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, et al.
Respondents.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* NATIONAL BLACK LAW STUDENTS ASSOCIATION IN SUPPORT OF RESPONDENTS

DEBORAH N. ARCHER
Counsel of Record
VINCENT M. SOUTHERLAND
JASON D. WILLIAMSON
CENTER ON RACE, INEQUALITY, AND THE LAW
AT NEW YORK UNIVERSITY SCHOOL OF LAW
245 Sullivan Street
New York, NY 10012
(212) 998-6528
deborah.archer@nyu.edu
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The National Black Law Students Association (NBLSA) submits this brief as amicus curiae in support of Respondents, urging this Court to affirm the rulings of two lower courts upholding the race-conscious admissions policies of Harvard University and the University of North Carolina at Chapel Hill. NBLSA is a membership organization formed in 1968 to promote the educational, professional, political, and social objectives of Black law students. Today, NBLSA is the largest student-run organization in the United States, with nearly 6,000 members, over 200 chapters in our nation's law schools, a growing pre-law division, and six international chapters or affiliates. NBLSA has an interest in this case because it is dedicated to protecting the racial diversity in legal education and the legal profession made possible by race-conscious college and university admissions programs.

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[1] The parties have consented to the filing of this brief. Written consent is on file with this Court. No counsel for a named party authored this brief in whole or in part, and no named party or counsel for a named party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Over 60 years ago this Court recognized that

> [t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. Painter, 339 U.S. 629, 634 (1950)

Thankfully, the legally-sanctioned racial segregation of law students at issue in *Sweatt* is a thing of the past. Today, the vast majority of this nation's law schools embrace the fact that a racially and ethnically diverse student body improves the quality of legal education for all students. However, there remains a systemic racial hierarchy across all aspects of American society. Ongoing, deeply-rooted racial segregation produces and perpetuates damaging racial disparities in educational opportunities and outcomes for Black students. Race-conscious admissions programs, like the ones used by Harvard University and the University of North Carolina, are designed to overcome some of this systemic racism and serve as a vital pipeline to educational and professional opportunities for students of color.

This Court has repeatedly held that race-conscious admissions programs in public colleges and universities are constitutional, see *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 376–77 (2016) (*Fisher II*); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 307–08 (2013) (*Fisher I*); *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978), and carry benefits that flow to the educational institution, the larger society, and individual students. *See Fisher II*, 579 U.S. at 376–377; *Fisher I*, 570 U.S. at 307–308; *Grutter*, 539 U.S. at 335. Yet, opponents of race-conscious admissions programs continue to argue, based on questionable quantitative evidence, that these programs demoralize minority students, exposing them to stigma and academic environments in which they are intellectually outmatched. In an amicus curiae brief submitted to the Court in support of the Petitioners in this case, amici cite to class rank and bar passage rates of Black law students as evidence that race-conscious admissions programs lead minority students to attend colleges, universities, and professional schools for which they are unqualified.[2]

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[2] Although *amici* Sander presents his arguments and analysis as unchallenged, both have been widely challenged and criticized. *See e.g.* Angela Onwuachi-Willig & William Kidder, *Still Hazy After All These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 TEX. L. REV. 895 (2014); Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity,* 88 DENVER U. L. REV. 751 (2011); Katherine Y. · Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?,* 101 NW. U. L. REV. 1759 (2007); andre douglas pond cummings, *"Open Water: Affirmative Action. Mismatch Theory and Swarming Predators - A Response to Richard Sander,* 44 BRANDEIS L.J. 795, 826-829 (2006); David B. Wilkins, *A*

Brief of Richard Sander as Amicus Curiae in Support of Petitioners at 27–29 [hereinafter "Sander Brief"]. However, the Sander Brief ignores the fact that "[r]ace continues to structure the opportunities and outlook of all Americans even as overt discrimination based on race recedes. Any dialogue about affirmative action, or about legal education and practice generally, must candidly acknowledge this complex reality." David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1961 (2005) [hereinafter "Systematic Response"]. In any event, while the reported gap between the performance of some Black and white law students is troubling, it is not a function of the schools' use of race--conscious admissions programs.

While mismatch is a phantom, there are real harms at play here. Given the ongoing impact of systemic racism in the United States—particularly in the areas of education and housing—eliminating the consideration of race in the admissions process would dramatically reduce the number of Black law students and lawyers, particularly at our nation's most selective law schools. See, e.g., David Chambers, et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1857, 1898 (2005) (concluding that eliminating race-conscious admissions programs would result in a

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Systematic Response to Systemic Disadvantage: A Response to Sander, 57 STAN. L. REV. 1915 (2005); Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander,* 114 YALE L.J. 2011 (2005). These scholars have engaged Professor Sander's arguments on his terms, despite the flaws in his methodology.

"substantial net decline in the number of African Americans entering the bar"); *see also* Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1853 (2005) (arguing that race- conscious admissions programs mitigate racial disparities and are likely to produce more Black lawyers). Indeed, the significant contributions by lawyers of color—across all sectors of the legal field—serve as compelling evidence of their success and value, and counsels in favor of continuing admissions programs such as those at issue in this case.

Finally, the race-blind admissions regime that Petitioners seek would levy a material disadvantage on Black students and other students of color in the admissions process by prohibiting those applicants from sharing the full breadth of their identities and experiences. Moreover, race-blind admissions procedures would require students to obscure and conceal any portion of their identities and experiences that intersect with their race. Silencing of that sort amounts to a dignitary harm and conveys an unmistakable message to prospective applicants of color: a salient—and for some, the *most* salient—part of your life is meaningless.

ARGUMENT

I. RACE-CONSCIOUS ADMISSIONS PROGRAMS BENEFIT THE LARGER EDUCATIONAL COMMUNITY AND SOCIETY AS A WHOLE

As both lower courts held in their decisions below, a university has a compelling state interest in achieving diversity in its student body because of the myriad benefits to the student body as a whole. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 187 (1st Cir. 2020); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 2021 U.S. Dist. LEXIS 255358, at *202 (M.D.N.C. Oct. 18, 2021). These race-conscious admissions policies "promote 'cross-racial understanding,' 'break down racial stereotypes,' enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race." *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 230 (5th Cir. 2011); *see also Grutter*, 539 U.S. at 319. This Court has long accepted that the educational mission of an American institution of higher learning goes far beyond the subject matter discussed in any single classroom to encompass the goals of ensuring availability of opportunity for all citizens, training students for leadership, and opening students' minds in an effort to create citizens who can collaborate, communicate and contribute meaningfully to an increasingly multi-ethnic and global community. *See, e.g., Grutter*, 539

U.S. at 331; *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Black students are not the sole intended beneficiaries of race-conscious admissions programs. The benefits of such programs inure to all segments of society.

While educational institutions have an interest in creating a diverse learning environment, society has a larger interest in colleges and universities training a diverse group of future leaders. Indeed, there has emerged a "national consensus among university, business, and military leaders on the value of racial inclusiveness." Lani Guinier, *Admissions Ritualsas Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 122 (2003) [hereinafter "Admissions Rituals"]; *see also Grutter*, 539 U.S. at 330-331 (citing to briefs on behalf of major U.S. corporations and military officials in support of the benefits of race-conscious admissions programs). Institutions of higher education are the training ground for our future leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332.

Institutions of higher education seek diversity in service of their "twin goals of educational excellence and democratic opportunity," Admissions Rituals at 199, not for the sole benefit of minority students admitted under race-conscious programs. "[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities,

represents a paramount government objective." *Id.* at 331-32. "[N]owhere is the importance of such openness more acute than in the context of higher education. Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332.

II. RACE-CONSCIOUS ADMISSIONS PROGRAMS ARE NOT HARMFUL TO THE PROFESSIONAL ASPIRATIONS OR THE PERSONAL WELL-BEING OF BLACK LAW STUDENTS

Black graduates of top-tier law schools overwhelmingly complete law school and go on to pass the bar. Indeed, over 95% of Black students attending the most elite schools graduate. Race-conscious admission programs at the undergraduate and graduate level have helped a significant number of Black law students overcome systemic barriers that previously blocked their entrance into our nation's flagship colleges and universities, creating pipelines to impressive and influential legal careers.

In fact, Black students at top-tier institutions graduate at high rates and proceed to have careers just as distinguished as their white classmates. William G. Bowen & Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS at 55-57 (1998) [hereinafter "SHAPE OF THE RIVER"]. That result flows from a fact confirmed by scholars: selective educational institutions yield high graduation rates. William G. Bowen et al., CROSSING

THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES, 192 (2009) [hereinafter "CROSSING THE FINISH LINE"].

Those same scholars also directly challenged the assumption that "mismatching" led to lower graduation rates for Black students. In their study, the scholars grouped Black men by their high school GPAs and then examined whether those with relatively low GPAs who enrolled in more selective public universities graduated at lower rates than those with the same GPAs who attended less selective institutions. The results proved just the opposite. Of the students with high school GPAs below 3.0, those who went to the most selective colleges and universities in the study had a graduation rate six percentage points higher than those who went to second-tier schools and eight percentage points higher than those who went to third-tier schools. *Id.* at 209.

Indeed, for all GPA levels Black men who went to more selective institutions graduated at higher rates than their peers with similar grades who went to less selective colleges. *Id.* "Moreover, contrary to what the overmatch or mismatch hypothesis would lead us to expect, the relative graduation rate advantage associated with going to a more selective university was even more pronounced for black men at the lower end of the high school grade distribution than it was for students with better high school records." *Id.* Similarly, in the earlier study by Bowen and Bok, they found that "the more selective the college attended, the lower the Black dropout rate." SHAPE OF THE RIVER at 259.

Several other studies also refute claims that Black students would fare better academically at schools where the average SAT score was similar to their own scores. Black students in the lowest category of SAT scores graduated at higher rates the more selective the school they attended. See CROSSING THE FINISH LINE at 209; SHAPE OF THE RIVER at 61, 259. Moreover, for students of similar gender, socioeconomic status, high school grades and SAT scores, graduation rates were highest for those students who attended the most selective schools. SHAPE OF THE RIVER at 63, 259. Finally, students in the same category of SAT scores were more likely to ultimately earn an advanced degree the more selective the school they attended. *Id.* at 114. This was true even if the student received a lower GPA at the more prestigious school. *Id.*

These studies support the conclusion that to help improve the academic and professional outcomes for Black students we should not "discourage them from enrolling in academically strong programs that choose to admit them. On the contrary, ... [they] should be encouraged to 'aim high' when deciding whether and where to pursue educational opportunities beyond high school." CROSSING THE FINISH LINE at 211. Indeed, the problem of "undermatching," where students with strong academic credentials do not enroll in colleges or universities that match their academic credentials, is far more troubling for Black students than the alleged issue of mismatch advanced in the Sander Brief. See *id.* at 100. Undermatching disproportionately effects racial and ethnic minorities, and within that cohort, is more prevalent among Black students. *Id.* at 103.

It also bears on diversity and race-conscious admissions programs, as one of the prominent reasons Black students decide not to attend colleges and universities that match their academic credentials is their belief that they would be "uncomfortable" in a community lacking racial and ethnic diversity. See *id.* at 104.

The deleterious effects of California's Proposition 209, which was enacted in 1996 and prohibited the use of affirmative action in higher education admissions, are instructive. The implementation of Proposition 209 fostered undermatching, which, in turn caused under-represented minorities to lose access to top-tier education, degree attainment, higher wages, and strong academic performance. *See* Zachary Bleemer, AFFIRMATIVE ACTION, MISMATCH, AND ECONOMIC MOBILITY AFTER CALIFORNIA'S PROPOSITION 209 at 14-16 (2020). Proposition 209 also decreased racial and ethnic diversity in higher education, failed to limit admission to the most qualified and academically accomplished students, decreased STEM attainment by underrepresented minority students, and produced cascading effects that pushed highly qualified Black and Latinx students into less selective schools. *See* David Mickey-Pabello, SCHOLARLY FINDINGS ON AFFIRMATIVE ACTION BANS at 2 (2020). The damage wrought by Proposition 209's race-blind admissions procedures refutes the educational mismatch hypothesis, while underscoring the collection of harms that flow from undermatching.

As the Court acknowledged in *Grutter*, law schools are a training ground for our country's leaders

in federal, state and local government, business and social institutions, both public and private. *Grutter*, 539 U.S. at 332. In order to ensure that we achieve a representative democracy, as well as a just and equitable society, we need to make sure the bench and bar, in addition to our elected leaders, business leaders, and leaders of public institutions, represent all ethnicities and backgrounds. As a practical matter, law schools cannot succeed in their quest for a well-qualified, racially and ethnically diverse student body unless flagship colleges and universities admit racially and ethnically diverse students to their undergraduate programs.

III. RACE-CONSCIOUS ADMISSIONS IN HIGHER EDUCATION IS NECESSARY TO ACHIEVE RACIALLY DIVERSE CLASSROOMS BECAUSE OF PERSISTENT AND PERVASIVE RACIAL SEGREGATION IN ELEMENTARY AND SECONDARY EDUCATION

Despite the relative progress we have made in recent decades, the United States remains profoundly segregated along racial lines. Indeed, this country has a long and sordid history of racial segregation enforced through public policies, individual acts of discrimination, and mob violence. The cumulative effects of this segregation on people of color are also profound. Research has consistently concluded that Black and Latinx people living in racially segregated communities, with the concentrated poverty that often accompanies such segregation, have profoundly limited life opportunities. *See e.g.,* Marguerite L.

Spencer & Rebecca Reno, Kirwan Inst. for the Study of Race and Ethnicity, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY (2009) (discussing the ways in which socioeconomic and racial segregation decreases life opportunities); Richard Rothstein, THE COLOR OF LAW at 186-187 (2017) (discussing the fact that young Black people are more likely to live in poor neighborhoods than young white people); Todd R. Clear, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE at 70 (Oxford 2007) (discussing the harms of concentrated disadvantage). Residential segregation, in turn, impacts an individual's access to quality education and social capital. Erika Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1419 (2014); Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 URB. LAW. 137, 144 (2013); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 499-501 (2010); john a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749 (1995).

The persistence of deep racial segregation in the United States has produced two systems of elementary and secondary education. One system is disproportionately populated with people of color, serves communities with lower incomes, has access to fewer financial resources, and is less likely to prepare its students for admission to institutions of higher education. The other is whiter, wealthier, and provides expansive opportunities to students who already benefit from privilege. Despite the Court's

foundational ruling in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), our schools remain separate and unequal. This ongoing systemic racism destroys hope, limits possibilities, and impedes the ability of every person to access opportunity and live a choice-filled life.

Access to higher education remains a powerful driver of economic opportunity for communities who have been denied that opportunity for too long. Yet the very disparities which negatively impact students of color in elementary and secondary education also disadvantage those students in higher education admissions. The result is that all students suffer. Students from disadvantaged communities are denied access to higher education, and students from communities of opportunity are denied the benefits of diverse classrooms. As a result, respondents' compelling interest in achieving the educational benefits of diverse classrooms simply cannot be achieved without utilizing race-conscious admissions practices.

A. Racial Disparities in Housing and Income Drive an Inequitable Education System, Which Impedes Black Students' Access to Postsecondary Education

In *Brown*, this Court declared that school segregation is "inherently unequal" in violation of the Equal Protection Clause of the Fourteenth Amendment. 347 U.S. at 495. In the decades since, school segregation has endured and inequality has continued. This is due, in large part, to the

persistence of racial segregation in housing throughout the United States.

In the aftermath of *Brown*, white communities across the country vigorously resisted school desegregation. Equal Just. Initiative, SEGREGATION IN AMERICA (2018), https://segregationinamerica.eji.org/report/acknowledgment.html ("Millions of white parents nationwide acted to deny Black children equal education by voting to close and defund public schools, transferring their children to private, white-only schools, and harassing and violently attacking Black students while their own children watched or participated.") Some state governments openly resisted school integration orders, requiring this Court's intervention. *See Cooper v. Aaron*, 358 U.S. 1, 16-18 (1958) (rejecting Arkansas officials' contention that they were not bound by *Brown*.).

While the Court refused to tolerate Arkansas officials' attempt to continue de jure segregation in *Cooper*, the Court has taken the opposite approach to systemic racial inequality and de facto segregation. Twenty years after *Brown*, the Court in *Milliken v. Bradley*, 418 U.S. 717 (1974) struck down a lower courts' proposed "interdistrict remedy" to desegregate schools in the Detroit metropolitan area by redistributing students among a predominantly Black district in central Detroit and several predominantly white districts in adjacent suburbs. *Id*. at 753. In declining to authorize the District Court's modification of school district lines, the Court treated Michigan's "school district boundaries as absolute barriers to the implementation of an effective

desegregation remedy." *Id.* at 783 (Marshall, J., dissenting). Nor has the Court permitted local governments to proactively implement programs that aim to ameliorate de facto segregation in elementary and secondary education in the absence of a previous judicial desegregation order. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (striking down Seattle's voluntary desegregation program). Since *Milliken*, the housing segregation that has kept students of different races in different school districts has been given full legal effect, and federal courts have allowed racial boundaries in housing to drive racial boundaries in elementary and secondary schools. See EdBuild, *Dismissed: America's Most Divisive School District Borders* at 11 (2019), https://s3.amazonaws.com/edbuild.org/public/projects/dismissed/report/EdBuild+Divisive+Borders+2019.pdf. National trends towards increasingly segregated and unequal schools are not coincidental. They are countenanced by law.

This de facto school segregation drives resource inequality. State and local decision-makers allocate fewer resources to school districts with higher proportions of non-white students. U.S. Dep't of Educ., Off. for C. R., Dear Colleague Letter from the Assistant Secretary (Oct. 1, 2014), at 5, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf. The resulting disparities in school funding negatively impact Black students' outcomes in K-12 education and beyond. *Id.* at 2. Those deprivations impose burdens on Black students that make them less likely to be admitted to institutions of higher education, let alone those

institutions that have been deemed "elite." Without race-conscious admissions policies, Black students will be under-represented in higher education, and all students will be denied the pedagogical benefits of diversity in the classroom.

B. Racial Disparities in Income and Housing Segregation Lead to Inequality in Elementary and Secondary Education

The Federal Housing Administration and private financial institutions contributed to housing segregation through policies such as redlining, setting Black and white neighborhoods on unequal trajectories. *See generally* Daniel Aaronson et al., *The Effects of the 1930s HOLC "Redlining" Maps* 13 AM. ECON. J.: ECON. POL'Y 355 (2021), https://www.aeaweb.org/articles?id=10.1257/pol.20190414. While some discriminatory practices subsided after the Fair Housing Act was passed in 1968, housing segregation has remained durable, and the downstream effects of past government practices such as racist highway construction programs endure. *See* Deborah N. Archer, *White Men's Roads Through Black Men's Homes: Advancing Racial Equity through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020). These policies have not only separated Black communities from white communities; they have cut Black communities off from economic opportunities. *Id*. at 1266.

Residential segregation perpetuates economic inequality, walling off communities of opportunity—which are typically whiter and wealthier—from

communities lacking opportunity. Raj Chetty et al., *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* 19-29 (Nat'l Bureau Econ. Rsch. Working Paper No., 25147, 2018). This economic inequality further entrenches segregation, as people who grow up in neighborhoods with fewer opportunities for economic mobility are unable to move to better resourced areas and obtain the benefits that come with living in a community of opportunity. *See id*. Since school funding is generally driven by local resources such as property taxes, geographic division and the resulting disparities in school funding creates an unequal distribution of wealth among schools. EdBuild, *Nonwhite school districts get $23 Billion less than white districts despite serving the same number of students,* https://edbuild.org/content/23-billion#CA. (last visited July 29, 2022).

Segregation, whether de jure or de facto, disproportionately harms students of color, and particularly Black students, who are more likely to attend schools with inadequate resources. Gary Orfield and Danielle Jarvie, UNEQUAL PUBLIC SCHOOLS MAKES AFFIRMATIVE ACTION ESSENTIAL FOR EQUAL OPPORTUNITY 27 (2020) (Black students face "double isolation by both race and class…."). Comparisons of neighboring districts with substantial gaps in both the proportion of nonwhite students and in revenue revealed that, on average, whiter, wealthier districts receive over $4,000 more per pupil each year. EdBuild, Dismissed, *supra*, at 1. In districts where racial disparities are most pronounced, revenue disparities grow to over $6,500. *Id*. *See also Comfort v. Lynn Sch. Comm.*, 263 F. Supp.

2d 209, 224-225 (D. Mass. 2003) (describing the adverse effects of the two-tiered system of education that flows from racial segregation).

Facially neutral funding policies have been deployed across the country to recreate the pre-*Brown* hierarchy of separate and unequal schools. See Bruce D. Baker and Preston C. Green III, *Tricks of the Trade: State Legislative Actions in School Finance Policy That Perpetuate Racial Disparities in the Post-Brown Era*, 111 AM. J. OF EDUC. 372, 406 (2005) (focusing on formerly de jure segregated states); *see also* EdBuild, Dismissed, *supra*, at 10. Additional state funding for schools with poorer tax bases fails to make up this gap. *Id.* at 6, 9-11. Since schools are funded in large part through property taxes, schools in neighborhoods with concentrated poverty are provided with less funding. Orfield & Jarvie, *supra*, at 25-26; EdBuild, Dismissed, *supra*, at 1. Even so, poor, predominantly white school districts receive nearly $1,500 more per student than poor, predominantly nonwhite districts. EdBuild, $23 Billion, *supra*, at 5.

Overall, unequal access to educational resources across racial groups gives white students an advantage in higher education admissions processes. Race-conscious admissions practices are a rejoinder to that advantage. Ending them ensures that Black students will be underrepresented in higher education, dulling the positive educational effects of diversity in the classroom.

C. Disparities in Elementary and Secondary Education Lead to Inequality in Access to Preparation for Postsecondary Education

The racial disparities that result from inequity in elementary and secondary education are mirrored in access to institutions of higher education. That is a direct consequence of the resources available to students at elementary and secondary educational institutions. Schools that primarily serve students of color are also less likely to offer advanced courses and gifted and talented programs than schools serving mostly white populations. U.S. Dep't of Educ., Off. for C. R., *supra*, at 3, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf. Advanced Placement coursework is viewed as an indicator of academic merit in the college admissions process, and gifted and talented programs are often a pipeline to Advanced Placement coursework. Yet, one in five Black high school students attend a high school that does not offer Advanced Placement courses, the highest proportion among all racial groups. *Id.* at 3. Even where these programs are offered, students of color are less likely to be enrolled in them. *Id*. For example, white students are 1.8 times more likely than Black students to take Advanced Placement classes, and Black third graders are half as likely as their white peers to be included in gifted programs. Lena V. Groeger et al., *Miseducation: Is there Racial Inequality at Your School?,* PROPUBLICA (Oct. 16, 2018), https://projects.propublica.org/miseducation/; Susan Dynarski, *Why Talented Black and Latino Students Can Go Undiscovered*, N.Y. TIMES (Apr. 8,

2016), https://www.nytimes.com/2016/04/10/upshot/why-talented-black-and-hispanic-students-can-go-undiscovered.html. As a result, students of color, particularly Black students, who lack the opportunity to take such courses, are at a disadvantage in gaining college admission. *See id*.

Black and Latinx students are also less likely to attend secondary schools that offer advanced math and science courses. *See id.* One-quarter of schools serving the highest percentage of Black and Latinx students do not offer Algebra II, a typical prerequisite for college-level math and science, and one-third do not offer chemistry. U.S. Dep't of Educ., Off. for C. R., Issue Brief No. 3, Civil Rights Data Collection: College and Career Readiness 8 (2014), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf. Again, even where these courses are available, Black and Latinx students are less likely to be enrolled in them. *Id.* at 3.

In addition to the ongoing inequalities in housing, health, and family income that have contributed to the underrepresentation of Black students in advanced courses, many Black students are locked out of advanced courses due to teacher bias. Even when Black students are admitted to advanced placement courses, white teachers, who comprise the majority of educators in the United States, have significantly lower expectations for Black students than they do for similarly qualified white students. Seth Gershenson & Nicholas Papageorge, THE POWER OF TEACHER EXPECTATIONS: HOW RACIAL BIAS

HINDERS STUDENT ATTAINMENT, 18 Education Next 64, 65–66 (2018). This bias results in Black students receiving less of the guidance, attention, or support needed to succeed in advanced courses.

Expert testimony, data, and court findings from recent cases show the connection between racially segregated school systems and poor educational outcomes that lead to racial disparities in college admissions. *See Thomas v. Sch. Bd. St. Martin Parish*, 544 F. Supp. 3d 651, 678 (W.D. La. 2021) (detailing the distinct harms of segregation on the academic performance, educational prospects, and employment prospects for Black children); *Cruz-Guzman v. State*, 916 N.W.2d 1, 5-6 (Minn. 2018) (noting the harmful effects of segregation on academic outcomes for Black children); *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1294 (11th Cir. 2020) (describing how racial disparities in high school graduation rates are reflected in the population of those who have earned degrees from institutions of higher education).

IV. RACE-BLIND ADMISSIONS REGIME UNFAIRLY BURDENS AND UNIQUELY HARMS BLACK APPLICANTS

A race-blind admissions regime would impose two distinct, but interrelated, harms on Black applicants. First, race-blind procedures levy a material disadvantage on Black students in the admissions process. That process is centered on an educational institution's constitutionally permissible goal of selecting and admitting students who they

believe will make unique contributions to their communities. Race-blind procedures are at odds with that goal because they prevent Black candidates from expressing how race has shaped what may be one of the most attractive and impactful components of an applicant's candidacy: the applicant's identity and experiences. By barring Black applicants from describing the full depth, breadth, and scope of their identities and experiences—the very same characteristics that educational institutions must assess when making admissions decisions—Black applicants are rendered less competitive in the admissions process.

Second, race-blind admissions procedures require Black students to stifle, suppress, and sever any portion of their identities and experiences that intersect with race. Silencing of that sort amounts to a dignitary harm. It conveys an unmistakable message to prospective applicants: a salient part of your life is not only unworthy of consideration but is meaningless. Such a message—anchored in colorblindness—is at odds with reality, given the persistent materiality of race as an animating force in American society. The unfair burden and dignitary harm of a race-blind admissions regime are paramount concerns worthy of this Court's attention and vindication. Those concerns ultimately counsel in favor of affirming the judgements below.

A. Race-Blind Admissions Materially Disadvantages Black Students

Pursuant to this Court's longstanding precedents, educational institutions are empowered

to construct and employ an admissions process that allows them to attain a diverse student body. *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 376–77 (2016) (*Fisher II*); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 307–08 (2013) (*Fisher I*); *Grutter v. Bollinger,* 539 U.S. 306, 327–333 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (opinion of Powell, J.). Educational institutions may do so in pursuit of the benefits that flow from diversity, "including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Fisher I*, 570 U.S. at 308, 310. Such benefits are central to the academic mission of a university, which has been long recognized as "a special concern of the First Amendment." *Bakke*, 438 U.S. at 312.

Where diversity is concerned, race is of utmost importance. That is because efforts to attain diversity require that academic institutions assess how a prospective applicant contributes to that objective. For Black students, race and the legacy of slavery matter to nearly every aspect of one's life and identity in this country. As such, racial identity necessarily bears on the question of how a candidate may contribute to an academic institution's diversity goals. While racial or ethnic origin is not the only dimension of diversity, it is certainly an "important element" of diversity. *Id.* at 315. A race-blind admissions process, as contemplated by Petitioners, would eliminate that key element wholesale from an institution's consideration.

The pervasive influence of race in America means that it can be integral to understanding a

candidate's personal narrative and identity. See Devon W. Carbado, *The New Racial Preferences*, CAL. L. REV. 96 1139, 1148 (2008) ("[T]he life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race . . . ."). It can provide insights about the complexity of an applicant's experiences and the magnitude of their achievements. It can shape everything from an applicant's academic interests to their socioeconomic status. Race can be implicated in experiences of oppression, subjugation, and subordination, all of which have a bearing on a person's identity. Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 149-152 (2017); see also Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 8 (1994) ("[R]ace and identity overlap and influence each other; each is both product and producer of the other."); Hazel Rose Markus & Paula M. L. Moya, DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY, "WHO AM I? RACE, ETHNICITY, AND IDENTITY" (2010) (relying on social and cultural psychological research to demonstrate that race shapes identity, and identity shapes how individuals experience the world). As Justice Sotomayor has explained:

> [R]ace matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up.

> Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you really from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'

Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

Rather than bring these dimensions of their life to bear on the admissions process, a race-blind regime would impose the burden of censorship exclusively on Black applicants. Their explanations of the ways race has mediated their lives, and in turn, how their racial identity can contribute to the diversity rightfully sought by a college or university could no longer be considered. Features of their identity that intersect with race would necessarily be censored and shielded from consideration by admissions officials. Applicants of color operating in a colorblind regime would be uniquely limited in what they are able to convey about themselves in their application for admissions. Some portion of prospective Black applicants will be discouraged from applying for admission at all, given

the hostility toward their identity inferred by the use of a race-blind admissions scheme.

Like California's experience with Proposition 209 in 1996, noted in Section II, *supra,* Michigan provides yet another cautionary tale. In 2006, Michigan voters passed Proposition 2, which amended the state constitution to outlaw affirmative action. This resulted in a 25% decline in underrepresented minority enrollment in the state from 2006 to 2012. *Id.* at 385 (Sotomayor, J., dissenting). The Black student population at the University of Michigan "dropped by nearly 10 percent in the three years following Proposition 2—from 1,615 to 1,476 . . . [a]nd according to the university, Black enrollment has hovered around 1,200 since 2010." Adam Harris, *What Happens When a College's Affirmative-Action Policy Is Found Illegal*, THE ATLANTIC (Oct. 26, 2018), https://www.theatlantic.com/education/archive/2018/10/when-college-cant-use-race-admissions/574126/. Washington's experience with an affirmative action ban is similarly instructive. In the immediate aftermath of Washington's 1999 affirmative action ban, "minority students simply chose not to apply to schools that no longer considered race." Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1203 (2010) (citing Susan K. Brown & Charles Hirschman, *The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College*, 79 SOC.EDUC. 106, 125–26 (2006) (highlighting a nearly 19 percent decrease in applications among black high school

seniors to the University of Washington immediately following the ban)).

A race-blind admissions process disadvantages Black applicants. It prevents them from receiving the type of holistic assessment of their candidacy that allows for an evaluation of all dimensions of their identity, the characteristic that has the most significant bearing on their successful admission. See Students, Alumni, and Prospective Students of Harvard College as Amici Curiae Supporting Defendant-Appellee at 6–12, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 980 F.3d 157 (1st Cir. 2020) (describing how the features of an applicant of color's identity that intersect with race enhances that applicant's candidacy for admission). That reality renders Black applicants less competitive in the admissions process, imposing a particular harm on them. This Court should prevent that harm by affirming the race conscious admissions practices deployed by Respondents.

B. A Race-Blind Admissions Process, Consistent with a Colorblind Ideology, Inflicts a Dignitary Harm Upon Black Students

A race-blind admissions scheme, rooted in the ideology of colorblindness, poses additional, distinct harms on Black applicants. Race-blind admissions inflict a dignitary harm on Black applicants by telling them that a key component of their identity—their race—does not matter. They do so by explicitly and exclusively devaluing race relative to other forms of

social identity, while also denying to "those who racially self-identify the full expression of their identity." Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64, 67–68 (2016). Those harms are especially egregious given the fact that the Constitution grants to all people the right to equal dignity, a core element of which consists of a person's ability "to define and express their identity." *Obergefell v. Hodges*, 576 U.S. 644, 681, 652 (2015). Indeed, this Court has long recognized deprivations of dignity as stigmatizing injuries that accompany the denial of equality. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)) (finding that the fundamental object of the 1964 Civil Rights Act "was to vindicate 'the deprivation of personal dignity that surely accompanies the denial of equal access to public establishments'"). *See also* Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims,* 69 FLA. L. REV. 1, 21-24 (2017) (describing the Supreme Court's invocation of dignity in cases involving substantive due process and the Eighth Amendment).

Black applicants laboring under a race-blind admissions scheme will be able to point to nearly all dimensions of one's social identity—socioeconomic status, disability, sexual orientation, gender identity, or religion—except race, which, in the world Petitioners seek, would be precluded from consideration. Even though race may be just as critical to a person of color's life and identity as these other characteristics, colorblindness demands that it be ignored. It impresses upon prospective applicants

of color that the influence of race is meaningless and has no bearing on their candidacy. That "compelled invisibility" upends recognition of the "entirety of one's personhood," thereby imposing a dignitary harm. Boddie, *supra*, at 77–78.

That harm is felt anew when a colorblind admissions process prevents an applicant of color from fully expressing their identity—and in particular those parts of their identity inextricably bound to their race. A race-blind process "demeans persons who embrace racial identity by denying them agency over how they present themselves to—and consequently are understood by—the state." *Id.* at 67. Black applicants must censor themselves, excising what may be a critical part of who they are and what they have experienced.

These harms underscore the damage wrought by colorblindness in a world shaped by race. Colorblindness demands that we ignore racial differences in the hopes that doing so will render them meaningless, despite the ubiquitous role of race in the lives of candidates of color. Ignoring race will not make it, or its effects, go away. *Schuette*, 572 U.S. at 381 (2014) (Sotomayor, J., dissenting) ("As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.").

Colorblindness is the antithesis of diversity. Indeed, it exacerbates racial injustice, by preventing all from grappling with the ways race shapes our lives, experiences, and interactions. Boddie, *supra*, at 79-81; Neil Gotanda, *A Critique of "Our Constitution in Color-Blind,"* 44 STAN. L. REV. 1, 59 (1991) (noting colorblindness would require "abolishing the distinctiveness that we attribute to [minority] community, culture, and consciousness"). In doing so, it perpetuates an unjust status quo rooted in racial caste, and buttressed by a willful blindness to the realities of American society.

For Black applicants, and by extension all applicants, race matters. This Court should, consistent with decades of its own precedents, sanction procedures that take stock of that reality as part of a holistic assessment of candidates for admission.

CONCLUSION

For the foregoing reasons, the United States Court of Appeals for the First Circuit and the United States District Court for the Middle District of North Carolina decisions upholding Harvard University's and the University of North Carolina's race-conscious admissions programs should be affirmed.

Respectfully Submitted,

DEBORAH N. ARCHER
Counsel of Record
Vincent M. Southerland
Jason D. Williamson
CENTER ON RACE,
INEQUALITY AND THE LAW
AT NEW YORK UNIVERSITY
SCHOOL OF LAW
245 Sullivan Street
New York, NY 10012
(212) 998-6528
Deborah.Archer@nyu.edu

Counsel for Amici Curiae