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 *AMICI CURIAE* FORMER FEDERAL OFFICIALS OF THE U.S. DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS IN SUPPORT OF PETITIONER

William E. Trachman
Counsel of Record
Joseph A. Bingham
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
wtrachman@mslegal.org
Attorneys for Amici Curiae

May 6, 2022

QUESTION PRESENTED

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

3. The Constitution and Title VI ban race-based admissions unless they are "'necessary'" to achieve the educational benefits of diversity. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 312 (2013). Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES - (CHRONOLOGICAL)

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are former officials of the U.S. Department of Education's Office for Civil Rights, having served under former Secretary of Education Betsy DeVos, and are interested in the lawful and appropriate enforcement of the Equal Protection Clause of the Fourteenth Amendment, the Equal Protection Principles contained in the Fifth Amendment Due Process Clause, and Title VI of the Civil Rights Act of 1964.

Kenneth L. Marcus is the former Assistant Secretary for Civil Rights, having served from 2018 to 2020.

Kimberly M. Richey is the former Principal Deputy Assistant Secretary for Civil Rights, having served from 2018 to 2021, including as Acting Assistant Secretary for Civil Rights for parts of 2020 and 2021.

Candice Jackson is the former Deputy Assistant Secretary for Strategic Operations and Outreach, having served from 2017 to 2018, including as Acting Assistant Secretary for Civil Rights for parts of 2017 and 2018.

---

[1] The parties have consented to the filing of this *amici curiae* brief. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no party or counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

David C. Tryon is a former Deputy Assistant Secretary for Policy and Development, having served from 2019 to 2021.

William E. Trachman is a former Deputy Assistant Secretary for Policy and Development, having served from 2017 to 2019, and later as Senior Counsel from 2019 to 2021.

Christian Corrigan is a former Senior Counsel to the Assistant Secretary in the Office for Civil Rights, having served from 2019 to 2021.

Sarah Perry is a former Senior Counsel to the Assistant Secretary in the Office for Civil Rights, having served from 2020 to 2021.

The Department of Education's Office for Civil Rights ("OCR") functions as an administrative law enforcement agency. OCR has jurisdiction over nearly all recipients of federal funds from the Department of Education, and enforces several federal civil rights statutes, including Title VI of the 1964 Civil Rights Act and its implementing regulations. 42 U.S.C. § 2000d; 34 C.F.R. § 100, *et seq.*[2]

As part of its enforcement authority, OCR receives complaints from the public, and where appropriate,

[2] OCR also enforces Title IX of the Educations Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, as well as Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* OCR also has jurisdiction over complaints arising under the Age Discrimination Act, 42 U.S.C. § 6101, *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905.

investigates those complaints and brings recipients of federal funds into compliance with Title VI through resolution agreements or enforcement proceedings. *See, e.g.*, U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS, HOW TO FILE A COMPLAINT WITH THE DEPARTMENT OF EDUCATION (September 2010);[3] *see also* U.S. Dep't of Educ. YouTube Channel, *OCR Short Webinar: How to File an OCR Complaint* (Mar. 20, 2020).[4] OCR also initiates proactive investigations in some instances, called Directed Investigations, and, separately, opens Compliance Reviews related to major OCR initiatives. *See* U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS, CASE PROCESSING MANUAL 23 (August 26, 2020) (describing Compliance Reviews in Section 401 of and Directed Investigations in Section 402).[5]

---

[3] https://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf.

[4] https://www.youtube.com/watch?v=BuwVa3JJE-4.

[5] https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf. On January 17, 2019, for instance, OCR announced a Compliance Review initiative on the topic of the inappropriate use of restraint and seclusion with respect to students with disabilities. *See U.S. Dept. of Ed. Announces Initiative to Support Children with Disabilities,* Campus Safety Magazine (Jan. 21, 2019), https://www.campussafetymagazine.com/safety/u-s-dept-ed-children-disabilities/. Similarly, on February 26, 2020, OCR announced a major initiative to open Compliance Reviews on the topic of sexual assault in elementary and secondary schools. *See* Letter to Superintendents from Assistant Secretary for Civil Rights Kenneth L. Marcus, *Secretary DeVos Announces New Civil Rights Initiative to Combat Sexual Assault in K-12 Public Schools* (Feb. 26, 2020), https://content.govdelivery.com/accounts/USED/bulletins/27debd7.

SUMMARY OF THE ARGUMENT

In determining whether to revisit its precedents, this Court asks, *inter alia*, whether they involve constitutional issues, whether they are well-reasoned, and whether they have proven to be workable. *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). This case presents fundamental questions of constitutional interpretation. These *Amici* will leave to others the question as to whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), was well-reasoned. But *Amici* can say with certainty, based on their experience in federal civil rights enforcement, that few areas of the law have been as *un*workable as the doctrinal framework that this Court established for addressing racially preferential university admissions programs.

This can be seen not only in the basic Equal Protection Clause and Title VI violations committed in this case by two of the nation's premier private and public educational institutions—violations which are, moreover, pervasive throughout higher education—but also in the futility of Executive Branch efforts to establish stable, predictable enforcement programs based on such cases as *Gratz v. Bollinger*, 539 U. S. 244 (2003), and *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) (*Fisher II*).

As a result, the Executive Branch has lurched wildly, from administration to administration, in its efforts to

provide educational institutions with a clear statement of the rules on which they will be evaluated when their admissions or financial aid programs are subjected to civil rights challenges. This has led not only to legal ambiguity and unpredictability but also to widespread race-conscious activity of precisely the sort that civil rights laws are intended to limit. This situation cannot be attributed solely to the different policy commitments and priorities embraced by successive presidential administrations. Rather, it results from decisions of this Court which fail to provide adequate guidance.

Under this Court's precedents, the use of racial classifications by public and federally-funded institutions is heavily disfavored. *Gratz v. Bollinger*, 539 at 270. *Cf. Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."); *accord League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring) ("It is a sordid business, this divvying us up by race.").

Yet in *Amici*'s experience, educational institutions subvert this principle on the basis of vague diversity or "equity" standards drawn tenuously from this Court's precedents. From student assignment at the K-12 level, to affinity groups, to programming, to college scholarships, and numerous other areas, schools are conscious of race and treat students differently based on their race. *See, e.g.*, U.S. DEP'T OF

EDUC.'S OFFICE FOR CIV. RIGHTS AND U.S. DEP'T OF JUST.'S CIV. RIGHTS DIV., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (Dec. 2, 2011) (citing *Grutter* for the proposition that K-12 "[s]chool districts are required to use race-neutral approaches only if they are workable.");[6] Nondiscrimination in Federally Assisted Programs: Title VI of the Civil Rights Act of 1964, Federal Register Vol. 59, No. 36 (Feb. 23, 1994) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), for the proposition that "a college may use race or national origin as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity.").[7]

Although this Court's precedents have attempted to curtail the misuse of race in American educational institutions, the trend is toward *more* racially preferential conduct, not less. *See, e.g.*, Draft OCR Letter of Finding to Evanston/Skokie School District 65, at 15 (Undated) ("OCR notes with particular concern the "What is Whiteness?" exercise used in the District's Beyond Diversity trainings, among other lessons that advocated assigning students and individuals characteristics based solely on their race.")[8]; *see also* Asra Q. Nomani & Erin Wilcox, *The*

---

[6] https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf ("DECEMBER 2011 ELEMENTARY AND SECONDARY GUIDANCE") (withdrawn on July 3, 2018; listed as "Under Review" as of July 30, 2021).

[7] https://www2.ed.gov/about/offices/list/ocr/docs/racefa.html (withdrawn on August 26, 2020; listed as "Under Review" as of August 19, 2021).

[8] *See infra*, Note 28.

purge of Asian American students at Thomas Jefferson High School has begun, Washington Post (June 2, 2022) ("But this past year, school leaders bemoaned a lack of 'diversity' at [Thomas Jefferson High School] and launched a crusade to change admissions. The student body is about 80 percent minority, but the wrong kind of minority for school officials, with about 70 percent Asian and about 10 percent of the minority students Black, Hispanic and multiracial.").[9]

Together, the cases consolidated here present the questions of whether racial discrimination against college applicants at Harvard and the University of North Carolina is compatible with the Equal Protection Clause and Title VI. The answer is surely no. And answering this question firmly and broadly is especially important now, given that the Court's 25-year admonition in *Grutter*, 539 U.S. at 310, is approaching, but is itself on uncertain ground. *Compare id.* at 310 ("The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."), *with Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157, 192 (1st Cir. 2020) ("Indeed, the Supreme Court never mentioned *Grutter*'s 25-year timeline in *Fisher I or Fisher II*.").

The question of whether diversity is an all-purpose excuse for race discrimination is not limited to the college admissions context at two schools. And for that reason, the Court should embrace the present

---

[9] https://www.washingtonpost.com/opinions/2021/07/02/purge-asian-american-students-thomas-jefferson-has-begun/

opportunity to end the pervasive use of race in educational decision-making. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *Miller v. Johnson*, 515 U.S. 900, 912 (1995) ("Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.") (internal quotation marks omitted).

Put simply, "diversity" was never meant to be an indefinite catch-all exception to the U.S. Constitution or to Title VI. *See, e.g.*, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."); *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) ("[T]he central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race."); *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind.").

Nor is the term "diversity," in its true sense, really in play when Harvard and the University of North Carolina use heavy-handed race-conscious policies. Instead, schools treat race as an end in itself, without regard to whether a student's skin color is genuinely connected to enhancing a school's diversity of

viewpoints or life experiences. *See, e.g.*, *Fisher II*, 579 U.S. at 414 (2016) (Alito, J., dissenting) ("It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share."). It is thus time to put to bed *Grutter*'s holding that racial discrimination is permissible because it is essential to the goal of diversity in education.

ARGUMENT

I. Harvard and the University of North Carolina Have Violated the Equal Protection Clause and Title VI.

The evidence in the record establishes that Harvard and the University of North Carolina have failed to comply with the Equal Protection Clause and Title VI standards articulated by this Court and by OCR. These schools use race to classify and segregate students during the consideration of their applications, and to make decisions about whether to extend offers of admission. This consideration reflects a heavy-handed form of racial balancing that bears little resemblance to the multi-factored diversity described in this Court's precedents. This use of race as a proxy for diversity cuts directly against the constitutional interests at play here, by suggesting that individuals of certain racial demographics contribute equally to "diversity" without regard to their life experiences, values, or viewpoints.

Harvard and the University of North Carolina are not alone. *Amici*'s experience is that schools have

increasingly used racial discrimination when making admissions and other educational decisions.

A. The Pervasive Use of Race Cannot Be Deemed Necessary to Satisfy a Compelling Interest.

Harvard and UNC's heavy use of racial preferences in admissions reflects racial balancing of a sort that this Court has rejected as "patently unconstitutional." *Fisher v. University of Texas at Austin*, 570 U.S. 297, 311 (*Fisher I*) (quoting *Grutter*, 539 U.S. at 330).

The compelling diversity interest recognized by this Court consists of an institution's efforts to achieve the educational benefits that flow from the exchange of varied viewpoints and perspectives, as may be accomplished by admitting students who collectively create a *multifactored* diversity. *Grutter*, 539 U.S. at 330; *Bakke*, 438 U.S. at 314. To judge a plan exclusively against its ability to attract African-American and Hispanic students would imply a pretextual character to the institution's pursuit of this multifactored diversity. *See* Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY 163, 166 (2008). Yet this is precisely what Harvard has done, evaluating a paltry number of alternative policies to determine whether they would result in significant increases in the number of African American or Hispanic applicants or admitted students. This approach makes sense only if Harvard's interest was in achieving a particular racial composition to its student body, rather than achieving the diversity-

related educational benefits that this Court's opinions have extolled. In other words, it makes sense only if Harvard's proffered interest is *not* the form of diversity which this Court has found to be compelling.

During *Amici*'s tenure, OCR applied the correct standard, warning against racially preferential educational activities that are not grounded in a compelling purpose. OCR used its experience with the Kentucky Department of Education to underscore this requirement in public messaging, such as a prominent webinar:

> The first complaint involved two Kentucky Department of Education scholarship programs. These programs were administered in a way that restricted the awards to members of certain racial groups. OCR found that the rationale offered—which was increasing the number of minority teachers, the need for minority role models, and remedying past segregation—were insufficient to satisfy the compelling interest prong under Title VI, because the diversity sought was not broader than mere racial diversity. The school's rationale, therefore, was not a compelling interest that justified the use of race by an educational institution. The Kentucky Department of Education voluntarily agreed to discontinue the program in order to comply with Title VI.

U.S. DEP'T OF EDUC., OCR WEBINAR: USE OF RACE IN POSTSECONDARY ADMISSIONS 3–4 (Jan. 19, 2021).[10]

Despite this Court's rulings and OCR's guidance, Harvard and UNC continue to engage in racially preferential activities that are unsupported by the diversity-related educational benefits that this Court has found to be compelling.

B. The Pervasive Use of Race by Educational Institutions Is Not Narrowly Tailored to the Goal of a Diverse Student Body.

Similarly, Respondents' racially preferential conduct is not narrowly tailored within the meaning of this Court's decisions and OCR's guidance. These decisions and guidance require, *inter alia*, a "serious, good-faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. *See generally* George G. La Noue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 CATH. U. L. REV. 991 (2008) (explicating the elements of "serious consideration").

During *Amici*'s tenure, OCR reminded universities of this requirement. For example, the webinar referred to above underscored violations that OCR had found at Texas Tech University Health Sciences Center:

> …OCR found that even though Texas Tech University Health Sciences Center had a

[10] https://www2.ed.gov/about/offices/list/ocr/docs/ocr-tvi-webinar-urpsa.pdf. (Transcript).

> compelling interest in a diverse student body, it had failed the "narrowly tailored" requirement of the strict scrutiny test. Although the school had considered race as only one factor in its individual consideration of applicants, it had not documented when and how it used race as a factor, or the necessity for the continued use of such preferences, or whether workable race-neutral alternatives would be as effective in achieving similar levels of diversity.
>
> OCR's investigation into the use of race at Texas Tech University Health Sciences Center illustrates the need for a school to narrowly tailor the use of race as a factor, including determining whether the school can reach its interest in diversity through non-racial classifications and documenting its efforts.

U.S. DEP'T OF EDUC., OCR WEBINAR: USE OF RACE IN POSTSECONDARY ADMISSIONS 3–4; *see id.* at 3 ("Before using race, there must be serious good faith consideration of workable race-neutral alternatives."); *id.* at 2 ("If a school can use race-neutral alternatives to achieve their sought-after student body diversity, then using race as an explicit factor in admissions or financial aid is impermissible.").

Respondents have failed to comply with this requirement as well. If Harvard, for example, were interested in narrowly tailoring its use of racial

preferences to achieve the educational benefits that flow from a multi-factored diversity, it would test whether various educational alternatives garnered those benefits. Its failure to test and measure this interest confirms that its interest was in racial balancing pursued for its own sake.[11]

II. The Court's Current Jurisprudence is Unworkable.

Respondents are not alone in their inability to comply with this Court's rulings or OCR's guidance. In *Amici*'s experience, noncompliance is pervasive throughout American elementary, secondary, and higher education. Worse, the Executive Branch itself has been unable to administer this Court's standards in a consistent, predictable fashion, creating an untenable situation for colleges and universities. The Court's present approach is unworkable because of significant doctrinal ambiguities in the *Grutter*/*Fisher* framework.

---

[11] With respect to the University of North Carolina, it is correct that in 2012, OCR found that the University had given good-faith consideration to race-neutral alternatives. While correct that OCR dismissed the 2006 complaint, OCR's findings also included the statement that the Respondent "has further committed to end or reduce the consideration of race or national origin," if it could still achieve a "sufficient degree" of race-based diversity. Letter of Findings to Dr. Holden Thorp, Chancellor, University of North Carolina, (Nov. 27, 2012), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11072016-a.html. Yet here we are, in 2022, still debating Respondent's use of race in admissions.

A. Respondents' Violations Reflect Widespread Noncompliance with this Court's Doctrinal Framework.

OCR's 2020 Annual Report to the Secretary, the President, and the Congress illustrated egregious instances of discrimination that had been the subject of complaints regarding colleges and school districts across the country. *See* U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS, ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS 46 (January 2021).[12]

The 2020 Annual Report demonstrated that schools are frequently failing to comply with Title VI as interpreted by this Court. Specifically, the Annual Report stated:

> OCR is aware of concerning reports recently that schools across the country are discriminating on the basis of race in different ways. Sometimes, these reports have involved schools' purported efforts to promote diversity and equity among students but are nevertheless prohibited because they violate Title VI. OCR has received complaints concerning the use of race-exclusionary policies or practices in schools. OCR has also opened investigations involving such complaints, including two directed investigations involving race

[12] https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf.

exclusionary practices. A few of those investigations are briefly described below.

- A teacher in a Chicago-area school district filed a complaint with OCR alleging that the district implemented a series of racial "equity" policies and programs that discriminated against staff, students, and job applicants; implemented certain policies and programs that discriminate against staff, students, and job applicants, including segregating staff and students into affinity groups based on race; used "Black Lives Matter" materials to advocate to students that white individuals bear collective guilt for racism, police brutality, and other social ills; and failed to discipline some students appropriately by allegedly taking race into consideration in its disciplinary decisions.
- OCR opened a directed investigation based on reports that a university in Kentucky segregated by race its incoming resident assistants for training purposes. As part of what the university called "White Accountability Training," resident advisors who identified as white were allegedly given training on "microaggressions" and "white

> privilege," while resident assistants who identify as "black, indigenous, [or] people of color," were given separate training.
> - OCR opened a directed investigation to examine whether a university in New York is discriminating on the basis of race, color, or national origin by offering and/or providing an exemption from the requirement to obtain vaccinations to students "who identify as Black, Indigenous, or as a Person of Color" based on their race, color, or national origin.
>
> OCR has concerns that using curricular or training materials for students or staff which are based on racial classifications or stereotypes of individuals—solely based on their race—may violate Title VI by requiring school personnel to engage in activities that result in the different treatment of students based on their race, or which constitute racial harassment. Such policies or pedagogical practices that perpetuate the idea that students may be categorized by race, assigned a set of characteristics, and be considered to possess certain characteristics based on that race, may subject students or staff to discrimination in violation of Title VI.

Id. at 46 (emphasis added).

Amici have also observed the use of race accelerating at the K-12 level, in tension with or violation of Title VI. *See, e.g.,* Carl Campanile, *US Dept. of Education curbs decision on race-based 'affinity groups'*, NEW YORK POST (Mar. 7, 2021) ("The findings—reached during the waning days of former President Trump's time in office in early January—were in response to a complaint about a Chicago-area school district's 'racial equity' training programs and lesson plans.").[13] This further demonstrates the need to revisit the Court's approach to race-conscious educational practices and approaches schools adopt in the name of "diversity."

B. Prior to *Amici*'s Tenure, OCR Guidance Encouraged Schools to Use Race-Conscious Policies.

The U.S. Department of Education has, at times, encouraged race conscious policies, based on a dubious interpretation of this Court's precedents. For instance, the Obama Administration provided schools with suggestions and guidelines regarding race-conscious scholarships, student retention, and mentoring.

On December 2, 2011, the Department of Education and the Department of Justice issued a joint "Dear Colleague" letter purporting to "explain how educational institutions can lawfully pursue voluntary policies to achieve diversity or avoid racial isolation . . . ." U.S. DEP'T OF EDUC.'S OFFICE FOR CIV.

---

[13] https://nypost.com/2021/03/07/education-dept-curbs-decision-on-race-based-affinity-groups/.

RIGHTS AND U.S. DEP'T OF JUST.'S CIV. RIGHTS DIV., GUIDANCE ON VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY OR AVOID RACIAL ISOLATION (Dec. 2, 2011) ("DECEMBER 2011 DEAR COLLEAGUE LETTER").[14]

The Dear Colleague letter was published with two companion guidance documents entitled: (1) Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools,[15] and (2) Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (together, the three "December 2011 Documents").[16]

The Dear Colleague Letter stated that together, the December 2011 Documents reviewed "three key Supreme Court rulings on the use of race by educational institutions." DECEMBER 2011 DEAR COLLEAGUE LETTER 1.

The December 2011 Documents, however, did more than merely review the case law. Instead, they went further, and *encouraged* the use of race across a broad spectrum of educational activities:

> For example, the elementary and secondary guidance discusses school districts' options

---

[14] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201111.pdf.

[15] *Supra*, note 7.

[16] U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS AND U.S. DEP'T OF JUST.'S CIV. RIGHTS DIV., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION (Dec. 2, 2011), https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf ("DECEMBER 2011 POSTSECONDARY GUIDANCE").

> in areas such as student assignment, student transfers, school siting, feeder patterns, and school zoning. Similarly, the postsecondary guidance provides examples of how colleges and universities can further diversity in contexts including admissions, pipeline programs, recruitment and outreach and mentoring, tutoring, retention, and support programs.

Id. The three cases reviewed in the December 2011 Documents were *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). Additionally, the December 2011 Dear Colleague Letter withdrew guidance documents issued during the Bush Administration. *See* DECEMBER 2011 DEAR COLLEAGUE LETTER 1 ("This guidance replaces August 2008 letters . . . .").[17]

Notably, the December 2011 Documents directly equate race-conscious admissions policies with obtaining a diversity of individual perspectives, stating that "[i]nteracting with students who have

---

[17] *See* U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS, DEAR COLLEAGUE LETTER ON THE USE OF RACE IN POSTSECONDARY STUDENT ADMISSIONS (Aug. 28, 2008), https://www2.ed.gov/about/offices/list/ocr/letters/raceadmissionpse.html (withdrawn on December 2, 2011, republished on July 3, 2018); U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS, DEAR COLLEAGUE LETTER ON THE USE OF RACE IN ASSIGNING STUDENTS TO ELEMENTARY AND SECONDARY SCHOOLS (Aug. 28, 2008), https://www2.ed.gov/about/offices/list/ocr/letters/raceassignmentese.html (withdrawn on December 2, 2011, republished on July 3, 2018).

different perspectives and life experiences can raise the level of academic and social discourse both inside and outside the classroom." DECEMBER 2011 POSTSECONDARY GUIDANCE 1. In other words, the December 2011 Documents suggested to schools that race is a stand-in for having students who have "different perspectives," such that racial diversity necessarily entailed actual diversity of perspective and life experiences.

Additionally, the documents drew heavily from Justice Kennedy's concurring opinion in *Parents Involved,* 551 U.S. at 782 (Kennedy, J., concurring), selectively embracing elements from Justice Kennedy's concurrence and joining them with the views of the dissenters to offer purported affirmative points of law. *See* 2011 ELEMENTARY AND SECONDARY GUIDANCE 5 ("Although *Parents Involved* ultimately was decided on other grounds, a majority of Justices expressed the view that schools must have flexibility in designing policies that endeavor to achieve diversity or avoid racial isolation, and, at least where those policies do not classify individual students by race, can do so without triggering strict scrutiny.").[18]

To drive home the point, the December 2011 Documents prognosticated about what this Court might do if faced with a case where a school adopted a

---

[18] This Court has specifically cautioned against this sort of "vote tallying" of concurrences and dissents. *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 193 (1977) (advising that when the Court is fragmented, "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.").

host of race-conscious policies that stopped just short of making decisions specifically based on the race of individual students:

> Thus, although there was no single majority opinion on this point, *Parents Involved* demonstrates that a majority of the Supreme Court would be "unlikely" to apply strict scrutiny to generalized considerations of race that do not take account of the race of individual students.

2011 ELEMENTARY AND SECONDARY GUIDANCE 5.[19] This analysis, although it appeared in the Elementary and Secondary Guidance document, was not clearly limited to that context. And, although the guidance was reaffirmed as operative by OCR as late as 2016,[20] it was in tension with *Fisher II*, which suggested that "race-neutral" plans adopted for race-conscious reasons are on just as shaky ground as outright racial preferences. In *Fisher II*, this Court held:

---

[19] Notably, one District Court in Maryland recently rejected this precise formulation, observing that "the entirety of Justice Kennedy's concurrence cannot be the 'controlling opinion'" when "clearly the narrowest grounds reached by the majority in *Parents Involved* were that the challenged policy had not been narrowly tailored to achieve its stated ends." *Ass'n for Educ. Fairness v. Montgomery Cty. Bd. of Educ.*, No. CV 8:20-02540-PX, 2021 WL 4197458, at *18 (D. Md. Sept. 15, 2021).

[20] *See* U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS AND AND U.S. DEP'T OF JUST.'S CIV. RIGHTS DIV., QUESTIONS AND ANSWERS ABOUT *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN II* at 2 (Sept. 30, 2016) (Question 2), https://www2.ed.gov/about/offices/list/ocr/docs/qa-fisher-ii-201609.pdf.

> As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, *though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment*. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I,* 570 U.S., 133 S. Ct., at 2433 (Ginsburg, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." [*Id*.] Consequently, *petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.*

Fisher II, 579 U.S. at 386 (emphasis added); *see also Students for Fair Admissions, Inc. v. President and Fellow of Harvard College*, 397 F. Supp. 3d 126, 200–01 (D. Mass. 2019) ("[P]etitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral. Here, just as in *Fisher II*, the Court is not persuaded that such a plan would actually be more race neutral.") (internal quotation marks omitted); *but see Coalition for TJ v. Fairfax County School Board*, No. 22-12802022, WL 986994, at *4 (4th Cir., Mar. 31, 2022) (Heytens, J., concurring) (asserting that existing Supreme Court precedents have "required" public officials to consider race-neutral plans that have an intended disparate impact on different racial demographics).

Moreover, in the December 2011 Documents, the Department cited Justice Kennedy's concurrence in *Parents Involved* for the proposition that schools are entitled to consider the racial impact of their decisions on diversity and racial isolation, but only so long as those considerations are not in furtherance of an invidious purpose. *See* DECEMBER 2011 POSTSECONDARY GUIDANCE 5, n.11 ("[L]eeway to devise race-conscious measures to achieve diversity or avoid racial isolation extends only to circumstances where entities pursue the goal of bringing together students of diverse backgrounds and races.") (internal quotation marks omitted); DECEMBER 2011 ELEMENTARY AND SECONDARY GUIDANCE 5, n.11 (same).

Thus, during the Obama Administration, OCR relied on Justice Kennedy's concurrence in *Parents Involved*, combined with the dissenters in that case, for the proposition that some "good" race consciousness was permitted, and not subject to strict scrutiny. This position, however, is in deep tension with other longstanding precedents. *See Adarand Constructors v. Pena*, 515 U.S. 200, 226 (1995) ("[D]espite the surface appeal of holding 'benign' racial classifications to a lower standard, it may not always be clear that a so-called preference is in fact benign. More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.") (internal quotation marks and citations omitted); *see also Fisher I*, 570 U.S. at 328 (Thomas, J., concurring) ("The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that

discrimination helped minorities."); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."); *but see Coalition for TJ*, 2022 WL 986994 at *4 (Heytens, J., concurring) (noting that adopting a decision because of its expected "adverse" effects on a racial group is impermissible, but that Appellee had not alleged *adverse* affects on Black or Hispanic applicants).

In addition to the December 2011 Documents, the Department of Education and Department of Justice later issued a joint guidance document after *Fisher I*. U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS AND U.S. DEP'T OF.'S CIV. RIGHTS DIV., QUESTIONS AND ANSWERS ABOUT *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN* (Sept. 27, 2013).[21] This document reiterated in full the Departments' earlier guidance, *id.* at 3, but also characterized this Court's decision in *Fisher I* as an extremely narrow holding, which applied essentially only to direct considerations of race with respect to individual students. The Departments went on to suggest ways that schools could generate "racial diversity" by sidestepping this Court's precedents. *Id.* at 2. Specifically, the Departments stated: "The Court's opinion does not address a college or university's ability to promote diversity through other efforts that do not consider an individual's race in admissions, such as engaging in targeted outreach and recruitment or partnering with high schools

[21] https://www2.ed.gov/about/offices/list/ocr/docs/qa-fisher-ii-201609.pdf.

through pipelines programs to promote student body diversity." *Id.* at 2 (Answer 2).

Catherine Lhamon, who previously served under President Obama, and now serves again under President Biden, as Assistant Secretary for the Office for Civil Rights, echoed her prior position—of tallying the votes of Justice Kennedy and the dissenters in *Parents Involved*—in her Questions for the Record, addressed to the U.S. Senate:

> [Question] 25. Has the U.S. Supreme Court ever ruled that K-12 schools have a compelling state interest in a student body diversity?
>
> [Answer] In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), a majority of the justices on the Supreme Court recognized the compelling interests that K-12 schools have in obtaining the benefits that flow from achieving a diverse student body and avoiding racial isolation. *Justice Kennedy, in concurrence, explained that he was in agreement with Justice Breyer's dissenting opinion*, which was joined by Justices Stevens, Souter, and Ginsburg, in recognizing these compelling interests.
>
> [Question] 26. Has the U.S. Supreme Court ever recognized "reducing racial isolation" as a compelling state interest that justifies racial preferences at the K-12 level?

[Answer] Please see the previous answer.

See U.S. Senate Health Committee Questions for the Record for Catherine Lhamon, Nominee to be Assistant Secretary for Civil Rights, Department of Education (July 14, 2021), at 14-15 (emphasis added).[22]

Indeed, even before Ms. Lhamon's confirmation in October 2021, OCR had announced that much of the Obama administration's rescinded guidance was back "under review" as of July 30, 2021. While these documents have not yet been fully reinstated, the message to schools and students is that they may soon be, so schools may need not heed the fact that they were rescinded in 2018. *See* "Under Review" Portal, Department of Education Office for Civil Rights.[23]

C. Between 2017 and 2021, OCR Withdrew Prior Guidance and Published New Material to Encourage Compliance with This Court's Precedents.

After reviewing and considering the guidance documents published between 2011 and 2016 on the topic of race-conscious policies, the Departments of Justice and Education jointly withdrew them all. On July 3, 2018, the Departments wrote in a Dear

---

[22] https://mslegal.org/wp-content/uploads/2021/08/Republican-HELP-Committee-QFRs-for-OCR-Nominee-Catherine-Lhamon-7.19.21.pdf.

[23] https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/underreview.html (last visited April 28, 2022).

Colleague Letter: "The Departments have reviewed the documents and have concluded that they advocate policy preferences and positions beyond the requirements of the Constitution, Title IV, and Title VI."[24]

Schools continued to struggle, however, with issues of race during *Amici*'s tenure. In 2020, for instance, schools were confronted with the COVID-19 pandemic, which caused many institutions to cease in-person instruction. As schools began reopening their physical spaces, OCR received reports that schools would re-open specifically by allowing students of certain racial demographics to return first. OCR was forced to respond to these troubling reports as part of its public-facing policy guidance. U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS, QUESTIONS AND ANSWERS FOR K-12 PUBLIC SCHOOLS IN THE CURRENT COVID-19 ENVIRONMENT (Sept. 28, 2020).[25] In one document, OCR answered the following question:

> Question 1:
>
> As school districts phase in the use of physical facilities and in-person instruction as a part of their reopening plans, may they prioritize students' return to in-person

---

[24] U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS AND U.S. DEP'T OF JUST.'S CIV. RIGHTS DIV., UPDATES TO DEPARTMENT OF EDUCATION AND DEPARTMENT OF JUSTICE GUIDANCE ON TITLE VI (July 3, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf.

[25] https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf.

> instruction based on their race, color, or national origin?
>
> Answer:
>
> No. A reopening plan—or any school policy—that prioritizes, otherwise gives preference to, or limits programs, supports or services to students based on their race, color, or national origin—regardless of how that plan is formulated—would likely violate Title VI of the Civil Rights of 1964.

Id. at 1 (*citing Gratz*, 539 U.S. at 275).

Separately, in another OCR webinar posted on January 19, 2021, OCR offered several statements advising schools of basic legal propositions pursuant to Title VI. OCR noted:

> Unfortunately, OCR is aware of recent concerning reports that schools across the country are discriminating on the basis of race in different ways. Sometimes, these reports have involved schools' purported efforts to promote diversity and equity among students, but are nevertheless prohibited because they violate Title VI. OCR offers this video to highlight how these and other examples may create Title VI violations.

U.S. DEP'T OF EDUC., OCR WEBINAR: RACIALLY EXCLUSIVE PRACTICES AND TITLE VI 1 (Jan. 19, 2021)

(Transcript).[26] The webinar offered several examples of diversity, equity, and inclusion programs that run afoul of Title VI:

> For instance, schools may not designate certain housing or dormitories only for students of a specific race, or exclude students of a particular race or races from such housing.
>
> Similarly, schools may not create designated "safe spaces" that admit or exclude individuals on the basis of race.
>
> Also, since the Supreme Court's landmark 1954 decision in *Brown v. Board of Education*, schools have been barred from segregating students according to race in classes, seminars, lectures, trainings, athletics, clubs, orientations, award ceremonies, graduations, or other meetings. This includes, of course, segregation that occurs in a virtual or online format as well.
>
> …
>
> Schools are also not permitted to ask that certain students engage with the class in a specific manner, based on race. Similarly, it is improper to give students of a particular race extra time or resources, such as the use of notes or textbooks, to complete an

---

[26] https://www2.ed.gov/about/offices/list/ocr/docs/ocr-tvi-webinar-reptvi.pdf.

> assignment. Schools also may not grade students differently or apply different grading criteria to students based on race.

Id. at 2. Separately, the webinar addressed troubling complaints that schools were using curricular materials that separated students by race and described racial demographic groups as having particular characteristics. OCR noted:

> One example that might violate Title VI is advocating a position that a particular race is collectively guilty of misconduct, or advocating a position that a particular race or something about that race is negative or evil. Title VI might also be violated if part of a curriculum instructs students that members of a particular race or racial identity pose specific dangers to other individuals, or if it advocates or forces members of certain races to deconstruct or confront their racial identities. For instance, a school may not advocate that students adopt specific beliefs based on their race, such as urging that white students be white without signing on to whiteness. These sorts of exercises would also be impermissible if used in the context of ascribing specific characteristics or qualities to all members of other races.

Id. at 2–3. These materials were designed to address what *Amici* considered to be the escalating use of race across the American educational spaces.

D. The Biden Administration has Signaled its Commitment to Increasing the Use of Race in Education.

Since January 2021, the Biden Administration has reversed course again, rescinding the webinars issued during *Amici*'s time regarding the limited lawful use of race in admissions, dormitory assignments, classwork, grading, discipline, returning only certain students to schools after COVID-19, and other arenas. Similarly, it withdrew the webinar addressing long-established caselaw in the context of the use of race in postsecondary admissions. Now, both documents are flagged with a warning that they are "ARCHIVED AND NOT FOR RELIANCE," based on the claim that each document "expresses policy that is inconsistent in many respects with Executive Order 13985 on Advancing Racial Equity and Support for Underserved Communities through the Federal Government."[27]

OCR's recent Evanston investigation further illustrates the wild fluctuations in the Executive

---

[27] EXECUTIVE ORDER 13985, ADVANCING RACIAL EQUITY AND SUPPORT FOR UNDERSERVED COMMUNITIES THROUGH THE FEDERAL GOVERNMENT, 86 Fed. Reg. 7009 (Jan. 25, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf. The webinar transcripts also state that they were withdrawn because they were issued without "the review required under the Department's Rulemaking and Guidance Procedures," although, of course, webinars describing recent OCR cases and black letter law are neither policy guidance nor agency rules.

Branch's response to race-conscious educational activities.

As reported in the *New York Post*, OCR's findings included that Evanston/Skokie had engaged in extensive conduct that violated Title VI, including:

- Separating administrators in a professional development training program in August, 2019 into two groups based on race—white and non-white.

- Offering various "racially exclusive affinity groups" that separated students, parents and community members by race.

- Implementing a disciplinary policy that included "explicit direction" to staffers to consider a student's race when meting out discipline.

- Carried out a "Colorism Privilege Walk" that separated seventh and eight grade students into different groups based on race.

  "If you are white take 2 steps forward. If you're a person of color with dark skin, take 2 steps back. If you're black, take 2 steps back," the privilege walk exercise said.

  The goal was for white students to "learn more about white privilege, internalized dominance, microaggressions and how to act

> as an ally for students of color," the lesson plan said.
>
> …
>
> "These materials would have led students to be treated differently based on their race, depriving them of a class free from racial recrimination and hostility. Such treatment has no place in federally-funded programs or activities, nor is it protected by the First Amendment."

Carl Campanile, *US Dept. of Education curbs decision on race-based 'affinity groups'*, NEW YORK POST (Mar. 7, 2021) (list formatting altered).[28]

After President Biden took office, however, a spokesperson for the Department of Education confirmed that the investigation into Evanston/Skokie School District has been suspended, "pending its reconsideration of the case in light of the executive orders on racial equity issued by President Biden." *See* Houston Keene, *Biden admin suspends*

---

[28] Additionally, the draft Letter of Finding was obtained as part of a Freedom of Information Request submitted by the Southeastern Legal Foundation, and is available publicly here: https://345h6j74bj93ldnop2phvizr-wpengine.netdna-ssl.com/wp-content/uploads/sites/12/2021/06/Letter-of-Finding.pdf; *id.* at 1 ("Beginning in the 2017-18 school year, and continuing through the 2020-21 school year, the District implemented certain policies and programs that discriminate against staff, students, and job applicants on the basis of race (white), including separating staff and students into affinity groups based on race.").

probe into school allegedly segregating students by race; Rep. Owens blasts decision (Mar. 11, 2021).[29]

In other words, what *Amici* determined to be a textbook example of race discrimination against teachers and students—a matter so egregious that it was highlighted in OCR's 2020 Annual Report to Congress—the Biden Administration instead found to be a potentially lawful approach to racial equity. This turn-about on a high-profile OCR enforcement determination is unusual in OCR's history to say the least.

III. This Court Must Establish a Clear Rule against Racial Discrimination in Education.

While the ambiguity of this Court's jurisprudence has encouraged some administrations to encourage racial discrimination in the admissions process and others to oppose it, there *is* a right answer. This Court should explicitly end the *Grutter*/*Fisher* regime and establish that answer with certainty: Title VI and the Constitution do not permit racial discrimination in admissions.

While the last several years have seen the rise of "equity," "diversity," and "inclusion" campaigns that openly call for considering race even more, the U.S. Constitution and Title VI protect against such discrimination. Under our Constitution, "[i]n the eyes of government, we are just one race here. It is

---

[29] https://www.foxnews.com/politics/biden-admin-education-department-racial-segregation-burgess-owens.

American." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); *see also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

The cases relying on the idea that diversity interests justify racial discrimination—*Bakke, Grutter*, and *Fisher II*—are the jurisprudential outliers in the world of equal protection and the Fourteenth Amendment. And the Court's precedents have even led government entities like OCR to *encourage* the use of race in several contexts. Now is the time to correct this error.

The Equal Protection Clause establishes categorically that no state shall deny any person the equal protection of the law. U.S. Const. amend. XIV, cl. 1. The goal of the Fourteenth Amendment was the "abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). And in other contexts, this Court has shown the courage to embrace the principle embodied in both the text and history of the Constitution. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2240-41 (2019) ("[T]he central concern of the Fourteenth Amendment was to put an end to governmental discrimination on account of race.") (internal quotation marks omitted); *see id.* at 2242 ("Discrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or jurors on account of race."); *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) ("The forcible relocation of U.S. citizens to

concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.").

But the Court's prior affirmative action cases have departed from the Constitution's categorical rule in favor of the principle that some equal protections are less equal than others: "not every decision influenced by race is equally objectionable." *Grutter*, 539 U.S. at 327. It has accordingly announced that "the educational benefits that flow from a diverse student body" justify an exception to the general principle of equal protection when it came to college admissions. *Id.* at 328.

The *Grutter* Court's decision also came with its own expiration date. *Id.* at 310 ("The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). These cases were filed in 2014. If another case were filed today, and reached this Court seven years from now, this Court's consideration of those cases would occur beyond the 25-year timeline, in 2029. Thankfully, nothing in *Grutter* is inconsistent with a return to principled enforcement of the Equal Protection Clause *now*, after a slightly shorter departure of two decades. This Court should announce that racial discrimination must stop in American higher education and that the *Grutter* regime has therefore ended.

CONCLUSION

For the foregoing reasons, this Court should grant judgment in favor of Respondents.

Respectfully submitted,

William E. Trachman
Counsel of Record
Joseph A. Bingham
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(720) 640-8713
wtrachman@mslegal.org

May 6, 2022

Attorneys for Amici Curiae