

Nos. 20-1199 & 21-707

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF
APPEALS FOR THE FIRST AND FOURTH CIRCUITS

**BRIEF OF *AMICI CURIAE* AMERICAN G.I. FORUM,
ET AL. SUPPORTING RESPONDENTS**

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Hispanic Association of Colleges And Universities
Hispanic Federation, Inc.
Hispanic National Bar Association
LatinoJustice PRLDEF
League of United Latin American Citizens
Massachusetts Advocates for Children
MANA, A National Latina Organization
Massachusetts Advocates for Children
Massachusetts Law Reform Institute
National Association of Latino Elected and
Appointed Officials Educational Fund
National Hispanic Caucus of State Legislators
National Hispanic Medical Association
National Latinx Psychological Association
New York Communities for Change
Parents Leading for Educational Equity
SER Jobs for Progress National, Inc.
United States Hispanic Leadership Institute, Inc.

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INTEREST OF AMICI CURIAE¹

Amici are national and local organizations and associations whose missions include serving the educational interests of the Latino community. Amici believe that preserving race-conscious admissions policies in higher education is critical to the advancement of Latinos—the nation’s fastest growing and largest minority community—and, thus, critical to the future of our nation as a whole. Accordingly, all have an interest in these proceedings, and all urge affirmance of the decisions below. Amici are the following organizations and associations:

The American G.I. Forum (AGIF). AGIF is a congressionally chartered Hispanic veterans and civil rights organization. Its motto is “Education is Our Freedom and Freedom should be Everybody’s Business.” AGIF currently operates chapters throughout the United States, with a focus on veterans’ issues, education, and civil rights. AGIF’s mission has expanded into non-veterans’ issues such as voting rights, jury selection, and educational desegregation. One of AGIF’s newer initiatives is the *principios* program, which offers financial incentives to elementary school students to stay in school. To help these students transition to and thrive in college, AGIF supports racial and ethnic diversity on college campuses.

¹ No counsel for any party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties’ letters consenting to the filing of amicus curiae briefs have been filed with the Clerk’s office.

ASPIRA Association (ASPIRA). ASPIRA is a national organization dedicated to the education and leadership development of Latino youth. Founded in 1961, its mission is to promote the socioeconomic development of the Latino community through advocacy, education and youth leadership development. ASPIRA has Associate offices in five states (DE, IL, NJ, NY, PA) and Puerto Rico, as well as formal partnerships with over 75 regional and local organizations across the country. ASPIRA serves over 45,000 students each year in after-school academic enrichment, tutoring, mentoring, career and college counseling, SAT/ACT Prep, and leadership development programs.

ASPIRA of New York (ASPIRA of NY). Founded in 1961, ASPIRA of NY is dedicated to fostering the social advancement of the Puerto Rican/Latino community by supporting its youths' pursuit of educational excellence. Through its Leadership and College Access Program, ASPIRA of NY has served thousands of young people, helping them to understand the college process and their career choices. Maintaining race conscious admissions policies in colleges not only allows young students to holistically describe themselves during the admissions process but enhances an inclusive and vibrant college setting.

Hispanic Association of Colleges And Universities (HACU). HACU has championed the higher education success of the nation's youngest and largest ethnic population. HACU also advocates on behalf of Hispanic Serving School Districts and the Hispanic K-12 students they educate. The formal mission of HACU is to promote the development of member colleges and universities; to improve access to and the

quality of postsecondary educational opportunities for Hispanic students; and to meet the needs of business, industry and government through the development and sharing of resources, information, and expertise. **Hispanic Federation, Inc. (HF).** HF is the nation's premier Latino nonprofit membership organization. Founded in 1990, HF seeks to empower and advance the Hispanic community, support Hispanic families, and strengthen Latino institutions through work in the areas of education, health, immigration, civic engagement, economic empowerment, and the environment. For two decades, HF has worked to advance educational equity, promote racial diversity and diminish racial isolation for students of color, particularly Latinx students. HF promotes its education objectives through several initiatives, including Pathways to Academic Excellence with its Pathways to College Prep and Pathways for Early Childhood Literacy components. HF supports increased racial, ethnic, and socioeconomic diversity in higher education to enhance pathways to opportunity for Latinx students.

The Hispanic National Bar Association (HNBA). Founded in 1972, HNBA has a membership comprised of thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. HNBA regularly participates as amicus curiae in this Court, including in civil rights and constitutional cases of importance to the millions of people of Hispanic heritage living in the United States.

LatinoJustice PRLDEF. LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in 1972. Its mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community. LatinoJustice PRLDEF helped establish bilingual education in New York City, and has since combated the forced segregation of Latino children in Connecticut, Delaware, Pennsylvania, and Massachusetts. In addition to creating pathways for success for Spanish-speaking children in public schools, it has fifty years of experience increasing the cadre of Latino/a law students and attorneys in the country with its pre-law counseling and mentoring programs.

League of United Latin American Citizens (LULAC). LULAC is the largest and oldest Hispanic membership organization in the United States. With over 135,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans. For more than 93 years, LULAC's members have sought increased opportunities in higher education for Hispanic students through the desegregation of public schools, reaching parity in school funding, the provision of scholarships, educational counseling, and strong affirmative action programs.

MANA, A National Latina Organization. MANA is a nonprofit, advocacy organization established in 1974 whose mission is to empower Latinas through leadership development, community service, and advocacy. MANA fulfills its mission through programs designed to develop the leadership skills of

Latinas, promote community service by Latinas, and provide Latinas with advocacy opportunities.

Massachusetts Advocates for Children (MAC). Founded in 1969, MAC is a statewide public interest organization that advocates for the rights of children who face significant barriers to equal educational and life opportunities, particularly those who have disabilities, are low income, and/or are racially, culturally, or linguistically diverse. MAC applies a racial justice lens to its advocacy and has a strong interest in diversification of the workforce at all levels to meet the needs of culturally and linguistically diverse students in Massachusetts.

The Massachusetts Law Reform Institute (MLRI). MLRI is a statewide nonprofit law and poverty center, and a principal support center for Massachusetts civil legal aid agencies. Its mission is to advance economic, social, and racial justice for low-income persons and communities. For over fifty years, MLRI has engaged in legislative, administrative, and judicial advocacy on behalf of its clients. Addressing public and institutional policies and procedures that either contribute to, or perpetuate, the cycle of poverty, and advancing racial equity, are two of the three fundamental frameworks guiding MLRI's mission. MLRI has a particular interest in supporting robust admissions in educational institutions that allow for a broad representation of society.

National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund. The NALEO Educational Fund is the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service. Its constituents include the more than

7,000 Latino elected and appointed officials nationwide who serve at every level of government, including positions with local and state education jurisdictions; counties, municipalities and special districts; state governance bodies; and the U.S. Congress. The NALEO Educational Fund is committed to strengthening the vitality and responsiveness of our democracy by ensuring that all of our nation's residents can become active contributors to our civic life.

The National Hispanic Caucus of State Legislators (NHCSL). NHCSL is the preeminent bipartisan organization representing the, currently, 449 Hispanic state legislators in 42 states and Puerto Rico. Since NHCSL legislators have a duty to the best interests of their constituents, they have legislated policies that call for diverse student bodies in state universities, but have found that, despite the increasing diversity those policies have achieved, episodes of racism, discrimination, and racial and ethnic insensitivity continue to plague higher education institutions. They have thus called for state legislatures to craft, adopt and require cultural competency plans for their states' higher education institutions in order to promote greater inclusivity; plans which would be undermined without actual diversity on campuses fostered by race- and ethnicity-conscious admissions policies.

The National Hispanic Medical Association (NHMA). NHMA is a nonprofit representing 50,000 licensed Hispanic physicians dedicated to improving the health of Hispanics and other underserved groups. NHMA believes the diversity of medical education is key to educating physicians to better care for all

Americans, and it strongly supports race/ethnic based admissions to improve the health of all Americans.

National Latinx Psychological Association (NLPA). NLPA is an organization of mental health professionals, academics, researchers and students whose objective is to generate and advance psychological knowledge and foster its effective application for the benefit of the Latinx population. NLPA aims for physical, psychological and social environments for Latinxs in the U.S. that reflect the ideals of respect for mental health, dignity and human and civil rights. NLPA supports racially and ethnically diverse college campuses because they help prepare future generations of Latinx psychologists for an increasingly racially diverse workforce.

New York Communities for Change (NYCC). NYCC unites communities in bold campaigns to advance racial and economic justice. NYCC has led hundreds of campaigns, including promoting accountability in K-12 schools. NYCC supports campaigns that ensure that low-income students, English language learners and Black and Latino students have equal opportunity to enter institutions of higher learning.

Parents Leading for Educational Equity (PLEE). PLEE is a parent-of-color founded and led grassroots organization in Rhode Island that works to elevate the voices of parents of color in advocating for improved educational outcomes, education equity and anti-racist schools. PLEE works collaboratively with state and local leaders to create systems that support the future of Rhode Island children, especially children of color.

SER Jobs For Progress National, Inc. (SER). SER is a national nonprofit 501c(3) corporation serving the needs of Hispanic Americans. SER was organized in 1964 by the League of United Latin American Citizens and the American GI Forum to help Hispanics prepare for and find jobs. SER now operates charter schools, daycare centers, one stop centers, and programs for the elderly, teaches financial literacy courses, and provides many other services that help individuals become productive members of society. SER is made up of 35 affiliate organizations across the country operating in over 200 cities and serving over 1.3 million individuals a year. It is recognized by the U.S. Department of Labor as the “premier community-based organization serving the employment needs of the Hispanic community.”

United States Hispanic Leadership Institute, Inc. (USHLI). USHLI is a national, nonprofit organization whose mission is to promote education, leadership development, and fulfill the promises of democracy for Latinos and other similarly disenfranchised groups. USHLI is one of only three Hispanic organizations in history honored by both the President of the United States and the Government of Mexico for promoting education and leadership development. Through its programs, USHLI seeks to unite parents and educators in 30 states to create a Culture of Education, making educational advancement every family’s goal. USHLI has been recognized by the American Association for Hispanics in Higher Education for its impact in promoting and facilitating access to higher education for Latino students.

SUMMARY OF ARGUMENT

For nearly half a century, this Court has upheld as constitutional the ability of colleges and universities to consider race, as one of many factors, in deciding which students to admit and has recognized that there is a compelling government interest in student body diversity and in “obtaining ‘the educational benefits that flow from student body diversity.’” *Fisher v. University of Texas at Austin*, 579 U.S. 365, 381 (2016) (“*Fisher II*”) (quoting *Fisher v. University of Texas at Austin*, 570 U.S. 297, 310 (2013) (“*Fisher I*”)); see *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 314-15 (1978).

Petitioner’s claim that the Equal Protection Clause of the Fourteenth Amendment requires colorblindness, see Pet. Br. 6, 69, is contrary to decades of precedent from the Court. The Equal Protection Clause does not compel colorblindness, but instead allows for sufficiently tailored race-conscious measures like those employed by Harvard College and the University of North Carolina in these cases. Compelled colorblindness in higher education admission processes would only obscure for the Court and educational institutions the disparities minorities continue to face and ensure their perpetuation and exacerbation.

Student body diversity, and obtaining the benefits that flow from it, are as important today as when they were first acknowledged in *Bakke*. Yet groups that have historically been underrepresented in higher education, including Latinos, continue to lag behind in several key socioeconomic indicators. There remains, therefore, a pressing need to continue taking

concrete steps to support and protect student diversity in higher education to “better prepare[] students for an increasingly diverse workforce and society.” *Grutter*, 539 U.S. at 330.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE COLORBLINDNESS.

A. The History and Purposes of the Fourteenth Amendment Do Not Support Petitioner’s Argument that Colorblindness is Constitutionally Required.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., amend. XIV. Congressional action at the time of the Amendment’s passage and this Court’s decisions shortly after its ratification establish that a primary purpose of the Fourteenth Amendment was not only to stop state-sanctioned discrimination but also to protect newly freed African Americans in the South and address their grievances.

The 39th Congress, which passed the Fourteenth Amendment, enacted laws aimed at remedying the effects of past discrimination in the same session. The Freedmen’s Bureau Act of 1866, enacted close in time to the passage of the Fourteenth Amendment by Congress on June 13, 1866, tasked the Freedmen’s Bureau with providing food, shelter, clothing, medical services, and land to displaced and newly freed African Americans from the South,

among other refugees.² The establishment of the Bureau demonstrated the intention to address the needs of African Americans in the wake of the Civil War. Congress also enacted multiple other race-conscious measures during this timeframe, such as establishing hospitals and schools specifically for newly free individuals and redistributing property confiscated from plantation owners in the South to newly free people.³

Similarly, the Court’s decisions in the decade following ratification of the Fourteenth Amendment confirmed that remedying past race-based discrimination was a principal purpose of the Fourteenth Amendment. In the *Slaughterhouse Cases*, for example, the Court explained that the “one pervading purpose” in passing the Thirteenth, Fourteenth, and Fifteenth Amendments was to “remedy” the “grievances” of African Americans:

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, *no one can fail to be impressed with the one pervading purpose found in them all, lying at the*

² See United States Senate, *Freedmen’s Bureau Acts of 1865 and 1866*, senate.gov, <https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm#:~:text=On%20March%203%2C%201865%2C%20Congress,includin%20newly%20freed%20African%20Americans.>

³ See Claude F. Oubre, *Forty Acres and a Mule: The Freedmen’s Bureau and Black Land Ownership* 20-21, Louisiana State University Press (1978).

foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

Slaughterhouse Cases, 83 U.S. 36, 71-72 (1872) (emphases added). Similarly, the Court underscored seven years later that the Fourteenth Amendment was “one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.” *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (holding that a person of color had the right to a jury which could include other people of color). The Court recognized, even then, that judicial intervention was necessary to protect the rights of minorities against an often-hostile majority. *Id.*

In short, the historical record does not support Petitioner’s assertion that the Fourteenth Amendment was intended to enshrine an imperative of constitutional colorblindness. *See* Pet. Br. at 50. Instead, the Equal Protection Clause anticipated the

use of race-conscious measures to achieve its principal purposes.

B. Under Court Precedent, the Equal Protection Clause Does Not Require Colorblindness.

Apart from being inconsistent with a principal purpose of the Equal Protection Clause, Petitioner's claim of a constitutionally required colorblindness conflicts with decades of this Court's precedent. Not only has this Court repeatedly approved the use of sufficiently tailored race-conscious measures, but its decisions have routinely considered the racial makeup of communities, the disparate impact that laws have across races, including on Latinos,⁴ and the need for increasing diversity in the jury pool, higher education, the workplace, and society at large. Given such longstanding precedent, Petitioner's call for a new and broad constitutional rule of colorblindness should be rejected.

In *Brown*, for example, after examining the way segregation impacted a specific race, this Court recognized the need to diversify student bodies in public education. *See Brown v. Board of Ed. of*

⁴ "Hispanic" and "Latino," while often used interchangeably, mean different things. "Hispanic" refers to individuals who originate from Spanish-speaking countries. *See* 42 USC § 300u-6(g)(2). "Latino," meanwhile, refers to individuals whose origins are from Latin America, which includes Mexico, Central America, and South America. *See* Hugo Lopez et al., *Who is Hispanic?*, Pew Research (Sep. 23, 2021), <https://www.pewresearch.org/fact-tank/2021/09/23/who-is-hispanic/>. In using both terms throughout this brief, *amici* are not implying interchangeability, but are instead simply recognizing that the cited references use one or the other of these terms.

Topeka, 347 U.S. 483, 494 (1954) (“Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.” (internal quotations omitted)). The Court thus analyzed how laws requiring “separate but equal” applications could still cause harm toward people of color and, conscious of that, struck down segregation laws, specific to public education, as violating equal protection. *See id.* at 488-95.⁵

The Court has also directly applied the Equal Protection Clause to protect other identifiable minorities. In *Hernandez v. Texas*, 347 U.S. 475, 478 (1954), the Court explained that “[t]hroughout our history differences in race and color have defined easily identifiable groups which at times *required the aid of the courts in securing equal treatment under the laws.*” *Id.* at 478 (emphasis added). It emphasized that the protections of the Equal Protection Clause must account for evolving circumstances: “community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection.” *Id.* After acknowledging the defendant’s ethnic identity, the racial makeup of the area in which he was tried, and the fact that there had not been a juror of Mexican descent in the area for the last twenty-five

⁵ Despite Petitioner’s reliance on Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), in which Justice Harlan opines that “[o]ur constitution is color-blind,” the Court has never adopted that position in subsequent cases. *See, e.g., Bakke*, 438 U.S. at 336 (Brennan, J., concurring in the judgment in part and dissenting) (“[N]o decision of this Court has ever adopted the proposition that the Constitution must be colorblind.”).

years, the Court held that sufficient evidence existed to create a prima facie case of denial of equal protection. *See id.* at 480-81. The Court reached its holding despite the testimony of five jury commissioners who had assured the lower court that their “only objective had been to select those whom they thought were best qualified.” *Id.* at 481. The Court found that the persistent absence of a juror of Mexican descent for such a prolonged period “bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.” *Id.* at 482.

Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), represents yet another example where this Court examined evolving racial disparities—a factor that would not be permitted if Petitioner’s colorblind paradigm were adopted. After reaffirming *Hernandez’s* holding that “Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment,” the Court noted that “Hispanos suffer the same educational inequities as Negroes and American Indians.” *Id.* at 197. It explained that, in determining whether a school is segregated, a court must consider “the racial and ethnic composition of a school’s student body” as well as “other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes towards the school.” *Id.* at 196.

The Court, in *Plyler v. Doe*, 457 U.S. 202, 230 (1982), held that laws authorizing school districts to deny undocumented Mexican children admission to their local public schools were unconstitutional in violation of the Equal Protection Clause. The *Plyler* decision represents yet another example of the Court recognizing that the Equal Protection Clause does not

compel colorblindness. The Court there explained that the Fourteenth Amendment's Equal Protection Clause was "intended to work nothing less than the abolition of all caste-based and invidious class-based legislation," *id.* at 213, and that, although the Clause generally directs that all similarly situated persons be treated alike, "the 'Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" *Id.* at 216 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

Besides prohibiting invidious race-based discrimination, this Court has also repeatedly held that the Equal Protection Clause specifically *permits* sufficiently tailored race-conscious admissions practices in higher education. Beginning with *Bakke*, Justice Powell, in a part of his opinion joined by a majority of the Court, found that the government has "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320. Indeed, four justices in *Bakke* rejected outright Petitioner's argument that the Equal Protection Clause requires colorblindness: "no decision of this Court has ever adopted the proposition that the Constitution must be colorblind." *Id.* at 336 (Brennan, J., concurring in the judgment in part and dissenting). Justice Powell recognized that the attainment of a diverse student body was "a constitutionally permissible goal for an institution of higher education," because of the essential "atmosphere of speculation, experiment, and creation" that such diversity promotes. *Id.* at 311 (opinion of Powell, J.). As the *Bakke* Court noted, our country's future "depends upon leaders trained through wide exposure to the ideas and mores of

students as diverse as this Nation of many peoples.” *Id.* at 313 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

In *Grutter*, the Court adopted and “endorse[d] Justice Powell’s view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions,” 539 U.S. at 325, and thereby confirmed once again that the Equal Protection Clause does not, as Petitioner claims, compel colorblindness. The Court emphasized that “not every decision influenced by race is equally objectionable,” and that “strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.” *Id.* at 327. Finding that the race-conscious admissions policies of the University of Michigan Law School did not violate the Fourteenth Amendment, the Court outlined the “substantial” benefits of a diverse student body: “cross-racial understanding,” the breaking down of “racial stereotypes,” and “livelier, more spirited, and simply more enlightening and interesting” classroom discussions. *Id.* at 330.

As the *Grutter* Court explained, however, the benefits of student body diversity do not end at the classroom door. Student body diversity “better prepares students for an increasingly diverse workforce and society,” and “promotes learning outcomes.” *Id.* Major American companies agreed, telling the Court that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* (citing Brief for 3M et al. as *Amici Curiae* 5; Brief for General Motors

Corp. as *Amicus Curiae* 3-4). Similarly, the *Grutter* Court noted that the military likewise maintained that “a highly qualified, racially diverse officer corps is essential to the military’s ability to fulfill its principle [sic] mission to provide national security,” and that “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies.” *Id.* at 330-31. The Court determined that “our country’s other most selective institutions must [similarly] remain both diverse and selective.” *Id.* at 331.

The most recent commitment from this Court to student body diversity as a compelling government interest justifying the use of race-conscious admissions was just six years ago, in *Fisher II*. The Court reiterated that race-conscious admissions are permissible so long as the practice “can withstand strict scrutiny.” 579 U.S. at 376 (citing *Fisher I*, 570 U.S. at 309). Accepting that “the use of race-neutral policies and programs had not been successful in achieving sufficient racial diversity at the University,” the Court held that the University had met its burden of “showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan.” *Id.* at 383 (internal quotations and alterations omitted). The Court so found, citing to the increase in the University of Texas at Austin’s minority enrollment, 54% for Hispanics and 94% for African Americans respectively, just three years after the University implemented its race-conscious admissions policy. The *Fisher* Court acknowledged that, while there “remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the

constitutional promise of equal treatment and dignity,” the University’s admissions policy was both constitutional and necessary. *Id.* at 388.

As shown by decades of Court precedent and analysis, Petitioner’s demand for a colorblind constitution should be rejected. No circumstances have changed that would justify such a radical departure from precedent and the overturning of *Grutter*.

II. EDUCATIONAL DIVERSITY, AND OBTAINING ITS BENEFITS, REMAIN COMPELLING INTERESTS.

As noted above, obtaining the benefits of student body diversity has long been recognized as a compelling government interest. *See Fisher II*, 579 U.S. at 381; *Grutter*, 539 U.S. at 343; *Bakke*, 438 U.S. at 315. With almost fifty years of race-conscious policies in admissions for colleges and universities across the country, progress has undeniably been made towards improving the socioeconomic outlook for minorities underrepresented in higher education.

Education plays a vital role in the progress that has been made by Latinos and other people of color. Studies show that a better education leads to higher income, wealth, higher homeownership rates, lower rates of unemployment, and increased civic participation. This positive domino effect of higher education benefits not only individuals, but society as a whole. These benefits strengthen the economy, unlock the benefits of diverse workforces, and increase community engagement.

A. This Court has Long Recognized the Substantial Educational Benefits of Student Body Diversity.

Contrary to the Petitioner’s narrative, diversity is not an illusory advantage. Instead, the benefits of student body diversity are significant, both on campus and in society at large.

Just six years ago, this Court reaffirmed the substantial educational benefits that flow from student body diversity:

[E]nrolling a diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” Equally important, “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”

See Fisher II, 579 U.S. at 381 (quoting *Grutter*, 539 U.S. at 330).⁶ Nothing has changed in the last six

⁶ See *also* Harvard J.A. 916, Testimony of Itzel Libertad Vasquez-Rodriguez (“I think having had experiences and relationships with people from different ethnoracial groups made me a much better listener, a more empathetic person, someone who is a more critical thinker, and whose, like, perspective of the world is more broad. . . . And I think now, with my work in California, working in a state that is so diverse and that is only becoming more ethnoracially diverse, it was important for me to have had experience and to have had interactions with people from a variety of ethnoracial backgrounds. And I think, again, like having had those

years to diminish the vital benefits of student body diversity recognized by this Court.

B. Higher Income, Increased Leadership Opportunity, and Higher Rates of Civic Engagement All Flow From Educational Diversity.

The benefits from student body diversity continue long after students graduate and extend to all aspects of society. As this Court has recognized, increasing student body diversity at colleges and universities will “better prepare[] students for an increasingly diverse workforce.” *Grutter*, 539 U.S. at 330. A more diverse workforce is good for business, not simply as an abstract concept, but for a company’s bottom line: “companies with a diverse workforce are 35% more likely to experience greater financial returns than their respective non-diverse counterparts.”⁷ This financial advantage has been linked to the creativity that a diverse group offers, allowing for a free flow of new ideas and the development of many varied solutions to business problems.⁸ An analysis of 600 business decisions made by 200 teams found that the decision making of diverse teams outperformed individual decision

experiences made me a better policy maker, a better policy thinker and much better equipped for this fellowship.”).

⁷ Amy Stahl, *3 Benefits Of Diversity In The Workplace*, Forbes (December 17, 2021), <https://www.forbes.com/sites/ashleystahl/2021/12/17/3-benefits-of-diversity-in-the-workplace/?sh=2be3bb0822ed>.

⁸ Washington State University Carson College of Business, *10 Benefits of Diversity in the Workplace* (January 14, 2021), <https://onlinemba.wsu.edu/blog/10-benefits-of-diversity-in-the-workplace>.

making up to 87% of the time.⁹ As companies continue to unlock the benefits of a diverse workforce, colleges and universities must be able to continue to better prepare students for the post-graduate workforce by increasing student body diversity on campus. *See Grutter*, 539 U.S. at 330.

Similarly, as was true when this Court decided *Grutter*, *see id.* at 330-31, the nation's military continues to seek a diverse set of perspectives in its high-ranking positions.¹⁰ Although Hispanics are the fastest growing population within the military, they make up only 8% of the officer corps and 2% of general/flag officers.¹¹ There is thus still a need for allowing institutions of higher education, including service academies, to increase student body diversity in order to obtain the “highly qualified, racially diverse officer corps” that “is essential” to “national security.” *Grutter*, 539 U.S. at 331.

⁹ *Id.*

¹⁰ Adrianna Rodriguez, *Latinos are fastest growing population in U.S. military, but higher ranks remain out of reach*, USA TODAY (May 23, 2020), <https://www.usatoday.com/in-depth/news/nation/2020/05/23/latino-hispanic-military-high-ranking-commissioned-officer-positions/4668013002/> (quoting statement from the U.S. Department of Defense that “As [the Department of Defense] continues to build on its efforts to cultivate a diverse and inclusive workforce for all who serve, we will draw upon the widest possible set of backgrounds, talents and skills to maximize our warfighting capability, adapt to address new threats and challenges, and take advantage of new opportunities—strengthening the lethality and readiness of the Total Force.”)

¹¹ *Id.*

Additionally, increasing student body diversity is critical in “cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry.” *Id.* at 332. This Court has recognized that universities “represent the training ground for a large number of our Nation’s leaders,” and that, for this reason, “it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Id.* Studies show that higher education helps diverse students obtain and hold leadership positions in public service careers. In a review of more than 900 officials and executives in prominent positions in law enforcement and government, the review found only about 20% identify as Black, Hispanic, Asian, Native American, multiracial or otherwise a person of color.¹² Increasing diverse representation in government can help in multiple ways, including “maintaining core public values, increasing managerial efficiency, improving policy effectiveness, raising the quality of public services, and enhancing social mobility.”¹³ Therefore, it is critical that the institutions that serve as “the training ground” for this country’s leaders be permitted to use race as one factor in admissions “so that all members of our heterogenous society may participate in the educational institutions that provide the training and education necessary to succeed in America.” *Grutter*, 539 U.S. at 332-33.

¹² Denise Lu, *Faces of Power: 80% Are White, Even as U.S. Becomes More Diverse*, The New York Times (September 9, 2020), <https://www.nytimes.com/interactive/2020/09/09/us/powerful-people-race-us.html>.

¹³ OECD, *Fostering Diversity in the Public Service*, (2009), <https://www.oecd.org/gov/pem/paper-fostering-diversity-public-service.pdf>.

Allowing institutions of higher learning to continue to increase student body diversity through race-conscious admissions practices will also increase civic participation among Latinos and other minority groups.¹⁴ Studies show that those who attain higher levels of education are more likely to vote.¹⁵ Students often begin college near the age they can legally vote and “are exposed to norms of voting in ways that young people outside of colleges do not experience.”¹⁶ Yet Hispanics have typically voted at lower rates than U.S. voters overall,¹⁷ which can result in the group’s interests not being adequately represented. This Court has “repeatedly acknowledged the overriding importance of preparing students for work and citizenship” and “has long recognized that ‘education

¹⁴ Jens Manuel Krogstad & Mark Hugo Lopez, *Latino voters’ interest in presidential race is mixed, and about half are ‘extremely motivated’ to vote*, Pew Research Center (October 26, 2020), [pewresearch.org/fact-tank/2020/10/26/latino-voters-interest-in-presidential-race-is-mixed-and-about-half-are-extremely-motivated-to-vote/](https://www.pewresearch.org/fact-tank/2020/10/26/latino-voters-interest-in-presidential-race-is-mixed-and-about-half-are-extremely-motivated-to-vote/) (“Civic participation, especially voting, is an expected behavior among the highly educated in the US, and consistent reminders of this expectation should eventually become self-enforcing.”).

¹⁵ See Emily Manis, *New research provides insight into why our education says way more about our politics than it used to*, PsyPost (May 16, 2022), <https://www.psypost.org/2022/05/new-research-provides-insight-into-why-our-education-says-way-more-about-our-politics-than-it-used-to-63152> (“Educational levels have also been linked with political participation, with more educated people being more politically active, more likely to vote, work on political campaigns, and commit to advocacy.”)

¹⁶ Eric R. Hansen, Andrew Tyner, *Educational Attainment and Social Norms of Voting*, 4-5, Political Behavior (Oct. 2019).

¹⁷ Krogstad & Lopez, *supra* note 13.

... is the very foundation of good citizenship.” *Grutter*, 539 U.S. at 331 (quoting *Brown*, 347 U.S. at 493). Allowing for the continued use of race as one factor in higher education admissions will help attain the “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation” that this Court recognized “is essential if the dream of one Nation, indivisible, is to be realized.” *Id.* at 332.

Demonstrable progress has been made in addressing educational disparities in higher education when a holistic, race-conscious approach is taken. But the need for obtaining the benefits of student body diversity at colleges and universities remains compelling. Overturning *Grutter* and requiring the use of a strictly colorblind paradigm in higher education would halt this progress and would ensure that disparities across our society, including in education, the labor force, and civic engagement, persist and worsen.

III. MANDATORY COLORBLINDNESS WILL MASK EXISTING RACIAL DISPARITIES, THWARTING THE PROMISE OF EQUAL PROTECTION.

A. Racial Disparities Exist in Multiple Areas and Would Worsen with Colorblindness.

Despite the progress made since *Bakke*, disparities still persist between Latinos and their white peers in higher education. Education, what Horace Mann long ago called the “great equalizer of the conditions of men, the balance wheel of the social machinery,” serves to alleviate most of these disparities. *See* Dr. Margaret Cahalan, *Widening*

Participation in Higher Education in the United States of America 6, Edge Hill University (Oct. 2013). Therefore, increasing student body diversity at colleges and universities remains essential today. Although the enrollment rates of underrepresented minorities in higher education have slowly but steadily improved,¹⁸ racial disparities persist in multiple areas and would worsen if colleges and universities are forced to use colorblind admissions.¹⁹

At present, even though the Hispanic population comprises “the nation’s largest minority group, expected to make up 29 percent of the population by 2060,”²⁰ educational outcomes for Latinos are still not on par with those of their white

¹⁸ De Brey, *et al.*, *Status and Trends in the Education of Racial and Ethnic Groups 2018*, National Center For Education Statistics, <https://nces.ed.gov/pubs2019/2019038.pdf> (Between “2000 and 2016, Hispanic undergraduate enrollment more than doubled (a 134% increase from 1.4 million to 3.2 million students).”).

¹⁹ See Thomas Peele and Daniel J. Willis, *Dropping affirmative action had huge impact on California’s public universities*, EdSource (Oct. 29, 2020), <https://edsources.org/2020/dropping-affirmative-action-had-huge-impact-on-californias-public-universities/642437> (finding California’s ban on affirmative action in 1996 lowered minority enrollment); see also *Schuetz v. Coalition to Def. Affirmative Action*, 572 U.S. 291, 385 (2014) (Sotomayor, J., dissenting) (“In 2006 before [Michigan’s affirmative action ban] took effect, underrepresented minorities made up 12.15 percent of the University of Michigan’s freshman class, compared to 9.54 percent in 2012—a roughly 25 percent decline.”).

²⁰ Kelly Field, *More Hispanics are going to college and graduating, but disparity persists*, PBS, (May 14, 2018) at vi, <https://www.pbs.org/newshour/education/more-hispanics-are-going-to-college-and-graduating-but-disparity-persists>.

counterparts.²¹ In the United States, as of 2020, 24% of Hispanic adults (25 and older) had earned an associate degree or higher, compared to 46% of white adults.²² These racial disparities in higher education carry over to other facets of life. For example, similar racial disparities are reflected in the nation’s labor force,²³ leaving many Hispanic families limited to low- to middle-wage jobs.²⁴ Although Hispanics hold one of the highest labor force participation rates in the country, most of those jobs do not require a college degree.²⁵ Yet, half of the fastest-growing occupations

²¹ *See supra*, note 19.

²² Excelencia in Education, *Latino College Completion: United States*, <https://www.edexcelencia.org/sites/default/files/LCCStateStats/Exc-2020-50StateFS-USA-05.pdf>.

²³ Kyle K. Moore, *State Unemployment by race and ethnicity*, Economic Policy Institute (May 2022), <https://www.epi.org/indicators/state-unemployment-race-ethnicity/>.

²⁴ “[W]orkers of color are far more likely to be paid poverty-level wages than white workers. In 2017, 8.6 percent of white workers were paid poverty wages—i.e., hourly wages that would leave them below the federal poverty guideline for their family size if they are the sole earner in the family, even if they work full-time, year-round. In contrast, 19.2 percent—nearly one in five—Hispanic workers were paid poverty wages, and 14.3 percent—roughly one in seven—black workers were paid poverty wages.” David Cooper, *Workers of color are far more likely to be paid poverty-level wages than white workers*, Economic Policy Institute (June 21, 2018), <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>.

²⁵ “In 2018, Latino workers represented just 17.8 percent of the workforce overall but constituted 27.6 percent in construction; 31.6 percent in agriculture, forestry, fishing, and hunting; and 23.8 percent in the accommodation and food services industries. These industries are more closely tied to the

in America require at least a four-year college degree.²⁶ Latinos are therefore being disproportionately left behind from these emerging occupations.

These educational and employment disparities impact not only Latino families, but the U.S. economy as a whole. Given the size of the Hispanic population as a percentage of this country's overall population, if this educational gap is not filled, there will be fewer educated workers to take on high-skilled, higher-paying jobs, and this could cause "annual household incomes for all Americans [to] drop by 5 percent by 2060."²⁷ Preparing Hispanics and other underrepresented minorities for the work force through higher education, then, is essential to the long-term strength of this nation's economy.

business cycle than the economy overall, and their higher cyclical results in less stable employment for their workers. Latinos are overrepresented in these industries, which tend to have workers with lower levels of educational attainment, potentially due to the lower percentage of Latino workers with a college education." Ryan Zamarripa, *Closing Latino Labor Market Gap Requires Targeted Policies to End Discrimination*, Center for American Progress (Oct. 21, 2020), <https://www.americanprogress.org/article/closing-latino-labor-market-gap-requires-targeted-policies-end-discrimination/>; see also *Labor force characteristics by race and ethnicity, 2018*, U.S. Bureau of Labor Statistics (October 2019), [https://www.bls.gov/opub/reports/race-and-ethnicity/2018/home.htm#:~:text=The%20labor%20force%20participation%20rate,and%20Whites%20\(57.6%20percent\)](https://www.bls.gov/opub/reports/race-and-ethnicity/2018/home.htm#:~:text=The%20labor%20force%20participation%20rate,and%20Whites%20(57.6%20percent).).

²⁶ The White House, *Winning the Future: Improving Education for the Latino Community*, Department of Education (Sep. 2011), www2.ed.gov/about/inits/list/hispanic-initiative/winning-the-future-improving-education-latino-community.pdf.

²⁷ *Supra*, note 19.

With, on average, less education and higher unemployment rates, homeownership rates for Hispanics lag as well.²⁸ This disparity impacts a host of other social and economic metrics. Homeownership provides many benefits to both individuals and communities, including “increased wealth accumulation, improved labor market outcomes, better mental and physical health, increased financial and physical health for seniors, reduced rates of divorce, and improved school performance and development of children.”²⁹ Homeowners are also more likely to become involved in community organizations, resulting in reduced crime and greater environmental awareness.³⁰ But Hispanics have just a 46% homeownership rate, compared with 72% for non-Hispanic whites.³¹ This disparity is substantial, especially when considering the socioeconomic benefits that homeownership can provide to both individuals and entire communities.

²⁸ See William C. Dudley, *Household Borrowing, Student Debt Trends and Homeownership*, Press Briefing from the Federal Reserve Bank of New York (Apr. 3, 2017) (showing college graduates have higher homeownership rates).

²⁹ *The Benefits of Homeownership*, National Association of Home Builders Housing Policy Department, https://www.internationalhousingassociation.org/fileUpload_details.aspx?contentTypeID=3&contentID=266313&subContentID=721506&channelID=38488.

³⁰ *Id.* at 3.

³¹ *Historical Census of Housing Tables: Homeownership by Race and Hispanic Origin*, UNITED STATES CENSUS (last visited June 22, 2022), [https://www.census.gov/data/tables/2000/dec/coh-ownershipbyrace.html#:~:text=Hispanic%20householders%20\(of%20any%20race,and%20Asians%20\(53%20percent\)\)](https://www.census.gov/data/tables/2000/dec/coh-ownershipbyrace.html#:~:text=Hispanic%20householders%20(of%20any%20race,and%20Asians%20(53%20percent))).

Finally, the disparities that persist in education have also created persistent disparities in wealth.³² For example, the median and mean family wealth for white families of \$188,200 and \$983,400, respectively, is significantly higher than the \$36,100 and \$165,500, respectively, for Hispanic families.

In short, creating a diverse student body in higher education allows for Latinos and other underrepresented groups to earn more, be more gainfully employed,³³ and have the financial support to build stable communities for their families and for their community members for generations to come.

B. Schools Should Not Be Forced to Ignore Existing Racial Disparities, As Such Disregard Will Ensure That Those Disparities Persist.

Petitioner’s demand for constitutional colorblindness is not, as Petitioner suggests, “[t]he way to stop discrimination on the basis of race.” Pet. Br. at 71 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (op. of Roberts, C.J.)). Racial discrimination—and the longstanding racial disparities that such discrimination fosters—cannot be addressed by simply blinding oneself to race, as Petitioner appears

³² Neil Bhutta *et al.*, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, Board of Governors of the Federal Reserve System (Sep. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>.

³³ Elka Torpey, *Education pays, 2020*, Career Outlook (June 2021) (showing that the higher education level one has, the less likely that person is to be unemployed).

to contend. In fact, doing so “can actually lead to greater, not weaker, racial bias.”³⁴ Instead, mandatory colorblindness would simply obscure for the courts and educational institutions the many racial disparities that exist across so many facets of society, thereby ensuring that those disparities persist and worsen over time. *See supra*, Argument Section III.A.

The Court has long recognized that universities “occupy a special niche in our constitutional tradition” and that “the freedom of a university to make its own judgments as to education includes the selection of its student body.” *Grutter*, 539 U.S. at 329. A blanket policy requiring institutions of higher education to use a colorblind admissions process, then, infringes on that freedom and forces those institutions to ignore what is often an indispensable and inseverable component of who college applicants are. The Constitution promises “liberty to all within its reach” to “define and express their identity.” *Obergefell v. Hodges*, 576 U.S. 644, 652 (2015). “[T]he most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”

³⁴ *See* Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCH. INQUIRY 77, 87 (2010); *see also* Martin Luther King Jr., *Where do We Go From Here?*, Annual Report Delivered at the 11th Convention of the Southern Christian Leadership Conference (Aug. 16, 1967) (“The tendency to ignore the Negro’s contribution to American life and strip him of his personhood is as old as the earliest history books and as contemporary as the morning’s newspaper.”).

Lawrence v. Texas, 539 U.S. 558, 574 (2003).³⁵ And dignity “remains the core aspirational value in the struggle for racial justice.”³⁶ Yet Petitioner’s nationwide colorblind admissions policy would also disadvantage students for whom race forms a critical component of their dignity and self-identity.³⁷ Such a policy would limit the ability of these applicants both to express themselves more fully and to provide institutions, as part of the admissions process, with a more complete understanding of who they are. This limitation can then impact students’ desire to share their identities with their classmates.³⁸ These far-

³⁵ In *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, 2022 WL 2276808, at *37 (U.S. June 24, 2022), this Court declared, after citing both *Obergefell* and *Lawrence* (among other decisions): “to ensure that our decision is not misunderstood or mischaracterized . . . [n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”

³⁶ Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 669 (2005); see also Boddie, *The Indignities of Color Blindness*, 64 UCLA L. Rev. Discourse 64 (2016) (explaining in greater detail the argument that the dignity of expressing one’s full self should extend to expressing oneself in the context of race in higher education).

³⁷ See Stephanie A. Fryberg and Nicole M. Stephens, *When the World is Colorblind, American Indians Are Invisible: A Diversity Science Approach*, Psychology Press (June 6, 2010) (explaining how colorblindness creates a “lack of self-relevant social representations” which “limits how members of [racial] groups understand who they are and what they see as possible for themselves.”).

³⁸ See Harvard J.A. 942, Testimony of Cecilia Nunez (“I think that for me it’s been really rewarding to be on a campus where there are other students of color, who I think can kind of connect to my own issues and my own identity, that I can have meaningful conversations with. And I think it’s also been very powerful to interact with students who don’t share my ethnic

reaching consequences for both the educational institutions and for these applicants are neither constitutionally required nor consistent with the “judicial deference” given to a school’s conclusion as to what serves its “educational goals.” *Fisher II*, 579 U.S. at 376-77.

This Court should reaffirm that colleges and universities may consider race as one factor in admissions, if they so choose, consistent with nearly half a century of precedent from this Court. Colleges and universities (and, by extension, society at large) must be permitted to continue to unlock the benefits that flow from student body diversity and “better prepare[] students for [our] increasingly diverse workforce and society.” *Grutter*, 539 U.S. at 330.

identity per se, and therefore I think we can have various conversations about what the differences are and what kind of the cultural experiences there have been like.”).

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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