No. 20-1199

In The
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE CALIFORNIANS FOR EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

In 1996, California passed Proposition 209 or the California Civil Rights Initiative, amending its state Constitution to bar the state and its subdivisions from "discriminat[ing] against, or grant[ing] preferential

[1] All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[2] In 2020, the California legislature proposed removing this fundamental protection from the state Constitution ("Prop. 16"), to re-authorize state colleges (along with other subdivisions) to engage in racial discrimination (in admissions, as well as in hiring and contracting). Expressly, the authors of Prop. 16 proposed it knowing that passage would halve the number of Asian students at the state's flagship schools; seeing this as a feature, rather than a bug, one proponent brushed aside objections to such a wholesale, racial disqualification of Californians, citing "even greater concerns" of preferred ethnicities.[3]

As described in more detail below, Californians overwhelmingly rejected Prop. 16 at the ballot box. CFER was formed by the veterans of the successful 2020 fight to preserve the California Civil Rights Initiative, many of them parents of young Californians who rightly perceived their children's future ability to compete on an equal footing, without confronting racial penalties, to be at stake.

These same veterans of the fight to preserve California's bar against racial discrimination in college admissions are similarly invested in the outcome of the

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[2] Cal. Const. art. I § 31.

[3] Betty Chu, *Reject State-Sanctioned Discrimination, Reject Proposition 16*, THE ORANGE COUNTY REGISTER (Sep. 4, 2020), https://www.ocregister.com/2020/09/04/reject-state-sanctioned-discrimination-reject-proposition-16-betty-chu (last visited Feb. 26, 2021).

litigation subject to Students for Fair Admissions' petition for certiorari to this Court. Their children were not participants in that litigation, but they stand parallel to those who were; their children's futures stand to be affected by the Court's resolution of the statutory issues in play.

SUMMARY OF ARGUMENT

CFER offers four (4) reasons the Court should grant certiorari.[4] First, the Court's three most recent cases concerning race-based school admissions require the application of strict scrutiny,[5] while prescribing deference to discriminating schools on the compelling interest they claim to have served through race-based decision-making;[6] that is incompatible with

[4] The highlighted reasons parallel the arguments advanced in Gail Heriot and Alexander Heideman, *The Defeat of Proposition 16 in California and Mr. Dooley: Should the Supreme Court Take Note of "Th' Iliction Returns" the Next Time It Addresses Race-Preferential Admissions Policies* (forthcoming 2021).

[5] *Fisher v. Univ. of Texas*, 136 S. Ct. 2198, 2208 (2016) ("*Fisher II*") (citing *Fisher v. Univ. of Texas*, 570 U.S. 297, 309 (2013) (*Fisher I*") (internal citations omitted); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). As those cases each involved state schools, they were decided as governed by the Equal Protection Clause of the Fourteenth Amendment; although this case involves a private school and the application of Title VI of the Civil Rights Act, the substance of the applicable law is the same. *See Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (holding that a recipient violates the prohibition of 42 U.S.C. § 2000d by engaging in discrimination that would be barred for a state-actor by the Equal Protection Clause).

[6] *Fisher II*, 136 S. Ct. at 2208 (citing *Fisher I*, 133 S. Ct. at 2419). While *Fisher II* omitted *Fisher I*'s authority for this

strict scrutiny and anathema to the rule of law. Second, it appears that *Grutter* (which both *Fisher I* and *Fisher II* purported to adopt on this point without reconsideration of its merits),[7] may have been grounded in Justice O'Connor's perception of a "broad societal consensus" in favor of race-based admissions policies;[8] to the extent such a perception influenced *Grutter*, it substantively got the facts wrong: at that writing, the American people had (and, today, they have) a broad-based, stable, national consensus against such policies. Third, recent events, including those in which CFER's members played a role, demonstrate that this broad-based, stable, national consensus remains strong (and may be strengthening), even in America's most diverse regions. Finally, while this Court would rightly refuse to consider a popular consensus in *favor* of racial discrimination, this broad-based, stable (potentially strengthening), national consensus *against* racial

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proposition, *Fisher I* expressly drew this conclusion from *Grutter v. Bollinger*, 539 U.S. 306, 328 and 330 (2003).

[7] *Fisher I*, 570 U.S. at 313, 133 S. Ct. at 2421 (" . . . the parties do not challenge, and the Court therefore does not consider, the correctness of" *Grutter*'s determination that the educational benefits of a critical-mass of diversity qualified as a sufficiently compelling interest to satisfy strict scrutiny as long as "it was not a quota, was sufficiently flexible, was limited in time, and followed 'serious, good faith consideration of workable race-neutral alternatives.' ") (internal citations omitted); *Fisher II*, 136 S. Ct. at 2211 ("At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies [of the alleged benefits of diversity], and the Court properly declines to consider the extra record materials" addressing this issue).

[8] Linda Greenhouse, *The Supreme Court: The Justices: Context and the Court*, N.Y. TIMES, June 25, 2003, at A1. This point is addressed *infra* at Section II.

discrimination in admissions *deserves* consideration by the Court—the public's repeated rejection of the arguments favoring racial discrimination in admissions renders untenable the contention that those interests are sufficiently compelling to survive strict scrutiny.

ARGUMENT

I. DEFERENCE TO DISCRIMINATING ENTITIES ON WHETHER DISCRIMINATION IS JUSTIFIED IS UNTENABLE AS AN EXERCISE IN STRICT SCRUTINY

The Court developed the concept of strict scrutiny to assess the constitutionality of governments' post-Reconstruction uses of race in policymaking.[9] Always and everywhere it applies, strict scrutiny requires a "compelling purpose" and "narrow tailoring."[10] Under strict scrutiny, it is the Court's job to conduct "a most searching examination."[11] Only three interests have

[9] *Fisher I*, 570 U.S. at 316 (Thomas, J., concurring) ("The Court first articulated the strict-scrutiny standard in *Korematsu v. U.S.*, 323 U.S. 214 (1944).").

[10] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 639 (6th ed. 2000). *See also* Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. LEGIS. 217 (2003) (making same point).

[11] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1984) (plurality opinion)).

ever been held to satisfy that examination: (a) national security, in the anti-precedent of *Korematsu*; (b) remedying the government's own historical discrimination, when there is "a strong basis in evidence for its conclusion that remedial action [is] necessary"; and (c) in this line of cases, the purported educational benefits of a diverse student body.[12]

Nominally, in *Grutter* and its progeny, the Court required exactly this same legal analysis. But this "strict scrutiny" is different from all other "strict scrutiny." Here, uniquely, the Court announced that it would "defer" to a defendant's judgment that it had a compelling need to make decisions based on race.

As a factual matter, there is reason to doubt that educational institutions have any discretion to determine whether there *are* any educational benefits of racially balanced student populations or to act on a conclusion that there are not. A sampling of accrediting agencies suggests that schools are *compelled* to achieve a "diverse" student body whether or not they believe that the racial balance of their students has any educational value at all.[13]

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[12] *Fisher I*, 570 U.S. at 316–17 (Thomas, J., concurring) (citing for the first two, respectively, *Korematsu*, 323 U.S. 214 (1944), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant*, 476 U.S. at 277)).

[13] For example, at least some of Harvard's accrediting agencies require such diversity to be achieved, regardless of the opinions of the accredited institution on the alleged educational benefits of a racially balanced student body. *See* ABET Board of Directors, *ABET Statements on Inclusion, Diversity, and Equity*

Even if they do, as an exercise in strict scrutiny, deferring to a defendant makes no sense. Every policymaker asserts that its reasoning is compelling. Even the Topeka Board of Education did in *Brown*.[14] If the Court's "most searching examination" is limited to asking the perp whether it had a good reason, then the "most searching examination" requirement has been reduced to no examination at all.

Such an approach makes a mockery of the Court's broader precedents and reduces the Rule of Law to little more than the punchline of a joke. It establishes that the law is the law for little people, whose betters in university administrations can ignore Congress's instructions and the people's ratified Constitutional amendments, since, after all, they know best. This is not a reasonable application of concepts of expertise and specialization; it is an enshrinement of oligarchy.

The Court should grant certiorari to correct any such implication in its recent case law and re-establish that the judiciary will apply the same standards to its

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(Jun. 15, 2020), at https://www.abet.org/about-abet/diversity-equity-and-inclusion ("It is time for our collective practices, procedures, policies, regulations, standards and laws to reflect our priorities and drive for accountability around inclusion, diversity, equity and justice across the STEM community.").

[14] *Fisher I*, 570 U.S. at 320 (Thomas, J. concurring) ("[T]he argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's. . . . And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination . . . the alleged educational benefits of diversity cannot justify racial discrimination today.") (citing *Brown v. Board of Education*, 347 U.S. 483 (1954)).

peers in academia that it does to both participants in government and the rest of the American people.

II. *GRUTTER*'S POTENTIAL ACCEPTANCE OF FALSE CONSENSUS

The Court heard oral arguments in *Grutter* on April 1, 2003.[15] Justice O'Connor published *The Majesty of the Law*: *Reflections of a Supreme Court Justice* that same day.[16] In it, Justice O'Connor wrote both that "courts, in particular, are mainly reactive institutions" and that "change comes principally from attitudinal shifts in the population at large"—with it being "rare indeed" that a "legal victory—in court or legislature—[]is not a careful byproduct of an emerging social consensus."

At least one of America's best-informed authorities on the Court concluded at the time that the book's text explained Justice O'Connor's reasoning in the *Grutter* opinion:

> For Justice O'Connor, the *broad societal consensus in favor of affirmative action in higher education* as reflected in an outpouring of briefs on Michigan's behalf from many of the

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[15] *Grutter v. Bollinger*, Oyez, https://www.oyez.org/cases/2002/02-241; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[16] *See* Publisher's Weekly, Book Notice: The Majesty of the Law: Reflections of a Supreme Court Justice, https://www.publishersweekly.com/9780375509254 (giving publication date as April 1, 2003).

> country's most prominent institutions was clearly critical to her conclusion. . . .[17]

Obviously, Linda Greenhouse was not Justice O'Connor and was no Metatron for Justice O'Connor. Her words were her own and cannot be ascribed to Justice O'Connor. Nonetheless, as they may reflect a silent component of *Grutter*'s reasoning,[18] they must be taken seriously. When so considered, they collapse as unsupported by the record and insupportable given clearly established facts.

A. No Record-Predicate for Existence of a Consensus at *Grutter*

Perhaps it needn't be stated that the *Grutter* record reflected no direct evidence of a public consensus in favor of race-based admissions at universities. Ms. Greenhouse cited only the number of *amicus* filings in support of her contention.[19] If that were accepted as a

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[17] Linda Greenhouse, *The Supreme Court: The Justices: Context and the Court*, N.Y. TIMES, June 25, 2003, at A1 (italics supplied).

[18] Elements of *Grutter* suggest that Justice O'Connor may have placed exactly the importance on the amicus-balance suggested by Ms. Greenhouse. *Grutter*, 539 U.S. at 328–29 ("Public and private universities across the nation have modeled their admissions programs on Justice Powell's views on permissible race conscious policies.") (citing a pair of amicus briefs); *id.* at 332 ("The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*."); *id.* at 333–34 ("These benefits are not theoretical but real, as major American businesses have made clear. . . .") (citing a pair of amicus briefs).

[19] Greenhouse, *supra* note 17.

meaningful metric, she'd be right: there were 69 briefs submitted in support of the university, with only 19 (four of which were filed at the petition stage) on the other side of the balance. So, yes, if the only thing that mattered was the page count, the university administrators would have had the (literal) weight of (paper) authority on their side.

But the whole concept of comparing stacks of *amicus* filings to ferret out public preferences presupposes that the Court could properly have engaged in such outside-the-record, appellate fact-finding. Of course, it can't.[20]

Even if it could, though, comparing stacks of *amicus* filings would be a profoundly lax way to gauge "societal consensus." Many *amicus* filings supporting the university were submitted by peers across academia pursuing parallel admissions schemes. More were submitted by government entities or government officials, also overwhelmingly drawn from among the practitioners of race-preferences. Most of the rest came from students, alumni, or associations of students or alumni from the same institutions, many of whom perceived themselves to be beneficiaries of the race-based policies at issue. One cannot extrapolate the views of these self-interested groups into a credible portrayal of the preferences of the public at large.

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[20] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("[A]ppellate courts must constantly have in mind that their function is not to decide factual issues.").

B. Demonstrable Consensus at the Time of *Grutter* Opposed Race-Based Admissions Policies

A better way would be to compare the universe of relevant public opinion polls. Here the evidence is consistent: by the issuance of *Grutter*, polls had consistently showed Americans to oppose race-based admissions policies; contemporaneously with its issuance, that remained so.

As early as 1993, public opinion experts Paul Sniderman and Thomas Piazza wrote that race-based admissions policies were "controversial precisely because most Americans do *not* disagree about it."[21] As these scholars demonstrated, at all relevant times, opposition was strong, indeed, *firmer* and *less malleable* than the positions taken by poll respondents on other issues.[22]

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[21] PAUL SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993) (citing polls indicating that race-preferential admissions have little support among members of the public). In 1997, Dr. Sniderman, this time partnering with Edward G. Carmines, studied specifically the correlation between opposition to racial preferences and racial intolerance. Among the group found to be in the top one percent in racial tolerance, opposition to preferential treatment was very high: approximately 80 percent opposed preferential treatment in hiring, and more than 60 percent opposed quotas in college admissions. Sniderman and Carmines wrote that "the fundamental fact is that race prejudice, far from dominating and orchestrating the opposition to affirmative action, makes only a slight contribution to it." PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 20–22 (1997).

[22] They found opinions changed less on this issue than on what they called "more traditional forms of governmental

More directly on point chronologically, a Gallup poll asked the following question in the same year that *Grutter* was decided (2003):

> Which comes closer to your view about evaluating students for admission into a college or university—applicants should be admitted solely on the basis of merit, even if that results in few minority students being admitted (or) an applicant's racial or ethnic background should be considered to help promote diversity on college campuses, even if that means admitting some minority students who otherwise would not be admitted?[23]

Sixty-nine percent (69%) of Americans choose "solely on the basis of merit"; twenty-seven percent (27%) thought race and ethnicity should be considered.

The accuracy of these polling data is supported by the roughly contemporaneous actual election results on related matters put to a vote. Twice over the decade before *Grutter*, states considered such ballot initiatives. Californians did so in 1996, when they passed Proposition 209, so amending their state constitution to include the California Civil Rights Initiative. Washington State voters followed suit in 1998, passing (through Initiative 200) a law banning the state from "discriminat[ing] against, or grant[ing] preferential

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assistance for the disadvantaged." *THE SCAR OF RACE*, *supra* note 21, at 142.

[23] Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, Gallup, July 8, 2016, https://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx.

treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[24] There were no contemporaneous counter-examples.

C. Demonstrable Consensus Has Opposed Race-Based Admissions Policies Ever Since

These results were no fluke.

Gallup asked precisely the same question in 2007, 2013, and 2016.[25] Each time the result was the same: Americans rejected the consideration of race or ethnicity by admissions offices by a margin of at least 2 to 1. Many other similar polls produced parallel results, including a 2019 poll by the Pew Research Center that showed seventy-three percent (73%) of Americans agreeing that colleges and universities should not consider race or ethnicity when making decisions about student admissions.[26]

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[24] *See* Paul Guppy, *A Citizen's Guide to Initiative 200: The Washington State Civil Rights Initiative*, Washington Policy Center (Sep. 1, 1998), https://www.washingtonpolicy.org/publications/detail/a-citizens-guide-to-initiative-200-the-washington-state-civil-rights-initiative (last visited Mar. 26, 2021); *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291 (2014).

[25] *See* n. 23, *supra.*

[26] *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, Pew Res. Ctr. (Feb. 25, 2019), https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions; *see*

And the subsequent history produced by American voting booths runs consistent with this later polling data. Voters in Michigan passed a parallel initiative in 2006.[27] Voters in Nebraska did the same in 2008.[28] In Arizona, in 2010.[29] In Oklahoma, in 2012.[30] Only in

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also a poll conducted on behalf of the *Washington Post* and other organizations that found that 94 percent of White and 86 percent of African Americans said hiring, promotions, and college admissions should be based "strictly on merit and qualifications other than race/ethnicity." *See* WASH. POST ET AL., *Race and Ethnicity in 2001: Attitudes, Perspectives, And Experiences* 22 (2001), https://www.kff.org/other/poll-finding/race-and-ethnicity-in-2001-attitudes-perceptions ("In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted, or admitted to college, or that hiring, promotions, and college admissions should be based strictly on merit and qualifications other than race or ethnicity?"). *See also* PAUL SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993).

[27] *See generally* Carl Cohen, *The Michigan Civil Rights Initiative and the Civil Rights Act of 1964*, 105 MICH. L. REV. FIRST IMPRESSIONS 117 (2006).

[28] *Official Results of Nebraska General Election—November 4, 2008*, NEB. SEC'Y OF STATE (2008), https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2008/2008%20General%20Canvass%20Book.pdf; Melissa Lee, *Affirmative Action Ban Passes*, LINCOLN J. STAR, Nov. 5, 2008, at 7A.

[29] *State of Arizona Official Canvass: 2010 General Election—November 2, 2010*, ARIZ. SEC'Y OF STATE (2010), https://apps.azsos.gov/election/2010/General/Canvass2010GE.pdf; *Affirmative-Action Ban is a Winner at Ballot Box*, ARIZ. DAILY STAR, Nov. 3, 2020, at A10.

[30] *Federal, State, Legislative and Judicial Races General Election—November 6, 2012*, Okla. State Election Bd., https://www.ok.gov/elections/support/12gen_seb.html (last visited Nov. 23, 2020); Silas Allen, *State Colleges Prepare for Affirmative Action Ban*, OKLAHOMAN, Nov. 8, 2012, at 7A.

Colorado in 2008 has such a statewide initiative *ever* failed.[31]

D. Consensus Clear and Opposed to Racial Admissions

Far from being a "consensus" policy, race-based admissions policies have been imposed from the top down over the broad-based, stable opposition of the American people. Where voters have had access to a referendum process, they have almost always overturned them. Americans simply do not support the supposed "consensus" in favor of race-based admissions reported by Ms. Greenhouse as accepted by Justice O'Connor.

III. BALLOT INITIATIVE HISTORY OVER THE LAST CYCLE DEMONSTRATES THAT AMERICA'S BROAD-BASED, STABLE, NATIONAL CONSENSUS REMAINS STRONG (AND STRENGTHENING), EVEN IN AMERICA'S MOST DIVERSE REGIONS

Nor has any of this changed in the present.

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[31] Tim Hoover, *Amendment 46 Fizzling Out*, DENVER POST, Nov. 6, 2008, https://www.denverpost.com/2008/11/06/amendment-46-fizzling-out.

A. California 2020: Electorate Refuses to Reauthorize Public Discrimination by Defeating Prop. 16

On November 3, 2020, California voters overwhelmingly voted to retain the California Civil Rights Initiative in their state Constitution, rejecting Prop. 16 by 57.2% to 42.8%.[32] This means a wider majority of Californians voted to *retain* Proposition 209 than voted to *adopt* it in 1996.[33]

California is one of America's most racially diverse states.[34] It has grown far more diverse since 1996.[35] Yet, when given the chance to *permit* the government and public institutions to discriminate against or grant preferential treatment to persons on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting, Californians said "no," more loudly and emphatically than a whiter, more homogenous California said "no" decades ago.

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[32] *State Ballot Measures—Statewide Results*, CAL. SEC'Y OF STATE, https://electionresults.sos.ca.gov/returns/ballot-measures (last visited Nov. 23, 2020).

[33] *Compare* n. 32, *supra*, *with General Election—Statement of Vote, November 5, 1996, Vote For and Against Statewide Ballot Measures*, CAL. SEC'Y OF STATE, https://elections.cdn.sos.ca.gov/sov/1996-general/votes-for-against.pdf (last visited Feb. 25, 2021).

[34] Adam McCann*, Most and Least Diverse States in America*, WalletHub (Sep. 9, 2020), https://wallethub.com/edu/most-least-diverse-states-in-america/38262 (last visited Feb. 25, 2021).

[35] *See A Quick Look at California's Changing Demographics*, LAist (Mar. 6, 2020) https://laist.com/latest/post/20200306/california-demographic-change-1970-to-now (last visited Feb. 25, 2021).

They did so despite widespread agreement among the state's ruling class that they should do otherwise. Prop. 16 flew out of the state's legislature, garnering more than two thirds of the vote in each house. Influential government officials, businesses, newspapers, and advocacy organizations endorsed it, including now–Vice President Harris, U.S. Senators Dianne Feinstein and Bernie Sanders, Governor Gavin Newsom, and the mayors of Los Angeles and San Francisco.[36] Encouraged that "[t]his summer, millions of Americans took to the streets to protest racial injustice," supporters of Prop. 16 urged the public to "cast their ballots for a simple measure advancing that cause: undoing two decades of educational and economic setbacks for Black and Latino Californians."[37]

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[36] *Endorsements*, VOTEYESONPROP16, https://voteyesonprop16.org/endorsements/ (last visited Nov. 23, 2020) (listing many other prominent endorsers, including U.S. Rep. Karen Bass, California Secretary of State Alex Padilla, Now Sec. of Transportation Pete Buttigieg, Tom Steyer, several local governments, the *New York Times*, the *Los Angeles Times*, the *San Francisco Chronicle*, two co-founders of Black Lives Matter, the AFL-CIO, the Anti-Defamation League, the California Democratic Party, the California Teachers Association, Natural Resources Defense Council, Sierra Club California, the ACLU of California, several chambers of commerce, the San Francisco 49ers, the San Francisco Giants, Twitter, Uber, Facebook, United Airlines, Wells Fargo, Yelp, and Instacart).

[37] Editorial, *Californians, Vote Yes on Prop 16*, N.Y. TIMES, Oct. 27, 2020, https://www.nytimes.com/2020/10/27/opinion/california-prop-16-affirmative-action.html; *see also* Conor Friedersdorf, *Why Californians Rejected Racial Preferences, Again*, ATLANTIC (Nov. 10, 2020), https://www.theatlantic.com/ideas/archive/2020/11/why-california-rejected-affirmative-action-again/617049 ("In 2020, in the heat of the George Floyd protests, the California legislature

They "dwarfed their opponents in fundraising by nearly a 14-1 margin."[38] Big businesses and big labor unions, including Pacific Gas & Electric ($250,000), Kaiser Foundation Health Plan, Inc. ($1,5000,000), United Domestic Workers of America Issues PAC ($100,000), Saleforce.com, Inc. ($375,000), SEIU Local 2015 Issues PAC ($50,000), and Genentech USA ($100,000), showered money on the "Yes on 16" campaign.

By contrast, the opposition to Prop. 16 had to operate on a shoestring. Its volunteers (a large number of whom were Asian Americans, more often than not Chinese immigrants or the children of Chinese immigrants, who correctly understood that Prop. 16 and the admissions programs its backers sought—likely modeled on that of Harvard—targeted the future of their children) organized car rallies during the pandemic and distributed yard signs. They were active on Facebook, Twitter, Instagram, WeChat, YouTube, and TikTok. They got out the word of what, behind the pretty phrases, Prop. 16 would do: reauthorize racial discrimination in education, expressly and primarily to the detriment of Asian Americans.

Since the vote, apologists have attributed the loss to a distracting election cycle, voters' inability to keep

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finally succeeded in putting a new affirmative-action proposition on the ballot.").

[38] *Yes on Prop. 16 Has Big Fundraising Lead in Effort to Restore Affirmative Action in California*, EDSOURCE, https://edsource.org/2020/yes-on-prop-16-has-big-fundraising-lead-in-effort-to-restore-affirmative-action-in-california/642647 (last visited Nov. 23, 2020).

track of issues, and "abundant misinformation concerning affirmative action."[39] But the data show that racial preferences are disliked by Californians of almost every stripe. About one-third of voters who supported President Biden's election rejected Proposition 16.[40] And opposition wasn't just bipartisan; there is strong evidence to suggest that Prop. 16 was solidly rejected by majorities of each subset of the more than ninety (90) percent of Californians labeled by demographers as white, Asian American, Pacific Islander, or Latino/Hispanic.[41]

A post-election poll conducted by Strategies 360 on behalf of the "Yes on 16" campaign showed that the notion that voters didn't understand it was a fantasy. Respondents were first asked whether they thought Prop. 16, described as "the proposal to permit government decision making policies to consider race, sex, color, ethnicity, or national origin in order to address diversity by repealing constitutional provision prohibiting such policies," was a good or a bad idea. Only 33%

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[39] Jeremy Bauer-Wolf, *California Vote Signals Affirmative Action Remains Divisive*, EDUCATION DIVE, Nov. 4, 2020, https://www.educationdive.com/news/california-vote-signals-affirmative-action-remains-divisive/588433/ (last visited Feb. 25, 2021).

[40] Althea Nagai, *Race, Ethnicity, and California Prop 16*, CTR. FOR EQUAL OPPORTUNITY 13 (2020), https://www.ceousa.org/attachments/article/1380/California%20Proposition%2016.pdf.

[41] For example: Liz Peek, *Hispanics Shock Democrats in Deep Blue California*, The Hill (Nov. 20, 2020), https://thehill.com/opinion/education/526642-hispanics-shock-democrats-in-deep-blue-california (last visited Feb. 25, 2021) ("[E]very single majority-Hispanic county voted against it.").

thought it was a good idea, with 44% responding that it was a bad idea and 22% admitting to being unsure. Respondents were next told:

> Sometimes the language on the ballot can be confusing, so here is a little more information about Prop[.] 16. California law currently bans the use of policies and practices within government that seek to include particular groups based on their race, gender, ethnicity, and national origin in areas in which they were underrepresented in the past such as education and employment. In order to address issues of diversity and representation, Prop 16 would have removed this ban and allowed state and local governments to optionally consider factors like race, gender, ethnicity, and national origin in college admissions, public employment, and public contracting. These programs would still be subject to federal laws, meaning that any quota systems would have remained illegal.
>
> Now that you have a little more information, do you think Prop[.] 16 was a good idea or a bad idea?[42]

The gap between those who viewed it as a good idea and those who viewed it as a bad idea barely changed: 37% viewed it as good idea to 47% who considered it a bad idea. Interestingly, among African

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[42] *California Statewide Adults, Ages 18+, Conducted November 4–15, 2020*, STRATEGIES 360 (2020), https://www.strategies360.com/wp-content/uploads/2020/11/20-665-Nov-CA-Community-Post-Elect-Survey-Toplines.pdf.

Americans, support for the idea *dropped* and opposition *increased*. Support changed moderately among Americans scored as Asian or Pacific Islanders, while their opposition significantly increased.[43]

Californians simply voted consistent with America's long-standing, stable, broad-based antipathy to race-based admissions programs. Like most Americans, California voters—including many who consider themselves left-of-center—have long known and understood how racial preferences work; they just don't like them. Apparently, they share the view, expressed as the *Argument Against Proposition 16* in the Official Voter Information Guide distributed to all voters through the mail, that the kind of discrimination Prop. 16 would have legalized was "poisonous."

As it stated, echoing this Court's opinion from *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*,[44] "The way to stop discriminating is to stop discriminating." "Not every Asian American or White is advantaged," just as "[n]ot every Latino or Black is disadvantaged." Pretending otherwise only "perpetuate[s] the stereotype that minorities and women can't make it unless they get special preferences."[45] It took

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[43] *Id.*

[44] 551 U.S. 701, 748 (Roberts, C.J.) (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

[45] Ward Connerly, Gail Heriot & Betty Tom Chu, Argument Against Proposition 16, Official Voter Information Guide: California General Election: Tuesday, November 3, 2020 29 (2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf.

no great insight to admit these points, while also admitting that California

> also has men and women—of all races and ethnicities—who could use a little extra break. Current law allows for "affirmative action" of this kind so long as it doesn't discriminate or give preferential treatment based on race, sex, color, ethnicity or national origin. For example, state universities can give a leg-up for students from low-income families or students who would be the first in their family to attend college. The state can help small businesses started by low-income individuals or favor low-income individuals for job opportunities.[46]

This common-sensical position resonated with Californians, even while staying true to the promises of our federal enactments. Californians understood that they could continue to have their state's colleges serve as the greatest engine of advancement the world has ever known, without reembracing the policies of the Yellow Scare and falling back into the race-baiting traps of yesteryear.

B. Washington State 2019: Electorate Refuses to Reauthorize Public Discrimination by Defeating Proposition 1000

Like California, Washington State lies on the Left Coast in more than the geographic sense. Politically, it

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[46] *Id.*

is among the nations' most progressive havens.[47] Demographically, it, too, is among our more diverse states, and it, too, has become progressively *more* diverse over the last two (2) decades.[48]

Just as California voters were not alone in banning discriminatory admissions policies more than two decades ago, they are not alone today in rejecting an effort by their legislature to repeal that protection. In 2019, voters in Washington State did the same.[49] While advocates of discriminatory admissions in Washington were keen for a third round and attempted to put the matter on the ballot again in 2021, they were unable to find even the minimal number of signatures

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[47] *See Political Ideology by State*, Pew Research Center (2014), https://www.pewforum.org/religious-landscape-study/compare/political-ideology/by/state/ (ranking Washington tied for 4th).

[48] For first, *see* Adam McCann*, Most and Least Diverse States in America*, WalletHub (Sep. 9, 2020), https://wallethub.com/edu/most-least-diverse-states-in-america/38262 (last visited Feb. 25, 2021); for second, *compare Washington 2000: Census 2000 Profile*, U.S. Census Bureau (Aug. 2002), https://www.census.gov/prod/2002pubs/c2kprof00-wa.pdf (last visited Feb 26. 2021), and *Population by Race*, Wash. Office of Fin'l Mgt., https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-changes/population-race (last visited Feb. 26, 2021).

[49] *Referendum Measure No. 88*, WASH. SEC'Y OF STATE (Nov. 26, 2019, 4:55 p.m.), https://results.vote.wa.gov/results/20191105/state-measures-referendum-measure-no-88.html; Joseph O'Sullivan, *With Nearly All Ballots Counted, Voters Reject Washington's Affirmative-Action Measure*, SEATTLE TIMES, Nov. 12, 2019, https://www.seattletimes.com/seattle-news/politics/with-nearly-all-ballots-counted-voters-reject-washingtons-affirmative-action-measure.

necessary before the December 30, 2020 deadline to start the initiative process this cycle.[50]

C. Consensus Clear and Opposed to Racial Admissions

America's most diverse, most progressive states' electorates remain firmly part of the national consensus (embodied in Title VI and the Equal Protection Clause, properly understood) against race-based admissions. The Court should grant certiorari to bring its jurisprudence back into accord with the mainstream, bipartisan majority of the American people's settled understanding of propriety and law on this subject.

IV. PROPRIETY OF CONSIDERING AMERICAN PUBLIC'S BROAD-BASED, STABLE, NATIONAL CONSENSUS AGAINST RACIAL ADMISSIONS POLICIES

Much of the foregoing addresses the long-standing, broad-based, American consensus against race-based admissions (and the apparent misapprehension to the contrary that may have infected *Grutter* at its issuance). A fair objection would be that none of this should matter at all to the Court—after all, "[f]ew would quarrel with" the proposition that "the Court must take care to render decisions 'grounded truly in principle,' and not simply as political and social

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[50] E-mail from WA Asians for Equality dated Dec. 31, 2020 (on file with CFER's executives).

compromises."[51] Indeed, "the Court's duty is to ignore public opinion and criticism on issues that come before it[.]"[52] And it is (or should be) error for Americans to imagine that the Court is "engaged not in ascertaining an objective law but in determining some kind of social consensus."[53] And yet, CFER raises these issues both because: (a) as discussed above, the *Grutter* opinion appears to *feed* this error (compounding it with factual error at that); and (b) this *one* setting arguably presents the exception that proves the rule.

It is one thing when the Court ignores public opinion that *favors* the kind of discrimination barred by the Fourteenth Amendment. That's what courts are supposed to do: ignore the passions of the moment, exercise their independent judgment of what law requires, and ensure that Americans' rights are not tossed aside by discriminatory policies without exceedingly rare, truly compelling justifications.[54] But *Grutter* presents the opposite scenario: the public isn't just *unconvinced*

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[51] *Planned Parenthood v. Casey*, 505 U.S. 833, 958 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

[52] *Id.*

[53] *Casey*, 505 U.S. at 999 (Scalia, J., concurring in part and dissenting in part).

[54] Federalist No. 78 ("[I]ndependence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

that the argument for race-based admissions is compelling; the public affirmatively *rejects* it by an overwhelming margin.

Acknowledging a stable, broad-based, national consensus *in harmony* with the clear language of the Equal Protection Clause and Title VI, from which prior precedent departed, is consistent with the judicial duty to follow the law instead of the passions of faction. The purpose of strict scrutiny is to create a strong presumption *against* the legitimacy of even *popular* racial discrimination, to favor the race neutrality required by the Equal Protection clause and preferred by the American people. Here, despite the usual norm, the Court should heed what Americans have been saying and voting for decades; allowing *Grutter*'s error to survive and to continue to declare "compelling" what the public consistently rejects would be inexcusable.[55]

The fact that the public has consistently opposed race-based admissions policies for decades, and continues to do so, is reason enough to acknowledge that, to grant certiorari, and to correct the lower-courts' finding that a compelling interest justifies Harvard's policy.

[55] *See* Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. LEGIS. 217 (2003).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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