

No. 20-1199

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

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

**BRIEF OF THE JEWISH COALITION FOR
RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN
SUPPORT OF NEITHER PARTY**

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
ERIN MORROW HAWLEY
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Amicus Curiae

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| <i>Healy v. James</i> , 408 U.S. 169 (1972)..... | 9 |
| <i>United States v. Seeger</i> , 380 U.S. 163 (1965)..... | 2, 5 |

Other Authorities

- 7 The Papers of Ulysses S. Grant, December 9, 1862—March 31, 1863, (John Simon ed., 1979) 17
- Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990) 7
- Alex M. Koller & Taylor C. Peterman, *HUPD Investigating Two Vandalism Incidents at Harvard Hillel Amid Nationwide Rise in Anti-Semitism*, THE HARVARD CRIMSON (June 8, 2021), <https://perma.cc/7PGM-S7KJ> 20
- AMCHA Initiative, <https://perma.cc/778R-K6DQ> 20
- AMCHA Initiative, *Incidents*, <https://perma.cc/3V3H-F5K6> 20
- Anti-Defamation League, *Antisemitism in American History*, <https://perma.cc/4AFA-EPF3> 17, 18
- Blake Nelson, *N.J. accuses Ocean County town of discriminating against Orthodox Jews*, NJ.COM (Apr. 27, 2021; updated Apr. 27, 2021), <https://perma.cc/YW9V-6TKN> 22

- Brian Thompson, *New Jersey Sues Town Over Park Ban Targeting Orthodox Jews*, NBC New York (Oct. 24, 2017; updated Oct. 25, 2017), <https://perma.cc/3D29-RHUG> 22
- Christmas*, Britannica.com, <https://perma.cc/2R5G-Q4U8>..... 10
- Dan Schere, *Police investigating anti-Semitic flyers distributed in Silver Spring*, Bethesda Magazine (Dec. 22, 2021), <https://perma.cc/NB94-2RG6>..... 22
- Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988)..... 5, 6
- Danielle Ziri, *Over 50 Percent of Americans Believe at Least One anti-Semitic Stereotype, Poll Shows*, HAARETZ (Jan. 29, 2020), <https://perma.cc/GA9V-VWK5>..... 23
- Eboo Patel, *Should Colleges De-Register Student Groups*, Inside Higher Ed (Sept. 28, 2018), <https://perma.cc/Q8SF-MVRK>) 9
- Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395 (1999) 17
- Flyers linking Jewish community to COVID pandemic found at homes in Beverly Hills, police say*, Eyewitness News ABC 7 (Nov. 29, 2021), <https://perma.cc/64TK-JEXN> 22

| | |
|---|----|
| Harvard University, <i>Congress on the Future of Faith at Harvard Student Feedback on The Conference</i> , YOUTUBE (Dec. 17, 2010), https://perma.cc/K2WG-48UR | 11 |
| <i>How Conspiracy Theories Can Kill</i> , Anti-Defamation League (Nov. 14, 2018), https://perma.cc/NYL2-ERZS | 23 |
| Ian Shapira, <i>Before Asian Americans sued Harvard, the school once tried restricting the number of Jews</i> , WASH. POST (Oct. 15, 2018), https://perma.cc/M6PR-ZYJL | 18 |
| Islam Awareness, <i>Hadith: Charity</i> , https://perma.cc/EV67-BSW7 | 10 |
| Jerome Karabel, <i>The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton</i> (2005) | 18 |
| <i>Jewish Holidays & Celebrations – List</i> , Peninsula Jewish Community Center, https://perma.cc/JSK9-PNPX | 10 |
| John D. Inazu, <i>A Confident Pluralism</i> , 88 S. CAL. L. REV. 587 (2015) | 9 |
| Jonathan D. Sarna & David G. Dalin, <i>Religion and State in the American Jewish Experience</i> (Notre Dame Press, 1997)..... | 16 |
| Justine Coleman, <i>61 percent of Americans agree with at least one anti-Semitic stereotype: poll</i> , THE HILL (Jan. 29, 2020), https://perma.cc/6LX2-TAAZ | 23 |

| | |
|--|----|
| Leonard Dinnerstein, <i>Antisemitism in America</i> (Oxford Univ. Press 1994) | 17 |
| Leonard Saxe et. al, <i>Hotspots of Antisemitism & Anti-Israel Sentiment on US Campuses</i> , Brandeis Univ., Ctr. for Modern Jewish Studies (Oct. 2016), https://perma.cc/H9GB- GY6C | 20 |
| Letter from Gen. Halleck to Gen. Grant (Jan. 21, 1863) | 17 |
| Letter from Moses Seixas, Warden, Yeshuat Israel, to President Washington (Aug. 17, 1790) in 6 <i>The Papers of George Washington: Presidential Series, July-November 1790</i> (Dorothy Twohig et. al. eds. 1986) | 16 |
| Mark J. Drozdowski, <i>The Historical Parallel Between Asian American and Jewish Students</i> , Best Colleges (Aug. 18, 2021), https://perma.cc/XM2N-6F9K | 19 |
| Matt Flegenheimer, <i>Andrew Cuomo's White- Knuckle Ride</i> , N.Y. TIMES (Apr. 13, 2021; updated Nov. 10, 2021), https://perma.cc/3XA2-NYF8 | 22 |
| Max J. Kohler, <i>Civil Status of the Jews in Colonial New York</i> , 6 Pubs. Am. Jewish Hist. Soc'y 81 (1897), https://perma.cc/DC2Q- DQP2 | 16 |

| | |
|--|----------|
| Michael M. McConnell, <i>Religious Participation in Public Programs: Religious Freedom at a Crossroads</i> , 59 U. CHI. L. REV. 115 (1992) | 9 |
| <i>Modeh Ani: What and Why</i> , Chabad.org, https://perma.cc/VG8T-SLMF | 6 |
| Note, <i>Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self</i> , 97 HARV. L. REV. 1468 (1984)..... | 5 |
| Omar Abdel-Baqi, <i>Anti-Semitic Incidents in U.S. Jump to New High, Report Says</i> , WALL ST. J. (Apr. 26, 2022), https://perma.cc/FVD8-JLPA | 21 |
| Peter Jamison & Valerie Strauss, <i>D.C. lawmaker says recent snowfall caused by ‘Rothschilds controlling the climate’</i> , WASH. POST (Mar. 18, 2018), https://perma.cc/NN4F-G9BA | 23 |
| <i>Religious Life at Harvard</i> , The Harvard Gazette, video available at https://perma.cc/ZQ76-L5N3 | 7, 8, 10 |
| <i>Sanatana-dharma</i> , Britannica.com, https://perma.cc/8UQP-9A79 | 10 |
| <i>Translation of The Shema</i> , Chabad.org, https://bit.ly/3s7i3Iw | 6 |

William P. Marshall, Smith, Christian Legal
Society, and *Speech-Based Claims for
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General Applicability*, 32 *CARDOZO L. REV.*
1937 (2011)..... 3, 5

Zachary T. Sampson & Katherine Landergan,
*Anti-Semitic incidents shock Northeastern,
Harvard*, *BOSTON.COM* (Nov. 30, 2012),
<https://perma.cc/PY5N-R3KZ> 20

INTEREST OF AMICUS CURIAE¹

The Jewish Coalition for Religious Liberty (“JCRL”) is a cross-denominational association of rabbis, lawyers, and professionals who practice Judaism and are committed to promoting religious liberty. As adherents of a minority religion that has faced quotas limiting their ability to attend prominent universities, JCRL members have a strong interest in ensuring that universities appreciate and honor the importance of religious diversity.

JCRL members publish articles and file amicus briefs highlighting the importance of protecting religious diversity on university campuses. *E.g.*, Br. of Amici Curiae Jewish Coalition for Religious Liberty and Asma Uddin, *Bus. Leaders in Christ v. Univ. of Iowa*, No. 19-1696, 2019 WL 2996340 (8th Cir. July 1, 2019). In this case, JCRL members seek to ensure that, in so far as Harvard prioritizes the educational benefits of diversity, its analysis does not exclude religious diversity.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Per Supreme Court Rule 37.3(a), all parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

For many religious students, faith is the most important aspect of their lives. It is central to a student's identity and to how she sees the world. As this Court has explained, religious belief encompasses a faith "to which all else is subordinate." *United States v. Seeger*, 380 U.S. 163, 176 (1965). That is part of why our Founders protected the free exercise of religion as an individual and inalienable right.

Significant educational benefits flow from religious diversity. Besides shaping personal identity, a student's faith enriches a campus community. Religious diversity in education offers "important and laudable" classroom benefits. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). It helps students gain a "wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 324 (cleaned up).

Under this Court's current precedent, colleges may use race as a "factor" in admissions decisions—but only if they consider "*all* the ways an applicant might contribute to a diverse educational environment." *Id.* at 337 (emphasis added). They must weigh a "broader array of qualifications and characteristics" than race alone. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 308–09 (2013).

Yet Harvard does not weigh religion alongside race. Instead, Harvard places race above all else and utterly ignores the benefits of religious diversity. Harvard also gives substantial admissions preferences to certain racial groups without requiring an applicant to demonstrate that his race will contribute to educational diversity.

In contrast, Harvard *deletes* religious information from an applicant's file. So an admissions officer will only know about an applicant's faith if the applicant chooses to write an essay about it. And even then, there is no automatic preference for religious diversity. In other words, Harvard believes it can achieve religious diversity—if it even recognizes the importance of doing so—without knowing its applicants' faith but claims that it cannot achieve racial diversity without placing racial identity front and center.

Valuing religious as well as other types of diversity in college admissions is critical to preparing students for life in a pluralistic society. Religion has been the subject of special protection under both the Constitution and civil rights laws because religious groups “have historically suffered the same types of invidious discrimination that have plagued racial and ethnic minorities.” William P. Marshall, Smith, Christian Legal Society, *and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 CARDOZO L. REV. 1937, 1940–41 (2011). From the Inquisition to the Star Chamber, history is replete with discrimination against disfavored religious groups.

American history is no exception: The United States has experienced “outbreaks of serious anti-Semitism, anti-Catholicism, and anti-Mormonism.” *Id.* at 1940. Regrettably, our great institutions of learning have not always been standard bearers but rather participants in religious discrimination. See Section IV, below. Ensuring that students have more contact with religious minorities at this formative stage of their life can help instill in them a sense of understanding and tolerance for people with whom

they may have yet to have any sort of meaningful interaction.

While religious life has flourished in the United States like in few other places, anti-religious bigotry—including antisemitism—has not disappeared. Rejecting unjust favoritism in college admissions and therefore exposing college students to a more religiously diverse college environment will better promote the value and diversity of *all* Americans.

The Constitution forbids Harvard's approach of elevating race over any other diversity factor. To the extent this Court allows colleges and universities to prioritize the educational benefits of diversity, it should ensure that religious diversity is included. Anyone granted a power as dangerous and potentially destructive to the American ideal as the power to discriminate based on immutable characteristics must be shackled with the responsibility of doing so in a just and even-handed manner that truly fulfills the compelling interests that it purports to advance.

ARGUMENT

I. Faith is of the utmost importance to many religious students.

For many religious students, faith is the most important aspect of their lives. Faith requires a “deep psychological commitment,” *Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014), and is “fundamental to [a] believer’s identity.” Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1477–78 (1984). Religious beliefs “define a person’s very being—his sense of who he is, why he exists, and how he should relate to the world around him.” Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164 (1988). Indeed, religion has been described as “an ‘ultimate concern,’ [and] as ‘a unified belief system that cuts across and directs more than a single aspect of an individual’s life.’” Note, *supra* at 1477–78.

As this Court put it in *United States v. Seeger*, 380 U.S. 163, 176 (1965), religious belief encompasses a faith “to which all else is subordinate or upon which all else is ultimately dependent.” In other words, religion “plays a particularly important role in an individual’s sense of self,” Marshall, *supra* at 1939, and “gives meaning and orientation to a person’s whole life,” Note, *supra* at 1477–78. Thus, when a student introduces herself as Jewish, Mormon, Christian, or Muslim, she is communicating information of fundamental importance.

This reality is manifestly true for Orthodox Jews as their religion dictates what food they may eat (kosher), what clothes they may wear (shatnez), what

words they may say (lashon hara), and even where they live (within walking distance of a synagogue). There is no element of an Orthodox Jew's life that is not affected or informed by his belief that he is involved in a covenantal relationship with his creator.

In addition, religious beliefs necessarily shape an individual's worldview. Faith "provide[s] a general structure of thought through which the person views the world, and a system of ethics through which he guides and evaluates his own conduct." Conkle, *supra* at 1164. "A person's religious beliefs cannot meaningfully be separated from the person himself; they are who he is." *Id.* at 1164–65. This is certainly true of Orthodox Jews, many of whose first words every morning are "I offer thanks to You, living and eternal King, for You have mercifully restored my soul within me," *Modeh Ani: What and Why*, Chabad.org, <https://perma.cc/VG8T-SLMF>, and whose last words before going to sleep are a prayer that instructs them to discuss religious truths "when you sit in your house and when you walk on the road, when you lie down and when you rise." *Translation of The Shema*, Chabad.org, <https://bit.ly/3s7i3Iw>.

Harvard's own history of discrimination against Jews, and its antisemitic quota system, discussed in Section IV(B), below, demonstrate that it has long understood that there is something unique and consequential about one's faith—even while discriminating on that basis.

Religious freedom is "an unalienable right," precisely because it is fundamental to a person's identity and worldview. Religious affiliation is "of such fundamental importance that individuals should not be

required to modify it.” *Ghebrehiwot v. Att’y Gen. of U.S.*, 467 F.3d 344, 357 (3d Cir. 2006). Thus, “the free exercise of religion . . . is part of that basic autonomy of identity and self-creation which we preserve from state manipulation, not because of its utility to social organization, but because of its importance to the human condition.” Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 95 (1990).

II. The educational benefits of religious diversity are substantial.

The educational benefits of a religiously diverse student body are “substantial.” See *Grutter*, 539 U.S. at 324. As *Grutter* explained, “nothing less than the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” *Ibid.* Faith is vitally important to the “ideas and mores” of many students. Religious diversity in education has “important and laudable” classroom benefits and is an important “way[] an applicant might contribute” to the “robust exchange of ideas” at the heart of educational mission. See *id.* at 324, 330, 337.

Colleges and universities are one of the best places for students to learn about unfamiliar religions by interacting with individuals of diverse faiths. As Nuri Friedlander, the Islamic Chaplain at Harvard explains, “the years that someone spends in college are years of exploration and discovery and personal growth.” *Religious Life at Harvard*, The Harvard Gazette, at :50, video available at <https://perma.cc/ZQ76-L5N3>. A religiously diverse university presents “a

great opportunity for students to get to learn about other people’s faith and also to get in touch with what really matters about their own.” *Id.* at 2:50.

In our pluralistic society, unfamiliarity with religious beliefs is sadly commonplace. Many knowledgeable and well-meaning Americans are simply unfamiliar with even some of the most commonly practiced and religiously significant Jewish practices. Consider a Fifth Circuit argument where the judge posited that turning “on a light switch every day” was unlikely to constitute a substantial burden on religious exercise. See Br. of Proposed *Amici Curiae* Jewish Coalition for Religious Liberty and Asma Uddin at 8, *Intervarsity Christian Fellowship v. Univ. of Iowa*, No. 3:18-cv-80 (S.D. Iowa Jan. 23, 2019), 2019 WL 10749772 (JCRL Intervarsity Br.) (citing Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 2015 WL 3852811 (5th Cir. Apr. 7, 2015)). As amicus has previously explained, “To an Orthodox Jew, however, turning on a light bulb on the Sabbath could constitute a violation of a biblical prohibition on lighting a fire on the Sabbath found in Exodus 35:3.” *Ibid.*

Ultimately, Harvard’s refusal to even consider religious diversity harms minority religions most. Because Americans are unlikely to meet many minority religious adherents, “they are less likely to understand and appreciate them.” JCRL Intervarsity Br. at 9. Indeed, the secularization of civil society presents a unique threat to minority religions: “not only do their beliefs put them outside the mainstream, but without meaningful public interaction with others, their beliefs will be viewed with suspicion and likely deemed less worthy of protection” or even toleration. JCRL Intervarsity Br. at 9–10. As Justice Brennan

warned: “[a] critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.” *Goldman v. Weinberger*, 475 U.S. 503, 523–524 (1986) (Brennan, J., dissenting); see also Michael M. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992) (“The more serious threat to religious pluralism today is a combination of indifference to the plight of religious minorities and a preference for the secular in public affairs.”).

University campuses purport to trade in the “marketplace of ideas.” See *Healy v. James*, 408 U.S. 169, 180 (1972). This “robust exchange of ideas,” *Grutter*, 539 U.S. at 329, should promote diverse civil society, “a place where people with differing identities and deep disagreements can collectively flourish, respecting one another’s identities, building relationships across disagreements a cooperating where they can serve the common good.” JCRL Intervarsity Br. at 19 (quoting Eboo Patel, *Should Colleges De-Register Student Groups*, Inside Higher Ed (Sept. 28, 2018), <https://perma.cc/Q8SF-MVRK>); accord John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 592 (2015) (promoting a “confident pluralism” that “seeks to maximize the spaces where dialogue and persuasion can coexist alongside deep ... differences about beliefs, commitments, and ways of life”).

On campuses where religious diversity flourishes, students can learn about Islam’s call to charity: “The believer’s shade on the Day of Resurrection will be his charity.” Islam Awareness, *Hadith: Charity*,

<https://perma.cc/EV67-BSW7>. They will be exposed to the “eternal” duties of Hinduism which include, “honesty, refraining from injuring living beings, purity, goodwill, mercy, patience, forbearance, self-restraint, generosity, and asceticism.” *Sanatana-dharma*, Britannica.com, <https://perma.cc/8UQP-9A79>. They will learn about Shabbat, where Jewish believers recognize the importance of abstaining from certain forms of creative labor in acknowledgement of God’s creation work, and Passover where they commemorate the Jews’ rescue from slavery in Egypt. *Jewish Holidays & Celebrations – List*, Peninsula Jewish Cmty. Ctr., <https://perma.cc/JSK9-PNPX>. Students who attend a religiously diverse campus can learn from their Catholic colleagues the meaning of Advent, the church tradition that invites one to step away from the frenzy of a commercialized Christmas to prepare for the birth of Jesus, and of Lent, 40 days of fasting and preparation for the resurrection. *Christmas*, Britannica.com, <https://perma.cc/2R5G-Q4U8>.

Students at Harvard agree that religious diversity is crucial to their college experience. As one graduate put it, “Religious life is an absolutely vital part of the Harvard experience.” *Religious Life at Harvard*, The Harvard Gazette, at 3:31, video available at <https://perma.cc/ZQ76-L5N3>. According to Harvard students, religious diversity is important to finding “common ground,” (third interviewee), “living harmoniously” in society, (first interviewee), gaining “a better understanding of other human beings [even those with whom they] profoundly disagree,” (fifth interviewee), coming to “respect” different viewpoints (fourth interviewee), and “know[ing] how to engage in real and meaningful ways,” (ninth interviewee).

Harvard University, *Congress on the Future of Faith at Harvard Student Feedback on The Conference*, YOUTUBE (Dec. 17, 2010), <https://perma.cc/K2WG-48UR>.

“[E]ducation . . . is the very foundation of good citizenship.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). If universities are going to prioritize diversity, religious diversity is an important “way[] an applicant might contribute.” See *Grutter*, 539 U.S. at 337. As with race, “cross-[religious] understanding” would help to “break down [religious] stereotypes,” and “enable[] students to better understand persons of different [religions].” *Id.* at 330.

III. Notwithstanding the myriad of benefits provided by religious diversity, Harvard utterly disregards the importance of religious diversity while proclaiming that racial diversity is absolutely essential to its educational mission.

In admissions, Harvard treats religious diversity very differently than racial diversity. Harvard considers race at *every* stage of its admissions process. Students are recruited differently based on their race; Harvard monitors the racial composition of each class throughout the admissions cycle; and Harvard uses “ethnic stats” to lop off tentative admits. As SFAA’s expert testified, race was determinative for nearly 1,000 students over a four-year period. Pet.12. As the petitioners have ably explained, race is not merely a “factor of a factor of a factor,” *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 375 (2016) (*Fisher II*); it is often determinative.

Contrast this with how Harvard treats religion. Although applicants identify their religion on their applications, Harvard *redacts* that information so admissions officers cannot see it. The *only* way Harvard can consider a student's religious identity is if an applicant chooses to write about her faith in the application. This means that religious diversity is almost never considered. Even if a student chooses to write about his religious faith, religious diversity does not result in an automatic admissions bump.

Harvard Administrators acknowledge the value of religious diversity yet treat religion altogether differently. Consider the following trial exchange between an SFFA lawyer and Harvard's Director of Admissions:

Q. [I]magine a young white gentleman from— young man from Milwaukee. He goes to college where his best friends are a Muslim, Hindu, and a Catholic. You agree it's possible that both the identity of those three friends as well as their religious background could really add to this suburban Milwaukee boy's experience, don't you?

A. Yes. I would agree.

Q. And this would be true even though the three friends just checked boxes on their application and didn't mention their own ethnicity or their religious preferences anywhere, right?

A. Yes.

Q. And the Muslim fellow for instance could be a Pakistani or Arab, but maybe the most profound way in which he was an educator of the young boy from Milwaukee is that he was a Muslim. That's not implausible, is it?

A. No, it's not implausible.

Q. ... The Catholic fellow could be Polish-American or Filipino, but maybe the most profound way in which he was an educator of me was that he was Catholic and my confirmation sponsor when I converted in college. Is that possible?

A. Yes, that's possible.

Q. ... So religion can be very important to who someone is and what they bring to the community and whether they'll be a great educator of others. Would you agree with that?

A. I would agree that that's possible.

Q. But Harvard does not track the religious identity of applicants, do you?

A. No, we do not track them.

Q. And your paper and online application systems do not allow you to even see the self-proclaimed religious identity of an applicant, correct?

A. Correct. . . .

Q. Do you consider that to be a significant obstacle in evaluating whole people, that you are not allowed to think about their self-proclaimed religious identity unless they've written about it elsewhere in their application?

A. We have not considered that to be a disadvantage.

Q. Would you consider it to be a disadvantage if you couldn't consider their race?

A. Would I consider it to be a disadvantage if we couldn't consider their race?

Q. It's the exact same question. So I just asked you about religion in the box and if you can't consider that is that an obstacle. And you said we haven't considered it a disadvantage.

A. We find it an advantage to be able to consider race. [CA1 Joint Appendix 1382-87.]

Harvard claims to value religious diversity and yet deprives its admissions officers of information related to a prospective student's religion. The college insists it can achieve religious diversity without knowing the religious composition of its class, while insisting that racial diversity cannot be similarly achieved. That is contradictory and deeply misguided at best.

In pursuing "student body diversity," universities must consider a "far broader array of qualifications and characteristics" than race alone. *Fisher*, 570 U.S. at 308–09. Harvard must, but does not, "giv[e] serious

consideration to all the ways an applicant might contribute to a diverse educational environment.” *Grutter*, 539 U.S. at 337. Indeed, the college altogether excludes from most applications any consideration of religious faith—the most fundamental part of many students’ identity.

To the extent that universities are allowed to be in the business of sorting students by diversity criteria, they must not consider one form of diversity to the exclusion of all others.

IV. Forgoing religious diversity harms college students by depriving them of the ability to better understand minority faiths while allowing antisemitism to blossom, including at institutions like Harvard.

Despite the fact that America has offered tremendous safety, security, and freedom to Jewish people and remains one of the most tolerant and welcoming countries on earth, there have also been difficulties based in either misunderstanding or outright hatred. The history of Jews in America shows the difficulty that religious minorities face when functioning within and contributing to American social and political life, including at institutions of higher education like Harvard.

A. Antisemitism in early America.

An early wave of Jewish immigration arrived in America in 1654 after escaping persecution during the Portuguese Inquisition. While they could land and stay in what was then New Amsterdam, they faced unrelenting hostility from Governor Peter Stuyvesant. See Jonathan D. Sarna & David G. Dalin,

Religion and State in the American Jewish Experience 39-41 (Notre Dame Press, 1997). Even after New Amsterdam became New York in 1664, and the Jewish community began to grow, a synagogue was not opened until 1682, and public worship was forbidden until a decade later. See Max J. Kohler, *Civil Status of the Jews in Colonial New York*, 6 Pubs. Am. Jewish Hist. Soc’y 81, 93-95 (1897), <https://perma.cc/DC2Q-DQP2>. Jews thus found safe haven from the Inquisition, but they did not enjoy the dignity of equal citizenship in American colonies.

After the American Revolution and the Constitution’s promise of religious freedom for all, the Jewish community of Newport, Rhode Island wrote to George Washington expressing its hope that the new “Government, erected by the Majesty of the People ... to bigotry [will] give[] no sanction, to persecution no assistance....” Letter from Moses Seixas, Warden, Yeshuat Israel, to President Washington (Aug. 17, 1790) in 6 *The Papers of George Washington: Presidential Series, July-November 1790*, 286, 286 n.1 (Dorothy Twohig et. al. eds. 1986)). President Washington assured the community that all “who dwell in this land ... shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid.” George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), in *id.* at 285.

Despite these assurances—and the fact that America did, in many ways, represent a much beloved home where Jews were granted the full rights and privileges of citizenship—Jews continued to face discrimination. In the Civil War, Ulysses S. Grant issued his infamous General Order No. 11, which accused “[t]he Jews, as a class [of] violating every regulation

of trade established by the Treasury Department and also department orders,” and declared that they “are hereby expelled from the Department [of the Tennessee] within twenty-four hours from the receipt of this order,” on penalty of arrest and imprisonment. 7 The Papers of Ulysses S. Grant, December 9, 1862—March 31, 1863, at 50 (John Simon ed., 1979). Only after President Lincoln intervened did this order get set aside, see Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1422-23 (1999)—though even he may have sustained the order had it only expelled “Jew peddlers,” Letter from Gen. Halleck to Gen. Grant (Jan. 21, 1863).

Yet America’s promises still attracted many Jews after the Civil War. From 1881 to 1914, approximately two million Eastern European Jews immigrated to America, “escaping poverty and a violent wave of pogroms that destroyed some tens of thousands of Jewish homes and economically ruined far more families.” Anti-Defamation League, *Antisemitism in American History*, <https://perma.cc/4AFA-EPF3>, (last accessed Apr. 21, 2022). About 85% of these immigrants “entered through the port of New York.” *Ibid.* Many could not travel further, so they “found skilled work ... and made their permanent homes” in the city. *Ibid.* Some Americans resented these immigrants, criticizing their “foreign mannerisms, customs, and ... drive to succeed in America.” *Ibid.* (citing Leonard Dinnerstein, *Antisemitism in America* 36 (Oxford Univ. Press 1994)). These historical facts highlight how antisemitism can be a product of the lack of familiarity and understanding that a diverse college environment counteracts.

B. Antisemitism at American colleges.

Promoting the attendance of religious minorities on college campuses would not only help ameliorate the problems of antisemitism in society at large. It could more directly and immediately combat the scourge of antisemitism on college campuses that has deep historic roots and represents a continuing problem. Jewish immigrants were resented even more as they climbed into the “middle class ... and advanced professionally.” *Ibid.*

This ascent also troubled elites at America’s colleges and universities. Harvard President A. Lawrence Lowell lamented that “the coming in large numbers of Jews of any kind” would “ruin” Harvard just like it “ruined” Columbia. Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* 88 (2005) (quoting letter from President Lowell to Prof. William Earnest Hoskins). So he combed through “enrollment cards ..., classifying each [student] into one of four categories:” J1 (“bona fide Jew”); J2 (“more than likely a Jew”); J3 (“might be” a Jew); and “Other.” Ian Shapira, *Before Asian Americans sued Harvard, the school once tried restricting the number of Jews*, WASH. POST (Oct. 15, 2018), <https://perma.cc/M6PR-ZYJL>. The results of this study confirmed Lowell’s “worst fears.” *Ibid.* Harvard then capped the number of Jews it enrolled. *Ibid.*

Lowell believed no more than 15% of Harvard enrollees should be Jewish. *Ibid.* When his “strict quota plan met faculty opposition,” he then pursued an admissions process based not on “pure merit” but on “character,” Mark J. Drozdowski, *The Historical Parallel Between Asian American and Jewish Students*,

Best Colleges (Aug. 18, 2021), <https://perma.cc/XM2N-6F9K>—a tactic echoed today in the way Harvard limits Asian admissions. To Lowell, “character” meant “not Jewish.” As the chair of Harvard’s admissions committee saw it, Lowell’s character test “would inevitably eliminate most of the Jewish element which is making trouble.” *Ibid.* And so it did. “The percentage of Jewish students entering Harvard dropped from 27% in 1925 to 15% the [next] year and remained unchanged for two decades.” *Ibid.*

Sadly, other Ivy League schools quickly followed suit. Princeton “cut its Jewish enrollment in half.” Drozdowski, *supra*. Dartmouth established its own “Jewish quotas.” *Ibid.* And Columbia sought “to repel what its leaders called the ‘Jewish invasion,’ when its Jewish population” began growing at uncomfortable levels. *Ibid.* According to David O. Levine, author of *The American College and the Culture of Aspiration, 1915-1940*, “[l]imiting the number of Jewish students ... became an obsession with officials at elite colleges” in the early 20th century. *Ibid.* And for no good reason: Colleges “reject[ed] academically qualified but socially undesirable students to placate alumni and upper-middle-class white” people. *Ibid.* This discrimination reflected bigotry against Jews and a strong cultural current to curb their “potential influence” in society. *Ibid.*

In some ways, this sort of open anti-Semitic bigotry from administrators is unthinkable today. But a different breed of insidious antisemitism continues to thrive and may even be increasing.

AMCHA reports over 4,500 antisemitic incidents on college campuses since 2015 alone, AMCHA

Initiative, <https://perma.cc/778R-K6DQ>—about 100 of which occurred at Harvard, AMCHA Initiative, *Incidents*, <https://perma.cc/3V3H-F5K6>. Just last year, for example, the Harvard Hillel building was vandalized twice in two weeks. Alex M. Koller & Taylor C. Peterman, *HUPD Investigating Two Vandalism Incidents at Harvard Hillel Amid Nationwide Rise in Anti-Semitism*, THE HARVARD CRIMSON (June 8, 2021), <https://perma.cc/7PGM-S7KJ>. Before that, antisemitic flyers were circulated, promoting a fake social club but saying, “Jews need not apply.” Zachary T. Sampson & Katherine Landergran, *Anti-Semitic incidents shock Northeastern, Harvard*, BOSTON.COM (Nov. 30, 2012), <https://perma.cc/PY5N-R3KZ>. And a visiting Jewish professor received an expletive-laced postcard invoking “a Nazi-era German phrase that means ‘Jews out!’” <https://bit.ly/37J1Cek> (search “Harvard Univerisity”). Similar examples abound.

These incidents at Harvard mirror others at campuses across the country. At Northeastern, for example, students vandalized a “decorative menorah” in the quad during the “eight-day celebration of Hanukkah.” Sampson & Landergran, *supra*. More broadly, Jewish students face rampant antisemitic stereotyping. They report gross bullying about their supposed “horns” and stinginess. Leonard Saxe et. al, *Hotspots of Antisemitism & Anti-Israel Sentiment on US Campuses* 21, Brandeis Univ., Ctr. for Modern Jewish Studies (Oct. 2016), <https://perma.cc/H9GB-GY6C>. And worse, they report being told to return to concentration camps, being awakened to swastikas and fake eviction notices posted on their doors, and being excluded from campus clubs. *Ibid*. From these reports, one thing is clear: for all of the undeniable progress

that has been made, life is sometimes still very difficult for Jewish students on college campuses.

C. Antisemitism generally today.

Even after graduating from college, Jewish people still experience a disturbing amount of antisemitism. If the educational benefits of diversity cited in *Grutter* exist, exposing more college students to Jewish people and ideas would help ameliorate this unacceptable reality.

According to data from the Anti-Defamation League, “the number of reported antisemitic incidents in the U.S., including assaults, vandalism, and harassment, rose to a new high last year.” Omar Abdel-Baqi, *Anti-Semitic Incidents in U.S. Jump to New High, Report Says*, WALL ST. J. (Apr. 26, 2022), <https://perma.cc/FVD8-JLPA>. More than 2,700 such incidents were reported in 2021—an increase of 34% from 2020 numbers “and the highest number on record since the ADL ... began tracking these figures in 1979.” *Ibid.* Sadly, this year has started no better. In January, “a gunman held hostages in a Texas synagogue for hours before they were freed by an elite FBI rescue team.” *Ibid.* Unfortunately, this is only one of several similar incidents that have occurred over the last few years. And in February, “anti-Semitic ... material was distributed in multiple cities across the U.S., prompting” official investigations. *Ibid.*

Jews also sometimes face government hostility. Take former New York Governor Andrew Cuomo. He notoriously lamented, “These people and their [expletive] tree houses,” referencing Orthodox Jews celebrating Sukkot—a holiday where Jews spend much of

their time living in huts or booths to commemorate the time they spent in the desert after the exodus from Egypt. Matt Flegenheimer, *Andrew Cuomo’s White-Knuckle Ride*, N.Y. TIMES (Apr. 13, 2021; updated Nov. 10, 2021), <https://perma.cc/3XA2-NYF8>. And the New Jersey Attorney General has sued multiple towns for rank antisemitic conduct—one for blocking Jews from its parks, Brian Thompson, *New Jersey Sues Town Over Park Ban Targeting Orthodox Jews*, NBC New York (Oct. 24, 2017; updated Oct. 25, 2017), <https://perma.cc/3D29-RHUG>, and another for “selectively enforcing local [zoning] rules” and even “creating new ones to discourage” Orthodox Jews from living there, Blake Nelson, *N.J. accuses Ocean County town of discriminating against Orthodox Jews*, NJ.COM (Apr. 27, 2021; updated Apr. 27, 2021), <https://perma.cc/YW9V-6TKN>.

Jews are also a common target for conspiracy theorists. Consider that right before Hanukkah last year, Beverly Hills investigators “found multiple flyers” around town reading, “Every single aspect of the COVID agenda is Jewish.” *Flyers linking Jewish community to COVID pandemic found at homes in Beverly Hills, police say*, Eyewitness News ABC 7 (Nov. 29, 2021), <https://perma.cc/64TK-JEXN>. These same conspiracy-theory flyers also appeared in cities across the country, including in North Carolina and Maryland. Dan Schere, *Police investigating anti-Semitic flyers distributed in Silver Spring*, Bethesda Magazine (Dec. 22, 2021), <https://perma.cc/NB94-2RG6>. Another such theory is “that Jews are engineering mass migration to Europe and the United States to pollute and eventually destroy the white race.” *How Conspiracy Theories Can Kill*, Anti-Defamation League (Nov.

14, 2018), <https://perma.cc/NYL2-ERZS>. This theory reportedly motivated a man to open fire on congregants at a Pittsburgh synagogue not long ago, killing 11. *Ibid.*

Jews also still face rampant and gross stereotyping. A recent survey shows that “[m]ore than half of American adults believe at least one or more” antisemitic stereotypes. Danielle Ziri, *Over 50 Percent of Americans Believe at Least One anti-Semitic Stereotype, Poll Shows*, HAARETZ (Jan. 29, 2020), <https://perma.cc/GA9V-VWK5>. The survey shows that “24 percent of Americans agree [that] ‘Jews are more loyal to Israel than to America.’” *Ibid.* It also shows that “15 percent of respondents believe[] Jews have ‘too much power in the business world,’” that 10% believe “Jews are more willing than other to use shady practices to get what they want,” that 31% believe Jewish employers “go ‘out of their way’” to hire other Jews, and that 17% believe “the movie and television industries are pretty much run by Jews.” *Ibid.* Some reports suggest these numbers are even higher. Justine Coleman, *61 percent of Americans agree with at least one anti-Semitic stereotype: poll*, THE HILL (Jan. 29, 2020), <https://perma.cc/6LX2-TAAZ>. And such shocking reports are not far-fetched given stories like that of one lawmaker claiming a recent snowfall was “caused by ‘Rothschilds controlling the climate.’” Peter Jamison & Valerie Strauss, *D.C. lawmaker says recent snowfall caused by ‘Rothschilds controlling the climate’*, WASH. POST (Mar. 18, 2018), <https://perma.cc/NN4F-G9BA>.

While religious life has thrived in America like in few other places on earth, anti-religious bigotry—including antisemitism—has far from disappeared.

Rejecting unjust favoritism in college admissions will better promote the dignity of *all* Americans, and thus help our confident pluralism to flourish.

CONCLUSION

Amicus does not take a position on which party should win or how this case should be decided. But it does urge the Court to consider this dispute within a broader context. Religious diversity is no less essential to obtaining educational benefits than racial diversity. And it makes no sense for universities to pursue the educational benefits of one form of diversity while ignoring all others, including religion.

Respectfully submitted,

KRISTEN K. WAGGONER

JOHN J. BURSCH

Counsel of Record

DAVID A. CORTMAN

ERIN MORROW HAWLEY

ALLIANCE DEFENDING FREEDOM

440 First Street, NW

Suite 600

Washington, DC 20001

(616) 450-4235

jbursch@ADFlegal.org

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