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 FOR ANN M. KILLENBECK AND MARK R. KILLENBECK AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

STUART TAYLOR, JR.
Counsel of Record
3911 Jocelyn St. NW
Washington, DC 20015
(202) 365-1812
stuarttaylorjr@gmail.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*[1]

Ann M. Killenbeck is a Professor of Law at the University of Arkansas School of Law. She has a longstanding interest in the issues posed by the decisions on the part of colleges, universities, and professional schools to admit a "diverse" entering class and their use of race-based preferences to achieve the educational benefits that arguably flow from a diverse educational environment. She has published a number of chapters and articles on these matters. Her doctoral dissertation, completed at the University of Michigan was one of the very first attempts to determine if a diverse student body and diverse learning environments and practices had any actual effects on law students during their first year of legal studies.

Mark R. Killenbeck is the Wylie H. Davis Distinguished Professor of Law at the University of Arkansas School of Law. He also has a long-standing interest in these issues and has also published a number of chapters and articles on these matters.

Both are founding editors and now serve as two of the three principal Editors of a website designed to provide complete, accurate, and objective information on affirmative action and diversity:

affirmativeactiondebate.org

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[1] No counsel for a party wrote this brief in whole or in part, and no party, counsel for a party, or anyone else made a monetary contribution intended to fund the preparation of submission of this brief. Counsel of record for all parties have filed blanket consent.

SUMMARY OF ARGUMENT

The Court has consistently held that the permissibility and proper use of race-based preferences in the pursuit of "student body diversity" are matters of educational judgment, not social policy. This is predicated on the assumption that certain specific educational outcomes supposedly associated with diversity are "not theoretical but real." *Grutter v. Bollinger*, 539 U.S. 306 (2003). Amici believe, and the Court confirmed in *Fisher v. The University of Texas at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*), that this imposes positive and continuous obligations on any college, university, or professional school that uses such preferences. Specifically, these entities must continuously and rigorously assess whether these benefits and outcomes actually occur and whether the use of preferences is still necessary. Unfortunately, to the best of our knowledge, there is no evidence that suggests that these institutions routinely do so. Indeed, neither the litigants in these cases, nor the courts below, have fashioned a record or decisions that live up to the obligations imposed by *Fisher II*. Rather, they focus almost exclusively on the admissions process, which is simply a *means* toward achieving the necessary *end*: meaningful, measurable education outcomes.

The Court may, or may not, bar the use of group identity preferences. We believe that the failure to live up to the full set of expectations imposed by the Court provides a possible basis for barring the use of preferences, if the Court is so inclined. Further, regardless of what the Court does, it is quite clear that

highly selective colleges, universities, and professional schools will continue to employ preferences in various forms. The Court should accordingly reaffirm that any such policies must be both designed to achieve the benefits outlined in *Grutter* and *Fisher II* and be continuously evaluated on that basis.

ARGUMENT

I. The "Compelling" Interest in Attaining Student Body Diversity Is an Educational Matter Tied to the Attainment of Specified, Measurable Educational Outcomes

The Court has maintained for close to fifty years that affirmative action and diversity are permissible as matters of educational policy, not social justice. A university's "broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." *Regents of the University of California v. Bakke*, 438 U.S. 265, 309 (1978). Specific actors have the power to remedy the present effects of their own past discrimination. *See, e.g.*, *Parents Involved in Community Schools, Inc. v. Seattle School District No. 1*, 551 U.S. 701, 721 (2007) (remedying the present effects of one's own past discrimination as one of only two compelling interests endorsed by the Court). But colleges and universities do not have a general warrant to "help[] certain groups" they "perceive[] as victims of 'societal discrimination.'" *Bakke*, 438 U.S. at 310. Rather, they are free to make an academic judgment that admitting a diverse class of matriculants is "integral to [their] mission." *Fisher v. The University of Texas at Austin*, 570 U.S. 297, 310 (2013) (*Fisher I*). To state the

obvious: that is and must be purely an educational decision, predicated on the notion that the students who are admitted and enroll will begin to realize "the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330.

This poses opportunities and challenges. As matters currently stand, institutions may adopt race-based preferences. But they must be prepared to defend them in three key respects. They must meet the requirements imposed by "strict scrutiny," the standard applied to any classification that uses the otherwise "inherently suspect" element of race, given that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting) & *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The policy must be central to that institution's declared academic mission. *See, e.g. Grutter*, 539 U.S. at 328 (emphasizing the need to show that a university's "educational judgment that such diversity is essential to its educational mission"); *Fisher I*, 570 U.S. at 308 & 310 (focus on diversity as "integral to [institution's] mission"); *Fisher v. The University of Texas at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*) (same). And the policy must be designed to, and in fact produce, actual educational and social outcomes. *Fisher I*, 570 U.S. at 330 (stressing that the ultimate goal is to attain "the educational benefits that flow from student body diversity").

Initial treatment of these matters in both *Bakke* and *Grutter* was in key respects cursory. The importance of diversity as an educational matter was clear. But precisely what was required was not outlined in any real detail. In *Bakke*, for example, Justice Powell characterized "the interest in diversity" as "compelling in the context of a university's admissions program." *Bakke*, 438 U.S. at 314. It is, he agreed, "an essential ingredient [in] the educational process." *Id.* at 312. But he did not tie it to any particular benefits, other than its ability to "reflect[] the rich diversity of the United States," *id.* at 323, and to promote a "robust exchange of ideas." *Id.* at 313. Indeed, as one of us has stressed, "Justice Powell [simply] took the claims made by the higher education establishment at face value," transforming "*intuitive* judgment[s] and . . . 'widely' shared 'beliefs' [that] were not documented in any meaningful fashion" into constitutionally permissible goals. Ann Mallatt Killenbeck, *Bakke, with Teeth? The Implications of Grutter v. Bollinger in an Outcomes-Based World*, 36 *J.C. & U.L.* 1, 17 (2009) (A. Killenbeck, *Bakke with Teeth*).

Grutter was the first step in linking diversity to actual, demonstrable educational and social outcomes and the differences between *Bakke* and *Grutter* are stark. While "Justice Powell was willing to accept at face value what the pro-diversity litigants before him maintained . . . Justice O'Connor [was] not." *Id.* at 31. The Court did "defer" to the Michigan Law School's judgment that the attainment of student body diversity was an essential element of its mission. *Grutter*, 539

U.S. at 328.[2] It did not, however, simply accept its judgment that diversity was a compelling constitutional interest at face value, or rubber stamp the means by which the Law School pursued that goal. Rather, it dutifully applied the rigors of strict scrutiny.

Given both "evidence" and "experience," Justice O'Connor declared, the "substantial . . . benefits [of diversity] are not theoretical but real." *Grutter*, 539 U.S. at 328. The importance of achieving such outcomes was couched within the general need to attain "the skills needed in today's global marketplace . . . developed through exposure to widely diverse people, cultures, and viewpoints." *Id.* Justice O'Connor stressed, in turn, that studying and living in a diverse environment would led to a series of specific benefits and outcomes. "[N]umerous studies," she stated, had convinced the majority that "student body diversity promotes [certain] learning outcomes," including "'cross-racial understanding,' help[ing] to break down racial stereotypes, and 'enabl[ing] [students] to better understand persons of different races.'" *Id.* (quoting the Law School admissions policy). These benefits were "'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' where the students have 'the greatest possible variety of backgrounds.'" *Id.*

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[2] Questions of the extent to which "deference" and "good faith" were elements of the O'Connor opinion have plagued subsequent discussions of the case. But those statements were purely descriptive, a judicially appropriate determination that institutions should be free "to define [their] institutional mission." A. Killenbeck, *Bakke with Teeth*, at 32.

We have discussed at some length Michigan's decision to defend its policies on the basis of "'research evidence' regarding 'the educational value of diversity.'" *See, e.g.*, Ann M. Killenbeck, *The Devil Is In the Lack of Details*, 85 *Ind. L.J.* 1261, 1266 (2010) (quoting Patricia Gurin et al., *The Educational Value of Diversity*, in *Defending Diversity: Affirmative Action at the University of Michigan*, at 97, 99 (Patricia Gurin et al. Eds. 2004)) (Killenbeck, Devil).[3] That strategy placed a number of works before the Court addressing these issues and led a substantial number of organizations and individuals to submit briefs in support of Michigan's policies. *See Grutter*, 539 U.S. at 330 (citing Brief for American Educational Research Association et al. as *Amici Curiae* at 3; William Bowen & Derek Bok, *The Shape of the River* (1998); *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Gary Orfield & Michael Kurlaender Eds. 2001); *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (Mitchell Chang, Daria Witt, James Jones, & Kenji Hakuta Eds. 2003)).

But with one exception, *see* Patricia Gurin et al., *The Educational Value of Diversity*, in *Defending Diversity*, at 97, none of the studies in question were tied to the actual student body at Michigan or to actual experiences over time while enrolled there. They were, rather, valuable but general treatments. Many focused

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[3] Ann notes here the beginnings of a deliberate decision and protracted process to take what we characterize as a "social science turn" in a series of meetings convened by the Harvard Civil Rights Project in the Spring of 1997. We were both invited participants in one of those gatherings.

on normative issues, stressing, for example, the widely held belief in higher education circles that "the state has a weighty and compelling interest in making it possible for higher education to help write a positive story of race in America." Nancy Cantor, *Introduction*, in *id.* at 1, 5. Some did describe the results of efforts to document the actual effects of diversity. *See, e.g.,* Barry Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in Diversity Challenged*, at 143-74. But these were, typically, like the Orfield and Whitla study, what we call "snapshots"; surveys that explored attitudes at a particular point in time.

These studies were not, accordingly, what we characterize as "longitudinal." That is, they did not undertake a detailed assessment of what the students looked like and believed and valued when they enrolled. And they did not identify or document how being in diverse educational and social situations produced actual changes, be they positive or negative.

That is a significant problem. "[T]he value of diversity lies in what it actually accomplishes, not simply what it promises." Ann Mallattt Killenbeck, *Ferguson, Fisher, and the Future: Diversity and Inclusion as a Remedy for Implicit Racial Bias*, 42 J.C. & U.L., 59, 72 (2016) (Ferguson and Fisher). As Professor Daryl G. Smith has emphasized, the central question is whether diversity changes attitudes or adds some otherwise absent dimensions to an education, that is, "interupt[s] habitual modes of thinking." Daryl G. Smith, *Diversity's Promise for Higher Education: Making It Work* 211 (2009). These changes – which are

the attributes of the "compelling interest" recognized in *Grutter* – can only be documented when institutions actively and continuously compare students' attitudes before and after they experience what preferences are designed to produce: education and socialization in a diverse environment. The assessments conducted must also "provide context . . . a means for differentiating between what occurs with and without diversity. It is a basic social science principle that '[*c*]*omparisons* need to be made between students who experience different types of education' given that 'survey research done on single groups often leads to invalid conclusions about cause-and-effect relationships.'" A. Killenbeck, *Ferguson and Fisher*, at 75 (quoting Bruce W. Tuckman, *Conducting Educational Research* 235 (4th Ed. 1994)).

Unfortunately, *Grutter* itself did not impose any assessment obligations on the colleges, universities, and professional schools using race-based preferences. That gave them extraordinary leeway as they structured their programs. It also created a temptation: to focus exclusively on the admissions policies themselves, and to couch the debate about their constitutionality in those terms.

II. *Fisher II* Requires Institutions Employing Group Identity Preferences to Engage in Constant, Rigorous Longitudinal Assessment

The constitutional landscape underwent a radical change for the better with *Fisher I* and, in particular, Fisher *II*, where Justice Kennedy spelled out in considerable detail exactly what is now required.

Fisher I stressed that the interest pursued must be "both constitutionally permissible and substantial" and that the "use of the [race-based] classification [must be] necessary . . . to the accomplishment of its purpose." 570 U.S. at 309 (quoting *Bakke*, 438 U.S. at 305)). Each institution must provide "a reasoned, principled explanation" for its decision that, "based on its experience and expertise . . . a diverse student body would serve its educational goals." *Id*. And "[o]nce [an institution] has established that its goal of diversity is consistent with strict scrutiny . . . there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation." *Id*. at 311.

Fisher II then provided a series of key requirements. Aa threshold matter, "a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turn[s] to a race-conscious plan." *Fisher II*, 136 S. Ct. at 2211. It must also establish that "student body diversity" is "central to its identity and educational mission." *Id*. at 2214. The institution's "goals cannot be illusory or amorphous – they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Id*. at 2211. This will then allow a "reviewing court [to] verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Fisher I*, 570 U.S. at 312 (quoting *Bakke*, 438 U.S. at 305).

This creates two sets of obligations. The first tells any entity that employs a group-identity preference – in particular, one that is race-based – that is must

gather and provide "evidence" that the preference is both necessary and effective. Each college, university, and professional school has, and is certainly in a position to generate, comprehensive information about the credentials, skills, characteristics, and backgrounds of the students it admits. That "valuable data" will allow it to study and understand "the manner in which different approaches to admissions may foster diversity or instead dilute it." *Fisher II*, 136 S. Ct. at 2214.

They will also have the capacity to assess what occurs over time as the admitted students live and learn in the resulting educational environment. Institutions must, accordingly:

> continu[ously] use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

Id. at 2214-15. In particular, they have an "ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policy." *Id.* at 2215.

The second set of obligations fall on any court asked to determine if a given policy is constitutional. This tracks the manner in which a trial judge is a "gate keeper" for the purposes of admitting expert witness testimony. *See Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). Lower courts must assure that every institution has met its

positive obligation to provide "significant evidence, both statistical and anecdotal [to] support its . . . position." *Fisher II*, 136 S. Ct. at 2212. That includes documenting both the actual need for the policy and "how the process works in practice." *Fisher I*, 570 U.S. at 313. In a similar vein, a reviewing court must both demand that such evidence be produced and, in support of whatever conclusions it reaches, provide a complete and accurate account of that material. All of this should be examined within the analytic matrix imposed by the Court in *Fisher II*. But, as we are about to document, that has not happened.

III. Neither Harvard College Nor the University of North Carolina Appears to Routinely Assess Whether the Outcomes Identified by the Court Actually Occur, and None of the Opinions to Date Comport with the Requirements Imposed by *Fisher II*

We begin with an important caveat. The record in these cases is massive. We do not for a moment pretend that we have read every page of the trial transcripts, examined with care all of the materials submitted to the trial courts, or all of the massive number of briefs submitted both supporting and opposing the policies employed by Harvard or North Carolina. That said, the critical question is not what might lurk in the record. It is rather what each court tells us mattered as it examined the policies and pronounced them constitutional.

Viewed in that manner, the record to date does not indicate that either Harvard or North Carolina routinely assess in the manner contemplated by the

Court, in particular, as required by Justice Kennedy's opinion in *Fisher II*. There is absolutely nothing in the record establishing that it is the official policy of either institution to routinely assess as a matter of sound educational practice, much less conduct rigorous longitudinal studies tied to the specific outcomes identified by the Court in *Grutter*. We are told about numerous studies and reports conducted to justify the adoption of admissions preferences. *See, e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 397 F. Supp. 3d 126, 148-54 (D. Mass. 2019) (noting and discussing various studies and reports conducted to justify the preferences). But those sorts of studies, and especially those generated in response to litigation, are not what is required.

Each of the three opinions, in turn, concentrates almost exclusively on process. What do these institutions take into account as they make their admissions decisions? And, within that, what weight do they give to group identity?

So, for example, when District Judge Allison Burroughs concluded that "Harvard's admissions program survives strict scrutiny," her focus was on the "admissions process." *SFFA v. Harvard College*, 397 F. Supp. 3d at 204. She acknowledged that *Fisher II* stressed the importance of assessment. *Id.* But she argued against "requiring an admissions *process* that is overly data driven." *Id.* (emphasis added). And even after quoting *Fisher II's* admonition for the need to "'identify the effects, both positive and negative, of the affirmative action measures'" employed, *id.* (quoting

Fisher II, 136 S. Ct. 2214-15), she devoted scant attention to them.

The opinion was eighty pages long. The examination of the process and of the contrasting views and findings of the two experts who evaluated how admissions decisions are made was extensive. *See, e.g.*, *id.* at 158-77 (discussing the studies and models prepared by Professors David Card for Harvard and Professor Peter Arcidiacono for the plaintiffs, Students for Fair Admissions (SFFA)). Her discussion of the actual effects of diversity was, on the other hand, confined to three paragraphs at the end of her opinion, *see id.* at 205-06, where she observed that this "eloquent testimony captures what is important about diversity in education." *Id.* at 206.

We agree that the "lived experiences" of individuals like the "esteemed author Toni Morrison" and the justly celebrated Dr. Ruth Simmons tell us a great deal about what students experience and what they value in their education and lives. But that does not in any meaningful way fulfill the requirement that Harvard document changes over time that are attributable to the diverse learning and living environments it tried to create. The one authority Harvard did cite for its belief that benefits accrued was, in turn, a "study" undertaken by one of its faculty. *See* Richard J. Light, *Making the Most of College: Students Speak Their Minds* (2001). But it was exactly what the title suggests: information gleaned from interviewing students at Harvard, not a formal study of how they changed or otherwise benefitted from their studies and lives there. Ironically, Harvard's students seem to

understand this, even if Harvard itself does not. *Id.* at 130 ("[s]tudents from all ethnic and racial backgrounds" understand "that any discussion of diversity on campus should be separated into two parts, "the questions of "access" and "educational impact").

The opinion for the Court of Appeals for the First Circuit was, astonishingly, even more deficient. The panel did acknowledge that one of the key considerations in Harvard's embrace of diversity was the extent to which it would be "transformative." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157, 174 (1st Cir. 2020). It also noted that "Harvard has identified specific, measurable goals it seeks to achieve by considering race in admissions." *Id.* at 186. The panel spent the vast majority of its forty-seven page opinion evaluating the admissions process. The discussion of effects, however, was confined to one paragraph and one footnote about "ample testimony" by Harvard's carefully selected pro-Harvard witnesses that "makes clear" their *belief* that a "reduction in African American representation . . . would make Harvard less attractive and hospitable to minority applicants while limiting all students' opportunities to engage with and learn from students with different backgrounds from their own." *Id.* at 195.

Once again, those "findings" are interesting and we do not discount the importance of such considerations. But they tell us little about what actually occurred during enrollment, much less the extent to which any

positive – or negative – changes can be attributed to the presence or absence of racial diversity.

The Trial Findings of Fact and Conclusions of Law in *Students for Fair Admissions, Inc. v. University of North Carolina*, 2021 WL 7628155 (M.D.N.C., Oct. 18, 2021), are marginally better. Judge Biggs notes that "UNC 'has been assessing the health of our campus, the success of our students, and the success of diversity initiatives for a long time." *Id.* at *24 (quoting trial testimony of Stephen Farmer, Vice Provost for Enrollment and Undergraduate Abscissions). She also acknowledges the efforts and studies of Dr. Abigail Painter, Senior Associate Dean for Undergraduate Education and Professor of Psychology and Neuroscience at UNC, including "longitudinal data that measures the experiences of individual students and is tied to a set of local and national assessments." *Id.*

But she does not provide any of the pertinent details, and certainly none that are consistent with what *Fisher II* requires. We are told that "[w]ith regard to whether UNC has already achieved its goals, [a] working group has reported that UNC students are indeed benefitting from the University's efforts in this area." *Id.* at *25. "Our graduating seniors reported that they have experienced the educational benefits of diversity throughout their time at Carolina, both within the classroom and in extracurricular activities." Trial Transcript, 804:16-199. *See also id.* at 805:3-11 (increases in percentage of students "challenged to think differently" and "expos[ed] to diverse people and ideas" documented by a "cross sectional as opposed to a longitudinal study").

These findings, and the fact that UNC proffered that information, suggest that UNC may have learned from the shortcomings evident in the Harvard case. But they still fall short of what we believe should be required.

If "the theory is that diversity has an actual, hopefully positive effect on actual students . . . [t]hose effects must be postulated and then measured over time, based on pre- and post-diversity profiles of the students in question." Killenbeck, *Ferguson and Fisher*, at 91. In particular, such studies should control for two important things.

The first is the extent to which self-assessments conducted by institutions that have made their strong commitment to diversity evident pressed the respondents "to be and appear to be good people." Seymour Sudman & Norman H. Bradburn, *Asking Questions: A Practical Guide to Questionnaire Design* 6 (1982). A fundamental tenet of survey data is that "self-reports of any socially sensitive topic, including race, are subject to social desirability pressures." Maria Kryson, Prejudice, *Politics, and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 Ann. Rev. Soc. 135, 138 (2006). Surveys linked specifically to diversity or racial climate at an institution that has made its commitment to affirmative action known pose risks, given that "[t]he more transparent or obvious the purposes of a questionnaire, the more likely respondents are to provide the answers they want others to hear about themselves rather that the ones they feel to be true." Tuckman, *Educational Research*, at 235.

That does not mean that such surveys have no value. Rather, they must be assessed with care and, if possible, alternative approaches explored. That is why, for example, Ann's dissertation, which explored the actual effects of diversity on the experiences of first-year law students, was not confined to diversity-related experiences and practices. Rather, she also explored possible changes in students' attitudes toward more general social issues they would encounter in the first year of legal education that have a strong correlation with the values normally associated with diversity. So, for example, she examined possible diminished support of the death penalty, which is arguably disproportionally invoked against African-American defendants. *See, e.g.,* Ann Mallatt Killenbeck, *Racial Diversity in Legal Education: Do Racially Diverse Educational Environments Affect Selected Attitudes of White First-Year Law Students?* at 115-16 (research hypotheses, each of which includes attitudes about "a diminished belief in the use of the death penalty") (Killenbeck Dissertation).

A second key need is to control for pre-enrollment experiences and attitudes. "[T]he most significant positive influence on student's openness to diversity and challenge during the first three years of college [is] the student's openness before college." Elizabeth J. Whitt et al., *Student's Openness to Diversity and Challenges in the Second and Third Years of College*, 72 J. Higher Educ. 172, 188 (2001). *See also* Ernest J. Pascarella et al., *What Have We Learned from the First Year of the National Study of Student Learning?*, ERIC ED 381 054 (1996) (data collected from undergraduate students at eighteen four-year colleges and universities

located in 15 different states throughout the country documents that student precollege "openness to diversity" had the strongest effect of any variable in the prediction model). *Accord*, Alexander W. Astin, *Assessment for Excellence: The Philosophy and Practice of Assessment and Evaluation in Higher Education* (1991); Ernest Pascarella, *Students' Affective Development within the College Environment*, 56 J. Higher Educ. 640 (1985).

Once again, Ann's dissertation verifies the importance of this. She found that "at the end of their first year, law students show a pronounced inclination toward many of the attitudes that proponents of affirmative action associate with a positive educational outcome as a result of studying in a diverse environment." Killenbeck Dissertation at 174. The various regressions she ran, however, showed that the most important factor with regard to this laudable outcome was "[p]re-law school diversity experiences," which "were found to influence several end of year attitudes." *Id.* at 175.

As matters currently stand, then, there are significant disparities between what the Court expects of institutions, what the records in these cases document, and how the courts below have addressed what the institutions are actually doing. The opinions do not accordingly comport with the mandates of *Fisher II*. The causes of action were, admittedly, filed on November 7, 2014, three years before *Fisher II* was decided. But significant pre-trial delays meant that they were tried, respectively, from October 15 through November 2, 2018 (Harvard) and for nine days starting

on November 9, 2020 (UNC), both well after *Fisher II* was promulgated. The parties and the courts were, accordingly, on notice regarding what full consideration of both the means *and* the ends of a preferential admissions policies required.

That said, the plaintiffs in these cases also bear a fair amount of responsibility for this. It has been apparent since the lawsuits were filed that SFFA's motivating impulse and true goal was to get these cases to this Court and secure a decision that would repudiate the use of race-based preferences, overruling the core holdings in *Bakke*, *Grutter*, and *Fisher I & II*. *See* Complaint, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 1:14-cv-14176-DJC, Nov. 17, 2014, at 119 (requesting a declaratory judgement that "any use of race or ethnicity in the educational setting violates the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964"); Complaint, *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 1:14-cv-00954, Nov. 17, 2014, at 64 (same).

Their attacks on the mechanics of the Harvard and UNC policies were simply the means by which they were able to fashion justiciable causes of action. In particular, to establish (after much dispute) that they had standing and that the cases were ripe and suitable for adjudication. As Harvard stressed in its Response to SFFA's Petition for a Writ of Certiorari, "while Harvard and amici put on evidence about the educational benefits of diversity . . . SFFA offered no rebuttal, declaring that "[d]iversity and its benefits are not on trial here."' Brief in Opposition, *Students for*

Fair Admissions v. President and Fellows of Harvard College, No. 20-1999, at 26 (quoting C.A.J.A. 453:14-15).[4]

We do not know at this juncture if these defects will be cured during the balance of the briefing process. As we write, SFFA has filed its brief on the merits. It sets out three Questions Presented. The first, predictably, asks that *Grutter* be overruled and for a holding "that institutions of higher education cannot use race as a factor in admissions." Brief for Petitioner, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, and *Students for Fair Admissions v. University of North Carolina*, No. 21-707, at i. The second alleges that Harvard discriminates against Asian-American applicants via "racial balancing, overemphasizing race, and rejecting workable race neutral alternatives," *id.*, that is, focuses on the admissions process. The third mentions "the educational benefits of diversity," but is couched not in terms of whether those are attained, but rather whether UNC has "rejected race-neutral alternatives" to determine who to admit.

SFFA does argue that "[u]niversities, if they were given truth serum, would agree that this Court's

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[4] SFFA may wish to contest this. In its just-filed brief on the merits, it notes that the District Court "granted Harvard judgment on the pleadings on SFFA's claim that this Court should overrule *Grutter*" and that "Harvard argued that 'Supreme Court precedent . . . left no doubt that diversity remains a compelling interest' and so the benefits of diversity were 'not appropriate topics for litigation in this case.'" Brief for Petitioner at 20 n. 4.

precedent [in this regard] is impossible to navigate." *Id.* at 61. Further:

> UNC called this Court's guidance "amorphous." UNC.JA390. And it could not say whether it could attain the educational benefits of diversity even if "all of the major racial groups" constituted "the same share of the campus population." UNC.JA755. Far from scientific or objective, the only way UNC knows how to measure these benefits on campus is by "talk[ing] with students [and] faculty . . . as to how people feel." UNC.JA388; see UNC.JA379-80. Harvard, too, could not identify any metric to determine when it has achieved the educational benefits of diversity. Harv.JA820-22.

Id. But SFFA did not directly address the issue and do not argue that the benefits have not been or cannot be achieved. Nor do they call either Harvard or UNC to task for failing to adhere to the assessment requirements set forth in *Fisher II*.

IV. The Court Should Reaffirm that Efforts to Secure Student Body Diversity Must Be Grounded in Sound Educational Practices and Should Be Rigorously and Continuously Assessed

As indicated, SFFA has asked that *Grutter* be overruled. In most respects, we are ambivalent about whether the Court outright bars institutional consideration of race or ethnicity in its admissions decisions. We understand and appreciate the

normative judgments advanced in support of diversity. There is reason to believe that the Court was correct when it held that the "substantial . . . benefits [of diversity] are not theoretical but real." *Grutter*, 539 U.S. at 328. That said, as one of us noted many years ago, "[t]here is [also] substantial evidence, both experimental and anecdotal, indicating that the single most important factor in the current antipathy toward affirmative action is 'a mind-set [by institutions] that treats [it] like an embarrassing family secret.'" Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 Calif. L. Rev. 1299, 1389 (1999) (quoting Gary Peller, *Espousing a Positive Vision of Affirmative Action Politics*, Chron. Higher Educ., Dec. 18, 1991, at B1 (footnotes omitted)). One of the positive results of the current litigation is that these cases have for the first time opened up the process, revealing in considerable detail exactly how two highly selective institutions go about using preferences. As one critic noted:

> Many colleges and universities have made a critical mistake in managing their affirmative-action policies. They have hidden the procedures they follow to admit students, including the weight they give to an applicant's racial or ethnic background. Whatever the reasons for this strategy, the institutions' failure to discuss affirmative action in concrete, procedural terms has set the stage for the premature elimination of affirmative action in higher education.

Rupert W. Nacoste, *The Truth About Affirmative Education*, Chron. Higher Educ., April 7, 1995, at A48.

We would like to assume that both institutions of higher education and the courts will base their decisions on the "science" of diversity, rather than what has been accurately characterized as its "politics." James H. Kuklinski, *Review: The Scientific Study of Campus Diversity and Students' Educational Outcomes*, 70 Pub. Opinion Q. 99 (2006). But that has not been the case. We believe, accordingly, that whatever this Court does, it should clearly state that admissions preferences are constitutional only to the extent that they facilitate the attainment of the educational and social outcomes identified in Justice O'Connor's opinion in *Grutter*. And that it should reaffirm *Fisher II's* emphasis on the critical importance of constant and rigorous longitudinal assessment to determine both if such preferences are necessary and what their actual effects are, be they positive or negative.

Those requirements must be in place and colleges, universities, and professional schools must be held accountable. The simple reality is that in many respects it does not matter whether the Court holds that institutions cannot use race-based preferences. It is abundantly clear that there is a near-unanimous consensus on the part of this nation's most prestigious and most selective institutions that "diversity [i]s a value that is central to the very concept of education in our institutions." Association of American Universities, *On the Importance of Diversity in University Admissions*, Almanac, Vol. 43 # 35, May 20,

1997. The Association is a limited membership group of the nation's most prestigious research institutions. The statement was adopted in the wake of *Hopwood* and in anticipation of *Grutter* and *Gratz*. It carries considerable weight in higher education circles, especially since support for such policies is both long-standing and deeply entrenched. In 1993, for example, then Harvard President Neil Rudenstine issued a lengthy report in which he "remind[ed]" one and all "that student diversity has, for more than a century, been valued for its capacity to contribute powerfully to the process of learning and to the creation of an effective educational environment." Neil M. Rudenstine, Harvard University, *The President's Report 1993 – 1995,* at 2

This being the case, it really does not matter what the Court does. Preferences will persist. Moreover, this debate is arguably a distraction from what really matters. "The most important challenges posed by *Grutter* and *Gratz* are social and political rather than educational: the need for this nation to finally and effectively guarantee to each of its citizens meaningful opportunities for a safe, healthy, and fulfilling life." Mark R. Killenbeck, *Affirmative Action and Diversity: The Beginning of the End? Or the End of the Beginning?,* at 32 (2004)

Unfortunately, we do not trust the colleges, universities, and professional schools that use preferences. It would be one thing if they actually assessed and tracked whether the outcomes championed by Justice O'Connor in *Grutter* occur. To the best of our knowledge, they do not. Rather, they

seem most interested in attaining what is called in the literature "structural diversity," that is, embracing policies that will admit what Michigan characterized as a "critical mass" of "underrpresented" minority students. *See* A. Killenbeck, *Devil*, at 1272-74 (discussing this issue). As Ann stresses there, "[t]he underlying assumption in many affirmative action policies is that structural diversity alone provides 'students with opportunities to interact with peers who are different from themselves and that these interactions ultimately contribute to a supportive campus environment and mediate students' intellectual and personal development.'" *Id.* at 1273 (quoting Gary R. Pike & George D. Kuh, *Relationships Among Structural Diversity, Informal Peer Interactions and Perceptions of Campus Environment*, 29 Rev. Higher Educ. 425, 426 (2006)). But, as she notes, the research has found that "the singular act of increasing the number of people of color on a campus will not create a more positive racial climate." Sylvia Hurtado, Kimberly A. Griffin, Lucy Arellano & Marcela Cuellar, *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. Diversity Higher Educ. 204, 207 (2008).

Structural diversity is then simply "a necessary, but not sufficient, factor" if the objective is to actually create "a more comfortable and less hostile environment for all." *Id*. Active programming designed to facilitate interaction and enrich courses is required. A. Killenbeck, *Devil*, at 1273-74. And, importantly, these efforts must be structured and conducted with great care, given that simply "[t]alking about these topics can blow up if you don't do it right."

Peter Schmidt, *"Intergroup Dialogue" Promoted as Using Racial Tensions to Teach*, Chron. Higher Educ., July 16, 2008 (quoting Professor Patricia Gurin).[5]

We recognize that the political and social pressures to do the supposedly "right thing" are immense. The manner in which the State of Texas dealt with this Court's refusal in *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), to review and possibly reverse the decision by the Court of Appeals for the Fifth Circuit that Justice Powell's opinion in *Bakke* was not controlling is instructive. The Texas legislature responded by enacting the so-called Top Ten Percent Plan, which required that the University of Texas at Austin and Texas A&M admit any Texas student who graduated in the top 10% of their high school class.

As Justice Ginsburg stressed, "Texas's percentage plan was adopted with racially segregated neighborhoods and schools front and center stage . . . It is race consciousness, not blindness to race, that drive such plans." *Fisher I*, 570 U.S. at 335 (Ginsburg, J., dissenting). These sorts of plans strike us, accordingly, as blatantly unconstitutional. They were adopted with the full knowledge of their discriminatory intent. The "natural and foreseeable consequences[s]," *Columbus Board of Education v. Penick*, 443 U.S. 449, 464 (1979), were obvious. Students were given preferential treatment on the basis of their race or

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[5] Professor Gurin was on the faculty at the University of Michigan and was their principal expert witness in the *Grutter* and *Gratz* litigation.

ethnicity, a policy that at least arguably – if not in fact – runs afoul of the admonition in *Grutter* that such considerations should simply be a "plus" factor in a "holistic" admissions system, rather than in and of themselves dispositive. That said, no challenge has been mounted and percent plans of this sort are widespread. *See* State Automatic Admissions Initiatives, https://affirmativeactiondebate.org/state-initiatives/. They remain, accordingly, one of the supposedly race-neutral alternatives available to public institutions like UNC.

There is also the question of the extent to which the body politic does, or does not, support the use of such preferences. The most recent Pew Research Center polling found that "more Americans say high school grades and standardized test scores should matter in the admissions process than say the same about other factors." Pew Research Center, *U.S. public continues to view grades, test scores as top factors in college admissions*, April 26, 2022, available at https://www.pewresearch.org/fact-tank/2022/04/26/u-s-public-continues-to-view-grades-test-scores-as-top-factors-in-college-admissions/. In particular, "nearly three quarters of Americans or more say gender, race or ethnicity, or whether a relative attended the school should *not* factor into admissions decisions," *id.*, and "athletic ability" drew more support as an admissions consideration (9%) than race or ethnicity (7%). *Id.*

That said, as we note on our website, "[t]he answers" to these questions "depends heavily on how the question is asked. *See* Polling Data, available at https://affirmativeactiondebate.org/polling-data/.

There is, for example, general support for "affirmative action" when it is defined as simply "increasing opportunities for racial minorities," *id*., that is, creating fair and open procedures. That changes when the issue is "preferences," especially when such measure are viewed as displacing traditional assumptions about "merit." *Id.*

These findings track the manner in which individuals respond when asked to vote on whether affirmative action should be permitted. With one exception, in Colorado in 2008, every constitutional or statutory referendum submitted to the voters that would ban affirmative action in employment, college and university admissions, and the like has been approved. *See* State Initiative Results, available at https://affirmativeactiondebate.org/state-initiative-results/.

Two are especially notable. The first ban approved was Proposition 209 in California in 1996. *Id.* In the 2020 election, a new measure, Proposition 16, which would have repealed Proposition 209, was on the ballot in a state that favored Joseph Biden over Donald Trump by a margin of 63.5% to 29.2%. That same group of voters rejected Proposition 16, with 57.1% voting no and only 42.9% in favor of repealing the ban. *Id*. In a similar vein, in the wake of *Grutter* and *Gratz* the Michigan Civil Rights Initiative was submitted to the Michigan electorate. It expressly barred "preferential treatment" by that state's public universities "on the basis of race, sex, color, ethnicity, or national origin." *Id.* (quoting Proposal 2). The University of Michigan, hoping to salvage its recent

victory at this Court, strongly opposed the measure. Nevertheless, it was approved by an overwhelming margin, 58% in favor and only 42% opposed. *Id.*

Taken together, all these considerations portray a complex mix of considerations that this Court must take into account as it assesses these matters. It would of course, be best if society, and in particular, our colleges, universities, and professional schools focused on root causes. As *amicus* observed more than twenty years ago, "[p]erhaps the single most important thing an[y] institution can do is to recognize that the very best affirmative actions – initiatives that will both enhance educational access and maximize individual attainment – will often take forms other than the consideration of race or ethnic identity as part of the admissions process." M. Killenbeck, *Principles*, at 1398. Given that numerous "studies suggest [that] intelligence and adaptive behavior are strongly influenced by socioeconomic status, and in particular include prenatal dimensions, the need for intensive early medical, social, and educational support becomes compelling." *Id.*

Unfortunately, the economic and social dislocations that informed those conclusions have only worsened in the intervening years. Affirmative action and preferences provide, accordingly, one possible solution to the extent that results are desired now.

We agree that measures must "have a termination point." *Grutter*, 539 U.S. at 342. We doubt that it will be the year 2028. And we would welcome the day when we can recalibrate the sense of what affirmative action is and must be, returning it to its original roots and

meanings, the need for an open and fair process, rather than a mechanism deigned to generate substantive results. *See* Mark R. Killenbeck, *Opportunity or Result? Evolving Rationales and the Transformation of Affirmative Action*, in *Controversies in Affirmative Action: Volume 2, Contemporary Debates*, at 51 (James A Beckman Ed, 2014). But until that happens we must account for the belief that preferences, properly fashioned, used, and evaluated, may "'better prepare students for an increasingly diverse workforce and society, and better prepare them as individuals.'" *Grutter*, 538 U.S. at 330 (quoting Brief for American Educational Research Association et al. as *Amici Curiae* at 3)).

CONCLUSION

As former Judge Richard A. Posner emphasized over twenty years ago, "[t]he big problem" in the debate about affirmative action "is not the lack of [constitutional] theory, but lack of knowledge — lack of the very knowledge that academic research, rather than the litigation process, is best designed to produce." Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 3 (1998). That is a crucial insight, and informs virtually all aspects of what we believe is important in these matters.

This Court must hold universities accountable. The obligation to clarify and explain exists regardless of how it rules. Preferences, overt or otherwise, are here to stay. But are the institutions claiming that such policies and the need for a "diverse" student body are essential attributes of their mission acting in good faith? Or are they actually pursuing what Justice

Thomas has characterized "as an aesthetic," that is, a desire "to have a certain appearance, from the shape of the desks and tables in . . . classrooms to the color of the students sitting at them"? *Grutter*, 539 U.S. at 354 n. 3 (Thomas, J., concurring in part and dissenting in part).

As matters currently stand, the Harvard and North Carolina cases focus almost exclusively on "the *means* by which [they] obtain[] educational benefits." *Fisher I*, 570 U.S. at 319 (Thomas, J., concurring). This elevates process over results, making diversity an "end pursued for its own sake." *Id.* This Court should reemphasize that institutions employing preferences must do so for one reason and one reason only: the extent to which they facilitate transformative education, within which student body diversity is intended to, and actually produces, certain positive outcomes, documented by continuous, rigorous longitudinal assessment.

Respectfully submitted,

STUART TAYLOR, JR.
Counsel of Record
3911 Jocelyn St. NW
Washington, DC 20015
(202) 365-1812
stuarttaylorjr@gmail.com

Counsel for Amici Curiae