Nos. 20-1199 & 21-707

In The Supreme Court of the United States

STUDENTS FOR FAIR ADMISSION, INC.,

Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Respondent.

STUDENTS FOR FAIR ADMISSION, INC.,

Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The First And Fourth Circuits

BRIEF FOR *AMICI CURIAE* AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY AND FUND FOR LEADERSHIP, EQUITY, ACCESS AND DIVERSITY IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The American Association for Access, Equity and Diversity ("AAAED") and its sister organization the Fund for Leadership, Equity, Access and Diversity ("LEAD Fund") respectfully submit this brief *amicus curiae* in support of Respondents President and Fellows of Harvard College ("Harvard") and the University of North Carolina ("UNC").

AAAED, a 501(c)(6) membership organization, is the oldest operating association of professionals in the Equal Opportunity field. AAAED promotes understanding and advocacy of affirmative action and other equal opportunity and related compliance laws to realize the tenets of access, inclusion and equality in employment, and economic and educational opportunities. Established by affirmative action professionals working for academic institutions, AAAED's membership currently includes institutions as well as employees of colleges and universities, private sector entities, and government agencies. AAAED is, therefore, uniquely suited to opine on both (1) the need for diversity on campus in order for students to receive the best possible education and graduate with the skills and experiences necessary to succeed as citizens, workers, and leaders, and (2) the importance of diversity to employers who, in order to remain competitive, must hire

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

qualified workers who reflect the increasingly diverse communities and markets in which their businesses now operate.

The LEAD Fund, a 501(c)(3) charitable organization, was established to provide thought leadership in promoting inclusive organizations and institutions through research and education on issues related to diversity, social responsibility, and human and civil rights. The LEAD Fund complements the work of AAAED through programs and activities that address affirmative action, equal opportunity, equity, access, civil rights, and diversity and inclusion in education, employment, business and contracting.

The New School, a university in New York City, offering a range of undergraduate and graduate programs, as well as continuing education programs, joins AAAED and the LEAD Fund in support of Respondents. From its establishment in 1919, The New School was committed to establishing an inclusive institution that explicitly created space for underrepresented and marginalized individuals to innovate by inviting dissent and diverse academic and lived experiences. Today, diversity continues as an integral component of The New School's model. Without exposure to diverse perspectives, students will experience insurmountable voids in their coursework and beyond.

The National Industry Liaison Group ("NILG") also joins this brief *amicus curiae.* NILG is a 503(c)(6) non-profit organization formed for the main purposes of improving communications between the U.S.

Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") and Industry Liaison Groups ("ILGs"). The NILG supports over 60 ILGs, which are composed of small, mid-size, and large federal contractors and subcontractors. NILG members depend on racial diversity as a key component to their business success and competitiveness.

SUMMARY OF ARGUMENT

The Petitioner's wholesale approach to eliminate any consideration during Harvard's or UNC's admission process of students' experiences related to or stemming from their race is inconsistent with the Court's precedent. Importantly, there is no legal basis to overturn *Grutter* because (1) Harvard and UNC admissions practices comport with strict scrutiny and (2) the educational benefits associated with a diverse student body have only increased since *Grutter* was decided, and continue to serve a compelling state interest. Additionally, student racial diversity at higher education institutions supports America's business economy.

ARGUMENT

I. THERE IS NO BASIS TO OVERTURN *GRUTTER*

A. Stare Decisis Is Central To The Court's Credibility

"Fidelity to precedent . . . is vital to the proper exercise of the judicial function."[2] The Court's legitimacy stems from the principle that judicial decisions are not arbitrary products of the prejudices of the decisionmakers rather than the law. Honoring precedent furthers this cornerstone principle. "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[3]

To "overrule an important precedent is serious business."[4] As a result, the Court requires something "over and above the belief that the precedent was wrongly decided."[5] Said another way, "a departure from

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[2] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 377 (2010).

[3] *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986)).

[4] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring) (quotation marks omitted); *see also Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (Kagan, J.); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (Roberts, J.).

[5] *Allen*, 140 S. Ct. at 1003 (quoting *Halliburton Co.*, 573 U.S. at 266).

precedent 'demands special justification.'"[6] That "special justification" involves three considerations: (1) whether "the prior decision was not just wrong, but grievously or egregiously wrong"; (2) whether the prior decision has "caused significant negative jurisprudential or real-world consequences"; and (3) whether overruling the prior decision would "unduly upset reliance interests."[7]

As for the first consideration, "[a] garden-variety error or disagreement does not suffice to overrule" constitutional precedent.[8] "In conducting [this] inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors."[9] For the second, "[t]he Court may consider jurisprudential consequences [and some of the same factors relevant to the first consideration], such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system."[10] Finally, the third consideration "focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting [this] inquiry, the Court may

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[6] *Gamble v. United States*, 139 S. Ct. 1960, 1962-63 (2019) (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

[7] *Ramos*, 140 S. Ct. at 1414-15.

[8] *Id.* at 1414.

[9] *Id.* at 1415.

[10] *Id.*

examine a variety of reliance interests and the age of the precedent, among other factors."[11]

As Chief Justice Roberts has recently recognized, "[s]urely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*."[12] "If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."[13]

Here, there have been no changes to the factual circumstances or legal underpinnings such that this Court's holding in *Grutter* is any less compelling today as it was in 2003. Its workability is demonstrated by the number of higher education institutions that have developed their applications processes to successfully comport with the guidelines established by *Grutter* and its progeny.[14] In addition, a holistic approach to evaluating an applicant's qualifications and background that includes race as a flexible "tip" factor only is not a violation of the equal protection clause; *Grutter*'s reasoning was sound and should not be

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[11] *Id.*

[12] *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 2 (U.S. June 24, 2022) (Roberts, C.J., concurring).

[13] *Id.*

[14] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 185-98 (1st Cir. 2020) [hereinafter *SFFA*]; *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 655-67 (M.D.N.C. 2021) [hereinafter *Univ. of N.C.*].

overruled.[15] But if the Court disagrees that Harvard's and UNC's admission practices adhere to precedent, the Court should reject their admissions processes, not *Grutter*.

B. The Admissions Processes At Harvard And UNC Adhere To Court's Precedent

1. Harvard's Admissions Process

The United States Court of Appeals for the First Circuit correctly held that Harvard's limited use of race in its admissions process adheres to this Court's precedent and does not violate Title VI of the Civil Rights Act of 1964.[16] The First Circuit also found that the evidence showed Harvard did not discriminate or stereotype against Asian Americans,[17] and that Harvard meets this Court's standards for the use of race in admissions as justified in achieving a diverse student body.[18]

To survive strict scrutiny, Harvard's use of race must further a compelling interest and be narrowly tailored to do so.[19] Here, Harvard does not engage in practices this Court has found impermissible, such as

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[15] *Grutter*, 539 U.S. at 327.

[16] *SFFA*, 980 F.3d at 164.

[17] *Id.* at 197.

[18] *See Grutter*, 539 U.S. at 324 (explaining that the Court only approves of using race in admission decisions when it is used to diversify the student body).

[19] *See Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 377 (2016) [hereinafter *Fisher II*].

racial balancing and using race as a mechanical plus factor; Harvard also does not have workable race-neutral alternatives.[20] Indeed, Harvard commissioned a study and convened a committee of highly-qualified individuals to review race-neutral admission options. Neither concluded that race-neutral practices alone could work to create the diverse student body required to achieve its educational mission.[21]

During its admission process, Harvard assigns applicants preliminary ratings based on six areas: academic ratings, extracurricular ratings, athletic ratings, school support ratings, personal ratings, and overall ratings.[22] Students' applications are then considered for admissions officer and alumni interviews, after which subcommittees discuss applicants in their geographic region and make recommendations to the full admissions committee.[23] Harvard also utilizes "tips" in its admissions process, which are essentially factors

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[20] *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 192-201, 203 (D. Mass. 2019) [hereinafter *Harvard Corp.*]; *SFFA*, 980 F.3d at 187-95.

[21] *See SFFA*, 980 F.3d at 172-79, 186-87. As part of this process, Harvard considered numerous race-neutral alternatives, including six SFFA proposals. *Id*. at 172-79. Overall, Harvard considered numerous race-neutral alternatives and found that such alternatives were not workable and would not achieve the desired result of increasing student body diversity. *Id*. at 176-78.

[22] *See SFFA*, 980 F.3d at 166-67. Harvard's admissions officers are provided a copy of Harvard's reading procedures, which explain how to evaluate applications and include guidelines and other factors for assigning numerical ratings to applicants in various categories. *See id.* at 166 n. 6.

[23] *Id*. at 169-70.

that might tip an applicant into Harvard's admitted class.[24] These tip factors include outstanding and unusual intellectual ability, unusually appealing personal qualities, outstanding capacity for leadership, creative ability, athletic ability, legacy status, race, and geographic, ethnic, or economic factors.[25] In this regard, Harvard's admissions process, like the process approved by this Court in *Grutter*, does not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity," and Harvard "actually gives substantial weight to diversity factors besides race" and "sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body."[26] As the First Circuit noted, Harvard's consideration of race in the admission process impacts who among the highly-qualified students in the applicant pool will be selected for admission.[27] The First Circuit further noted that Harvard's consideration of other factors are just as consequential as race in admissions.[28] Harvard also does not simply rely on including race in its admission process to increase its student diversity. Harvard recruits a wide-range of minority

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[24] *Id.* at 170.

[25] *Id*.

[26] *Grutter*, 539 U.S. at 338-39.

[27] *SFFA*, 989 F.3d at 191.

[28] *Id.* at 169-70.

students through its Undergraduate Minority Recruitment Program.[29]

2. UNC's Admissions Process

Likewise, the United States District Court for the Middle District of North Carolina correctly held that UNC's admissions process adheres to the precedent of this Court. UNC's admission process survives strict scrutiny because it employs a limited use of race "to enhance student diversity"; its "admissions policies mandate that race is [considered] only as one of many tip factors" with any weight given "determined in the context of all . . . information . . . in a student's application"; and it strictly "prohibits the use of race as a defining feature of any [student's] application."[30] Further, the record shows that UNC has considered race-neutral alternatives in good faith, including commissioning a study and report to examine the issue, but has found none could achieve a diverse student body without imposing intolerable administrative costs.[31]

UNC has recognized and continues to actively pursue the compelling interest of educational benefits that flow from a diverse student body, which is critical to its mission "to serve as the center of research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to

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[29] *Id.*

[30] *Univ. of N.C.*, 567 F. Supp. 3d at 594-95.

[31] *Id.* at 635-36.

become the next generation of leaders."[32] The district court ruled that UNC offered principled, reasoned explanations for its decision to pursue the educational benefits that flow from diversity. UNC's admissions process includes a limited use of race during the application evaluation process. Critically, UNC's admissions office instructs application readers "to consider each applicant as an individual based on all relevant factors revealed in his or her application in order to understand the candidate holistically and comprehensively."[33] "In describing how the Admissions Office may use race, ethnicity, or national origin, [UNC] repeatedly cites Supreme Court precedent as guideposts for its policy."[34]

Race is one factor, among many, that is considered in UNC's holistic review of each student applicant, which directly aligns with the proscribed application evaluation process in *Grutter* in that UNC "gives substantial weight to diversity factors besides race" and "sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body."[35] The district court correctly held that race has not become "a predominant factor" in UNC's admissions process[36] and that UNC has in fact been

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[32] *Id.* at 655.

[33] *Id.* at 597.

[34] *Id.*

[35] *Grutter*, 539 U.S. at 338-39.

[36] *Univ. of N.C.*, 567 F. Supp. 3d at 660.

transparent about the "checks, balances, and quality controls [that] exist throughout [its] admissions process."[37] The district court also correctly held that "UNC has satisfied its burden of demonstrating that there is no non-racial approach that would promote such benefits about as well as its race-conscious approach at tolerable expense."[38]

C. *Grutter* Acknowledges A Legitimate And Compelling Interest Of Higher Education Institutions While Simultaneously Protecting Individuals' Rights

1. *Grutter* Fully Addressed When And How Race Should Be Considered In Admissions

The Court anticipated circumstances under which an applicant's race could be considered as part of the larger picture of an applicant's file and explained the use of strict scrutiny as applied to racial classifications in higher education admissions:

> Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy's assertions, we do not

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[37] *Id.* at 604-05.

[38] *Id.* at 635.

> "abandon[] strict scrutiny[.]" Rather, as we have already explained, we adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take such "relevant differences into account."[39]

Grutter provides a clear and reasonable framework for the consideration of race in higher education admissions through the lens of strict scrutiny:

> To be narrowly tailored, a race-conscious admissions program cannot use a quota system – it cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants." Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulating the individual from comparison with all other candidates for the available seats." In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[40]

The current strict scrutiny standard correctly allows public and private higher education institutions "flexib[ility,] enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant," and to now hold otherwise would do

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[39] *Grutter*, 539 U.S. at 333-34 (citations omitted).

[40] *Id.* at 334 (citations omitted).

grave harm to the educational benefits that have rightly been recognized and sought after by individuals and educational institutions alike.[41] Harvard's and UNC's admissions processes follow the clear and reasonable framework articulated by the Court in *Grutter*.

2. Overturning *Grutter*, Would be Tantamount to Dictating Institutions' Missions

While the Court has the obligation to scrutinize Harvard's and UNC's admissions processes strictly under *Grutter*, that analysis does not require the Court to substitute its policy preferences in place of those of Harvard's and UNC's administrations.[42] Where, as here, there is clear evidence supporting a State's and a private institution's determinations that considering race serves a compelling interest, strict scrutiny review ensures that individuals' rights are protected. When it is shown that the use of race is sufficiently narrowly tailored to accomplish the compelling interest, this Court must defer to those determinations, and it is not the Court's province to weigh in on whether such policies are sound.[43]

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[41] *Id.*

[42] *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.").

[43] *Id.*

II. THE EDUCATIONAL BENEFITS OF A DIVERSE STUDENT BODY ARE EVEN MORE COMPELLING NOW THAN WHEN *GRUTTER* WAS DECIDED

The foundation of the *Grutter* ruling was that "a 'critical mass' of underrepresented minorities is necessary to further [the] compelling interest in securing the educational benefits of a diverse student body."[44] While the Court has sometimes distinguished specific admissions policies on the ground that they were not appropriately tailored to achieve this interest, the underlying educational benefits of a diverse student body have been consistently recognized as a compelling interest throughout the Court's subsequent jurisprudence.[45]

As part of these rulings, the Court has made clear that "the approach sanctioned in *Grutter* should not be a permanent solution, but rather should be "limited in time."[46] As Justice O'Connor observed in her opinion, *Grutter* was decided 25 years after Justice Powell "first

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[44] *Grutter*, 539 U.S. at 333.

[45] *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726-27 (2007) (distinguishing impermissible Seattle approach from the benefits derived from a sufficient level of diversity achieved in *Grutter*); *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 333-34 (2014) (finding that, while the Constitution does not *compel* the consideration of race in admissions, it continues to *permit* that approach as a means to achieve the educational benefits that flow from a diverse student body); *Fisher II*, 579 U.S. at 380 (reaffirming the principle that achievement of a diverse student body is a compelling interest).

[46] *Grutter*, 539 U.S. at 342.

approved the use of race to further an interest in student body diversity in the context of public higher education."[47] She added: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[48] Now, 19 years later, this Court has been asked to decide whether that point has been reached.

The answer to this question is clearly no. Justice O'Connor's hope was based on an observation that, in the 25 years between *Bakke* and *Grutter*, "the number of minority applicants with high grades and test scores . . . increased."[49] The clear implication was that, assuming continuation of this trend, the consideration of race in admissions decisions ultimately would not be necessary, as increasingly diverse applicant pools would eventually reach the "critical mass" that consideration of race was designed to attain. Unfortunately, Justice O'Connor's vision has not materialized.

Meanwhile, the importance of diversity to education outcomes has never been greater. Our daily newsfeeds are filled with disturbing accounts of individuals committing crimes where the evidence reveals racially motivated intentions. Our colleges and universities, which are charged with producing future leaders who can lead a restoration of racial harmony and tolerance, still need the tools sanctioned in *Grutter* to achieve the

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[47] *Id.* at 343 (referencing the plurality opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978)).

[48] *Id.*

[49] *Id.*

educational benefits of student diversity. A reversal of *Grutter* and its progeny would strike a devastating blow to these efforts.

A. The Experience Of States That Have Banned Consideration Of Race In University Admissions Confirms That Such Measures Are Necessary To Achieve Adequate Diversity

The measure that Petitioners urge this Court to take – a blanket prohibition of any consideration of race in university admission decisions – has ample precedent at the state level. Arizona,[50] California,[51] Florida,[52] Michigan,[53] Nebraska,[54] New Hampshire,[55] Oklahoma,[56] and Washington[57] all have enacted legal bans against any consideration of race in the university admissions process. Extensive research has been conducted regarding the impact of these laws on student body diversity within these jurisdictions. The unanimous finding has been that the representation of people of color has significantly decreased in the wake

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[50] Ariz. Const., art. II, § 36(F).

[51] Cal. Const., art. I, § 31.

[52] Fla. Exec. Order No. 99-281.

[53] Mich. Const., art. I, § 26(1).

[54] Neb. Const., art. I, § 30(1).

[55] N.H. Rev. Stat. Ann. §§ 187-A:16-a, 21-I:52.

[56] Okla. Const., art. II, § 36A(A).

[57] Wash. Rev. Code Ann. § 49.60.400(1).

of the enactments, and that attempts to enhance diversity by other means have not succeeded.

One of the most comprehensive studies was a nationwide analysis of minority enrollment trends at selective colleges.[58] The authors of this study found that "banning affirmative action at a public university in the top 50 of the *U.S. News* rankings is associated with a decrease in Black enrollment of roughly 1.74 percentage points, a decrease in Hispanic enrollment of roughly 2.03 percentage points, and a decrease in Native American enrollment of roughly .47 percentage points."[59] Because the average starting point at these institutions was a baseline of 5.79 percent Black enrollment, 7.38 percent Hispanic enrollment, and .51 percent Native American enrollment, the outcome in most cases was an extremely limited representation of these groups within the overall student body.[60]

Another study found similar impacts across a sample of nineteen public universities.[61] The key focus of this study was a demographic comparison of high school graduating classes and enrolled college students. At one of the studied institutions, the University

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[58] Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 REV. ECON. & STAT. 712 (2012).

[59] *Id*. at 717.

[60] *Id.* at Table 4.

[61] Mark Long & Nicole Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 42 EDUC. EVALUATION & POL'Y ANALYSIS 188 (2020).

of California at Berkeley, the gap between the proportion of underrepresented minorities in the student body and the representation of these same minorities among California high school graduates was 25 percentage points in 1998, which was the year that California's affirmative action ban was enacted.[62] This was more than double the gap of 11 percentage points that existed just three years earlier.[63] The situation deteriorated further in subsequent years, with the gap reaching 34 percentage points in 2015.[64] Based on this data and similar patterns observed at the 18 other public universities that were analyzed, the authors concluded that "underrepresentation will persist indefinitely without policy change."[65] Another study about the California ban showed even broader, more adverse effects in which underrepresented minorities "cascaded" into less competitive institutions, undergraduate and graduate degree attainment declined, and the average income of applicants' wages dropped by five percent.[66]

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[62] *See id.* at 191.

[63] *Id.*

[64] *Id*.

[65] *Id*.

[66] Zachary Bleemer, *Affirmative Action, Mismatch and Economic Mobility After California's Proposition 209, Center for Studies in Higher Education* (2020), https://cshe.berkeley.edu/sites/default/files/publications/rops.cshe.10.2020.bleemer.prop209.8.20.2020_2.pdf. Bleemer found that: (1) Ending affirmative action caused the University of California, Berkeley's ("UC") 10,000 annual underrepresented minority ("URM") freshman applicants to cascade into lower-quality public and private universities;

B. A Diverse Student Body Is Critical To The Contemporary Educational Environment

Chronic minority underrepresentation is a serious detriment to the educational experience. The compelling benefits of a diverse student body have thus long been recognized by this Court.

As this Court noted in *Bakke*, "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[67] A diverse student body "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[68] The Court in *Grutter* noted the existence of "numerous studies" establishing that "student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"[69] As the Court further observed, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed

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(2) URM applicants' undergraduate and graduate degree attainment declined overall and in STEM fields, especially among lower-testing applicants; (3) As a result, the average URM UC applicant's wages declined by five percent annually between ages 24 and 34, almost wholly driven by declines among Hispanic applicants.

[67] 438 U.S. at 313 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

[68] *Grutter*, 539 U.S. at 330 (quoting lower court opinion).

[69] *Id.*

through exposure to widely diverse people, cultures, ideas, and viewpoints."[70] Equally important to the Court was the needs of the military, which depends upon "a highly qualified, racially diverse officer corps" to meet its national security mission.[71]

More recent academic research confirms that a diverse higher education environment remains as critical now as it was when *Bakke* and *Grutter* were decided. These benefits are particularly familiar to AAAED, one of the *amici*, whose membership includes a large representation of academic professionals who have devoted their careers to the advancement of diversity, equity, and inclusion at the university level.

A substantial portion of the literature on this subject has focused on how diversity affects educational outcomes for minority students. When representation levels fall short of "critical mass," minority students tend to experience feelings of "loneliness and isolation."[72] At the University of Texas, where Black student representation historically hovered around 4 percent during the period when race was not considered in the admissions process, only 21 percent of undergraduate classes with at least five students had more than one Black enrollee.[73] This lack of diversity has multiple consequences for the experience of minority students, including a "perceived lack of academic, social, or

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[70] *Id.* at 330-31 (citing *amicus* briefs from 3M and General Motors).

[71] *Id.* at 331.

[72] *Fisher II*, 579 U.S. at 384.

[73] *Id*.

psychological support," and an "inability of faculty to genuinely connect . . . in the absence of shared identities."[74] The impacts on minority students include "social climate stresses, interracial stress, racial discrimination, within-group stresses, and achievement stress," all of which are barriers to attaining the benefits of higher education.[75] Additionally, minority students who attend schools in anti-affirmative action states "were more likely than any other group to encounter . . . open hostility, internal stigma, and external stigma." "As a result, they were more likely to seek refuge in graduate schools with affirmative action."[76] A recent report also indicates that more than half of the total reported on-campus hate crimes in 2019 were motivated by race or ethnicity and that race was in the top two categories of motivating bias associated with hate crimes at postsecondary institutions.[77]

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[74] Marie-Claire Gwayi-Chore et al., *"Being a Person of Color in This Institution Is Exhausting": Defining and Optimizing the Learning Climate to Support Diversity, Equity, and Inclusion at the University of Washington School of Public Health*, Frontiers in Public Health, 4 (2021), https://www.frontiersin.org/articles/10.3389/fpubh.2021.642477/full.

[75] Darnell Cole, Jeanett Castellanos & Lee Jones, *Examining the Ethnic Minority Student Experience at Predominantly White Institutions: A Case Study*, 1 J. OF HISPANIC HIGHER EDUC. 19, 23 (2002).

[76] Deirdre Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L. J. 1197 (2010).

[77] The Condition of Education 2022, *Hate Crime Incidents at Postsecondary Institutions, National Center for Education Statistics* (May 2022), https://nces.ed.gov/programs/coe/indicator/a22.

Impacts from a lack of educational diversity, moreover, are not limited to minority students. Research on this topic makes clear that the educational experience of the entire student body is negatively affected. A study sponsored by the Trustee Ad Hoc Committee on Diversity at Princeton University found that "[g]reater diversity-related experiences are associated with positive learning outcomes for whites and people of color alike, such as greater accumulation of knowledge and intellectual engagement."[78] Student body diversity continues to yield dividends after students graduate and enter the workforce: "Not only do experiences with diversity improve one's cognitive skills and performance, it also improves attitudes about one's own intellectual self-confidence, attitudes toward the college experience, and shapes performance in the workplace."[79] Benefits include not only greater academic achievement, but also improved socialization, which is critical to functioning in the increasingly diverse modern workforce.[80]

Every higher education institution is unique. Some institutions operate in environments that more

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[78] Deborah Son Holoien, *Do Differences Make a Difference? The Effects of Diversity on Learning, Intergroup Outcomes, and Civic Engagement* at 7 (2013), https://inclusive.princeton.edu/sites/g/files/toruqf1831/files/pu-report-diversity-outcomes.pdf.

[79] *Id.* at 8.

[80] *See* Scott Carrell et al., *The Impact of College Diversity on Behavior toward Minorities*, 11 Am. Econ. J. 159 (2019) (Air Force Academy study documenting how increased exposure to students of different backgrounds during freshman year improves understanding between the races going forward.).

naturally lend themselves to the attraction of diverse candidates who meet their established academic standards. That is why this Court has wisely dictated an individualized consideration of whether the educational benefits of a diverse student body can be achieved without the direct consideration of race in the admissions process.[81] But at some institutions, including many of the colleges and universities discussed above whose student body diversity has suffered in the wake of state affirmative action bans, the flexibility to consider race as one factor in a holistic admissions decision remains essential to attaining the educational benefits of a diverse student body.

Further, diversity in admissions in higher education institutions serves an important purpose to the business community.[82] Numerous studies demonstrate the importance of diversity to success in business, including increasing sales revenue, customers, market

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[81] *See Fisher II*, 579 U.S. at 384-85 (finding that the University of Texas had adequately considered alternatives such as recruitment outreach and adjusted scoring for academic and socioeconomic factors and had properly concluded that it did not provide "workable means for the University to attain the benefits of diversity it sought").

[82] *See, e.g.*, Brief of General Motors Corporation *Amicus Curiae* in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003), available at http://blackfreedom.proquest.com/wp-content/uploads/2020/09/grutter79.pdf; Brief of Fortune-100 and Other Leading American Businesses as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003), available at https://www.scotusblog.com/wpcontent/uploads/2015/11/14-981-bsac-Fortune-100-and-Other-Leading-Businesses-In-Support-of-Respo....pdf.

share, and profits.[83] Likewise, increased racial diversity increases employee productivity and performance and decreases lawsuits.[84]

III. CONSIDERATION OF RACE AS PART OF A HOLISTIC APPROACH TO COLLEGE ADMISSIONS IS A NECESSARY STEP TO ACHIEVE A COMPELLING STATE INTEREST

Petitioners' advocacy of a putatively "color-blind" process rests upon a fallacy that ignoring race will guarantee fairness, racial neutrality, and diversity in admissions outcomes. This proposition was thoroughly debunked in an analysis by Professor Dierdre Bowen of the University of Seattle School of Law.[85] Hopes that color-blind policies will level the playing field inevitably collide with other realities. Two popular alternative pathways are insufficient to maintain the racial diversity that affirmative action provides. The two most popular alternative pathways are (1) implementing percentage plans and (2) using another similar factor instead of race. Several studies show that percentage plans cannot entirely circumvent racially-based affirmative action policies.[86] Other studies also show

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[83] Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208 (2009).

[84] Katharine Esty et al., *WORKPLACE DIVERSITY: A MANAGER'S GUIDE TO SOLVING PROBLEMS AND TURNING DIVERSITY INTO COMPETITIVE ADVANTAGE* 9-10 (1995).

[85] Bowen, *supra* note 76.

[86] *See*, *e.g.*, Stella M. Flores & Catherine L. Horn, *Texas Top Ten Percent Plan: How It Works, What Are Its Limits, and Recommendations to Consider* 1, 17 (2015); Mark C. Long & Marta

that affirmative action bans are not overcome by using another similar factor instead of race.[87] Most tellingly, one study showed that even a model using a combination of 195 variables does not adequately substitute for an underrepresented racial minority's ("URM") race because that model could only correctly identify a student as a URM 82.3 percent of the time.[88]

Numerous studies show that affirmative action bans result in decreased racial and ethnic diversity in higher education. According to one study, enrollment has declined by a percentage change greater than 25 percent for Black students and nearly 20 percent for Hispanic students.[89] Other scholars have also confirmed

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Tienda, *Winners and Losers: Changes in Texas University Admissions Post-*Hopwood, 30 EDUC. EVALUATION & POL'Y ANALYSIS 255 (2008); Mark C. Long & Marta Tienda, *Changes in Texas Universities' Applicant Pools after the* Hopwood *Decision*, 39 SOC. SCI. RSCH. 48 (2010).

[87] SIGAL ALON, RACE, CLASS, AND AFFIRMATIVE ACTION (2015); William C. Kidder, *How Workable Are Class-Based and Race Neutral Alternatives at Leading American Universities*, 64 UCLA L. REV. DISC. 100 (2016); William C. Kidder & Patricia Gandara, *Two Decades After the Affirmative Action Ban: Evaluating the University of California's Race-Neutral Efforts* (2015); Mark Long, *The Promise and Peril for Universities Using Correlates of Race in Admissions in Response to the* Grutter *and* Fisher *Decisions* (2015); Sean F. Reardon et al., *Can Socioeconomic Status Substitute for Race in Affirmative Action College Admissions Policies? Evidence from a Simulation Model* (2015).

[88] Long, *supra* note 87, at 11-12.

[89] Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. HUM. RESOURCES 435 (2012).

a decline.[90] No applicant "should ever be granted or denied admission to a college or university *because* of the applicant's race."[91] "But, taking all of the above considerations into account, it is untenable to argue that admissions officers should be permitted to consider an applicant's every characteristic and experience *except* race and ethnicity."[92]

A. Educational Disparities Continue To Exist In Grades K-12

Disparities in educational resources in grades K-12 result in unequal educational experiences. These disparities have pervaded schools[93] and continue to exist today, particularly when comparing students across different racial and ethnic groups. In 2015, the average

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[90] *See*, *e.g.*, Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209* (2020); Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 REV. OF ECON. & STAT. 712 (2012); Prabhdeep Singh Kehal et al., *When Affirmative Action Disappears: Unexpected Patterns in Student Enrollments at Selective U.S. Institutions, 1990-2016*, 7 SOCIO. OF RACE & ETHNICITY 543 (2021); David Antonio Mickey, *A Structural Investigation of Laissez Faire Racism: The Intended and Unintended Consequences of Affirmative Action Bans* (2019) (Ph.D. dissertation, Univ. of Mich.).

[91] Br. for the Am. Ass'n for Affirmative Action as *Amicus Curiae* Supporting Resp'ts 8, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2018) [hereinafter *AAAA Fisher Brief*].

[92] *Id.*

[93] *See generally* JOEL SPRING, DECULTURALIZATION AND THE STRUGGLE FOR EQUALITY: A BRIEF HISTORY OF THE EDUCATION OF DOMINATED CULTURES IN THE UNITED STATES (2016).

fourth and eighth grade reading scores for white students were 26 points higher than Black students and 24 points higher than Hispanic students.[94] Reading scores in 2017 showed little to no improvement as the Black-white point difference stayed the same and the Hispanic-white gap shortened by one point.[95]

In addition to unequal test scores, course selections in high school are also unequal. Only half of high schools offer calculus (a required course for some college admissions).[96] In high schools with the highest percentage of Black or Hispanic students, a quarter of the schools do not offer Algebra II and a third do not offer chemistry.[97] American Indian and Alaska Native students face even poorer course offerings since less than half have access to a full range of math and science courses.[98]

The COVID-19 pandemic worsened these disparities as students – particularly those of low-income, Black, or Hispanic communities – experienced learning

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[94] *Fourth-Grade Reading Scores Increase for Two Demographic Groups Compared to 2013*, The Nation's Report Card (2015), https://www.nationsreportcard.gov/reading_math_2015/#reading?grade=4.

[95] Cristobal de Brey et al., *Status and Trends in the Education of Racial and Ethnic Groups 2018* iv (2019), https://nces.ed.gov/pubs2019/2019038.pdf.

[96] U.S. Dep't of Educ., *Civil Rights Data Collection Snapshot: College and Career Readiness* 1 (Mar. 21, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf.

[97] *Id.* at 8.

[98] *Id.* at 1.

loss because they lacked access to high-quality remote learning and internet, personal devices that do not need to be shared, parental academic supervision, and quiet spaces with minimal distractions.[99] While the average learning loss was estimated at 6.8 months, Black, Hispanic, and low-income students were estimated to lose 10.3, 9.2, and 12.4 months of learning, respectively.[100]

Since K-12 public schools are funded locally, redistricting and local socio-economic levels impact the quality of education offered at local public schools.[101] On average, non-white school districts receive about $2,200 less per student than predominately white school districts.[102] This $23 billion difference in funding presents as older, worn textbooks, less access to computers, and a less competitive salary to offer to teachers seeking to apply.[103] Normally, states are tasked to "fill the gap" to ensure evenly funded communities, but these funding gaps still exist in many states

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[99] Emma Dorn et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime* (June 2020), https://www.childrensinstitute.net/sites/default/files/documents/COVID-19-and-student-learning-in-the-United-States_FINAL.pdf.

[100] *Id*.

[101] Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? $23 Billion Report Says*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html.

[102] EdBuild, *$23 Billion* (Feb. 2019), https://edbuild.org/content/23-billion/full-report.pdf.

[103] Mervosh, *supra* note 101.

including California, New Jersey, and New York,[104] which have some of the largest K-12 student populations.[105]

B. Race-Blind Admissions Processes Are Racially Biased

Several studies over the years have shown that standardized tests[106] have a significant adverse impact on Black and Hispanic students. The Brookings Institute examined the distribution of scores on the math section of the general SAT test, using publicly available College Board population data for all of the nearly 1.7 million college-bound seniors in 2015 who took the SAT.[107] According to that study, the mean score on the math section of the SAT for all test-takers is 511 out of 800. The average scores for Blacks (428) and Hispanics (457) are significantly below those of whites (534) and Asians (598). "The scores of [B]lack and [Hispanic]

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[104] *Id*.

[105] *Table 203.20. Enrollment in Public Elementary and Secondary Schools, by Region, State, and Jurisdiction: Selected Years, Fall 1990 Through Fall 2023*, *in* Digest of Education Statistics (National Center for Education Statistics), https://nces.ed.gov/programs/digest/d13/tables/dt13_203.20.asp.

[106] Harvard and UNC announced as a result of the effect of limited test site availability neither will require standardized test scores as part of its admission process until at least 2027 and 2024, respectively.

[107] Richard V. Reeves and Dimitrios Halikias, *Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility* (Feb. 1, 2017), https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/.

students are clustered towards the bottom of the distribution, while white student scores are relatively normally distributed, and Asian students are clustered at the top."[108]

According to another study, the class of 2021 high school graduates did not fare much better, with average math scores for Blacks (457) and Hispanics (477), still significantly below those of whites (550) and Asians (642).[109]

One reason that Blacks and Hispanics have lower scores than whites and Asians is related to the design of the exam. When the Educational Testing Service ("ETS"), in coordination with the College Board, is evaluating whether or not to use a question on the SAT, it will review the rate of students who correctly answer the question, and questions that are not answered by a majority of the test takers are eliminated.[110] The questions selected for inclusion in the SAT, 99 percent favored white students over Black and Hispanic students.[111]

This result is a natural consequence of the method employed by ETS. We know that the majority of test takers are white students, so any questions that might

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[108] *Id.*

[109] 2021 SAT Suite of Assessments Annual Report (College Board 2021).

[110] Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles*, *in* SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS (Joseph A. Soeres ed., 2015).

[111] *Id.*

tend to favor a minority of the students (i.e., Black or Hispanic students), are eliminated. And the questions that are more correctly answered by the majority of the test takers – the majority being white students – are retained.

C. Socioeconomic Status Is Not A Proxy For Race In Higher Education Admissions

Proponents for SES considerations to the exclusion of race argue that many Americans do not like the idea that the racial box an applicant checks has an impact on the applicant's chances of admission and that they fear that racial preferences stigmatize beneficiaries and breed resentment.[112]

First, this type of commentary fails to accurately portray the process of holistic admissions, in which race is one of many factors that is considered in a student's application. Second, these proponents posit that so-called "racial preferences" stigmatize beneficiaries, however, legacies and athletics, which are given preference in admissions, are never viewed as stigmatizing. The relative paucity of Black or Hispanic applicants should

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[112] *See*, *e.g.*, Richard Kahlenberg, *Affirmative Action Should be Based on Class, Not Race*, THE ECONOMIST (Sept. 4, 2018), https://www.economist.com/open-future/2018/09/04/affirmative-action-should-be-based-on-class-not-race?utm_medium=cpc.adword.pd&utm_source=google&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=EAIaIQobChMIrZe_qp3l-AIVl_6zCh3W_wlUEAAYASAAEgIvh_D_BwE&gclsrc=aw.ds.

not cause resentment any more than the larger number of nonminority students who are legacy admits.[113] As Justice Blackmun wrote:

> It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.[114]

Researchers have shown SES does not effectively and adequately serve as a substitute for race. There are several reasons why this is so:

(1) Research shows that whites outperform underrepresented minorities in standardized testing within the same income groups and SES cannot compensate for these differences.

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[113] *See*, *e.g.*, Daniel Golden, *Many Colleges Bend Rules to Admit Rich Applicants*, Wall Street Journal, Page One (Feb. 20, 2003), https://online.wsj.com/public/resources/documents/Polk_Rich_Applicants.htm; *see also* Stephanie Saul, *Elite Colleges' Quiet Fight to Favor Alumni Children*, N.Y. TIMES (July 13, 2022), https://www.nytimes.com/2022/07/13/us/legacy-admissions-colleges-universities.html.

[114] *Bakke*, 438 U.S. at 404 (1978) (Blackmun, J., concurring).

(2) The contribution of minorities to SES diversity is modest. "Eliminating a number of high SES Blacks to take up more slots for low SES white students is not going to make much of a difference because their numbers are simply too small to have a large impact."

(3) By removing the higher income minority students, an SES-based admission system would also result in a loss of students whose performance more closely resembles that of their white peers. This would lead to a drop in overall Black student performance.

(4) The disadvantages of low socioeconomic status are more "onerous" for minorities, especially Black students.

(5) A substitution of SES for race in the admissions process would result in a diminution of racial and ethnic diversity.[115]

Other researchers have identified three important patterns that will not produce the kind of race-neutral alternatives that the Court in *Fisher* would consider workable: "(a) even relatively aggressive SES-based affirmative action policies do not mimic the effects of race-based policies on racial diversity; (b) there is little evidence of any systemic mismatch induced by affirmative action policies; and (c) the use of affirmative action policies by some higher education institutions

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[115] AAAA Fisher Brief, *supra* note 91.

affects enrollment patterns in other higher education institutions as well."[116]

In trying to solely rely on socioeconomic status as a proxy for race, data indicates that we should not ignore the disadvantages that minorities endure at all income levels."[117] Data also indicates that white students from high SES backgrounds are nearly 2.8 times more likely to attend selective colleges than Black students from similar socioeconomic backgrounds.[118]

The SES model would produce a class of students needing, on average, much more academic and financial support and are less likely to succeed than better prepared Black and Hispanic students who need less support and aid, making the expense on colleges too high.[119] Moreover, at the graduate levels, the SES alternative cannot work because graduate and professional students often are no longer dependent on their parents' income and many are almost all poor in terms of current income. A study focusing on SES

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[116] Reardon, *supra* note 88.

[117] Tiffany Jones, *Postsecondary Education's Role in Promoting Justice: Adopt Campus Level Race-Conscious Policies*, at 17-18 (2021), https://files.eric.ed.gov/fulltext/ED617156.pdf.

[118] *Id.* at 6.

[119] Gary Orfield, *Social Science and the Future of Affirmative Action: The Supreme Court's* Fisher II *Decision and New Research, in Alternative Paths to Diversity: Exploring and Implementing Effective College Admissions Policies* 2, 11 (2017), https://onlinelibrary.wiley.com/doi/pdf/10.1002/ets2.12121.

alternatives concluded the policies were not effective in producing more racial diversity.[120]

Research conducted since 2013 reaffirms that socioeconomic status in higher education admissions is an unsatisfactory substitute for race as a factor in a holistic admissions program. As a matter of demographics, the number of non-minority low SES students exceeds the number of disadvantaged students of color and would easily minimize the diversity goals of the institution. In addition, the vast amounts of financial assistance needed to support an admissions program emphasizing socioeconomic status would be unaffordable for most colleges and universities, both public and private.

We, therefore, agree with Justice Blackmun in *Bakke*:

> "I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way.[121]

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[120] *Id.*; *see also* Reardon, *supra* note 87, at 19 ("[The] failure to produce substantial increases in racial diversity at elite colleges is not a result of tepid implementation. These results are consistent with Sander (1997), who found that SES-based affirmative action at the UCLA law school did not produce the levels of diversity achieved under race-based affirmative action policies.").

[121] *Bakke*, 438 U.S. at 265 (Blackmun, J., concurring).

CONCLUSION

America's higher education institutions play a unique and critical role in diminishing and eradicating discrimination and its harmful impacts on our society. When higher education institutions develop their missions, particularly to serve racially diverse student bodies and provide their students exposure to various views, including but not limited to vantage points from different racial groups, this Court should not substitute its judgment as to whether their missions are right. Rather, the Court's role should be to provide a framework to ensure that any consideration of race in the admissions process complies with strict scrutiny.

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