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 U.S. Court of Appeals for the First and Fourth Circuits

BRIEF OF THE LIBERTY JUSTICE CENTER AND MOMOKO TAKAHASHI AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center believes that every American has a right to fair and equal treatment regardless of race, whether in education or other sectors of society. *See, e.g., Joyner v. Vilsack*, 1:21-cv-01089 (W.D. Tenn.) (challenging race-discriminatory USDA program on behalf of a farmer who would be eligible for hundreds of thousands of dollars in farm loans if not for his race); *Clark v. State Public Charter School Authority*, 2:20-cv-02324-APG-VCF (D. Nev.) (challenging public education program that identifies plaintiff as belonging to groups characterized as "oppressive" and "wrong"); *Menders v. Loudoun Cty. School Bd.*, 1:21-cv-00669-AJT-TCB (E.D. Va.) (similar).

Momoko Takahashi is a Ph.D. candidate at Northwestern University in Evanston, Illinois. Throughout her academic career, she has faced discrimination in school admissions due to her ethnicity.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. All parties have filed blanket consent for *amicus* briefs.

SUMMARY OF ARGUMENT & INTRODUCTION

Discriminating between people based on race, when race is so ill-defined to begin with, is illogical and should be illegal in America. "To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Educ.,* 347 U.S. 483, 494 (1954).

Yet this is exactly what Harvard and the University of North Carolina ("the Universities") have done. They have done this under the auspices of this Court's decision in *Grutter v. Bollinger,* 539 U.S. 306 (2003), which held that institutions of higher education have a compelling interest in a "diverse" student body, which justifies race-based discrimination in their admissions programs. 539 U.S. at 328 (defendant law school also sought to obtain "the educational benefits that flow from a diverse student body"); *id.* at 329-33 (noting universities have a compelling interest in securing such educational benefits); Pet'rs App. in No. 21-707 *("*UNC Pet'rs App.") 58 (trial court findings of fact). In the years since that decision, it has become clear that affirmative action impermissibly discriminates against some college applicants (usually Asian-American applicants) and has not resulted in more racially equal outcomes.

The Universities have justified their racial discrimination as a means to achieve "the educational benefits of diversity" as permitted by *Grutter*. But

subsequent research has demonstrated that affirmative action is an inefficient way of achieving student body diversity.

Moreover, Harvard in particular has rejected multiple race-neutral admissions plans and continues to maintain that only its discriminatory system is workable, because it wants to maintain a facially race-neutral set of preferences for athletes and children of alumni, donors, and faculty. These preferences, or "tips," overwhelmingly benefit rich white applicants in contradiction of Harvard's stated aim of having a diverse student body.

The Universities can and must do better, not only for the sake of better educational outcomes but for the betterment of all Americans. So can all of American higher education. *Grutter* hoped that universities would "draw on the most promising aspects of . . . race-neutral alternatives as they develop." 539 U.S. at 342. But although the Court saw "no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point," *id.*, that end point is no more in sight today than when *Grutter* was decided.

Finally, the Universities do not serve their alleged diversity interest by discriminating against Asians and Asian Americans. It is nonsensical for the Universities to claim that they need fewer, rather than more, applicants from the most populous and diverse continent on the planet in order to further diversity.

ARGUMENT

I. The affirmative action regime countenanced by *Grutter* is discriminatory and would be unlawful in any other context.

It has long been clear that the "holistic" approach authorized by *Grutter*, 539 U.S. at 337, still results in clear racial bias. *See* Thomas J. Espenshade et al., NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 93 (Princeton Univ. Press, 2009). A study looking at 1997 admission practices demonstrated that Black applicants received an "admission bonus" "equivalent to 310 SAT points." *Id.* Asian candidates, on the other hand, were penalized 140 SAT points compared to their white counterparts. *Id.* This would *appear* to run counter to *Grutter's* admonishment that, although universities may use race as a "plus" factor, an applicant cannot be evaluated "in a way that makes an applicant's race or ethnicity the defining feature of his or her application." 539 U.S. at 337. Therefore, one would think that, post-*Grutter*, this practice would not be permissible. But when this data was cited in disputes about Princeton's admissions process between 2006 and 2011, Princeton successfully defended itself on the grounds that "the university's holistic review of applicants in pursuit of its compelling interest in diversity meets the standards set by the Supreme Court." Rebecca Prinster, *Feds Clear Princeton of Discriminating Against Asian American*

Students, INSIGHT INTO DIVERSITY (Sept. 28, 2015).[2] *Grutter*'s admonishment is at best a paper tiger; universities may still openly discriminate on the basis of race.

No other institution or industry is trusted with the use of racial classifications. *See Shelley v. Kraemer,* 334 U.S. 1 (1948) (holding race-based restrictive covenants violate the Equal Protection Clause); *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273 (1976) (holding race-based discrimination in employment violates Title VII of the Civil Rights Act of 1964); *Strauder v. West Virginia,* 100 U.S. 303 (1880) (holding racial discrimination in jury selection offends the Equal Protection Clause). *Strauder* and its progeny are particularly noteworthy here because one could just as easily argue that juries, like universities, have an interest in diverse viewpoints. Yet racial discrimination in each of those circumstances is intolerable.

What makes universities so special that they may discriminate where employers and juries may not? *Bakke* says universities have a First Amendment right "to make [their] own judgments as to education[,] includ[ing] the selection of [their] student bod[ies]." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312 (1978). From this, the *Grutter* Court extrapolated the notion that "attaining a diverse student body is at the heart of the [university]'s proper institutional mission." *Grutter,* 539 U.S. at 329. How convenient for universities. Less convenient, of course,

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[2] https://www.insightintodiversity.com/feds-clear-princeton-of-discriminating-against-asian-american-students/.

for the students the universities are supposed to be educating and the students' families. *Grutter* emphasized the benefits conferred on those who are admitted: they gain "the skills needed in today's increasingly global marketplace" and preparation "for work and citizenship" in a manner "pivotal to sustaining our political and cultural heritage." 539 U.S. at 330-31 (cleaned up). But apparently those applicants who do not check certain racial boxes do not deserve those benefits, regardless of their effort expended to attain the measurable qualities that the universities purport to require for their admission candidates in the name of excellence.

Bakke and *Grutter* did note, however, that "'good faith' on the part of a university is to be 'presumed' absent 'a showing to the contrary.'" *Grutter,* 539 U.S. at 329, quoting *Bakke,* 438 U.S. at 318-19. And here, at least, that showing to the contrary is readily available.

II. Harvard rejected race-neutral alternatives to maintain its discriminatory ALDC admission program.

A. Harvard was presented with workable race-neutral alternatives to its race-based admissions program.

Harvard's stated intention is diversity: "Harvard tries to create opportunities for interactions between students from different backgrounds and with different experiences to stimulate both academic and non-academic learning." Pet'rs App. in 20-1199 ("Harvard Pet'rs App.") 109 (District Court Findings of Fact).

Harvard convinced the First Circuit that its goal was "not simple ethnic diversity" but rather "exposure to widely diverse people, cultures, ideas, and viewpoints." Harvard Pet'rs App. 59-60 (Opinion below, quoting *Grutter v. Bollinger,* 539 U.S. 306, 324-45 (2003)).

Harvard convened a committee to determine, as *Grutter* and *Fisher* require, "whether Harvard College's pursuit of its diversity-related educational objectives still requires it to consider the race and ethnicity of undergraduate applicants . . . or whether Harvard could accomplish those objectives without taking race into account." William Fitzsimmons, Rakesh Khurana, & Michael D. Smith, *Report of the Committee to Study Race-Neutral Alternatives*, Apr. 2018 ("Harvard Report"), Joint. App'x (JA) 1307-25. After this lawsuit was filed, that committee released a report stating that Harvard's "goal is to admit students . . . who will contribute through their diversity of experiences, backgrounds, and interests to the quality and vitality of life at the College." *Id.* at 1 (JA 1307).

While promoting student body diversity may be a compelling interest, "the reviewing court must ultimately be satisfied that *no* workable race-neutral alternatives would produce the educational benefits of diversity." *Fisher v. Univ. of Tex.,* 570 U.S. 297, 312 (2013) (emphasis added). "[S]trict scrutiny imposes on the university the ultimate burden of demonstrating . . . that available, workable race-neutral alternatives do not suffice." *Id.* In other words, Harvard's discriminatory plan passes muster only if it is the sole way to effectively achieve its goal.

As Petitioner alluded to in its Harvard petition, at least one workable race-neutral alternative exists. Pet. 43. This statement undersells the Expert Report of Richard D. Kahlenberg, Dkt. 416-1 in No. 1:14-cv-14176-ADB (D. Mass.) ("Expert Report"). The Expert Report was specifically commissioned to examine "whether Harvard could implement workable race-neutral alternatives that would produce the educational benefits of diversity." Expert Report at 3.

In fact, Kahlenberg found several race-neutral alternatives. First, Kahlenberg found that increasing socioeconomic preferences would increase both racial and socioeconomic diversity without penalizing applicants based on their race. Expert Report at 17-29. He noted that such a program would benefit "working-class" applicants who are "more likely . . . to live in segregated neighborhoods"—in other words, it would increase the socioeconomic diversity Harvard professes to want. *Id.* at 19.

Second, Kahlenberg proposed that Harvard live up to its 2007 commitment to increase financial aid. *Id.* at 29. Harvard, with its $40,929,700,000 endowment, could afford to increase financial aid in furtherance of its stated objective of increasing socioeconomic diversity. Ilana Kowarski, *10 Universities With the Biggest Endowments*, U.S. News (Sept. 22, 2020).[3] Increasing financial aid would allow Harvard "to create opportunities for interactions between students from different backgrounds and with different experi-

[3] https://www.usnews.com/education/best-colleges/the-short-list-college/articles/10-universities-with-the-biggest-endowments.

ences." Harvard Pet'rs App. 109 (District Court Findings of Fact).

Third, Kahlenberg discussed eliminating preferences for athletes, children of donors or faculty members, and the "Z-list," discussed in more detail later in this brief. Expert Report at 31-36.

Fourth, Kahlenberg observed that one of Harvard's own professors published an essay in a book Kahlenberg edited, suggesting that "a university" could achieve a greater degree of diversity by sorting students through a "geographic diversity algorithm" using ZIP codes. Expert Report at 2, 37 (quoting Danielle Allen, *Talent is Everywhere: Using Zip Codes and Merit to Enhance Diversity*, *in The Future of Affirmative Action: New Paths to Higher Education Diversity after* Fisher v. University of Texas 147-48 (Richard D. Kahlenberg ed., 2014)).

Fifth, Kahlenberg suggested that Harvard increase its recruitment efforts, noting that Harvard "exerts far less effort to recruit economically disadvantaged applicants" and "does an especially poor job of recruiting . . . students whose parents do not have a college degree." Expert Report at 39.

Sixth, Kahlenberg noted that "many selective public and private colleges" provide opportunities for high-achieving community college students to transfer, thus promoting socioeconomic diversity. Expert Report at 41. However, Harvard has "lagged" while other colleges have been increasing community college transfers. *Id.*

Finally, Kahlenberg proposed that Harvard end early admissions—as it had once done, citing their inherent unfairness to low-income students. Expert Report at 42. In total, Kahlenberg proposed seven different race-neutral alternatives to achieve Harvard's stated goal of increasing socioeconomic diversity; Harvard rejected them all.

Kahlenberg observed that the sum total of Harvard's token effort to meet its obligation under *Fisher* to consider a workable alternative to its racist admissions system was "a disbanded committee" and the creation of a three-member committee that met only once. Expert Report at 16. Harvard's own experts did not address this failure in their own reports. Rebuttal Expert Report of Richard D. Kahlenberg, Dkt. 416-2 in No. 1:14-cv-14176-ADB (D. Mass) ("Rebuttal Report") at 6. (The Rebuttal Report is dated January 29, 2018; the three-member committee met in March of that year to discuss "race-neutral alternatives . . . including responses to [the] Kahlenberg rebuttal report." JA 4412. That committee produced the Harvard Report in April 2018; some of the Harvard Report's shortcomings will be discussed in Section II of this brief.)

Most telling of all, Kahlenberg used a model produced by one of *Harvard*'s expert witnesses (with a few improvements to account for disadvantaged high school students; parental income, education, and English proficiency; neighborhood income; athletic preferences; and a lack of early admissions) to demonstrate that viable race-neutral alternatives exist, and that Harvard is deliberately ignoring them in violation of *Fisher*. Rebuttal Report at 29-32. Kahlen-

berg's simulation—again, based on Harvard's expert's model, and therefore using data that Harvard had or should have had available—saw white students fall from 40% of admissions to 32%; Asian-American students rise from 24% to 31%; and, perhaps most important for Harvard's stated goal of increasing socioeconomic diversity, first-generation college admissions rose from 7% to 25%. Rebuttal Report 33.

To reiterate, Harvard's stated justification for its racial discrimination is that it wants to obtain "a student body that reflects the broadest possible range of backgrounds and experiences." Harvard Report at 1, JA 1307. Harvard maintains that if it eliminated race as a factor in admissions, minority representation in the student body would decrease. *Id.* at 8, JA 1314. To defend its racist practices, Harvard must believe that "no workable race-neutral alternatives would produce the educational benefits of diversity." *Fischer,* 570 U.S. at 312. Harvard's defense in this case revolves around diversity.

Why, then, does Harvard insist on protecting its policy of favoring athletes, legacies, "Dean's list" or "Z-list" applicants, and children of faculty (collectively "preferred applicants"), even though its objectives in maintaining such favoritism are directly at odds with its stated objective of student body diversity?

B. The system Harvard defends is at odds with its stated goal of diversity.

Preferred applicants are still disfavored if they are Asian-American—or indeed any minority. Between 2014 and 2019, 68 percent of admitted preferred ap-

plicants were white, while Asian Americans made up only 12% of that figure, and African Americans and "Hispanic or Other" represented a paltry six percent each. JA 1776. This program is plainly at odds with Harvard's stated goals of promoting racial and socio-economic diversity.

Start with athletes. 86 percent of athletes are admitted, compared to only six percent of non-athletes. JA 1785. One might expect, depending on the sport, an at-least equal share of white and African-American athletic admissions. For example, 58.9 percent of NFL players in 2019 were African-American. Christina Gough, *Share of African Americans in the National Football League in 2019, by Role*, Statista (Aug. 27, 2020).[4] In the NBA, 74.8 percent of players were African-American. Richard Lapchick, *The 2019 Racial and Gender Report Card: National Basketball Association*.[5] What was the percentage of African-American athletes admitted by Harvard in 2019? 13 percent. JA 1785.[6]

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[4] https://www.statista.com/statistics/1154691/nfl-racial-diversity/.

[5] https://tidesport.org/nba (last visited March 25, 2021).

[6] A separate reason for eliminating athletic preferences is that they are ripe for abuse. While Harvard itself was not implicated, the recent admissions scandal cannot have escaped the Court's notice. The rich and famous paid more than $25 million in total bribe money to place their children in prestigious universities' athletic admissions program. Aaron Feis & Lia Eustachewich, *Felicity Huffman, Lori Loughlin Busted in College Admissions Cheating Scandal,* N.Y. Post, Mar. 12, 2019, https://nypost.com/2019/03/12/lori-loughlin-felicity-huffman-busted-in-college-admissions-cheating-scandal/.

Legacies, likewise, are overwhelmingly white. As Petitioner's expert observed, "only 7.6% of legacy admi[ssions] in 2002 were underrepresented minorities, compared with 17.8% of all students." Expert Report at 32, citing John Brittain & Eric L. Bloom, *Admitting the Truth: The Effect of Affirmative Action, Legacy Preferences, and the Meritocratic Ideal on Students of Color in College Admissions*, *in Affirmative Action for the Rich: Legacy Preferences in College Admissions* 132 (Richard D. Kahlenberg ed., 2010). Petitioner's expert also determined that four of the top ten universities do not employ legacy preferences, suggesting that Harvard could do the same if it were, in fact, committed to socioeconomic diversity. Expert Report at 32.

At trial, Dean Fitzsimmons admitted that Harvard gives a "tip" in its admissions scoring process to children of alumni because alumni perform recruitment tasks for Harvard, promote Harvard across the country, and "have helped raise money or give money to Harvard." JA 684. (Kahlenberg argues that "the existence of legacy preferences does not increase alumni donations to an institution." Expert Report at 32.) Likewise, Harvard also "give[s] a tip to children of Harvard faculty and staff." Appellant's Appendix in No. 19-2005 (1st Cir.) at 921. It does this "to attract faculty to Harvard." *Id.* at 922. And it also gives a "tip" to athletes because "having all of [its] students gather together . . . for athletic contests builds a spirit of community." *Id.* at 915. These "tips" matter; legacy applicants have a 33.6 percent admittance rate compared to 5.9 percent of non-legacy applicants, and children of faculty or staff have a 46.7 percent admittance rate compared to a 6.6 percent rate for appli-

cants who are not children of faculty or staff. *Id.* at 5989. And Dean Fitzsimmons admitted that "[t]here are some [athletes and legacies] who needed a tip to get in." *Id.* at 916.

So, it should come as no surprise that Kahlenberg's expert report proposed removing preferred applicant "tips" as a means of achieving a greater degree of racial and socioeconomic diversity and, incidentally, a more race-neutral admissions rubric. Expert Report 31-36. For example, if Harvard stopped showing favoritism to children of "the wealthiest donors, those giving $1 million or more," Harvard's student body would obviously become more socioeconomically diverse. Expert Report at 34.

Kahlenberg also proposed eliminating the "Z-list," a method by which Harvard admits mediocre students (those whose "academic records on average fall about as close to rejected students as they do to admitted students") on the condition that they take a gap year before entering Harvard. *Id.* at 34, 36.

The Harvard Report euphemistically states that the Z-list "allows Harvard to admit excellent students who would benefit from the experiences gained in a gap year." Harvard Report at 17 (JA 1323). But then the Report immediately goes on to admit that, yes, some Z-list students "also have significant connections to the University." *Id.* Harvard nevertheless presents this as a good thing. Favoring well-connected applicants at the expense of underserved communities "helps to cement strong bonds between the university and its alumni." *Id.* at 16 (JA 1322). An inoffensive goal, perhaps—but not a sufficiently

important reason to discriminate based on race. And while Harvard self-servingly states that "children of Harvard alumni tend to be very strong applicants," *Id.* at 17 (JA 1323), that only raises the question of why "very strong applicants" need an extra advantage.

Likewise, Ruth Simmons, President of Prairie View A&M University in Texas and an expert witness for Harvard, testified at trial that Harvard would "never" admit a child of an alumnus or donor "if they [were] not qualified on the same basis as other students," JA 1003, raising the question why those applicants get "tips" in the first place. Her further testimony may answer that question: "when individuals who are prominent, . . . who have all manner of things that they can do to assist the university, might have children apply," it would not be "problematic to admit those students" "if it is possible that their children are highly able and . . . their parents could make a difference for the institution." JA 1004. This is somehow different from "admit[ting] a student because their family promises a contribution," which would be a "completely inappropriate" "quid pro quo." JA 1004. Semantics aside, Harvard's interest in maintaining these sorts of perks for wealthy, well-connected (and usually white) students is at odds with its stated intention of having a diverse student body.

Moreover, this sort of discrimination flies in the face of even *Grutter*'s dream of "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation." *Grutter,* 539 U.S. at 332. Under Harvard's regime, how does a poor white or Asian

student, the first in her family to attend college, get admitted to Harvard despite having a GPA and SAT scores more than satisfactory to perform well at Harvard? She does not. This directly contradicts Harvard's proclaimed mission. *See Bakke,* 438 U.S. at 313 ("[T]he 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" (cleaned up)). This student's "ideas and mores," which, given her background, would likely be more extraordinary than those of the star football players Harvard would rather admit, do not matter.

Harvard is, on the one hand, hiding behind its "diversity" goal to discriminate against Asian Americans, and on the other, completely ignoring that goal to avail itself of wealthy parents' largesse (to the detriment of *all* minorities). This hypocrisy should not stand.

III. Discrimination is an inefficient means by which to obtain diversity.

The *Grutter* Court took "the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula and will terminate its race-conscious admissions program as soon as practicable.'" 539 U.S. at 343 (citation omitted). Such race-neutral alternatives do exist, *see ante* at Section II-A. But Harvard and other schools with race-based admissions have not followed them—even as their current systems fail to promote diversity.

A. White students are also beneficiaries of affirmative action programs.

If Asian Americans are being discriminated against, *cui bono*? If affirmative action worked as intended, the answer would be "underserved African-Americans." But that is not the case. "[T]he primary beneficiaries of affirmative action have been Euro-American women." Kimberle W. Crenshaw, *Framing Affirmative Action,* 105 MICH. L. REV. FIRST IMPRESSIONS 123, 129 (2007);[7] *see also* Victoria M. Massie, *White Women Benefit Most from Affirmative Action – And Are Among Its Fiercest Opponents,* VOX (June 23, 2016).[8] And, again, legacy admissions also favor rich white applicants who obviously do not bring a diverse viewpoint to campus.

The solution to this problem, according to affirmative action's defenders, is to double down. *See, e.g.,* Sally Kohn, *Affirmative Action has Helped White Women More than Anyone,* TIME (June 17, 2013, 9:00 AM)[9] ("The success of white women make a case not for abandoning affirmative action but for continuing it."). This, despite the fact that *Grutter* presumed a good-faith intent on the part of universities to "terminate [their] race-conscious admissions program as soon as practicable." 539 U.S. at 343; *see also Regents of Univ. of Cal. v. Bakke,* 438 U.S. 263, 318-19 (1978) (opinion of Powell, J.) ("[G]ood faith would be pre-

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[7] https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1093&context=mlr_fi.

[8] https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action.

[9] https://time.com/4884132/affirmative-action-civil-rights-white-women/.

sumed in the absence of a showing to the contrary.") Doubling down on a failed, racist policy is not evidence of good faith.

Over forty years ago, Justice Powell wrote that universities must not be presumed to be operating their "facially nondiscriminatory admissions polic[ies] . . . as a cover for the functional equivalent of a quota system." *Bakke,* 438 U.S. at 318. Sadly, the evidence of time has shown this Court can no longer rely on Justice Powell's good-faith assumption.

B. Minimizing Asian presence on campus does not achieve diversity because Asians and Asian Americans bring their own unique viewpoints to universities.

To reiterate, the Universities' affirmative action plans are *supposed* to admit "students who could contribute to the University [and] the achievement of critical masses of underrepresented populations," the latter of which is necessary to give all students "the educational benefits of a diverse learning environment" and to avoid "undue pressure on underrepresented students." UNC Pet'rs App. 54 (cleaned up). But minimizing the presence of Asians and Asian Americans does not further this interest.

Asian Americans as a whole are far more likely to bring "a perspective different from that of" other students. *Grutter,* 539 U.S. at 319; *see also* UNC Pet'rs App. 57 ("improved classroom discussion through different perspectives" a sought benefit of using race in admissions). This is because Asians and Asian Americans are more likely to be foreign-born than their

counterparts: 57 percent of Asian Americans, including 71% of Asian-American adults, were born in another country, compared to only 14 percent of all Americans and 17 percent of all American adults. Abby Budiman & Neil G. Ruiz, *Key Facts About Asian-Americans, a Diverse and Growing Population,* PEW RESEARCH (Apr. 29, 2021).[10] *Amicus* Momoko Takahashi is one such individual: born in Japan, she moved to the U.K. before immigrating to America as a nine-year-old. Yet despite having lived in two more countries and speaking one more language (Japanese, the furthest-removed language from English)[11] than most of her peers, and despite her record as a champion high school debater, she was rejected from every non-state university she applied to as an undergraduate applicant in favor of less accomplished applicants.

Approximately one-third of Asian Americans, particularly those raised in households where English is not spoken, lack proficiency in writing, reading, and speaking skills. Guofang Li, *Other People's Success: Impact of the 'Model Minority' Myth on Underachieving Asian Students in North America*, KEDI JOURNAL OF EDUCATIONAL POLICY, Vol 2., Issue 1, 69, 70 (2005). *Amicus* Momoko Takahashi is one among many Asians and Asian Americans who have strug-

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[10] https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/.

[11] Barry R. Chiswick & Paul W. Miller, *Linguistic Distance: A Quantitative Measure of the Distance Between English and Other Languages,* IZA Discussion Paper No. 1246 (Aug. 2004), https://ftp.iza.org/dp1246.pdf; *see also Foreign Language Training,* Foreign Service Institute, U.S. Department of State, https://www.state.gov/foreign-language-training/ (last visited April 26, 2022) (Japanese is one of five "super-hard languages" that require 2200 class hours to master).

gled with English as a second language, but did not receive the necessary help in school due to being stereotyped as a super-smart Asian. Ms. Takahashi excelled in mathematics, which apparently offset her shortcomings in other subjects in her teachers' eyes. Her mathematics proficiency, however, was not due to her race, but rather due to the sacrifices made by her family, who believed that school excellence was a collective effort. This is a common experience for many Asian Americans; it is not unusual for a student's parents to sell their house to finance their child's education, leading one Asian American to comment that "if I failed to earn scholarships[,] it would be the financial equivalent of burning down my parents' home." Jingjing Xiao, *For an Asian-American Family, the Cost of Education,* N.Y. TIMES (Mar. 26, 2019)[12]; *see also Children of Asian Immigrants Reveal Sacrifices Their Parents Made,* YouTube (June 16, 2015)[13].

Asian Americans can also bring a unique perspective on discrimination. They were, after all, the victims of the first U.S. law to prevent immigration and naturalization on the basis of race, the Chinese Exclusion Act of 1882. *Asian Americans Then and Now,* ASIA SOCIETY.[14] They have also been victims of the Japanese internment during World War II and the recent spate of anti-Asian violence in the wake of COVID-19.

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[12] https://www.nytimes.com/2019/03/26/well/family/for-an-asian-american-family-the-cost-of-education.html

[13] https://www.youtube.com/watch?v=k1lDX0lzhd4

[14] https://asiasociety.org/education/asian-americans-then-and-now (last visited Dec. 11, 2021).

C. Excluding or minimizing the presence of Asians and Asian Americans does not further the goal of diversity because Asian Americans themselves are an extremely diverse group.

By handicapping Asian or Asian-American applicants, universities are reducing students with Chinese, Japanese, Korean, Vietnamese, Thai, Cambodian, or Indian heritage (among others) into a single box labeled "Asian." Each of these distinct ethnic groups has its own language, culture, sociological makeup, and perspective, but they are all locked into the same box in race-based admissions programs.

Most of those categories are self-explanatory, but an example of a sociological difference among East Asian cultures illustrates the point. Chinese and Koreans are more likely to adopt new technologies than Japanese, who are more focused on potential negative effects of new technology. Martin Schiere, et al., *Understanding the Social Cultural Differences Between China, Japan and South Korea for Better Communication,* GLOCALITIES.[15] And Japanese and South Koreans are more likely to be "open-minded idealists who value personal development and culture" than their Chinese counterparts, who are more likely to "value family and community." *Id.*

Southeast Asians arguably have it even worse. The very term "Asian American" tends to center on East Asians (such as Chinese, Koreans, or Japanese)

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[15] https://glocalities.com/news/understanding-the-social-cultural-differences-between-china-japan-and-south-korea-for-better-communication (last visited Dec. 11, 2021).

at the expense of South Asians (Bangladeshis, Indians, Sri Lankans) and Southeast Asians (Cambodians, Filipinos, Thai, Vietnamese). *See, e.g., Li Zhou, The Inadequacy of the Term "Asian American,"* VOX (May 5, 2021, 10:10 AM).[16] And Southeast Asians in America often live experiences entirely different from those of their East Asian or non-Asian counterparts. For example, while only 12.1 percent of all U.S. Asians live in poverty, below the U.S. average of 15.1%, that number is 19.1 percent for Cambodians. *U.S. Cambodian Population Living in Poverty,* PEW RESEARCH CENTER (Sept. 8, 2017).[17] Even more curiously, while a smaller percentage of U.S.-born Asians live in poverty than their foreign-born counterparts, that statistic is reversed for Cambodians. *Id.* And while Indian Americans have a median income of $100,000, Burmese Americans have a median income of only $36,000. Dedrick Asante-Muhammad & Sally Sim, *Racial Wealth Snapshot: Asian Americans and the Racial Wealth Divide,* NATIONAL COMMUNITY REINVESTMENT COALITION (May 14, 2020).[18] Bangladeshi and Hmong poverty rates outstrip those of African-Americans. Huizhong Wu, *The Model Minority Myth: Why Asian-American Poverty Goes Unseen*, MASHABLE (December 14, 2015).[19] And while over 94 percent of Taiwanese and Japanese Americans have a high school diploma, that statistic is under 66 percent for

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[16] https://www.vox.com/identities/22380197/asian-american-pacific-islander-aapi-heritage-anti-asian-hate-attacks.
[17] https://www.pewresearch.org/social-trends/chart/u-s-cambodian-population-living-in-poverty/.
[18] https://ncrc.org/racial-wealth-snapshot-asian-americans-and-the-racial-wealth-divide/.
[19] http://mashable.com/2015/12/14/asian-american-poverty/#.UK4LnHskgqr

Laotian and Hmong Americans. Benjamin Chang, *Asian Americans and Education,* OXFORD RESEARCH ENCYCLOPEDIA OF EDUCATION (Feb. 2017).[20] 17 percent of Pacific Islanders, 14% of Cambodian Americans, and 13 percent of Laotian and Hmong Americans have four-year college degrees (compared to 22 percent for African-Americans or 15 percent for Hispanics). Sahra Vang Nguyen, *The Truth about 'The Asian Advantage' and 'Model Minority Myth'*, HUFFINGTON POST (Oct 14, 2015).[21]

And Southeast Asians also differ among themselves. Vietnamese culture differs from Cambodian and Lao culture, for example, in that the former has strong Chinese influences while the latter two are more influenced by India. *Asian Americans Then and Now, ante*. And the majority of Southeast Asian countries are "home to dozens of different ethnic groups" and have within themselves a clear geographically-based religious divide. Michael G. Peletz, *Diversity and Unity,* ASIA SOCIETY (last visited Dec. 13, 2021).[22] A student from one such country's highland areas, following an animalistic tradition, would obviously have perspectives from those of a student from the lowlands, who would be more likely to adhere to a more formal religion such as Islam, Buddhism, or Christianity. *Id.*

The university admissions systems' response to this rich cultural diversity is to take geography as an indicator of diversity, call the people from the largest

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[20] https://files.eric.ed.gov/fulltext/ED577104.pdf.

[21] http://huffingtonpost.com/sahrah-vang-nguyen/the-truth-about-the-asian_b_8282830.html)

[22] https://asiasociety.org/education/diversity-and-unity.

continent in the world (and their American descendants) collectively "Asian," and disadvantage them in their admissions process. All (ostensibly) in the name of "diversity."

CONCLUSION

In *Grutter,* this Court wrote that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343. There are now seven years left on that clock, and universities nationwide are no closer to abandoning race as a factor in admissions than they were on the day *Grutter* was decided. All they've done is perpetuate a racist system that fails to obtain their stated goal of diversity.

This Court should adopt a clear, bright-line rule: no educational institution may consider an applicant's race in determining whether to admit that applicant.

Respectfully submitted,

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