No. 20-1199

In the

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the foundational principle that "all men are created equal." The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Fisher v. University of Texas*, 136 S.Ct. 2198 (2016); *Grutter v. Bollinger*, 593 U.S. 244 (2003); *Adarand Constructors, Inc. v. Mineta*, 545 U.S. 103 (2001); and *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

SUMMARY OF ARGUMENT

Without any recognition of the irony, Harvard recently issued statements decrying discrimination against Asian-Americans. At the same time, Harvard is using an explicitly race-conscious admissions program that requires Asian-American applicants to have substantially higher scores than all others in order to gain admission. The so-called "holistic" admissions program is a means of racial balancing (ensuring that there are not "too many" Asian-Americans and "just enough" of other racial minorities) and ought not to be tolerated. Harvard claims a need to balance its class by skin color and ethnicity. But this Court

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[1] All parties have been timely notified and have consented to the filing of this amicus brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

should hold that preference for an individual because of the color of his skin is never permissible under our Constitution or Civil Rights laws. Review should be granted here to overrule (or recognize the expiration of) the decision in *Grutter* that temporarily authorized consideration of race in the selection of students.

REASONS WHY REVIEW SHOULD BE GRANTED

I. The Race of an Applicant Can Never Be a Legitimate Concern

This Court in *Grutter* noted that it expected that after 25 years, the use of racial preferences would no longer be necessary to further a university's interest in "diversity." *Grutter* 539 U.S. at 343. Justice Thomas agreed that racial discrimination would be illegal in 25 years but parted company with the Court on the idea that it was legal at all at the time of the *Grutter* decision. "The Constitution means the same thing today as it will in 300 months." *Id*. at 351 (Thomas, J., concurring in part and dissenting in part). *Grutter* was a significant departure founding ideals of equality of opportunity rather than equality of result. Strict scrutiny "forbids the use even of narrowly drawn racial classifications except as a last resort." *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 519 (1989) (Kennedy, J. concurring in part and concurring in the judgment). It is past time for the Court to return to these principles.

A. The idea that an individual's race communicates something relevant about him is contrary to our founding principles.

The fundamental creed upon which this nation was founded is that "all men are created equal." DECLARATION OF INDEPENDENCE ¶ 2. This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." Letter from Abraham Lincoln to H.L. Pierce (Apr. 6, 1859), in 3 Collected Works 374, 376 (1953). "All men" meant all human beings—men as well as women, black as well as white. *See*, *e.g.*, James Otis, Rights of the British Colonies Asserted and Proved ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), reprinted in B. Bailyn, ed., Pamphlets of the American Revolution 439 (1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?").

These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), reprinted in 1 THE FOUNDERS' CONSTITUTION 6 (P. Kurland & R. Lerner, eds., 1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), reprinted in 1 THE FOUNDERS' CONSTITUTION at 11. Even those founders who owned slaves recognized that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence.

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result. Indeed, James Madison described the "protection of different and unequal faculties" as "the first

object of government." The Federalist No. 10, at 78 (Rossiter ed. 1961) (1788). Alexander Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all." The Federalist No. 36 at 217 (emphasis added).

With the eradication of slavery and the passage of the Fourteenth Amendment and the Civil Rights Act, the promise of legal equality was opened to all. Unfortunately, in *Plessy v. Ferguson*, 163 U.S. 537 (1896) , this Court, in one of its darkest moments, held that legal policies which separated Americans by race were acceptable under the Constitution. Alone in dissent, Justice John Marshall Harlan eloquently penned the judicial equivalent of the Declaration's creed:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559 (Harlan, J., dissenting). Fifty-eight years later, in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, this Court repudiated *Plessy*'s separate but equal doctrine and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its

creed: 'We hold these truths to be self-evident: that all men are created equal.'" King, I Have A Dream (1963) reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 217, 219 (James Washington ed. 1986). We should not wait 58 years – nor even 25 – to repudiate the implicit foundation of the *Grutter* opinion, that a man can be judged by the color of his skin.

The evils of racial discrimination are not lessened because they are allegedly created to benefit previously excluded groups. After the Civil War, new racist laws, such as Black Codes and Jim Crow laws, were created in order to keep newly freed slaves from voting, earning a living, or owning property. But the paternalism of "benign" whites limited the freedom of blacks in many ways, too. The former slave Frederick Douglass addressed this problem when he wrote that "in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply justice." Frederick Douglass, What The Black Man Wants (Jan. 26, 1865), reprinted in 4 Frederick Douglass Papers 59, 68-69 (Blassingame & McKivigan, eds. 1991). Douglass continued:

> Everybody has asked the question... "What shall we do with the Negro?" I have had but one answer from the beginning. Do nothing with us! ... All I ask is, give him a chance to stand on his own legs! … If you will only untie his hands, and give him a chance, I think he will live.

In exactly the same way, racial preferences, whether in hiring, contracting, the provision of government benefits, or, as here, in college admissions, are ostensibly designed to shield minority group members, but in fact are premised on the notion that they are incapable of competing without a big brother—a white big brother—to guide them. Further, while its claim may be that it desires to admit "just enough" of some racial minorities Harvard is also ensuring that it does not admit "too many" Asian-Americans. Harvard is perfectly willing to injure some on the basis of race in its quest for a racially balanced class photo. This is the evil that *Grutter* countenanced.

As Justice Douglas wrote, "A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting); see also *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1978) (opinion Powell, J.) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").

B. *Grutter* has reached its expiration date and should be overruled.

This Court's decision in *Grutter* bought in to the notion that race and ethnicity matter – that the founders were wrong when they claimed that all men were created equal. Harvard's admission process presumes that an applicant's race is a determining factor in that applicant's character and quality as a student. Ac-

cording to this view, an Asian American or black applicant is inherently different from—is not equal to—the white applicant with same test scores and grades. Indeed, an Asian-American applicant must score several hundred points higher on standardized tests in order for Harvard to consider him the equal of other applicants of different racial backgrounds. Under Harvard's admissions program the content of the applicant's character is determined by his race. This is the very definition of racism. *See* American Heritage Dictionary (4th Ed. 2000) ("Racism: the belief that race accounts for differences in human character or ability and that a particular race is superior to others"). It is fundamentally contrary to the principle of equality to presume that a person's contributions to the classroom will be determined by his race.

Such discrimination is morally wrong because it "treats the accidental feature of race as an essential feature of the human persona [and thus] violates the principles of human nature—those principles in The Declaration of Independence that are said to stem from the proposition that 'all men are created equal.'" Edward Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 Notre Dame J. L. Ethics & Pub. Pol'y 15, 49 n. 132 (1997). As Charles Sumner, one of the principal authors of the Fourteenth Amendment's Equal Protection Clause, wrote:

> [The principle of equality] is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution and enter into and diffuse itself through all the national legislation. Such are the commanding authorities which constitute 'Life, Liberty,

> and the Pursuit of Happiness,' and in more general words, 'the Rights of human Nature,' without distinction of race…as the basis of our national institutions. They need no additional support.

Charles Sumner, The Barbarism of Slavery (1860) reprinted in Against Slavery: An Abolitionist Reader 313, 320 (Mason Lowance, ed. 2000).

Grutter was wrong when it was decided. Nearly twenty years later, it is still wrong.

II. Categorizations by Race or Ethnicity Have No Lawful Purpose in University Admissions

Consideration of race in college admissions will exacerbate rather than cure race discrimination. Experience has shown that racism is not overcome easily, whether it be in segregated schools or in legal classifications like the race-conscious admissions program at issue here. This Court spent more than two decades fighting such classifications after the *Brown I* case. *See Griffin v. County Sch. Bd.*, 377 U.S. 430 (1968); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Brown v. Board of Ed.*, 349 U.S. 294 (1955) ("*Brown II*"); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979). Since then, America has made remarkable progress. Today, Americans generally believe that race is an illegitimate factor for government classification. Across the country, Americans have rejected the notion of racial classifications, including supposedly "benign" ones. *See* Clint Bolick, Blacks and Whites on Common Ground, 10 Stan. L. & Pol'y Rev 155, 158 (Spring 1999); Terry Eastland,

ENDING AFFIRMATIVE ACTION: THE CASE FOR COLOR-BLIND JUSTICE 164-165 (2d ed. 1997). States have begun to incorporate Justice Harlan's *Plessy* dissent into law. *See* Cal. Const. art. I, 31, cl. A (1996) (Proposition 209); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (noting that Proposition 209 "adopt[s] the original construction of the Civil Rights Act"); ARCW § 49.60.400 (1) (Washington Initiative 200).

Yet today, defenders of racially discriminatory laws, as emphatic as their predecessors in the 1950s, are exhibiting the same determination to avoid the commands of the Equal Protection Clause. This Court's decision in *Grutter* to grant a temporary license to colleges and universities to discriminate on the basis of race in their admissions programs violates the fundamental command of Equal Protection. It was wrong when *Grutter* was decided, and it is no more permissible than the long and sordid reliance on *Plessy v. Ferguson* to rationalize "separate but equal" segregation and its scheme of racial classifications.

The time for forbidding colleges and universities from treating individuals on the basis of their skin color rather than their merit is long is long past. As the plurality of this Court noted in *Croson*, racial classifications are often motivated by illegitimate notions of racial inferiority. 488 U.S. at 493-94; *see also Adarand II*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual"). "The time for mere

'deliberate speed' [to fully enforce this principle] has run out." *Griffin*, 377 U.S. at 234; see also *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *cf. Brown II*, 349 U.S. at 301 (ordering that assignment of pupils to schools based on race be ended "with all deliberate speed").

Experience has shown that racial discrimination is not easily eradicated. Professor Lino Graglia has noted the "intense resistance that can be expected from academics and the educational bureaucracy" in eliminating racial preferences. Despite California's state laws prohibiting such preferences, for instance, "the Governor and the Board of Regents have encountered the recalcitrance, not to say insubordination, of the President of the University System who is seeking to delay implementation of [a racially-neutral admissions policy] as long as possible." Lino Graglia, "Affirmative Action," Past, Present, And Future, 22 Ohio N.U.L. Rev. 1207, 1219 (1996). The federal government's response to this Court's decision in *Adarand I* parallels California's experience. As one commentator notes, despite *Adarand*'s holding, awards to racially preference contractors actually increased in the years following the decision. No honest attempt has been made to fix the problems with the program at issue in *Adarand* —instead, those who defend racially discriminatory laws have sought "to marginalize *Adarand*'s holdings by tinkering with the operation of set-aside programs, but by no means calling for their termination." R. Brad Malone, Note: *Marginalizing Adarand : Political Inertia and the SBA 8(A) Program*, 5 Tex. Wesleyan L. Rev. 275, 298-299 (Spring 1999).

These facts reveal that the political opposition to the demands of the Equal Protection Clause is every bit as powerful as the opposition this Court faced in the years following *Brown*. What Martin Luther King, Jr. said in 1964 is therefore equally true today: "the announcement of the high court has been met with declarations of defiance. Once recovered from their initial outrage, these defenders of the status quo had seized the offensive to impose their own schedule of change." Martin Luther King, Jr., Why We Can't Wait 5-6 (1964). Indeed, the defiance of today's defenders of racial classifications is, in some ways, even more pernicious, because their reliance on "diversity" as a governmental interest is one that "effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'elimat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race' . . . will never be achieved." *Croson*, 488 U.S., at 495 (plurality opinion of O'Connor, J.) (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)). Only by insisting, as the post-*Brown* Court did, that racial discrimination is no longer tolerable, can this Court end racial classifications in the law once and for all.

It is also time to realize that the principles of the Declaration, codified at long last in the Constitution via the Fourteenth Amendment, as well as in the Civil Rights Act, will not countenance the idea that an individual's race or ethnicity is a valid measure of his qualification for admission to a university.

CONCLUSION

Like a bottle of milk in the refrigerator that has gone bad, this Court's decision in *Grutter* is past its expiration date. The experiment with allowing universities to treat applicants according to their race has not born any positive benefits. Indeed, treating applicants on the basis of race can only further entrench the idea that the color of one's skin is more important than the content of their character. This Court should grant review to overrule its prior decision in *Grutter*.

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