

Nos. 20-1199 & 21-707

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

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**

**BRIEF *AMICUS CURIAE* OF GAIL HERIOT
AND PETER N. KIRSANOW, MEMBERS OF
THE UNITED STATES COMMISSION ON CIVIL
RIGHTS, IN THEIR CAPACITIES AS PRIVATE
CITIZENS, IN SUPPORT OF PETITIONER**

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<i>Parents Involved in Community Schools v. Seattle School District No. 1</i> , 551 U.S. 701 (2007)	21
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STATUTES	
Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957).....	1
Pub. L. 99-498, 100 Stat. 1294 §§ 321-327 (1986)(codified at 20 U.S.C. § 1060).....	23
Pub. L. 105-244, 112 Stat. 1581 1765-74 (§§ 501-18) (1998)(codified at 20 U.S.C. §§ 1101-1101d)	21
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LAW REVIEWS AND OTHER ACADEMIC JOURNALS	Page(s)
Alan Dershowitz, <i>Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext</i> , 1 <i>CARDOZO L. REV.</i> 379 (1979).....	16
Brian Fitzpatrick, <i>The Diversity Lie</i> , 27 <i>HARV. J.L. & PUB. POL'Y</i> 385 (2003).....	15
David Barnhizer, <i>A Chilling Discourse</i> , 50 <i>ST. LOUIS L.J.</i> 361 (2006).....	27
Erwin Chemerinsky, <i>Making Sense of the Affirmative Action Debate</i> , 22 <i>OHIO N.U. L. REV.</i> 1159 (1996).....	16
Jed Rubinfeld, <i>Affirmative Action</i> , 107 <i>YALE L.J.</i> 427 (1997).....	15
Jerome Karabel, <i>How Affirmative Action Took Hold at Harvard, Yale, and Princeton</i> , 48 <i>J. BLACKS HIGHER ED.</i> 61 (2005).....	5
Kent Greenawalt, <i>The Unresolved Problems of Reverse Discrimination</i> , 67 <i>CAL. L. REV.</i> 87 (1979).....	15
Owen M. Fiss, <i>Affirmative Action as a Strategy of Justice</i> , 17 <i>PHILOSOPHY & PUB. POL'Y</i> 37 (1997).....	16
Peter H. Schuck, <i>Affirmative Action: Past, Present, and Future</i> , 20 <i>YALE L. & POL'Y REV.</i> 1 (2002).....	15

TABLE OF AUTHORITIES—Continued

BOOKS AND BOOK CHAPTERS	Page(s)
DONALD E. HELLER, THE STATES AND PUBLIC HIGHER EDUCATION POLICY (2001)	19
EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF INEQUALITY IN AMERICA (2009).....	17
Gail Heriot & Carissa Mulder, <i>The Sausage Factory</i> , in A DUBIOUS EXPEDIENCY (Gail Heriot & Maimon Schwarzschild, eds., 2021).....	26, 27
Gail Heriot, <i>A Dubious Expediency in A DUBIOUS EXPEDIENCY</i> (Gail Heriot & Maimon Schwarzschild, eds., 2021)	8, 14
JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES AND FUTURE REPARATIONS (2018).....	17
John Ellis, <i>Down the Slippery Slope</i> , in A DUBIOUS EXPEDIENCY (Gail Heriot & Maimon Schwarzschild, eds., 2021).....	20
MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012)	17
Peter N. Kirsanow, <i>Segregation Now</i> , in A DUBIOUS EXPEDIENCY (Gail Heriot & Maimon Schwarzschild, eds., 2021).....	9
Peter W. Wood, <i>Diversity's Descent</i> , in A DUBIOUS EXPEDIENCY (Gail Heriot & Maimon Schwarzschild, eds., 2021).....	14

TABLE OF AUTHORITIES—Continued

	Page(s)
SUSAN WELCH & JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS (1998)	18, 20, 26
NEWSPAPERS AND OTHER PERIODICALS	
Anne Delaney, <i>University of Northern Colorado Aims for Status as Hispanic Serving Institution</i> , GREELEY (CO) TRIBUNE, Sept. 1, 2021, https://www.greeleytribune.com/2021/09/01/university-of-northern-colorado-aiming-for-status-as-hispanic-serving-institution/	22-23
Ben Flanagan, <i>Watch Alabama Students March for Diversity and Free Speech in Wake of Dean’s Resignation</i> , AL.COM, Sept. 20, 2019, https://www.al.com/news/2019/09/watch-alabama-students-march-for-diversity-and-free-speech-in-wake-of-deans-resignation.html	25
Daniel Golden, <i>Some Backers of Racial Preferences Take Diversity Rationale Further</i> , WALL ST. J., June 14, 2003	16
Devin Anderson-Torrez, <i>‘Equity Over Equality’: MSU Students and Alumni March, Demanding University to Represent Their Community</i> , STATE NEWS, June 15, 2020, https://statenews.com/article/2020/06/equity-over-equality-msu-students-demand-changes-in-university	25

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	Page(s)
DAILY CLEVELAND HERALD, Mar. 29, 1869 ..	15
Holly Poag, <i>Students Demand Greater Diversity, Inclusion on Campus</i> , DAILY GAMECOCK, June 21, 2020, https://www.dailygamecock.com/article/2020/06/students-take-action-to-promote-diversity-and-inclusion-on-campus-poag-news	25
Jon Offredo & Jonathan Starkey, <i>NAACP, State Lawmakers: UD is Lacking in Diversity</i> , NEWS JOURNAL, Feb. 10, 2015....	20
Joshua Rhett Miller, <i>Black Student Erupts Over ‘Too Many White People’ at UVA Multicultural Center</i> , N.Y. POST, Feb. 14, 2020, https://nypost.com/2020/02/14/black-student-erupts-over-too-many-white-people-at-uva-multicultural-center	4
Randall Kennedy, <i>Affirmative Reaction</i> , AM. PROSPECT (Feb. 19, 2003), https://prospect.org/features/affirmative-reaction/ ...	17
Shereen Marisol Maraji & Gene Demby, <i>The Whitest Historically Black College in America</i> , Code Switch (Oct. 18, 2013), https://www.npr.org/sections/codeswitch/2013/10/18/236345546/the-whitest-historically-black-college-in-america	23

TABLE OF AUTHORITIES—Continued

	Page(s)
Stephanie Fernandez, Local University Aims to Become Hispanic Serving Institution, FOX4NOW (Dec. 15, 2021, 10:51 PM), https://www.fox4now.com/news/local-news/local-university-aims-to-become-hispanic-serving-institution	22
Thomas Sowell, <i>The Day Cornell Died</i> , HOOVER DIGEST, Oct. 1999	7
OTHER AUTHORITIES	
Althea Nagai, <i>Pervasive Preferences 2.0: Undergraduate and Law School Admissions Statistics Since Grutter</i> , CTR. FOR EQUAL OPPORTUNITY (2021).....	7
APASS History, APASS, https://apass.usc.edu/about/history/ (last visited Mar. 10, 2021).....	13
Caroline Hugh, <i>Recent Editorials/Articles</i> , CORNELL'S A3C BLOG (Mar. 6, 2009, 11:37), https://a3c-cornell.blogspot.com/2009/03/recent-editorials.html	12
Commitment to Diversity Leads to Gift, MORITZ COLLEGE OF LAW (Apr. 5, 2012), https://moritz-law.osu.edu/briefing-room/alumni/commitment-to-diversity-leads-to-gift/	24
DARYL G. SMITH, ET AL., BUILDING CAPACITY (2006), http://hdl.handle.net/10244/51	23

TABLE OF AUTHORITIES—Continued

	Page(s)
Dep't of Educ., Fiscal Year 2022: Budget Summary (2021), https://www2.ed.gov/about/overview/budget/budget22/summary/22summary.pdf	21
Dion J. Pierre & Peter W. Wood, <i>Neo-Segregation at Yale</i> , NAT'L ASS'N OF SCHOLARS (2019), https://www.nas.org/storage/app/media/Reports/NeoSeg%20at%20Yale/NeoSegregation_at_Yale.pdf	5, 11
<i>Hispanic-Serving Institutions Education Grants (HSI) Program</i> , Nat'l Inst. of Food and Agric., https://nifa.usda.gov/program/hispanic-serving-institutions-education-grants-program (last visited May 3, 2021)	21
Leah Libresco, <i>Here Are the Demands from Students Protesting Racism at 51 Schools</i> , FIVETHIRTYEIGHT (Dec. 3, 2015), https://fivethirtyeight.com/features/here-are-the-demands-from-students-protesting-racism-at-51-colleges/	24
Letter from Daniel D. Polsby, Dean, School of Law, to Hulett H. Askew, Consultant on Legal Education, ABA (Jan. 3, 2008) (available at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/05/Response-to-ABA-Site-Visit-Report-2.pdf).....	26-27

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Munk-skukum</i> , OR. STATE U. HOUSING & DINING SERVICES, https://uhds.oregonstate.edu/housing/munk-skukum (last visited Mar. 10, 2021)	13
<i>NSF's Hispanic-Serving Institution Program</i> , Nat'l Sci. Found., https://nsf.gov/ehp/HSI/ProgramPlan.jsp (last visited May 3, 2021)	21
Peter W. Wood, <i>Mobbing for Preferences</i> , CHRON. HIGHER EDUC. (Sept. 22, 2011), https://www.chronicle.com/blogs/innovations/mobbing-for-preferences	24
Precious G. Gunter, Florida Educational Equity Report 1 (2019), https://www.fgcu.edu/equity/documentsandreports/files/2019EquityReport.pdf	22
SCHOLA ² RS HOUSE, https://lc.uconn.edu/schola2rshouse/	11
<i>Tyler Hogan Oral History Interview</i> , OR. DIGITAL (2013), https://oregondigital.org/catalog/oregondigital:df724k56c#page/1/mode/1up	10
UJAMAA RESIDENTIAL COLL., https://cornell.campusgroups.com/urc/home/ (last visited Mar. 10, 2021)	8, 9

INTEREST OF *AMICI CURIAE*¹

Gail Heriot and Peter N. Kirsanow (“*Amici*”) are two members of the eight-member U.S. Commission on Civil Rights (“the Commission”). Members are part-time appointees of the President or Congress. This brief is being filed in *Amici*’s individual capacities as private citizens.

The Commission was established pursuant to the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957). One of the Commission’s core duties is to gather evidence on issues and make recommendations to Congress, the President and the American people. As then-Senate Majority Leader Lyndon Johnson put it, the Commission’s task is to “gather facts instead of charges”; “it can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men.” 103 Cong. Record 13,897 (1957) (statement of Sen. Johnson).

Amici believe that, as a result of their Commission work as well as their experience as a law professor (Heriot) and as a practicing lawyer and adjunct law professor (Kirsanow), which gave rise to their respective appointments, they are in a special position to inform the Court about the issues in this case.

¹ Pursuant to this Court’s Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This brief is an expanded version of *Amici's* certiorari-stage brief. In it, *Amici* respond to two of the assumptions that underpin the case for race-preferential admissions policies: (1) that these policies promote racial integration on campuses; and (2) that these policies are the result of expert academic judgments concerning the pedagogical benefits of a racially diverse class.

The evidence shows that neither assumption is true.

First, rather than promote the important goal of racial integration, race-preferential admissions policies have the perverse effect of promoting racial separation. Separate student lounges, separate student dormitories, and such things as separate orientations and graduation ceremonies are now a way of life on many campuses. It is *Amici's* view that one of the most significant factors in bringing about this state of affairs is the gap in credentials between students who were admitted to the school based on their own academic credentials and those who needed a preference. Put differently, race preferences are helping to cause the problem of racial separation rather than helping to solve it.

Second, while it's tempting to believe that race-preferential admissions policies are motivated by a concern for pedagogy—since that is the motive that is sanctioned by *Grutter v. Bollinger*, 539 U.S. 306 (2003)—the reality is different. Much more often, practical and ideological considerations that have nothing to do with the pedagogical benefits of diversity dominate. One of the most important ideological motivations—a belief that a debt is owed to an entire race as compensation for past wrongs—has already

been rejected as a justification for race-preferential admissions policies. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 307–09 (1978) (opinion of Powell, J.). And the very real practical motivations—like the need to appease state legislators or student protestors or the need to qualify for lucrative federal or foundation grants—should not under any circumstances receive judicial sanction.

Stripped of underpinnings like these, the case for tolerating race discrimination in admissions collapses. For this and other reasons, *Amici* urge the Court to overrule *Grutter*.

For background's sake, this brief also comments briefly on preferences based on socio-economic status. When such preferences are simply a pretext for race preferences, they should be viewed as on the same legal and constitutional footing as race preferences. When they are not adopted because of their relation to race, but rather as an end unto themselves, they should survive legal and constitutional scrutiny.

ARGUMENT

I. RACE-PREFERENTIAL ADMISSIONS POLICIES APPROVED IN *GRUTTER* DO NOT PROMOTE RACIAL INTEGRATION.

Excuse me, if y'all didn't know, this a [Multicultural Student Center] and frankly, there's just too many white people in here, and this a space for people of color. . . . So just be really cognizant of the space that you're taking up because it does make some of us POCs uncomfortable when we see too many white people in here.

This is not parody. This is a newspaper account of an incident at the University of Virginia. Joshua Rhett Miller, *Black Student Erupts Over 'Too Many White People' at UVA Multicultural Center*, N.Y. POST, Feb. 14, 2020, <https://nypost.com/2020/02/14/black-student-erupts-over-too-many-white-people-at-uva-multicultural-center>.

A. Race-preferential admissions contribute to self-segregation. This undermines the claim that preferences are necessary to achieve the educational benefits of diversity.

The Court has accepted the argument made by institutions of higher education “that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.” *Grutter*, 539 U.S. at 333. Learning to live and work in a racially integrated setting may be considered to be one of these educational benefits. *Amici* believe that the use of racial preferences in admissions does not promote those alleged benefits because racial preferences

lead many minority students to engage in self-segregation.

As a preliminary matter, let us state the obvious: Racial preferences at elite universities are used to admit black and Hispanic students who are by any measure very talented but whose academic qualifications are weaker than those of white and Asian admittees. If this were not so, no preference would be necessary.

Amici believe that admitting students because of their race who are, as a group, academically weaker than other students contributes to racial separatism on campus instead of promoting integration. The National Association of Scholars, in its report *Neo-Segregation at Yale*, traced the development of racial preferences and the almost simultaneous development of a parallel campus life for black students. Dion J. Pierre & Peter W. Wood, *Neo-Segregation at Yale*, NAT'L ASS'N OF SCHOLARS (2019), https://www.nas.org/storage/app/media/Reports/NeoSeg%20at%20Yale/NeoSegregation_at_Yale.pdf (hereinafter *Neo-Segregation*).

Jerome Karabel noted that during the 1960s, there may have been as few as 400 black male students nationwide with verbal SAT scores of 550 or higher—at a time when the tenth percentile of Yale admittees had verbal SAT scores of 591. Jerome Karabel, *How Affirmative Action Took Hold at Harvard, Yale, and Princeton*, 48 J. BLACKS HIGHER ED. 61 (2005). There were thus very few black students academically qualified to attend the most elite universities. Elite universities were initially loath to admit minority students whose academic qualifications were below those of white students, but the riots that swept the

country following the assassination of Martin Luther King, Jr. frightened them into doing so.

Unfortunately, black students who were admitted due to racial preferences struggled academically. Thomas Sowell, who was an economics professor at Cornell at the time of the Willard Straight takeover, wrote in 1999:

One of the most obvious factors [in racial tensions at Cornell] that receives virtually no attention were the serious academic problems of the black students admitted under lower academic standards. How much of their disaffection and alienation was a result of this painfully humiliating fact, obvious to the whites around them, and how much was due to the “racism” that they claimed to see everywhere, is a question that needed exploration, no matter how politically incorrect it might be to discuss such things. . . .

At the time, I was sufficiently alarmed by the well-known fact that half of the black students were on academic probation that I went over to the administration building and checked the files. It was here that I first learned of a pattern that would prove to be all too common at elite colleges and universities across the country: Most of the black students admitted to Cornell had SAT scores above the national average—but far below the averages of other Cornell students. They were in trouble because they were at Cornell—and, later, Cornell would also be in trouble because they were there.

Thomas Sowell, *The Day Cornell Died*, HOOPER DIGEST, Oct. 1999.

The disparity in academic qualifications between black and Hispanic students and Asian and white students persists. For example, at the University of Virginia in 2016 the median black admittee had an SAT score of 1240 points, the median Hispanic admittee had an SAT score of 1350, the median white admittee had an SAT score of 1420, and the median Asian admittee had an SAT score of 1480. Median undergraduate GPAs followed the same pattern: black admittees had a median GPA of 4.16, Hispanic admittees 4.26, white admittees 4.32, and Asian admittees 4.35. Althea Nagai, *Pervasive Preferences 2.0: Undergraduate and Law School Admissions Statistics Since Grutter*, CTR. FOR EQUAL OPPORTUNITY, Tables 3–5 (2021).

There is no need to belabor the point. The existence and persistence of credentials gaps have been known for decades.

Amici believe that the use of racial preferences has not promoted academic and social integration and thus has not promoted “the educational benefits of diversity.” Rather, students admitted with a preference often realize they are at an academic disadvantage. They are starting at a disadvantage and their classmates do not stand still while they catch up. They learn that they will have to find a niche at the university that does not require academic competitiveness. For many of them, racially separate dorms, student organizations, and courses are such a niche—places where, not coincidentally, they are

with students who not only share their skin color but often are at a similar academic level.²

History supports this view. No sooner had universities started to use racial preferences than racial minority students began to demand separate academic courses, living arrangements, and social events and spaces. UJAMAA RESIDENTIAL COLL., <https://cornell.campusgroups.com/urc/home/> (last visited Mar. 10, 2021).

One of us (Kirsanow) attended Cornell in the early years of Ujamaa House, a dormitory reserved for African-American students. He recalls:

Ujamaa had a higher concentration of “political” (or, in today’s terminology, “woke”) black students than other residence halls. There was a greater insularity among Ujamaa residents than the rest of the black students on campus. The tendency to self-segregate while dining, partying, and studying persisted from matriculation through graduation. A vague sense of militancy hung over the dorm; allegations, rumors, and protests of disparate treatment seemed disproportionately to emanate from Ujamaa relative to blacks in other residence halls.

² For a discussion of the empirical research indicating that the country would have more African American physicians, scientists, and engineers and likely more African American lawyers and college professors if colleges and universities engaged in race neutral admissions, see Gail Heriot, *A Dubious Expediency in A DUBIOUS EXPEDIENCY* 19 (Gail Heriot & Maimon Schwarzschild, eds., 2021).

Peter N. Kirsanow, *Segregation Now*, in *A DUBIOUS EXPEDIENCY* 111, 112 (Gail Heriot & Maimon Schwarzschild, eds., 2021).

Little appears to have changed since the 1970s. Today, Ujamaa Residential College is a residential complex that “celebrates the rich and diverse heritage of Black people in the United States, Africa, the Caribbean, and other regions of the world.” Prospective residents are assured: “Understand that we, the Ujamaa residential team, foster individuals defining their Blackness and living in their truth.” UJAMAA RESIDENTIAL COLL., <https://cornell.campusgroups.com/urc/home/> (last visited Mar. 10, 2021). What black students from the United States, Africa, and the Caribbean have in common other than skin color is left unexplained.

The widespread existence and promotion of racially segregated housing, student groups, cultural centers, orientations, graduations, and recruitment programs suggests that universities are not primarily interested in the educational benefits of racial diversity. If the purpose of racial preferences is to create an environment where students are exposed to classmates of different races and backgrounds, establishing separate racial enclaves is a strange way to go about it. And that is exactly what these are. Below is an example of student support for racially separate arrangements, as well as a mission statement from an organization.

In an oral-history interview for the Native American Longhouse Eena Haws [hereinafter NAL Eena Haws] at Oregon State University, a student said:

NF: And how would you describe the impact of the Longhouse on native students?

TH: I would say, we always say we're a home away from home but we really are. You start to develop a family after you've been here long enough, these people become such close friends that when you don't see them for a day, you're like "oh wait, where is so and so? Why are they not here right now and I know they don't have class right, they're supposed to be in here" and **so it's really cool building that sense of community, especially because most of our communities are relatively small, oftentimes it's just, you know, a family, an extended family or whatever.** And you get to build that while you are here on campus, **only you do it with the friends that will become your kind of native OSU family.**

Tyler Hogan Oral History Interview, OR. DIGITAL 10–11 (2013), <https://oregondigital.org/catalog/oregondigital:df724k56c#page/1/mode/1up> (emphasis added).

In 2016, the University of Connecticut established a "learning community" called "SchOLA²Rs House (Scholastic House Of Leaders in Support of African American Researchers & Scholars). This is the official mission of SchOLA²Rs House on UConn's website:

SCHOLA²RS House is a Learning Community designed to support the scholastic efforts of male students who identify as African American/ Black through academic

and social/emotional support, access to research opportunities, and professional development. The intent of this Learning Community is to increase the retention and persistence of students using educational and social experiences to enhance their academic success at UConn and beyond in graduate and professional school placement. ScHOLA²Rs House will encourage involvement with the larger university community to foster peer and mentor relationships and will actively engage students in inclusion efforts at UConn.

ScHOLA²Rs HOUSE, <https://lc.uconn.edu/schola2rs/house/> (last visited Mar. 11, 2021).

B. Racial separatism on campus is getting worse, not better. If racial preferences and separate spaces promote integration, then there should be less demand for preferences and separate racial programs now than in the 1970s.

Once one group of people receive preferences in admissions, separate dorms, special university recognition, extra counselors, extra financial aid, and so on, other groups of people want as many of the same things as they can finagle. That is exactly what happened.

After black students at Yale succeeded in pressuring the administration into increasing black enrollment and creating an Afro-American Studies major, a Puerto Rican student group, *Despierta Boricua*, urged Yale to eliminate its SAT requirement and staff its admissions office with Puerto Ricans. *Neo-Segregation*, 66–67.

The same pattern can be seen in the crusade by Asian-American students at Cornell in the mid-2000s to force the university to establish a separate Asian student center (now known as A3C). In a blog post, a Cornell student active in the effort to establish A3C wrote, “[I]f Cornell administrators say they support program housing, it’s about time they speak up on this issue While the A3C will not be a program house, program houses and the A3C (as well as the Lesbian, Gay, Bisexual, Transgender Resource Center) are safe spaces for oppressed groups to gather and have resources devoted to their needs.” Caroline Hugh, *Recent Editorials/Articles*, CORNELL’S A3C BLOG (Mar. 6, 2009, 11:37), <https://a3c-cornell.blogspot.com/2009/03/recent-editorials.html>. Once one group has “resources devoted to their needs,” everyone else will claim they too are oppressed and in need of separate “safe spaces.”

Although colleges and universities began establishing separate housing facilities, graduation ceremonies, and student centers for minority students in the 1970s, they continue to establish new racially separate programs and spaces. The problem is getting worse, not better.

Proponents of racially separate facilities and activities argue that they will help minority students feel more integrated into campus life. *Amici* believe the effect has, in many cases, been the opposite. In fall 2020, Oregon State University established the *munkskukum* Indigenous Living Learning Community, which “offers a residential space for students to find community, explore cultural identity and learn more about the lands on which they will be residing. This community offers connections to other students with a shared interest in centering Indigenous people,

cultural events on campus and to resources to help support students.” *Munk-skukum*, OR. STATE U. HOUSING & DINING SERVICES, <https://uhds.oregonstate.edu/housing/munk-skukum> (last visited Mar. 10, 2021).

In 2017, the University of Southern California established the Asian, Pacific Islander, Desi American Leaders Community in a residence hall. That program grew out of USC’s Asian Pacific American Student Services (APASS), which was established in 1982 because students felt the administration did not “appreciate[] their diverse cultural experiences.” *APASS History*, APASS, <https://apass.usc.edu/about/history/> (last visited Mar. 10, 2021).

Both NAL Eena Haws (mentioned above) and APASS seem to have contributed to a desire among students for more racial separation, not less. In both cases, separate gathering spaces were the forerunners of separate living spaces.

The existence and continued establishment of racially segregated programs and living arrangements illustrates that universities use different definitions of “diversity” depending on their audience. As Peter Wood has written:

Diversity is marketed to white students as a life-enhancing and educationally enriching encounter with students of other races and ethnicities. But when colleges speak of *diversity* to minority students, that integrationist rhetoric and imagery disappears and is replaced by strong assurances that the university has an abundance of students in their own racial group and lots of well-funded

opportunities to bond with people *just like you*.

Peter W. Wood, *Diversity's Descent*, in *A DUBIOUS EXPEDIENCY* 87, 99–100 (Gail Heriot & Maimon Schwarzschild, eds., 2021).

In one breath, universities tell the courts and the public that racial preferences are necessary to guarantee sufficient diversity that students of different races mix. In the next, they tell minority students that “diversity” means the school has sufficient resources to minimize interaction with students of other races, should that be the student’s wish. It is unlikely universities can successfully fulfill both these promises.

II. RACE-PREFERENTIAL ADMISSIONS POLICIES THAT PURPORT TO BE AUTHORIZED BY *GRUTTER* ARE SELDOM MOTIVATED BY THE DESIRE TO REAP THE EDUCATIONAL BENEFITS OF DIVERSITY FOR ALL STUDENTS.

In *Grutter*, this Court deferred to the University of Michigan Law School’s “educational judgment that . . . diversity is essential to its educational mission.” 539 U.S. at 328. But colleges and universities are not guided by careful consideration of pedagogy in setting their race-preferential admissions policies.³ Their

³ In 2015, hoping to get a sense of each university’s deliberative process, *Amici* worked with the Center for Equal Opportunity to send public records requests to twenty-two public universities. *Amici* asked for any document even mentioning the problem of “mismatch” or the leading empirical studies on that topic (see Gail Heriot, *A Dubious Expediency in A DUBIOUS EXPEDIENCY* 19 (Gail Heriot & Maimon Schwarzschild, eds., 2021)). *Amici* believed—and continue to believe—that no responsible university would

actual motivations are much messier. The American poet John Godfrey Saxe commented in 1869, “Laws, like sausages, cease to inspire respect in proportion as we know how they are made.” DAILY CLEVELAND HERALD, Mar. 29, 1869, at 1. He could have been speaking of modern admissions policies.

A. Ideological motivations shape race-preferential admissions policies.

Many academics candidly admit that “social justice” or “compensation for past discrimination,” rather than the educational benefits of diversity, is what motivates their support for race-preferential admissions. Columbia University law professor Kent Greenawalt—a skeptic of these policies—once declared, “I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students. . . .” Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979). See also Brian Fitzpatrick, *The Diversity Lie*, 27 HARV. J.L. & PUB. POL’Y 385 (2003); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 34 (2002) (“[M]any of affirmative action’s more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.”); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) (“The purpose

develop its admissions policy without at least considering the evidence that preferential treatment decreases, rather than increases, the likelihood of career success for minority students. *Amici* got back nothing. The universities evidently hadn’t given it a thought.

of affirmative action is to bring into our nation's institutions more blacks, more Hispanics, more Native Americans, more women, sometimes more Asians, and so on—period. Pleading diversity of backgrounds merely invites heightened scrutiny into the true objectives behind affirmative action.”); Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 *PHILOSOPHY & PUB. POL'Y* 37 (1997) (“[T]wo defenses of affirmative action—diversity and compensatory justice—emerged in the fierce struggles of the 1970s and are standard today, but I see them as simply rationalizations created to appeal to the broadest constituency. . . . In my opinion, affirmative action should be seen as a means that seeks to eradicate caste structure by altering the social standing of our country's most subordinated group.”); Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 *OHIO N.U. L. REV.* 1159, 1161 (1996) (citing past discrimination as “the most frequently identified objective for affirmative action”); Alan Dershowitz, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 *CARDOZO L. REV.* 379, 407 (1979) (“The raison d'être for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals”); Daniel Golden, *Some Backers of Racial Preferences Take Diversity Rationale Further*, *WALL ST. J.*, June 14, 2003 (quoting former University of Texas law professor Samuel Issacharoff: “The commitment to diversity is not real. None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint.”).

Harvard law professor Randall Kennedy, an affirmative-action proponent, put it even more pointedly:

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), <https://prospect.org/features/affirmative-reaction/>.

In recent years, the dominant cultural rhetoric has focused on combatting "structural racism" or "systemic racism," which suggests righting past and present wrongs. The advocacy literature concentrates even more on "social justice" themes, including slavery reparations. While the term "diversity" still gets bandied about, the educational benefits of diversity don't get much mention. *See, e.g.*, JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES AND FUTURE REPARATIONS* (2018); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF INEQUALITY IN AMERICA* (2009).

B. Practical motivations shape race-preferential admissions policies.

Practical motivations—frequently stemming from pressure from outside forces—play a significant role in setting race-preferential admissions policies, too. Even at colleges and universities that would have leaned towards race-preferential admissions anyway, outside pressure strengthens the hands of those who favor the most aggressive policies and discourages their more cautious colleagues.

In a poll taken by political scientists Susan Welch and John Gruhl in the late 1990s, more than 23% of medical school and 15% of law school admissions officers reported that they have felt “significant” or “some” pressure to engage in “affirmative action” from state or local governments. SUSAN WELCH & JOHN GRUHL, *AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS* 80, Table 3.3 (1998) [hereinafter *ENROLLMENTS IN MEDICAL AND LAW SCHOOLS*]. To our knowledge, no recent poll has asked that same question. But given the growth of identity politics over the last twenty years, any suggestion that the pressure has decreased rather than increased seems unlikely.

State legislatures control state university budgets, and no public university president would be wise to forget that. In 1995, University of California Regent Ward Connerly authored a policy ending race-preferential admissions at UC and persuaded the Board of Regents to adopt it. The California legislature’s majority was not sympathetic to Connerly’s view. Connerly described UC President Jack Peltason’s reaction this way:

“Jack said, ‘look we got a legislature to deal with . . . that really has yes or no over our budget.’ The code for everything that he was saying is that it’s a Democratically controlled legislature. Willie Brown was the speaker and John Vasconcellos was chairing the Budget Committee, and John took a real interest in the University. So Jack’s concerns were that, ‘God, we’re going to run into a buzz saw here,’ and looking out for the best interests of the University, don’t rock the boat.”

DONALD E. HELLER, *THE STATES AND PUBLIC HIGHER EDUCATION POLICY* 145 (2001).

Sometimes legislative pressure is very public—as in the case of the University of Delaware in 2015. The *News Journal* reported:

Delaware’s flagship university is facing new questions about a lack of diversity on campus, with students, state lawmakers, and civil rights leaders calling on the University of Delaware to do more to recruit and retain black students.

. . . .

Sen. Harris McDowell, a Wilmington Democrat and co-chair of the budget committee, said the university’s record on diversity is “disappointing.”

“The data is very discouraging,” McDowell said.

Budget Committee member Rep. James “J.J.” Johnson, a New Castle Democrat, said the university must work harder to close the racial gap.

Jon Offredo & Jonathan Starkey, *NAACP, State Lawmakers: UD is Lacking in Diversity*, NEWS JOURNAL, Feb. 10, 2015, at A1, A12. Leaders at the University of Delaware almost certainly understood what to do to return to the legislature's good graces: Up the ante on race-preferential admissions.

Another significant influence on admissions policy is the federal government. Some admissions officials have reported threats of legal action and threats to withhold funds; others reported that the need to fill out federal paperwork effectively pressures them to engage in affirmative action. ENROLLMENTS IN MEDICAL AND LAW SCHOOLS at 80, Table 3.3. But it is the carrots rather than the sticks that have the most profound effects. Former dean of the graduate division of UC, Santa Cruz, John Ellis—now an opponent of race-preferential admissions—has candidly admitted that he started his school down the wrong road in order to qualify for federal monies in the 1970s:

[At] the beginning of my terms as Graduate Dean at UCSC we had as yet no affirmative action program for graduate student admissions. And so when my office chief-of-staff got wind of a soon-to-be announced federal program of grants to campuses to provide fellowships for minority and women graduate students, we both had the same thought: of course, we'd like more money to support our graduate students—but mainly we want more money, whatever it may be earmarked for.

John Ellis, *Down the Slippery Slope, in A DUBIOUS EXPEDIENCY* 7, 8 (Gail Heriot & Maimon Schwarzschild, eds., 2021).

A well-funded example is the Hispanic Serving Institution (“HSI”) program: The federal government currently gives special funding to schools that qualify as HSIs. PUB. L. 105-244, 112 Stat. 1581 1765-74 (§§ 501-18) (1998) (codified at 20 U.S.C. §§ 1101-1101d). In FY 2022, the U.S. Department of Education requested over \$561 million for HSIs. This was up from FY 2021’s budget of about \$256 million. Dep’t of Educ., Fiscal Year 2022: Budget Summary 51 (2021), <https://www2.ed.gov/about/overview/budget/budget22/summary/22summary.pdf>.⁴

To qualify as an HSI a college or university must have a Hispanic enrollment of 25% or more. This is strictly a racial/ethnic requirement; there is no requirement that the Hispanic students at these universities be English learners. Eligibility is also determined by a few other requirements, but the program is named for its most important consideration: It is for *Hispanic-Serving Institutions* only.

The HSI program cannot be justified as a remedy for past discrimination by the college or university since colleges and universities are not required to demonstrate past discrimination. It cannot even be justified as an effort to promote diversity since an HSI can be 100% Hispanic and still receive federal funds. See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)

⁴ In addition to funding from the Department of Education, HSIs are also eligible for funding from the Department of Agriculture and the National Science Foundation. See generally *Hispanic-Serving Institutions Education Grants (HSI) Program*, NAT’L INST. OF FOOD AND AGRIC., <https://nifa.usda.gov/program/hispanic-serving-institutions-education-grants-program>; *NSF’s Hispanic-Serving Institution Program*, NAT’L SCI. FOUND., <https://nsf.gov/ehp/HSIProgramPlan.jsp>.

(holding unconstitutional a race-preferential school assignment scheme that could not be justified on either ground).

Currently, there are several hundred HSIs. Many other schools aspire to join the list. For example, a 2019 document approved by the trustees of Florida Gulf Coast University (“FGCU”) noted that FGCU “continues to see an increase in enrollment of Hispanic students currently accounting for 20 percent of enrollment.” It further noted that “[o]nce the University reaches 25 percent Hispanic enrollment, we will be eligible to apply for [HSI designation], which would open up the door to additional federal funding.” Precious G. Gunter, Florida Educational Equity Report 1 (2019), <https://www.fgcu.edu/equity/documents/andreports/files/2019EquityReport.pdf>.

By December 2021, FGCU was close to achieving its goal. It only needed to increase its percentage of Hispanic students from 24% to 25% of the student population.

“Achieving an HSI status allows us to become eligible for a lot of funding. That then can support our students, our faculty and support our staff so it’s really important to have [the] ability to have access to additional funding that is specifically designated for Hispanic[-] serving institutions,” vice-president of student success and management, Mitch Cordova said.

Stephanie Fernandez, Local University Aims to Become Hispanic Serving Institution, FOX4NOW (Dec. 15, 2021, 10:51 PM), <https://www.fox4now.com/news/local-news/local-university-aims-to-become-hispanic-serving-institution>. See also Anne Delaney,

University of Northern Colorado Aims for Status as Hispanic Serving Institution, GREELEY (CO) TRIBUNE, Sept. 1, 2021, <https://www.greeleytribune.com/2021/09/01/university-of-northern-colorado-aiming-for-status-as-hispanic-serving-institution/>.

The incentive this creates to give preferential treatment to Hispanic students should be obvious. Getting to 25% opens the spigot for federal funding.⁵

Private foundations and alumni donors have a similar effect on admissions policies. By offering carrots to institutions to increase race preferences, donors can surely assume they get results. *See, e.g.*, DARYL G. SMITH, ET AL., BUILDING CAPACITY (2006), <http://hdl.handle.net/10244/51> (discussing a \$29 million effort to assist California colleges and universities with strategically improving campus diversity);

⁵ This makes the HSI program very different from the program for Historically Black Colleges and Universities (“HBCUs”). An HBCU is an institution that was established prior to the Civil Rights Act of 1964 with the intention of primarily serving African American students. *See* Pub. L. 99-498, 100 Stat. 1294 §§ 321-327 (1986)(codified at 20 U.S.C. § 1060). It is subject to the same anti-discrimination laws as any other university. Many HBCU students are white, and some HBCUs are majority white. *See* Shereen Marisol Maraji & Gene Demby, *The Whitest Historically Black College in America*, CODE SWITCH (Oct. 18, 2013), <https://www.npr.org/sections/codeswitch/2013/10/18/236345546/the-whitest-historically-black-college-in-america>. No HBCU need fear losing its status on the ground that its black enrollment slips below the mandatory quota. Congress premised the federal HBCU program on the ground that these institutions had been discriminated against in the past in federal and state funding. In a sense, the HBCU program may also have been founded on the recognition that the Civil Rights Act of 1964, while a good thing for the country, had put schools that had been founded to ensure that African Americans could get a college education in a vulnerable position.

Commitment to Diversity Leads to Gift, MORITZ COLLEGE OF LAW (Apr. 5, 2012), <https://moritzlaw.osu.edu/briefing-room/alumni/commitment-to-diversity-leads-to-gift/>.

Appeasing students' demands is part of the story, too. In 2011, for example, at the University of Wisconsin, a student mob, egged on by the University's Vice Provost for Diversity and Climate, overpowered hotel staff, knocking some to the floor, to interrupt a press conference at which the speaker was critical of race-preferential admissions policies. Peter W. Wood, *Mobbing for Preferences*, CHRON. HIGHER EDUC. (Sept. 22, 2011), <https://www.chronicle.com/blogs/innovations/mobbing-for-preferences>. No doubt this was bad publicity for the University of Wisconsin and its president. The easiest way to calm the students down is to try to give them at least part of what they want.

The Wisconsin protest was more unsettling than most, but there are many other examples. In 2015, one writer found 21 schools where students had issued formal demands for increased student diversity. Leah Libresco, *Here Are the Demands from Students Protesting Racism at 51 Schools*, FIVETHIRTYEIGHT (Dec. 3, 2015), <https://fivethirtyeight.com/features/here-are-the-demands-from-students-protesting-racism-at-51-colleges/>. In 2019, over 200 students at the University of Alabama carried signs, chanted, and marched to the President's office to demand, among other things, greater diversity. Upon their arrival at the administration building, they were greeted by President Stuart Bell, who agreeably told them that he, too, wanted a safe, inclusive, and diverse university for students. "I appreciate you taking the time out of your schedule," he told them. "You have

my pledge that we will take this, and we will look at providing action items as we move forward.” At that point, one of the protestors told him to shut up. Ben Flanagan, *Watch Alabama Students March for Diversity and Free Speech in Wake of Dean’s Resignation*, AL.COM, Sept. 20, 2019, <https://www.al.com/news/2019/09/watch-alabama-students-march-for-diversity-and-free-speech-in-wake-of-deans-resignation.html>.

In 2020, students at the University of South Carolina and students and alumni at Michigan State University held diversity-inspired marches. Holly Poag, *Students Demand Greater Diversity, Inclusion on Campus*, DAILY GAMECOCK, June 21, 2020, <https://www.dailygamecock.com/article/2020/06/students-take-action-to-promote-diversity-and-inclusion-on-campus-poag-news>; Devin Anderson-Torrez, *‘Equity Over Equality’: MSU Students and Alumni March, Demanding University to Represent Their Community*, STATE NEWS, June 15, 2020, <https://statenews.com/article/2020/06/equity-over-equality-msu-students-demand-changes-in-university>.

Lastly, accreditors exert pressure on colleges and universities to implement race-preferential admissions policies. Because they can decide whether particular colleges or universities will be eligible for federal funding, including funding for student loans, they have the power of life or death over these institutions. That puts them in the position to act as “cartel enforcers” for the orthodoxy of race preferences.

By the late 1990s, 31% of law schools and 24% of medical schools polled by Welch and Gruhl reported that they “felt pressure” “to take race into account in making admissions decisions” from “accreditation agencies.” It is interesting that Welch and Gruhl didn’t ask directly about accreditation agencies. As

discussed above, they asked respondents about pressure from the federal, state, or local governments. Only after that did they ask in a catch-all question if they had felt pressure from other sources. If respondents answered “yes,” they were asked to specify which groups. The information about accreditors was thus volunteered and likely to be understated. See ENROLLMENTS IN MEDICAL AND LAW SCHOOLS at 80.⁶

⁶ Given the confidentiality of the accreditation process, most cases are never publicized and must be dug out through public records requests. There is plenty of evidence, however, that the Liaison Committee on Medical Education (“LCME”), which describes itself as consisting of “medical educators and administrators, practicing physicians, public members and medical students,” has been finding medical schools “noncompliant” with its diversity standards. Similar evidence exists for the American Bar Association’s Section on Legal Education and Admissions to the Bar (the “ABA”), which accredits law schools and for a number of other accreditors. See Gail Heriot & Carissa Mulder, *The Sausage Factory*, in A DUBIOUS EXPEDIENCY 167 (Gail Heriot & Maimon Schwarzschild, eds., 2021) (hereinafter *The Sausage Factory*).

Occasionally egregious cases—like that of George Mason University’s law school—come to light. Between 2000 and 2007, the ABA refused to renew that law school’s accreditation until it satisfied the ABA’s relentless demands that it admit more and more under-represented minority students. Trying desperately to appease the ABA, the law school admitted students against the better judgment of its faculty. As a consequence of that effort at appeasement, African-American students experienced dramatically higher rates of academic failure at that institution: 45% of African-American law students experienced academic failure as opposed to only 4% of students of other races. In a 2008 letter to the ABA, Dean Daniel Polsby put the problem plainly: “We have an obligation to refrain from victimizing applicants, regardless of race or color, by admitting them to an educational program in which they appear likely to fail.” Letter from Daniel D. Polsby, Dean, School of Law, to Hulett H. Askew, Consultant on Legal

What should be made of these various pressures on colleges and universities? It is unlikely that the Court in *Grutter* would have approved the University of Michigan's race-preferential admissions policy if its explanation for it had been: "This is what our state legislature wants, and it is our judgment that without the legislature's support, our educational mission will suffer"; or, "The Ford Foundation is very enthusiastic about race-preferential admissions, and that's where the money is."

Similarly, justifications like, "Some of our students really want more racial diversity in their classes, and we like to please our customers," or even, "Some of our students are so exercised over this issue that we think that it is in the best interests of their education—and everyone's education—to give them what they demand," would likely have been rejected. Race discrimination cannot be justified by a desire to satisfy the demands of protesters.

It is also unlikely that the Court would have approved the University of Michigan Law School's policies if it had argued, "We discriminate because otherwise our ideologically motivated accrediting agency would cut us off from federal aid and cut our students off from taking the bar exam." If accreditors rather than individual schools are pulling the strings, it is difficult to see how the resulting admissions policies should be viewed as consistent with *Grutter* deference, which was intended to allow colleges and

Education, ABA (Jan. 3, 2008) (available at <http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/05/Response-to-ABA-Site-Visit-Report-2.pdf>). For a more detailed account of this story, see *The Sausage Factory*. See also David Barnhizer, *A Chilling Discourse*, 50 ST. LOUIS L.J. 361 (2006) (describing ABA influence on faculty diversity-hiring).

universities some measure of autonomy, not to foster academic conformity.

Yet explanations like these are more consistent with aggressive efforts to enroll minority students despite large gaps in academic credentials than is any effort to capture diversity's educational benefits for all its students. It is beyond comprehension that a college or university would neglect to consider the pedagogical problems created by the inevitable gaps in academic credentials if the educational benefits of diversity were in fact its primary concern.

III. WHEN SOCIO-ECONOMIC STATUS AND OTHER PREFERENCES ARE A PRETEXT FOR RACIAL PREFERENCES, THEY ARE ON THE SAME LEGAL AND CONSTITUTIONAL FOOTING AS RACIAL PREFERENCES, BUT WHEN THEY ARE ADOPTED AND IMPLEMENTED FOR THEIR OWN SAKE, THEY ARE MUCH MORE LIKELY TO HOLD UP TO LEGAL AND CONSTITUTIONAL SCRUTINY.

Preferences based on socio-economic status ("SES") are sometimes held out as a substitute for racial preferences.

The policy arguments for and against these alternative admissions policies are interesting and varied but need not be enumerated here. What is important here is their legality and constitutionality. When SES preferences or percent solutions are adopted *because of* their effect on the racial composition of the class, they are on the same legal and constitutional footing as racial preferences. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (if an employer's stated reason for rejecting plaintiff's application for

employment was a pretext for race discrimination, the employer has violated Title VII).

But such preferences are not always adopted for that purpose. Even state universities that adopt SES preferences immediately following a state ban on race-preferential admissions policies, *see, e.g.*, Cal. Const. art. I § 31, cannot be conclusively presumed to be acting pretextually. Its leaders may sincerely believe that SES preferences are a good in themselves. It could be the case that they would favor them even if the policy would have no effect whatsoever on the racial composition of the class.

The best way to tell whether these universities are using SES preferences as a pretext is to look at their SES metrics. Most measures of SES are only loosely related to race. Nevertheless, by carefully engineering the SES metrics a university can produce whatever racial mix it deems desirable. For example, in California, if it wants more African Americans it can give points for coming from an urban household. If it wants more Latinos, it can give greater weight to coming from a non-English-speaking household. If it wants to exclude Asian Americans, it can give greater weight to students who come from fatherless households. The level of engineering can (and sometimes does) get so intricate that the university makes its intentions apparent.

CONCLUSION

Racial preferences are not the result of academia's expert judgment on pedagogical matters. Moreover, they do not promote a racially integrated society. In 2003, Justice Sandra Day O'Connor, in her majority opinion in *Grutter*, wrote that "[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary." *Grutter*, 539 U.S. at 310. That time is almost up, and no progress has been made. The anomaly in the law created by *Grutter* should end now.

For the foregoing reasons, *Amici* respectfully request the Court to overrule *Grutter*.

Respectfully submitted,

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