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 to the U.S. Court of Appeals for the Fourth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 15, 2021

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The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center believes that every American has a right to fair and equal treatment regardless of race, whether in education or other sectors of society. *See, e.g., Joyner v. Vilsack*, 1:21-cv-01089 (W.D. Tenn.) (challenging USDA program); *Clark v. State Public Charter School Authority*, 2:20-cv-02324-APG-VCF (D. Nev.) (challenging critical race theory in public education); *Menders v. Loudoun Cty. School Bd.*, 1:21-cv-00669-AJT-TCB (E.D. Va.) (similar).

SUMMARY OF ARGUMENT & INTRODUCTION

Discriminating between people on the basis of race should be illegal in America. "To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioner and Respondents received notice more than 10 days before its filing that Amicus intended to file this brief, and both consented to its filing.

hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Educ.,* 347 U.S. 483, 494 (1954).

Yet this is exactly what the University of North Carolina ("the University") has done. It has done this under the auspices of this Court's decision in *Grutter v. Bollinger,* 539 U.S. 306 (2003), which held that institutions of higher education ("universities") have a compelling interest in a diverse student body, which justifies race-based discrimination in their admissions programs. 539 U.S. at 328. In the years since that decision, it has become clear that affirmative action impermissibly discriminates against some college applicants (usually Asian-American applicants), and has not resulted in more racially equal outcomes.

The University has justified its racial discrimination as a means to achieve "the educational benefits of diversity" as permitted by *Grutter*. Petitioner's App. *("*App.") 58 (trial court findings of fact); *see also Grutter,* 539 U.S. at 328 (defendant law school also sought to obtain "the educational benefits that flow from a diverse student body"); *Id.* at 329-33 (universities have a compelling interest in securing such educational benefits). But subsequent research has demonstrated that affirmative action is an inefficient way of achieving student body diversity.

Grutter optimistically hoped that universities would "draw on the most promising aspects of . . . race-neutral alternatives as they develop." 539 U.S. at 342. But although the Court saw "no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point," *id.*, that end point is no more in sight today

than when *Grutter* was decided. This case, and its companion, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* No. 20-1199, present this Court with ideal vehicles to revisit its past decisions and correct its overly optimistic assumptions.

ARGUMENT

I. The affirmative action regime countenanced by *Grutter* is discriminatory and would be unconstitutional in any other context.

It has long been clear that the "holistic" approach (539 U.S. at 337) authorized by *Grutter* still results in clear racial bias. *See* Thomas J. Espenshade, et al., NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 93 (Princeton Univ. Press, 2009). A study looking at 1997 admission practices demonstrated that Black applicants received an "admission bonus" "equivalent to 310 SAT points." *Id.* Asian candidates, on the other hand, were penalized 140 SAT points compared to their white counterparts. *Id.* This would *appear* to run counter to *Grutter's* admonishment that, although universities may use race as a "plus" factor, an applicant cannot be evaluated "in a way that makes an applicant's race or ethnicity the defining feature of his or her application." 539 U.S. at 337. Therefore, one would think that in a post-*Grutter* setting, this practice would not be permissible. But when this data was cited in disputes about Princeton's admissions process between 2006 and 2011, Princeton successfully defended itself on the grounds that "the university's holistic review of applicants in pursuit of its compelling interest in diversity meets the standards set by the Supreme

Court." Rebecca Prinster, *Feds Clear Princeton of Discriminating Against Asian American Students,* INSIGHT INTO DIVERSITY (Sept. 28, 2015).[2] *Grutter*'s admonishment is therefore a paper tiger; universities may still openly discriminate on the basis of race.

No other institution is trusted with the use of racial classifications. *See Shelley v. Kraemer,* 334 U.S. 1 (1948) (race-based restrictive covenants violate the Equal Protection Clause); *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273 (1976) (race-based discrimination in employment violates Title VII of the Civil Rights Act of 1964); *Strauder v. West Virginia,* 100 U.S. 303 (1880) (racial discrimination in jury selection offends the Equal Protection Clause). *Strauder* and its progeny are particularly noteworthy here because one could just as easily argue that juries, like universities, have an interest in diverse viewpoints. Yet racial discrimination in each of those circumstances is intolerable.

II. Discrimination is an inefficient means by which to obtain the diversity interest.

The *Grutter* Court took "the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula and will terminate its race-conscious admissions program as soon as practicable.'" 539 U.S. at 343 (citation omitted). Such race-neutral alternatives do exist, *see* Brief of the Liberty

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[2] https://www.insightintodiversity.com/feds-clear-princeton-of-discriminating-against-asian-american-students/.

Justice Center as *Amicus Curiae* in Support of Petitioners at 2-7, *Students For Fair Admissions v. President & Fellows of Harvard College* (2021) (No. 20-1199). But these alternatives are, apparently, less "practicable" than the system currently in place.

So let us examine how effective the current system is at meeting its stated goal of improving student diversity.

A. White students are also beneficiaries of affirmative action programs.

If Asian-Americans are being discriminated against, *cui bono*? Surely, if affirmative action worked as intended, the answer would be "underserved African-Americans." But this is not the case. "[T]he primary beneficiaries of affirmative action have been Euro-American women." Kimberle W. Crenshaw, *Framing Affirmative Action,* 105 MICH. L. REV. FIRST IMPRESSIONS 123, 129 (2007);[3] *see also* Victoria M. Massie, *White Women Benefit Most from Affirmative Action – And Are Among Its Fiercest Opponents,* VOX (June 23, 2016, 12:00 PM).[4] And as *Amicus* observed in a previous brief, legacy admissions also favor rich white applicants who obviously do not bring a diverse viewpoint to campus. Brief of the Liberty Justice Center as *Amicus Curiae* in Support of Petitioners at 7-12, *Students For Fair Admissions v. President & Fellows of Harvard College* (2021) (No. 20-1199).

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[3] https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1093&context=mlr_fi.

[4] https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action.

The solution to this problem, according to affirmative action's defenders, is to double down. *See, e.g.,* Sally Kohn, *Affirmative Action has Helped White Women More than Anyone,* TIME (June 17, 2013, 9:00 AM)[5] ("The success of white women make a case not for abandoning affirmative action but for continuing it."). This despite the fact that *Grutter* presumed a good-faith intent on the part of universities to "terminate [their] race-conscious admissions program as soon as practicable." 539 U.S. at 343; *see also Regents of Univ. of Cal. v. Bakke,* 438 U.S. 263, 318-19 (1978) (opinion of Powell, J.) ("[G]ood faith would be presumed in the absence of a showing to the contrary.") Doubling down on a failed, racist policy is not evidence of good faith.

Further evidence of a lack of good faith on the part of universities can be found in grade inflation. *See* Matthew Q. Clarida and Nicholas P. Fandos, *Substantiating Fears of Grade Inflation, Dean Says Median Grade at Harvard College is A-, Most Common Grade is A,* THE HARVARD CRIMSON (May 26, 2017);[6] *Data Shows Seniors Had Highest Grades Last Summer,* LOYOLA PHOENIX (Mar. 19, 2013);[7] *Grade Inflation at American Colleges and Universities,* GRADEINFLATION.COM (last visited Dec. 13, 2021).[8] Why would universities do this if the students they admit are all perfectly qualified? And why would they do it if they know that it results

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[5] https://time.com/4884132/affirmative-action-civil-rights-white-women/.

[6] https://www.thecrimson.com/article/2013/12/3/grade-inflation-mode-a/.

[7] http://loyolaphoenix.com/2013/03/data-shows-seniors-highest-grades-semester/.

[8] https://www.gradeinflation.com/.

in each class being "more coddled, protected, and spoiled than previous students," and "expecting to be rewarded for showing up"? Valerie Strauss, *Why Grade Inflation (Even at Harvard) is a Big Problem*, WASH. POST (Dec. 20, 2013).[9]

In light of their unwillingness to fix what is obviously broken, perhaps this court *should* assume, *contra* Justice Powell, that universities *are* operating their "facially nondiscriminatory admissions polic[ies] . . . as a cover for the functional equivalent of a quota system." *Bakke,* 438 U.S. at 318.

B. Excluding or minimizing the presence of Asians and Asian-Americans does not further the goal of diversity.

To reiterate, the University's affirmative action plan is *supposed* to admit "students who could contribute to the University [and] the achievement of critical masses of underrepresented populations," the latter of which is necessary to give all students "the educational benefits of a diverse learning environment" and to avoid "undue pressure on underrepresented students." App. 54 (cleaned up). But minimizing the presence of Asians and Asian-Americans does not further this interest.

First, Asian-Americans as a whole are far more likely to bring "a perspective different from that of" other students. *Grutter,* 539 U.S. at 319; *see also* App. 57

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[9] https://www.washingtonpost.com/news/answer-sheet/wp/2013/12/20/why-grade-inflation-even-at-harvard-is-a-big-problem/.

("improved classroom discussion through different perspectives" a sought benefit of using race in admissions). This is because Asians and Asian-Americans are more likely to be foreign-born than their counterparts: 57% of Asian-Americans, including 71% of Asian-American adults, were born in another country, compared to only 14% of all Americans and 17% of all American adults. Abby Budiman and Neil G. Ruiz, *Key Facts About Asian-Americans, a Diverse and Growing Population,* PEW RESEARCH (Apr. 29, 2021).[10]

Asian-Americans can also bring a unique perspective when it comes to discrimination. They were, after all, the victims of the first U.S. law to prevent immigration and naturalization on the basis of race, the Chinese Exclusion Act of 1882. *Asian Americans Then and Now,* ASIA SOCIETY (last visited Dec. 11, 2021).[11] And that's not even mentioning Japanese interment during World War II or the recent spate of anti-Asian violence in the wake of COVID-19.

Second, by handicapping Asian or Asian-American applicants, universities are reducing students with Chinese, Japanese, Korean, Vietnamese, Thai, Cambodian, or Indian (to name a few) heritage into a single box marked "Asian." Each of these distinct ethnic groups has its own language, culture, sociological makeup, and perspective, but they are all locked into the same box in race-based admissions programs.

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[10] *available at* https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/

[11] https://asiasociety.org/education/asian-americans-then-and-now.

Most of those categories are self-explanatory, but perhaps an example of a sociological difference among East Asian cultures is in order. Chinese and Koreans are more likely to adopt new technologies than Japanese, who are more focused on potential negative effects of new technology. Martin Schiere, et al., *Understanding the Social Cultural Differences Between China, Japan and South Korea for Better Communication,* GLOCALITIES (last visited Dec. 11, 2021).[12] And Japanese and South Koreans are more likely to be "open-minded idealists who value personal development and culture" than their Chinese counterparts, who are more likely to "value family and community." *Id.*

Southeast Asians arguably have it even worse. The very term "Asian-American" tends to center on East Asians (such as Chinese, Koreans, or Japanese) at the expense of South Asians (Bangladeshis, Indians, Sri Lankans) and Southeast Asians (Cambodians, Filipinos, Thai, Vietnamese). *See, e.g.,* Li Zhou, The Inadequacy of the Term "Asian American," VOX (May 5, 2021, 10:10 AM).[13] And Southeast Asians in America often live entirely different experiences to either their East Asian or non-Asian counterparts. For example, while only 12.1% of all U.S. Asians live in poverty, below the U.S. average of 15.1%, that number is 19.1% for Cambodians. *U.S. Cambodian Population Living in*

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[12] https://glocalities.com/news/understanding-the-social-cultural-differences-between-china-japan-and-south-korea-for-better-communication.

[13] https://www.vox.com/identities/22380197/asian-american-pacific-islander-aapi-heritage-anti-asian-hate-attacks.

Poverty, PEW RESEARCH CENTER (Sept. 8, 2017).[14] Even more curiously, while a smaller percentage of U.S.-born Asians live in poverty than their foreign-born counterparts, that statistic is reversed for Cambodians. *Id.* And while Indian Americans have a median income of $100,000, Burmese Americans have a median of only $36,000. Dedrick Asante-Muhammad and Sally Sim, *Racial Wealth Snapshot: Asian Americans and the Racial Wealth Divide,* NATIONAL COMMUNITY REINVESTMENT COALITION (May 14, 2020).[15] And while over 94% of Taiwanese and Japanese Americans have a high school degree, that statistic is under 66% for Laotian and Hmong Americans. Benjamin Chang, *Asian Americans and Education,* OXFORD RESEARCH ENCYCLOPEDIA OF EDUCATION (Feb. 2017).[16]

And Southeast Asians also differ among themselves. Vietnamese culture differs from Cambodian and Lao culture, for example, in that the former has strong Chinese influences while the latter two are more influenced by India. *Asian Americans Then and Now*. Or consider that the majority of Southeast Asian countries are "home to dozens of different ethnic groups" and have within themselves a clear geographically-based religious divide. Michael G. Peletz, *Diversity and Unity,* ASIA SOCIETY (last visited Dec. 13, 2021).[17]

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[14] https://www.pewresearch.org/social-trends/chart/u-s-cambodian-population-living-in-poverty/.

[15] https://ncrc.org/racial-wealth-snapshot-asian-americans-and-the-racial-wealth-divide/.

[16] https://files.eric.ed.gov/fulltext/ED577104.pdf.

[17] https://asiasociety.org/education/diversity-and-unity.

A student from one such country's highland areas, following an animalistic tradition, would obviously have different perspectives to a student from the lowlands, who would be more likely to adhere to a more formal religion such as Islam, Buddhism, or Christianity. *Id.*

The university admissions systems' response to this rich cultural diversity? Mash it all into a single box marked "Asian" and disadvantage them in their admissions process. All (ostensibly) in the name of "diversity."

CONCLUSION

In *Grutter,* this Court wrote that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343. There are now seven years left on that clock, and universities nationwide are no closer to abandoning race as a factor in admissions than they were on the day *Grutter* was decided. All they've done is perpetuate a racist system that fails to obtain their stated goal of diversity.

This Court should adopt a clear, bright-line rule: no educational institution may consider an applicant's race in determining whether to admit that applicant.

Respectfully submitted,

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