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 Writer of Certiorari Before Judgement to the Fourth Circuit Court of Appeals**

## BRIEF OF *AMICI CURIAE* THE ASIAN AMERICAN COALITION FOR EDUCATION AND THE ASIAN AMERICAN LEGAL FOUNDATION IN SUPPORT OF PETITIONER


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitution, Statutes, Orders**



**Trial Record, Appellate Record**



**Books**



**Miscellaneous**

## THE INTEREST OF *AMICI CURIAE* [1]

This case presents issues of critical importance to *amici curiae* and their constituents, who are Americans of Asian ethnic descent. Asian Americans have historically faced discrimination in many aspects of American life, particularly in education. Issues raised by this case are particularly poignant as the Asian American community has recently been experiencing a pandemic of raced-based violence, with vulnerable Asian Americans viciously attacked and even murdered in the streets of American cities.[2]

Asian Americans have often been subjected to admissions processes at institutions where, as at the University of North Carolina ("UNC"), their ethnicity is considered undesirable and not "diverse." Many of Amici's constituents have children who were denied entrance to or who may one day aspire to attend

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties have been timely notified of and have given their consent to the filing of this *amici curiae* brief.

[2] *Anti-Asian Hate Crimes Rose 73% Last Year, Updated FBI Data Says,* NBCNews (Oct. 25, 2021), *found at* https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-rose-73-last-year- updated-fbi- data-says-rcna3741 (last visited 12/11/2021); *Surge in Anti-Asian Hate Crimes Raises Fears,* Daily Bulletin (March 5, 2021), *found at* https://www.dailybulletin.com/ 2021/03/05/surge-in -anti-asian-hate-crimes-raises-fears-in-southern-california/ (last visited 12/9/2021).

UNC or other selective institutions with similar discriminatory admissions practices.

The Asian American Coalition for Education ("AACE") is an apolitical, non-profit, national alliance supported by over 300 organizations nationwide. It is devoted to promoting equal rights for Asian Americans in education and education-related activities. The leaders of AACE and its supporting organizations are Asian American community leaders, business leaders and, most importantly, parents. They are not professional "civil rights advocates" and do not get funding from large corporations or multibillion dollar foundations, but were forced to become civil rights advocates to expose, stop and prevent the discrimination against their children that the "professionals" ignore, downplay and facilitate. More information on AACE can be found at http://asianamericanforeducation.org.

The Asian American Legal Foundation ("AALF"), a non-profit organization based in San Francisco, was founded in 1994 to protect and promote the civil rights of Asian Americans. AALF focuses its work on situations where Asian Americans are discriminated against for a purportedly benign purpose and where high profile groups and individuals deny that discrimination even exists. Members of AALF were instrumental in the struggle to end discrimination against Chinese American students in the San Francisco, California public school system. *See Ho v. San Francisco*

*Unified Sch. Dist.,* 147 F.3d 854 (9th Cir. 1998). More information on AALF can be found at http://www.asianamericanlegal.com.

*Amici Curiae* ask this Court to hear their arguments in support of Petitioner.

## SUMMARY OF ARGUMENT

The record below demonstrates that UNC's race conscious admissions program, which grants preferences to certain favored minorities, discriminates against Asian American and white applicants to UNC's colleges. As with Harvard and certain other selective institutions, UNC's racial discrimination is carried out in the name of diversity but the result is the same—discrimination against individual applicants who are of non-favored races.[3]

UNC's discrimination is not subtle. The evidence shows an in-state male Asian American candidate whose statistical chances of admission are 25% based on grades and other metrics would have a

[3] Selective colleges are no longer as blatant in their racial discrimination as in the past, but in recent years many have instituted ostensible "diversity" programs that essentially do the same thing—discriminate against individual applicants, particularly Asian Americans, solely because of their ethnicity. *See* Ron Unz, *The Myth of American Meritocracy: How Corrupt are Ivy League Admissions?,* (The American Conservative (Dec. 2012), *at* https://www.theamericanconservative.com/articles/the-myth-of-american-meritocracy/ (last checked 12/9/2021).

63% chance of admission if treated as Hispanic and a 88% chance of admission if treated as black.

UNC's lumping of all Asian Americans into one disfavored group that it deems to lack diversity ignores the fact that Asian Americans comprise at least 20 distinct ethnic groups, each with its own cultural heritage. Such treatment of Asian American applicants as "faceless" members of a disfavored "overrepresented" race is reminiscent of the negative stereotyping historically used to justify persecution of Asian Americans. It also echoes what Harvard did in the 1920s to keep Jewish Americans from being "overrepresented" on its campus. And, just as past anti-Semitic slurs spawned violence against Jews, today's libel similarly promotes violence against Asian Americans. *See* Cady Lang, *Hate Crimes Against Asian Americans Are on the Rise,* Time (Feb. 18, 2021), *found at* https://time.com/ 5938482/asian-american-attacks/ (last visited 12/9/2021).

Throughout their long history in this country, Asian Americans faced discrimination rationalized by depicting them as featureless members of a "yellow horde," lacking the human attributes of other Americans and not deserving to be treated on their own merits as individuals. It is thus sad to see Asian Americans again subjected to negative stereotyping and discrimination—this time by UNC and respected educational institutions. This widespread discrimination, copied across the nation, causes real and tangible harm, resulting in Asian American

children feeling a sense of inferiority, anger, and hopelessness in their academic endeavors, knowing they are likely to face additional hurdles to college admission just because of their ethnicity.

UNC's program should be stopped. Universities should not be allowed to use race conscious admissions in a misguided effort to hide failures in K12 education, something that fails to address the root causes of the problem while trammeling the rights of individuals. This case and the similar Harvard admissions case illustrate that, exactly as this Court has repeatedly declared, distinctions based on race are "odious" to a free people and should not be allowed except where necessary to remedy prior illegal use of race. If the present trend of imposing unneeded racial distinctions is allowed to continue, it will not stop with university admissions but will permeate all aspects of American society, with grave consequences for our future.

This Court should grant *certiorari* so that it can hear this case together with the Harvard admissions case, and clarify the standards applicable to a university's use of race.

## ARGUMENT

### I. THE UNIVERSITY'S UNLAWFUL DISCRIMINATION CAUSES PROFOUND INJURY TO ASIAN AMERICAN STUDENTS.

#### A. UNC's Race-Conscious Admissions Discriminate Heavily Against Asian American Applicants.

In its college admissions, UNC "demeans the dignity and worth" of Asian Americans by judging them by ancestry instead of by their "own merit and essential qualities." *Rice v. Cayetano,* 528 U.S. 495, 517 (2000). As the evidence shows, UNC gives preference to black, Hispanic and native American applicants, deeming them "under-represented minorities" ("URM"), while at the same time discriminating against individuals of the non-preferred races, particularly Asian and white Americans. (D.C.Dkt. 160-1 at 2-4.)

The entire UNC admissions process is permeated with race.[4] UNC gives preferences to applicants of the preferred races under the guise of

[4] Candidates are assigned numerical scores in five categories: academic program, academic performance, extracurricular activity, personal qualities, and essay. (App. 70-71.) Race is considered at every stage of the admissions process. (App. 51, 97.) With a limited number of seats available, college admissions at UNC, like other selective schools, is a "zero sum" game. *See Fisher v. Univ. of Tex. at Austin,* 136 S.Ct. 2198, 2227 n.4 (2016) (Alito, J. dissenting).

promoting diversity but is actually attempting to mirror the racial demographics of the State: "The term 'underrepresented' in this context refers to any group 'whose percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina.'" (App. 15 n. 7.) Such attempts at racial balancing are something this Court has long taught is forbidden. "We have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake.'" *Parents Inv. In Comm. Sch. v. Seattle School No. 1*, 127 S. Ct. 2738, 2757 (2007) (citing cases).

Admissions officers' internal communications demonstrate that Asian Americans along with whites are at the bottom of UNC's racial hierarchy. As the court below noted, "One email, in the words of Plaintiff, 'express[es] disappointment that an applicant with perfect test scores was Asian and not 'Brown.'" (App. 40.) UNC itself concedes race can be a determinative factor in admission. (App. 150.) Indeed, UNC's discrimination is not subtle. As the Petitioner's expert found, an in-state male Asian American candidate whose statistical chances of admission are 25% based on his grades and other metrics would have a 63% chance of admission if treated as Hispanic and a 88% chance of admission if treated as black. (D.C.Dkt. 160-1 at 7, 30.) The effect of the racial preferences is even greater with out-of-state applicants. (*Id.* at 31, 46-47.)

UNC's discrimination against Asian American

and white applicants extends even to recruitment: "URMs in North Carolina could score as low as a 26 on the ACT and be recruited, whereas white and Asian American students needed at least a 29." (App. 48.)

Not only does UNC penalize Asian Americans because it does not consider them as contributors to diversity; it lumps them all together despite the fact that "Asian" encompasses many different ethnic groups, each of which is a distinct minority: "Asian Americans trace their roots to more than 20 countries in East and Southeast Asia and the Indian subcontinent, each with unique histories, cultures, languages and other characteristics." Abby Budiman & Neil G. Ruiz, *Key Facts about Asian Americans, a Diverse and Growing Population*, Pew Research Center (April 21, 1921), *found at https://www .pewresearch. org/fact -tank/2021/04/29/key -facts-about-asian-americans/*(last visited 12/10/2021).

### B. The Burden of UNC's Use of Race Falls Heaviest on Those Least Able to Bear It.

It would be wrong to think that Asian American students uniformly apply to UNC with high GPAs and test scores and that conditions are merely being "equalized" by UNC's use of race, and that no one is really being harmed. First, under the Fourteenth Amendment to the United States

Constitution, the constitutional injury lies in the absence of equal treatment, whatever the result. *Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville,* 508 U.S. 656, 666 (1993). Moreover, as noted, "Asian" comprises at least 20 distinct ethnic groups. Within each of these there are considerable differences in terms of family background and resources. What happens in UNC admissions is that the more socioeconomically advantaged, better prepared Asian American candidates may still gain entry in spite of the ethnic "handicap": "when you're in the very top decile, pretty much everybody is getting in." (App. 76.) However, less advantaged Asian American candidates with less than perfect scores are at a severe disadvantage compared to similarly-placed applicants of the preferred races: "For instance, in decile five, 'whites and Asian Americans have admit rates that are below 30%, but the African American admit rate is over 40 points higher, at 71%, and the Hispanic admit rate is almost 54%.' " (App. 76-77.)

Thus, perversely, the burden of UNC's racial discrimination falls heaviest on the most disadvantaged Asian American and white individuals who apply for admission.

### C. The Higher Admissions Standards Imposed on Asian American Children by UNC and Other Selective Universities Lead to Unbearable Study Loads, Stress, Depression and Other Psychological Harm.

Preparing for college is daunting for all high school students. The *de facto* higher admission standards imposed by UNC and other selective colleges on applicants identified as "Asian" makes the process even worse for Asian American students. Filled with despair because they know they will face formidable additional barriers in the admissions process, many of them undertake overwhelming study loads, working themselves into ill health, and suffering higher rates of anxiety, depression and suicide. "Asian American college students are 1.6 times more likely than all others to make a serious suicide attempt." George Qiao, *Why Are Asian American Kids Killing Themselves?* Plan A Magazine, Oct. 3, 2017, *found at https://planamag.com/why-are-asian-american-kids-killing-themselves/* (last visited 12/12/2021).

When Asian American children learn they face barriers because they are deemed to contribute "less" to "diversity," they often want to deny or repudiate their ethnic heritage. Many researchers have documented the pernicious effects felt throughout the Asian American community. *See* Yi-Chen (Jenny)

Wu, *Admission Considerations in Higher Education Among Asian Americans,* American Psychological Association, *found at* https://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/article-admission (last visited 12/12/2021) (citing sources).

### D. There is a Terrible Effect on the Dignity and Self Worth of Students Who Know They will Face Discrimination if Seen as "Asian."

As found by this Court, classification by race inevitably promotes feelings of "racial inferiority" and "racial hostility." *Richmond v. J. A. Croson Co.,* 488 U. S. 469, 493-94 (1989). In American education today, it has produced a pernicious regime in which it is viewed as somehow shameful to be "Asian."

As Lee Cheng, Secretary of AALF, testified in hearings before the U.S. House of Representatives, Sub-Committee on the Constitution, "Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage . . ." *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution (June 1, 1995), p. 241, *at* http://www.archive.org/stream/grouppreferences00unit/grouppreferences00unit_djvu.txt (last visited 12/12/2021).

Consultants who advise on how to get kids into college openly state that Asian Americans should conceal or downplay their ethnicity: "'We will make them appear less Asian when they apply.'" Bella English, *To Get Into Elite Colleges, Some Advised To 'Appear Less Asian,'* The Boston Globe, June 1, 2015, *found at* https://www.bostonglobe.com/lifestyle/2015/06/01/college-counselors-advise-some-asian-students-appear-less-asian/Ew7g4JiQMiqYNQlIwqEIuO/ story.html (last visited 12/12/2021). "And for the college essay, don't write about your immigrant family . . ." (*Id.*)

The Princeton Review advises Asian Americans: "If you're given an option, don't attach a photograph to your application and don't answer the optional question about your ethnic background. This is especially important if you don't have an Asian-sounding surname. (By the same token, if you do have an Asian-sounding surname but aren't Asian, do attach a photograph)." Akane Otani, *Tips From the Princeton Review: Act Less Asian, Add Pics if You're Black,* Bloomberg, Nov. 21, 2014, *found at* https://www.bloomberg.com/news/articles/2014-11-21/princeton-review-tells-asians-to-act-less-asian-and-black-students-to-attach-photos (visited 12/12/2021).

Only Asian American children have to hide that they want to be violinists or pianists, or doctors or scientists; or are told it might be fatal to their college admission chances to provide a photograph that reveals their race. This cannot be right.

American children should not need to feel they will be discriminated against in education unless they conceal their heritage.

UNC promotes this shameful trend in higher education, sending a distinct message to Asian American applicants that they will not be considered as individuals on their own merits unless they can somehow hide their ethnicity.

## II. UNC'S RACIAL HIERARCHY PROMOTES THE SAME REPELLANT STEREOTYPES HISTORICALLY USED TO JUSTIFY DISCRIMINATION AND VIOLENCE AGAINST ASIAN AMERICANS.

### A. Throughout Much of This Nation's History, Persecution of Asian Americans Was the Shameful Norm.

UNC's discrimination against Asian Americans because it does not view them as contributing to diversity evokes the odious stereotypes historically used to justify discrimination against Asian Americans. Throughout early American history, Asian Americans were marginalized as somehow lacking in ordinary human qualities and denied opportunities open to other individuals. *See, e.g.,* Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race*

(East/West Publishing Co. 1982).

While Asian American immigrants were drawn to the United States by its promise of a better life, all too often they found only hardship and the dangerous work that nobody else wanted. Their treatment was so dismal it gave rise to the expression "a Chinaman's Chance," a term meaning, "Little or no chance at all; a completely hopeless prospect." The Free Dictionary, *found at* https://idioms.thefreedictionary.com/Chinaman%27s+chance (last visited 12/09/2021).[5] The many court cases in which Asian Americans struggled for equal treatment provide a historical record that is tragic, outrageous and impossible to refute.

In 1854, in *People v. Hall,* 4 Cal. 399, 404-05 (1854), the California Supreme Court invalidated the testimony of Chinese American witnesses to a murder, explaining that Chinese were "a distinct people . . . whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference."

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[5] There are various explanations for the origin of this phrase. "One is that they were given the most dangerous jobs, such as setting and igniting explosives. Another is that judges and juries routinely convicted Chinese defendants on the flimsiest of evidence. A third is that Chinese miners were allowed to work gold claims only after others had taken the best ore." *Id.*

In *Ho Ah Kow v. Nunan,* 12 F. Cal. 252 (C.C.D. Cal. 1879) (No. 6,546), a district court invalidated San Francisco's infamous "Queue Ordinance" on equal protection grounds.

In *In re Ah Chong,* 2 F. 733 (C.C.D. Cal. 1880), the court found unconstitutional a law forbidding Chinese Americans from fishing in California waters.

In *In re Tiburcio Parrott,* 1 F. 481 (C.C.D. Cal. 1880), the court declared unconstitutional a provision of California's 1879 constitution that forbade corporations and municipalities from hiring Chinese Americans.

In *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), the Supreme Court ruled that Chinese were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance.

In *In re Lee Sing,* 43 F. 359 (C.C.D. Cal. 1890), the court found unconstitutional the "Bingham Ordinance," which had mandated residential segregation of Chinese Americans.

In *United States v. Wong Kim Ark,* 169 U.S. 649 (1898), the Supreme Court ruled that a Chinese American boy, born in San Francisco, could not be prevented from returning to the city after a trip abroad.

### B. The Chinese Exclusion Act.

In 1882, in an extraordinary attack on equal protection, Congress passed the Chinese Exclusion Act, a law enacted to prevent an entire ethnic group from immigrating to the United States. *See Chinese Immigration and the Chinese Exclusion Acts, found at* https:// history.state.gov/ milestones/1866-1898/ chinese-immigration (last visited 12/12/2021). Fueled by anti-Chinese hysteria, it prohibited all entry of "Chinese laborers." *Id.* As aptly described by opponent Republican Senator George Frisbie Hoar, it was "nothing less than the legalization of racial discrimination." *Id.*

In 1943, when China was an ally in the war against the Empire of Japan, the United States finally repealed the Chinese Exclusion Act. *Id.*

### C. World War II Internment of Japanese American Families.

One of the most egregious modern attacks on the constitutional rights of Asian Americans occurred during World War II, when entire families of Japanese Americans were removed from their West Coast homes and placed in internment camps.[6]

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[6] Executive Order No. 9066, issued February 19, 1942, authorized the Secretary of War and military commanders "to prescribe military areas from which any persons may be excluded as protection against espionage and sabotage." Congress enacted § 97a of Title 18 of the United States Code,

Supported by the statements of authorities and experts who declared the discriminatory measure necessary to national security, the internment of Americans in concentration camps on American soil was allowed by the courts. *See Hirabayashi v. United States*, 320 U.S. 81 (1943). Only decades later was it acknowledged there had been no justification for this abrogation of constitutional rights. *See Korematsu v. United States,* 584 F. Supp. 1406, 1416-20 (N.D. Cal. 1984) (motivation was "racism" and "hysteria" and not "military necessity"); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

### D. The Disgraceful History of Discrimination Against Asian Americans in Education.

After the 1776 Revolution, Americans agreed with Thomas Jefferson "that the future of the republic depended on an educated citizenry" and that universal public education should be provided to all citizens. Johann N. Neem, *The Founding Fathers Made Our Schools Public. We Should Keep Them That Way,* The Washington Post, Aug. 20, 2017, *found at* https://www.washingtonpost.com/news/made-by-history/wp/2017/08/20/early-america-had-

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making it a crime for anyone to remain in restricted zones in violation of such orders. Military commanders then issued proclamations excluding Japanese Americans from West Coast areas and sending them to internment camps. *See Korematsu,* 584 F. Supp. at 1409.

school-choice-the-founders-rejected-it/ (last visited 12/09/2021). Alas, that noble sentiment did not extend to Asian Americans, who were often denied access to public education.

*In Tape v. Hurley,* 66 Cal. 473, 6 P. 12 (1885), it took a court battle to force San Francisco schools to admit a Chinese American girl denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian" children. *McClain, supra,* at 137. In response to the ruling, the California legislature authorized the establishment of separate "Chinese" schools: "When such separate schools are established, Chinese or Mongolian children must not be admitted into any other schools." Chinese American schoolchildren were restricted to those schools until well into the twentieth century. *Ho v. San Francisco Unified Sch. Dist.,* 147 F.3d at 864.

Asian American schoolchildren were among the first victims of the "separate-but-equal" doctrine created in *Plessy v. Ferguson,* 163 U.S. 537 (1896). The Court created the doctrine in a case where a black passenger attempted to board a "white" railway car. *Id.* In 1902, in *Wong Him v. Callahan,* 119 F. 381 (C.C.N.D. Cal. 1902), this doctrine was applied to schools when a court ruled that Chinese American children in San Francisco could be barred from "white" schools because the "Chinese" school in Chinatown was "separate but equal."

In *Gong Lum v. Rice,* 275 U.S. 78 (1927), the Supreme Court affirmed that the separate-but-equal doctrine applied to K-12 schools, finding that a nine-year-old Chinese-American girl in Mississippi could be denied entry to the local "white" school because she was a member of the "yellow" race. *Id.* at 87.

In *Ho v. San Francisco Unified Sch. Dist., supra,* 147 F.3d 854, a striking modern example of discrimination against Asian Americans, constituents of *amici curiae* were forced to engage in five years of vigorous litigation to end the San Francisco school district's policy of assigning children to the city's K-12 schools based on their race. *See id.*; *San Francisco NAACP v. San Francisco Unified. Sch. Dist.,* 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

The *Ho* case was particularly ironic as just a few decades earlier, in *Lee v. Johnson,* 404 U.S. 1215, 1215-16 (1971), Supreme Court Justice Douglas, recognizing the long history of discrimination against Asian Americans in education, wrote: "Historically, California statutorily provided for the establishment of separate schools for children of Chinese ancestry. That was the classic case of *de jure* segregation involved [and found unconstitutional] in *Brown v. Board of Education* [347 U.S. 483 (1954)]. . . *Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco."

Unfortunately, as demonstrated by UNC, Harvard and certain other selective institutions, the same discriminatory intent is alive today, now cloaked as a striving for "diversity."

## III. THE DISTRICT COURT'S DEFERENCE TO UNIVERSITY OFFICIALS OMITTED THE SKEPTICAL REVIEW REQUIRED UNDER TRUE STRICT SCRUTINY.

### A. The Court Below Deferred to UNC Rather Than Applying Hostile Review to its Use of Race.

In *Grutter v. Bollinger,* 539 U.S. 306 (2003), this Court held that the University of Michigan law school was permitted, for pedagogical purposes, to use race to achieve a "critical mass" of minority students in order to reap the benefits that flow from diversity. *Id.* at 330-333, 343.[7] However, even in the pedagogical context, a court must examine the race-conscious program under strict scrutiny, to determine whether it is narrowly tailored to use race to the least degree necessary to accomplish a legitimate purpose:

> We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that

[7] *See also, Fisher v. Univ. of Tex. at Austin,* 136 S.Ct. 2198 (2016) (applying holding of *Grutter* to college admissions).

> such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.

*Grutter* at 326 (internal citation omitted).

Strict scrutiny requires an unsympathetic, skeptical examination of a school's use of race, and not the highly deferential review the court below gave the UNC admissions program. Even if UNC's motives are benign, this Court rejected, in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995), the proposition that "benign" use of race merits more lenient review, declaring the first principle in examining *any* use of race is "skepticism: 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination.'" *Adarand,* at 223, 227-28 (citation omitted). Otherwise, there is no way to know "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 226.

Here, instead of conducting its own searching inquiry, the court below did little more than determine that UNC officials had made their own determinations that use of race was necessary to achieve the "benefits of diversity," then rubber-stamped the university's conclusions. The record shows UNC officials had never even assessed their use of race in terms of what was minimally necessary

to produce a "critical mass" of "underrepresented minorities," (App. 54-55), a critical step in crafting a narrowly-tailored program that uses race only to the degree necessary. Nevertheless, the court below did an end run around the narrowly tailored requirement and accepted UNC's argument that it was sufficient it had considered its program in terms of the benefits of diversity: "Accordingly, the Court finds that UNC has defined the term "critical mass" ... by reference to the educational benefits of diversity this concept is designed to produce." (App. 56-58.)

By deferring to UNC's officials on the issues it should have examined skeptically, the district court failed to apply true strict scrutiny to "smoke out" the "illegitimate use[] of race." *Croson* 488 U. S. at 493.

### B. The Court Below Ignored Evidence there were Race-Neutral Alternatives to Racial Discrimination.

The court below improperly deferred to UNC's own self-serving statements and ignored evidence race-neutral alternatives would have achieved any reasonable diversity goals. "[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, *before* turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Fisher v. Univ. of Tex. at Austin,* 133 S. Ct. 2411, 2420 (2013) (emphasis added). "Workable" does not mean perfection or

exactly-the-same; it means "about as well . . . " *Id.* at 2420. In this analysis, "the University receives no deference." *Id.*

Many universities have achieved diversity without resort to racial discrimination.[8] The record shows UNC had workable race-neutral alternatives available that would have achieved campus diversity; but these were rejected by both UNC and the court below because they would not have produced exactly the same results as use of race. These included race-neutral programs rejected because they would have admitted: fewer URM students from wealthy families; more white students from poor families; or slightly fewer of the favored minorities. (App. 131-32, 134, 136-37, 139-40 and n. 43; D.C.Dkt. 154-22, Ex. 11, Tbl. 1, 251-1 at 38.) UNC even rejected a Top Ten Percent Plan that would have increased URM enrollment slightly.[9]

Any of these alternatives would have produced "critical masses" of URM students sufficient to

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[8] *UC System Admits Largest, Most Diverse Undergraduate Class,* AP News (Oct. 20, 2021), *found at* https://apnews.com/article/education-race-and-ethnicity-79f7d0e7eb812ce36538b9e112c38956 (last visited 12/12/2021); *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity, U.S. Department of Education Office for Civil Rights,* March 2003, *found at* https:// www2.ed.gov/about/offices/list/ocr/edlite-raceneutral report. html (last visited 12/12/2021);

[9] *See UNC-Amicus-Br., Fisher v. Univ. of Tex. at Austin,* No. 11-345 (S.Ct. Aug. 9, 2012), at 33-35, *found at* https://www.scotusblog.com/wp-content/uploads/2016/08/11-345-respondent-amicus-UNCCH.pdf (last visited 12/13/2021).

provide "the educational benefits that flow from a diverse student body." *Grutter v. Bollinger,* 539 U.S. 306, 333, 343 (2003). By rejecting workable alternatives to its race-conscious program that would have worked "about as well" just because they would not have produced *exactly* the same results, UNC demonstrates its use of race is unconstitutional. UNC's use of race will also, unless stopped, continue forever, because UNC will never find a race-neutral alternative that produces *exactly* the same results as its tailored racial discrimination.

## IV. THIS CASE ILLUSTRATES WHY RACE SHOULD NOT BE USED BY SCHOOLS OUTSIDE OF A REMEDIAL CONTEXT.

This Court should disavow *Grutter's* holding that racial diversity can rise to a compelling government interest, and should put an end to the deferential standard of review that has evolved in the wake of that decision. As this Court has long taught, "[c]lassifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U. S. 630, 643 (1993) (quoting *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943)). Consistent with that principle, universities should never consider race except where necessary to provide a remedy for prior *de jure* discrimination. Diversity is "simply too amorphous,

too insubstantial, and too unrelated to any legitimate basis for employing racial classifications…." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting).

As this case demonstrates, if a search for diversity is allowed to rise to a compelling government interest, it is all too easy for universities like UNC to justify a race conscious program in perpetuity by concocting ambiguous and ill-defined goals, backed by the self-serving statements of their officials and allied experts.

Until *Grutter*, this Court's jurisprudence taught the Fourteenth Amendment's prohibition against governmental use of race was absolute except where necessary to further the compelling interest of providing a remedy to individuals harmed by prior racial discrimination. "Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination." *Metro Broadcasting,* 497 U.S. at 612.

In reaching the decision in *Grutter*, this Court relied on Justice Powell's dicta in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and thus indirectly, on the tainted anti-Semitic Harvard admissions program of the 1920s.[10]

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[10] Justice Powell's statement in *Regents of the University of California v. Bakke*, 438 U.S. 265, that diversity might in some circumstances rise to a compelling government interest was *dicta* and not a holding, as the Court found the medical school admission program at issue unconstitutional. It was also expressed in an opinion ascribed to only by *Justice Powell. See*

The ruling in *Grutter* has opened the floodgates to allow UNC and other institutions to use race-conscious admissions to advance political agendas under the guise of a need for more diversity. As with UNC, they ignore that *Grutter* allowed use of race only to the degree needed to create a "critical mass" of minority students.[11]

As this Court warned in *Croson*, 488 U.S. 469, unless racial classifications are "reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility." *Id.* at 493. That is exactly what is happening at UNC and other institutions that use race to achieve their notions of diversity, unchecked by the strictures of a narrowly tailored remedy to prior racial discrimination.

*Grutter* itself reveals the constitutional awkwardness of elevating diversity to a compelling government interest. The opinion in *Grutter* acknowledges that in evaluating the academic benefits that flow from diversity, deference will be accorded the school conducting the discrimination,

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438 U.S. at 272, 320. While Justice Powell lauded Harvard College's "soft" diversity-discretion model of affirmative action, he failed to recognize that the Harvard Plan had anti-Semitic roots, being designed to restrict enrollment of Jewish students in the 1920s. *See* Unz, *supra, The Myth of American Meritocracy*.

[11] UNC officials admit they have never even assessed their use of race in terms of creating a critical mass of URM students. (App. 54-55.)

539 U.S. at 330—something squarely at odds with the skepticism demanded by strict scrutiny. *See Adarand,* 515 U.S. at 223. We can see the effects of this watering down of strict scrutiny in this case, where instead of subjecting the UNC admissions program to skeptical review, with the burden always on UNC, the court below deferred to UNC assessments and officials at every step of the inquiry.

Similarly, this Court has held that, "all governmental use of race must have a logical end point." *Grutter,* 539 US at 342. However, as the Sixth Circuit accurately stated, "[u]nlike a remedial interest, an interest in academic diversity does not have a self-contained stopping point." *Grutter v. Bollinger,* 288 F.3d 732, 751-52 (6th Cir. 2002). The lack of any real end point presents a most serious problem. If universities are allowed to deem "diversity" a compelling interest justifying use of race so long as their own officials say it is necessary, their use of race will continue forever. Their discriminatory admissions programs will become exactly what this Court has warned against—"ageless in their reach into the past, and timeless in their ability to affect the future." *Croson*, 488 U.S. at 498 (citation omitted).

The "separate but equal" doctrine enunciated in *Plessy v. Ferguson,* 163 U.S. 537, at least implicitly acknowledged a right to the equal treatment it failed to provide. The holding of *Grutter,* however, as interpreted by courts below, explicitly allows unequal

treatment—all in the name of diversity. If that trend is allowed to continue, the result will be to further devalue the rights of individuals, and will extend beyond UNC and academia to balkanize American society into racial groups, each pitted against the other in a zero sum game that can only lead to further racial tension and hostility.

It is time to return to a bright line rule that reserves governmental use of race for remedial settings where it is truly needed.

## V. UNIVERSITIES SHOULD NOT BE ALLOWED TO USE RACE CONSCIOUS ADMISSIONS IN A MISGUIDED EFFORT TO COVER UP FAILURES IN K-12 EDUCATION.

UNC may also patronizingly believe it is simply lifting up minorities who need help, but it would be wrong. Not only does race-conscious admission favor well-off applicants of the favored minorities over disadvantaged individuals of other groups, it also has the effect of discriminating against American-born members of the minority communities it claims to benefit. *Top Colleges Take More Blacks, but Which Ones?* New York Times, June 24, 2004, *found at* https://www.nytimes.com/2004/06/24/us/top- colleges-take-more-blacks-but-which-ones.html (last visited 12/9/2021).

Decades of race-conscious college admission has failed to improve education in black and Hispanic

communities. *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago,* New York Times, Aug. 24, 2017, *found at* https://www.nytimes.com/ interactive/ 2017/08/24/us/ affirmative-action .html (last visited 12/9/2021); *see* Jason R. Riley, *Please Stop Helping Us* (Encounter Books 2014) (affirmative action has resulted in fewer black college graduates).

UNC and other selective universities should instead use their enviable resources to work with local government and community groups to bolster early education in communities where K-12 resources are deficient. *See* Matt Zalasnick, *How Colleges Partner With K-12 On Student Success,* University Business, Oct. 17, 2019, found at https://universitybusiness.com/colleges-partner-k-12-student-success/ (last visited 12/9/2021). Then, they would be contributing to a solution instead of making things worse by obfuscating the root causes of the problem while trammeling the rights of individuals.

## CONCLUSION

The UNC admissions program causes harm, unlawfully discriminating against Asian American applicants and others who are not members of UNC's preferred races. Whatever the motive, such discrimination is incompatible with the principle of equal protection and Title VI of the 1964 Civil Rights Act. Some 70 years ago, in *Brown v. Board of*

*Education*, 347 U.S. 483, this Court recognized the inherent injury to individuals when schools treat students differently because of their race and found that such discrimination was unlawful, whatever the stated justifications. That same reasoning should apply here today.

Accordingly, this Court should grant *certiorari*.

Respectfully submitted,

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