

No. 20-1199

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

*On Petition for a Writ of Certiorari to the United
States Court of Appeals for the First Circuit*

**BRIEF OF THE JEWISH COALITION FOR
RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN
SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICUS CURIAE¹

The Jewish Coalition for Religious Liberty (“JCRL”) is a cross-denominational association of rabbis, lawyers, and professionals who practice Judaism and are committed to promoting religious liberty. As adherents of a minority religion that previously faced quotas limiting their ability to attend prominent universities, JCRL has a strong interest in ensuring that universities appreciate and honor the importance of religious diversity.

JCRL members have previously published articles and filed amicus briefs highlighting the importance of protecting religious diversity on university campuses. *E.g.*, Br. of Amici Curiae Jewish Coalition for Religious Liberty and Asma Uddin, *Bus. Leaders in Christ v. Univ. of Iowa*, No. 19-1696, 2019 WL 2996340 (8th Cir. July 31, 2019) (JCRL Br.). In this case, JCRL is interested in ensuring that, in so far as Harvard prioritizes the educational benefits of diversity, its analysis does not exclude religious diversity.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

SUMMARY OF THE ARGUMENT

For many religious students, faith is the most important aspect of their lives. It is fundamentally important to a student’s identity and to how he sees the world. As this Court has explained, religious belief encompasses a faith “to which all else is subordinate.” *United States v. Seeger*, 380 U.S. 163, 176 (1965). That is why our Founders protected the free exercise of religion as an individual and inalienable right.

A variety of educational benefits flow from religious diversity. A student’s faith is important not only to her identity but also to what she brings to a community. Religious diversity in education has “important and laudable” classroom benefits. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). And religious diversity helps students gain a “wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Id.* at 324.

Under this Court’s precedents, colleges may use race as a “factor” in admissions decisions—but only narrowly. Current law requires Harvard to “giv[e] serious consideration to *all* the ways an applicant might contribute to a diverse educational environment.” *Grutter*, 539 U.S. at 337 (emphasis added). Universities must pursue global “student body diversity,” a “far broader array of qualifications and characteristics” than race alone. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 308–09 (2013).

Yet Harvard does not put religion on the same footing as race. Instead, Harvard places race above everything else. It gives substantial admissions preferences to certain racial groups. And it does so no matter whether the applicant writes about why their

race is important to them or explains how their racial makeup will bring diversity to the campus. The applicant merely needs to check the right racial box, and Harvard gives them an admissions advantage that can be dispositive.

In contrast, Harvard *deletes* religious information from an applicant's file. The only way an admissions officer will ever know about an applicant's faith background is if the applicant chooses to write about her beliefs. And even then, there is no automatic preference for religious diversity. In other words, Harvard believes it can achieve religious diversity without even knowing its applicants' faith but claims that it cannot achieve racial diversity without racial identity front and center.

Harvard's approach contravenes the very narrow way this Court has approved the use of race as a factor in admissions. This Court has said that a university that uses race must be pursuing "student body diversity" that "encompasses a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Fisher*, 570 U.S. at 315 (cleaned up). In other words, the university must place race "on the same footing for consideration" as other elements that make someone diverse. *Grutter*, 539 U.S. at 334.

The Constitution prohibits Harvard's approach of placing race over any other diversity factor. To the extent this Court allows colleges and universities to prioritize the educational benefits of diversity, it should ensure that religious diversity is included.

ARGUMENT

I. Faith is of the utmost importance to many religious students.

For many religious students, faith is the most important aspect of their lives. Faith involves a “deep psychological commitment,” *Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014), and is “fundamental to [a] believer’s identity.” Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1477–78 (1984). Religious beliefs “define a person’s very being—his sense of who he is, why he exists, and how he should relate to the world around him.” Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164 (1988). Indeed, religion has been described as “an ‘ultimate concern,’ [and] as ‘a unified belief system that cuts across and directs more than a single aspect of an individual’s life.’” Note, *supra* at 1477–78.

As this Court put it in *United States v. Seeger*, 380 U.S. 163, 176 (1965), religious belief encompasses a faith “to which all else is subordinate or upon which all else is ultimately dependent.” In other words, religion “plays a particularly important role in an individual’s sense of self,” William P. Marshall, *Smith, Christian Legal Society, and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 CARDOZO L. REV. 1937, 1939 (2011), and “gives meaning and orientation to a person’s whole life,” Note, *supra* at 1477–78. This is perhaps even more true for Orthodox Jews as their religion dictates what food they may eat (kosher), what clothes they may wear (shatnez), what words

they may say (*lashon hara*), and even where they live (walking distance of a synagogue). There is no element of an Orthodox Jew's life that is not affected or informed by his belief that he is involved in a covenantal relationship with his creator.

In addition, religious beliefs necessarily shape an individual's worldview. Faith "provide[s] a general structure of thought through which the person views the world, and a system of ethics through which he guides and evaluates his own conduct." Conkle, *supra* at 1164. "A person's religious beliefs cannot meaningfully be separated from the person himself; they are who he is." *Id.* at 1164–65. Thus, when a student introduces herself as Jewish, Mormon, Christian, or Muslim, she is communicating information of fundamental importance. This is certainly true of Orthodox Jews, many of whose first words every morning are "I offer thanks to You, living and eternal King, for You have mercifully restored my soul within me." *Modeh Ani: What and Why*, Chabad.org, <https://perma.cc/VG8T-SLMF>.

The Framers recognized the centrality of religion to an individual. As James Madison wrote, the religion "of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Memorial and Remonstrance Against Religious Assessments (1785), in 8 PAPERS OF JAMES MADISON 301 (W. Rachal, R. Rutland, B. Ripel, & F. Teute eds. 1973). "This right is, in its nature, an inalienable right. It is inalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men; it

is inalienable also, because what is here a right towards men is a duty towards the Creator.” *Ibid.*

Religious freedom is “an unalienable right,” precisely because it is fundamental to a person’s identity and worldview. As this Court’s cases teach, “[t]he First Amendment’s Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.” *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

That is why the Framers protected religious freedom in the Bill of Rights. And, though not strictly immutable, courts have long acknowledged that classifications based on religion must satisfy strict scrutiny because religious identity is a characteristic that “either cannot realistically change or ought not be compelled to change because it is fundamental to their identities.” *Hassan v. City of New York*, 804 F.3d 277, 301–03 (3d Cir. 2015), as amended (Feb. 2, 2016). Religious affiliation is “of such fundamental importance that individuals should not be required to modify it.” *Ghebrehiwot v. Attorney Gen. of U.S.*, 467 F.3d 344, 357 (3d Cir. 2006). Thus, “the free exercise of religion . . . is part of that basic autonomy of identity and self-creation which we preserve from state manipulation, not because of its utility to social organization, but because of its importance to the human condition.” Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 95 (1990).

For the same reasons, religion has been the subject of special protection under both the Constitution and civil rights laws because religious groups “have historically suffered the same types of invidious discrimination that have plagued racial and ethnic minorities.” Marshall, *supra* at 1940–41. From the Inquisition to the Star Chamber, history is replete with discrimination against disfavored religious groups. And American history is far from immune: The United States has experienced “outbreaks of serious anti-Semitism, anti-Catholicism, and anti-Mormonism.” *Id.* at 1940.

Regrettably, our great institutions of learning have not always been standard bearers but rather participants in religious discrimination. As Students for Fair Admissions, Inc.’s petition for certiorari reveals, Harvard’s admission policies historically have “been deliberately manipulated for the specific purpose of perpetuating religious and ethnic discrimination in colleges admission.” Pet.5 (quoting Dershowitz & Hanft, *Affirmative Action & the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 385 (1979)). In the 1920s, Harvard became alarmed by the number of Jewish admittees and modified its test-score based admissions procedures to include subjective criteria specifically designed to “reduce the number of Jews”—ethnic and religious discrimination it now admits. *Id.* at 4. In doing so, the school admitted that there is something unique and consequential about one’s faith, even while discriminating on that basis.

II. The educational benefits of religious diversity are substantial.

The educational benefits of a religiously diverse student body are “substantial.” See *Grutter*, 539 U.S. at 324. As this Court recognized in *Grutter*, “[n]othing less than the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” *Ibid.* Nothing is of more importance to the “ideas and mores” of many students than is their faith. Religious diversity in education has “important and laudable” classroom benefits and is an important “way[] an applicant might contribute” to the “robust exchange of ideas” at the heart of the educational mission. See *Grutter*, 539 U.S. at 324, 330, 337.

Colleges and universities may be the best place for students to learn about unfamiliar religions by interacting with individuals of diverse faiths. As Nuri Friedlander, the Islamic Chaplain at Harvard explains, “the years that someone spends in college are years of exploration and discovery and personal growth.” *Religious Life at Harvard*, *The Harvard Gazette*, at :50, video available at <https://perma.cc/ZQ76-L5N3>. A religiously diverse university presents “a great opportunity for students to learn about other people’s faith and also to get in touch with what really matters about their own.” *Id.* at 2:50.

In our pluralistic society, unfamiliarity with religious beliefs is commonplace. Consider a Fifth Court of Appeals argument where the judge posited that turning “on a light switch every day” was unlikely to constitute a substantial burden on religious exercise. See Br. of Proposed *Amici Curiae*

Jewish Coalition for Religious Liberty and Asma Uddin at 8, *Intervarsity Christian Fellowship v. Univ. of Iowa*, No. 3:18-cv-80 (D. Iowa Dec. 21, 2018) (JCRL Intervarsity Br.) (citing Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 2015 WL 3852811 (5th Cir. Apr. 7, 2015)). As amicus has previously explained, “To an Orthodox Jew, however, turning on a light bulb on the Sabbath could constitute a violation of a biblical prohibition on lighting a fire on the Sabbath found in Exodus 35:3.” *Ibid.*

Ultimately, Harvard’s refusal to even consider religious diversity harms minority religions most. Because Americans are unlikely to meet many minority religious adherents, “they are less likely to understand and appreciate them.” JCRL Intervarsity Br. at 9.

Indeed, the secularization of civil society presents a unique threat to minority religions: “not only do their beliefs put them outside the mainstream, but without meaningful public interaction with others, their beliefs will be viewed with suspicion and likely deemed less worthy of protection.” JCRL Intervarsity Br. at 9–10. As Justice Brennan warned: “[a] critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.” *Goldman v. Weinberger*, 475 U.S. 503, 523–524 (1986) (Brennan, J., dissenting); see also Michael M. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992) (“The more serious

threat to religious pluralism today is a combination of indifference to the plight of religious minorities and a preference for the secular in public affairs.”).

University campuses purport to trade in the “marketplace of ideas.” See *Healy v. James*, 408 U.S. 169, 180 (1972). This “robust exchange of ideas,” *Grutter*, 539 U.S. at 329, should promote diverse civil society, “a place where people with differing identities and deep disagreements can collectively flourish, respecting one another’s identities, building relationships across disagreements a cooperating where they can serve the common good.” JCRL Intervarsity Br. at 19 (quoting Eboo Patel, *Should Colleges De-Register Student Groups*, Inside Higher Ed (September 28, 2018), <https://perma.cc/Q8SF-MVRK>).

On campuses where religious diversity flourishes, students can learn about Islam’s call to charity: “The believer’s shade on the Day of Resurrection will be his charity.” Islam Awareness, *Hadith: Charity*, available at <https://perma.cc/EV67-BSW7>. They will be exposed to the “eternal” duties of Hinduism which include, “honesty, refraining from injuring living beings, purity, goodwill, mercy, patience, forbearance, self-restraint, generosity, and asceticism.” *Sanatana-dharma*, Britannica.com, <https://www.britannica.com/topic/sanatana-dharma>. They will learn about Shabbat, where Jewish believers recognize the importance of abstaining from certain forms of creative labor in acknowledgement of God’s creation work, and Passover where they commemorate the Jews rescue from slavery in Egypt. *Jewish Holidays & Celebrations – List*, Peninsula Jewish Community Center, <https://perma.cc/JSK9-PNPX>. Students who attend a religiously diverse campus can learn from

their Catholic colleagues the meaning of Advent, the church tradition that invites one to step away from the frenzy of a commercialized Christmas to prepare for the birth of Jesus, and of Lent, 40 days of fasting and preparation for the resurrection. *Christmas*, Britannica.com, <https://perma.cc/2R5G-Q4U8>.

Students at Harvard agree that religious diversity is crucial to their college experience. As one graduate put it, “Religious life is an absolutely vital part of the Harvard experience.” David Sackstein, *Religious Life at Harvard*, *The Harvard Gazette*, at 3:31, video available at <https://perma.cc/ZQ76-L5N3>. According to Harvard students, religious diversity is important to finding “common ground,” (third interviewee), “living harmoniously” in society, (first interviewee), gaining “a better understanding of other human beings [even those with whom they] profoundly disagree,” (fifth interviewee), coming to “respect” different viewpoints (fourth interviewee), and “know[ing] how to engage in real and meaningful ways,” (ninth interviewee). Harvard University, *Congress on the Future of Faith at Harvard Student Feedback on The Conference*, YouTube (Dec. 17, 2010), available at https://www.youtube.com/watch?v=a6Iq4_hOE2I&list=PL11DE2A01CBABCF99.

“[E]ducation . . . is the very foundation of good citizenship.” *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). If universities are going to prioritize diversity, religious diversity is an important “way[] an applicant might contribute.” See *Grutter*, 539 U.S. at 337. As with race, “cross-[religious] understanding” would help to “break down [religious] stereotypes,” and “enable[] students to better understand persons of different [religions].” *Id.* at 330.

III. Harvard treats religious diversity much differently than racial diversity.

In admissions, Harvard treats religious diversity very differently than racial diversity. Harvard considers race at *every* stage of its admissions process. Students are recruited differently based on their race; Harvard monitors the racial composition of each class throughout the admissions cycle; and Harvard uses “ethnic stats” to lop off tentative admits. As SFAA’s expert testified, race was determinative for nearly 1,000 students over a four-year period. Pet.12.

Harvard claims that race is “one part of [a] whole-person review.” *Id.* at 5 (quoting JA.651:18-652:21). But Harvard automatically awards racial preferences to certain minorities “regardless of whether [they] write about that aspect of their backgrounds” in their applications. *Ibid.* (citation omitted). Indeed, African-American and Hispanic students get a boost similar to the one they would receive for near-perfect grades and test-scores or for authoring original scholarship. At Harvard, race is not a “factor of a factor of a factor,” *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2207 (2016) (*Fisher II*), but often determinative.

Contrast this with how Harvard treats religion. Although applicants identify their religion on their applications, Harvard *redacts* that information so admissions officers cannot see it. The *only* way Harvard can consider a student’s religious identity is if an applicant chooses to write about her faith in the application. This means that religious diversity is almost never considered. Even if a student chooses to write about his religious faith, religious diversity does not result in an automatic admissions bump.

Harvard Administrators acknowledge the value of religious diversity, yet treat religion altogether differently. Consider the following trial exchange between an SFFA lawyer and Harvard's Director of Admissions:

Q. I want to use an example based on me. So imagine a young white gentleman from— young man from Milwaukee. He goes to college where his best friends are a Muslim, Hindu, and a Catholic. You agree it's possible that both the identity of those three friends as well as their religious background could really add to this suburban Milwaukee boy's experience, don't you?

A. Yes. I would agree.

Q. And this would be true even though the three friends just checked boxes on their application and didn't mention their own ethnicity or their religious preferences anywhere, right?

A. Yes.

Q. And the Muslim fellow for instance could be a Pakistani or Arab, but maybe the most profound way in which he was an educator of the young boy from Milwaukee is that he was a Muslim. That's not implausible, is it?

A. No, it's not implausible.

Q. He's Pakistani, by the way. The Catholic fellow could be Polish-American or Filipino, but maybe the most profound way in which he was an educator of me was that he was Catholic and my confirmation sponsor when I converted in college. Is that possible?

A. Yes, that's possible.

Q. He's Filipino. So religion can be very important to who someone is and what they bring to the community and whether they'll be a great educator of others. Would you agree with that?

A. I would agree that that's possible.

Q. But Harvard does not track the religious identity of applicants, do you?

A. No, we do not track them.

Q. And your paper and online application systems do not allow you to even see the self-proclaimed religious identity of an applicant, correct?

A. Correct. . . .

Q. Do you consider that to be a significant obstacle in evaluating whole people, that you are not allowed to think about their self-proclaimed religious identity unless they've written about it elsewhere in their application?

A. We have not considered that to be a disadvantage.

Q. Would you consider it to be a disadvantage if you couldn't consider their race?

A. Would I consider it to be a disadvantage if we couldn't consider their race?

Q. It's the exact same question. So I just asked you about religion in the box and if you can't consider that is that an obstacle. And you said we haven't considered it a disadvantage.

A. We find it an advantage to be able to consider race. [CA1 Joint Appendix 1382-87.]

Harvard claims to value religious diversity and yet does not consider it to be a disadvantage for its admissions officers to be deprived of information related to a prospective student's religion. The college insists it can achieve religious diversity without knowing the religious composition of its class, all while insisting that racial diversity cannot be similarly achieved. That makes no sense.

In sum, Harvard's admissions policies do not place race "on the same footing for consideration" as religion. *Grutter*, 539 U.S. at 337. In contrast to the automatic plus factor that certain minority students receive, admissions officers are often not even aware of religiously diverse applicants because Harvard intentionally hides that information from their application file.

Harvard's disparate treatment of race and religion flouts this Court's admonition that diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Grutter*, 539 U.S. at 324–25. Under this Court's precedents, colleges can use race narrowly—as a "factor of a factor"—in admissions, *Fisher II*, 136 S. Ct. at 2207, but only if the sum total of admissions policies are "flexible enough to consider *all* pertinent elements of diversity in light of the particular qualifications of each applicant." *Grutter*, 539 U.S. at 334 (emphasis added).

In pursuing "student body diversity," universities must consider a "far broader array of qualifications and characteristics" than race alone. *Fisher*, 570 U.S. at 308. Harvard must, but does not, "giv[e] serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337. Indeed, the college altogether excludes from most applications any consideration of religious faith—the most fundamental part of many students' identity.

To the extent universities are allowed to be in the business of sorting students by diversity criteria, they must not consider one form of diversity to the exclusion of all others.

CONCLUSION

In deciding whether to grant this case, the Court should consider the context in which it arises. While amicus does not take a position on whether the petition should be granted or how the case should be decided, in no event should the Court rubber stamp a regime that makes a racial checkbox the primary criteria for admissions “diversity,” to the exclusion of religious beliefs.

Respectfully submitted,

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