Nos. 20-1199 & 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
UNIVERSITY OF NORTH CAROLINA ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the First and Fourth Circuits

BRIEF OF HAMILTON LINCOLN LAW INSTITUTE AND ILYA SHAPIRO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Hamilton Lincoln Law Institute ("HLLI") is a public-interest law firm dedicated to protecting free markets, free speech, limited government, and separation of powers, and against regulatory abuse and rent-seeking.[1] Its subunit, the Center for Class Action Fairness, represents class members *pro bono* in class actions where class counsel employs unfair procedures to benefit themselves at the expense of the class. HLLI has emerged as America's leading defender of consumers and shareholders against abusive class-action settlements, winning hundreds of millions of dollars for these stakeholders, and setting precedents that safeguard consumers, investors, courts, and the public.

Ilya Shapiro is the former vice president for constitutional studies at the Cato Institute, where he filed more than 500 briefs in the Supreme Court, including in leading civil rights cases. Shapiro is the author of *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court* and editor of eleven volumes of the *Cato Supreme Court Review* (2008-18). He is the chairman of the board of advisers of the Mississippi Justice Institute, a member of the board of fellows of the Jewish Policy Center, and a member of the Virginia Advisory Committee to the U.S. Commission on Civil Rights. He

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[1] Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for a party authored this brief in any part, and that no person or entity other than *Amici* or their counsel financially contributed to preparing or submitting it. All parties have filed blanket consent for *amicus* briefs.

regularly provides commentary on civil rights and constitutional issues in a variety of publications and media.

In their litigation practice HLLI and Shapiro have directly confronted, and sought this Court's intervention to halt, the pervasive expansion of race-conscious decision-making into areas outside university admissions by those insisting on the propriety of that action using the language of *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

Amici share petitioner's conclusion that *Grutter* has generated no legitimate reliance interests. It could not, because when precedent "undermines the fundamental principle of equal protection as a personal right," it is "the principle," not the decision, which "must prevail." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). And because *Grutter* itself required that the "race-conscious admissions policies" that it authorized "must be limited in time" and should face "sunset provisions" forcing regular "reviews to determine whether racial preferences are still necessary," all with the "expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary." *Grutter*, 539 U.S. at 342, 343.

What this Court authorized in *Grutter* as a temporary, grudging exception to America's ideals and generally applicable law of Equal Protection has "caused significant … real-world consequences." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part). In many ways its effect has metastasized into a threat blooming across the legal landscape, the economy, and society as a whole. Despite *Grutter*'s own language, the case has signaled beyond the university-admission context that it may be legally permissible for government actors to discriminate on the basis of race.

Even in the university setting, *Grutter* has not achieved the educational or other benefits its proponents laud. Instead of creating academic communities with a broad mix of perspectives and life experiences, or even making amends to the descendants of slaves—which the Court has never accepted as a constitutional justification for racial preferences—race-based admissions have served to further entrench wealth and privilege, while corporate diversity efforts have led to a culture of groupthink.

The Court should take this opportunity to excise that threat and begin to rehabilitate American ideals by overruling *Grutter*. It is time to recognize that this line of precedent is an aberration from equal-protection principles.

ARGUMENT

I. *Grutter* is a grudging exception to the well-defined rule that racial classifications are prohibited in all but the most narrowly tailored instances.

While *Grutter* "endorse[d the] view that student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U.S. at 325, Justice O'Connor's opinion (and the Court's decisions since *Grutter*) cabined that holding.

Grutter pays lip-service to the general rules that courts apply to all racial policy-making, reiterating that (a) "the Fourteenth Amendment protects persons, not groups," leaving "all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—…subject to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed"; and (b) "such classifications are constitutional only if they are

narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326 (cleaned up).

Even so, *Grutter* went on to approve grudgingly the University of Michigan Law School's racially discriminatory admissions program, because of a host of specific requirements that it concluded the school to have satisfied. First, *Grutter* approved the program not as serving an interest in diversity-for-its-own-sake, but only as advancing an interest in obtaining for students the alleged educational benefits of maintaining a racially diverse student body. *Grutter*, 539 U.S. at 328; *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729 (2007) (reiterating that "racial balancing" is not a compelling state interest). It did so only on finding that Michigan's program was narrowly tailored to advance that end, specifically noting (and requiring) that the policy: (a) sought an amorphous critical mass, rather than a specific number of students of particular races, *Grutter*, 539 U.S. at 335–36; (b) demonstrably followed from the "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks," *id.* at 339; (c) did "not unduly harm members of any racial group," so that no "rejected applicant will … have been foreclosed from all consideration … simply because he was not the right color or had the wrong surname," *id.* at 341 (cleaned up); and (d) "be limited in time" with "periodic reviews to determine whether racial preferences are still necessary to achieve" the purported educational benefits of racial diversity, *id.* at 342.

Because of these limits, the Court could persuade itself that it was doing no harm to the larger canvas of American constitutional law. Acting on what it styled the "long recognized … important purpose of public education," *Grutter* purported to grant "universities" a "special niche in

our constitutional tradition," *id.* at 329, rather than establishing that any other institution could similarly discriminate on the basis of race whenever its insiders decided it would aid their institutional purpose.

II. Despite *Grutter*'s narrow holding, race-conscious policies spread, infecting areas the Court has held to be off-limits.

But however carefully the Court sought to cabin off its precedent in *Grutter*, the "diversity" rationale for racial discrimination has metstasized. Institutional actors have taken *Grutter* as a warrant to bring back racial discrimination in field after field where federal law and this Court's precedents have long made clear that it is forbidden. The exception is swallowing the rule, reaching back to defeat even the guaranties of our oldest civil-rights protections.

Racially discriminatory decision-making has permeated the internal decisions of America's universities (where their choices are unauthorized by *Grutter*'s narrow allowance for admissions departments). It has returned to the assignment of students to K-12 public schools. Private companies have announced that they will refuse to contract with parties unless those parties discriminate on the basis of race in their hiring, firing, promotional, and assignment decisions. Certain courts have permitted governmental employers to apply diversity-based "racial mirroring" goals to race-based promotional decisions. California has wielded the "diversity" rationale as a justification for imposing a gender quota on the boards of publicly-traded corporations. Even federal courts have adopted a "diversity" justification for discrimination in appointing class counsel.

Regardless of any particular actor's motives, *Grutter*'s "diversity" rationale has allowed racialist thinking to permeate our legal landscape.

A. Universities discriminate on the basis of race in allocating post-admission honors.

Grutter found that universities' interest in providing the putative educational benefits of a diverse student body was enough to allow Michigan's race-conscious admissions program to satisfy strict scrutiny. Although it did not otherwise authorize universities to discriminate on the basis of race, administrators do not appear to have noticed the difference. Widespread accounts suggest ongoing violations of Title VI—and, for public schools, Fourteenth Amendment—violations by engaging in race-conscious decisions untethered to admissions standards and the approved goal of achieving diverse student bodies.

For example, last year George Mason University announced a racially discriminatory hiring program geared toward obtaining a faculty and staff reflective of the demographics of its student population. The public university advanced this program despite this Court's admonition that schools may not discriminate in hiring to produce faculty-student demographic match.[2] "With the issues of diversity, inclusion, equity and social justice at the forefront of national events," the school proposed

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[2] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion) (rejecting justification of firing-decision on basis of race, because it "allows the [school] to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. Indeed, by tying the required percentage of minority teachers to the percentage of minority students, it requires just the sort of year-to-year calibration the Court stated was unnecessary.").

race-based hiring as part of a campaign "to become a national exemplar of anti-racism and inclusive excellence."[3] It did so with no apparent consideration of the constitutional question raised or this Court's direct precedent.

Also last year, the *Yale Law Journal* (part of federal-funding recipient Yale University, with no separate legal existence), revealed that its membership selection process—which uses "diversity statement[s]"—results in the election of students of different races at vastly disproportionate rates. Aaron Sibarium, *Yale Law Students Said a Top Journal was Racist. Admissions Data Suggest Otherwise*, Washington Free Beacon (Feb. 21, 2021). The disclosed data suggests that journal membership is intentionally discriminating on the basis of race in choosing whom to admit to its board, in likely violation of Title VI. (Despite benefiting from an extraordinarily disproportionate selection process, activists at the school demand even more in the way of racial preferences. *Id.*)

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[3] John Hollis, *President Washington announces membership to the Anti-Racism and Inclusive Excellence Task Force*, George Mason University (Sep. 3, 2020), https://www2.gmu.edu/news/2020-09/president-washington-announces-membership-anti-racism-and-inclusive-excellence-task (last visited May 8, 2022). One should note that "anti-racism" is an Orwellian term as propounded by leading theorist Ibram X. Kendi, who baldly states in his best-selling book *How to Be an Antiracist* (2019): "'The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination…. The only remedy to present discrimination is future discrimination.'" Noah Rothman, *Searching for the 'Anti' in 'Antiracism,'* Commentary (Dec. 21, 2020). "The 'discrimination' critical race theorists want to 'remedy,' through still more discrimination, is any failure to meet a racial quota. As Mr. Kendi puts it, 'When I see racial disparities, I see racism.'" Hans Bader, *Is the Cure for Racism Really More Racism?*, Wall St. J. (Oct. 12, 2020).

Indeed, *Yale Law Journal*'s admissions about the racial disparities in its selection rates parallels similar allegations in recent litigation challenging the legality of alleged racial criteria for membership on a law journal at New York University. *Faculty, Alumni, & Students Opposed to Racial Preferences v. New York Univ.*, 11 F.4th 68 (2d Cir. 2021).

B. K-12 school systems re-incorporate race into school assignments.

Outside the ambit of *Grutter*'s "special niche" for universities, a spate of public-school systems have recently altered their policies for placement of students, because of concerns over the racial diversity of the students placed in particular schools. In Boston,[4] San Francisco,[5] and New York,[6] public-school administrators concerned by the

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[4] Meg Woolhouse, *Boston Public Schools Suspends Test for Advanced Learning Classes; Concerns About Program's Racial Inequities Linger*, GBH News (Feb. 26, 2021), https://www.wgbh.org/news/education/2021/02/26/citing-racial-inequities-boston-public-schools-suspend-advanced-learning-classes (last visited May 8, 2022) (quoting superintendent as explaining move as part of "work we have to do in the district to be antiracist").

[5] David K. Li, *San Francisco School Board Eliminates Academic Admission Standards for Renowned School*, NBC News (Feb. 10, 2021) (describing Lowell High School as "50.6 percent Asian," and quoting San Francisco Unified School District's passed resolution abandoning use of grades and standardized tests for Lowell High admission as justified by these criteria having "created a school that does not reflect the diversity of SFUSD students and perpetuates segregation and exclusion").

[6] Alex Zimmerman & Monica Disare, *De Blasio's Specialized School Proposal Spurs Outrage in Asian Communities*, Chalkbeat

number of Asian-Americans qualifying for seats at prestigious magnet schools have chosen to do away with quantifiable metrics for admission, usually in favor of "holistic" processes. Asian-Americans found fleeting success in litigation over the practice in a Fairfax magnet high school before the Fourth Circuit permitted the diversity program to proceed.[7]

Here, too, the Court has emphasized that the Constitution does not countenance racially motivated decisions of which students may attend which elementary and secondary schools. "The Court in *Grutter* expressly articulated key limitations on its holding— … noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary

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New York (Jun. 5, 2018), https://ny.chalkbeat.org/2018/6/5/21105142/de-blasio-s-specialized-school-proposal-spurs-outrage-in-asian-communities (last visited May 8, 2022) (citing subject schools as having 62% Asian American enrollment and goal of admissions policy change as "to boost diversity at the city's elite high schools" by "enroll[ing] more black and Hispanic students").

[7] *See generally Coalition for TJ v. Fairfax County Sch. Board*, 2022 WL 579809 (E.D. Va. Feb. 25, 2022), *stayed* 2022 WL 986994 (4th Cir. Mar. 31, 2022), *appeal pending* No. 22-1280 (4th Cir.). *See also* Hannah Natanson, *Fairfax School Board Switches to 'Holistic Review' Admissions System for Thomas Jefferson High School*, Wash. Post (Dec. 17, 2020) (citing "[d]iscontent over the demographics" of this "70 percent Asian" school as justification for move); Alex Nester, *Fairfax County Schools Came Under Fire for Effort to Boost Black and Hispanic Enrollment*, Wash. Free Beacon (Jan. 14, 2022) (quoting former president of parent-teacher-student association as saying new district policies are a "targeted hit" on Asian Americans under the "guise" of "diversity").

and secondary schools. The present cases are not governed by *Grutter*." *Parents Involved in Cmty. Sch.*, 551 U.S. at 725; *see also Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (forbidding race-based sorting of students in K-12 schools).

That clarity has not stopped decision-makers citing the importance of "diversity" and "demographics" to their enterprise and following what they apparently misperceive to be the meaning of *Grutter* to allow a morass of racial allocations. Nor has it stopped lower courts from relying on *Grutter* to find that increasing racial diversity in specialized high schools is a compelling government interest. *See, e.g.*, *Christa McAuliffe Intermediate Sch. PTO, Inc. v. DeBlasio*, 364 F. Supp. 3d 253, 282-83 (S.D.N.Y. 2019).

C. Private businesses and public employers and regulators adopt "diversity" as justification for racial discrimination in hiring and contracting.

The Civil Rights Act of 1866, legislation that predates the Fourteenth Amendment, guarantees all Americans "the same right" to "make and enforce contracts," including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981. Save only for the narrow exceptions this Court has recognized,[8] these guarantees bar

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[8] *See U.S. Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (recognizing narrow exception to parallel provisions of Title VII of the Civil Rights Act of 1964); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 498-99 (3rd Cir. 1999) (treating Title VII and § 1981 claims as coextensive in scope); *Marsh v. Bd. of Ed.*, 581 F. Supp. 614, 619-26

employers (including law firms) from discriminating on the basis of race in their hiring, firing, assignments, and promotions of individuals.[9] Federal civil rights law also bars parties from discriminating in their contracting with corporations because of the race of their counter-parties' personnel.[10]

And yet, citing the importance of "diversity," "external legitimacy," and "demographic mirroring," public employers have since *Grutter*, successfully justified race-based hiring or promotional practices in federal and state courts. *See, e.g., Petit v. City of Chicago,* 352 F.3d 1111, 1114 (7th Cir. 2003); *Bredesen v. Tenn. Judicial Selection Comm'n*, 214 S.W.3d 419 (Tenn. 2007); *see generally* Darwinder S. Sidhu, *Racial Mirroring*, 17 U. Pa. J. Const. L. 1335, 1342-1347 (2015) (discussing cases).

(E.D. Mich. 1984) (extending *Weber* to § 1981 claims) (vacated on appeal on other grounds).

[9] Curt Levey, *The Legal Implications of Complying with Race and Gender-Based Client Preferences*, 8 Federalist Soc'y Rev. 14 (2007).

[10] *Brown v. J. Kaz., Inc.*, 581 F.3d 175, 181 (3rd Cir. 2009) (reversing dismissal of a contractor's § 1981 claim and clarifying that statute applies beyond employment scenarios); *Vill. Green at Sayville, LLC v. Town of Islip*, 2019 U.S. Dist. LEXIS 167177, at *22, 2019 WL 4737054 (E.D.N.Y. Sept. 27, 2019) (denying motion to dismiss corporate plaintiff's § 1981 claim against town whose allegedly racially motivated inaction rendered plaintiff's contract unperformable); *Annuity, Welfare & Apprenticeship Skill Improvement & Safety Funds of the Int'l Union of Operating Eng'rs, Local 15, 15A, 15C & 15D v. Tightseal Constr., Inc.*, 2018 U.S. Dist. LEXIS 138041, at *16-*18, 2018 WL 3910827 (S.D.N.Y. Aug. 14, 2018) (denying motion to dismiss corporate plaintiff's § 1981 claim for termination of contract allegedly because of race of plaintiff's personnel).

State regulators have followed suit with gender-and-race based quotas in the name of "diversity."[11]

More recently, in furtherance of "diversity," major American corporations have announced as policy an intention to discriminate in their contracting because of the race of their counterparties' personnel.[12] Again, the language employed in the announcements pegs these actions to *Grutter*'s widely perceived blessing of racial discrimination undertaken in the name of achieving "diversity."

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[11] *See Meland v. Weber*, 2021 WL 6118651, 2021 U.S. Dist. LEXIS 246227 (E.D. Cal. Dec. 27, 2021) (denying California's diversity rationale for a gender-based quota on corporate board membership, but upholding its "remedial purpose"); *In re Amendment to Rule Regulating the Fla. Bar 6-10*, 315 So. 3d 637 (Fla. 2021) (repudiating Florida Bar rule that imposed minority-status-based quota for participants at CLE conferences).

[12] *McDonald's Overhauling Workplace Culture to Meet Diversity Goals*, CBS News (Feb. 18, 2021), https://www.cbsnews.com/video/mcdonalds-overhauling-workplace-culture-diversity-goals/ (last visited May 8, 2022) (company will tie executive compensation to the race of those working for those executives); Sam Skolnik, *Novartis Demands Outside Counsel Make Tough Diversity Guarantees*, Bloomberg Law (Feb. 12, 2020), https://news.bloomberglaw.com/us-law-week/novartis-demands-outside-counsel-make-tough-diversity-guarantees (last visited May 8, 2022) (conditioning 15% of bills on firms staffing matters in compliance with "diversity" requirements, so demonstrating "commit[ment] to being a leader in diversity and inclusion"); Ruiqi Chen, *Coke GC Tired of "Good Intentions," Wants Firm Diversity Now*, Bloomberg Law (Jan. 28, 2021), https://news.bloomberglaw.com/business-and-practice/coke-gc-tired-of-good-intentions-wants-law-firm-diversity-now (last visited May 8, 2022) (among other items, proposing conditioning payment of 30% of bills on firms staffing matters in compliance with "diversity" requirements, while also conditioning both future retentions and placement on "Preferred Firm Panel" on compliance).

D. Courts discriminate on the basis of race in appointing class counsel.

Closest to home for HLLI, even courts—which should know best the illegality of treading these grounds—have followed the culturally received understanding of *Grutter* into race-based allocations in the nominal service of "diversity."

The Center for Class Action Fairness once asked this Court to review a then "unique" and "highly unusual practice" of forcing class-counsel to discriminate in staffing legal matters on the basis of race. *Martin v. Blessing*, 571 U.S. 1040, 1040 (2013) (Alito, J., respecting denial of the petition). The Court declined, with one justice commenting that he was "hard-pressed to see any ground on which [the judge's] practice can be defended." *Id.* at 1041-42. The district judge in question was unapologetic. Ian Millhiser, *Federal Judge Slams Justice Alito's Lack Of 'Understanding Or Interest' In Race Or Gender Equality*, ThinkProgress (Dec. 9, 2013).

Unfortunately, in the years since that 2013 case, and despite Justice Alito's warning, this legally indefensible practice has become much more commonplace. In 2020, another Southern District of New York judge concluded that the race and sex of potential class-counsel's lawyers "is a relevant factor for the [c]ourt," as "[f]or well over a decade now, the courts have emphasized the importance of diversity in their selection of counsel." *City of Providence v. AbbVie Inc.*, 2020 U.S. Dist. LEXIS 189472, at *26, 2020 WL 6049139 (S.D.N.Y. Oct. 13, 2020). Judge Liman cited examples from district courts across the country. *Id.* (citing *In re Robinhood Outage Litig.*, No. 20-cv-01626-JD (N.D. Cal. July 14, 2020); *SEC v. Adams*, 2018 U.S. Dist. LEXIS 93837, 2018 WL 2465763, at *4 n.6 (S.D. Miss. June 1, 2018); *In re Oil Spill by Oil Rig Deepwater*

Horizon, 295 F.R.D. 112, 137-38 (E.D. La. 2013); *Public Employees' Ret. Sys. of Miss. v. Goldman Sachs Group, Inc.*, 280 F.R.D. 130, 142 n.6 (S.D.N.Y. 2012); *In re Dynex Capital, Inc. Sec. Litig.*, 2011 U.S. Dist. LEXIS 22484, 2011 WL 781215, at *9 (S.D.N.Y. Mar. 7, 2011); *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007)). District courts' selection of class-counsel based on "diversity" concerns rather than exclusively on Rule 23 factors show no sign of abating—and is increasing as the body of precedent continues to grow.[13]

How could so many district courts get this so wrong? Judge Liman again helpfully provides the answer, explaining that "[a] commitment to diversity is not a commitment to quotas. *See Grutter v. Bollinger*, 539 U.S. 306, 334, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (rejecting the use of racial quotas in the race-conscious affirmative action

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[13] *See, e.g.*, *In re FICO Antitrust Litig.*, 2021 WL 4478042, 2021 U.S. Dist. LEXIS 189371, at *14-*15, *24 (N.D. Ill. Sept. 30, 2021) (citing *City of Providence* and "agree[ing[that it is in the class's best interest to have a diverse legal team at its disposal"); *see also* Amanda Bronstad, *MDL Judge Taps "Most Diverse Leadership Team Ever" in Data Breach Class Action*, Nat. L. J. (Mar. 3, 2021) (covering appointment in *In re Blackbaud, Inc., Customer Data Breach Litig.*, 3:20-mn-02972-JMC (D.S.C.)); Case Management Order No. 2 (Organizational Structure and Appointment of Counsel Leadership), *Blackbaud*, Dkt. 14 at 5 (reflecting in "Appointment of Plaintiffs' Counsel Leadership" section that despite "[t]he court desir[ing] to appoint individuals, not firms," it was "committed to the diversity of MDL leadership. Given the multitude of claims … from diverse Plaintiffs … diverse leadership is integral to the success of these proceedings. The court also seeks to develop the future generation of diverse MDL leadership by providing competent candidates with opportunities for substantive participation now.").

context while recognizing a compelling interest in promoting diversity)." *City of Providence*, 2020 U.S. Dist. LEXIS 189472, at *26. In short, lower courts are using *Grutter*'s presumptive blessing of "diversity" to justify allocating benefits on the basis of race.

III. Race-conscious decisions achieve only superficial diversity, failing to realize either the educational benefits approved by *Grutter* or the broader goals championed by advocates of affirmative action.

As actors inside and outside the university setting have relied on *Grutter* to make race-conscious decisions in the name of "diversity," they have failed to achieve either the diversity of viewpoint and experience that *Grutter* suggested could enhance higher education or the broader reparative goals often cited to justify affirmative action.

Instead, studies show that universities are selecting racially diverse students through criteria more likely to reflect their family's wealth than diverse life experiences. Even some high-profile proponents of affirmative action for college admissions have expressed reservations that such programs no longer serve their intended beneficiaries. In 2004, the *New York Times* noted that Professors Lani Guinier and Louis Henry Gates observed during a reunion of Harvard University's Black alumni, "that a majority of them—perhaps as many as two-thirds—were West Indian and African immigrants or their children, or to a lesser extent, children of biracial couples." Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. Times (June 24, 2004). Studies show that a majority of the black students at many elite colleges are indeed African immigrants, a group that averages a higher educational attainment than any population group in the country, including Asian-American,

while Latino diversity statistics are bolstered by "[a]ffluent, well-educated new immigrants from South America … while the children of migrant farm workers are left behind." *See* Lani Guinier, *Our Preference for the Privileged*, Bost. Globe (July 9, 2004); *see also* Clarence Page, *As Black Immigrants Collect Degrees, Is Affirmative Action Losing Direction?*, Baltimore Sun (Mar. 20, 2007).

Those comments underscored the uneasy tension that programs ostensibly set up to benefit the descendants of slaves to correct for past injustices were now primarily benefiting students who either had not endured the legacy of past racial discrimination or the children of parents who had already achieved a measure of financial and/or professional success, all under the guise of "diversity."[14] Professor Guinier further opined that such diversity is superficial because such students are too similar to "their wealthier white counterparts," resulting in a "[d]iversity [that] produces a more interesting rainbow of students who benefited from a host of advantages assembled from birth." Guinier, *supra*, *Our Preference for the Privileged.*

Even if racial preferences used to create a diverse student body achieved that goal on paper, the universities that purport to want diversity are encouraging many black students to join self-segregated "safe spaces."[15]

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[14] *See* Daniel N. Lipson, *Where's the Justice? Affirmative Action's Severed Civil Rights Roots in the Age of Diversity*, 6 Perspectives on Pol. 691, 700 (Dec. 2008) ("Numerous affirmative action scholars and activists have raised concerns about the detachment of civil rights roots from affirmative action, calling attention to the dangers of this transformation….").

[15] *E.g.*, Isabella Brown, *Black Affinity AUx2 Is Praised as a Safe Space for Black Students*, The Eagle (Aug. 13, 2021).

Such race-based spaces and affinity groups deny the university community the very diversity upon which *Grutter* justified its limited acceptance of race-conscious admissions. In short, today's race-conscious admission policies are not achieving what *Grutter* intended.

In the corporate and employment context, increased attention to diversity often is correlated with less diversity in viewpoint and speech regulation. As many companies have adopted diversity and inclusion programs, employees who do not offer full-throated support for specific viewpoints on controversial topics favored by the corporations such as race-based reparations, critical race theory, and bias in news reporting are reporting adverse employment actions. *See* Christopher F. Rufo, *The Price of Dissent*, City Journal (Jan. 5, 2022).

These critiques highlight the false promise of using "diversity" as a justification for preferences based on race or ethnicity. The diversity achieved typically is superficial and artificial. A better method, and one required by the Constitution, would be to treat all students equally, regardless of their race or ethnicity.

* * *

Racism still exists, but we no longer live in the injustice of Jim Crow America, which ended decades before *Grutter*. Since *Grutter*, America has elected an African-American president and an African-American vice-president; indeed, major parties' African-American nominees have won three out of three national elections. Since *Grutter*, African-Americans have won Gallup's "Most Admired Man" or "Most Admired Woman" annual poll fifteen times in the last thirteen years Gallup conducted the poll. *Gallup's most admired man and woman poll*, Wikipedia (May 8, 2022). Racial prejudice against African-Americans

is today not even remotely socially acceptable; indeed, prominent media people and academics lose their jobs or face discipline simply because they fail to be sufficiently supportive of the so-called anti-racism movement. *E.g.*, Editors, *Canceled: A Running List of the People, Places, and Things That Have Been Toppled as the Country Reckons with Racism*, Los Angeles Magazine (Jun. 11, 2020). American icons like Coca-Cola and McDonald's are so opposed to discrimination against African-Americans that they are willing to risk violating the law to demonstrate that opposition. America as a country is blessedly past the point where African-Americans cannot succeed because past discrimination has been inadequately remedied. "'Structural racism' isn't an explanation, it's an empty category." Glenn Loury, *Unspeakable Truths about Racial Inequality in America*, Quillette (Feb. 10, 2021). Even under its own terms, it is time for *Grutter* to end. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

CONCLUSION

All across the American legal landscape, private and public actors, like Harvard and UNC here, share the same misreading of *Grutter* and believe it to have created a "diversity-serving" exception stronger than the Constitution's general rule against race-based decision-making. But the Court never sought that broadened application, which Justice O'Connor explicitly sought to prevent in her majority opinion in *Grutter*. *Grutter* has not succeeded in carving out a "special niche" for universities to engage in otherwise forbidden race-based decision-making. Instead, it has invited a systemic assault on America's deeply cherished principles of equal protection. When combined with

the dramatic racial progress America has made in the last two decades, it is time for *Grutter*'s self-envisioned sunset.

The lower court decisions should be reversed.

Respectfully submitted,

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