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 WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF BY UNIVERSITY RESPONDENTS

Joshua H. Stein
Attorney General

Ryan Y. Park*
Solicitor General

Nicholas S. Brod
Sarah G. Boyce
James W. Doggett
Deputy Solicitors General

Sripriya Narasimhan
Deputy General Counsel

Stephanie A. Brennan
Tamika L. Henderson
Special Deputy Attorneys General

Samuel W. Magaram
Solicitor General Fellow

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
(919) 716-6400
rpark@ncdoj.gov

Patrick Fitzgerald
Amy Van Gelder
Skadden, Arps, Slate, Meagher & Flom LLP
155 North Wacker Drive
Chicago, IL 60606

Lara Flath
Skadden, Arps, Slate, Meagher & Flom LLP
One Manhattan West
New York, NY 10001

* *Counsel of Record*

QUESTIONS PRESENTED

1. Should this Court overrule *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013); and *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016)?

2. Did the district court correctly hold that, consistent with this Court's precedents, the University of North Carolina adequately considered race-neutral alternatives to its undergraduate admissions policy?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Rule

Other Authorities

INTRODUCTION

The University of North Carolina at Chapel Hill is the nation's first public university and the State's flagship public institution of higher education—"the University of the people." Charles Kuralt, Bicentennial Opening Ceremonies (Oct. 12, 1993). With its roots in North Carolina's foundational charter, UNC is a primary means for the State to promote democratic values, cultivate an educated citizenry, and generate economic opportunity. It is notable among highly selective universities in enrolling predominantly in-state students, and in maintaining a bedrock commitment to affordability. These features reflect a constitutional mandate "that the benefits of [t]he University of North Carolina … as far as practicable, be extended to the people of the State free of expense." N.C. Const. art. IX, §9.

UNC's history and mission inform its admissions policy. Each year, the University seeks to enroll students from a wide range of backgrounds, experiences, and perspectives. In choosing to pursue such diversity and its educational benefits, UNC embodies the nation's highest ideals and best traditions. On campus, diversity promotes the robust exchange of ideas, fosters innovation, and nurtures empathy and mutual respect. It also looks to the future, equipping students with the tools and experiences necessary for success in the modern world. In UNC's academic judgment, diversity is central to the education it aims to provide the next generation of leaders in business, science, medicine, government, and beyond.

In a comprehensive 155-page decision, the district court found that UNC seeks these educational benefits while scrupulously following this Court's precedents on the careful and limited consideration of race in university admissions. UNC faithfully applies a holistic admissions policy that affords individualized consideration to all aspects of an applicant's background. An applicant's race is only one among dozens of factors that UNC may consider as it brings together a class that is diverse along numerous dimensions—including geography, military status, and socioeconomic background.

Ideally, UNC could achieve this diversity without considering race. UNC has worked diligently to accelerate its progress toward that objective, giving serious and ongoing consideration to race-neutral alternatives and enthusiastically adopting the most promising strategies for attaining diversity in race-neutral ways. These efforts have already borne considerable fruit. Although UNC's holistic process considers all aspects of an applicant's background, race only rarely plays a meaningful role—explaining a mere 1.2% of admissions decisions. But as the district court found, even this limited consideration of race remains necessary to achieve UNC's academic mission.

UNC stands ready to adopt any workable race-neutral alternative at the earliest feasible moment. Some States have chosen to end consideration of race in university admissions. Under our federal system, that is their prerogative. In many States, however, the people and their representatives continue to allow

narrowly tailored consideration of race in university admissions. This Court should not lightly intrude on this ongoing process of democratic deliberation.

Any such intrusion, moreover, would not end with this case. If the Court overturns decades of settled precedent, it would force hundreds of institutions across the country to overhaul admissions policies developed in reliance on that precedent. Abandoning precedent would thus invite a flood of future litigation—including over alternatives that universities might adopt in its wake.

To elicit such profound consequences would be especially mistaken here, as this lawsuit fails for lack of standing. When it filed suit, Students for Fair Admissions consisted of a founder and a generalized grievance. To find standing would allow any person to subvert Article III's jurisdictional limits merely by forming a paper organization and suing on behalf of nonexistent members. That is not the law.

UNC respectfully submits that the wisest course would be to maintain this Court's longstanding commitment to allowing universities to pursue the educational benefits of diversity in a narrowly tailored way. This commitment is faithful to the original meaning of the Fourteenth Amendment, honors *Brown*'s legacy, and would promote stability in the law. And under the legal standards established by this Court's forebears, UNC has complied precisely with its constitutional obligations. The judgment below should be affirmed.

STATEMENT OF THE CASE

A. UNC Has Embraced Diversity as a Core Part of Its Educational Mission.

UNC's mission is "to serve as a center for research, scholarship, and creativity and to teach a diverse community of … students to become the next generation of leaders." J.A.1371. Since opening its doors in 1795, UNC has sought to embody the State's constitutional commitment to education as "necessary to good government and the happiness of mankind." N.C. Const. art. IX, §1.

To fulfill this mission, UNC has long strived to enroll a diverse student body. Because "diversity takes many forms," *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 380 (2016) ("*Fisher-II*"), UNC defines diversity broadly, recognizing "that no person is one-dimensional and no two people [are] the same in every respect." J.A.1375. UNC students arrive on campus with "varying perspectives, experiences, beliefs, and goals." J.A.1389.

In 2017, when the record here closed, UNC undergraduates hailed from all 50 States and each of North Carolina's 100 counties. J.A.1388. Nearly 20% were first-generation college students. J.A.1389. Fully 7% were affiliated with the military, including the most veterans on campus since World War II. J.A.1389. And 35% of in-state freshmen came from rural counties. UNC Undergraduate Admissions, *Our New Undergraduate Students*, https://unc.live/3OV2BJ0.

This diversity provides all UNC students with educational benefits that are central to the University's mission. J.A.1377-79; Pet.App.13. At trial, UNC proved that diversity's educational benefits "are not theoretical but real." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Unrebutted expert testimony established that diverse educational environments enhance cognitive development, improve learning outcomes, and prepare effective leaders and citizens who will stand in solidarity with others and commit themselves to the common good. J.A.1487-88, 1492-96; *see Fisher-II*, 579 U.S. at 381-82 (recognizing similar benefits).

University administrators, faculty, students, and alumni explained concretely the crucial role that diversity plays in a UNC education. A leading chemistry professor and entrepreneur observed that diversity provides "fertile ground for innovation" in his research lab and wards against "groupthink" that stifles new ideas. J.A.1574. A white alumna described how attending a diverse university helped prepare her to teach in underserved schools. J.A.1567-69. An African-American alumnus with a suburban upbringing recounted how his study partner, a white student from rural North Carolina, taught him to move beyond "the implicit assumptions [he] was making about people," which helped prepare him for a successful career in business and academia. J.A.1581-82. And the former mayor of Charlotte, who attended UNC in the 1960s, only shortly after integration, explained how his children received a

superior education at UNC decades later thanks to its greater diversity. J.A.1591-93.

Tellingly, SFFA proffered no contrary evidence. Indeed, SFFA's expert readily agreed that diversity yields many "important" educational benefits—including a "richer and deeper" learning environment, "more creative" problem-solving, and "reduced" bias. J.A.545-46.

UNC takes seriously its efforts to foster the benefits of diversity—including diversity of intellectual thought. Both state law and University policy require that UNC promote a campus environment where all voices can be heard, even viewpoints that some might find "unwelcome, disagreeable, or even deeply offensive." N.C. Gen. Stat. §116-300(2); UNC Policy Manual §1300.8, https://bit.ly/3P56Npc. UNC's diversity initiatives range from campus discussion forums and student debates to course offerings. J.A.1506-14. Through these efforts, UNC seeks to create an environment where students from different backgrounds, and with different viewpoints, can meaningfully interact with and learn from one another. Pet.App.19. SFFA itself cites a study listing UNC as among the "top colleges overall for free speech." *See* Br.65 (citing College Pulse, *College Free Speech Rankings*).

UNC also tracks and measures its progress toward achieving the educational benefits of diversity. As just one example, UNC collects data from routine surveys about the University's educational environment. It then analyzes data trends and makes comparisons with other universities. Pet.App.15-17. This data

allowed UNC's expert to empirically conclude that UNC introduces students to diverse learning environments and that this diversity contributes to undergraduate education in meaningful ways. J.A.1515-29. The district court also credited qualitative evidence from students and faculty showing that UNC experiences the educational benefits of diversity that it seeks. Pet.App.17-18.

But challenges remain. One continuing challenge is the admission and enrollment of underrepresented minorities, who are admitted at lower rates than their white and Asian-American peers.[1] Pet.App.185. The district court credited statements from UNC professors that this lack of representation "limits opportunities for exposure and learning." Pet.App.20. Thus, despite sustained and dedicated efforts, UNC has not yet fully achieved its diversity-related educational goals. Pet.App.19-22. As the district court observed, UNC—a Southern flagship university that for most of its history excluded racial minorities from admission altogether—"continues to have much work to do." Pet.App.186.

---

[1] Consistent with a 1981 consent decree between the UNC System and the United States, UNC defines "underrepresented" to include students who identify as "African-American," "American-Indian," or "Hispanic." Pet.App.15 n.7. Merely defining the term "underrepresented" does not show that UNC engages in racial balancing. As SFFA admits, this Court has defined racial balancing as when an institution "seek[s] 'some specified percentage' of a particular race." Br.75 (quoting *Grutter*, 539 U.S. at 329). SFFA's expert expressly conceded at trial that SFFA had made no showing of that kind. J.A.497.

B. UNC Considers Race Flexibly as One Factor Among Many in Its Admissions Process.

UNC must draw its student body predominantly from North Carolina, with out-of-state enrollment capped at 18% of each incoming class of about 4,200 students. During the relevant period (from 2013 to 2017), the typical acceptance rate for in-state students was 47-50%. For out-of-state students, who make up two-thirds of UNC's 44,000-member applicant pool, the typical acceptance rate was 12-14%. Pet.App.23.

UNC affords each candidate a comprehensive, holistic, and individualized review. As one longtime member of the admissions office testified, applicants are "not just the test score, not just the GPA, not just an essay. They're a whole person." J.A.701. Readers seek to "understand the context" of each applicant's experience. J.A.701. The goal is to enroll "great students who will make each other better, both because of the excellence of their achievement and their potential and because of their differences [from one] another." J.A.615.

To apply, most students submit the Common Application, a standard application used by hundreds of universities. J.A.347. On that application, students may indicate their race, as well as a range of other information about their background, including military service, foreign-language proficiency, and career interests. J.A.1715-31.

Dozens of readers in UNC's admissions office review applications. Pet.App.26. Using this Court's

precedents as guideposts, the office provides each reader with extensive training on how to appropriately engage in holistic admissions. Pet.App.27-30; J.A.1409-16. Readers are guided by a non-exhaustive list of more than forty criteria that may be considered at any stage of the process. These criteria include academic performance, athletic or artistic talents, and personal background. J.A.1414-15. Readers assign a rating for some categories—a kind of "internal shorthand" for a "reader's impression of a particular candidate." Pet.App.35-37. But the scores are never added together or awarded based on race, and no formula determines admission. Pet.App.36-37.

UNC's holistic review takes place in multiple stages. Readers review each application for a provisional decision. Pet.App.31. A second reader reviews the majority of applications again. Pet.App.42. Senior admissions-office leaders also read a sample of every reader's files. Pet.App.45. Finally, a committee of veteran readers evaluates provisional decisions from each high school, a process called "school-group review." Pet.App.31-33.

UNC's individualized process considers all aspects of an applicant's background and values many kinds of diversity. For example, UNC actively recruits military-affiliated students. *See* J.A.1383, 1389. Veterans who apply as transfers may not have as robust an academic record due to their service. Yet they may nonetheless be admitted if their diverse experiences demonstrate that they are capable of

meeting the rigors of a UNC education while enriching its broader educational environment.

Geographic diversity plays a similar role. In 2017, UNC System President Margaret Spellings made increasing rural enrollment a system-wide goal. UNC System, *Five-Year Goals*, https://bit.ly/3mmq2OI. Although students from rural areas already make up over a third of UNC's first-year class, increasing educational access for low-income and rural students remains a key strategic aim. *Strategic Plan for UNC, 2017-2022*, https://bit.ly/3avGjhk; J.A.641-42. Access to academic opportunities varies widely across the State, with students in many rural areas attending secondary schools with fewer resources. Even so, applicants who demonstrate promise in the context of their environment may gain admission in part because their rural backgrounds contribute to a diversity of perspectives among UNC's student body.

These are but a few illustrations of the numerous factors that UNC considers when conducting a holistic, individualized review of each application. Other factors—from community service to socioeconomic status—abound. J.A.1414-15. The admissions process ensures that every admitted student rightfully earns a place at UNC and has the potential to succeed at the University and beyond.

When UNC does consider race, it does so only alongside all other factors. As the district court found, readers do not evaluate candidates of different racial groups separately, nor does UNC impose quotas of any kind. Pet.App.36-37. UNC's consideration of race is neither mechanical nor formulaic. Pet.App.174. Like

any of the many factors UNC considers—from work history to creativity to capacity for leadership—an applicant's race may occasionally tip the balance toward admission in an individual case, but almost always does not. Pet.App.36-37, 112.

The trial concretely showed how UNC conducts race-conscious holistic review. For example, the former head of admissions described an applicant originally from Vietnam whose family had moved across the world and settled in an unfamiliar part of North Carolina. J.A.638. The student "thrived in her environment despite the difficult circumstances." J.A.638-39. Thus, it was "the whole of her background"—including her race, interacting with many other factors—that mattered as the admissions office evaluated her application. J.A.639. Her story, the former head of admissions testified, "reveals sometimes how hard it is to separate race out from other things that [the office] know[s] about a student." J.A.639.

Expert testimony further confirmed that UNC engages in holistic review and that race does not play an outsized role in admissions. The district court credited UNC's expert's finding that race explained a mere 1.2% of admissions decisions. Pet.App.110-13. The court also credited the expert's finding that statistical modeling could successfully predict only 42.8% of admissions decisions. Pet.App.109-10. The remaining 57.2% reflects consideration of factors that are observable to the reader, but *not* the model—consistent with holistic review. J.A.809-10. Indeed, "it is uncontested by both experts that their models"

cannot explain all of UNC's holistic admissions process through the "observable, discrete factors available to them." Pet.App.110.

In its brief, SFFA describes a very different admissions process, making gratuitous, disparaging, and inaccurate attacks on UNC and how it assembles its vibrant community each year. Br.40-44. Again and again, SFFA blatantly misrepresents the record, proceeding as if an eight-day bench trial—where it completely failed to substantiate its factual allegations—never happened. That is, SFFA depicts the factual record it wished it had developed, not the actual record that the district court so meticulously reviewed.

In SFFA's telling, UNC awards "mammoth" racial preferences. Br.48. That accusation is strange, as SFFA has not challenged the district court's factual findings that race plays a modest, nonmechanical role in admissions. Even SFFA's expert conceded "that race is not a dominant factor in the University's program as a whole." Pet.App.173; J.A.516.

The district court also found that SFFA's statistical evidence was seriously flawed in multiple ways. Pet.App.88-92. As just one example, SFFA's expert developed an admissions model that relied on SAT scores—even though all North Carolina public-school students are required to take the ACT, and thus a large share of applicants submit only ACT scores. Pet.App.90; J.A.519. Rather than simply converting ACT scores into SAT scores using a table published by the College Board, as UNC does, SFFA's expert made the "troubling" decision to assign

applicants with *identical* ACT scores *different* SAT scores based on their race and gender. Pet.App.90. Specifically, his model assigned lower SAT scores to underrepresented-minority students than white and Asian-American students—even when two students, in reality, *received the exact same ACT score*. The district court rightly observed that this choice penalized underrepresented-minority applicants because it falsely "exaggerates" the difference between their academic credentials and those of other applicants in the model. Pet.App.92. This was no minor flaw: SFFA's expert had no answer to the charge that this choice skewed data for more than 50,000 applicants who submitted only ACT scores—a group that, in one year studied, made up 42% of African-American applicants and 45% of Hispanic applicants. Pet.App.92.

This glaring error is merely illustrative of the many fundamental problems with SFFA's expert's analysis. *E.g.*, Pet.App.101-03 (noting flaws in SFFA's expert's "average-marginal-effect" analysis); J.A.827 (noting that SFFA's expert's analysis of the purported "share" of admissions decisions explained by various factors, including race, exceeded 500%, a statistical impossibility).

Without credible expert testimony, SFFA's claim to have uncovered evidence of UNC's "constant" focus on race falls apart. Br.40. SFFA says that, before it sued, UNC impermissibly relied on so-called "core reports" identifying the racial makeup of the class, along with other demographic information. Br.38. However, since 2010—years before the admissions

cycles challenged here—only a few senior admissions officers even had access to this information. J.A.1229; *see* J.A.711-12. And since 2015, any admissions officer who sees this information "must thereafter recuse themselves from reading any additional applications." Pet.App.50. Thus, the district court found that core reports did not affect admissions decisions "in any way." Pet.App.49.

SFFA's fact-free distortion of school-group review is particularly galling. Br.42. At trial, SFFA *expressly conceded* that it failed to prove that UNC impermissibly considers race at this stage of the process. Pet.App.43. The district court thus made the "uncontradicted" finding that school-group review "changes the racial composition of the class very little and, to the extent that it does, has only *reduced* the number of admitted" underrepresented-minority students. Pet.App.43. It is likewise undisputed that admissions officers do not even *have access to* racial or ethnic data on the admitted class when they conduct school-group review. Pet.App.31-32, 49-50.

SFFA's final—and most desperate—attempt to disparage UNC is by featuring several instant messages made on a single day in 2014. Br.41-42 (citing J.A.1244-51). The messages that SFFA highlights were made by two employees, out of more than one hundred admissions staff members, Pet.App.23, 39, both of whom were junior readers who no longer work at UNC. Moreover, most of the comments discussed merit scholarships—not admissions, the only issue in this lawsuit.

UNC agrees that some of the language in these messages was inappropriate. But SFFA's attempt to portray these offhand and isolated comments as somehow representative of UNC's entire admissions process rings hollow. The voluminous record included "hundreds of thousands of application files and materials shared during discovery," including comments on all application files received from 2013 to 2017. Pet.App.39. That SFFA can point only to a few, cherry-picked messages itself disproves SFFA's irresponsible assertion that UNC's process is unduly focused on race. Pet.App.39-41.

C. UNC Has Implemented Many Race-Neutral Alternatives and Continually Assesses the Viability of Others.

UNC devotes significant resources to pursuing diversity in race-neutral ways. And it has already implemented many of the most promising race-neutral strategies. These strategies have significantly reduced—but not altogether eliminated—the need for UNC to consider race when making admissions decisions.

First, the district court found "strong evidence" that UNC seeks to make college affordable for all students, regardless of race, by combining lower tuition than its peers with "exceptional levels of financial aid." Pet.App.120, 181. UNC practices need-blind admissions, and is one of only two public universities nationwide that meets the full demonstrated need of every undergraduate eligible for federal aid. Pet.App.120-21. In the 2016-2017 school year, UNC provided roughly $159 million in

undergraduate scholarships and grants. A "foundational part" of this commitment is the Carolina Covenant program, which offers admitted students whose family income is under 200% of the federal-poverty guidelines a debt-free financial-aid package that covers the entire cost of attendance at UNC. Covenant scholars typically make up 10-14% of each incoming class. The program puts no cap on the number of students who qualify. Pet.App.121.

As the district court found, UNC has made these significant financial commitments "even amid serious financial challenges." Pet.App.121. UNC devotes most of its unrestricted endowment-generated funds to need-based aid. Pet.App.121-22. Its efforts on college affordability have earned widespread recognition. For example, UNC has been ranked the best value among public universities by Kiplinger's magazine for eighteen consecutive years. And UNC was the first public university to win a national award given to the college or university "doing the best job for outstanding low-income students." J.A.664.

Second, UNC engages in significant recruiting efforts to encourage diverse students to apply and enroll. Pet.App.118-19. UNC annually identifies roughly 100,000 prospective students of all backgrounds for targeted recruitment, and sends admissions officers to high schools in every county in the State. J.A.330; Pet.App.118. It also invites prospective students to visit UNC, including through a program that brings about 1,000 "rural, low-income, underrepresented first-generation college and other

[high-school] students" to campus every summer. Pet.App.119; J.A.334.

Third, UNC partners with underserved high schools throughout the State to increase the number of low-income, first-generation, and underrepresented applicants. Pet.App.119-20. The Carolina College Advising Corps places recent college graduates as college advisors in almost 80 high schools across the State. J.A.337. This program reaches significant percentages of minority students enrolled in North Carolina public high schools. Pet.App.119-20.

Fourth, the district court found that UNC "has in good faith" made "significant efforts" to recruit high-achieving community-college students. Pet.App.122-23. UNC guarantees admission and meets 100% of financial need for low-income students who attend partner community colleges, complete required coursework, and graduate with an associate's degree. The program now includes 14 partner colleges and 400 participating students each year. It has consistently expanded, with community-college graduates growing from 28% to 45% of the incoming transfer class over the past five years. As the district court found, UNC "continues to test [the program] as a potential long-term" race-neutral alternative. Pet.App.123.

UNC also continues to evaluate, on an ongoing basis, whether additional race-neutral measures might help it achieve the educational benefits of diversity. As the district court found, UNC has considered race-neutral alternatives since at least 2004, shortly after this Court's decision in *Grutter*.

Pet.App.114. Reviewing these efforts, the U.S. Department of Education concluded in 2012 that "the University had given serious, good faith consideration to race-neutral alternatives." Pet.App.178; Compliance Resolution (Nov. 27, 2012), https://bit.ly/3MMefF2.

UNC redoubled these efforts after this Court's decision in *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) ("*Fisher-I*"). In 2013—more than a year before SFFA sued—UNC formed a working group on race-neutral alternatives. Pet.App.116-17. The group produced a report that included a review of academic literature on race-neutral alternatives and the results of data analysis on various possible alternatives. J.A.1439-58. The group concluded that no alternative could produce the educational benefits of diversity about as well, and at tolerable expense, as UNC's current process. J.A.1457; Pet.App.116-17.

UNC subsequently convened another committee on race-neutral strategies in 2016. The committee includes internationally recognized scholars with expertise on a range of topics, including statistical analysis. Pet.App.117. The committee met 15 times between 2016 and 2018, with most of its work conducted by committee members independently. Pet.App.117. In 2018, it produced an interim report describing its efforts, which remain ongoing. Pet.App.117; J.A.1420-72.

Since the record closed, the committee has considered the expert analysis and district court findings in this litigation and continued to study and quantitatively analyze various race-neutral

alternatives. J.A.746-48, 1425. Although these and other efforts have not yet identified a workable race-neutral alternative, the district court found that UNC remains steadfastly committed to doing so. Pet.App.113-14.

D. SFFA Sues UNC.

SFFA is a nonprofit organization formed just months before it brought this lawsuit in 2014. J.A.1045. At that time, SFFA had only nominal "affiliate members" who played no role in the organization: they did not pay dues, elect directors, or participate in activities. J.A.286, 295, 298, 302-04. The district court nonetheless denied UNC's motion to dismiss for lack of associational standing. Pet.App.237-45.

In its complaint, SFFA alleged that UNC's undergraduate admissions process is unlawful because it considers race as a factor in admissions decisions. The district court entered summary judgment for UNC on this claim, as all agreed that it was squarely foreclosed by this Court's precedents. Pet.App.7.

The complaint also alleged that UNC's admissions process unduly considers race and overlooks available race-neutral alternatives. Pet.App.145. After trial, the district court entered a comprehensive opinion setting out detailed findings of fact and conclusions of law to support its judgment for UNC on this claim. The court based its decision on three central conclusions.

First, the court concluded that UNC has demonstrated a compelling interest in pursuing the

educational benefits of student-body diversity. Pet.App.158-65.

Second, the court concluded that UNC considers race only as one factor among many in its holistic admissions process and does not unduly consider race. Pet.App.165-75.

Third, the court concluded that UNC engages in serious, good-faith consideration of workable race-neutral alternatives. Pet.App.176-83. While the court emphasized UNC's continuing obligation to study the feasibility of alternatives, it concluded that UNC had satisfied its burden to show that no alternative is workable at this time. Pet.App.143-44.

All told, the court's meticulous findings of fact led to a straightforward legal conclusion: UNC proved that its undergraduate admissions program complies with this Court's precedents.

SUMMARY OF ARGUMENT

This case fails at the outset because SFFA lacks standing. It is black-letter law that a plaintiff must have standing when it sues. Here, when SFFA filed this case, it was a paper organization established to litigate its founder's generalized grievances. Only after the lawsuit was well underway did SFFA recruit actual members who arguably have any concrete connection to the claims in this case. SFFA cannot use this tactic to sidestep Article III's jurisdictional limits.

If this Court chooses to look past this jurisdictional defect, it should affirm. At the outset, SFFA has not come close to meeting its burden to identify history that supports its bid to overturn precedent. Instead,

the history is clear that appropriately tailored race-conscious measures are consistent with the Fourteenth Amendment's original public meaning. As just one of many examples, during Reconstruction, the Freedman's Bureau financed an institution of higher education, Berea College, with a race-conscious admissions policy.

SFFA invokes *Brown* to distract from its lack of historical support, but this effort likewise fails. *Brown* held that the arbitrary *separation* of students based on race violates equal protection. Institutions like UNC that seek to bring students of diverse backgrounds *together* are the rightful heirs to *Brown*'s legacy.

Grutter is consistent with this long tradition. Our nation's diversity is one of its greatest strengths. Diversity in higher education is essential to harnessing that strength and preparing students for success in modern society. This Court has thus correctly recognized that public universities have a compelling interest in achieving diversity and its educational benefits.

SFFA's invitation to abandon nearly five decades of precedent would upend a settled and workable strict-scrutiny regime, where universities may pursue their compelling interest in diversity in a narrowly tailored way, while steadfastly working toward the day when race-conscious admissions policies are no longer necessary. SFFA impatiently asks this Court to scrap that ongoing process—a process that this Court initiated and has repeatedly encouraged—and replace it with a *per se* legal regime that contradicts the

original meaning and historical application of the Fourteenth Amendment. Stare decisis exists to restrain such sudden lurches in the law.

Overturning precedent would also disrupt significant and concrete reliance interests. Universities have long relied on this Court's teachings to structure their admissions policies and broader educational missions. That precedent has also structured the terms of an ongoing democratic debate on race-conscious admissions. It would be a profound mistake for this Court to wrest authority to decide this issue from the people, their representatives, and the political process.

Finally, the district court correctly held that UNC's admissions process complies with existing law. SFFA does not contest that UNC proved its compelling interest in fostering student-body diversity or that it engages in proper holistic review, with race playing an appropriately limited role. SFFA claims only that UNC has refused to implement available race-neutral alternatives. But as the district court found, UNC has already gone to extraordinary lengths to adopt race-neutral alternatives, though these efforts have not yet proven sufficient. SFFA's proposals, by contrast, rest on wildly unrealistic assumptions and would require UNC to abandon holistic admissions entirely. Such alternatives are, by definition, unworkable.

ARGUMENT

I. SFFA Lacked Standing When It Filed This Lawsuit.

As "[t]he party invoking federal jurisdiction," SFFA "bears the burden of establishing" standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Here, SFFA claims "associational" standing as a representative of its members. Because it lacked genuine members when it sued, however, SFFA cannot invoke this basis for Article III jurisdiction.

A. SFFA's standing must be assessed at the time of its complaint.

To establish standing, a plaintiff must prove that it "had the requisite stake in the outcome when the suit was filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008); *see Carney v. Adams*, 141 S.Ct. 493, 499 (2020) ("[The plaintiff] bears the burden of establishing standing as of the time he brought th[e] lawsuit."). Thus, standing cannot arise during the course of litigation. Wright & Miller, *Federal Practice and Procedure* §3531 (3d ed.) ("Post-filing events that supply standing that did not exist on filing may be disregarded").

Here, the district court mistakenly assessed standing as of the time of the motion to dismiss. This error permeated the court's analysis, because SFFA implemented major organizational changes *after* it filed this lawsuit to bolster its case for standing. For example, the district court found it significant that SFFA's members elect one of its five managing directors, and that it assesses membership dues.

Pet.App.233-34. None of this was true when SFFA filed suit. J.A.286, 302-03.

B. SFFA was not a genuine membership organization when it sued.

An organization without genuine members cannot stand in those members' place. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). An entity's "self-proclaimed status" as a membership organization does not suffice. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 196 (2d Cir. 2000). Instead, SFFA must prove that it was truly a membership organization when it filed suit.

This Court has never defined what constitutes a genuine "membership organization" for purposes of associational standing. Drawing on this Court's related "indicia of membership" test, lower courts have considered two factors to determine whether an organization has genuine members. *See Hunt*, 432 U.S. at 343.

First, courts assess whether members control the organization, such as by electing and serving as officers or influencing the organization's policies. *Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 225 (D.C. Cir. 2018). Second, courts examine whether members fund the organization. *Id.* These inquiries ensure that the organization seeking judicial relief is "in the hands of those who have a direct stake in the outcome" and not "concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (cleaned up).

Applying these standards shows that SFFA was not a genuine membership organization when it sued.

First, SFFA's purported members neither controlled the organization nor played a meaningful role in its activities. At the relevant time, SFFA's bylaws provided only for "affiliate members" who had "no voting rights." J.A.302. The bylaws further assigned the power to appoint or remove directors to a self-appointed board of directors. J.A.303-04. As SFFA's founder admitted, "members" had "no … rights" other than to "express opinions" or "resign." J.A.288-89. One of SFFA's "standing members" even confessed that his only role in the organization was to sign a declaration and sit for a deposition *in this lawsuit*. J.A.298. It was not until 2015—the year after it sued—that SFFA revised its bylaws to create "General Members" with limited voting rights. J.A.306.

Second, SFFA's purported members "provide[d] almost none of the organization's funding." J.A.275-77, 286, 295-96. The board lacked the power even to assess dues until the bylaws were revised in 2015. J.A.306. SFFA was instead funded almost entirely by outside groups, including a litigation fund controlled by SFFA's founder. J.A.276-77, 1044-48.

In sum, the undisputed record shows—and SFFA has never seriously disputed—that SFFA's members played no meaningful role in its operations when it sued. Instead, SFFA was a founder-controlled litigation vehicle whose main purpose was to circumvent the Constitution's bar against litigating generalized grievances, disconnected from any actual

members with standing. As this Court has taught, a plaintiff may not "rais[e] only a generally available grievance about government" for which relief would "no more directly and tangibly benefit[ ] him than it does the public at large." *Lujan*, 504 U.S. at 573-74. Allowing SFFA's lawsuit here would thus invite courts to overstep their "proper—and properly limited—role" in our "democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Parties with standing have numerous ways to challenge race-conscious admissions policies. *E.g.*, *Fisher-II*, 579 U.S. 365. But a citizen without standing cannot manufacture Article III jurisdiction merely by creating a self-proclaimed membership organization and suing on behalf of nonexistent members. Because that is what SFFA has done here, this lawsuit should be dismissed as jurisdictionally infirm.

II. This Court Should Affirm Its Longstanding Precedents on the Consideration of Race in University Admissions.

Stare decisis is a "foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). Because "adherence to precedent is the norm," "to overrule a constitutional precedent, the Court requires something over and above the belief that the precedent was wrongly decided." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1413-14 (2020) (Kavanaugh, J., concurring). To overrule precedent, a decision must be "grievously or egregiously wrong." *Id.* at 1414. Moreover, this Court does not easily discard precedents that have proven workable or

induced significant reliance interests. *Janus v. AFSCME*, 138 S.Ct. 2448, 2478-79 (2018).

Here, SFFA asks this Court to abandon nearly five decades of precedent allowing universities to adopt race-conscious admissions policies that are narrowly tailored to achieve the educational benefits of student-body diversity. *Fisher-II*, 579 U.S. at 376-77; *Fisher-I*, 570 U.S. at 310-12; *Grutter*, 539 U.S. at 343; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314-15 (1978) (Powell, J.).

SFFA does not stop there. According to SFFA, the Equal Protection Clause mandates colorblindness, with "no exceptions." Br.50. It claims that *Brown* confirms "the absolutism of the constitutional text." Br.51. And though it pays lip service to the tiers-of-scrutiny approach that has defined this Court's equal-protection cases for decades, SFFA insists that the analysis is virtually automatic: it claims that strict scrutiny "approximate[s] an outright ban" on any consideration of race, because "no one has a legitimate interest" in considering race for any reason. Br.61, 66.

This novel, *per se* equal-protection rule would wreak havoc on constitutional law. It ignores the original meaning of the Fourteenth Amendment, defies this Court's longstanding jurisprudence, and overlooks the compelling benefits that flow from diverse institutions of higher learning. SFFA thus falls far short of meeting its steep burden to show that this Court's precedents are *egregiously* wrong.

Adopting SFFA's unprecedented *per se* rule would also upend this Court's settled strict-scrutiny

framework for evaluating university admissions policies. This approach imposes clear and rigorous limits on race-conscious admissions policies. This Court should maintain its workable framework that universities, and society at large, have relied on for almost fifty years.

A. This Court's precedents on university admissions are manifestly correct.

1. *Grutter* is faithful to the Equal Protection Clause's original meaning.

SFFA casually asserts that "*Grutter* has no support in the Fourteenth Amendment's historical meaning." Br.50. Its arguments on this score are woefully inadequate. The Fourteenth Amendment's framers themselves pursued race-conscious policies designed to promote certain compelling government interests—including bringing together students of diverse backgrounds to learn from one another.

Parties seeking to overturn precedent on historical grounds have the "burden" to point to evidence that settles "the historical question with enough force" to displace precedent. *Gamble v. United States*, 139 S.Ct. 1960, 1974 (2019). To satisfy this burden, parties must point to "something more than ambiguous historical evidence." *Id.* at 1969 (cleaned up). This rule helps mediate disagreement over past cases: "Uncertainty" over whether precedent was correctly decided "counsels retention of the status quo." Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1711 (2013).

The Fourteenth Amendment guarantees "equal protection of the laws." U.S. Const. amend. XIV, §1. To support its sweeping claim that the Clause's historical meaning forbids race-conscious government action, SFFA cites a *single floor statement* by a one-term Senator who was not even in Congress when the Fourteenth Amendment was debated and ratified. Br.50. This statement—made nearly a decade after those ratification debates—discussed legislation that, had it become law, would have overridden state laws mandating segregated schools. Specifically, the statement supported "mixed schools" where students of all racial backgrounds could learn together. 2 Cong. Rec. 4083 (1874).

Statements like these, spoken against racial *segregation*, hardly prove that the Fourteenth Amendment was originally understood to bar race-conscious measures that *bring together* students from diverse backgrounds. Instead, the historical record shows that the Fourteenth Amendment was originally understood to allow appropriately tailored race-conscious decisionmaking of that kind.

The congressional proceedings that forged the Amendment's text make this understanding clear. In particular, the Amendment's framers "considered and rejected a series of proposals that would have made the Constitution explicitly color-blind." Andrew Kull, *The Color-Blind Constitution* 69 (1992). The framers initially adopted a proposal providing that "[n]o discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."

Benjamin Kendrick, *Journal of Joint Committee of Fifteen on Reconstruction* 83 (1914). This categorical prohibition, however, was ultimately abandoned. At the suggestion of Representative John Bingham, the framers instead adopted a proposal guaranteeing "equal protection of the laws." *Id.* at 106, 116.

This "equal protection" language was understood to prohibit "class legislation," and thus eliminate "the injustice of subjecting one caste of persons to a code not applicable to another," such as the infamous Black Codes used to subordinate African-Americans after emancipation. Cong. Globe, 39th Cong., 1st. Sess. 2766 (1866). This bar on class legislation arose against the backdrop of antebellum state-law precedents similarly banning "unequal" laws. Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 259 (1997); *cf. District of Columbia v. Heller*, 554 U.S. 570, 584-86 (2008) (relying on interpretation of state constitutional rights to ascertain meaning of federal right to bear arms). Under those precedents, laws singling out groups for "special benefits or burdens" could be valid unless they were grounded in "mere favoritism or prejudice." Saunders, *supra*, 260-61.

The Reconstruction Congress repeatedly enacted race-conscious legislation benefiting African-Americans, consistent with its understanding that some race-conscious policymaking comports with equal protection. Stephen Siegel, *The Federal Government's Power to Enact Color-Conscious Laws*, 92 Nw. U. L. Rev. 477, 558-65 (1998); Eric Schnapper, *Affirmative Action and the Legislative History of the*

Fourteenth Amendment, 71 Va. L. Rev. 753, 754-83 (1985). As just one of many examples, Congress passed measures creating special financial protections for African-American soldiers, sailors, and marines that did not apply to white servicemen. Resolution of Mar. 29, 1867, No. 25, 15 Stat. 26, 26. Proponents of these laws rejected arguments that they constituted impermissible "class legislation," explaining that they were consistent with "the principle of the equality" established by the Fourteenth Amendment. Cong. Globe, 40th Cong., 1st. Sess. 79 (1867).

The Reconstruction Congress also provided considerable support to African-Americans through the Freedmen's Bureau, which awarded benefits based on "previous condition of servitude." Siegel, *supra*, 560; *e.g.*, Act of July 16, 1866, ch.200, 14 Stat. 173-74. The Bureau "provided its charges with clothing, food, fuel, and medicine; it built, staffed, and operated their schools and hospitals; and it wrote their leases and labor contracts, rented them land, and interceded in legal proceedings to protect their rights." Siegel, *supra*, 559. Congress also separately made special provisions for the education of African-American soldiers and appropriated funds specifically for poor African-Americans. *Id.* at 560-62.

In providing these targeted benefits to African-Americans, Congress demonstrated that the Equal Protection Clause was understood to allow certain race-conscious measures. *Cf. Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (relying on early congressional action to assess scope of the Establishment Clause).

Once again, supporters of these laws in Congress—the same Congress that drafted the Fourteenth Amendment—rejected the argument that the measures qualified as "class legislation" that offended equal protection. Cong. Globe, 39th Cong., 1st. Sess. app.69 (1866). Instead, they explained that race-conscious measures are *consistent* with equal protection when their "very object" is "to break down the discrimination between whites and blacks." *Id.* at 632.

The activities that the Bureau financed, moreover, reveal that race-conscious policies promoting diversity in higher education were understood to be consistent with equal protection. *Cf. Espinoza v. Mont. Dep't of Revenue*, 140 S.Ct. 2246, 2258 (2020) (reviewing Bureau's funding for religious schools to assess meaning of First Amendment). For example, the Bureau provided significant financial support to an institution in Kentucky with just such policies: Berea College. Richard Sears, *A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866-1904*, 56, 63, 89 (1996).

During Reconstruction, Berea adopted a race-conscious admissions policy that sought to achieve "a fifty-fifty ratio of black and white students." Paul Nelson, *Experiment in Interracial Education at Berea College, 1858-1908*, 59 J. Negro Hist. 13, 13 (1974); *see also* Sears, *supra*, 44. The policy sought to ensure that "blacks would be present in such numbers as to stamp their own life style on college society." Nelson, *supra*, 17. Despite this race-conscious policy, Berea regarded

itself as an institution that made "no distinction … on account of color." Sears, *supra*, 85, 135.

Berea College maintained a race-conscious admissions policy for decades, until Kentucky enacted legislation that forced its African-American students to transfer to another school. Nelson, *supra*, 23-24. This Court, over Justice Harlan's dissent, upheld the Kentucky law in *Berea College v. Kentucky*, 211 U.S. 45 (1908). Nearly fifty years later, in *Brown v. Board of Education*, this Court acknowledged that its decision to allow Kentucky to force Berea to *dismantle* its race-conscious admissions policy was an unconstitutional application of "the 'separate but equal' doctrine" established by *Plessy*. 347 U.S. 483, 491 & n.7 (1954).

As this history shows, admissions policies that bring together students of diverse backgrounds are consistent with the original meaning of the Equal Protection Clause. SFFA does not even come close to satisfying its heavy burden to prove the opposite. *See Gamble*, 139 S.Ct. at 1969.

2. *Grutter* is also consistent with *Brown* and this Court's broader equal-protection jurisprudence.

This Court has never understood the Equal Protection Clause to impose *per se* rules against particular government classifications. Instead, this Court has used tiered scrutiny to decide whether a classification bears a sufficiently close relationship to a government interest. *E.g.*, *Adarand Constructors,*

Inc. v. Pena, 515 U.S. 200, 229-30 (1995). Race-based classifications receive strict scrutiny. *Id.*

This rule accords with the Court's broader constitutional jurisprudence. For example, the government may not regulate speech based on content unless the regulation is narrowly tailored to serve a compelling interest. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). Similarly, the government may not interfere with the fundamental right to marry unless the regulation is "supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Additional examples abound. *E.g.*, *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1881 (2021).

Grutter and the other admissions cases align with this well-settled approach to constitutional law. They do not impose a *per se* rule barring institutions from considering race, but rather require universities to prove that their admissions processes satisfy strict scrutiny. 539 U.S. at 326-27. To carry that burden, a university must show that it is pursuing a compelling interest in a narrowly tailored fashion—a familiar, workable legal standard that this Court has applied in scores of decisions across different areas of the law. Through its longstanding use of tiers-of-scrutiny analysis, this Court has established a flexible framework that allows it to calibrate the balance between the relevant government interest and the constitutional principle involved.

In seeking to cast aside this time-honored approach, SFFA invokes this Court's historic decision

in *Brown*. However, *Brown* cannot support SFFA's equal-protection revisionism. It is UNC—not SFFA—that carries on *Brown*'s vision of an integrated educational environment where diverse students learn together. *Brown* held that race-based *segregation* denies students equal protection. 347 U.S. at 494-95. It explained that "separation" of students based on race is premised on racist assumptions about "the inferiority" of certain races, and "deprive[s] the children of the minority group of equal educational opportunities." *Id.* at 493-94. This reasoning echoed Justice Harlan's dissent in *Plessy*, which declared that "arbitrary *separation* of citizens, on the basis of race, … is a badge of servitude wholly inconsistent with … equality before the law." 163 U.S. 537, 562 (1896) (emphasis added).

Policies that bring students *together* bear no such badge. Although Justice Harlan's "aspiration" of a colorblind constitution was "justified in the context of his dissent in *Plessy*," "[i]n the real world," absolute colorblindness "cannot be a universal constitutional principle." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring). The race-conscious measures that this Court ordered to bring students together in the wake of *Brown* underscore the point. *See Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 437-39 (1968). This point was also reaffirmed in *Parents Involved*, where a majority of Justices on this Court held that schools may adopt race-conscious policies "to reach *Brown*'s objective of equal educational opportunity" and to "encourage a diverse student body." 551 U.S. at

788 (Kennedy, J., concurring); *see id.* at 865 (Breyer, J., dissenting).

Brown could not have been clearer on this score: As noted, *Brown* explicitly disavowed a prior decision of this Court upholding a Kentucky law forcing Berea College to *terminate* race-conscious admissions. 347 U.S. at 491 n.7. *Brown* held that *Plessy* wrongly led to the *end* of race-conscious admissions at Berea. *Id.* It would be astonishing to now invoke *Brown* to require that same result at universities nationwide.

In keeping with *Brown*'s promise, UNC's admissions policy furthers the school's unwavering commitment to providing equal educational opportunities to all qualified students, no matter their race. As *Brown* emphasized, one of the "intangible considerations" that "make[s] for greatness" in a school is the ability of a diverse student body "to engage in discussions and exchange views with other students." 347 U.S. at 493 (quoting *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641 (1950)). *Grutter* echoed *Brown*'s insight, noting that educational environments are greatly enhanced when "students have the greatest possible variety of backgrounds." 539 U.S. at 330 (cleaned up).

SFFA nonetheless claims that legal developments since *Grutter* have undermined its holding that universities have a compelling interest in bringing together students from diverse backgrounds to learn from one another. Br.57-58. But the cases that SFFA highlights—*Parents Involved* and *Fisher*—cited *Grutter* extensively and approvingly. As the Court emphasized in *Parents Involved*, *Grutter* continues to

apply with full force in the "unique context of higher education." 551 U.S. at 725. If anything, then, subsequent caselaw further supports reaffirming *Grutter* on stare decisis grounds.

3. Fostering student-body diversity is a compelling government interest.

SFFA next mocks *Grutter*'s core holding—that fostering the educational benefits of diversity is a compelling governmental interest. SFFA goes so far as to claim that "[n]o one believes" in diversity. Br.60. It could not be more wrong.

Our nation rightly takes "pride in the rich diversity that has been such a vital part of our country's greatness." Ronald Reagan, Message on the Observance of National Afro-American (Black) History Month (Jan. 26, 1982). "We are a people whose strength flows from the unity molded from that diversity." *Id.*

Mindful of this fundamental American value, this Court has held, time and again, that "the interest of diversity is compelling in the context of a university's admissions program." *Bakke*, 438 U.S. at 314. Among other benefits, exposure to diverse "ideas and mores" leads to "enhanced classroom dialogue," "lessening of racial isolation and stereotypes," and greater "cross-racial understanding." *Id.* at 313; *Fisher-I*, 570 U.S. at 308; *Grutter*, 539 U.S. at 330.

As the record here shows, these benefits accrue to *all* students, regardless of their background. J.A.1610, 1618. At trial, UNC put on extensive—and unrebutted—evidence that diversity fosters

interaction between students of different backgrounds. J.A.1372-91. These experiences teach students to engage with one another, and prepare them for success in "an increasingly diverse workforce and society." *Grutter*, 539 U.S. at 330.

Diversity thus produces not just better students, but better citizens. "[E]ducation … is the very foundation of good citizenship." *Brown*, 347 U.S. at 493. It is "pivotal to 'sustaining our political and cultural heritage'" and plays a "fundamental role in maintaining the fabric of society." *Grutter*, 539 U.S. at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). Allowing institutions of higher learning to bring together students of varied backgrounds, including different races, is central to achieving these goals.

These benefits are concrete and measurable. The "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330. As just one of many examples, diversity is indispensable to military readiness. *Id.* at 331. "To fulfill its mission, the military … must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." *Id.* Building a diverse officer corps requires that universities from which the military draws officers also be diverse. *Id.* This rationale applies fully here, where UNC makes concerted efforts to recruit and enroll military-affiliated students.

More broadly, universities serve as a "training ground for a large number of our Nation's leaders" in all sectors of society. *Id.* at 332. "In order to cultivate

a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

These insights are hardly new. As early as 1849, Charles Sumner explained that diverse schools are essential to teaching students how to live together in a diverse society. Because "all classes meet, without distinction of color, in the performance of civil duties," he explained, "so should they all meet, without distinction of color, in the school," which trains students "for the larger world of life." Kull, *supra*, 47.

As the flagship public university of a Southern State, and an institution that was formally segregated for much of its history, UNC takes seriously its responsibility to prepare students for the larger world of life in our diverse society. This Court has long recognized that a university's academic judgment that "diversity is essential to its educational mission" is owed "deference." *Grutter*, 539 U.S. at 328. This deference is rooted in our nation's "deep[ ] commit[ment] to safeguarding academic freedom," a value that "long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). As Justice Frankfurter observed, "free universities"—meaning free from "governmental intervention in the intellectual life of a university"—are essential to "free society" itself. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (concurring). "The freedom of a university to make its own

judgments" extends to "the selection of its student body." *Bakke*, 438 U.S. at 312.

In sum, cultivating the strength that flows from our nation's diversity "is at the heart" of universities' "proper institutional mission." *Grutter*, 539 U.S. at 329. This Court has thus rightly held that fostering the educational benefits of diversity is a compelling government interest of the highest order.

B. Upending this Court's settled framework for university admissions would be profoundly disruptive.

This Court's precedents on university admissions have proven workable and have induced concrete and significant reliance interests. Overruling *Grutter* and replacing it with a *per se* rule forbidding universities from considering an applicant's race would destabilize the law and open the floodgates to litigation over the contours of this new constitutional rule.

1. *Grutter* provides a workable standard for ensuring admissions policies are narrowly tailored.

This Court has developed a detailed framework for assessing the legality of a university's admissions policy: "Race may not be considered unless the admissions process can withstand strict scrutiny." *Fisher-I*, 570 U.S. at 309. This "searching examination" requires schools to prove that their admissions policies are necessary to further a "compelling governmental interest," and that their use of race is "narrowly tailored" to advance that interest. *Id.* at 310.

This Court's opinions have also clarified precisely what a university must show to satisfy strict scrutiny. To start, a school may not impose racial quotas or use race in a "mechanical, predetermined" way. *Grutter*, 539 U.S. at 337. Nor may race be "the predominant factor" in the school's "admissions calculus." *Id.* at 320. Instead, a university's use of race "must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 337. In addition, the institution must show that race-neutral approaches would not promote its compelling interest "about as well and at tolerable administrative expense." *Fisher-II*, 579 U.S. at 377. If an institution can carry this burden, it may lawfully consider race as one of many factors in its admissions process. *E.g.*, *id.* at 387-89.

This case provides a perfect example of how this settled and stable legal framework guides universities and courts alike.

First, as the district court found, UNC carefully followed this Court's instructions in designing its admissions policy. It scrupulously crafted a process for holistic review, and it devised a regime to identify and evaluate race-neutral alternatives on an ongoing basis. *See supra* pp. 8-19.

Second, the district court had no difficulty applying the relevant legal framework to the fact-intensive record in this case. Pet.App.145-83. The district court examined UNC's admissions process over an eight-day trial, during which it heard from

numerous witnesses and assessed their credibility. Pet.App.7. This inquiry included a careful post-trial examination of the record, which yielded an exhaustive opinion showing that UNC had complied with settled law.

The same is true of other cases in which a university's admissions process was challenged. Each time, the relevant court ably applied this Court's precedents. SFFA's inability to identify any split in authority belies its claim that the governing legal framework has proven difficult to apply. *Compare Johnson v. United States*, 576 U.S. 591, 601-02 (2015) (confusion among lower courts suggests precedent is unworkable).

The fact-sensitive nature of this constitutional framework does not make it unworkable. *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 785 (1992) (affirming constitutional test that is "quite fact sensitive"). After all, strict scrutiny should be strict. *Fisher-I,* 570 U.S. at 314. And sensitivity to the specific circumstances of a particular challenged practice is a feature of many standards in constitutional law. *E.g.*, *Missouri v. McNeely*, 569 U.S. 141, 150 (2013).

Further, there are serious workability problems with SFFA's proposed alternatives. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 459 (2015) (workability of existing rule must be compared to possible replacements); *see Fulton*, 141 S.Ct. at 1882-83 (Barrett, J., concurring) (uncertainty surrounding proposed alternatives can support preserving existing rule). SFFA asks this Court to overrule numerous

precedents and declare unconstitutional all consideration of race in university admissions. It nonchalantly suggests that "[m]ost universities can keep their admissions systems exactly as they are" and simply exclude race from consideration. Br.69.

But this new legal regime would hardly settle the matter. It would instead raise many novel and difficult questions that could invite a cascade of litigation. To name only a few: How would universities conduct holistic, individualized review without considering race? In a bait-and-switch, would the kinds of race-neutral alternatives proposed by SFFA be the next targets of litigation, because they were designed with diversity in mind? *Compare infra* p. 55 (noting that SFFA now criticizes race-neutral measures that it had earlier proposed).

The uncertainty triggered by overruling this Court's settled precedents would thus lead to continuing "give-it-a-try" litigation, creating enormous instability in this area of the law. *Janus*, 138 S.Ct. at 2481 (quoting *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring)). The prospect of such confusion and continuing discord counsels strongly against abandoning precedents that have proven workable for so long.

2. This Court's precedents have engendered extensive reliance interests.

Stare decisis concerns are "at their acme" when "reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). This is especially true where

overruling precedent would give rise to "economic, regulatory, or social disruption." *Ramos*, 140 S.Ct. at 1406. Here, SFFA seeks to upend a settled economic, regulatory, and social order that this Court's precedents have structured for decades.

Appreciation of diversity has become "embedded" as "part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (Chief Justice Rehnquist explaining for the Court that this embeddedness is alone "adequate reason not to overrule" a precedent he had earlier criticized). As the amicus briefs in this case show, nearly every leading sector in society agrees that diversity is crucial to our nation's social and economic prosperity. Since this Court decided *Bakke*, diversity has solidified as a motivating ideal for generations of Americans. This Court should not so easily cast aside a value that has become embedded in the very fabric of modern society.

Taking this Court at its word, for decades, hundreds of "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." *Grutter*, 539 U.S. at 323. They have also expended vast financial and other resources to ensure they implement those policies in compliance with this Court's guidance. These efforts include training thousands of application readers on how to faithfully apply this Court's guardrails on the use of race in admissions. UNC has invested in its admissions process in precisely these ways. J.A.631-34, 1381-82.

Overturning precedent would abruptly force UNC—and scores of universities like it—to fundamentally alter their admissions practices, one of the core academic freedoms that they have long enjoyed under the First Amendment. It would also compromise their efforts to pursue the educational benefits of diversity that this Court has long recognized. For example, UNC has developed and implemented numerous programs and policies that allow students from diverse backgrounds to meaningfully interact with and learn from one another, both inside and outside of the classroom. *See supra* pp. 6-7. These programs are premised on UNC's ability to assemble a diverse student body to participate in and benefit from them. Abandoning precedent would thus upend universities' careful planning and frustrate their ability to pursue their academic mission.

At the same time, the wisdom of race-conscious admissions has been subject to vigorous democratic deliberation—in university boardrooms, state legislatures, voting booths, and the halls of Congress. This Court's precedents have thus structured—and indeed encouraged—an ongoing "dialogue regarding this contested and complex policy question." *Schuette v. BAMN*, 572 U.S. 291, 301 (2014) (plurality); *see Fisher-II*, 579 U.S. at 388 (calling for "constant deliberation and continued reflection" on the issue). SFFA is wrong to ask this Court to "short-circuit[ ] the democratic process" and impose a one-size-fits-all judicial solution on the entire nation. *Dobbs v.*

Jackson Women's Health Org., 142 S.Ct. 2228, 2265 (2022).

Under our federal system, States and universities have the freedom to choose for themselves whether, and how, to pursue diversity's educational benefits. All agree that States may choose to limit race-conscious admissions within their borders. But where States have legislated (or refrained from doing so) against the backdrop of this Court's decisions, that democratic process gives rise to enhanced respect for precedent. *Allied-Signal*, 504 U.S. at 785.

Congress, too, has stayed its hand in reliance on this Court's guidance. Again, no one doubts that Congress could pass legislation limiting race-conscious admissions, and many bills have been proposed to do just that. Thus far, however, all such efforts have failed—and on a broad, bipartisan basis. *E.g.*, Higher Education Amendments of 1998, Pub.L.No.105-244, H.Amd.612 (1998). Congress's decision to leave this Court's framework in place weighs strongly against disturbing settled law, even in constitutional cases. *Bay Mills*, 572 U.S. at 802 ("[W]e act today against the backdrop of a congressional choice" to leave this Court's precedents undisturbed).

To be sure, this Court in *Grutter* announced its hope—framed as an "expect[ation]"—that in 25 years, race-conscious admissions "will no longer be necessary" to achieve diversity's educational benefits. 539 U.S. at 343. But *Grutter* did not fix a hard-and-fast deadline. Rather, in articulating the legal standard for assessing race-conscious admissions

policies, *Grutter* made clear that the "durational requirement can be met by … periodic reviews to determine whether" such policies "are still necessary to achieve student-body diversity." *Id.* at 342. As shown below, the district court was correct that UNC has amply satisfied this standard.

III. UNC Has Faithfully Applied This Court's Precedents on the Consideration of Race in Undergraduate Admissions.

UNC's holistic admissions process passes strict scrutiny. SFFA effectively concedes that UNC has proved its compelling interest in assembling a diverse student body. Br.83-86. It further concedes that UNC's admissions process is properly holistic, considering race as only one factor among many in its individualized review of all aspects of an applicant's background. Br.83. SFFA also does not dispute the district court's factual finding that a mere 1.2% of UNC's admissions decisions are explained by race. Pet.App.110; *see Fisher-II*, 579 U.S. at 385 (holding that the modest consideration of race is a "hallmark of narrow tailoring").

Thus, SFFA's attack on UNC's admissions process is limited in two important ways. First, under existing precedent, the only question before the Court is whether UNC has given serious, good-faith consideration to workable race-neutral alternatives. Second, SFFA sought certiorari before judgment, meaning that this Court "effectively stand[s] in the shoes of the Court of Appeals." *Whole Woman's Health v. Jackson*, 142 S.Ct. 522, 531 (2021). As the appellate court of first review, this Court examines the district

court's factual findings for clear error. Fed.R.Civ.P. 52(a)(6). A district court clearly errs only when the appellate court has "the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Here, the district court was right that UNC has complied with this Court's precedents requiring universities to consider workable race-neutral alternatives.

A. Workable alternatives must be effective and realistic.

To be narrowly tailored, a university's admissions process must have no workable race-neutral alternative. "Workable" means "practical and effective." Black's Law Dictionary (11th ed. 2019); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971) (equating "workable" with "feasible," "effective," and "realistic"). A workable alternative must "realistically" signify "an effective admissions policy." *Fisher-II*, 579 U.S. at 387. To be workable, an alternative must also "promote [the university's] interest in the educational benefits of diversity about as well" as holistic, race-conscious admissions "and at tolerable administrative expense." *Id.* at 377.

This focus on "workable" alternatives is practical, not theoretical. Courts "take account of a university's experience and expertise in adopting or rejecting certain admissions processes." *Fisher-I*, 570 U.S. at 311. Based on its experience, a university may consider alternatives "working forward from some demonstration of the level of diversity that provides

the purported [educational] benefits." *Parents Involved*, 551 U.S. at 729 (plurality). A university may also consider the experiences of universities in other States. *Grutter*, 539 U.S. at 342.

A university need not exhaust *every* alternative "conceivable." *Id.* at 339. Strict scrutiny does not require a university to implement an alternative "however irrational, costly, unreasonable, and unlikely to succeed such alternative might be." *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 923 (9th Cir. 1991) (O'Scannlain, J.), *overruled on other grounds* 941 F.3d 1195 (9th Cir. 2019) (en banc). Instead, a workable alternative must be not only feasible but also reasonably likely to secure the university's compelling interest. *Id.*

Thus, an alternative is unworkable if it would force a university to abandon "the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340. Similarly unworkable are alternatives that would force a university to choose "between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* at 339.

Finally, a university must consistently evaluate workable alternatives by giving "serious, good faith consideration" to alternatives on an ongoing basis. *Id.*

B. SFFA's proposed alternatives are entirely unworkable.

SFFA touts various proposed substitutes for UNC's holistic, race-conscious admissions process. The district court did not clearly err in finding that these proposals rest on expert testimony that is wholly untethered from reality.

To start, SFFA cites simulations purporting to show how its alternatives would allow UNC to admit a diverse and academically qualified class. Br.83-85. As the district court found, those simulations depend on assumptions that are wildly unrealistic. Pet.App.136, 141. They assume either that (1) *every* eligible applicant in North Carolina would apply to and matriculate at UNC; or (2) UNC's applicant pool would remain fixed, even if it adopted a radically different admissions policy.

Neither assumption makes sense. First, it defies logic to assume that *every* eligible North Carolina applicant, including every valedictorian, would apply to and choose to enroll at UNC. SFFA's expert himself called this assumption "audacious" and "unlikely." J.A.595-96. Yet that condition is a core feature of fully *half* the simulations that SFFA cites. J.A.595, 1154-55 (Simulation-9); J.A.600-01, 1150-51 (Simulation-11); J.A.601-02, 1156-57 ("Modified-Hoxby"). Take SFFA's lead alternative, dubbed the "Modified-Hoxby." This simulation assumes UNC could admit the State's 750 highest-scoring, most socioeconomically disadvantaged public high-school students. It then assumes UNC could fill the remaining 80% of the class with the State's most

academically qualified public high-school students based on SAT scores and GPAs. Br.83; J.A.1156-57. These assumptions defy reality: UNC cannot simply enroll any student it wants. And besides, UNC does not seek only to maximize applicant test scores and grades.

Second, as this Court has recognized—and as the district court found as a matter of fact—when a university changes its admissions process, applicant behavior inevitably changes as well. *Fisher-II*, 579 U.S. at 387; Pet.App.135-36, 141. Nevertheless, SFFA's other simulations assume that UNC's current applicant pool would remain static despite a complete overhaul of its admissions process. J.A.596-600, 1144-47 (Simulation-3); J.A.873, 1152-53 (Simulation-8); J.A.600, 1148-49 (Simulation-13). For example, these simulations assume that a socioeconomically disadvantaged student who scored 1100 on the SAT and chose not to apply to UNC would behave no differently if UNC's new process treated her application as if she had scored 1500. This assumption is nonsensical: of course a change of this magnitude would affect who applies. J.A.865-66.

This Court's cases ask whether an alternative would make "an effective admissions policy" in the real world. *Fisher-II*, 579 U.S. at 387. The district court did not err—let alone clearly err—by finding that SFFA's simulations depend on assumptions that are completely "unrealistic." Pet.App.136, 141.

SFFA's far-gone simulations are unworkable for another reason: they would require UNC to abandon holistic admissions. The "Modified-Hoxby" simulation

is a prime example. By focusing on only three factors—test scores, GPA, and socioeconomic status—this simulation would bar UNC from engaging in holistic, individualized review. The district court was therefore right to reject this alternative as unworkable, because it would require UNC to fundamentally alter its academic mission. Pet.App.134 n.43; *see Fisher-II*, 579 U.S. at 386-87.

An air of unreality also clouds SFFA's other proposed alternatives. For example, SFFA contends that UNC could maintain holistic admissions while increasing emphasis on socioeconomic status. Br.84. But SFFA's models place so much weight on socioeconomic status—in some cases making it the equivalent of scoring an extra 400 points or more on the SAT—that this one factor would eclipse any other aspect of an application. J.A.597, 866-87. The district court was therefore right to reject this alternative as unworkable. Pet.App.136.[2]

---

[2] In addition to increasing emphasis on socioeconomic status, these simulations proposed eliminating legacy preferences and the early-application deadline. The district court correctly found that these proposals would have no meaningful effect on the admissions process. Pet.App.124-25. SFFA's expert conceded that legacy status does not "have a big [e]ffect" on admissions, and it is undisputed that legacy status is considered only for the small share of out-of-state students. J.A.508, 645. As for the early-admission deadline, unlike in early *decision* programs, students who meet UNC's early-application deadline "are not bound to enroll at UNC and may apply to any other institution." Pet.App.124. The district court therefore found "no basis" to conclude that early admission provides applicants with an advantage. Pet.App.125.

SFFA's last theory is that UNC could replace holistic admissions with a percentage plan. But its proposed plans border on the nonsensical. Instead of using class rank, SFFA's simulations posit a convoluted system requiring UNC to automatically admit certain students from each high school based on a flawed statistical model of UNC's admissions process. Br.84-85; J.A.593-95, 872-75. This model does not come close to reflecting UNC's actual admissions process. It overweights test scores and grades akin to an "academic index" that UNC does not use and that SFFA's expert simply imported from his work on the *Harvard* litigation. J.A.506, 593-95, 873. And it again assumes that every single qualified in-state applicant will apply to UNC, including every valedictorian in the State. J.A.595, 875.

Under these plans, SFFA would have a federal court mandate that UNC adopt an imaginary and arbitrary model, run each student through that model, rank students by high school, and then report the results to each high school or individual student. J.A.872-74. As the district court found, this proposal would be "impractical" and "unprecedented … in higher education." Pet.App.141.

These many flaws refute SFFA's claim that the district court rejected its proposed alternatives merely because they would cause "tiny dips" in SAT scores or racial diversity. Br.84. In reality, SFFA's alternatives fail for far more fundamental reasons: they are based on "dubious assumptions" and "untested proposals" that would require UNC to abandon holistic admissions entirely. Pet.App.143-44. Under this

Court's precedents, alternatives of that kind are plainly unworkable. *Fisher-II*, 579 U.S. at 386-87; *Grutter*, 539 U.S. at 340.

C. A workable alternative to UNC's admissions process has yet to be identified.

In contrast to SFFA's theorizing, UNC has actually analyzed and implemented race-neutral strategies in the real world. UNC remains eager to adopt additional workable alternatives as they arise—including alternatives that would allow it to move beyond race-conscious admissions entirely. Nevertheless, the district court was right that UNC carried its burden to show that a workable alternative to its current admissions process does not yet exist. SFFA has done nothing to challenge as clearly erroneous the district court's exhaustive factual findings that support this conclusion.

UNC has already implemented numerous race-neutral strategies that allow it to assemble a diverse class while minimizing its conscious consideration of race. These strategies range from establishing and expanding partnerships with high schools and community colleges, to increasing financial aid to make college more affordable. *See supra* pp. 15-17. SFFA itself argued that universities should make these kinds of efforts to increase enrollment of underrepresented minorities. Pet.App.118-22.

SFFA does not contest the district court's finding that UNC has already implemented race-neutral alternatives "well beyond" SFFA's "suggestions."

Pet.App.181. Nor does it dispute the district court's findings that financial constraints limit UNC's ability to significantly expand these efforts even further. *See supra* p. 16. SFFA's expert even praised UNC's extensive implementation of race-neutral strategies. J.A.584-85.

SFFA's one attempt to question UNC's efforts on this score does not hold water. SFFA claims that UNC's deliberate recruitment of underrepresented-minority students shows that the University has a "constant focus on race." Br.40. But again, SFFA itself argued that UNC should engage in enhanced recruitment of applicants with diverse backgrounds. Pet.App.48. And this Court has cited such efforts as evidence of an appropriate and narrowly tailored admissions process. *Fisher-II*, 579 U.S. at 385.

In addition to incorporating race-neutral strategies, UNC has consistently and rigorously evaluated whether workable alternatives exist, as the district court correctly found. *See supra* pp. 17-19. UNC has examined in depth the two leading alternatives discussed in this Court's cases: "enhanced consideration of socioeconomic and other factors" and a percentage plan that guarantees admission to students based on high-school class rank. *Fisher-II*, 579 U.S. at 385-86. After studying these proposals in earnest, UNC has thus far concluded that they remain unworkable for UNC at this time.

As for percentage plans, UNC's analysis has been fully consistent with this Court's precedents. UNC's 2018 report on race-neutral strategies recognized that

"by admitting students based on class rank alone," percentage plans require "universities [to] ignore other aspects of student quality that [they] might consider important." J.A.1423; *accord* J.A.1463-66. This reasoning aligns with this Court's holding that percentage plans are not workable alternatives when they would require a university to sacrifice all other aspects of applicants' backgrounds in favor of class rank. *Fisher-II*, 579 U.S. at 385-87.

As for socioeconomic status, enrolling a socioeconomically diverse class is already critical to UNC's mission. J.A.1416. UNC thus values and considers applicants' socioeconomic background when making admissions decisions. J.A.1414-15. Like a percentage plan, however, a plan centered on socioeconomic status alone would prevent UNC from valuing other types of diversity. This is particularly true for UNC, which must draw the vast majority of its student body from North Carolina, where socioeconomic status and race are not highly correlated. J.A.864-65, 1189.

UNC also showed that no workable race-neutral alternatives currently exist through expert-witness testimony. The district court credited the "exhaustive" analysis by UNC's expert showing a lack of viable race-neutral alternatives. Pet.App.182. UNC's expert ran more than 100 simulations of various alternatives, including plans tied to socioeconomic status, high-school class rank, and geographic location. J.A.1187-1207. Throughout, she made generous assumptions to maximize the chance that an alternative would prove workable, assuming for

example that large numbers of highly qualified students who do not currently apply to UNC would apply under an alternative process. Pet.App.129, 136, 182. Despite these efforts, not a single simulation achieved a racially diverse, academically qualified class about as well as UNC's current holistic admissions process. Pet.App.182.

SFFA argues that simulations like these are workable alternatives because they would not cause dramatic changes to UNC's baseline levels of racial diversity and academic preparedness. Br.85. But as the district court found, UNC's efforts to achieve the educational benefits of diversity are unfinished. *See supra* p. 7. Although UNC has made great strides in pursuing those benefits, even at current levels of diversity, the University has yet to fully achieve its goals. An alternative that would "compromise UNC's tenuous momentum" on this score is hardly effective or practical. Pet.App.136. A "workable" alternative is one that does "about as well" as a university's holistic process—not one that interferes with its pursuit of its educational mission. *Fisher-II*, 579 U.S. at 377. The district court thus correctly found that UNC's expert properly measured alternatives by "working forward" from UNC's current levels of diversity and academic preparedness. *See Parents Involved*, 551 U.S. at 729 (plurality).

Experiences of other States confirm a lack of workable alternatives here. Though many States have banned race-conscious admissions by law, UNC reasonably relied on extensive social-science literature showing that comparable selective state-

flagship universities have struggled to enroll diverse, academically qualified classes. J.A.928-32, 943-44. SFFA makes the sweeping claim that "public universities from across the country have eliminated the use of race and maintained diversity." Br.85. As the amicus briefs from public universities in Michigan and California show, however, SFFA paints a distorted picture that does not reflect the struggles those universities have faced in the real world.

But even if other universities were able to maintain diversity while eliminating the use of race, the evidence shows that no race-neutral alternative is yet workable *in North Carolina*, with its unique demographics and history. "Context matters" when applying strict scrutiny. *Grutter*, 539 U.S. at 327. Within constitutional bounds, States may choose to approach this difficult, contested issue in different ways, depending on their particular circumstances. And as this Court has recognized, "public universities, like the States themselves, can serve as laboratories for experimentation" on race-neutral alternatives. *Fisher-II*, 579 U.S. at 388 (cleaned up).

UNC is serving in this role, taking seriously its "ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies." *Id.* It has closely studied the expert analysis in this case. J.A.746-48, 1425. And it has continued to vigorously pursue numerous race-neutral alternatives. In the 19 years since *Grutter*, UNC has made significant progress—and it may yet achieve that case's aspirational 25-year goal. UNC remains steadfastly committed to continuing its efforts to

identify and implement workable race-neutral alternatives that would allow it to end race-conscious admissions as soon as possible. This Court should not short-circuit this ongoing process.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

Joshua H. Stein
Attorney General

Ryan Y. Park
Solicitor General
Counsel of Record

Nicholas S. Brod
Sarah G. Boyce
James W. Doggett
Deputy Solicitors General

Sripriya Narasimhan
Deputy General Counsel

Stephanie A. Brennan
Tamika L. Henderson
Special Deputy Attorneys General

Samuel W. Magaram
Solicitor General Fellow

NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629

Raleigh, NC 27602
(919) 716-6400
rpark@ncdoj.gov

Patrick Fitzgerald
Amy Van Gelder
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, IL 60606

Lara Flath
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

July 25, 2022