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 OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] has submitted briefs in various affirmative-action cases at the Court, recommending a thoughtful and maybe even "moderate" approach: e.g., in *Fisher v. University of Texas* "I", 570 U.S. 297 (2013) (Amicus' brief *available at* https://utexas.app.box.com/s/qoru87f0jmghdwkgzaoe2lw9eepx6ubh), and "*Fisher* II", 579 U.S. 365 (2016) (brief *available at* https://utexas.app.box.com/s/9cqsr07xlg4r4rfssjuqb0muluu6plq7), supporting the retaining of *Grutter v. Bollinger*, 539 U.S. 306 (2003); but in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), supporting States' right to end affirmative-action programs (brief *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/07/12-682_pet_amcu_db.authcheckdam.pdf).

Thus, Amicus would not mind thoughtfulness or due moderation by the Court in the instant case, especially since the Court itself has been peopled by affirmative-action recipients: e.g., Justice Amy Coney Barrett, chosen by President Donald Trump because she is a woman; Justice Ketanji Brown Jackson, chosen by President Joe Biden because she is an African-American woman.

Amicus notes that presently, Petitioner wants to destroy affirmative action, while not simultaneously suing for the destruction of, e.g., alumni-child admission advantages which are older than

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[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court.

affirmative action and reward the already-privileged. This disparity seems profoundly wrong.

One would think that the latter, grotesquely-unfair "privilege for the already-privileged" should be eliminated before there's any thought of doing away with affirmative action, either race-based or gender-based. (Gender-based affirmative action could be useful where women are underrepresented —as the Court has historically been.)

But the Court's allowing affirmative action to survive wouldn't mean abandoning skepticism about how Harvard College ("Harvard"), the University of North Carolina ("UNC"), or other institutions, administrate affirmative action. Colleges can be profoundly evasive, even irresponsible (hopefully not deceitful?), about their admissions programs.

So, if the Court can insist on a consistently higher standard of responsibility, which may include mandating, e.g.: colleges must produce prospective timelines for ending affirmative action; more serious inquiry into race-neutral alternatives; avoiding stereotyping Asian Americans; etc., affirmative action may be worth saving for those States and colleges who wish to keep using it (as *Schuette*, *supra* at 1, allows) to desegregate and diversify their student bodies, so as not to "deprive [students] of some of the benefits they would receive in a racial[ly] integrated school system", *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (latter brackets in the original) (citation, footnote, internal quotation marks omitted).

Not everyone is hopeful, though, that the Court can be unbiased in "culture war" issues; on that

head, Amicus will briefly, following the Summary of Argument, discuss the deleterious impact of the *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022) decision upon the Court's image…

SUMMARY OF ARGUMENT

The Court, after its controversial decision in *Dobbs*, *supra*, may want to be especially careful to seem unbiased and procedurally fair towards all the inhabitants of America's great Republic.

Since Justice Jackson was chosen by President Biden for being a black woman, the Court may be obliged to ask for her removal from the Court, if it declares that all race-based affirmative action is illegal.

Because Israel arguably practices affirmative action for Jews, and most Americans support Israel, it is strange to argue affirmative action is inherently evil.

The Court should make sure alumni-child admissions preferences, a.k.a. "affirmative action for the advantaged", and similar preferences (donor preferences—which resemble bribery/prostitution—; faculty/staff; etc.) are past history before outlawing affirmative action. The Court should even consider *sua sponte* banning such "privilege preferences"; and Petitioner should have sued to ban them, to show it really cared about ending unfair admissions.

The Court's Members should be publicly transparent about their own families' benefit from such privileges.

The fact that some underrepresented minorities are now alumnae/i, should not save "legacy" preferences from extinction. Too, minority applicants should be able to opt out of bonuses for minority status, if desired.

While Petitioners' simulations modeling an end to preferences-for-the-privileged do some good, they may massively reduce the number of underrepresented-minority students, and also commit the logical fallacy that eliminating "privilege preferences" necessitates eliminating affirmative action as well. (*Inter alia*, the seats freed up by ending privilege preferences may give more room for affirmative-action recipients.)

Similarly, it is fallacious to state that ending prejudice/stereotypes against Asian Americans necessitates ending affirmative action. However, as affirmative action is phased out gradually, preferences for underrepresented minorities may lessen, and this, plus ending privilege preferences, may offer more seats for Asian Americans.

Two Asian-American students supporting affirmative action offer their illuminating views.

Affirmative action should last at least until the 2028 date set in *Grutter*, 539 U.S. at 343, and maybe longer, given the white-supremacy and COVID-19 crises, and the corrosive persistence of "legacy" bonuses.

Petitioner's comparison of *Grutter* to *Plessy v. Ferguson*, 163 U.S. 537 (1896), is ridiculous, especially given the desegregation imperative of

Brown, *supra* at 2; Colin Powell's support of *Grutter*; and Martin Luther King's embrace of actual quotas for maltreated minorities.

Finally, following *Schuette*, which gives States the right to allow affirmative action, the Court, which has benefited from its own many affirmative-action recipients, should mend affirmative action, keep it responsible to the People and the law, not immediately end it.

ARGUMENT

I. THE COURT MUST DO BETTER THAN ITS *DOBBS* OPINION (OR DISSENT), LEST IT LOSE PUBLIC CREDIBILITY

After reading the Court's decision in *Dobbs*, Amicus felt like quipping, "Enjoy it while it lasts." How that Opinion is going to stand the test of history, and future Courts, is questionable

Indeed, *Dobbs* sets bad precedent, as the Chief Justice noted in his concurrence-in-judgment, e.g., the Court's "dramatic and consequential ruling is unnecessary to decide the case before us." *Id.* (slip op., as for all *Dobbs* citations herein) at 2 (Roberts, C.J.). And if the Court is *sub rosa* skewed, biased, towards one side in America's "*Kulturkampf*", this may taint not just the Court, but even the instant affirmative-action case.

Ironically, if the Court had approved Mississippi's banning abortion at 15 weeks, but gone no further, any number of ambitious State attorneys-general would have slavered over the chance to have their own States—and selves—be showcased at the Court, and very soon, re abortion: but *properly*. E.g., both

their certiorari petitions *and* their merits briefs would call for the overturn of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *from the start*, instead of changing horses in midstream.

But Mississippi, notably, didn't do this, infecting *Dobbs* forever with a feeling of procedural impropriety. If *Dobbs* was the most important case in half a century, and the Court couldn't even dot all the i's and cross all the t's, that is a problem.

The Opinion, which is arguably unprincipled if it rewards Mississippi's "bait and switch", then dares to insult the Chief Justice's words as being unprincipled: "The concurrence's most fundamental defect is its failure to offer any principled basis for its approach." Op. at 73 (Alito, J.). However, when the majority itself, *id.* at 53, castigates "a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy": if those latter nations are such role models, how can the Opinion criticize Roberts for upholding a 15-week limit close to the 12-some weeks many of those "western democracies", *supra*, have? He even explicitly mentions the rough global standard of a "12–week line", Concurrence at 5.

Too, it is arguably false that "[t]he concurrence would do exactly what it criticizes *Roe* for doing: pulling 'out of thin air' a test that '[n]o party or *amicus* asked the Court to adopt.' *Post*, at 3." Op. at 73. But: Amicus' own July 2021 brief supporting Petitioners in *Dobbs* (*available at* https://www.supremecourt.gov/DocketPDF/19/19-1392/184456/20210720221629952_19-1392_tsac_DavidBoyle.pdf)

said, e.g., "A 15-Week Abortion Limit May Seem Highly Reasonable", Br. at 9; "the Act [] allows the entire first trimester … for people to decide about abortion. 15 weeks is 105 days, which gives couples/women over 100 days to decide. This is a significant amount of time, making it harder to say that the window for decision is an 'undue burden'", *id.* at 12; "However, if Americans are convinced that the Court is sensible and non-partisan, then moderate measures like a 15-week ban might not only thrive, but also serve as a bridge to bans at a lower number of weeks, in the future, when conditions for women have improved", *id.* at 34; "If a 15-week limit is a workable 'golden mean' for now, Amicus would not be surprised at all", *id.* at 35.

So at least one amicus (Amicus) does mention, *supra*, that (especially given Mississippi's moving the goalposts) a 15-week limit may seem reasonable for now and show fairness to pregnant women; and the Chief Justice may be justified in what he said.

The *Dobbs* Dissent has its own inaccuracies; e.g., the dissenters complain about the Opinion's citing sources going back to the 13th Century, "(the 13th!)", Dissent at 13 (Breyer, Sotomayor, Kagan, JJ.)—as if venerability of precedent is a *problem*, worth an alarmed exclamation point, *id.*?

Even worse, the Dissent didn't notice it's actually the *12th Century*; "Even before Bracton's time, English law imposed punishment for the killing of a fetus. See Leges Henrici Primi 222-223 (L. J. Downer ed., 1972) (imposing penalty for any abortion and treating woman who aborted a 'quick' child 'as if she were a murderess')", Op. at 17 n.25, refers to the

Leges, from the 1100's. *See, e.g.*, Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 Wm. & Mary J. Women & L. 107, 130 (2007), *available at* https://scholarship.law.wm.edu/cgi/viewcontent cgi ?article=1042&context=wmjowl (footnote omitted).

Far worse than the Dissent's time error, though, the Opinion omits mentioning—as has been pointed out to this Court before—that the "penalty" is merely *ecclesiastical*. *See* Spivack, *supra*, at 130,

> Mulier si partum suum ante xl dies sponte perdiderit tribus annis peniteat, si postquam animatus est, quasi homicida vii annis peniteat. (A woman shall do penance for three years if she intentionally brings about the loss of her embryo before forty days; if she does this after it is quick, she shall do penance for seven years as if she were a murderess.)

Id. (footnote omitted, though it cites, *id.*, to "LEGES HENRICI PRIMI . . . at 222-223", as the Opinion at 17 n.25 does) A *church* penalty of penance for abortion is not a *criminal or civil* penalty; but the dissenters didn't call out the majority's grossly-misleading omission about the penalty's ecclesiastical nature, an omission which calls the legitimacy of the whole Opinion into question. Why didn't the Dissent notice this? Incomprehensible. (One is almost tempted to quip, does the Court need new Justices, or just new clerks?)

…One of the slightly-brighter spots in *Dobbs* is Justice Brett Kavanaugh's concurrence, which admits that the life of the mother might actually matter enough (!!!) to prevent a State from forcing her to bear a child if it'd kill her (a.k.a. "fatal hyper-statism"), Concurrence at 4 n.2. The concurrence also admits that "Berlin Wall" laws allowing States to penalize fugitive mothers running to another State for an abortion, might be *unconstitutional*, *id.* at 10. *Cf.* Bruce Springsteen, *Born to Run*, *on Born to Run* (Columbia Records 1975) (idea of archetypal American freedom to flee).

So, per Kavanaugh, maybe the Constitution addresses abortion after all—which may fuel movement, outside the Court or inside a later Court, to swing the pendulum back to larger abortion rights. Constitution aside, though, sheer public unhappiness with *Dobbs* has, well… If this is the "post-*Roe* generation", this is what it's really like: *see, e.g.*, Associated Press in Jerusalem, *Israel eases abortion regulations in response to 'sad' Roe v Wade ruling*, The Guardian, June 27, 2022, 8:07 p.m., https://www.theguardian.com/world/2022/jun/27/israel-eases-abortion-regulations-in-response-to-sad-roe-v-wade-ruling, "The new rules, approved by a[n Israeli] parliamentary committee, grant women access to abortion pills through the country's universal health system and remove a longstanding requirement that women appear physically before a special committee before they are permitted to terminate a pregnancy. [Etc.]" *Id.*

See also, e.g., Emmanuel Akinwotu, *Sierra Leone backs bill to legalise abortion and end colonial-era law*, July 6, 2022, 12:57 p.m., The Guardian, https://

www.theguardian.com/global-development/2022/jul/06/sierra-leone-backs-bill-to-legalise-abortion-and-end-colonial-era-law,

> President Julius Maada Bio said his cabinet . . . . would expand access to abortion[.]
>
> . . . .
>
> "At a time when sexual and reproductive health rights for women are either being overturned or threatened, we are proud that Sierra Leone can once again lead with progressive reforms," said President Bio, referring to the US supreme court's decision to overturn the constitutional right to abortion, which has drawn criticism around the world.

Id. So, *Dobbs* will now likely *cause more abortions*, in multiple nations. One doesn't need to read Sophocles to wonder if the *Dobbs* Opinion's hubris is already bringing nemesis, so that *Dobbs* may be a pyrrhic victory for "pro-life" enthusiasts.

There is even the recent *opéra bouffe* of Justice Kavanaugh having to flee a steakhouse staked out by "pro-choice" protesters. Amicus is sorry that this flight had to happen (and is pleased that Kavanaugh has also escaped assassination…); but if masses of Americans feel cheated of justice, unpleasant things may happen. On that note, it is best, after *Dobbs*, that the Court try to avoid decisions that make Americans feel procedurally (or substantively) cheated, including in "culture war" cases relating to sex, gender, religion, race/affirmative action, etc.

II. JUSTICE KETANJI BROWN JACKSON WAS CHOSEN BY OPEN RACIAL/GENDER SELECTION, SO THE COURT'S MEMBERS MAY BE OBLIGED TO OPPOSE HER SEAT ON THE COURT IF THEY TRULY OPPOSE RACE-BASED AFFIRMATIVE ACTION

The duty to avoid "cheating" is especially pertinent in the instant case, since the Court itself flagrantly instantiates affirmative action. *See* Sahil Kapur, *Biden pledged to put a black woman on the Supreme Court. Here's what he might have to do.*, NBC News, May 6, 2020, 6:12 a.m., https://www.nbcnews.com/politics/2020-election/problem-biden-s-pledge-black-woman-justice-n1200826, "Biden made his pledge days before the South Carolina primary. 'I'm looking forward to making sure there's a black woman on the Supreme Court, to make sure we, in fact, get every representation[.]'" *Id.*

And Biden carried out his "pledge", not allowing for whites, males, or anything but a black/Black woman. Joe Biden is a government official (President) who used, and even proudly, publicly proclaimed, an exclusive racial/gender test to nominate either Ketanji Brown Jackson or another African-American woman—again, *exclusive*.

See also Brent D. Griffiths, *Reagan's White House made sure the president stuck by his promise to name a woman to the Supreme Court — they knew the politics would help too,* Bus. Insider, Jan. 27, 2022, 2:52 p.m., https://www.businessinsider.com/supreme-court-women-history-reagan-biden-nominees-2022-1 (President Reagan makes gender-exclusive choice, i.e., affirmative action, to nominate Justice Sandra Day O'Connor); Geoff Bennett, Shannon Pettypiece

& Monica Alba, *Trump vows to choose a woman to fill Ginsburg's Supreme Court seat*, NBC News, Sept. 19, 2020, 10:33 a.m. (updated Sept. 19, 2020, 5:05 p.m.), https://www.nbcnews.com/politics/supreme-court/amy-coney-barrett-emerging-front-runner-fill-ginsburg-s-supreme-n1240547 (President Trump makes gender-exclusive choice, i.e., affirmative action, to nominate Justice Amy Coney Barrett).

If race-conscious affirmative action is really illegal, how is Jackson's selection for the Court remotely legal, or moral, even? True, she is already on the Court, and the Court hasn't outlawed affirmative action yet. But if Petitioner is suing to have Asian Americans transfer into colleges who allegedly discriminate against Asians: if that is found proper, then by extension, it would be obligatory for Jackson to leave the Court (unless the Court expands by one seat, maybe…), and for the President to nominate a new candidate to "transfer in" to the Court, without any racial, or maybe gender, criteria whatsoever.

This is not a comfortable topic, but why should it be? The Court has no place ending affirmative action unless it also publicly criticizes Justice Jackson's presence on the Court, and expresses a wish for her removal. (And also Justice Barrett, if the Court outlaws gender-based affirmative action.) For the Court to turn a blind eye and make an exception, use a "double standard", for its own affirmative-action-stamped group, Members of the Court, would be supremely hypocritical. (The Court should embrace Jackson wholeheartedly… and affirmative action, with limits.)

III. SUPPORTING ISRAEL, A.K.A. "AFFIRMATIVE ACTION FOR JEWS", MAKES IT AWKWARD TO SAY AFFIRMATIVE ACTION IS EVIL AND MUST BE BANNED

Speaking of hypocrisy: if a heckler sneeringly asked an affirmative-action supporter, "Are you for racial preference?", he/she could answer, "Yeah, it's called Israel. God bless Israel", without missing a beat. Anyone who professes to hate race-conscious affirmative action but is happy with the existence of Israel as a purposely Jewish state, and American funding and arming of all that for decades, may be confused, or dishonest.

Various Jewish people/organizations themselves have explicitly used the term "affirmative action" to describe what Israel does for Jews. *See, e.g.*, Tamar Sternthal, *From 'Ethnic Cleansing' to Casualty Count, Prof. Qumsiyeh Errs*, CAMERA [Committee for Accuracy in Middle East Reporting and Analysis], Aug. 20, 2004, https://www.camera.org/article/from-ethnic-cleansing-to-casualty-count-prof-qumsiyeh-errs/,

> Had [pro-Palestinian professor Mazin] Qumsiyeh bothered to read the International Convention on the Elimination of All Forms of Racial Discrimination, for example, he would learn that it actually upholds the Israeli Law of Return which he so vilifies. . . .
>
> In addition, Section 4 [of the International Convention, *supra*] establishes that affirmative action–

> displaying preferences to undo prior discrimination–is legitimate[; a]nd, if ever there was a people in need of affirmative action it was the Jews of Palestine.

Id. (The rationale for "affirmative action" above is not exactly the "diversity" rationale in *Grutter*, but there is still the idea that racial preference might be needed, in a pinch, to do justice.) *See also, e.g.*, Rabbi David Hoffman, *Zionism is not a 'settler-colonial undertaking*', The Mail & Guardian (South Africa), June 28, 2005, *available* under "Zionism Commentary" *at* http://www.zionismontheweb.org/Zionism_is_not_a_settler-colonial_undertaking.htm,

> In its essence, Zionism is not a "settler-colonial undertaking" but a national programme of affirmative action. . . .
>
> . . . .
>
> [W]hen one takes what is essentially affirmative action and understands it to be colonial oppression, then one is not far from "gross insensitivity" -- the kind of insensitivity that leads to yet another Holocaust.

Id. And Israel is permanent affirmative action for a majority (Jews) in Israel, while in America, all that is asked for is *temporary* affirmative action for underrepresented *minorities*, so the case for affirmative action may be at least as legitimate in America as in Israel.

(Amicus is well aware that America is not under Israeli law, and vice versa; but at least morally, it is difficult to support Israel, and then condemn affirmative action as *verboten*. And if Jews are often an oppressed group, so are African Americans, Latinos, Native Americans. E.g., George Floyd's death, and the May 14, 2022 mass shooting in Buffalo, New York, where white supremacist Payton Gendron allegedly murdered ten black people, vividly remind us that minorities are still oppressed—even in college environments, *see, e.g.*, Aimee Cho & NBC Washington Staff, *Georgetown Administrator at Center of Tweet Controversy Resigns*, NBC Wash., June 6, 2022, updated 6:24 p.m., https://www.nbcwashington.com/news/local/georgetown-administrator-at-center-of-tweet-controversy-resigns/3070566/ (re Ilya Shapiro's racist-leaning Twitter comment on "lesser black woman" re Court nominations).

Finally, Petitioner makes much of the anti-Semitic origins of alumni-child college-admission advantages; so, when we hear, *supra*, that there is affirmative action that *opposes* anti-Semitism—and we also know that affirmative action for minorities can offset advantages for predominately white/ wealthy alumni children—, maybe American affirmative action is not so intolerable after all.

IV. THE COURT SHOULD NOT ABOLISH AFFIRMATIVE ACTION BEFORE ALUMNI-CHILD COLLEGE-ADMISSION PRIVILEGES—THEMSELVES A FORM OF AFFIRMATIVE ACTION—HAVE BEEN ABOLISHED

Speaking of "white/wealthy alumni children": "legacy" university-admission preferences are an unearned, hereditary privilege for people already from privileged families. It is a sordid business—heard that phrase before?—, *a sordid business*, this "legacy" privilege. Should privilege be awarded with *further* privilege? Is that the American dream… or an abusive nightmare?

If the Court abolishes a tool of integration and desegregation like affirmative action—admittedly a blunt instrument at times, but one which has done much good—, but leaves in place a cage of segregation and anti-diversity like "legacy" preferences, not unlike the realm of royal/aristocratic hereditary privilege in Britain from which the American Revolution was supposed to free the 13 Colonies, would that be truly American?

Amicus is concerned that the Court might self-righteously eliminate "traditional" affirmative action (benefiting underrepresented minorities), and then offer only a pious, airy hope that somehow this might "pressure" colleges to abandon "affirmative action for the already-advantaged" ("AAAA"?) such as alumni-child preferences. The glaring hypocrisy of keeping only the privileges that aid the privileged, not to mention the fact that many of the Court's Members' own children may benefit from such privileges, may not improve the image of the Court.

And many schools, if traditional affirmative action is destroyed, may make only cosmetic improvements, saying, maybe, "We'll, uh, *somewhat reduce the scale* of alumni-child bonuses", when they should not have such preferences at all. —On that latter note:

A. The Court Might Consider *Sua Sponte* Abolishing Alumni-Child (or Similar) Admissions Advantages

For the Court to spontaneously outlaw alumni-child privileges would be a huge step, and maybe no party has asked for it. But if the Court in *Dobbs* was willing to go far beyond what the certiorari petition asked for, then it might not be such a stretch for the Court to outright illegalize "legacy" privileges; especially if the Court abolishes race-based affirmative action—God forfend—, the Court could then abolish "legacy" bonuses as themselves a form of forbidden race-based affirmative action. (Incidentally, bonuses for athletes may not be evil, as long as they're not just surrogates for white wealth, as could happen with, e.g., lacrosse, equestrianism, or sailing.)

After all, Petitioner makes alumni-kid privileges sound racialized and horrible—and they are, with whiffs of anti-Semitism, white supremacy, etc. Not even mentioning possible fraud issues: any college that claims it supports "diversity" but has privileges for the privileged, is arguably fraudulent and self-contradictory.

B. Why Didn't Petitioner Sue Respondents Over Alumni-Child Admission Advantages?

Too, Amicus finds it disturbing that Petitioner could have sued Respondents over "legacy" privileges, but didn't. If such privileges really stem from anti-Semitism, plus other odious things (white supremacy; snobbery; being around longer than affirmative action has; and again, even fraud, if the

college claims to value diversity but still keeps anti-diversity policies like "legacy" advantage), Petitioner easily could have sued.

But it is suing only to end affirmative action helping underrepresented minorities. (*See generally* Br. Amicus Curiae of Professor Fiona A. Harrison in Supp. of Neither Party in 20-1199, especially at 12 n.6 (noting Petitioner's failure to sue over "legacy"-type preferences).) This is wrong, and recognizing that error should color (so to speak) the Court's deliberations.

C. The Court's Members Should Be Transparent About Any Admissions Privileges Their Families Have Received or Will Receive, Including Alumni-Child, Donor, or Other Privileges

This is another sensitive topic, but relevant. A number of the Court's honorable Members may be graduates of Harvard or other colleges which offer privilege preferences. This being so, the Court may be ruling, in the instant case, on privileges affecting their own families.

Thus, Amicus hopes the Court will be publicly transparent about any such privileges, past, present, or prospective; and hopes that the Nation's journalists may be energetic in trying to find out about privileges benefiting Justices' families. Fair is fair.

D. Just Because Some Alumni Children Are Also from Underrepresented Minorities, That Does Not Justify Keeping Alumni-Child Privileges

By the way, some may argue that because colleges are more integrated than formerly, many children of alumnae/i will now be black, Latino, or Native American; and that therefore, it's "okay" to keep alumni-child privileges. But, while the progressing diversification of alumni and offspring is a good thing in itself: still, on the whole, "legacy" preferences tend to benefit the majority racial group (Caucasian), and always benefit people who are privileged enough to be alumni, regardless of color.

If an alumna/us of color's children receive a "legacy" admissions boost, that hurts not only anyone who isn't an alumni kid, it hurts *applicants of color* who aren't alumni kids.

And what if an alumni-child of color receives double benefits, both for being a "legacy" and for being a minority? (Should Barack Obama's children have received admissions privileges for their father's name, …and his being a Harvard alumnus, …and being African-American?) Is that fair? The reader may come to her/his own conclusions.

E. Underrepresented Minorities Should Be Able to Opt Out of Preferential Treatment in Admissions, if They Feel Stigmatized by It

As for the allegation that affirmative action may stigmatize minorities, perhaps the Court should mandate that minority applicants who don't want an admissions boost for their racial-group membership, should be able to demand that they get no plus. Say, a Native American applicant named Thomas Clarence, who is horrified at affirmative action, could request that he not be given extra points for being Cherokee.

But affirmative action would exist for other minorities who *want* that boost. Therefore, they wouldn't be hurt (affirmative action would still exist), but Thomas Clarence wouldn't be insulted, since he could opt out of affirmative action: a classic win-win situation.

F. Giving Admissions Privileges to Children of Donors Is Reminiscent of Prostitution/Bribery

Turning to donors' children, instead of just alumni's or faculty/staff's children, for a moment: the idea of purchasing Junior's way into the class, has an un-American stench to it, redolent of the brothel. America is supposed to be about merit, hard work, and diversity ("*E pluribus unum*"), not a rigged game and "dirty pool". What's next, purchasing a seat on the Court? To quote the corrupt policeman Tom Keough (played by Jack Kehoe) in *Serpico* (Paramount Pictures 1973): "[W]ho can trust a cop who don't take money?" Ugh.

The excuse that "schools can use the money" is a poor one. (Harvard talking poor-mouth looks particularly bad.) There are other ways to raise money, which don't look corrupt. If anything is justified to raise money for a college, then, why not sell marijuana (where it's legal…) at football games, and auction the maidenhead of cheerleaders (if prostitution is legal…), or at least lap dances/ striptease from cheerleaders, to raise money for Dear Old Alma Mater?

Donor-child preferences are *per se* tainted by resembling, or being, a sort of prostitution, or bribery, or both. The Court should be loath to end

affirmative action before donor-child privilege (which does skew white and wealthy) is abolished.

Such privilege even may hurt donor children themselves—just as hereditary privilege might. Without mentioning George W. Bush, Jared Kushner, or Hunter Biden, privilege can be deeply corruptive to its recipients.

G. Petitioner's Simulated Alternative, Ending Privilege Preferences, Has Good Points, but Does Not Logically Imply Affirmative Action Must End… and It Also Massively, Wrongly Hurts Underrepresented-Minority Applicants

On that note, Amicus, trying to be reasonable, sees some limited good in Petitioner's ideas for change. For example,

> At trial, SFFA simulated an alternative where Harvard eliminates its preferences for the children of donors, alumni, and Harvard faculty—who are overwhelmingly white and wealthy—and increases its preference for the socioeconomically disadvantaged. Harv.JA763-65, 774-75. Under this simulation, underrepresented minority admissions rise slightly, Asian-American admissions increase, Harvard becomes more socioeconomically diverse, and academic characteristics remain excellent. Harv.JA774-75, 1775, 1783.

Pet'r's Merits Br. at 81 (citations omitted). *Prima facie*, this sounds fairly good. Amicus is all for the elimination of the listed now-forbidden preferences, and more Asians and socioeconomic diversity both sound excellent.

However, there are huge problems with Petitioner's argument. First, there are logical problems, such as:

a. elimination of "legacy" and similar preferences (dean's special list, etc.), does not logically imply that

b. affirmative action for underrepresented minorities must also be eliminated;

and the corollary issue/possibility, that:

a. if elimination of privilege preferences produces a larger number of seats for, e.g., Asians and poorer people at a school,

b. that may actually *reduce the pressure to eliminate* affirmative action for underrepresented minorities, since the extra seats available from the end of "legacy"-type preferences, may compensate for seats taken by underrepresented minorities under affirmative action.

Otherwise put, an admissions model may be mathematically possible (and otherwise desirable), wherein privileges for the privileged vanish, but affirmative action for underrepresented minorities still exists: either at its present strength, or, alternatively, somewhat weakened, if people see it as overly benefiting those minorities.

A second huge problem, more "factual" and "equitable" than just "logical", maybe, is the colossal drop in minorities' attendance under Petitioner's models. Petitioner acknowledges an enormous c. 75% decline in Native American admissions at UNC, from 1.8% to 0.5%, under one model, Br. at 85 (citations omitted). And the 20-1199 ("Harvard") joint appendix at 1775, "Outcome Measures", line 4, yields, *id.*, under three different models, drops of, respectively, 30%, 30%, and 32%—almost a third!—in black student admissions. This is catastrophic, and Petitioner's brief doesn't even have the candor to mention it explicitly.

Do such collapses in Native American/African-American attendance constitute "workable race-neutral alternatives"? Maybe not.

But, as Amicus noted *supra*, admissions models may be possible, wherein privilege preferences disappear, but underrepresented minorities still receive admissions bonuses. This would tend to prevent the horrific cratering of underrepresented-minority attendance that Petitioner's own models *supra* predict.

Still, if there is eventually *some* reduction in underrepresented-minority numbers, just not near the 30% range, reasonable people might consider that acceptable, if that is the price of a gradual truncation of, or end to, affirmative action, as per the original 2028 limit mentioned in *Grutter*.

At this point, we shall switch to further discussion of Asian-American admissions:

V. AFFIRMATIVE ACTION DOES NOT LOGICALLY REQUIRE BIAS AGAINST ASIAN AMERICANS OR OTHER GROUPS

Amicus was sorry to hear that there was alleged bigotry against Asian Americans in Respondents' school-admissions processes. If so, that was as deplorable as any other form of racial/ethnic bigotry, and should be ended.

However, affirmative action does not of necessity mean that Asians, or others, will automatically be treated badly or stereotyped. Why would it? If admissions officers really understand diversity, they should be able to comprehend that Asian Americans may differ individually as much as anyone else. (Are Harvard and UNC, reputable research universities, considered *just too stupid* to learn to respect Asian Americans? Really?)

Otherwise put, Petitioner makes the logical error of assuming/claiming, "If there has been any prejudice/stereotyping against Asian- (or other-) American university/college applicants under affirmative-action regimes: *all* affirmative action is *ipso facto* wrong and must be destroyed immediately."

But that is a false dilemma. What if, say, prejudice against Asian Americans (or others), alleged to be caused by affirmative action, can be alleviated, without destroying affirmative action? Then affirmative action needn't be destroyed.

Petitioner itself admits that treatment of Asians improved over time, even if it needed a push from Petitioner. Br. at 17 (Harvard admitted more Asians after lawsuit). So, there is hope for fair treatment of Asians under affirmative action. (Schools *without* affirmative action might also stereotype Asians, and

maybe even worse than schools with affirmative action, for all we know, since schools without affirmative action might not even value any kind of diversity.)

Thus, if affirmative action is useful, e.g., for preventing underrepresented-minority students from diminishing over 30%, one may as well keep it, but not keep bigotry against Asian Americans.

One possible objection is that even if there's no bias or "negative rating" for Asians, the bonus for blacks, Latinos, or Native Americans may be so high that there's allegedly unfair advantage for the latter over Asians. However, if Asian Americans aren't disadvantaged more than whites, say, then at least Asians (or Caucasians/whites) are not being treated as actual inferiors.

Too, as noted *supra*, the amount of "bonus" or "plus", so to speak, for underrepresented minorities could be reduced, if deemed excessive. Amicus isn't claiming that Respondents use actual numerical bonuses in affirmative action, but if their admissions practices resemble such, that could be altered. This would make it harder to claim that whites or Asians are being treated less fairly than are African Americans, Latinos, or Native Americans.

If schools don't use the concept of "critical mass", denoting a large-enough number of minority students that the members of a minority don't feel isolated or tokenized, maybe they could adopt it, even if with a less radioactive term than "critical mass". (Maybe "significant/substantial group", "self-supporting group", "confident number", or something else, would be better than "critical mass".)

Then schools could discuss the lowest rough number of minorities they feel might be enough to prevent isolation. This number may get smaller over time, as our society hopefully proceeds towards greater integration and less bigotry. Since affirmative action is supposed to disappear eventually, it would be good if the "confident number" becomes smaller over time.

(Of course, a too-rigid number may be seen as a forbidden "quota". Then again, commonsensically, if there's just one minority student, or a small handful, then minority students may feel very uncomfortable. So rough numbers may not be all bad, especially since affirmative action has to go, eventually.)

VI. TWO ASIAN-AMERICAN STUDENTS SUPPORTING AFFIRMATIVE ACTION

It is now time to hear from some actual Asian-American students, at length, eloquently supporting affirmative action. First, Benjamin Chang, *I'm an Asian American Harvard student. The anti-affirmative-action case does not speak for me*, Wash. Post, Feb. 4, 2022, 12:58 p.m., https://www.washingtonpost.com/opinions/2022/02/04/harvard-asian-american-student-believes-in-affirmative-action/,

> As president of the Asian American Association at Harvard and the son of an immigrant family, I have a message for those who oppose affirmative action: Do not use the Asian American community to advance your political agenda.

. . . .

Students for Fair Admissions, led by conservative legal strategist Edward Blum, claims to stand up for Asian Americans, arguing that affirmative action unfairly targets certain minorities. But this organization does not represent us. In fact, the Harvard Asian American community has overwhelmingly supported race-conscious admissions, with 10 Asian student organizations filing an amicus brief for Harvard when the case was heard by the Massachusetts District Court in 2018. . . .

. . . .

For Blum, this effort dates to *Fisher v. University of Texas*, an affirmative action case that he lost — after which he bluntly stated that he "needed Asian plaintiffs." By using Asian clients as a front for his attack on communities of color, he is pitting minority groups against one another . . . .

. . . .

Talking with my roommate about how he faced racism in Mississippi taught me more about the Black experience than I ever could have learned in a classroom. Late-night conversations with classmates about our hometowns transformed my idea of the Middle East. . . .

. . . .

> Yes, there is still much to be done to make Harvard more equitable. Statistics show that Asian American applicants generally have high academic ratings but are unfairly penalized in the qualitative "personal rating" category. Legacy students still make up a disproportionate percentage of the student body. . . .
>
> . . . .
>
> . . . By attacking affirmative action, SFFA is attempting to rob our children of valuable opportunities to understand one another and the world. This we students cannot stand for. So please: Stop using people like me as a political tool to attack other communities of color. You do not speak for us.

Id. Second, Zachariah Chou, *My race may have played a factor in my college rejections, but I support affirmative action*, Yahoo! News (originally *in* USA Today), Feb. 15, 2022, https://www.yahoo.com/news/race-may-played-factor-college-130024410.html,

> I got rejected from those two colleges [, Harvard and UNC.]
>
> . . . .
>
> At the end of the day, affirmative action helps Asian Americans – especially underrepresented subgroups – and a supermajority of us support it.
>
> And to those who don't support it, I get it.

It hurts because the American dream tell[s] us that if you work hard enough, you can do anything. But that's just not the way it is in reality. Expecting to get into a particular college just because you worked hard is called entitlement . . . .

It hurts because when we read the lawsuit's (contested) claim that Asian American applicants to Harvard scored lower on personality traits, it reminds us the implicit bias we face every day in our classrooms and workplace. Yes, admissions offices can be more diverse and admissions officers can be better trained to overcome their biases. However, I can't see this one claim as good enough reason to end affirmative action across our country.

What really hurts is seeing Asian Americans being used by white people like Edward Blum to attack a system that benefits ourselves and other minorities. The playbook is so old[:] Asian Americans are being used as a racial mascot[,] a racial wedge[,] being racially triangulated against other minorities by white people in their fight against affirmative action. . . .

. . . .

Maybe my race played a role in my rejection. Maybe it didn't. Life goes on if you don't get into the college of your dreams.

> Affirmative action, as a principle, serves to help all underrepresented groups of people, including those from rural areas or lower socioeconomic status. Race really is just one of the many, many factors college admissions officers look at through their holistic review processes.
>
> To scapegoat race for an admissions rejection would be, well, unfair.

Id. Indeed, Asians may have worse problems than alleged affirmative-action issues: *see, e.g.*, Dr. Mishal Reja, *Trump's 'Chinese Virus' tweet helped lead to rise in racist anti-Asian Twitter content: Study*, ABC News, Mar. 18, 2021, 2:58 p.m., https://abcnews.go.com/Health/trumps-chinese-virus-tweet-helped-lead-rise-racist/story?id=76530148, "On the night several Asian women were shot dead in Atlanta, [Trump] referred to COVID-19 as the 'China Virus' on Fox News." *Id.*; Sakshi Venkatraman, *Black, Asian law students call for professor to be suspended over racist remarks*, NBC News, April 20, 2022, 11:22 a.m., https://www.nbcnews.com/news/asian-america/black-asian-law-students-call-professor-suspended-offensive-remarks-rcna25187 (University of Pennsylvania teacher Amy Wax waxes racist).

VII. AFFIRMATIVE ACTION SHOULD SURVIVE FOR AT LEAST THE "25-YEAR GRACE PERIOD" GRANTED IN *GRUTTER*, AND POSSIBLY LONGER

As for when/whether affirmative action should leave the stage, permanently: Amicus is somewhat

shocked that Petitioner would destroy it immediately, when even their own brief, *id.* at 12, refers to "*Grutter*'s 25-year grace period." That period hasn't expired, and, as noted, Petitioner hasn't shown a necessity for destroying all affirmative action right now. Their brief also mentions, *id.* at 67, *Grutter*'s "own self-destruct mechanism" (citation omitted); well, if *Grutter* is designed to disappear anyway, why gratuitously push it out the window prematurely?

Petitioner does have a point, if it's true that "[t]he whole point of *Grutter*'s 25-year deadline, moreover, was to give universities time to wind down their racial preferences. But universities aren't doing that. Harvard and UNC have not decreased the size of their racial preferences since 2003, and both insist that *Grutter*'s deadline is not influencing their behavior." Br. at 68-69. The Court may need, then, to "encourage" schools gradually to abate preferences for underrepresented minorities, whether on a 25-year timeline or a more extended timeline.

However, given the horrific, disproportionate suffering and mass deaths of minorities during the COVID-19 pandemic; and also given the epidemic of white supremacy (e.g., in the January 6, 2021 terrorist attack on the U.S. Capitol): it might be cruel not to give some extension to the 25-year *Grutter* deadline, say, 5-10 years. This doesn't come close to doubling the deadline (50 years), so may be considered reasonable. Affirmative action must take its curtain call at some point, but it would be graceless to violate the 25-year grace period; and maybe also, graceless not to give some extension,

even a decade, maybe, considering the recent atrocious, deadly, mass suffering of minorities.

(*See, e.g.,* Br. for Ann M. Killenbeck et al. as *Amici Curiae* in Supp. of Neither Party in 20-1199 & 21-707,

> Unfortunately, the economic and social dislocations that informed those conclusions [the need for early educational/medical/etc. support for future college applicants] 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. . . .

Id. at 30.)

All that being said, Amicus still thinks it improper to end affirmative action before ending alumni-kid advantage. Maybe affirmative action should still be here many years from now… if and only if the stench of "legacy" preferences still persists; hopefully, it won't persist long at all.

VIII. *GRUTTER* IS NOT *PLESSY*, ESPECIALLY GIVEN *BROWN*, COLIN POWELL'S EMBRACE OF AFFIRMATIVE ACTION, AND MARTIN LUTHER KING'S ADVOCATING ACTUAL QUOTAS FOR UNDERREPRESENTED MINORITIES

It is especially important to uphold affirmative action in the face of Petitioner's grossly offensive claims, *see* Br. at 47, 68, 86, that affirmative action is just *Plessy* wearing drag. Such claims are unconvincing, given that, e.g., African-American patriots like General Colin Powell supported affirmative action. *See, e.g.*, the military amicus brief he co-signed (Br. of Lt. Gen. Julius W. Becton, Jr., as *Amici Curiae* in Supp. of Resp'ts) in *Fisher* I, *supra* at 1, *available at* https://www.scotusblog.com/wp-content/uploads/2016/08/11-345-respondent-amicus-becton.pdf,

> As one senior Pentagon official put it, "[d]oing affirmative action the right way is deadly serious for us—people's lives depend on it." . . . .
>
> . . . .
>
> The court of appeals correctly confirmed the constitutionality of UT's race-conscious admissions policy under existing precedent, including *Grutter*. The judgment of the court of appeals should be affirmed.

Br. at 8, 38 (brackets in original) (citation omitted). (General Powell signed at an unnumbered page, *id.*, directly following the cover page.)

So, was Powell really some closet racist who wanted blacks segregated from whites *à la Plessy*? Petitioner should take care not to make asinine claims.

Moreover, the Reverend Dr. Martin Luther King, Jr., advocated a form of affirmative action for African Americans which amounted to actual quotas,

a stronger form of preference than the diversity criterion of *Grutter* allows. *A fortiori*, then, King may likely have supported *Grutter*'s diversity criterion for affirmative action, since it isn't as strong as what he did advocate. …But who reading this would call King a "racist" for doing that? That would not be very wise.

See, e.g., Ruthann Robson, *Daily Read: MLK and Affirmative Action*, Const. L. Prof. Blog, Jan. 15, 2018, https://lawprofessors.typepad.com/conlaw/2018/01/daily-read-mlk-and-affirmative-action.html (quoting David B. Oppenheimer, Abstract of *Dr. King's Dream of Affirmative Action*, written Aug. 7, 2017, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015018 (some citations/dates omitted)),

> Yet as Professor Oppenheimer argues it is simplistic - - - and incorrect - - - to conclude that Martin Luther King's political theorizing can be reduced to a convenient "color-blind" position. Oppenheimer writes:
>
> [indented words of Oppenheimer]
> …On the one hand, he spent much of the last six years of his life actively promoting what we would describe today as race-conscious affirmative action, including the use of racial quotas in employment. Specifically, from 1962-68 Dr. King orchestrated and implemented "Operation Breadbasket," a civil rights boycott campaign that demanded employment quotas for Black

> American workers based on their numbers in a workforce, neighborhood or city. Yet on the other hand, with regard to class-based affirmative action, Dr. King supported a massive war on poverty. In advocating for special benefits for poor Americans he sometimes used color-blind language and pointed out that it would benefit poor whites as well as poor Blacks, while at other times he justified it as an example of the kind of reparations to which Black Americans were entitled under the equitable remedy of restitution for unpaid wages.
> [end of quoted Oppenheimer paragraph]
>
> . . . .
>
> It seems pretty clear that MLK supported what is now known as "affirmative action."

Id. And, last but not least, let us hear from *Brown* itself on the essence of *Plessy*: "[T]he so-called 'separate but equal' doctrine announced by this Court in *Plessy v. Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate." 347 U.S. at 488 (Warren, C.J.). But as we know, *Grutter* is about diversity and desegregation, not promoting segregation as *Plessy* does, per Earl Warren, *supra*.

So, all told, when Petitioner makes absurd comparisons of affirmative action to *Plessy*, they have little to stand on—unless Petitioner wants to

argue with King, Powell, and the *Brown* Court. Amicus doubts Petitioner would win that argument.

(Incidentally, if *Plessy* has never been formally, *per se* overturned, or fully overturned, Amicus politely asks the Court to overturn *Plessy* formally, *per se*, and fully, right now. This may be long overdue, and far better than overturning a pro-integration case like *Grutter*.)

* * *

Amicus, by the way, was a student (not an underrepresented minority) at the University of Michigan Law School in a time (1999-2002) leading up to *Grutter*, which vindicated the school's affirmative-action program. He, and many others, felt that they benefited, intellectually and socially, from the racially-diverse student body at the school. (*Pace* Petitioner, Amicus believes in *Grutter*; Petitioner never even asked Amicus about it.)

While the State of Michigan (and California, etc.) doesn't currently allow affirmative action, at least it had a *choice* (which Amicus defended in *Schuette*, noted *supra* at 1) to keep or reject it. Now Petitioner wants to take that choice away; that should not happen before 2028 at the earliest, or before "legacy" and similar preferences are extinct.

Indeed, not just Michigan Law, but most of the honorable Court, has benefited from some form of affirmative action, it seems. Justices Barrett and Jackson in the Court-nomination procedure; Justice Brett Kavanaugh in applying to Yale (*see* Eoin Higgins, *Yale Legacy Admission Brett Kavanaugh Is Now the Swing Vote on Affirmative Action at Universities*, The Intercept, Oct. 8, 2018, 1:36 p.m.,

https://theintercept.com/2018/10/08/brett-kavanaugh-affirmative-action-at-universities/), Justice Sonia Sotomayor in applying to Princeton, and Yale Law, and Justice Clarence Thomas in applying to Yale Law; …and Justice Samuel Alito from what may be called "man-firmative action", since he entered Princeton in 1968 and apparently didn't have to compete with females (Princeton admitted women in 1969; *cf*. Wikipedia, *Concerned Alumni of Princeton*, https://en.wikipedia.org/wiki/Concerned_Alumni_of_Princeton (as of Mar. 14, 2022, 5:50 GMT), re Alito's membership of a group opposing affirmative action, but supporting minimum quota of men at Princeton).

This all might make it odd for the Court to claim that any admission privilege for any race/gender is always a bad thing, since this might condemn most of the Court's Members themselves. (Justice Elena Kagan's former deanship of Harvard Law School, if alumni/donor/etc. admissions privileges existed under her leadership, may also be of interest, if not quite (?) recusal material.)

In particular, with two African-American affirmative-action beneficiaries on the Court—a 100% increase in black membership from a few months ago—, it might be a strange time to adopt Petitioner's proposals, which, as noted *supra* at 23, project a roughly 1/3 drop in black student admission at Harvard, and roughly 3/4 drop in Native American student admission at UNC.

But if the Court can find a solution which avoids racial exclusion (e.g., prejudice against Asian Americans), is thoughtfully time-limited, ends "legacy"/donor/faculty/staff and similar preferences, allows preferences keeping schools integrated

instead of segregated (e.g., no 30% attendance-drops of any underrepresented minority), and is untainted by bias in America's "culture war": the Court may be staying true to its own history as an affirmative-action-peopled, affirmative-action-*improved* institution; being attentive to international examples like Israel ("Jewish affirmative action"); and honoring the spirits of Colin Powell, Martin Luther King, and the epic, desegregative greatness of the *Brown* Court.

CONCLUSION

The Court should uphold *Grutter*, but also hold affirmative-action-using schools to greater responsibility, such as ending the sordid business of admissions preferences for already-privileged children of donors/alumni/faculty/staff. Amicus humbly thanks the Court for its time and consideration.

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