Nos. 20-1199 & 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the First and Fifth Circuits

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND DEVON WESTHILL IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *City of Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003), or for amici, *e.g.*, *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016); *Carson v. Makin*, No. 20-1088 (U.S. argued Dec. 8, 2021). The ACLJ strongly believes in the unity of all people in one human nature, from fertilization through natural death. Just as there is no difference in kind between prenatal, neonatal, adolescent, or adult human beings, there is likewise no difference in kind between black, white, Asian, or other ethnic groups of human beings. There is one race – the human race. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment). The ACLJ therefore opposes any effort by Harvard or the

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[1]The parties in these consolidated cases have filed blanket letters of consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

University of North Carolina (UNC) to attach consequences to racial labels for individuals.

Devon Westhill served as the Deputy Assistant Secretary for Civil Rights at the U.S. Department of Agriculture in the administration of President Donald J. Trump where he led the civil rights program with the principal responsibility to enforce federal civil rights laws. Mr. Westhill now serves as the president and general counsel of the Center for Equal Opportunity where he promotes colorblind law and policy within the public and private sectors. As a racially and ethnically diverse alumnus of the University of North Carolina at Chapel Hill, Mr. Westhill believes strongly that individuals should be judged by the content of their character and not the color of their skin.

SUMMARY OF ARGUMENT

There is only one "race" of people – the human race. Institutional efforts to pigeonhole groups of people into racial boxes – what Chief Justice Roberts called a "sordid business," *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part) – is both ultimately incoherent (as people of mixed ethnicity illustrate) and a hallmark of racism (as with the Nazi efforts to define Jews and the segregationist efforts to define "colored" people). The use of racial labeling by Harvard and UNC is incompatible with one of the basic premises of the Constitution and our Nation: the inherent, equal dignity of all persons.

ARGUMENT

I. TYING BENEFITS OR BURDENS TO RACIAL LABELS IS RACE DISCRIMINATION.

When educational institutions *forbid* the differential treatment of individuals on the basis of racial labels, they properly set themselves against race discrimination. But when such institutions *undertake* to treat people differentially on the basis of racial labels, they run afoul of the norm of color-blindness embraced by the Equal Protection Clause of the Fourteenth Amendment and laws against race discrimination, such as Title VI of the Civil Rights Act of 1964. "[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Fisher v. Univ. of Texas*, 570 U.S. 297, 316 (2013) (*Fisher I*) (Thomas, J., concurring) (internal quotation marks and citation omitted). The same goes for private universities like Harvard.

In particular, the use of racial classifications as triggering preferential or disfavored treatment suffers from two glaring flaws: first, such labeling is ultimately incoherent, as racial categories are both arbitrary and porous; and second, such labeling, and the concomitant need to decide who fits into which racial "box," associates the racial classifiers with some of the worst historical pedigrees in human history.

A. Racial Categories Are Arbitrary and Ultimately Incoherent.

The enforcement of any system of racial preference necessarily requires a determination of who counts as belonging to which race. "When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite?" *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment).

In a world of completely segregated populations, it might be possible to maintain the fiction that there are intrinsically distinct, identifiable ethnic groups such as "black" and "white," or "Hutu" and "Tutsi," or "Asian" and "Hispanic." But in a cosmopolitan world, such pretensions are exposed as utterly illusory. Countless children are born each day with a heritage drawing upon a host of varied ethnic and cultural backgrounds. "As racial and ethnic prejudice recedes, more and more students will have parents (or grandparents) who fall into more than one of [the designated racial] groups." *Fisher v. University of Texas*, 136 S. Ct. 2198, 2229 (2016) (*Fisher II*) (Alito, J., dissenting). That is exactly what is happening. Nicholas Jones, *et al.*, "2020 Census Illuminates Racial and Ethnic Composition of the Country," *Census.gov* (Aug. 12, 2021) ("Multiracial population . . . was measured at 9 million people in 2010 and is now 33.8 million people in 2020, a 276% increase").

Indeed, there are websites devoted to identifying and celebrating such "multiracial" individuals. *See, e.g.*, Horne Jeffrey, "Mixed, Multiracial, Eclectic, & Exotic Race Celebrities!" *IMDb* (Feb. 16, 2013) (listing,

and providing ethnic background information about, *inter alia*, Halle Berry, Beyoncé, James Brown, Mariah Carey, Johnny Depp, Cameron Diaz, Vin Diesel, Salma Hayek, Whitney Houston, Vanessa Hudgens, Derek Jeter, Dwayne Johnson, Tommy Lee Jones, Alicia Keys, Val Kilmer, Ben Kingsley, Bruce Lee, Barack Obama, Prince, Keanu Reeves, Rihanna, Lionel Ritchie, Steven Seagal, Jada Pinkett Smith, Will Smith, Tina Turner, Oprah Winfrey, and Tiger Woods); "Multiracial/Multiethnic and Intermarried Celebrities," *The Multiracial Activist*, *available at* https://multiracial.com/index.php/conferences-lists-and-stuff/multiracial-multiethnic-and-intermarried-celebrities/ (listing, and providing ethnic background information about, *inter alia*, Joan Baez, Jennifer Beals, Roy Campanella, Johnny Cash, Linda Chavez, Cher, Jimi Hendrix, Anthony Quinn, Geraldo Rivera, Linda Ronstadt, Eddie Van Halen, and Raquel Welch). *See also* Juan Williams, "Am I not Black enough?" *The Hill* (Apr. 19, 2021) ("I'm actually 50 percent African, 30 percent Indian and a 20 percent hodgepodge of Irish, Scottish and Norwegian genes").

Human beings cannot be pigeonholed into racial boxes, and it is offensive to insist that they can – or must – be so labeled. As the Supreme Court of California stated:

> If the [rule assigning significance to racial categories] is to be applied generally to persons of mixed ancestry the question arises whether it is to be applied on the basis of the physical appearance of the individual or on the basis of a genealogical research as to his ancestry. If the physical appearance of the individual is to be the test, the

> [rule] would have to be applied on the basis of subjective impressions of various persons. Persons having the same parents and consequently the same hereditary background could be classified differently. On the other hand, if the application of the [rule] to persons of mixed ancestry is to be based on genealogical research, the question immediately arises what proportions of [the pertinent ethnic groups of] ancestors govern the applicability of the statute. Is it any trace of [the pertinent ethnic] ancestry, or is it some unspecified proportion of such ancestry that makes a person a [member of the pertinent ethnic group]?

Perez v. Sharp, 32 Cal. 2d 711, 738, 198 P.2d 17, 28 (1948). *Accord Fisher II*, 136 S. Ct. at 2230 (Alito, J., dissenting) ("If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough[?]").

For that matter, the very notion of discrete human "races" is, at best, highly questionable. As this Court unanimously observed:

> There is a common popular understanding that there are three major human races – Caucasoid, Mongoloid, and Negroid. *Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary* and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. *Clear-cut categories do not exist*.

> The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that *racial classifications are for the most part sociopolitical*, rather than biological, in nature.

St. Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (emphasis added) (citing extensive authorities). "The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races." *Fisher v. University of Texas at Austin,* 631 F.3d 213, 264 (5th Cir. 2011) (Garza, J., specially concurring) (footnote omitted).

To be sure, individuals can take great pride in asserting – or recharacterizing[2] – their own ethnic identities, whether Irish, African-American, Italian, Chinese, or what have you. But it is an entirely different matter *to have an institution attach consequences* to such a label, whatever its source.

It is no answer to have individuals self-designate their race for purposes of preferential treatment. Even total deference to an individual's unfettered self-description still privileges (or disfavors) a person's

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[2] *See, e.g.,* Meg Butler, "11 Black Celebrities Who Say They're Not African American," *Madamenoire* (Oct. 6, 2014). For example, the article quotes actor Shemar Moore as follows: "I'm very proud to be Black but I'm just as much Black as I am White."

status as, e.g., "black" or "Semitic." And if the institution exercises any supervision over the racial designations, it raises the sorry prospect of official agents asserting, for example, that someone is "too white" to qualify for minority status (or vice-versa). This is not an unrealistic scenario, even in the modern world. *E.g.*, Bob Pockrass, "Pennsylvania driver sues NASCAR, claims he was excluded from diversity program for being 'too Caucasian,'" http://blog.pennlive.com/pasports/2012/04/nascar_driver_too_caucasian.html (Apr. 19, 2012) (driver of Puerto Rican and Spanish descent sues over exclusion from program for minorities); Mem. in Support of Deft. Access Marketing & Communication LLC's Mot. for Sum. Judg. at 12 n.7, *Rodriguez v. NASCAR*, No. 3:10-cv-00325 (W.D.N.C. Jan. 17, 2012) ("Plaintiff did not fit the purpose of the affirmative action program because he looked like a Caucasian male"). *See also* Michael Olesker, 'When 'black' apparently was not quite black enough," *Baltimore Sun* (Sept. 3, 2002) (African-Lebanese plaintiff sues, alleging failure to be hired for "diversity" position at college because he was "not visibly black").

Moreover, if an institution attaches benefits or privileges to a racial label, this "is an invitation for applicants to game the system." *Fisher II*, 136 S. Ct. at 2230 (Alito, J., dissenting). *See*, *e.g.*, Doha Madani, "Hispanic Miami police captain suspended after claiming 'one-drop rule' means he's black," *NBC News* (Apr. 12, 2022) (officer accused of "having identified himself as a black man on police exams to get a promotion"); "A Bored and Unpromoted Robert E. Lee Takes Affirmative Action: Meet Roberto E. Leon," *People* (Apr. 16, 1979) (county worker changed name

and asserted Hispanic identity "to apply for the county's affirmative action program – and the pledge of promotions ahead of equally qualified white males"); "Some Asians' college strategy: Don't check 'Asian,'" *USA Today* (AP Dec. 4, 2011), if not outright lie, Christian Spencer, "More than a third of white students lie about their race on college applications, survey finds," *The Hill* (Oct. 21, 2021). *See also* Nina Agrawal, "Graduate student who claimed to be Black loses faculty job offer at Fresno State," *Los Angeles Times* (Sept. 18, 2020); Isabel Vincent, "How disgraced health expert Carrie Bourassa passed as indigenous for years," *NY Post* (Dec. 1, 2021); "Ex-NAACP Leader Rachel Dolezal 'Lied' About Race, First Lady McCray Says," *CBS News* (June 16, 2015); Hannah Frishberg & Elizabeth Rosner, "Professor Jessica Krug admits she lied about being black: 'I cancel myself,'" *NY Post* (Sept. 3, 2020); Tim Evans & Natalia Contreras, "Satchuel Cole, leader in the fight for racial equality in Indianapolis, lied about own race," *Indianapolis Star* (Sept. 18, 2020); Anagha Srikanth, "What is the ethnicity scandal about Alec Baldwin's wife?" *The Hill* (Dec. 29, 2020).

B. The History of Official Racial Classification of Individuals Is Not One that Should Be Imitated.

Governments have tried before to undertake the "sordid business" of "divvying us up by race," *LULAC*, 548 U.S. at 511 (Roberts, C.J., joined by Alito, J., concurring and dissenting) – and the results have not been pretty.

1. Germany and Rwanda

The ugliest examples are associated with genocide.

In Germany in the early 20th Century, for example, the national regime composed detailed formulae for determining who would or would not be deemed Jewish.[3] As Justice Stevens acidly observed, "If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935 . . . ." *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (citing German law defining Jews by ancestry or by combination of ancestry and marriage or religious practice). The horrific steps following this categorization led to the murder of millions of Jews.

In Rwanda, racial labeling immensely facilitated the genocidal massacre of hundreds of thousands of Tutsis in 1994. Mandatory government identification cards listed bearers as belonging to supposedly distinct tribal groups, most notably either Hutu or Tutsi. "[T]he designation 'Tutsi' spelled a death sentence at any roadblock." Jim Fussell, "Group Classification of

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[3]The Holocaust brutally exemplifies the arbitrariness of racial classifications. As one scholar noted, "racial fanaticism" led Nazis to

> exterminat[e] millions of defenseless men, women, and children who were so similar to themselves in appearance that insignia, tattoos, or documents had to be used to tell the victims from their murderers.

Thomas Sowell, *The Economics and Politics of Race: An International Perspective* 15 (1983).

National ID Cards as a Factor in Genocide and Ethnic Cleansing," Presentation to the Seminar Series of the Yale University Genocide Studies Program (Nov. 15, 2001), *available at* www.preventgenocide.org/prevent/removing-facilitating-factors/IDcards/.

2. United States

The United States has had its own disgraceful experiments with giving racial labels official significance. In particular, the enforcement of immigration and naturalization laws, miscegenation laws, and racial segregation required the government to decide in which racial "box" a person belonged.

In *Ozawa v. United States*, 260 U.S. 178 (1922), this Court faced the question whether a Japanese immigrant qualified as a "white person" eligible for citizenship. This Court wrote:

> the words import a racial and not an individual test . . . . Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. [We hold that] the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race.

Id. at 197.

Then in *United States v. Thind*, 261 U.S. 204 (1923), the Court addressed whether "a high caste Hindu of full Indian blood" was "a white person" eligible for naturalization, *id.* at 206. The *Thind* Court took *Ozawa*'s emphasis on being "Caucasian" and added ethnic origin and appearance:

> What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other Europe parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

Id. at 214-15.

In *Morgan v. Virginia*, 328 U.S. 373, 382 (1946), this Court observed: "In states where separation of races is required . . ., a method of identification as white or colored must be employed." *See also id.* at 383 & n.28 (listing as examples tests for "any ascertainable Negro blood" and "one-fourth or more Negro blood"). Lower courts consequently had to wrestle with the ultimately arbitrary question, "Who exactly is white and who is nonwhite?" *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment).

The case of *Wall v. Oyster*, 36 App. D.C. 50 (1910), is also illustrative. *Wall* involved the use of racial labels to determine admission to educational institutions. In the District of Columbia, the government maintained separate schools for "white" and "colored" children. *Id.* at 53. A child named Isabel Wall began attending the "white" school, but the principal excluded her "shortly thereafter . . . on the ground that she was a 'colored child,'" despite the fact that Isabel asserted "she is a white child in personal appearance, and is so treated and recognized by her neighbors and friends." The trial court acknowledged that "'[T]here was to be observed of the child no physical characteristic which afforded ocular evidence suggestive of aught but the Caucasian,'" but ruled that because "'the child is of negro blood of one eighth to one sixteenth . . . her racial status is that of the negro [and s]he is, therefore, "colored," according to the common meaning of the term . . . .'" *Id.* at 50-52.

The D.C. Court of Appeals affirmed. That court observed that "the duty was necessarily devolved . . . upon the board of education to determine what

children are white and what are colored whenever that question shall arise in a particular case." *Id*. at 54. The court noted the variety of approaches taken by the states: "In some States 'colored persons' are declared by the statute to be those having a certain proportion of negro blood in their veins, – in some instances one fourth; in some one eighth; in some one sixteenth; and in others any admixture." *Id*. at 56. Since Congress had provided no such mathematical definition, the appeals court believed itself "compelled to ascertain the popular meaning of the word 'colored.'" *Id*. at 57. After reviewing the approach taken in several cases and consulting the dictionary, the court concluded that "the word 'colored,' as applied to persons or races, is commonly understood to mean persons wholly or in part of negro blood, or having any appreciable admixture thereof." *Id*. at 58.

The *Wall* court's struggle with the delineation of racial categories was by no means unique. Other courts undertook similar challenges. *E.g.*, *State ex rel. Farmer v. Board of School Comm'rs*, 226 Ala. 62, 145 So. 575 (1933) (upholding exclusion of creole children from "white" school and their relegation to "colored" school, and discussing similar precedents and policy of racial separation); *Weaver v. State*, 22 Ala. App. 469, 471 (1928) (miscegenation prosecution) ("It was proper to prove that defendant's grandfather had 'kinky hair.' This is one of the determining characteristics of the negro. This also applies to the questions involving the nose and other features. It is proper in a case of this kind to prove the race of defendant by description of any or all the characteristics belonging to the negro race, and even a photograph has been held to be admissible"); *State v. School Dist. No. 16*, 154 Ark. 176,

179 (1922) ("it cannot be said there was no substantial evidence tending to show a trace of negro blood in the veins of said children"); *State v. Treadway*, 126 La. 300, 52 So. 500 (1910) (miscegenation prosecution) (extensive treatment of distinction between "Negro" and "colored" to determine that an "octoroon" was not a "Negro"); *Messina v. Ciaccio*, 290 So. 2d 339 (La. App. 1974) (birth certificate designation of race) (discussion of imprecision of various racial terms). *Cf. McLaughlin v. Florida*, 379 U.S. 184, 187 (1964) ("At the trial one of the arresting officers was permitted, over objection, to state his conclusion as to the race of each appellant based on his observation of their physical appearance").

These official excursions into racial classification rightly strike the modern mind as appallingly racist and insensitive to the fundamental humanity of all persons, regardless of skin color, features, or ancestry. "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." *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting).

One would have thought that, in the wake of the Civil Rights Movement, *Brown v. Board of Education*, 347 U.S. 483 (1954), and the adoption of federal laws against race discrimination, official efforts to sort people by their race would have ended. But that is not at all the case. To the contrary, to this day government agencies "have established rules for what makes someone African American, Asian, Hispanic, Native American, or white, and for how one proves that one meets the relevant criteria." David E. Bernstein, *The Modern American Law of Race*, 94 So. Cal. L. Rev. 171, 172 (2021) (footnote omitted). As the Bernstein article

documents with lengthy detail, both states and federal agencies, for purposes of awarding preferential benefits, set forth criteria for identifying who does, or does not, belong to various racial and ethnic groups. Notably, those criteria often differ from each other. It seems the "sordid business" of imposing racial labels has simply evolved from a means of disfavoring some over others to a means of favoring some over others.

In the present case UNC, a governmental entity, and Harvard, an entity statutorily barred from race discrimination, attach potentially dispositive significance to a prospective student's race. That the universities profess a benign motive for this exercise does not change the fact that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting). "The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 328 (2013) (Thomas, J., concurring). Regardless of whether the university itself makes the racial labeling determination or puts upon the individual the task of self-labeling (with or without any oversight to forestall manipulation of the system, *see supra* pp. 7-9), it is the *institution* that ultimately says the label *matters*. That is inconsistent with the Fourteenth Amendment and Title VI.

CONCLUSION

"The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). As the Chief Justice stated in *Parents Involved*, 551 U.S. at 748 (plurality): "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." This Court should reverse the judgments below.

Respectfully submitted,

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