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 *AMICUS CURIAE* PROJECT 21 IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Project 21 is an initiative of the National Center for Public Policy Research, which has no parent company. No publicly held company owns 10 percent or more of its stock.

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Project 21, the national leadership network of black conservatives, is an initiative of the National Center for Public Policy Research to promote the views of black Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil-rights establishment. The National Center for Public Policy Research is a communications and research foundation supportive of the view that the principles of a free market, individual liberty, and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century.

Project 21 has regularly participated as *amicus curiae* in cases before this Court. This case concerns Project 21 because it raises vital questions about the pernicious effects of racial classifications and presents the opportunity to vindicate the U.S. Constitution's guarantee of equal protection by eliminating race-based preferences in college admissions, one of the last circumstances in which race-based decision-making is protected by current law.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The Constitutional Defense Fund, Inc. made a monetary contribution to fund the preparation and submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution promises all Americans a right to equal treatment and that "no discrimination shall be made against them by law because of their color." *Plessy v. Ferguson*, 163 U.S. 537, 556 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Yet since its 1978 decision in *University of California v. Bakke*, 438 U.S. 265 (1978), this Court has blessed the overt use of racial preferences in admissions by institutions of higher education. It has done so not to achieve some temporary and critically pressing need, but for the haziest of purposes: "obtaining the educational benefits that flow from a diverse student body." *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (quotation marks omitted). That interest is patently insufficient to justify overt racial discrimination in contravention of our most fundamental constitutional guarantees. The decisions of this Court holding otherwise are demonstrably and grievously wrong. This Court should overrule them.

The so-called "diversity rationale," first articulated by Justice Powell's solo opinion in *Bakke* and then adopted in *Grutter*, cannot justify the continuing, blatant racial discrimination in higher education. It never could. Justice Powell stood alone in finding this rationale persuasive in 1978: the University of California did not seriously press it, and no other Justice on the Court endorsed it. And it has not become more persuasive with the passage of time. While universities, academics, and school administrators pay lip service to the diversity

rationale in litigation, their statements outside the courtroom—and the makeup of their incoming classes—tell a different story. The goal of these programs is not to admit "a 'critical mass' of minority students" to obtain "the educational benefits that diversity is designed to produce," *Grutter*, 539 U.S. at 329-30, it is to ensure that the student body has a particular racial makeup, out of a desire to "aid[ ] persons perceived as members of relatively victimized groups at the expense of other innocent individuals," *Bakke*, 438 U.S. at 307. The fact that even *the defenders* of race-based admissions policies justify them on grounds that this Court has not adopted—and has expressly and repeatedly *repudiated*—expresses a profound truth: The diversity rationale is deeply unpersuasive, and the decisions that relied upon it to uphold overt race discrimination must go.

Bakke and *Grutter* are not only wrong in constitutional principle, they are pernicious in effect. The race discrimination those decisions sanction has inflicted deep and lasting harm—just as racism always has done. That harm has fallen on Americans of all races, including Asian Americans excluded from places like Harvard because of their "wrong" ethnicity. And the harm has, perversely, also fallen on the very disadvantaged minorities that these race-based programs are ostensibly designed to aid. Some of these minority students may get into an Ivy, but they on balance do less well academically than they could have in the school they would have attended but for the racial preference, and they spend the rest of their lives stigmatized by their very membership in a race perceived as benefiting from "affirmative action." Moreover, the purported *benefit* of the "diversity

rationale" redounds to *the other (white) students*, who supposedly benefit from their minority classmates' "diverse" backgrounds.

The decisions upholding this discriminatory practice were wrong when they were decided and are wrong today. The Court should end its experimentation with the machinery of racial discrimination.

ARGUMENT

Stare decisis is not "an inexorable command"—particularly in cases involving constitutional interpretation, where "correction through legislative action is practically impossible." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). In determining whether to overrule one of its precedents, this Court considers a variety of factors, including whether "the prior decision was not just wrong, but grievously or egregiously wrong," whether it has "caused significant negative jurisprudential or real-world consequences," and whether overruling it would "unduly upset reliance interests." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring). We focus on the first two sets of considerations here. Both overwhelmingly favor overruling *Grutter* and *Bakke* and restoring the principle at the heart of the Fourteenth Amendment's Equal Protection Clause: "no State has any authority … to use race as a factor in affording educational opportunities among its citizens." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (quoting Tr. of Oral Arg., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

I. *Grutter* and *Bakke*'s Allowance of the Use of Race in Admissions Based on the So-Called Diversity Rationale is Grievously Wrong.

Both *Grutter* and *Bakke* are premised on the so-called "diversity rationale"—the notion that schools have a compelling interest in using race-based admissions policies to pursue "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 325, 328. But far from compelling, that premise is antithetical to the Constitution's guarantee of Equal Protection, was unpersuasive—and seen as unpersuasive—at the time it was adopted, and has only become less persuasive over time.

A. The Diversity Rationale Is Fundamentally Contrary to Principles of Equal Protection.

1. The diversity rationale depends on the premise that skin color predicts a person's contributions to society. That premise is false and anathema to America's founding principles.

The signers of the Declaration of Independence believed it "to be self-evident, that all men are created equal" and "endowed by their Creator with certain unalienable Rights." Our Nation struggled early to live up to that principle and will always struggle to live up to it fully. But the Fourteenth Amendment sought to correct our early failures, guaranteeing that no state could "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

That guarantee is a bedrock principle of our system of government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). *See also Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Grutter*, 539 U.S. at 326.

Yet race-based admissions policies distinguish among citizens based solely on skin color, and when they do so in service of the diversity rationale, it is because of the offensive belief that skin color predicts the contributions an individual might make to academic discourse. After all, the point of the diversity rationale is, according to its defenders, not to achieve an "aesthetic" diversity of different skin colors in the classroom, *id.* at 354–55 & n.3 (Thomas, J., dissenting), but rather a diversity of viewpoints, backgrounds, and experiences. The idea is that assembling students with varying "personal talents … or other qualifications deemed important," *Bakke*, 438 U.S. at 317, ultimately "promotes learning outcomes." *Grutter*, 539 U.S. at 330 (quotation marks omitted).

It follows that any admissions system that achieves "diversity" by factoring in race depends on pernicious racial stereotyping. When a school pursuing the diversity rationale assembles a student body based on the students' *race*, it is using race as a proxy for something else: for the diversity in talents, experiences, and backgrounds that the rationale *actually* purports to achieve. *See* Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling,* 11 MICH. J. OF RACE & L. 625, 649-50 (2006) ("[R]acial

diversity serves as a proxy for viewpoint diversity," in part because "direct measurement would present too great an administrative burden."). The underlying presumption is thus that one racial group is different from other racial groups in these more meaningful ways *solely because of their skin color*. Peter H. Shuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 40-41 (2002). This "racial essentialism" "utterly contradicts liberal, egalitarian, legal, scientific, and religious values" embodied in the Declaration of Independence and the Fourteenth Amendment. Shuck, *id.* at 41.

This racial-stereotyping premise is also false on its face. A person's skin color, apart from his or her socioeconomic background, life experience, religious background, or interests, says nothing about that individual's views or likely contributions to the classroom or society. One cannot speak of a "black" perspective or a "Hispanic" perspective, because "no one … is so stupid as to believe that all (or even most) members of any given group necessarily have similar opinions on a variety of important issues." Sanford Levinson, *Diversity,* 2 U. PA. J. CONST. L. 573, 577 (1999); *see also Grutter*, 539 U.S. at 333 (quoting Michigan Law School's brief as disclaiming "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue"). It would be absurd—and illegal—for an employer to reduce job applicants to racial stereotypes or for a police officer to premise traffic stops on broad assumptions about particular racial groups. *See id.* College admissions are not different. Yet when the Court authorized schools to use racial stereotypes in

choosing applicants, it invited race essentialism to run amok in college admissions.

Seeming to acknowledge this problem, some affirmative action proponents now advocate for admissions policies that consider race only alongside other personal characteristics. Orlando Patterson, a Harvard professor, has urged affirmative action for "African-Americans, Native Americans and most Latinos" that "include[s] an economic means test," such that "[o]nly those who are poor or grew up in deprived neighborhoods should benefit." Orlando Patterson, *Affirmative Action: The Sequel*, N.Y. TIMES (June 22, 2003), https://nyti.ms/3KmkbCu. Other scholars have noted that increasing numbers of affirmative action admissions—even majorities of such admissions at some elite schools—go to the children of African immigrants, whose forebears did not experience slavery and racial segregation in the United States. Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1277-71 (2008). They propose expanded application questions to help distinguish between recent African immigrants and African-Americans with longer histories in the United States, coupled with essay questions that invite applicants to discuss their experiences with racial discrimination in the United States. *Id*.

Proposals like this reveal two things: (1) identifying diversity-value based on skin color alone depends on racial stereotypes that are inaccurate, even to affirmative action proponents, and (2) the

purpose of race in admissions, insofar as it contributes to diversity at all, is as a proxy for the historic experience of societal discrimination, *see infra* at 15-21. *See also* Goodwin Liu, *Racial Justice in the Age of Diversity*, 106 CAL. L. REV. 1977, 1984 (2018) ("[I]t is becoming clear today that race alone is not enough to identify those burdened by historical subjugation" because "[d]ue to black immigration and the success of affirmative action and other policies …, blackness is no longer itself a marker of membership in an underclass.").

Accordingly, as these modern proponents of affirmative action implicitly acknowledge, skin color bears no relationship to the contributions a student might make in future academic discourse or community life. If universities desire students who have overcome adversity, coped with poverty, or faced discrimination, then they should seek those things directly. Race-based admissions merely perpetuate the racial stereotyping that we rightly recognize to be illegitimate in other contexts.

2. Not only do admissions policies based on racial stereotyping fail to achieve the genuine diversity in experiences and viewpoints that the diversity rationale purports to seek; in some cases they are obviously counterproductive to that goal. Harvard presents a striking case in point.

Harvard's ideological conformity belies the genuine "diversity" of experiences and viewpoints it claims to value. The diversity rationale, properly understood, seeks in central part to compile a student body with *ideological* diversity. *Bakke*, 438 U.S. at 312 (Powell, J.); *Grutter*, 539 U.S. at 329. But Harvard

admits an ideologically conformist student body that is an outlier in its leftward lean even among incoming university freshman more generally. The diversity Harvard seeks is only skin deep.

In its annual survey of the incoming freshman class, The Harvard Crimson asked the Class of 2025 about their political preferences. Seventy-two percent identified as "very" or "somewhat" liberal, while only nine percent identified as "somewhat" or "very" conservative. The remaining 19 percent identified as moderate. Meet the Class of 2025, THE HARVARD CRIMSON, *available at* https://bit.ly/36Tkozj. When asked to identify by party, 55 percent identified as Democrat, compared to only five percent as Republican. (Twenty-six percent claimed no affiliation, 12 percent identified as Independent, and the remainder chose "other.") These numbers are consistent with previous surveys. Meet the Class of 2024, THE HARVARD CRIMSON, *available at* https://bit.ly/3Krw5eb (Seventy-three percent of incoming freshmen identify as "very" or "somewhat" liberal; seven percent of incoming freshman identify as "somewhat" or "very" conservative); Meet the Class of 2023, THE HARVARD CRIMSON, *available at* https://bit.ly/37Myi6Z (similar). Indeed, 90 percent of Harvard's incoming class of 2024 supported President Biden in the 2020 presidential election. Meet the Class of 2024, THE HARVARD CRIMSON, *available at* https://bit.ly/3Krw5eb; *see also* Amanda Y. Su, *Reversing 2016 Stance, Harvard Republican Club Endorses Donald Trump for President*, THE HARVARD CRIMSON (Sept. 30, 2020), https://bit.ly/3KH8OW5.

Young people tend to be more liberal than older demographics, but even still, the liberal ideological conformity of Harvard's incoming classes is an outlier. In a study of students entering college in 2019, the class of 2023, only 37 percent identified as either "liberal" or "far-left," while 20 percent identified as "conservative" or "far right." Forty-four percent of incoming college freshmen identified as "politically middle-of-the-road." Ellen Bara Stolzenberg, et al., *The American Freshman: National Norms Fall 2019*, COOPERATIVE INST. RSCH. PROGRAM, at 19 (2020), https://bit.ly/3FeLHRD. On all three metrics, Harvard's student body is an outlier.

While the ideological demographics of Harvard's incoming freshmen do not match college students more generally, they do approximate fairly closely the political leanings of Harvard's faculty: notoriously and radically liberal. In a 2021 survey, Harvard's faculty identified as "liberal" or "very liberal" at a rate of 78 percent; 20 percent identified as "moderate;" and only three percent identified as "conservative" or "very conservative"—a percentage that will go down if Harvey Mansfield ever retires.

Whatever the reason for the steep leftward lean among Harvard's incoming freshmen, it is not because Harvard pursues an admissions policy based on ideological diversity. To the extent Harvard does pursue diversity in admissions, it is limited to superficial details, like skin color, not ideological differences that might bring students of different worldviews together. *Bakke* and *Grutter*'s diversity rationale has thus defeated itself: Harvard's race-based admissions policies—touted by both the *Grutter*

majority, 539 U.S. at 335-36, and Justice Powell's opinion in *Bakke*, 438 U.S. at 316-18—has led to the construction of a student body that utterly lacks the diversity in experiences and viewpoints that the diversity rationale is premised upon.

Any doubts about the ideological diversity of Harvard's student body are dispelled by the stifling political correctness that pervades every aspect of student life. Ideological conformity reigns at Harvard. All who dare to espouse traditional sexual mores, raise a doubt about the science of climate change, or champion the rights of unborn children quickly learn to keep their views to themselves or risk becoming a pariah among their peers. Indeed, many of the articles published in the lone conservative paper on campus are now published under pseudonyms. *See* Naomi Schaefer Riley, *Harvard's Conservatives Shouldn't Have to Hide Behind Pseudonyms*, BLOOMBERG (Dec. 13, 2021), https://bloom.bg/3y0QTXo. Even the President of Harvard is not immune to this stifling ideological coerced conformity, a lesson that Larry Summers learned the hard way.

B. From the Beginning, Even the Supporters of Affirmative Action Understood that the Diversity Rationale Was Unpersuasive.

"A case may be egregiously wrong when decided," *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring), and *Bakke* surely was: the diversity rationale Justice Powell endorsed was *recognized* as unpersuasive *by eight of the Justices on the Court* when it was first articulated. *Cf. Ramos*, 140 S.Ct. at 1402 (Gorsuch, J.) (criticizing the "dubious" view of *stare decisis* under

which "a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected").

1. The diversity rationale for affirmative action policies originated in an opinion by Justice Powell, writing for himself. In *Bakke*, the medical school of the University of California at Davis justified its race-based admission preferences not based on the diversity rationale, but rather as a means "to compensate for the effects of societal discrimination on historically disadvantaged racial and ethnic minorities" and "achieve the benefits of a truly open, racially diverse society." Br. for Pet., *Bakke*, 1997 WL 187977, at *3, 9 (June 7, 1977). While the *result* of that program was greater racial diversity among students, the *purpose* behind it was to remedy the perceived effects of past discrimination.

The medical school's own briefing dispelled any doubt on this point. In its reply brief, the school stated its belief, which it shared with the United States as *amicus curiae*, "that this case presents one—and only one—inescapable question: 'whether a state university admissions program may take race into account *to remedy the effects of societal discrimination*.'" Reply Br., *Bakke*, 1977 WL 189552, at *2 (emphasis added).

In a one-Justice plurality opinion, however, Justice Powell rejected the generalized experience of past societal discrimination as a justification for race-based admissions programs and endorsed instead a "diversity rationale." Justice Powell believed that "the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of

'societal discrimination' does not justify" race-based classifications in admissions, but he thought "the attainment of a diverse student body" was "clearly … a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 310, 311-12 (Powell, J.).

Justice Powell's diversity rationale depended on the proposition that an admissions policy that pursued diversity defined by skin color would yield a school with a variety of "experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Id*. at 314. Justice Powell offered no evidence for that proposition, but rather claimed that it "is widely believed," based on a quote from the president of Princeton University that had been published in a periodical. *Id*. at 312, 314 n.49.

2. No other Justice on the Court in *Bakke* joined Justice Powell's opinion or endorsed his diversity rationale. Four justices—Chief Justice Burger, then-Justice Rehnquist, and Justices Stevens and Stewart—would have struck down the University of California's admissions policy under Title VI of the Civil Rights Act, and they therefore did not reach the constitutional question. *See* 438 U.S. at 412-21. And the remaining four Justices—Justices Brennan, White, Marshall, and Blackmun—endorsed race-based admissions not because of any "diversity rationale," but because of their belief that "Government may take race into account when it acts … to remedy disadvantages cast on minorities by past racial prejudice." *Bakke*, 438 U.S. at 325

(Brennan, J., concurring in part and dissenting in part). These justices did not endorse any other purpose for race-preferential admissions, but took the medical school at its word, that "Davis' articulated purpose" was to "remedy[] the effects of past societal discrimination." *Id*. at 362.

In short, neither the Petitioner nor *any other Justice on the Court* in *Bakke* endorsed Justice Powell's diversity rationale. Justice Powell was an island unto himself, apparently, in viewing that rationale as persuasive.

C. The Diversity Rationale Has Become Even Less Persuasive in the Intervening Years.

Just as the University of California did not defend its admission policy based on the diversity rationale, as conceived by Justice Powell, schools, activists, and scholars today apparently do not genuinely believe in, or pursue, that goal. Indeed, post-*Bakke*, "legal or factual understandings or developments" have further undermined the persuasiveness of the diversity rationale. *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring).

Unsurprisingly, after *Bakke*, colleges and universities rushed to justify their racial preferences based on the diversity rationale that Justice Powell had articulated. Their race-based admissions programs, however, had been built not to attain Justice Powell's vision of diversity, but rather to remedy past societal discrimination, and efforts to cloak them in "diversity" terms did not fundamentally change their purpose. The "diversity rationale" simply

drove the *real* rationale for race-based admissions underground.

Legal scholars have long observed this phenomenon in the years following *Bakke*. They have noted that, "because of Justice Powell's emphasis on the almost unique legitimacy of 'diversity' as a constitutional value, it has become the favorite catchword—indeed, it would not be an exaggeration to say 'mantra'—of those defending the use of racial or ethnic preferences." *Supra* Levinson, at 577. Yet this pivot to the diversity rationale has been "little more than a rhetorical Hail Mary pass, an argument made in desperation when all other arguments for preferences have failed." *Supra* Shuck, at 34.

As Professor and affirmative action proponent Jack Balkin has explained, he "understand[s] 'diversity' to be a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment." *Supra* Levinson, at 601 (quoting Letter from Jack Balkin, Prof., Yale Law School, to Sanford Levinson, Prof., Univ. of Texas Law School (March 18, 1999)). To be "honest about what 'diversity' is really about," Professor Balkin acknowledges, would require admitting that "[i]t is primarily about distributive justice of human capital," and that "Blacks and Hispanics should be given a larger share of this capital to make up for their relative deprivations due to social subordination." *Id*. at 601-02. Or as Professor Rubenfeld put the point: "Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued" by universities, but that "[t]he purpose of affirmative

action is to bring into our nation's institutions more blacks, more Hispanics, more Native Americans, more women, sometimes more Asians, and so on—period." Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997).

California Supreme Court Justice Goodwin Liu has similarly lamented that "[e]ver since *Bakke*, we have conflated concepts of justice with concepts of diversity." *Supra* Liu, at 1984. This has come "at a cost," because while "[d]iversity rationales greatly expand the number of groups entitled to claim preference or special protection, … they are an awkward fit as justifications for policies designed to address entrenched patterns of racial subordination." *Id*. As a result, "[t]oo often we speak of diversity when *our real concern* is racial justice." *Id*. at 1984-85 (emphasis added).

Other prominent liberal scholars and affirmative action proponents are of the same mind. *See, e.g.*, Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N. UNIV. L. REV. 1159, 1161 (1996) ("The most frequently identified objective for affirmative action is to remedy past discrimination."); Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL'Y 37 (1997) ("[T]wo defenses of affirmative action—diversity and compensatory justice—emerged in the fierce struggles of the 1970s and are standard today, but I see them as simply rationalizations created to appeal to the broadest constituency. … In my opinion, affirmative action should be seen as a means that seeks to eradicate caste structure by altering the social standing of our country's most subordinated group.");

Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 407 (1979) ("The raison d'etre for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals.").

Accordingly, while colleges and universities have publicly invoked the diversity rationale as an advantageous litigation position, their true aims are the same as the University of California's in *Bakke*: to remedy past societal discrimination by admitting a certain proportion of students from preferred races. That is evident from the profiles of the classes they assemble. Universities claim to practice race-based admissions to attain a "critical mass" of students from certain racial groups, which they define as a number of students sufficient "[t]o ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend[,] and to challenge all students to think critically and reexamine stereotypes." *Grutter*, 539 U.S. at 380 (Rehnquist, C.J., dissenting). Yet this does not explain why, in a University Michigan Law School class of approximately 1,300 students, a "critical mass" of African-Americans is between 91 and 108 students, while a "critical mass" of Hispanic students is between 47 and 56, and a "critical mass" of Native American students merely 13 to 19 individuals. *Id*. at 381. Why are 100 students required to avoid isolation among

African-Americans, but only 20 students required for Native Americans? How can it be that other students find sufficient opportunities to engage with Hispanics when only 50 are present, but with African Americans only when there are twice as many?

The University of Michigan Law School also consistently admitted individuals from favored racial groups at the same rate that individuals from those groups applied for admission. *Grutter*, 539 U.S. at 385 (Rehnquist, C.J., dissenting) (noting that "in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American," while in "2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American."). This "striking" correlation "suggests a formula for admission" under which the "proportion of each group admitted should be the same as the proportion of that group in the applicant pool." *Id*. at 385. This smacks of racial quotas, not the pursuit of a "critical mass" of individuals with diverse backgrounds and viewpoints.

Harvard's annual admissions exhibit a similarly striking consistency: in a decade's time, Harvard admitted African Americans at a rate of between 10 and 12 percent of the incoming class, and Hispanics at a rate of eight to 12 percent. Cert Pet. at 10. These remarkably stable numbers do not suggest an admissions policy in which, "a university may consider race or ethnicity only as a 'plus' in a particular applicant's file," *Grutter*, 539 U.S. at 334, (quoting *Bakke*, 438 U.S. at 317 (Powell, J.), but rather an effort "to assure within its student body some specified percentage of a particular group

merely because of its race or ethnic origin." *Id*. at 329 (quoting *Bakke*, 438 U.S. at 307 (Powell, J.). *See also* ANTHONY KRONMAN, THE ASSAULT ON AMERICAN EXCELLENCE 134 (2019) ("That the percentage of black students and other minorities admitted to the nation's top colleges and graduate schools remains so steady year after year strongly suggests that something like a quota system is still at work, although it is disguised by a myriad of individual judgments and officially disclaimed by deans and college presidents.").

Yet as they go about obsessively assembling student bodies with a prescribed racial makeup, surreptitiously in pursuit of the goal of remedying the history of societal discrimination—precisely the rationale that this Court has rejected as unconstitutional—schools continue to dress their admission policies in the costume of the diversity rationale. For they understand that "relying on diversity rather than discrimination places affirmative action programs on more solid legal and perhaps political grounds." Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 733 (1999); *see also* Owen Fiss, *The Accumulation of Disadvantages*, 106 CAL. L. REV. 1945, 1964 (2018) (The "diversity rationale saved the day, at least as a strategic matter, but it left the policy of preferential treatment without a justification that has the gravity required to offset the sense of unfairness it gives to many.").

Today, the diversity rationale is even further out of step with what affirmative action proponents promote as justification for affirmative action policies. With the rise of critical race theory and the academic

focus on "systemic racism" as a driver of the differences in outcomes among racial groups and subgroups, the diversity rationale has undergone sustained critique by proponents of race-conscious admissions. For example, one scholar has recently pointed out that "the diversity rationale" has caused "equal protection jurisprudence" to "stake[] out a clear position on when 'discrimination' is permissible—not to remediate past discrimination against marginalized groups but to create a multicultural environment for the benefit of white people." Robin Walker Sterling, *Through a Glass Darkly: Systemic Racism, Affirmative Action, and Disproportionate Minority Contact*, 120 MICH. L. REV. 451, 501 (2021).

The short of it is this: the diversity rationale appears to be nothing but a convenient fig leaf advanced by affirmative action proponents to cover their genuine aim: pursuing some vision of racial justice. The fact that "the defenders of the precedent do not attempt to defend its actual reasoning" weighs strongly in favor of overruling *Bakke* and *Grutter*'s endorsement of race-based admissions and restoring the principle of equal protection that our ancestors fought and bled to enshrine in our fundamental law. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S.Ct. 2448, 2481 n.25 (2018) (cleaned up).

Grutter itself provides further support for overruling the decision. There, the Court predicted that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343. This makes clear that the Court was not intending to establish a

lasting constitutional norm. Indeed, *Grutter* held that "race-conscious admissions policies must be limited in time," and that making such policies permanent would actually *violate the Constitution* because it "would offend th[e] fundamental equal protection principle." *Id*. at 342. Respondents, however, have no plans to wind down their affirmative action policies, or indeed, even to regularly revisit whether their policies are still needed or whether their objectives could be achieved in race-neutral ways. Although we have not quite reached *Grutter*'s sell-by date, enough time has passed to make clear that the ill-conceived experiment started by Justice Powell and continued by the *Grutter* majority should be shut down once and for all.

II. Fostering "Diversity" By Focusing on Race Has Profoundly Negative Consequences.

As discussed above, *Bakke* and *Grutter*'s endorsement of race-based admissions policies, based on the "diversity rationale," is demonstrably and grievously wrong. That arguably should suffice to justify their repudiation. *See Gamble v. United States*, 587 U.S.---, 139 S.Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("[I]f the Court encounters a decision that is demonstrably erroneous … the Court should correct the error, regardless of whether other factors support overruling the precedent."); *see also* Charles J. Cooper, *Stare Decisis: Precedent & Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 401-08 (1988); Charles J. Cooper, *A Note on Justice Marshall & Stare Decisis*, 1992 PUB. INT. L. REV. 95, 97-100. Ultimately, however, the debate over the

correct approach to *stare decisis* is beside the point, because in addition being demonstrably erroneous, *Bakke* and *Grutter*'s endorsement of race-based admission policies has led to "significant negative … real-world consequences," *Ramos*, 140 S.Ct. at 1415, that justify cashiering those precedents on any view. We focus on four of them.

A. Race-Based Diversity Policies Instrumentalize Racial Minorities for the Purported Benefit of Other Students.

Because the diversity rationale depends on the premise that a student's racial or ethnic background "may bring … experiences, outlooks, and ideas that enrich the training of … [the] student body and better equip … graduates" for their future careers, *Bakke*, 438 U.S. at 314 (Powell, J.), it effectively instrumentalizes minority students for the benefit of others. This approach generalizes and stereotypes minority students rather than treating them as individuals. Instead of evaluating a minority student's classroom contributions on the merits, the approach simply assumes that minority students will contribute to the university community *by virtue of their immutable characteristics alone*. *See* James McWhorter, *It's Time to End Race-Based Affirmative Action*, N.Y. TIMES (Jan. 28, 2022) ("I shudder at the thought of someone on a college admissions committee … reading [my daughters'] dossiers and finding their being biracial … the most interesting thing about them. Or even, frankly, interesting at all.").

That assumption is fundamentally wrong because it instrumentalizes human beings. And its effects are

pernicious. Students who believe they may have been selected for admission because of their race, for example, are likely to draw one or both of two conclusions. First, these students may feel a responsibility to speak or act *for their race*, as if the only perspective they are expected to provide is one premised on their racial identity. Or second, these students may come to believe that "their success is guaranteed simply by being who they are," because "minority students make an essential contribution to the educational work of their school *merely on account of their racial or ethnic identities*." *Supra,* KRONMAN at 136. Both views are harmful. The first places significant pressure on minority students and limits their expected contributions to academic discourse in a way that other students are not limited. The second "encourages students to think first about what they contribute, not what they stand to gain" from the experience of studying at a university—obviously not the right frame of mind for a college freshman about to be challenged by the rigors of higher education. *Id*.

Affirmative action proponents, too, have increasingly criticized the diversity rationale for the way that it instrumentalizes minority students. They complain that diversity has become a "utilitarian paradigm," in which "diversity and its egalitarian meaning are not goods in themselves, but instruments serving greater goods of professional success and economic prosperity." This "utilitarian paradigm" of diversity "risks impeding the long-term struggle for racial justice, making us blind and numb to the ongoing racial stratification." Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry Into the Evolving Meaning of Diversity from* Bakke *to* Fischer, 20 J.

CONST. L. 1145, 1203 (2018). Others point out that "diversity brings minorities into predominantly white institutions primarily for white benefit and not necessarily for the benefit of minorities themselves." Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 451 (2014). Indeed, "diversity is heralded primarily to benefit white institutions so that white institutions can be successfully promoted as diverse, thus enhancing their institutional reputation, social capital, and cultural capital." *Id*. Or put differently: "Students of color go to college for the same reasons that white students do: to get the education and the institutional validations to advance in a society that puts tremendous value on higher education. They are not there to provide their white peers an enriching experience." Alana Massey, *Transforming White People Is Not the Job of Minority Students*, PACIFIC STANDARD (Apr. 10, 2015), https://bit.ly/38Axt18.

B. Race-Based Diversity Policies Stigmatize Racial Minorities By Calling Into Question Whether They Were Admitted On Their Merits.

Race-based diversity policies further harm the minority students they purport to help by calling into question whether those students were admitted on their merits and "deserve" to be at the institutions where they enroll. Many Justices have recognized the stigma affirmative action causes, and minority students report feeling it. It could not be otherwise, when Respondents claim that they cannot achieve a

diverse student body without making a substantial number of admissions decisions based on race.

Justice Brennan's opinion for himself and Justices White, Marshall, and Blackman is one of the first to identify the potential stigmatizing effect of affirmative action. Justice Brennan wrote that "[s]tate programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma" that a statute based on "paternalistic stereotyping" creates, since affirmative action policies "may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own." *Bakke*, at 438 U.S. at 360 (Brennan, J., concurring).

Other justices have discussed the risk of stigma, too, both in the context of affirmative action and in the context of other race-based classifications intended to disburse benefits. Justice Powell himself acknowledged in *Bakke* that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Id.* at 298 (Powell, J.). Justice O'Connor's plurality opinion in *City of Richmond v. J.A. Croson Co.* noted that "[c]lassifications based on race carry a danger of stigmatic harm" and "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 488 U.S. 469, 493 (1989) (plurality). And Justice Thomas has written repeatedly about this problem, explaining that "[s]o-called 'benign' discrimination teaches many that because of chronic

and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence," and "stamp[s] minorities with a badge of inferiority." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring); *accord Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part) ("The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving."); *see also Fullilove v. Klutznick*, 448 U.S. 448, 545, 553 (1980) (Stevens, J., dissenting) ("[A] statute of this kind *inevitably* is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race," and this is true "when benefits are distributed as well as when burdens are imposed.") (emphasis added).

A 2005 survey of minority students at Harvard Law School confirms these concerns. The students questioned in the survey reported in significant numbers that they have "experienced … stigma from classmates, professors, in job interviews, etc. based on someone else's assumption that [they] benefitted from affirmative action[.]" Ashley M. Hibbett, *The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education*, 21 HARV. BLACKLETTER L.J. 75, 90 (2005) (Thirteen of 20 participants answered "yes" to the question). In the words of one student,

> Yes, white students in general assume that black students have not performed as well [as]

> they have on the LSAT. And they assume that the LSAT is the objective measure of merit for admission to HLS. And because they believe that black students have not performed as well as they have, they intuitively believe that black students have benefited from affirmative action.

Id. at 101. *See also* Rebecca E.J. Cadenhead, *The Truth About Imposter Syndrome*, HARVARD MAGAZINE (2022) ("[M]y blackness … made it all the more necessary … to convince others I was exceptional.").

It is no mystery that race-based admissions programs risk stigmatizing racial minorities presumed to have benefitted from them. *Respondents' whole justification* for their policy is that their race-based preferences are necessary to admit a large number of minority students who would not be admitted based on race-neutral criteria alone. The University of North Carolina says it has "modeled the effects of five different types of race-neutral alternatives" but that each "would lead to a decline in racial diversity, a decline in academic quality, or both." UNC BIO 10. Harvard says that despite "several decades" devoted to "developing whole-person admissions programs," it cannot yield a program "that is both diverse and excellent" without making race-based admissions decisions. Harvard BIO 36. Of course, Petitioner has amply demonstrated that race-neutral alternatives exist, including alternatives that would make Respondents' enrolling classes both more diverse and better qualified. SFFA Pet., No. 21-707 at 29; SFFA Pet. No. 20-1199 at 17-19. But in light of Respondents' public position that substantial

numbers of minority students would not be admitted *without* preferences granted solely on account of their race, the stigma that their admissions stereotypes create for minority students is no surprise.

C. Race-Based Diversity Policies Harm Racial Minorities' Educational Achievement.

Race-based diversity policies also perversely harm the educational achievements of the very minority students they profess to benefit.

Affirmative action programs, taken together, yield a systemic "mismatch" between minority students and schools, placing minority students in academic environments too demanding for their existing skills and experiences. As Justice Thomas has explained, schools with affirmative action programs "tantalize[ ] unprepared students with the promise of a[n elite] degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition." *Grutter*, 539 U.S. at 372 (Thomas, J., dissenting). The problem is not that minority students lack the talent or ability to succeed in higher education. The problem is that, by reducing the qualification thresholds required for certain students to be admitted, minority students choose to attend universities at which they rank near the bottom among their peers in terms of preparation rather than institutions where they rank near the middle or top and are just as academically prepared as their peers.

For example, a minority "student who would flourish at, say, Wake Forest or the University of

Richmond, instead finds herself at Duke" "where she has weaker academic preparation than nearly all of her classmates," and "where the professors are not teaching at a pace designed for her—they are teaching to the 'middle' of the class, introducing terms and concepts at a speed that is challenging even to the best-prepared student." RICHARD SANDER AND STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT, at 4 (2012). Because this student is "mismatched" at Duke, she will likely underperform her capabilities—struggling to keep up, falling to the bottom of the class, and perhaps self-selecting out of more difficult majors (like science and engineering) or dropping out altogether.

> Mismatch largely explains why, even though blacks are more likely to enter college than whites with similar backgrounds, they will usually get much lower grades, rank toward the bottom of the class, and far more often drop out; why there are so few blacks and Hispanics with science and engineering degrees or with doctorates in any field; and why black law graduates fail bar exams at four times the white rate.

Id. at 4. *See* Peter Arcidiacono, et al., *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California*, AM. ECON. REV. (Mar. 2016) 559-60 (concluding that minority students mismatched at UC campuses when racial preferences were in effect and then exhibited lower grades and graduation rates in STEM fields).

Data from California confirm the mismatch theory. When California banned racial preferences in admissions in 1998 with Proposition 209, UCLA was forced to abandon the large racial preferences it had adopted. Initially, this caused a steep drop in the number of black and Hispanic students admitted to UCLA. Yet over time, black and Hispanic performance improved at the university. The four-year graduation rate among black students doubled after Proposition 209; strong black and Hispanic students accepted their UCLA offers at much higher rates (suggesting they valued being enrolled at a school where their race had not been a factor in their admission); and some minority students were admitted to less elite schools instead of UCLA, but were able to gain academic experience and later transfer to and graduate from UCLA. *Id*. at 8-9. Ultimately, *"[t]he total number of black and Hispanic students receiving bachelor's degrees was the same for the five classes after Prop 209 as for the five classes before*." *Id*. at 8 (emphasis in original). While the numbers of minority students *admitted* went down in the years after Prop 209, the graduation rates and overall success of minority students soared.

The University of California system of colleges experienced similar successes after Proposition 209, when many schools in the UC system adopted race-neutral criteria to buoy minority admission numbers. Despite these efforts, minority admission numbers still decreased. But "[m]inority graduation rates [in the UC system] rose rapidly in the years after Prop 209, and on-time (four-year) graduation rates rose even faster." *Id*. at 146. During the six years before Proposition 209, the overall four-year graduate rate of

black UC students was 22 percent; during the six years after Prop 209, it was 38 percent. Despite the decline in black admissions, black graduation rates rose dramatically. *Id*.

Students of all races are better served by enrolling at institutions that match their academic preparation, where they will be more likely to succeed and excel. Affirmative action policies work against this matching, and in the process, they harm minority students who would otherwise succeed.

D. Race-Based Diversity Policies Disproportionately Benefit Wealthy Members of Favored Races.

Race-based diversity policies also disproportionately benefit members of favored races who least need special treatment: the wealthy.

Elite universities already privilege wealthy enrollees at large rates. Studies show that approximately 3% of students at Harvard come from the lowest income quintile of families, while fully 70% of Harvard students come from just the top 1% of the family income distribution. Raj Chetty, et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility*, at 14 (July 2017), https://bit.ly/3vSdFyf. Affirmative action policies layer racial preferences on top of wealth preferences, with the result being that even among minority students, wealth is greatly overrepresented. At Harvard, 71% percent of admitted black and Latino students come from wealthy backgrounds—out of proportion with the 32% of individuals in these demographics who would qualify as wealthy in the

general population. Richard Kahlenberg, *A Better Way to Diversity Harvard*, SLATE (June 22, 2018). *See also* Peter Arcidiacono, et al., *What the Students for Fair Admissions Cases Reveal About Racial Preferences*, J. OF ECON. LIT. (Apr. 15, 2022) (concluding that Harvard and UNC "provide larger racial preferences to under-represented minorities from higher socioeconomic backgrounds"). Other commentators have noticed the sizeable shift in the number of black students from immigrant backgrounds at elite universities, rather than students from more economically disadvantaged communities of native-born blacks. *Supra* Liu, at 1982-83.

Accordingly, race-based affirmative action policies have disproportionately benefitted wealthy minorities. That result diminishes the genuine diversity of experiences and viewpoints that underlies *Bakke* and *Grutter*'s "diversity rationale." It also shows that race-based admissions programs are failing to assist those minorities who are suffering most from the "product of past discrimination." *Bakke*, 438 U.S. at 369 (Brennan, J., concurring in part). On either justification, race-based admissions have failed to achieve their aims. The time has come for the Court to call a halt to this failed, unconstitutional experiment in allowing avowed racial discrimination in higher education.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urge this Court to reverse the decisions below.

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