No. 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit

Brief of *Amicus Curiae* National Association of Scholars in Support of Petitioner

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae National Association of Scholars ("NAS") is an independent membership association of academics, including professors, graduate students, administrators and trustees, that works to foster intellectual freedom and to sustain the traditions of intellectual integrity and individual merit in America's colleges and universities.

In pursuit of this mission NAS has produced scholarship directly relevant to the argument of petitioner Students for Fair Admissions ("SFFA") that the Court should overrule the holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that student diversity is a compelling interest justifying the use of race as a factor in admissions. NAS has found that the emphasis on diversity first touted by Harvard University, respondent in the companion case of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199 ("Harvard case"), in its *amicus* brief in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and adopted in the lead opinion of Justice Powell there and then by the Court in *Grutter*, has not led to the ideal of cross-cultural stimulation

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of the brief.

NAS gave timely notice pursuant to Rule 37.2(a) to counsel of record for all parties of its intention to file this *amicus* brief, and received written consent from all parties.

contemplated by the Court. Rather, it has paradoxically contributed to just the reverse: a world of "neo-segregation" on campus featuring separate graduations, separate dorms and even separate classes.

NAS has filed a similar amicus brief in support of petitioner in the Harvard case.

SUMMARY OF ARGUMENT

The Court should reconsider the *Grutter* holding that student diversity is a compelling interest justifying race-based admissions because in practice it has led not to interracial understanding but to a new segregation; because in our multiracial society it now burdens not the white majority but Asian-Americans, another historically marginalized racial minority; and because the Harvard admissions plan hailed as a model of diversity in *Bakke* and *Grutter* was in fact tainted in bigotry from its inception.

In *Bakke* Justice Powell spoke of diversity as fostering a cross-racial "atmosphere of speculation, experiment and creation" and the Court majority echoed that view in *Grutter*. But the reality of campus diversity in 2021 is sadly different from this ideal. Rather, the dream of integration has given way to a regime of "neo-segregation" featuring separate dorms, separate graduations, and even de facto segregated classes. Further, contemporary diversity now "turns affirmative action on its head," *Fisher v. Univ. of Tex. at Austin*, 579 U.S. __, 136 S. Ct. 2198, 2216 (2016) ("*Fisher II*") (Alito, J., dissenting), in two ways. Rather than providing disadvantaged minorities with

a leg up while enriching others with their diverse perspectives, it now largely benefits middle and upper middle class minority students but encourages them to segregate by race.

The enormous growth of the Asian-American population since *Bakke* and *Grutter*, and the resulting transformation of America from an essentially biracial society to a multiracial one, also casts doubt on the continued adherence to those precedents, for there is strong evidence that the cost of racial preferences is now largely borne by Asians. Studies have found that up to 80 percent of slots awarded to African-American and Hispanic students under preferential admissions come from Asian-Americans rather than whites. That this would be so even though there are many more white than Asian applicants suggests that in deciding who must give up their seats in the name of racial diversity, admissions officers may ironically fall victim to implicit racial bias against Asians. Thus race-conscious admission, once a tool for combatting racial bias, now provokes it.

Finally, *Bakke* and *Grutter* are tainted by their reliance on the Harvard admissions system which they held out as a model, when in fact that system was instituted to exclude Jews, who were stereotyped in much the same way as Asians are today, and there are uncanny parallels between the imposition of a de facto Jewish quota under the system in the 1920's and the Asian admission experience since the 1990's.

ARGUMENT

I. The Court Should Reconsider *Grutter* Because the Use of Race to Achieve Diversity Has Led Not to Cross-Cultural Intellectual Stimulation and Understanding But to "Neo-Segregation."

In his controlling opinion in *Bakke* that was later adopted by the Court in *Grutter*, 506 U.S. at 325, Justice Powell held that only one potential institutional interest was compelling enough to justify consideration of race in college admissions: "the educational benefits that flow from an ethnically diverse student body." *Bakke*, 438 U.S. at 306. Justice Powell summarized these benefits as consisting of "[t]he atmosphere of 'speculation, experiment and creation' [that is] so essential to the quality of higher education," citing the statement of former Princeton University President William G. Bowen that "students of . . . different races . . . learn from their differences and . . . stimulate one another to reexamine even their most deeply held assumptions." *Id.* at 312 & n.48 (citing William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Wkly., Sept. 26, 1977, at 7, 9).

Embracing this diversity rationale for race-conscious admissions, the *Grutter* Court similarly described the "educational benefits that diversity is designed to produce" as "promot[ing] 'cross-racial understanding'" and "break[ing] down racial stereotypes." 539 U.S. at 330 (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001), *rev'd in*

part and vacated in part, 288 F.3d 732 (6th Cir. 2002), *aff'd* 539 U.S. 306). "'[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds'," the Court stated. 539 U.S. at 330 (quoting 137 F. Supp. 2d at 849).

Justice Powell's *Bakke* opinion held out the Harvard College admissions program as an example of such beneficial diversity, appending a summary of the program which was attached as an appendix to an *amicus* brief for Harvard and other elite schools in the case. 438 U.S. at 316-17, 321-24 (quoting and reprinting Brief of Columbia University, Harvard University et al. as Amici Curiae, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 U.S. S. Ct. Briefs LEXIS 128, app.) ("A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.")

The rest of the Harvard *amicus* brief described diversity in the same vein, arguing that racial diversity, like diversity of experience and interests, "provides the most stimulating intellectual environment," and that "[m]inority students" expose others to "new and provocative points of view" and "new intellectual experiences." Brief of Columbia, Harvard et al. at 8, 13, 1977 U.S. S. Ct. Briefs LEXIS at *6, *14.

The *Grutter* Court also favorably cited the Harvard program, 506 U.S. at 335-39, and in an *amicus* brief in that case Harvard again spoke of racial diver-

sity as fostering the "wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." Brief of Harvard University et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 U.S. S. Ct. Briefs LEXIS 189, at 12 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal quotations omitted)).

The reality of campus diversity in 2021 is sadly different from this ideal of interracial understanding and intellectual cross-pollination, however. As diversity advocates have focused increasingly on group identity rather than racial reconciliation in the years since *Bakke*, the dream of integration has given way to a regime of "neo-segregation" in America's colleges and universities, featuring separate graduations, separate dormitories and even de facto segregated classes.

NAS recently completed a comprehensive study of this phenomenon at 173 schools, including a book-length report on the experience at Yale University. *Separate but Equal, Again: Neo-Segregation in American Higher Education*, https://www.nas.org/reports/separate-but-equal-again; Dion J. Pierre & Peter W. Wood, *Neo-Segregation at Yale* (2019),[2] *see also* Dion J. Pierre, *Demands for Segregated Housing at Williams College Are Not News*, Nat'l Rev. (May 8,

[2] https://www.nas.org/storage/app/media/Reports/NeoSeg%20at%20Yale/NeoSegregation_at_Yale.pdf.

2019).[3] It found that, in addition to a host of racially-identified student centers, academic programs, and counseling and mentorship services, 43 percent of colleges offer segregated residences to students of different races, 46 percent offer segregated orientation programs, and 72 percent sponsor segregated graduation ceremonies. Pierre & Wood, *supra*, at 17; *see* Anemona Hartocollis, *Colleges Celebrate Diversity With Separate Commencements*, N.Y. Times, June 3, 2017, at A11 (Harvard and other top schools); Dustin Barnes, *Columbia University Offering Graduation Ceremonies Based on Race, Ethnicity, Income Status*, USA TODAY, Mar. 16, 2021.

This segregation is exacerbated by the tendency of African-American students to choose different majors and classes than white students. A study at Duke University found that while more black than white freshmen intended to major in the natural sciences, engineering or economics, the majority of them switched to less demanding majors over the course of their college careers while very few white students in these fields did. Thus only 32% of black students graduated with degrees in STEM fields or economics compared to 45% of white students. Peter Arcidiacono, Esteban M Aucejo & Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, IZA J. Lab. Econ 1:5, Oct. 2012,[4] at 12-13; *see* Heather

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[3] https://www.nationalreview.com/2019/05/american-colleges-segregated-housing-graduation-ceremonies/

[4] https://izajole.springeropen.com/track/pdf/10.1186/2193-

- *continued* -

Mac Donald, *The Diversity Delusion* 53-59 (2018) (summarizing study and reaction).

This may reflect the "mismatch" theory that racial preferences actually harm many talented black students by placing them in more competitive academic environments than they are prepared for. As a result they receive lower grades, choose less demanding majors with lower earnings potential, and drop out at higher rates than they would at slightly less competitive schools with peers at a similar level. *See generally* Richard Sander & Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (2012); *see* Peter Arcidiacono et al., *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California* 1, 13 (Nat'l Bureau Econ. Rsch., Working Paper 18799, 2013), https://www.nber.org/system/files/working_papers/w18799/w18799.pdf (data "suggest that mismatch of students with initial interests in STEM majors to UC campuses may be sizeable for minorities [and] may be a consequence of affirmative action policies in which race as well as academic preparation affect which campus students attend").

Such a "mismatch" between students receiving racial preferences in admissions and the schools admitting them may also, and understandably, increase their receptiveness to other forms of neo-segregation on campus, leading them to retreat into homogeneous enclaves with others who are superficially like them-

selves. Thus, not only are such students more likely to succeed and excel academically at somewhat less competitive institutions, they are more likely to contribute to **genuine** diversity there – i.e., to interracial camaraderie and to that "wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues" that Harvard spoke of in its *Grutter* brief (*see supra* p. 6). The ironic result is that the use of racial preferences in pursuit of diversity may actually undermine the very goals sought in pursuing it.

Compounding this irony is that the students receiving these admissions preferences in the name of diversity are not in fact very diverse from their fellow students in any ways other than skin color. As Justice Alito noted in his dissent in *Fisher II*, *supra*, the University of Texas had been particularly blunt about its preference for more affluent minority students in its earlier brief to the Court in the first *Fisher* case, *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) ("*Fisher I*"), and in so doing had laid bare an inherent conflict underlying the diversity rationale:

> UT has . . . claimed . . . that the race-based component of its plan is needed because the [already existing program admitting the top ten percent of each high school class] admits **the wrong kind** of African-American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African-American or Hispanic. As UT put it in

> its brief in *Fisher I*, the race-based component of its admissions plan is needed to admit "[t]he African-American or Hispanic child of successful professionals in Dallas."
>
> … [T]he argument turns affirmative action on its head. Affirmative-action programs were created to help **disadvantaged** students.

136 S. Ct. at 2216 (Alito, J., dissenting) (emphasis in original) (quoting Brief for Respondents, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (No. 11-345), at 34).

In fact, for the reasons discussed above, diversity as practiced on campus today actually stands the concept on its head in **two** ways. What was conceived as a means of bringing the perspectives of underprivileged minorities to bear on upper status culture while integrating them into that culture now brings yet more representatives of the dominant upper middle class culture to campus but encourages them to segregate by race. Surely this can no longer be considered a compelling interest justifying racially based admissions decisions.

This dual irony of modern diversity would be reason enough to reconsider *Grutter*, even without regard to a third crowning irony: that, as discussed in Point II, the burden of these racially based decisions now no longer falls on the white majority but on another historically marginalized racial minority.

II. The Court Should Reconsider *Grutter* Because the Burden of Race-Conscious Admissions Now Falls Largely on Asian-Americans, Another Racial Minority Group Historically Victimized by Discrimination.

Asian-Americans are the fastest growing racial or ethnic group in the United States. Gustavo López *et al.*, Pew Research Center, *Key Facts About Asian Americans, a Diverse and Growing Population* (2017), http://pewrsr.ch/3scIdaE. The Asian-American population has increased by 67 percent just since the *Grutter* decision in 2003, and by over 600 percent since the *Bakke* decision in 1978. *See* U.S. Census Bureau, *Asian American and Pacific Islander Heritage Month: May 2020* (Apr. 30, 2020), https://www.census.gov/newsroom/facts-for-features/2020/aian.html; Wikipedia, *Demographics of Asian Americans*, https://en.wikipedia.org/wiki/Demographics_of_Asian_Americans#Population. With this rise, and the concomitant increase of the Latino population, the largely biracial, black-and-white American society of 1978, and even of 2003, has become a multiracial one.

This transformation casts serious doubt on the wisdom of continued adherence to *Bakke* and *Grutter*. For there is strong evidence that in our current multiracial society the cost of the racial preferences for underrepresented minorities that was approved in these decisions is now primarily borne not by the white majority but by Asian-Americans – another

racial minority group that has been historically subject to discrimination.[5]

This effect could already be seen not long after *Grutter*. A 2005 study by two Princeton researchers reached the staggering conclusion that racial preferences for African-Americans and Latinos at elite colleges come almost entirely at the expense of Asian-Americans rather than whites. They found that if preferences were eliminated "[n]early four out of every five places . . . not taken by African-American and Hispanic students would be filled by Asians." Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 Soc. Sci. Q. 293, 298 (2005).

A more recent study of the "holistic admissions review" instituted at UCLA in the wake of *Grutter*[6] similarly found that Asian-Americans were the only applicants negatively impacted by it, while whites were largely unaffected or even benefitted slightly. Robert D. Mare, *Holistic Review in Freshman Admissions at the University of California – Los Angeles* 22, 26, 36-37 (May 27, 2014) (unpublished report).

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[5] This legacy of discrimination is well-known and is set out at length in the Brief of Amicus Curiae Asian American Coalition for Education et al. in Support of Petitioner in the Harvard case (at 11-17).

[6] California is of course technically barred from explicitly considering race in admissions under Proposition 209, Cal. Const. art. I, § 31.

Evidence in the Harvard case has also shown that "Asian Americans are the primary group hurt by preferences given in Harvard's Admissions Office" and that if all preferences were to be removed the number of Asians admitted would increase by 50 percent while white admissions would increase by only a negligible 3.5 percent. While these figures include the impact of removing athletic and legacy as well as racial preferences, removing racial preferences alone would increase Asian enrollment by 40% but white enrollment by only 18%. Harvard's own Office of Institutional Research ("OIR") similarly found that removing racial preferences would increase Asian enrollment by 45% but white enrollment by only 15%.[7]

The evidence that racial preferences for Black and Latino students now come largely at the expense of Asian-Americans rather than whites might seem incongruous at first blush. Whites are after all the majority and Asians the minority, even in the applicant pool for top schools, and there is no reason to think that Asians cluster towards the bottom. (Indeed copious evidence in the Harvard case shows that they rank at the top of this pool there.) So one would expect that whites would at the very least bear the cost of these preferences in proportion to their share of the applicant pool. The fact that they do not – that they are apparently the last to go while Asian-

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[7] Citations for these statistics are at page 13 of our Brief in Support of Petitioner in that case.

Americans are often the first – suggests that implicit bias may be at play here.

That is, in deciding who must give up their slots in the name of racial diversity, admissions officers may ironically fall back on the subconscious racial stereotypes of Asians as "quiet," "bland," "flat," "[un]exciting" and "timid."[8] In the biracial era, other, less historically suspect, biases, such as those based on economic class, may have come into play in making these decisions among white candidates. But with the rise of Asian-Americans in the present multiracial era race has become a factor. Thus race-conscious admission, once seen as a tool for combatting racial bias, now provokes it.

Such "dramatic changes in factual circumstances" as the shift in the racial landscape of the United States from an essentially biracial one to a multiracial one over the last forty years may well "support a departure from precedent under the prevailing approach to stare decisis." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 534 (2009) (Thomas, J., concurring). *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855, 861 (1992).

As America has become a more diverse multiracial society the diversity rationale for race-based admissions sanctioned by Justice Powell in *Bakke* and

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[8] *See* App. to Pet. Cert. 160, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199.

approved by the Court in *Grutter* has foundered on diversity itself. The Court should overrule those precedents.

III. Historical Evidence that Harvard's Holistic Admissions Policies That Were Embraced in *Bakke* and *Grutter* Were Instituted to Exclude Jews, Who Were Stereotyped in Much the Same Way as Asians are Today, Shows That Those Decisions Were Founded on a Lie.

In the Harvard case, SFFA submitted copious historical evidence that Harvard's "holistic" admissions system touted in *Bakke* and *Grutter* was originally instituted to exclude Jewish students who were stereotyped in much the same way that Asian-Americans are today, and that there are uncanny parallels between the imposition of de facto Jewish quotas at Harvard and other top schools under this system in the 1920's and the Asian admission experience since the 1990's. While the district court there allowed only limited presentation of this historical record, it is particularly relevant to this Court's consideration of both cases, because of the *Bakke* and *Grutter* Courts' reliance on the Harvard plan as the model of an acceptable race-conscious admissions program. (*See* Point I *supra*.) In fact, the plan was the product of the most vile anti-Semitism, and thus supports the conclusion that it now cloaks similar anti-Asian prejudice.

This history was summarized in a lengthy 2012 article on admissions at Harvard and other selective schools:

> During the 1920s, the established Northeastern Anglo-Saxon elites who then dominated the Ivy League wished to sharply curtail the rapidly growing numbers of Jewish students . . . T**he approach . . . taken by Harvard President A. Lawrence Lowell . . . was to transform the admissions process from a simple objective test of academic merit into a complex and holistic consideration of all aspects of each individual applicant; the resulting opacity . . . allow[ed] the ethnicity of the student body to be shaped as desired. As a consequence, university leaders could honestly deny the existence of any racial or religious quotas, while still managing to reduce Jewish enrollment** to a much lower level.

Ron Unz, *The Myth of American Meritocracy: How corrupt are Ivy League admissions?*, The American Conservative, Dec. 2012, at 14, http://www.theamericanconservative.com /articles/the-myth-of-american-meritocracy. (Emphasis added; footnotes omitted.)

The anti-Semitism that gave rise to this is eye-popping. *See generally* Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton* 1-109 (2005); Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity Discretion Model: Paradigm or Pretext?*, 1 Cardozo L. Rev. 379 (1979). The

following discussion draws heavily on these sources to set out this history.

Prior to the early 1920's admission to Harvard and other Ivy League schools was based almost entirely on grades and an entrance examination. Essays and personal interviews were not required, and there was relatively little consideration of extra-curricular activities or of the kind of subjective "character" traits and "leadership skills" included in today's amorphous personal rating. While the admission criteria were objective, until about the turn of the century they were not particularly demanding, in keeping with the Ivy League reputation as a place for the social rather than the intellectual elite.

Beginning in the 1890's, however, Harvard began to make its requirements more academically rigorous, just as increasing numbers of Jewish immigrants whose culture emphasized academics were arriving in America, and Jews began to comprise a growing share of the student population. Harvard was already 7 percent Jewish by 1900, a figure which increased to 10% in 1909, 15% in 1914 and 21.5% in 1922.

This did not sit well with many Harvard officials and alumni. As early as 1907 the dean of financial aid expressed his preference for "sons of families that have been American for generations" rather than the "increasing class [of] foreigners, and especially the Russian Jews." Some twenty years later, as Jewish enrollment reached its peak, a member of the Class of 1901 wrote to President Lowell after attending the

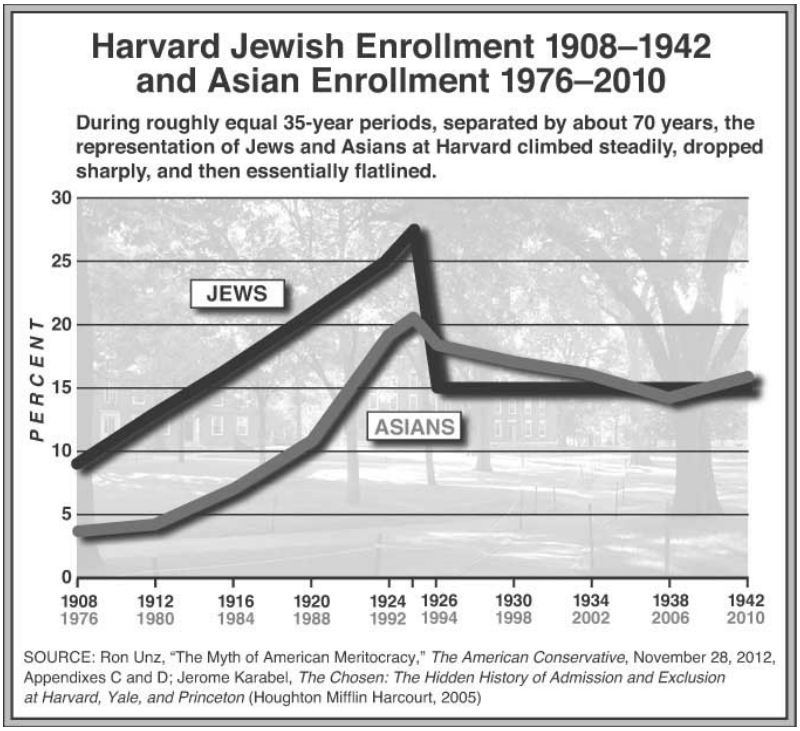
Harvard-Yale game that "to find that one's University had become so Hebrewized was a fearful shock. There were Jews to the right of me, Jews to the left of me." Lowell responded sympathetically that he "had foreseen the peril of having too large of a number of an alien race and had tried to prevent it."

Lowell had indeed proposed a formal 15% Jewish quota in 1920, which the faculty rejected, but when the Jewish numbers reached 27.6% in 1925 they adopted his proposal to impose a de facto quota via discretionary admissions criteria emphasizing subjective measures of "character and personality" rather than exam scores. Lowell was quite candid that "a very large proportion of the less desirable, upon this basis, are . . . the Jews."

The impact of the holistic policy was immediate and drastic. The percentage of Jews in Harvard's freshman class plummeted from over 27% in 1925 to just 15% in 1926, and remained virtually unchanged at about that level until the 1940's. During this time Harvard buttressed this quota by reinforcing the subjective elements of its admissions system, for the first time requiring candidates to submit personal essays and descriptions of their extracurricular activities in an attempt to further emphasize "leadership" skills and "character." Jewish numbers at Harvard did not begin to rebound until after World War II.

Comparing the experience of Jewish students of that era and Asian students over the last several decades under Harvard's holistic admissions plan, Unz observed that the Asian experience "exactly

replicates the historical pattern … in which Jewish enrollment rose very rapidly, leading to imposition of an informal quota system, after which the number of Jews fell substantially, and thereafter remained roughly constant for decades." Unz, *supra*, at 18. This is starkly illustrated in the chart below comparing Harvard's Jewish enrollment for the period from 1908 to 1942 with its Asian enrollment for the corresponding period from 1976 to 2010:



Dennis Saffran, *Fewer Asians Need Apply*, City J., Winter 2016, at 38, 43.[9]

This stunning parallel suggests that, just as they did a century ago, Harvard and other top schools now deem another upstart, achievement-oriented minority that has been too successful under the old academic standards to be deficient in the highly subjective and discretionary "personal estimate of character" favored by President Lowell.

In holding up Harvard's subjective admissions plan as a model of benign diversity for other schools rather than a mechanism for invidious discrimination, *Grutter* and *Bakke* were founded on a lie. This is all the more reason why, as Petitioner argues, they were "egregiously wrong," *Ramos v. Louisiana*, *supra*, 140 S. Ct. at 1414 (2020) (Kavanaugh, J., concurring in part), and should be overruled.

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[9] https://www.city-journal.org/html/fewer-asians-need-apply-14180.html.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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