Nos. 20-1199 & 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC., PETITIONER

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE

STUDENTS FOR FAIR ADMISSIONS, INC., PETITIONER

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIRST AND FOURTH CIRCUITS

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

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QUESTIONS PRESENTED

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

3. The Constitution and Title VI ban race-based admissions unless they are "'necessary'" to achieve the educational benefits of diversity. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013). Can the University of North Carolina reject a race-neutral alternative because the composition of its student body would change, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

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INTEREST OF AMICUS CURIAE

This month, 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, these institutions have 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 month also marks the 126th 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. Dissenting alone, Justice Harlan exhorted that "[o]ur constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.* at 559. Justice Harlan's view now holds sway in almost every context. Higher-education admissions is a conspicuous exception.

These cases provide the opportunity to correct that shameful anomaly. Texas's experience underscores why this Court should renounce 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] Texas Higher Education Coordinating Board, *Enrollment Forecast 2021–2035* (Jan. 2021), https://tinyurl.com/njn8d98w. No counsel for any party authored this brief, in whole or in part. No person or entity other than amicus contributed monetarily to its preparation or submission. All parties have consented to its filing.

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 635–36, 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. at Austin*, 570 U.S. 297, 304 (2013) (*Fisher II*). The University of Texas considered her less worthy of admission because of her race. *Id.* at 305. 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 the University of North Carolina and Harvard, respondents here, wrong Asian Americans by denying them an equal admissions process.[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). As a state university, UNC must comply with that constitutional guarantee. *Sweatt*, 339 U.S. at 635–36. And because Harvard has chosen to accept federal funding, it is held to the

[2] Like petitioner, Texas uses the term "Asian Americans" only because that is what Harvard does. Pet'r Br. 15 n.1.

same standard. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). That standard would not permit racial preferences in other contexts, and it should not do so here. This Court should 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

Texas understands that "[o]verruling precedent is never a small matter." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). "But stare decisis is 'not an inexorable command.'" *Franchise Tax. Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). 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. *Id.* (citing *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478–79 (2018); *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

Each of these factors is present in *Grutter*, which was wrong the day it was decided. *First*, *Grutter*'s deference to university officials who discriminate on the basis of race flouted 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 veneer of judicial respectability to "patently unconstitutional" practices that "amount to outright racial balancing." *Fisher II*, 570 U.S. at 311. *Third*, this Court has severely undercut *Grutter*'s key premise that a State has a compelling interest in promoting the educational benefits that some 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

The time has come for the Court to overrule *Grutter*. "The Court's precedents identify a number of factors to consider" when deciding whether to overturn prior precedent, including "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Franchise Tax. Bd.*, 139 S. Ct. at 1499 (citing *Janus*, 138 S. Ct. at 2478–79; *Gaudin*, 515 U.S. at 521)). Each of those factors weighs in favor of repudiating *Grutter*'s anomalous acceptance of overt racial discrimination.

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. at Austin*, 579 U.S. 365, 401–04 (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 other context 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 racial classification subjecting that person to unequal treatment." *Gratz*, 539 U.S. at 270; *see also, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) ("'[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'" (quoting *Croson*, 488 U.S. at 494)).

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 also, e.g.*, *Fisher II*, 570 U.S. at 328

(Thomas, J., concurring); *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*, 515 U.S. at 240 (Thomas, J., concurring). That is, the "the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Id.* at 227 (majority op.). The existence of preferences creates a "stigma" toward 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. 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.[3]

[3] Before *Brown*, *Korematsu v. United States* held that a "[p]ressing public necessity may sometimes justify the existence of" racial discrimination. 323 U.S. 214, 216 (1944). But this rule was

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; Jared M. Mellott, *The Diversity Rationale for Affirmative Action in Employment After* Grutter: *The Case for Containment*, 48 Wm. & Mary L. Rev. 1091, 1101 (2006) (summarizing the Court's jurisprudence as having "consistently . . . invalidated policies predicated on the interest of remediation of societal discrimination as too amorphous").

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." *Parents Involved*, 551 U.S. at 754–55 (Thomas, J., concurring) (citing *Croson*, 488 U.S. at 500). Specifically, this Court held that the governmental entity that 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 (citing J.H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41

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born of war and never applied in peace. More importantly, like *Plessy*, *Korematsu* is now understood to have been "gravely wrong the day it was decided." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Its view that the rights of the individual to be free of racial discrimination must bend to ill-defined notions of the greater good has "no place in law under the Constitution." *Id.*

U. Chi. L. Rev. 723, 727 n.26 (1974)); *accord Milliken v. Bradley*, 433 U.S. 267, 280–81 (1977) (requiring remedial action to be "designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct"). That is, neither political convenience nor policy preference is enough: 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 starkly departed from this Court's long-held skepticism regarding racial discrimination. Though purporting to apply strict scrutiny, *Grutter* departed from prior precedent in three ways, by: (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 alleged 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 it was a "plus" factor in an admissions file. *Grutter*, 539 U.S. at 334. These policies overtly racially discriminate against certain applicants in favor of others: college admissions are a zero-sum game. *Fisher IV*, 579 U.S. at 410 n.4 (Alito, J., dissenting). Universities have only so many beds in their dormitories and seats in their classrooms. *See* Harv.Pet.App.66; UNC.Pet.App. 169. Giving an advantage to one applicant based on skin

color necessarily disadvantages all other applicants. *Cf.* Harv.Pet.App.133 (describing Harvard's "lop process").

Harvard's and UNC's racial preferences are currently designed to benefit traditionally underrepresented minority populations. *E.g.*, Harv.Pet.App.68–69; UNC.Pet.App. 15 & n.7, 37. But the same arguments that "racial discrimination may produce 'educational benefits'" were made to justify segregation in the era before *Brown*. *Fisher IV*, 579 U.S. at 389 (Thomas, J., dissenting) (quoting *Fisher II*, 570 U.S. at 319 (Thomas, J., concurring)). This Court rejected these arguments when they were used to benefit Caucasians. *See 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 (addressing a "disparity" in government contracts).

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. *Parents Involved*, 551 U.S. at 723–25. College admissions departments stand alone.

Grutter never provided a principled reason for why student-body diversity was 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 (Scalia, J., concurring in part and dissenting in part) (cleaned up). Nothing about these claimed benefits is unique to collegiate lecture halls—yet this Court has rightly never applied *Grutter* in 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. The "equal protection of the laws" is. U.S. Const. amend. XIV. Where the two conflict, there is no question which must prevail. For example, 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, 387 (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 an extraconstitutional "special concern" like "academic freedom" can fare no better. *Grutter*, 539 U.S. at 362–64 (Thomas, J., dissenting).

Indeed, the very justifications for "diversity" rest on invidious racial stereotyping. Proponents have admitted that affirmative-action policies like those in these cases are an exercise in "'social engineering.'" *Fisher IV*, 579

U.S. at 398 (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), which is fundamentally "at odds with equal protection mandates," *Miller v. Johnson*, 515 U.S. 900, 920 (1995). 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 racial discrimination to offer a "strong basis in evidence" that such discrimination is strictly necessary. *Parents Involved*, 551 U.S. at 754–55 (Thomas, J., concurring) (citing *Croson*, 488 U.S. at 500). This burden of proof "requires proper findings regarding the extent of the government unit's past racial discrimination," "the scope of any injury," and "the necessary remedy." *Id.* at 755.

Grutter requires none of these things. It accepts at face value the admission officer's refrain 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. Moreover, by applying a supposed "tradition of giving a degree of deference to a university's academic

decisions," it defers to the university's own conclusion that its racial policies actually serve its ill-defined goal. *Id.* at 328.

Though extraordinary, this level of deference to the university is the predictable consequence of the imprecision of the "diversity" interest. According to one scholar, "[d]iversity, the notion that we should embrace and celebrate people's differences, became fashionable in the 1980s." Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 Stan. J. C.R. & C.L. 171, 172 (2005). In particular, so-called "diversity initiatives received greater public acceptance" as "more traditional affirmative action programs" became increasingly "maligned and viewed as unwanted relics of the past." *Id.* at 173. The term "diversity," however, "lacks a substantive, clearly defined meaning in contemporary parlance," and "means different things to different people depending upon when, where, and by whom it is invoked." *Id.* at 176.

This absence of a clear goal led directly to the unprecedented level of deference that *Grutter* provided to university officials—the very actors accused of racial discrimination. *Fisher IV*, 579 U.S. at 401–02 (Alito, J., dissenting). How does the proponent of racial preferences in admissions criteria achieve the "educational benefits that flow from a diverse student body"? By achieving a "critical mass." *Grutter*, 539 U.S. at 329. And what exactly constitutes a "critical mass"? No one can really say, but University of Michigan officials considered it to be "meaningful numbers" or "meaningful representation," such that the beneficiaries of race preferences do "not feel isolated." *Id.* at 318. That contentless test 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)); *id.* at 234 ("[T]he Court's slapdash analysis of the empirical evidence shows why critical mass is too illusory to be a useful doctrinal tool.").

At bottom, "diversity" as articulated by its proponents is too amorphous to constitute a compelling state interest that satisfies the Equal Protection Clause—and if it means merely 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.

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

The last nineteen 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. In one of these cases, which came before the Court twice, the Court at first seemed to cut back *Grutter* (*Fisher II*) but later applied *Grutter* wholesale (*Fisher IV*). In the other (*Parents Involved*), the Court reverted to the traditional notion that the Equal Protection Clause means what it says: the government must provide all citizens "equal protection" of the

laws regardless of race, U.S. Const. amend. XIV, and "'state-provided education is no exception,'" *Schuette*, 572 U.S. at 316 (Scalia, J., concurring) (quoting *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part)). The result is a muddle—one that can be efficiently clarified by overruling *Grutter*.

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 she came before the Court, the Court held the University of Texas to its traditional equal-protection standards, concluding 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. But the second time, 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*, 579 U.S. at 378; *see also id.* at 434–35 (Alito, J., dissenting) (criticizing the University's dearth of evidence to support its race-conscious practices). 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 389–90 (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. At present, most state universities use race-blind admissions practices; the University of Texas is the only university in the State that still accords benefits based on an applicant's skin color. *E.g.*, *Fisher IV*, 579 U.S at 372–73; *Fisher II*, 570 U.S. at 304–06; *Hopwood*, 78 F.3d at 935–38.

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 interests promoted here, the Fifth Circuit concluded it did *not* satisfy the Equal Protection Clause. *Hopwood*, 78 F.3d at 955. That case, like *Sweatt* before it, involved an applicant to the University's prestigious law school, which maintained a "segregated application evaluation process" and "segregated waiting lists" 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* reached the correct result (albeit not necessarily on the correct grounds). 539 U.S. at 271–75.

2. In the eight years following *Hopwood*, Texas universities did not consider race when reviewing applications for admission. *Fisher II*, 570 U.S. at 304. The Texas Legislature also responded by enacting the "Top Ten

Percent Law," which gave Texas high-school students 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*, 579 U.S. at 394 (Alito, J., dissenting).

When the University of Texas was no longer permitted to consider applicants' race in admissions, it instead turned to more worthy criteria, including an 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. African-American and Hispanic enrollees made up 4.1% and 14.5% (respectively) of the entering class in the year before *Hopwood* and 4.5% and 16.9% (respectively) in the last year of race-neutral admissions. *Id.* The University boasted in 2003 that it had "effectively compensated for the loss of affirmative action." *Fisher IV*, 579 U.S. at 394–95 (Alito, J., dissenting).

3. Then came *Grutter*. The University, which had publicly boasted of achieving greater minority admissions through race-neutral means, immediately declared an about-face. *Id.* at 395 & 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 397. Though proponents of the new plan 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.*; *see id.* at 429 (the University was "gratuitously brandishing the covers of tens of thousands of applications with a bare racial stamp," "telling each student he or she is to be defined by race" (cleaned up)).

4. The cover of Abigail Fisher's application read "Caucasian." *Cf. id.* at 375 (majority op.). In keeping with its declared admissions policy of preferring certain races of applicants to others, the University of Texas discriminated against her. *See id.* And because racial discrimination violates the Equal Protection Clause, she sued the University. *See id.* The district court granted summary judgment to the University under *Grutter*, and the Fifth Circuit affirmed based on *Grutter*'s "deference to a university's academic decisions." *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 (5th Cir. 2011) (*Fisher I*). Specifically, that court 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 minted in *Grutter*. *Fisher II*, 570 U.S. at 313–14. But the Court left it to the Fifth Circuit to decide whether the University had produced enough evidence to show that its use of racial preferences both served sufficiently specific interests *and* that its program was narrowly tailored to serve those interests. *Id.* at 314.

On remand, the Fifth Circuit again held in favor of the University. *Fisher v. Univ. of Tex. at Austin*, 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 required 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 (Garza, J., dissenting).

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*, 579 U.S. at 389–90 (Alito, J., dissenting). The majority recognized as much. *Id.* at 378 (majority op.) ("The Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review."). 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.* at 379, often faulting Fisher, the victim of racial discrimination, for not showing why it was impermissible for the University, the state actor engaged in racial discrimination, to racially discriminate, *id.* at 429–30 (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 the failure to enforce *Grutter*'s admonitions that "race-conscious admissions policies

must be limited in time" and that "[e]nshrining a permanent justification for racial preferences would offend [the] fundamental equal protection principle." 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*, 579 U.S. at 395 (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.[4] Far from desiring to end racial preferences, the University says that this policy is "central" to its self-defined "constitutional mandate to serve the state of Texas."[5]

Since *Fisher IV*, most African-American and Hispanic students admitted to the University of Texas are

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

[5] Press Release, UT News, Statement on Admissions Policies (July 3, 2018), https://tinyurl.com/3p296ck8; *see also* Claire Parker, *UT-Austin has no plans to drop affirmative action policy, despite new Trump administration guidelines*, The Texas Tribune (July 3, 2018), https://tinyurl.com/mwub9nxw.

admitted through the Top Ten Percent Law.[6] 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.[7] Increased enrollment of Asian-American and Hispanic students at the University is traceable to the passage of the Top Ten Percent Law.[8] Almost two decades of racial discrimination have garnered the 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 at least professed to want 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, such as the University of California at Berkeley Law School (Boalt Hall), which is forbidden by law from considering race in admissions, *id.* at 367 (Thomas, J., dissenting), or Texas A&M

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[6] University of Texas at Austin, *Report on the Implementation of SB 175, 81st Legislature, for the period ending Fall 2020*, at 33, https://tinyurl.com/d8jve84k; University of Texas at Austin, *Report on the Implementation of SB 175, 81st Legislature, for the period ending Fall 2018*, at 33, https://tinyurl.com/yynzcf95.

[7] *Compare* University of Texas Office of Institutional Reporting, Research, and Information Systems, *2020–21 Statistical Handbook* 24, https://tinyurl.com/622shuuv, *with Fisher IV*, 579 U.S. at 395 (Alito, J., dissenting) (citing the 2004 admissions statistics under the pre-*Grutter* race-neutral regime).

[8] *See, e.g.*, University of Texas at Austin, *Report on the Implementation of SB 175, 81st Legislature, for the period ending Fall 2020*, at 33, https://tinyurl.com/d8jve84k.

University, which "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.*

The ongoing experience of the University of Texas compared to its peers gives away the game. As Texas A&M's example 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 and UNC consider race in their application processes first and foremost because they want to racially discriminate. As a state university, UNC must comply with the strictures of the Equal Protection Clause. *Sweatt*, 339 U.S. at 635–36. Harvard must as well: although private institutions like Harvard are not directly subject to that constitutional constraint, *The Civil Rights Cases*, 109 U.S. 3, 11–12 (1883), as long as Harvard accepts federal funds, it is subject to the same standard, *Gratz*, 539 U.S. at 276

n.23. Each university, then, has a "continuing obligation to satisfy the burden of strict scrutiny" and to reassess the legality and "efficacy" of its race-conscious admissions scheme. *Fisher IV*, 579 U.S. at 379. Yet both institutions racially discriminate in order to maintain their notions of the ideal racial composition of their respective student bodies. The record reflects that Harvard and UNC fail to satisfy strict scrutiny in defense of their discriminatory policies in at least two important ways.

First, Harvard and UNC have 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 (citing, *inter alia*, *Freeman v. Pitts*, 504 U.S. 467, 494 (1992)). *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. *Grutter*, 539 U.S. at 309.

Harvard's application process might *consider* these other factors, but this case reflects that Harvard will implement race-neutral admissions policies only if they would not result in "any decline" in African-American or Hispanic representation from current levels. Harv.Pet. App.77 n.32; *id.* at 209. As petitioner has demonstrated, this absolute requirement of certain minimum minority enrollment levels is in constitutional substance a quota system. *See* Pet'r Br. 76 (citing Harv.JA1770). The result is that all racial groups stay within narrow bands of

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

UNC engineers a similar outcome. It regards African Americans, Hispanic Americans, and Native Americans as "underrepresented minorities" and awards those applicants racial preferences in its admissions process. UNC.Pet.App.15 & n.7, 37; UNC.JA690. But Asian Americans are not considered underrepresented and do not receive a preference because the percentage of Asian Americans in UNC's student body (12%) currently exceeds their percentage in North Carolina's state population (2.6%). UNC.Pet.App.15 & n.7, 21. That benchmark controls admissions preferences—and even then, it fails to account for the demographics of the population outside of North Carolina, from which UNC draws 18% of its students. *Id.* at 23 & n.8.

The way that Harvard and UNC have structured their racial preferences reflects a form of stereotyping that is inconsistent with both their own rationale and the theory behind *Grutter*. The term "Asian American" itself reflects a stereotype that lumps together as one group "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population." *Fisher IV*, 579 U.S. at 414 (Alito, J., dissenting) (citation and quotation marks omitted). Many individuals in these groups have suffered considerable racial discrimination and economic hardship.[9]

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[9] *See Korematsu*, 323 U.S. at 216 (allowing the United States to intern Japanese Americans during World War II); Hua Hsu, *The Muddled History of Anti-Asian Violence*, The New Yorker (Feb. 28, 2021), https://tinyurl.com/ra9zamns (discussing increased incidents of anti-Asian violence as the result of the COVID-19 pandemic).

Yet Harvard and UNC have designed their systems to benefit other minority groups at Asian Americans' expense. 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'r Br. 24. Similarly, petitioner cites evidence that an out-of-state Asian American in the fourth-highest decile of UNC's academic index has only a 6.51% chance of admission, whereas an African-American applicant in that same decile has a better chance of admission (57.74%) than an Asian American in the *top* decile (52.89%). Pet'r Br. 43.[10]

Second, the record demonstrates that Harvard's and UNC's systems are 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 and UNC had satisfied this requirement because they have conducted periodic reviews and determined that race-neutral means do not ensure their diversity goals. Harv.Pet.App.46–47, 73–79; UNC.Pet.App.176–83. But both universities have defined their "diversity goals" by reference to narrow bands of acceptable racial compositions in their student populations. *E.g.*, Pet'r Br. 21–23 (describing Harvard's careful monitoring of the racial makeup of admissions and showing that the share of African Americans, Hispanics, and Asian Americans in each class remained steady for a decade); UNC.Pet.App.134 n.43, 139 (rejecting race-neutral

[10] Harvard and UNC are not the only universities to help African Americans and Hispanic Americans at the expense of Asian Americans: the University of Texas's system of racial preferences has a similar impact. *Fisher IV*, 579 U.S. at 410–12 (Alito, J., dissenting).

alternatives to UNC's current policies that would cause admissions of underrepresented minorities to decline from 16.5% to 16.0% or admissions of Native American students to drop from 1.8% to 0.5%). In other words, these universities' interest in maintaining a specific racial balance cannot be satisfied by anything but rigorous racial balancing. That rationale may be a clever workaround, but it is not narrow tailoring, let alone an approach designed to end racial discrimination in the future.

More fundamentally, each of these periodic reviews assumed that the universities should not be required to change *other* aspects of their admissions policies. *See* Harv.Pet.App.73–79; UNC.Pet.App.113–44. 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 at Harvard would increase diversity. Pet'r Br. 81. 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." Harv.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).

Similarly, the district court rejected a race-neutral alternative for UNC modeled on Texas's Top Ten Percent Law that would have maintained the overall percentage of in-state underrepresented minorities and

increased the share of in-state African Americans in UNC's class. UNC.Pet.App.139–40. The court reasoned that under this model average SAT scores would drop 31 points and GPAs would "marginally" decline. *Id.* at 140. But that is not remotely the sort of "dramatic sacrifice" of academic quality that the Court has said renders a race-neutral alternative unworkable. *Grutter*, 539 U.S. at 340; *see also id.* at 355–56 (Thomas, J., dissenting) (explaining that the true interest upheld in *Grutter* "is not simply 'diversity,'" but rather "offering a marginally superior education while maintaining an elite institution" that is racially diverse).

Put another way, Harvard and UNC are at least obligated to turn to racial discrimination only as a last resort. Harvard and UNC may maintain admissions policies that might adversely affect certain minority groups—*e.g.*, permitting legacy admissions or rigidly adhering to specific academic metrics. But, outside *Grutter*, Harvard and UNC could not avail themselves of the last resort of racial discrimination without first changing these policies, too. Elite universities' unwillingness to adapt other admissions policies to reduce reliance on race further underscores that these institutions turn to racial discrimination as a first, rather than last, resort, and 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 in applying strict scrutiny," 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 do.

Cabining *Grutter* to the university context thus only highlights its flimsy rationale. The Court should 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). Even in the face of significant reliance, the Court is least reticent to overrule precedent when, as here, the precedent interpreted the Constitution. *Id.* at 1405 (majority op.); *see*

also Knick v. Township of Scott, 139 S. Ct. 2162, 2177 (2019).

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*, 515 U.S. at 911. And the experiences 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 Court should overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and reverse the court of appeals.

Respectfully submitted.

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