U.S. at 343. And it stands in sharp contrast to the experience of other universities that have moved away from race preferences in admissions. For example, the University of California at Berkeley Law School (Boalt Hall) is forbidden by law from considering race in admissions but has maintained both its prestige and its diversity. *Id.* at 367 (Thomas, J., dissenting). Similarly, Texas A&M University "sparked outrage" when, notwithstanding *Grutter*, it maintained race-blind admissions policies. Matthew Watkins & Neena Satija, *At A&M, Diversity Increases Without Affirmative Action*, THE TEXAS TRIBUNE (June 19, 2016), https://tinyurl.com/58nrzf3w. But, twelve years later, its enrollment of African-American and Hispanic students had increased by 114%, far more than the increase seen by the University of Texas during the same period. *Id.*

As Texas A&M's experience shows, universities do not *need* to consider race to promote minority admissions, which can rise without racial discrimination. *See Fisher II*, 570 U.S. at 305. But that is not enough for some. Instead, elite American universities consider race because they *want* to. *See Grutter*, 539 U.S. at 360 (Thomas, J., dissenting). And they have given no indication that they intend to stop doing so when *Grutter*'s twenty-five-year clock runs—or ever. This Court should end its failed experiment in permitting universities to racially discriminate.

B. The experience of petitioner's members further demonstrates the theoretical problems behind *Grutter*.

The record here similarly reflects that Harvard considers race in its application process because it wants to. Doing so allows Harvard to maintain a preferred racial composition. Because Harvard is a private institution, it is not directly subject to the strictures of the Equal Protection Clause. *The Civil Rights Cases*, 109 U.S. 3 (1883). But as long as it accepts federal funds, it is subject to the same standard. *Gratz*, 539 U.S. at 276 n.23. Harvard has failed to meet its "continuing obligation to satisfy the burden of strict scrutiny" and to reassess the legality and "efficacy" of its race-conscious admissions scheme. *Fisher IV*, 136 S. Ct. at 2209-10.

First, Harvard has violated *Grutter*'s fundamental premise that reliance on diversity cannot be a code word "to assure some specified percentage of a particular group merely because of its race." *Grutter*, 539 U.S. at 308. This Court "ha[s] many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake.'" *Parents Involved*, 551 U.S. at 729-30. *Grutter* endorsed the so-called "Harvard plan" of admissions because it assumed that Harvard's system was "flexible enough to consider all pertinent elements of diversity," including socioeconomic status, family circumstances, and other personal experiences. 539 U.S. at 309.

That assumption has proven incorrect. As petitioner shows, Harvard will only consider race-neutral admissions policies if they would not result in "any decline" in African-American or Hispanic representation from current levels, Pet. App. 77 n.32; *id.* at 209—functionally creating a quota. *See* Pet. 40 (citing JA.4435). The result is that all racial groups stay within narrow bands of

admissions rates to yield Harvard's preferred racial mix. *Id.*

The way that Harvard has structured its racial preferences reflects a form of stereotyping that is inconsistent with both its own rationale and the theory behind *Grutter*. The term "Asian" itself reflects a stereotype, lumping "roughly 60% of the world's population" into one group. *Fisher IV*, 136 S. Ct. at 2229 (Alito, J., dissenting). Many in this group, like Harvard's preferred groups, are and have been subject to considerable racial discrimination and economic hardship.[8]

Yet Harvard has designed its system to harm Asian-Americans in order to help other minorities. For example, petitioner cites evidence that an Asian-American applicant in the top decile of Harvard's academic index is admitted less often (12.7%) than an African-American applicant in the fourth-lowest decile (12.8%). Pet. 11.

Second, the record demonstrates that Harvard's system is not narrowly tailored to ensure that "race-conscious admissions programs have a termination point." *Grutter*, 539 U.S. at 342. The lower courts concluded that Harvard had satisfied this requirement because it has conducted periodic reviews and determined that race-neutral means do not ensure Harvard's diversity goals. Pet. App. 46-47, 73-79. But Harvard has set narrow bands for what it views as an acceptable racial mix in its student population. In other words, Harvard's interest in maintaining a specific racial balance cannot be satisfied by anything but rigorous racial balancing. This system may be a clever work-around, but it is not narrow

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[8] *See* Hua Hsu, *The Muddled History of Anti-Asian Violence*, THE NEW YORKER (Feb. 28, 2021), https://tinyurl.com/ra9zamns.

tailoring, let alone an approach designed to end racial discrimination in the future.

More fundamentally, each of these periodic reviews assumed that Harvard should not be required to change *other* aspects of its admissions policies. Pet. App. 73-79. This permissive view of narrow tailoring is fundamentally inconsistent with the view that racial classifications are a "last resort." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring). For example, petitioner offered expert evidence that eliminating a preference for legacy admissions would increase diversity. Pet. 43. Yet Harvard insists that it cannot do so because it would "adversely affect Harvard's ability to attract top quality faculty and staff and to achieve desired benefits from relationships with its alumni." Pet. App. 76. But the potential to upset certain members of the community has consistently (and correctly) been rejected as a compelling interest throughout this Court's jurisprudence. *E.g.*, *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218 (1964).

Put another way, Harvard may adopt admissions policies that might adversely impact certain minority groups—*e.g.*, preferring legacy admissions. But, outside *Grutter*, Harvard could not avail itself of the last resort of racial discrimination without first giving up other things it likes, too. Elite universities' unwillingness to adapt other admissions policies to reduce reliance on race further underscores that *Grutter* cannot be salvaged.

III. This Court Has Undermined *Grutter* in Subsequent Case Law.

In addition to proving unworkable, *Grutter* cannot be squared with this Court's subsequent decision in *Parents Involved*, 551 U.S. 701. That case involved whether "race-based assignments were permissible at the

elementary and secondary level" following *Grutter*. *Id.* at 724. Observing that "[c]ontext matters," the Court concluded that they were not, thus limiting *Grutter* to its post-secondary-education context. *Id.* at 724-25. Outside that context, the Court explained, "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Id.* at 732.

Though *Grutter* did *say* it depended on the higher-education context, the distinction makes no sense. *Grutter* is based on a State's supposedly compelling interest in promoting the educational benefits of diversity, which "prepar[es] students for work and citizenship" in a diverse society. 539 U.S. at 331. But "essentially the same lesson [is] taught to (or rather learned by, for it cannot be 'taught' in the usual sense) people three feet shorter and 20 years younger than the full-grown adults" at issue in *Grutter*. *Id.* at 347 (Scalia, J., dissenting). There is no doctrinal reason why a State has a compelling interest in preparing eighteen-year-olds privileged enough to go to universities for work but *not* fourteen-year-olds. Yet that is what this Court's cases claim to hold.

It is difficult to predict every way in which *Grutter* may be invoked, but it continues to be applied on a daily basis at universities across the country. This Court should grant review in this case, reverse the lower courts' decisions, and hold institutions of higher education to the same requirements of racial neutrality as other institutions.

IV. Purported Reliance Interests Are No Basis to Retain *Grutter*.

Finally, university admissions is not a circumstance where correcting an anomaly in this Court's equal-protection jurisprudence would "unduly upset reliance

interests." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part). *Grutter* was written to avoid engendering significant reliance concerns. It stated that "deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in service of the goal of equality itself." 539 U.S. at 342. Noting that it "ha[d] been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity," it anticipated that in an additional 25 years, "the use of racial preferences will no longer be necessary." *Id.* at 343. Eighteen years have lapsed since *Grutter* and *Gratz*—enough time for the children of the plaintiffs denied admission to the University of Michigan and its law school to apply to those schools. Anyone who assumed that *Grutter* would operate indefinitely did so at his own peril.

Nor would that reliance be legitimate even without *Grutter*'s expiration date. Any governmental preference based on race is "odious to a free people," *Cayetano*, 528 U.S. at 517, and betrays the very foundations of our Constitution's guarantee of equal protection, *Miller v. Johnson*, 515 U.S. 900, 911 (1995). And the experience of prominent universities like Berkeley and Texas A&M demonstrate that race preferences are *not* necessary. The Court should not wait for the court of history to overrule *Grutter*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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