No. 20-1199, No. 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondents.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

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

AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch files amicus curiae briefs in cases involving issues it believes are of public importance, including cases involving race-preferential admissions programs in higher education. *See*, *e.g.*, Brief of Amicus Curiae Judicial Watch, Inc. in Support of Plaintiffs-Appellants and Reversal of the District Court's Judgment in the First Circuit, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* No. 19-2005; and Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioner, *Fisher v. Univ. of Tx. at Austin*, 579 U.S. 365 (2016) (No. 14-981).

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than Amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici sought and obtained the consent of all parties to the filing of this Amici Curiae brief.

briefs as a means to advance its purpose and has appeared as an amicus curiae in this Court on many occasions.

Amici Curiae have an interest in jurisprudence related to race-preferential education policies, particularly as they concern the Fourteenth Amendment's Equal Protection Clause. The First Circuit in the Harvard case and the District Court in the UNC case approved explicitly race-based criteria for their admissions programs. These actions are fundamentally at odds with basic notions of proper equal protection analysis. Further, these institutions could have achieved increased racial diversity in their student bodies with the use of workable, race-neutral admissions policies. However, they chose to use race-preferential admissions programs instead in violation of this Court's narrow tailoring requirement.

Amici Curiae respectfully request that this Court reconsider its prior rulings in the *Bakke* line of cases regarding race-preferential admissions programs and reverse those rulings and the rulings of the lower courts.

SUMMARY OF ARGUMENT

In the Harvard case, Petitioner Students for Fair Admissions ("SFFA") filed suit against Harvard in 2014 under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. It alleged that Harvard's admissions program intentionally discriminated against Asian American applicants based on their race. Harvard's admissions program gives race-

based preference to African Americans and Hispanics, but it does not afford such preference to Asian Americans. Accordingly, Harvard's race-based admissions program plays an integral part in the admission or rejection of Asian American applicants to Harvard.

In the University of North Carolina ("UNC") case, American Indians, as well as African Americans and Hispanics, are provided race-preferential school admissions, while Asian American and white applicants are not. UNC.Pet.App. 15, n 7, 37. Petitioner in that case filed suit in 2014 as well under both Title VI and the Equal Protection Clause of the Fourteenth Amendment. Petitioner alleged that both Asian American and white applicants were subjected to discrimination by UNC's race-preferential admissions program.

In past cases where this Court ruled that racial classifications did not violate the Equal Protection Clause, this Court determined later that such rulings were in error and reversed them. *See*, *e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) which was reversed in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Race-based admissions programs for higher education have been the subject of this Court's attention in five major cases in the last 44 years. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex.*,

570 U.S. 297 (2013) (*Fisher I)*; and *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016) (*Fisher II).* In each of these cases, this Court has grappled with the issue of whether the Equal Protection Clause allows schools of higher learning to take race into account in admissions decisions and, if so, what test(s) are applicable for identifying constitutionally permissible race-based admissions programs.

These rulings have generated numerous opinions, pluralities, concurrences, and dissents, many of which conflict in fundamental and significant ways. These decisions achieved little consensus regarding whether race-preferential admissions comply with the Equal Protection Clause and have not provided a workable standard for lower courts and school officials to use when reviewing and implementing such admissions programs.

The *Bakke* line of cases'[2] use of a "strict scrutiny diversity defense" has not meaningfully assisted courts and schools in identifying admissions programs that are constitutionally permissible. Instead, encouraged by the possibility of meeting the strict scrutiny standard, schools have camouflaged or been less than candid about their desire to simply increase their number of minority students, as Justice Ginsburg predicted. *Gratz*, 539 U.S. at 305

[2] The terms "*Bakke* line of cases," "*Bakke* line," and "*Bakke* and its progeny" refer to the five aforementioned precedents of this Court that specifically address the constitutionality of race-preferential school admissions programs in higher education.

(affirmative action will be achieved "through winks, nods, and disguises"). *Infra* at 25.

In fact, *Bakke* and its progeny have resulted in more race-preferential programs, have perpetuated racial hostility and animosity, and have led to calls for a guarantee of proportional racial results in school admissions. To mitigate these problems, which are detrimental to the development of proper equal protection jurisprudence, this Court should use the instant consolidated cases before it now to reconsider the correctness of the *Bakke* line and to rule that the Equal Protection Clause does not permit race-preferential admissions programs.

In the alternative, this Court should consider in both cases whether Respondents carried their burden of proving that workable, race-neutral alternatives to their admission programs did *not* exist. Respondents did not carry that burden in either case, and on this ground alone Petitioner is entitled to a reversal of the judgments below.

ARGUMENT

I. Past Rulings That Failed to Enforce the Equal Protection Clause's Prohibition Against Race Discrimination Have Not Stood the Test of Time.

Rulings by this Court which held that under the Equal Protection Clause individuals *may* be treated differently based on race have subsequently been held by this Court to have been wrongly decided.[3] Amici respectfully submit that these cases number among the most famous missteps in the history of Supreme Court jurisprudence.

In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the petitioner challenged a Louisiana law that required all passenger railroads to "provide equal but separate accommodations for the white, and colored races." *Id.* at 540. In upholding this segregation law, this Court reasoned that the "object of the [Fourteenth] amendment" was to enforce the equality of the two races before the law, "but in the nature of things it could not have been intended to abolish distinctions based upon color," or to require "the comingling of the two races." *Id.* at 544.

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[3] Since Harvard is a private institution, its case was decided under §601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. Title VI is coextensive with the Equal Protection Clause of the Fourteenth Amendment. *Bakke*, 438 U.S. at 287 (Powell, J., opinion of the Court). UNC is a public institution that receives federal funds. Petitioner's claims in the UNC case were decided under both Title VI and the Fourteenth Amendment.

Plessy's "separate but equal doctrine" stayed in effect for 58 years, providing legal justification for a multitude of Jim Crow segregation laws that thwarted the racial integration of American society. This Court finally rejected *Plessy* in *Brown*, 347 U.S. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."). However, by failing to uphold the core guarantee of the Equal Protection Clause, *Plessy* did immense damage to the very concept of equal protection of the laws embodied in the Fourteenth Amendment.[4]

Two other decisions that the Court later overturned involved the rights of Japanese Americans. In *Korematsu v. United States*, 323 U.S. 214 (1944), a U.S. citizen of Japanese descent was convicted of remaining in a military area from which all Japanese Americans had been excluded. *Id.* at 215-16. Relying on *Hirabayashi v. United States*, 320 U.S. 81 (1943), which approved a curfew order that applied to those of Japanese ancestry, this Court reasoned that "exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage." *Korematsu*, 323 U.S. at 219. Importantly, the

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[4] Only one justice, the first Justice John Marshall Harlan, dissented in *Plessy*. In doing so he stated that upholding the constitutionality of such racial segregation laws "will encourage the belief that it is possible . . . to defeat the beneficent purposes" of the Equal Protection Clause and warned that such laws would "permit the seeds of race hate to be planted under the sanction of law." 163 U.S. at 560 (Harlan, J., dissenting).

government did not claim that "petitioner's loyalty to the United States" was at issue, only his race. *Id.* at 216. The majority in *Korematsu* determined that this race-based program had to satisfy strict scrutiny (*id.*) but went on to conclude that national security needs during a time of war were sufficient constitutional justifications to sanction this race-based confinement of Asian American citizens. *Id*. at 223-24.

These two cases, like *Plessy*, have not withstood the test of time. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu* and stating that it "was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution'") (quoting Justice Jackson's dissent in *Korematsu,* 323 U.S. at 248.)

In each of these three cases, the Court ruled that treating individuals differently based on race or ethnicity did not violate the Equal Protection Clause. Indeed, in *Hirabayashi* and *Korematsu,* this Court found that the government had justified its disparate treatment of Japanese Americans under the strict scrutiny test. *Korematsu*, 323 U.S. at 223-24. These infamous cases demonstrate how misguided it is for this Court to sanction racial or ethnic-based discrimination. This Court's reconsideration of the *Bakke* line of cases is necessary here so that it may determine whether race-preferential admission standards in higher education are ever constitutional in light of the Equal Protection Clause's prohibition against race-based discrimination.

In these cases, the Court should make it abundantly clear that race-preferential college admission practices are *never*[5] constitutional. These race-based practices certainly cannot be justified by a nebulous, subjective, and unquantifiable claim that some level of racial diversity is necessary to enhance the learning experiences of all students.

II. Universities and Lower Courts Have Struggled Unsuccessfully for Forty-Four Years to Reconcile This Court's Precedents Regarding Race-Based Admissions Programs.

Over the course of 44 years, *Bakke* and its progeny have produced at least 26 separate opinions. Many of these have attempted to explain the constitutional rationale for allowing race-based preferences, even though those rationales appear to directly conflict with the original meaning and text of the Equal Protection Clause.

In *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), this Court addressed the constitutionality of a university admissions program that used race for the purpose of increasing minority student admissions. *Bakke* produced six separate opinions, but no majority. A plurality agreed that the

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[5] Here the undersigned do not argue or suggest that race-based remedial orders by courts after judicial findings of race discrimination are never appropriate. However, in the instant cases the challenged race-based admissions programs were created by Harvard and UNC officials and not by courts in their remedial capacities.

respondent's admission application for medical school had been illegally rejected and that he was entitled to the injunctive relief – admission to the school – granted by the lower court. *Id.* at 284-324, 408-21.

Justice Powell wrote an extensive opinion with which four justices concurred that included a detailed explanation of how he believed schools could devise constitutionally acceptable admission programs that used race preferences for the purpose of achieving greater student body diversity. *Id.* at 319-24, n.55. He attached a copy of Harvard's admissions plan in effect in 1978, a predecessor program to the one challenged here. *Id.* at 321-24. One rational for that race-preferential plan was that a greater number of preferred minority admittees were purportedly needed to achieve educational benefits for all students. *Id.* at 311-17. The four other justices in *Bakke* dissented from this portion of Justice Powell's opinion because they were of the view that race preference programs could not pass constitutional muster. *Id.* at 408-21.

Thus, the *Bakke* line of cases was born 44 years ago in a state of confusion arising from conflicting opinions on whether and to what extent the race or ethnicity of an individual applicant may be constitutionally considered in higher education admissions. The notion that the Equal Protection Clause allows individuals to be treated differently because of their race in school admissions in order to achieve greater student body diversity for educational purposes split the Court, as reflected by the "fractured decision in *Bakke*." *Grutter*, 539 U.S. at 325.

Twenty-five years after *Bakke*, the Court heard two University of Michigan school admission cases, one arising at the undergraduate college and the other at the law school. *See Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Gratz*, it was undisputed that the University gave each minority applicant twenty additional points in order to "admit 'virtually every qualified . . . applicant' from . . . [minority] groups" to its undergraduate school. 539 U.S. at 253-55.

The majority in *Gratz* stated "that the University's use of race in its . . . admission program [must] employ[] 'narrowly tailored measures that further compelling governmental interests,'" *Id.* at 270 (citing *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)). In striking down the race-based admissions program in *Gratz*, the majority held that the undergraduate school's policy of "distributing . . . one-fifth of the points needed to guarantee admission" to every minority applicant "solely because of race, is *not* narrowly tailored to achieve the interest in educational diversity," on which the undergraduate school had relied. 539 U.S. at 27. (Emphasis added.) *Gratz* produced seven divergent opinions.

In *Grutter*, the University of Michigan Law School's admissions program claimed it considered race or ethnicity to enroll a "critical mass" of minority students so as to produce a diverse student body that, "promotes learning outcomes," and prepares students to work in an increasingly diverse workforce. 539 U.S. at 316, 319, 330. However, these aspirational

goals, while admirable, may have little, if anything to do, with what is actually occurring on college campuses.[6] Such speculative hopes clearly should not be justifications for the use of race-preferential admissions plans.

Grutter generated six written opinions. The five-to-four majority held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325. *Grutter* did apply the strict scrutiny diversity test to Michigan Law School's racial classifications in its admissions program. *Id.* at 326. *Grutter* then concluded that this program passed the strict scrutiny test and was constitutionally permissible. *Id.* at 337-44.

Fisher v. Univ. of Tex., 570 U.S. 297, 300-15 (2013) (*Fisher I)* concerned a challenge to the legality of the University of Texas' undergraduate admissions plan. While the program did not assign a "numerical

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[6] *See Grutter*, 539 U.S. at 349 (Scalia, J. concurring in part and dissenting in part) (criticizing universities that "talk of multiculturalism and diversity," but support "tribalism and racial segregation on their campuses," including "minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority only graduation ceremonies"). More recently, student demands for the establishment of "safe-zones" on campuses where students are assured of *not* hearing statements with which they disagree, and student protests that shut down speakers who have been invited to campus to speak about racial issues, do not reflect tolerance for the articulation of diverse thoughts on campuses. *See* Heather Mac Donald, THE DIVERSITY DELUSION: HOW RACE AND GENDER PAMPERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE 1-33 (2018).

value for each applicant" on the basis of race, it did have a goal of creating a "critical mass" of minority students. *Id.* at 301. This Court determined that the court of appeals ruling at issue in *Fisher I* must be vacated and remanded because that court had not held "the University to the demanding burden of strict scrutiny articulated in *Grutter*." *Id.* at 303.

Importantly, this Court reasoned that "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id.* at 312. In addition, *Fisher I* stated that "[s]trict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Id.* at 313. After the case was heard on remand by the Fifth Circuit, it returned to this Court on a second grant of certiorari. *Fisher v. Univ. of Tex.*, 579 U.S. at 369 (*Fisher II).*

Fisher II ruled in favor of the University of Texas by a 4-3 margin. There were three opinions in *Fisher II*: the opinion of the Court, and two dissenting opinions. The majority stated that "a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'" *Id.* at 381. The four-justice majority found that "enrolling a diverse student body 'promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different

races.'" *Id.*, citing *Grutter*, 539 U.S. at 330. *But see*, *Fisher II*, 579 U.S. at 418 (Alito, J., dissenting) (referring to the university's purported need for "affirmative action to admit privileged minorities," rather than disadvantaged minorities, as "affirmative action gone wild.").

As the splintered rulings in *Bakke, Gratz, Grutter, Fisher I*, and *Fisher II*, show, the law regarding race-preferential school admissions has always been in a state of considerable conflict and ambiguity.

III. This Court Should Reverse the *Bakke* Line of Cases Which Permits Racial Discrimination Against Individual Applicants in School Admissions in Violation of the Guarantees of the Equal Protection Clause.

As shown above, the *Bakke* line of cases have held that institutions of higher learning *can discriminate* against individuals because of their race if school officials can demonstrate a compelling interest in increasing preferred minorities' percentages in their student bodies in order to achieve purported educational benefits. The *Bakke* line of cases was a well-intended effort by this Court to address the issue of minority student admissions in higher education. This Court, however, should reverse *Bakke* and its progeny, because the harm that those holdings are doing to the fundamental concept of "equal protection of the laws" far outweighs any benefit derived from them.

A. The Equal Protection Clause Does Not Countenance Intentional Racial Discrimination Against Any Individual.

Bakke and its progeny plainly conflict with the text of the Equal Protection Clause. It commands, "no state shall . . . deny *to any person* within its jurisdiction the equal protection of the laws." (Emphasis added.) The Fourteenth Amendment contains no exceptions to the Equal Protection Clause's prohibition against the use of race.

This Court has repeatedly stated that the Equal Protection Clause's prohibition against racial discrimination is at its very core. *See e.g.*, *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in judgment) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."). "'[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *Id.* at 521 (Scalia, J., concurring in the judgment) (citation omitted).

If the Framers of the Fourteenth Amendment had wanted to limit the protections of the Equal Protection Clause to African Americans or other racial minorities, the Framers would *not* have used the term "any person" in the text of the Amendment.

Not surprisingly, those Framers drafted broad language for the Equal Protection Clause that protects *all* Americans from the evils of race discrimination and not just the members of certain minority groups.

The text of the Equal Protection Clause does not provide any defenses or exceptions wherein the use of race-preferential policies are permissible. Indeed, the strict scrutiny diversity defense for the use of race in school admissions was judicially created by the *Bakke* line of cases, and it should be judicially abrogated.

B. Since the Ruling in *Bakke*, Demands for Race-Preferential Programs Have Increased, Not Diminished.

Bakke and its progeny have allowed the consideration of race in college admissions for 44 years. Notably, several of the justices who were instrumental in developing the strict scrutiny diversity defense envisioned – incorrectly as it turned out – that this use of race would *not* become a long-term or permanent feature of this area of the law. *See Bakke*, 438 U.S. at 403 (Blackmun, J., concurring in the judgment in part and dissenting in part) ("I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. *I would hope that we could reach this stage within a decade* [*i.e.*, 1988] *at the most*.") (Emphasis added.); *see also*, *Grutter*, 539 U.S. at 343 (O'Conner, J.) ("We expect that 25 years from now [*i.e.,* 2028], the use of racial

preferences will no longer be necessary to further the interest approved today.") Unfortunately, things have *not* gone as Justices Blackmun and O'Conner had hoped.

Demands for such preferences show no signs of abating. Indeed, it has become abundantly clear that race-based admissions programs are *not* likely to become "a relic of the past" any time soon. Far from declining, as Justices Blackmun and O'Conner had hoped, the demand for racial proportionality is presently on the rise in every major area of life, including but not limited to college admissions.

These demands will not end, it is respectfully submitted, until this Court unequivocally declares that race discrimination in school admissions programs is violative of the Equal Protection Clause. *See Gratz,* 539 U.S. at 281 (Thomas, J., concurring) ("I would hold that a state's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause").

C. The *Bakke* Line of Cases Has Misinterpreted the Equal Protection Clause to Permit Intentional Racial Discrimination and Racially Proportional Results in College Admissions.

It is axiomatic that an Equal Protection Clause violation occurs where actions are taken intentionally to discriminate against an individual because of race. Such a claim is not established where the action in

question has only a discriminatory effect or result. *See Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 330-31 (2014) (Scalia, J., concurring in the judgment). *See also, Crawford v. Board of Ed.*, 458 U.S. 527, 537-38 (1982) ("Even when a neutral law has a disproportionately adverse effect . . . the Fourteenth Amendment is violated only if a discriminatory purpose can be shown."); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979) (Equal Protection Clause "guarantees equal laws, not equal results"); and *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-65 (1977) (the Equal Protection Clause is not violated where the action in question has only a discriminatory result).

The *Bakke* line of cases established a legal analysis that is fundamentally at odds with these equal protection precedents. Under the *Bakke* line, schools may intentionally discriminate against their applicants on the basis of race if they show that this discrimination is necessary to achieve a greater proportion of preferred minorities in the schools' student bodies, (*i.e.,* diversity) in the hopes of improving educational benefits. Achieving racial proportionality in their student bodies is, in fact, the schools' true objective. Racially proportionate student bodies are certainly *not* constitutionally required; nevertheless, the effort by schools to achieve them is, under the *Bakke* line, allowed to defeat the anti-discrimination guarantee of the Equal Protection Clause. Today this end is fashionably referred to as *racial equity,* and it is, of course, what the strict scrutiny diversity defense provides.

The *Bakke* line of cases turns the Equal Protection Clause on its head by interpreting it to give greater constitutional importance to *increasing* the number of minority students at institutions of higher learning than to *preventing* intentional discrimination against individual applicants because of their race.[7] That is, however, exactly what the *Bakke* line does by reasoning that the need to increase the number of minority students is a compelling interest that outweighs the interest in preventing intentional race discrimination itself.

This approach abrogates the core of the Equal Protection Clause. There simply is no mention of a defense of this kind in the text of the Fourteenth Amendment. Neither has the Congress enacted any enforcement legislation, pursuant to Section V of the Fourteenth Amendment, that would arguably permit race-preferential admissions practices by educational institutions. Amici respectfully submit that the *Bakke* line of cases has had the practical effect of circumventing the race-neutral enforcement of the Equal Protection Clause when it comes to college admissions. The *Bakke* line, like *Plessy, Korematsu,* and *Hirabayashi*, should be reversed because it does fundamental injury to equal protection jurisprudence.

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[7] Increased racial diversity in student bodies is a laudable goal; however, a laudable goal does not justify the use of *any* means to achieve that goal. Means in conflict with the Equal Protection Clause's core purpose of prohibiting race discrimination should *not* be deemed to pass constitutional muster.

D. The Failure to Reverse the *Bakke* Line of Cases Will Encourage Government Officials to Seek Proportional Results Rather than Equal Opportunity.

If the Court fails to reverse the *Bakke* line of cases, their flawed reasoning will corrupt the race-neutral application of the law in other areas.

That this is already happening to a considerable extent can be seen in the explicit effort to replace the goal of equal opportunity with that of racially proportional outcomes. Some of the Biden administration's executive orders, for example, have replaced the term *equality* with the term *equity*. Thus, Executive Order 13985, issued January 20, 2021, is entitled "Advancing Racial *Equity* and Support for Underserved Communities Through the Federal Government." (Emphasis added). In that Executive Order, the term "equity" is mentioned 21 times and the term "equality" is not mentioned at all. On June 25, 2021, President Biden issued Executive Order 14035, entitled "Executive Order on Diversity, *Equity*, Inclusion and Accessibility in the Federal Workforce." (Emphasis added.) And on October 19, 2021, President Biden issued Executive Order 14050 entitled, "White House Initiative on Advancing Educational *Equity*, Excellence, and Economic Opportunity for Black Americans." (Emphasis added.)

Vice President Harris has explained the difference between "equity" and "equality" this way:

> There's a big difference between equity and equality. Equality suggests, "everyone should get the same amount." The problem with that, not everybody's starting out from the same place. . . . *Equitable treatment means we all end up in the same place.* (Emphasis added.)

Kamala Harris (@KamalaHarris), *Equality vs. Equity*, TWITTER, Nov. 1, 2020 (available at https://twitter.com/kamalaharris/status/1322963321994289154?lang=en).

There is, however, no constitutional guarantee that we will all "end up in the same place." The foregoing statements reveal a distorted view of the Equal Protection Clause that would guarantee racially proportionate outcomes under the name of equity, not the equality of opportunity the Equal Protection Clause has always guaranteed.

These are more than mere words or theories. Racial preferences have increasingly become incorporated in real-world, governmental decisions and policies. For example, United States Department of Agriculture (USDA) officials recently sought to use race as a basis for deciding who receives governmental loan forgiveness. *See Miller v. Vilsack*, No. 4:21-cv-0595-O (N.D. Tex. 2021) and *Wynn v. Vilsack*, No. 3:21-cv-0514-MMH-JRK (M.D. Fla. 2021)

(two of a series of civil actions filed within the last year against the USDA alleging that its loan forgiveness payments, set forth in Section 1005 of the American Rescue Plan of 2021, violate the Equal Protection Clause because they deny loan forgiveness on the basis of race).

In a similar vein, New York issued guidelines identifying criteria to govern which COVID-19 patients are eligible to receive life-saving monoclonal antibodies and therapeutics. These criteria include that the patient be a person of color or Hispanic ethnicity. John B. Judis and Ruy Teixeira, *New York's Race-Based Preferential COVID Treatments: New guidelines say whites may not be eligible for antibodies and antivirals, while nonwhites are*, WALL ST. JOURNAL, Jan. 7, 2022 (available at https://www.wsj.com/articles/new-york-race-based-covid-treatment-white-hispanic-inequity-monoclonal-antibodies-antiviral-pfizer-omicron-11641573991).

These examples show how important it is to rigorously apply the constitutional protections of the Fourteenth Amendment. Whether the rationale of the moment involves diversity, equity, or any other pretext, state actors have proved time and again to be quite willing to erode the core guarantees of the Equal Protection Clause. *Bakke* and its progeny have encouraged government officials to try to do so. To ensure that this unfortunate encouragement does not continue, the *Bakke* line of cases should be reversed.

E. Enforcement of the Racial Preferences Sanctioned by *Bakke* and Its Progeny Increases Racial Resentment.

Increasing the number of minority admittees does not compensate for the constitutional injury inflicted on innocent individual applicants from non-preferred racial groups who are not admitted and the harm that that injury does to race relations generally. *See Parents Involved in Cnty. Sch. v. Seattle Sch. Dist.,* 551 U.S. 701, 759 (2007) (Thomas, J., concurring) ("This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and 'provoke[s] resentment'") (citing *Adarand*, 515 U.S. at 241)). Legalizing the use of race in deciding who is admitted to schools of higher learning has caused enormous conflict in our society, including among members of this Court. *See Schuette*, 572 U.S. at 325 (2014) (Scalia, J., concurring) ("The Equal Protection Clause 'cannot mean one thing when applied to one individual and something else when applied to another color. If both are not accorded the same protection it is not equal'"), quoting *Bakke*, 438 U.S. at 289-290; *see also, Fisher II*, 579 U.S. at 399 (Alito, J., dissenting).

Justice Thomas' concern about the creation of racial "resentment" caused by race-preferential admissions programs echoes the first Justice Harlan's concern about "the seeds of race hatred being planted

under the sanction of law" by the segregated seating practices at issue in *Plessy*. 163 U.S. at 560-61. These two Justices understood that non-preferred applicants become resentful when they learn that they were discriminated against. By prohibiting racial discrimination, the Equal Protection Clause reduces race-based discord and engenders unity. But when the Equal Protection Clause is interpreted to allow racial discrimination, as was done in *Plessy* and is now done by the *Bakke* line of cases, this salutary purpose is diminished if not destroyed.

This destructive cycle of race-preference and resentment must be ended for the sake of national unity. As simply but correctly stated in *Parents Involved*, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." 551 U.S. at 748. Accordingly, if we are to move forward toward an America united and free of racial discrimination, the *Bakke* line of cases must be reversed.

F. The Strict Scrutiny Diversity Defense Has Led School Officials to Deliberately Misrepresent Their Race-Preferential Programs.

The strict scrutiny diversity defense applied by the *Bakke* line of cases looks at school rationales that are both subjective and unquantifiable.[8] Thus, the

[8] How does one objectively correlate the amount of "cross-racial" educational benefit with the percentages of minority students in a class? Precisely because such correlations are

use of strict scrutiny with its two-pronged compelling interest and narrow tailoring tests cannot meaningfully determine whether the school in question should be allowed to racially discriminate against non-preferred applicants.

The late Justice Ginsburg predicted that schools might be less than candid if courts attempted to take away their race-based affirmative action programs. *See Gratz*, 539 U.S. at 304-05 (Ginsburg, J., dissenting) (observing that colleges and universities "may resort to camouflage" or "disguise[]" to protect their race-conscious programs from attack, and that these admissions programs might be preserved through "winks, nods, and disguises.") Protection from race discrimination is a cornerstone of the Fourteenth Amendment and recognition of this important constitutional guarantee should not be dependent upon decision-making that uses "camouflage" or "winks, nods, and disguises." *Id.* Unfortunately, the strict scrutiny diversity defense appears to have been manipulated for just such purposes.

Harvard law school professor Randall Kennedy, an advocate of race-conscious admissions programs, acknowledged that *Bakke's* strict scrutiny diversity defense is a pretext when he stated,

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wholly subjective, the diversity defense has provided schools with a way to avoid the anti-discrimination prohibitions of the Equal Protection Clause.

> Let's be honest: Many who defend affirmative action for the sake of 'diversity' are actually motivated by a concern that is considerably more compelling. They are not so much animated by a commitment to what is, after all, only a contingent pedagogical hypothesis. Rather, they are animated by a commitment to social justice. They would rightly defend affirmative action even if social science demonstrated uncontrovertibly that diversity (or its absence) has no effect (or even a negative effect) on the learning environment.

Randall Kennedy, *Affirmative Reaction*, AM. PROSPECT (Feb. 19, 2003) (available at https://prospect.org/features/affirmative-reaction/); [9] *see* Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 Colum. L. Rev. 1589, 1590-91 (2003) (former Michigan University President Lee Bollinger acknowledging that the use of the strict scrutiny diversity defense in *Grutter* was a litigation strategy, because a defense based upon the history of discrimination against black Americans was not available).

Given Justice Ginsburg and Professors Kennedy and Bollinger's observations, it should come

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[9] Professor Kennedy is quoted in Gail Heriot & Maimon Schwarzschild (eds.), A DUBIOUS EXPEDIENCY: HOW RACE PREFERENCES DAMAGE HIGHER EDUCATION 173, n.18 (2021).

as no surprise that in some of the school admission cases the positions advanced by the schools and the testimony offered in support of their strict scrutiny diversity defenses have involved disingenuous representations. *See e.g.*, *Fisher II*, 579 U.S. at 390 (Alito, J., dissenting) ("To the extent that [the University of Texas] has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been *shifting, unpersuasive, and, at times, less than candid*.") (Emphasis added.)

As noted in *Fisher II*, University of Texas officials had argued in *Fisher I* that they needed to admit minority children of "successful professionals." However, in *Fisher II*, the same school "attempted to disavow ever making the argument." 579 U.S. at 391 (Alito, J., dissenting). To this, Justice Alito responded that the University *did* make the argument in *Fisher I* and that "the argument turns affirmative action on its head. Affirmative-action programs were created to help *disadvantaged* students." *Id.* These "shifting and unpersuasive" representations undermine the credibility of the very administrators who request that courts allow them to use race-preferential admissions programs.

In the Harvard case, its pretrial failure to disclose material facts revealed disingenuous behavior by school officials. Shortly before the trial began, Harvard changed its procedures for reviewing applications for admission to "make sure its admissions officers did not fall prey to implicit bias or racial stereotyping about Asians." Harv.JA.3287:18-

3288-23. This highly relevant evidence only came to light because one of Harvard's witnesses inadvertently mentioned it at trial, and not because Harvard produced this evidence pre-trial. Harv.Pet.App. 106 n.2., Harv.Pet.App. 121-22.

Also in the Harvard case, the court of appeals noted that "eliminating race as a factor in admissions . . . would reduce African American representation at Harvard from 14% to 6% and Hispanic representation from 14% to 9%." *SFFA v. President and Fellows of Harvard Coll.*, 980 F.3d 157, 180 (1st Cir. 2020). The First Circuit also observed that "at least 10% of Harvard's class would not be admitted if Harvard did not consider race and that race is a *determinative* tip for approximately 45% of all admitted African American and Hispanic students." *Id.* (Emphasis added.) Given the material impact that Harvard's use of race has upon the racial composition of its student body, Harvard's argument that it is using race merely as "a plus" or "one part of [a] whole-person review," Harv.JA.651:18-652:21, is implausible[10] and should not have been credited by the First Circuit. The First

[10] If 10% of a Harvard class or 45% of its African American and Hispanic admittees would not have been admitted had their race not been considered, it is irrational to argue, as Harvard does here, that the use of race is not a substantial factor driving its admissions process. Looked at from the point of view of non-preferred applicants, this means that a substantial number of applicants from non-preferred racial groups were not admitted to Harvard because of their race. Harvard's use of race was not merely a "plus" for the preferred group; it was a minus that discriminated against applicants from non-preferred racial groups who were consequently not admitted.

Circuit's conclusion that Harvard's use of race is *not* grounded on the school's desire to increase and racially balance minority representation, *SFFA*, 980 F.3d at 187, is both clear factual error and a misapplication of this Court's precedents.

For all these reasons, Amici Curiae respectfully request that this Court: (1) reconsider its rulings in the *Bakke* line of cases and (2) rule that educational institutions covered by Title VI of the Civil Rights Act of 1964, by the Fourteenth Amendment, or by both shall not be permitted to defend their race-preferential admissions programs by pointing to their need to increase the number of minority admittees.

IV. The Respondents' Race-Preferential Admissions Programs Fail Strict Scrutiny Because Workable Race-Neutral Alternatives Are Available.

Even if this Court is satisfied that the *Bakke* line of cases should continue to be controlling precedent, both the First Circuit in the Harvard case and the District Court in the UNC case erred in finding that the schools' admission plans satisfied strict scrutiny review. In both cases Respondents failed to comply with this Court's rulings in *Bakke* and its progeny that require schools to carry their burden of showing that there were *no* workable race-neutral alternatives to their race-preferential admission programs. *Fisher I*, 570 U.S. at 312. That failure alone is sufficient reason to reverse the

judgments of both courts below and to enter judgments for Petitioner.

Under *Fisher I*, strict scrutiny required the courts below to consider whether a race-based admissions program is necessary. *Id*. *See also, Parents Involved,* 551 U.S. at 734-35 (narrow tailoring requires proof that the racial classification is "necessary" to achieve the compelling interest and that race is a "last resort"). It is not necessary to use race if "workable race-neutral alternatives" exist. *Fisher I*, 570 U.S. at 312.

In the Harvard case, Petitioner offered Simulation D into evidence as a workable race-neutral alternative. Under Simulation D, Harvard's *racial* preferences would be eliminated. Its preferences for children of large donors, of alumni (legacies), and of faculty/staff [11] would also be eliminated while its preferences for socio-economically disadvantaged individuals would be increased. Harv.JA.5987; Harv.JA.1491:15-1505:18. Simulation D would increase the combined African American and Hispanic percentage of admittees and would result in greater racial diversity without using race as a factor affecting admission. Harv.JA.5988;

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[11] Harvard's insistence on continuing its *well-connected* preferences for the children of Harvard professors, while requesting a constitutional exemption from the requirement that individuals—many of whom are not well off—not be discriminated against based on race is astonishingly self-serving. It is a demonstration of Harvard's profound lack of seriousness regarding its legal duty not to discriminate against any individual because of race.

Harv.JA.5789. Under Simulation D, African American representation alone would be reduced from 14% to 10%. *SFFA*, 980 F.3d at 194. White admissions would also decrease, but Hispanic, Asian-American, and socio-economic diversity would increase. Harv.JA.5988; Harv.JA.5789. Moreover, academic characteristics such as high school GPAs and SAT scores would remain almost the same. *Id.*

Harvard rejected Simulation D and the First Circuit upheld this rejection, stating that Simulation D was not an acceptable race-neutral alternative, because "considering race . . . prevents diversity from plummeting. Harvard's race-conscious admissions program ensures that Harvard can retain the benefits of diversity it has already achieved." *SFFA*, 980 F.3d at 194. That decline or, as the First Circuit described it, "plummeting," only applied to the 14% to 10% drop in African American admittees if Simulation D were used.[12]

Under the ruling in *Parents Involved*, schools can pay attention to the number of minority admittees in the past in order to determine the number that is needed to provide a "pedagogic concept of the level of diversity needed to obtain the asserted educational benefits." 551 U.S. at 726. "Working forward from some demonstration of the level of diversity that provides the purported benefits" is allowable; "working backward to achieve a particular

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[12] The use of Simulation D would increase Asian American admittees from 24% to 31% and "Hispanic and Other" admittees from 14% to 19%. *Id.* at 193.

type of racial balance" is constitutionally impermissible. *Id.* at 729. But the First Circuit adopted Harvard's constitutionally impermissible approach when the court rejected Simulation D. *SFFA*, 980 F.3d at 194. By doing so, the First Circuit ensured that Harvard could continue the 14% level of African American admittees it had "*already achieved*." *Id.* (Emphasis added.) Without question, therefore, both Harvard and the First Circuit were "looking backward" in demanding that the 14% level not be decreased.

The district court's reasoning in the UNC case regarding workable race-neutral alternatives was remarkably similar to the mistakes made by the First Circuit in the Harvard case. One alternative proposed was for UNC to reserve 750 seats in its incoming classes for disadvantaged applicants of all races, and then admit the remainder of the class with applicants who are best qualified academically. UNC.Pet.App. 134 n. 43. Use of this race-neutral alternative would provide greater socio-economic diversity while maintaining racial diversity and academic excellence. UNC.Pet.App. 134 n. 43 and UNC.Dkt. 244 at 443: 13-448:20; UNC.Dkt. 247-2 at 23. The district court erroneously rejected that alternative, as well as other alternatives offered by the Petitioner,[13] because it determined that these

[13] Those alternatives would have resulted in UNC admitting fewer wealthy minority students, UNC.Pet.App. 131-32; admitting a greater number of poorer white students, UNC.Pet.App. 136-37; and admitting slightly fewer minority students overall. UNC.Pet.App. 134 n.43, 139-40.

alternatives would fundamentally alter the "actual" results of the admissions program at UNC.Pet.App. 126, 143-44.

Such reasoning is not a proper application of the narrow tailoring test under strict scrutiny analysis. Obviously, enforcement of the Equal Protection Clause's prohibition against race discrimination has frequently resulted in enormous changes in the lives of persons affected, *e.g.*, students reassigned after *Brown v. Board* to racially desegregated schools. It would indeed be strange if school officials were allowed to satisfy their burden of proof under strict scrutiny by claiming that if they stopped enforcing their race-preferential programs, the composition of the student body would change to some extent. This reasoning by the district court is reminiscent of Harvard's insistence on maintaining the exact racial percentage of African American students (14%) previously achieved by use of their race-based plan. In other words, both universities achieved their desired results by using race-preferential plans, and both are opposed to changing those results by implementing a race-neutral plan so as to satisfy their strict scrutiny burden.

Harvard and UNC have a duty under strict scrutiny review to adopt a workable race-neutral alternative if one exists. Respondents in both cases failed to prove that such an alternative does *not* exist. Harvard erroneously claimed that once a certain level of minority representation is achieved by using race, institutions of higher learning should be permitted to

continue to use race to maintain that level. It was clear legal error for the First Circuit to reject Simulation D on this basis.[14] It was also clear error in the UNC case for the district court to reject a workable race-neutral alternative because it would significantly alter UNC's admission outcomes. UNC.Pet.App. 126, 143-44. When a school uses a race-preferential program, which UNC does, and then does not satisfy the strict scrutiny defense because it rejects the use of a workable race-neutral alternative, as UNC has done, major changes in who is admitted can be expected under existing precedent and are manifestly in order.

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[14] Importantly, colleges and universities are also involved in "racial balancing" when they attempt to achieve or maintain a specific percentage of admittees from a racial group. *Grutter* 539 U.S. at 329. Racial balancing is also prohibited by strict scrutiny. *Fisher I*, 570 U.S. at 311. Harvard's demand not to decrease the African American percentage from the 14% level achieved in the past is impermissible on the related ground of "racial balancing" as well.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court set aside the judgments in the Harvard and UNC cases and to enter judgment in favor of Petitioner.

Respectfully submitted,

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