Nos. 20-1199, 21-707

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
PRESIDENT & 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 PROFESSOR DAVID E. BERNSTEIN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

David E. Bernstein is University Professor at George Mason University's Antonin Scalia Law School. He is the author of the article *The Modern American Law of Race* in the Southern California Law Review and the forthcoming book *Classified: The Untold Story of Racial Classification in America.*

[*] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and his counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus* briefs.

SUMMARY OF ARGUMENT

This brief seeks to highlight an issue that *Grutter v. Bollinger*, 539 U.S. 306 (2003), did not address: whether a school's methodology for dividing applicants into racial and ethnic categories passes constitutional muster. This brief identifies two problems with the way schools such as Harvard and UNC sort applicants based on race and ethnicity.

The first problem is that Harvard and UNC use racial and ethnic categories that are arbitrary and irrational in the context of pursuing diversity. The way these schools classify students cannot pass rational-basis scrutiny, much less the requisite strict scrutiny.

For example, Harvard and UNC cannot justify grouping people whose national origins represent roughly 60% of the world's population together as "Asian," despite vast differences within this category in appearance, language, and culture. Nor can they explain why white Europeans from Spain, people of indigenous Mexican descent, people of Afro-Cuban descent, and South and Central Americans who may be any combination of European, African, and indigenous by descent are grouped together as "Hispanic."

The second problem is that Harvard and UNC rely on applicants' self-identified race. Self-identification is highly susceptible to inaccuracy and disparate treatment of similarly situated applicants. This is due to fraudulent and exaggerated claims of minority ancestry, confusion about how students should self-identify, and inconsistent classification of multiracial applicants.

These are inherent and unsolvable problems with racially discriminatory admissions policies. The Court should overturn *Grutter* and hold that arbitrary racial and ethnic categories cannot be used to determine our children's destiny.

ARGUMENT

Harvard and UNC's race-conscious admissions policies divide applicants into the following categories for purposes of determining eligibility for race-based advantages in the admissions process: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African American; and (6) Native American. Harv.JA1279–81; UNC.JA1234–41.

As Professor David Bernstein has shown, these racial and ethnic categories were created in the mid-1970s by federal bureaucrats whose only goal was to unify the racial and ethnic categories federal agencies used for recordkeeping. David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171, 197–200 (2021); *see also* DAVID E. BERNSTEIN, CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA (forthcoming 2022). The categories came about in a haphazard manner without any input from anthropologists, sociologists, ethnologists, or other experts.

The bureaucrats who created the categories expressly warned that they "should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants for eligibility for participation in any Federal program." Transfer of Responsibility for Certain Statistical Standards from

OMB to Commerce, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978).

There was never even a hint in the development of the categories that they were established for achieving educationally beneficial diversity in higher education. *See* Hugh Davis Graham, *The Origins of Official Minority Designation, in* THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS 289 (Joel Perlmann & Mary C. Waters eds., 2002) ("[N]one of the career civil servants and appointed officials who shaped the outcomes had any awareness that they were sorting out winners and losers in a process that, by the end of the twentieth century, would grant preference in jobs, government contracts, and university admissions to government-designated official minorities . . . .").

Harvard and UNC's racial and ethnic categories match the categories adopted by federal agencies, including the Department of Education. Whatever value the categories may have in allowing for consistency in data collection, they lump together members of very diverse groups into arbitrary categories. As Michael Omi and Howard Winant, two of the leading sociologists of race in the United States, point out: "These racial categories are rife with inconsistencies and lack parallel construction. Only one category is specifically racial, only one is cultural, and only one relies on a notion of affiliation or community recognition." MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 122 (3d ed. 2015); *see also* PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A

SAFE DISTANCE 164 (2003) (describing the racial categories as "almost comically arbitrary").

Harvard and UNC cannot explain why they use these particular racial and ethnic categories in their admissions policies. The categories were never intended to be used to enhance diversity in higher education and are themselves extremely internally diverse. Harvard and UNC also cannot explain how they verify whether a student has submitted an accurate racial self-identification. These are inherent and unsolvable problems with racially discriminatory admissions policies. The Court should overturn *Grutter* and hold that this "sordid business" of "divvying us up by race" is unconstitutional. *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

I. Harvard and UNC's Racial Categories are Arbitrary and Irrational

Consider the following ways in which Harvard and UNC's racial and ethnic categories are arbitrary and irrational in the context of achieving diversity in higher education.

1. Harvard and UNC use the exceedingly broad racial category of "Asian," which classifies East Asians (*e.g.*, Chinese, Korean, Japanese) and South Asians (*e.g.*, Indian, Pakistani, Bangladeshi) as members of one group, even though they are obviously very different in appearance, language, and culture. *See* RAJ S. BHOPAL, MIGRATION, ETHNICITY, RACE, AND HEALTH IN MULTICULTURAL SOCIETIES 18 (2d ed. 2014) ("The term 'Asian' . . . is extremely broad and masks

important variations by country of origin, religion, language, diet, and other factors . . . ."). This difference is reflected in the legal profession's minority bar associations, which are frequently divided into an "Asian" bar association whose members are predominantly East Asian and Southeast Asian (though South Asians are not excluded) and a "South Asian" bar association. *Compare Who We Are*, NAPABA, perma.cc/9WKU-7Q8N (National Asian Pacific American Bar Association), *with About Us*, SABA, perma.cc/TDA3-UG6N (South Asian Bar Association of North America).

As Justice Alito rightly noted in *Fisher v. University of Texas at Austin*, it "would be ludicrous to suggest that all [students classified as 'Asian'] have similar backgrounds and similar ideas and experiences to share." 579 U.S. 365, 414 (2016) (Alito, J., dissenting). Such a "crude" and "overly simplistic" racial category cannot possibly serve as a meaningful basis for deciding how "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population" would contribute to a university campus. *Id.* (quoting Brief for Asian American Legal Foundation et al. as *Amici Curiae*).

Historically, South Asians had been classified in the United States as Caucasian. In *United States v. Thind*, this Court held that although South Asians were "classified by certain scientific authorities as of the Caucasian or Aryan race," they were not "white" within the meaning of racially exclusionary citizenship laws. 261 U.S. 204, 210–13 (1923).

By the early 1970s, however, the federal government frequently classified South Asians as white. For example, a 1975 Office of Federal Contract memorandum stated that people "of Indo-European [descent], e.g., Pakistanis and East Indians . . . are regarded as white." MAXINE P. FISHER, THE INDIANS OF NEW YORK CITY: A STUDY OF IMMIGRANTS FROM INDIA 119 (1980). Similarly, the Department of Education's EEO-6 form, used for reporting faculty hiring at universities receiving federal funds, defined people with ancestry in the Indian subcontinent as white. *See* Higher Education Staff Information Report, 40 Fed. Reg. 25,188, 25,195 (June 12, 1975) ("White (not of Hispanic origin): All persons having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent.").

When the Office of Management and Budget decided to standardize federal racial categories for recordkeeping purposes in the 1970s, a committee entrusted with creating those categories recommended that South Asians, like Western Asian Middle Easterners, be classified as white. *See* FED. INTERAGENCY COMM. ON EDUC., REPORT OF THE AD HOC COMMITTEE ON RACIAL AND ETHNIC DEFINITIONS OF THE FEDERAL INTERAGENCY COMMITTEE ON EDUCATION (1975), perma.cc/6ESE-UJ3X (referring to people with origins in the Indian subcontinent as "Caucasians, though frequently of darker skin than other Caucasians"). The ultimate inclusion of South Asians in the "Asian" category was the result of political lobbying by segments of the South Asian community for recognition as a minority group. *See* Bernstein, *The Modern American Law of Race*, *supra*, at 200–01, 206.

Today, people in the United States still associate the term "Asian" much more with East Asians than South Asians. *See* Jennifer Lee & Karthick Ramakrishnan, *Who Counts as Asian*, 43 ETHNIC & RACIAL STUDIES 1733 (2019). Only forty-six and thirty-seven percent of Americans consider Asian Indian and Pakistani Americans, respectively, to be Asian or Asian American. *Id.*

In Great Britain, the opposite is true. The British use "Asian" to refer to South Asians, whereas "Oriental" was the historic term for East Asians, though that term has recently fallen out of fashion. *See* Peter J. Aspinall, *Who is Asian? A Category that Remains Contested in Population and Health Research*, 25 J. PUB. HEALTH MED. 91, 91 (2003) (noting that in the 2001 Census, Britain used the categories "Asian or Asian British" and "Chinese or other ethnic group").

Given the unduly broad nature of the "Asian" category, it is no surprise that only a minority of people assigned to that category identify as "Asian" or "Asian American." *See* JANELLE WONG ET AL., ASIAN AMERICAN POLITICAL PARTICIPATION: EMERGING CONSTITUENTS AND THEIR POLITICAL IDENTITIES 162 (2011) (finding that less than 40% of Indian, Chinese, and Filipino respondents identified as "Asian" or "Asian-American," even as a secondary identity); Miranda Oshige McGowan, *Diversity of What?*, 55 REPRESENTATIONS 129, 133 (1996) (noting that "people categorized racially as Asian often do not view themselves as such, nor do they necessarily feel a sense of identity or kinship with others categorized as Asian").

This confusion about who counts as Asian apparently extended to UNC's admissions office. In response to an admissions officer's message noting that an applicant had a "perfect 2400 SAT," another admissions officer asked, "Brown?!" UNC.JA1250. The first admissions officer responded, "Heck no. Asian." UNC.JA1251. This exchange reveals a misunderstanding of the term "Asian" as excluding dark-skinned individuals with ancestry in South and Southeast Asia.

2. Harvard and UNC treat "Native Hawaiian and Pacific Islander" and "Asian" as two separate groups, even though the United States historically treated them as members of the same group. The old, combined category of "Asian and Pacific Islanders" had previously existed in the United States for decades and was embraced by Asian advocacy groups that wanted to include as many people as possible. *See, e.g.*, NAPABA, *supra* (describing the National Asian Pacific American Bar Association's mission as achieving "representation and influence of Asian American and Pacific Islander attorneys in every facet and level of the legal profession").

The disaggregation of the two groups occurred recently in response to political lobbying from Native Hawaiians and Pacific Islanders, who recognized that being grouped with Asians was disadvantageous. *See, e.g.*, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,786 (Oct. 30, 1997) (stating that "Native Hawaiians presented compelling arguments" for increased recognition of the discrimination they face). Native Hawaiians and Pacific Islanders quite

rationally sought to avoid the taint of being associated with Asians, whose experiences of discrimination are overlooked by those who view them as overrepresented compared to their share of the population. *Cf. Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009) (Sparks, J.) ("Asian-Americans . . . are largely *overrepresented* compared to their percentage of Texas' population.").

That a single racial group was so suddenly split into two separate groups further underscores the arbitrary and capricious way in which Harvard and UNC's racial categories originated. To add an additional arbitrary twist, Filipino Americans, all of whom have origins in the Pacific islands of the Philippines, and who are ethnographically related to other Pacific Islanders, remain categorized as "Asians" and not "Pacific Islanders."

3. Harvard and UNC employ the extremely broad category of "Hispanic," which is defined as an "ethnicity" that encompasses people of all races whose ancestors come from countries with Spanish culture, including white Europeans from Spain.

One particularly arbitrary aspect of the Hispanic category is that it includes people whose ancestors' first language was not Spanish and who may have never spoken Spanish. This includes immigrants from Spain and their descendants whose ancestral language is Basque or Catalan. It also includes indigenous immigrants from Latin America whose first language is not Spanish, whose surnames are not Spanish, and whose ethnic and cultural backgrounds are not Spanish. *See* Jack D. Forbes, *The Hispanic*

Spin: Party Politics and Governmental Manipulation of Ethnic Identity, 19 LATIN AM. PERSP. 59, 64 (1992) ("The concept of Hispanic . . . is especially absurd as applied to Maya, Mixtec, Zapotec, or other American peoples who often do not even speak Spanish (except perhaps as a second, foreign language), whose surnames are often not of Spanish origin, and whose racial and cultural backgrounds are First American . . . .").

As scholars across disciplines have noted, the "Hispanic" category was invented by the United States government for political reasons and does not reflect a coherent social group. *See, e.g.*, Jonathan Borak et al., *Who is Hispanic? Implications for Epidemiologic Research in the United States*, 15 EPIDEMIOLOGY 240, 241 (2004) ("The term 'Hispanic' was created by the U.S. government; the population so identified is, in fact, an artificial rubric for a set of diverse populations that resulted from the mixture of indigenous American peoples, African slaves, and Europeans."); Forbes, *supra*, at 67–68 (explaining that "the Hispanic concept is a Nixon-engineered political device"); Martha E. Gimenez, *Latino/"Hispanic"—Who Needs a Name? The Case Against a Standardized Terminology*, 19 INT'L J. HEALTH SERVS. 557, 558, 568 (1989) (explaining that the Hispanic category "fulfills primarily ideological and political functions" and "identifies neither an ethnic group nor a minority group"); *see also Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 304 (5th Cir. 2011) (Jones, J., dissenting from the denial of rehearing en banc) ("To call these groups a 'community' is a misnomer; all will

acknowledge that social and cultural differences among them are significant.").

There is a circuit split on whether including European "Hispanics" in affirmative-action programs while excluding all other European groups is an arbitrary classification that violates the Equal Protection Clause. The Seventh Circuit held that Illinois violated the Equal Protection Clause by using an unconstitutionally overinclusive definition of "Hispanic" as including Europeans for its minority business enterprise program. *Builders Ass'n of Greater Chi. v. Cook Cty.*, 256 F.3d 642, 647–48 (7th Cir. 2001). According to the court, "the concern with discrimination on the basis of Hispanic ethnicity is limited to discrimination against people of South or Central American origin, who often are racially distinct from persons of direct European origin because their ancestors include blacks or Indians or both." *Id.* at 647. The court found that there was "nothing to differentiate immigrants from Spain or Portugal from immigrants from Italy, Greece, or other southern European countries so far as a history of discrimination in the United States is concerned." *Id.* By contrast, the Eleventh Circuit has held that a county fire department's broad definition of "Hispanic" for affirmative-action purposes as including Europeans does not run afoul of the Equal Protection Clause. *See Peightal v. Metro. Dade Cty.*, 26 F.3d 1545, 1559–60 (11th Cir. 1994).

These conflicting authorities illustrate the confusing and arbitrary nature of the "Hispanic" classification. The question of who counts as "Hispanic" has

continually befuddled federal and state authorities. *See, e.g.*, *Marinelli Constr. Corp. v. State*, 613 N.Y.S.2d 1000, 1002 (N.Y. App. Div. 1994) (denying Hispanic status to a person of Italian-Argentine descent); *Major Concrete Constr., Inc. v. Erie Cty.*, 521 N.Y.S.2d 959, 960 (NY. App. Div. 1987) (denying Hispanic status to a person with one Mexican grandparent); *In re Rothschild-Lynn Legal & Fin. Servs.*, SBA No. MSBE-94-10-13-46, 1995 WL 542398, at *3–4 (Apr. 12, 1995) (granting Hispanic status to a Sephardic Jew whose ancestors had fled Spain centuries earlier); *In re DCS Elecs., Inc.*, SBA No. MSBE-91-10-4-26, 1992 WL 558961, at *4 (May 8, 1992) (recounting agency's conclusion that someone with "blond hair and light skin" was not Hispanic); *In re Kist Corp.*, 99 F.C.C.2d 201, 216–17, 248 (1983) (granting partial minority credit for Hispanic status to a person with one Cuban grandparent); *In re Storer Broad. Co.*, 87 F.C.C.2d 190, 191–93 (1981) (accepting Sephardic Jewish heritage as evidence of Hispanic status); *In re Lone Cypress Radio Assocs., Inc.*, 7 FCC Rcd. 4403, 1992 WL 690184, at *5 (1992) (concluding that while being one-fourth Hispanic is enough to classify someone as Hispanic, being one-eighth Hispanic is not); Participation by Disadvantaged Business Enterprise in Department of Transportation Programs, 62 Fed. Reg. 29,548, 29,550 (May 30, 1997) (reaffirming Department of Transportation decision to classify "persons of European Spanish and Portuguese origin" as Hispanic, even though the latter group is not of Spanish origin or culture).

Harvard and UNC cannot explain why a white Hispanic with ancestors from Spain contributes to diversity in a way that other white Europeans do not,

and in a way that is comparable to the contributions of a person with ancestry in Central or South America (*e.g.*, Mexico, Columbia, Venezuela). *See* David E. Hayes-Bautista, *Identifying "Hispanic" Populations: The Influence of Research Methodology Upon Public Policy*, 70 AM. J. PUB. HEALTH 353, 355 (1980) ("Spain is a European country and its inhabitants are white people of European stock."). The Hispanic category is far too broad and arbitrary to serve as a meaningful basis for evaluating a student's potential contributions to the diversity of a university campus.

4. Harvard and UNC's "white" category irrationally combines all of Europe, Asia west of India, and North Africa into one group. People who self-identify as Arab are classified as white even though they experience racism and discrimination in the United States that people of European ancestry do not face. *See* Sarah Parvini & Ellis Simani, *Are Arabs and Iranians White? Census Says Yes, But Many Disagree*, L.A. TIMES (Mar. 28, 2019), perma.cc/CQW3-QF56 (discussing lobbying efforts by Arab and Iranian communities to be described as Southwest Asian, North African, or Middle Eastern).

There is a tremendous amount of ethnic, cultural, linguistic, and religious diversity within the category of people that Harvard and UNC classify as white. *See United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 185 (1977) (Burger, C.J., dissenting) ("The 'whites' category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations."). The category includes, among others, Welsh, Norwegians, Greeks, Moroccans, Chaldeans,

Afghans, Iranians, and North African Berbers. To place people descended from all these groups into one category is inconsistent with the goal of achieving genuine educational diversity.

Neither Harvard nor UNC has explained why a white Catholic of Spanish descent, classified as Hispanic, gets an admissions preference for contributing to educational diversity, but a dark-skinned Muslim of Arab descent, an Egyptian Copt, a Hungarian Roma, a Bosnian refugee, a Scandinavian Laplander, a Siberian Tatar, or a Bobover Hasid—all classified as "white"—do not. Similarly, it is hard to see how diversity is better accomplished by admitting an additional "Hispanic" student of Mexican ancestry over an equally or better qualified student whose parents immigrated from Turkmenistan, who would be the only Turkman in the entire student body, because the Turkman is arbitrarily classified as "white."

5. A descendant of American slaves who grew up in a working-class, majority-black neighborhood in Milwaukee does not contribute to diversity in the same way as a child of an African diplomat, nor as a black-identified applicant with multiracial ancestry who grew up in an overwhelmingly white small town in Montana. *See* KEVIN BROWN, BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION (2014) (arguing that the American black population should be divided into three categories for affirmative-action purposes: descendants of enslaved Americans, first- and second-generation immigrants, and individuals

with one non-black-identified parent). Yet they all fall into the same diversity category at Harvard and UNC.

6. Similarly, the experiences of a Navajo Indian who grew up on the tribe's reservation in Arizona are quite different from those of a person with one-sixty-fourth Cherokee ancestry and a European surname whose appearance and life are indistinguishable from his "white" neighbors' except that he has inherited tribal membership. *See* Grant D. Crawford, *Cherokee Citizenship Determined by Dawes Rolls, Not DNA*, TAHLEQUAH DAILY PRESS (Nov. 2, 2018), perma.cc/2YHB-KT8E (explaining that the Cherokee Nation does not have a "blood quantum" and citizenship is "based on a person's ability to trace his or her ancestry back to the Dawes Rolls"). But again, Harvard and UNC put both applicants in the same diversity category, so long as they both check the Native American box.

* * *

The racial and ethnic categories that Harvard, UNC, and universities across the country use in their admissions policies were created by executive-branch bureaucrats who specifically warned that they were not scientific or anthropological in nature and should not be used to determine eligibility for benefits in race-conscious policies. The categories are imprecise, over and underinclusive, and are not narrowly tailored to achieve educationally beneficial diversity. The Court should overturn *Grutter* and hold that this arbitrary system of racial and ethnic classification cannot be used to determine our children's destiny.

II. An Admissions System that Relies on Self-Identified Race is Inherently Flawed and Unreliable

Harvard and UNC presented no evidence that they attempt to verify an applicant's self-identified race. *Cf.* Transcript of Oral Argument at 33, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (No. 11-345) ("CHIEF JUSTICE ROBERTS: You don't check, in any way, the racial identification? MR. GARRE: We do not, Your Honor, and no college in America, the Ivy Leagues, the Little Ivy Leagues, that I'm aware of.").

The problem with relying on self-identification is that it invariably results in inaccuracies and disparate treatment of similarly situated applicants. This is due to fraudulent and exaggerated claims of minority ancestry, confusion about how to self-identify, and inconsistent classification of multiracial applicants.

Examples of fraud and exaggeration can be seen in cases adjudicating dubious claims of minority status. *See, e.g.*, *Orion Ins. Grp. v. Wash. State Office of Minority & Women Bus. Enters.*, No. 16-5582, 2017 WL 3387344, at *8 (W.D. Wash. Aug. 7, 2017), *aff'd*, 754 F. App'x 556 (9th Cir. 2018) (per curiam) (rejecting minority status for a person who presented DNA evidence showing he was 4% Sub-Saharan African and 6% Native American); *Malone v. Civil Serv. Comm'n*, 646 N.E.2d 150, 151–52 (Mass. App. Ct. 1995) (summarizing proceeding in which twin brothers were found to have "willfully and falsely" identified as black to receive appointments as firefighters); *Lagrua v. Ward*, 519 N.Y.S.2d 98, 99 (N.Y. Sup. Ct. 1987) (holding that a police officer with a mother from Gibraltar was not Hispanic).

Fraudulent claims of Native American identity have been so rampant in law-school admissions that the American Bar Association passed a resolution urging law schools to require proof of tribal citizenship or other evidence of Native American identity for admissions. *See* House of Delegates Resolution No. 102, ABA (Aug. 8–9, 2011), perma.cc/PGY4-NXM7 (urging law schools to address the "large systemic problem" of "providing false information about being Native American on law school applications").

A George Washington University professor, Jessica Krug, recently revealed that she fraudulently adopted a black identity to build a career as a scholar of African history. *See* Leah Asmelash, *A White Professor Says She Has Been Pretending to be Black for Her Entire Professional Career*, CNN (Sept. 4, 2020), perma.cc/4878-UGN7; *cf.* THE RACHEL DIVIDE (Netflix 2018) (telling the story of Rachel Dolezal, an Africana Studies instructor at Eastern Washington University who fraudulently claimed to be black).

Particularly relevant to the lawsuit against Harvard, Asian college applicants frequently conceal their race to avoid discrimination. *See, e.g.*, Aaron Mak, *The Price of Admission*, SLATE (Dec. 5, 2017), perma.cc/EP9A-XU2S ("I avoided participating in the future doctors' association, ping-pong club, the robotics team, and the Asian culture group. I quit piano, viewing the instrument as a totem of my race's overeager striving in America. . . . I dropped [Mandarin] a few weeks in. . . . I didn't want *Mandarin* on my transcript and as a second language on my application, which I feared could be a red flag for the admissions committee.");

Jesse Washington, Associated Press, *Asian-Americans Fight Stereotypes Getting Into College*, HOUSTON CHRON. (Dec. 3, 2011), perma.cc/C3QR-F3DC ("Ethnically, she considers herself half Taiwanese and half Norwegian. But when applying to Harvard, [she] checked only one box for her race: white.").

Even the good-faith efforts of applicants to honestly report their race will inevitably result in inaccuracies due to confusion about how to self-identify. The popularity of genetic tests such as Ancestry.com, 23andMe, and MyHeritage has shown that many Americans are uncertain about their ancestry. *See* Nikki Graf, *Mail-In DNA Test Results Bring Surprises About Family History for Many Users*, PEW RESEARCH CTR. (Aug. 6, 2019), perma.cc/YR5M-8DGB ("About four-in-ten (38%) say they were surprised by what their DNA test results showed about what countries or continents their ancestors came from, while 27% express surprise at what these results indicated about their ancestors' racial or ethnic background."). Every Census, millions of Americans change their racial or ethnic identity. *See* D'vera Cohn, *Millions of Americans Changed Their Racial or Ethnic Identity from One Census to the Next*, PEW RESEARCH CTR. (May 5, 2014), perma.cc/A2F3-KWNF ("People of every race or ethnicity group altered their categories on the census form . . . .").

A system of self-identification also has no way of ensuring consistent treatment of multiracial applicants. As Judge Danny Boggs once observed: "A child might be born who would, in today's conventional terms, be held to be one-half Chinese, one-fourth Eastern-European

Jewish, one-eighth Hispanic (Cuban), and one-eighth general North European, mostly Scots-Irish." *BAMN v. Regents of the Univ. of Mich.*, 701 F.3d 466, 493 (6th Cir. 2012) (en banc) (Boggs, J., dissenting), *rev'd*, *Schuette v. BAMN*, 572 U.S. 291 (2014). Suppose that child applied to Harvard, identified as Hispanic, and received a race-based advantage. Now suppose that child's younger sibling applied to Harvard, identified as Asian, and received a race-based penalty. Even though the two siblings have the same ancestry and grew up in the same family, their different (legitimate) self-identifications would result in vastly different chances of admission.

The reason universities rely on self-identification is that any test for verifying an applicant's racial identity would necessarily be arbitrary. A bright-line rule based on genetic testing would be reminiscent of the sordid criteria once used to implement segregation. *See Plessy v. Ferguson*, 163 U.S. 537, 541 (1896) (deciding the racial classification of a person who "was seven-eighths Caucasian and one-eighth African"). And an open-ended inquiry into applicants' appearance, upbringing, and culture would inevitably be infected by bias, stereotyping, and inconsistency as admissions officers struggled to determine which applicants qualified as "authentic" minorities. *See* Lulu Garcia-Navarro, *For Affirmative Action, Brazil Sets Up Controversial Boards to Determine Race*, NPR (Sept. 29, 2016), perma.cc/4ZUR-J5NG (noting that one Brazilian state issued guidelines about how to measure lip size, hair texture, and nose width for purposes of determining eligibility for affirmative action).

Because it is impossible to devise a fair way to divide applicants into racial categories, universities such as Harvard and UNC have resorted to allowing applicants to self-identify, giving rise to the problems of fraud and exaggeration, confusion about how to self-identify, and inconsistent treatment of multiracial applicants. Such an untrustworthy system of racial preferences cannot justify the imposition of race-based harms on applicants. The Court should overturn *Grutter* and hold that universities may not award educational opportunities based on self-identified race.

CONCLUSION

Grutter was wrong to endorse Justice Powell's diversity justification for racially discriminatory admissions policies. The Court should overturn *Grutter* and hold that arbitrary racial and ethnic categories cannot be used to determine our children's destiny.

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