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 FOR RICHARD SANDER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Interest of the Amicus Curiae[1]

Richard Sander is an economist and law professor at UCLA, and a leading scholar in the field of affirmative action. Without compensation, he provided advice to Students for Fair Admissions about *SFFA v. Harvard* and *SFFA v. University of North Carolina, et al.*, and had authorized access to data disclosed to SFFA under the district court's protective order. None of that confidential information is used or cited in this brief, which represents only his own views.

Summary of Argument

This Court's grant of certiorari to both the Harvard and University of North Carolina cases may indicate an interest on the Court's part in broadly reviewing the question of when, and whether, universities should be permitted to use racial preferences in admissions. Amicus has tried to synthesize in this brief some of his conclusions from closely studying and observing the general operation, mechanisms, and effects of racial preferences in

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[1] No counsel for a party wrote this brief in whole or in part, and no party, counsel for a party, or anyone else made a monetary contribution intended to fund the preparation of submission of this brief. Counsel of record for all parties have filed blanket consent.

American higher education, and to draw several legal inferences from these conclusions.

Argument

I. The Court should not grant any special deference to colleges and universities in their use of racial preferences, and should apply an undiluted strict scrutiny to the practices of Harvard and the University of North Carolina.

This Court has consistently held that the use of racial preferences by public or publicly-supported institutions is subject to strict scrutiny. Yet the Court has also articulated the notion that when universities use racial preferences, they are entitled to significant deference. In her majority opinion for *Grutter*, Justice O'Connor repeatedly cited the importance of deference to university judgments as to the need for racial preferences, their appropriate extent, and the feasibility of race-neutral alternatives. In his dissent in *Grutter*, Justice Kennedy drew a distinction between deference to universities as to the educational importance of diversity, and the race-based means used to achieve that diversity. In the *Fisher* decisions, he reiterated that view.[2] Even this

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[2] *Grutter v. Bollinger*, 529 U.S. 306 (2003), at 388 ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal" (Justice Kennedy, dissenting)). "The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University

more limited formulation led to subjective judgments; the dissenters in *Fisher II* contended that Justice Kennedy's majority opinion had engaged in precisely the sort of deference to university judgments that Justice Kennedy had criticized in his *Grutter* dissent, and ruled out in his *Fisher I* opinion.[3]

The logic behind granting any degree of deference to university judgments on the use of racial classifications is based on faulty premises.

A. Colleges and universities do not behave autonomously. Behind any judicial deference to higher education diversity policies lies an assumption that universities should have the autonomy to determine when their interest in diversity is sufficiently compelling to justify the extraordinary step of race-conscious admissions. But

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receives no deference." *Fisher v. University of Texas*, 570 U.S. 297 (2013) at 311.

[3] In his *Fisher II* dissent, Justice Alito wrote, "The University [of Texas] has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking 'the educational benefits of diversity' is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request." *Fisher II* at 390. He later noted that, "[b]y accepting these amorphous goals as sufficient for the University of Texas to carry its burden, the majority violates decades of precedent rejecting blind deference to government officials defending 'inherently suspect' classifications." *Fisher v. University of Texas*, 579 U.S. 365 (2016) at 403 (Justice Alito, dissenting).

this autonomy does not in fact exist; it is actively constrained by a variety of external forces that create enormous pressures on university officials to conform to generalized notions of appropriate diversity policies. For example, American law schools are accredited by the American Bar Association (which derives part of its authority from the U.S. Department of Education). Law schools are periodically evaluated to assess how well they comply with ABA standards; a school defying these standards risks loss of accreditation, which in turn would deny the school's graduates the ability to sit for bar exams in nearly all states. ABA Standard 206 provides that "a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity."[4] When the George Mason University's law school (now the Antonin Scalia School of Law) determined, in the early 2000s, that large racial preferences were harming the students they were intended to help, it exercised its professional judgment that preferences should be scaled down. This met with fierce pushback from the ABA accreditors, who essentially demanded that the school continue to use racial preferences.[5]

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[4] *ABA Standards and Rules of Procedure for Approval of Law Schools, 2021-2022* at 14.

[5] See Richard Sander and Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (2012), Chapter 14.

Similar, though more subtle pressures come from media coverage, which regularly excoriates colleges that are judged to be insufficiently racially diverse[6] and publish rankings based on the racial diversity of campuses.[7]

B. University judgments are overridden by political judgments in the pursuit of politically-acceptable levels of diversity. University professionals often find themselves at the mercy of political forces pushing for racial diversity in ways that disregard professional judgment or measured analysis. In recent years, diversity advocates have argued that higher education institutions should stop using standardized tests – such as the SAT, ACT, and GRE – in their admissions process, on the grounds that such tests "discriminate" against racial minorities.[8] The root claim is false: while the average scores obtained by tests like the SAT do vary substantially by race, these variations accurately reflect differences in academic preparation. The tests would be discriminatory if they predicted college performance less accurately for underrepresented racial minorities than they do for

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[6] Id. at 134-35.

[7] See, for example, these US News rankings based on "diversity": https://www.usnews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity

[8] For a particularly vivid example, see Jay Rosner, "The SAT: Quantifying the Unfairness Behind the Bubbles," in Joseph A. Soares, *SAT Wars: The Case for Test-Optional College Admission* (2012).

whites and Asian-Americans, or, in particular, *if they underpredicted the actual college performance of underrepresented groups*. In reality, as an abundant social science literature demonstrates, standardized test scores are generally *more highly correlated* with college (or graduate-school) performance for Blacks and Hispanics than for whites,[9] and, though highly accurate in predicting performance, any bias in the tests errs slightly toward *overpredicting* Black and Hispanic performance.[10]

Recent events at the University of California ("UC") – one of the nation's largest and most prestigious university systems – powerfully illustrate how university expertise fares in the highly-politicized environment around issues of race. UC leadership, feeling pressure to do something in response to the false claim that the SAT and ACT were racially discriminatory, asked the university's Academic Senate to study the issue. The Senate created a special committee, comprised of authorities in psychometrics as well as a broad cross-section of

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[9] See, for example, the *Report of the UC Academic Council Standardized Testing Task Force* ("STTF"), p. 21, showing that for a very large population of UC students, the SAT's correlation with freshman grades was .37 for Blacks, .39 for Hispanics, versus .34 for whites.

[10] See, for example, Lisa Anthony and Mei Liu, *LSAT Technical Report 00-02, analysis of Differential prediction of Law School Performance by Racial/Ethnic Subgroups* (2003), which finds that pre-law credentials overpredict Black performance in law school by perhaps 1/8 of a standard deviation; the actual gap in law school grades is close to two standard deviations.

distinguished academics, including several faculty known to favor more aggressive efforts to increase racial diversity at the university. The committee produced a detailed, careful study, using extensive, internal university data on hundreds of thousands of UC students, which confirmed the high value of the SAT and ACT in predicting college performance and the absence of racial bias.[11] The study identified a variety of ways in which the admissions process could produce greater "diversity" yields, but *unanimously* recommended that the standardized tests be kept in UC undergraduate admissions. A few weeks later, the UC Board of Regents, disregarding the report and perhaps considering its careful analyses irrelevant to the political questions at hand, voted *unanimously* to overrule the Academic Senate's recommendation and end UC's required use of the SAT and ACT in admissions.[12]

This is not an atypical story. Rather, it illustrates how pervasively judgments that are even marginally related to the racial composition of college campuses have become politicized in American higher education, and are emphatically not the province of expert judgment on how best to foster effective educational environments.

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[11] *STTF report*, *supra* note 9.

[12] University of California, « University of California Board of Regents unanimously approved changes to standardized testing requirement for undergraduates, » at https://www.universityofcalifornia.edu/press-room/university-california-board-regents-unanimously-approved-changes-standardized-testing

C. Universities also suffer from collective action problems that seriously impede their ability to pursue their diversity goals in rational ways. For example, even casual observers of contemporary higher education are aware of the intense efforts underway in thousands of academic departments to achieve "diversity" goals in faculty recruitment and hiring. These special efforts – which include rewarding departments with additional faculty slots for hiring underrepresented minorities, and aggressively using, as screening devices, self-statements from candidates about how they will further "diversity, equity, and inclusion" on campus – are not new, though they seem to have become more aggressive in the past few years.[13] Fundamentally, this intense competition to hire young academics from underrepresented racial groups arises from the substantial racial imbalances in the "pipeline" – in particular, the underrepresentation of Blacks and Hispanics in the ranks of students seeking doctorates and pursuing academic careers.[14]

A fundamental reason for the attenuated pipeline of Black and Hispanic students into

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[13] See, for example, Daniel Ortner, "In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia," 70 *Catholic University L. Rev*. 1 (2021).

[14] In 2018, Blacks accounted for 5% of doctorates awarded to U.S. citizens in the life sciences, 4% of doctorates awarded in engineering, and 3% of doctorates awarded in the physical sciences. See National Science Foundation, Survey of Earned Doctorates: 2018, Table 22, at https://ncses.nsf.gov/pubs/nsf20301/

academia is academic mismatch at the undergraduate level. This phenomenon was the subject of an exhaustive study in the early 2000s by sociologists Stephen Cole and Elinor Barber. The Council of Ivy League Presidents commissioned Cole and Barber to conduct a careful empirical study of how college-level education policies influenced the racial diversity of the "academic pipeline" into graduate school and academic careers. Cole and Barber, with the cooperation of many institutions, gathered survey data and a range of other information on thousands of minority undergraduates at over two dozen good to very elite colleges. Their book, *Increasing Faculty Diversity* (published by Harvard University Press),[15] made a number of varied recommendations, but a central finding was that elite colleges were seriously undermining the diversity of the academic pipeline through the overly aggressive use of racial admissions preferences. Since anyone (of any race) receiving a very large preference was likely to struggle academically, systematically large racial preferences for Blacks and Hispanics meant that a disproportionately large share of those students would receive mediocre or poor grades. Low grades would not only mean that these students were less prepared and less competitive for doctoral programs; it also made an academic career fundamentally less appealing. Cole and Barber found that among otherwise similar pairs of students who had aspired, as freshmen, to academic careers, one of

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[15] Stephen Cole and Elinor Barber, *Increasing Faculty Diversity* (2003).

whom attended a school with no preference or a small preference, and the other attending a more elite school with a substantial preference, the latter student was half as likely to want to pursue an academic career by her senior year.

The most telling part of this story is what the university leaders who had sponsored the study did with the results: they buried them. Cole reported that Barber's and his findings on academic mismatch were roundly ignored, and one will search in vain for any official document from an educational institution that even considers whether the mismatch effect narrows the minority pipeline to academia. Universities continue to use large preferences in the same ways and on the same scale as two decades ago, thus damaging the collective minority pipeline into academic careers, while universities simultaneously intensify their race-conscious competition for the modest number of underrepresented minorities who emerge from the other end of the pipeline.

D. Universities are increasingly unwilling to tolerate even a discussion of affirmative action's flaws. Amicus discusses, in Section IV below, the powerful and steadily growing evidence that large preferences actually undermine student learning and contribute to poor outcomes. Of particular relevance in this section (on the degree of deference the Court should grant higher education) is the failure of the academic community to honestly grapple with the mismatch issue. There are perhaps two explanations for this disengagement. First, any serious attempt to address mismatch requires, at the

outset, an acknowledgement of the size of preferences currently in use in higher education. This university administrators are reluctant to do, for obvious political and legal reasons. Second, higher education leaders see themselves caught in a collective action trap. More than one university president has offered amicus, in substance, the following argument: "Let us grant that science mismatch exists, and that our large preferences contribute to high attrition by minority students from our STEM majors. If we unilaterally acknowledge a problem exists, what will happen? We will greatly compound the already difficult challenge of recruiting minority students – they will instead attend schools that don't acknowledge the problem. If, instead, we substantially reduce our use of preferences, then the minority students we admit will be lured away by more elite schools using larger preferences." In other words, institutions making first moves toward addressing mismatch, in an environment where large preferences are pervasive, will place themselves at a great competitive disadvantage.

The result is, at best, collective silence and inaction by higher education leaders on the mismatch problem. The United States Commission on Civil Rights ("USCCR") has issued two detailed reports on mismatch – a 2008 report on mismatch in law schools,[16] and a 2010 report on mismatch in

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[16] U.S. Commission on Civil Rights Briefing Report, *Affirmative Action in American Law Schools* (April 2007).

undergraduate science.[17] Both reports were careful, empirical, and well-grounded in peer-reviewed studies. Both identified pervasive practices that worked to the disadvantage of minority students – a genuine problem, in contrast to the mythological problem of standardized testing. But the aggregated response of higher education was quiet disregard. So far as amicus is aware, there has not been a single effort among higher education leaders or institutions to study or engage with the problems identified by the USCCR.

Yet even this non-engagement is at the positive end of the spectrum of university responses to the mismatch issue. A more negative response has been the rapid decline of data transparency (see subsection I.6, below). And often the response has been aggressive action to silence even the hint of discussion of problems in affirmative action policies.

Thus, in 2020,[18] Norman Wang, a distinguished professor of medicine at the University of Pittsburgh, published an article examining the use of racial preferences in medical schools, and discussing how the problem of academic mismatch could negatively affect diversity in the profession. The article, which was peer-reviewed and published

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[17] U.S. Commission on Civil Rights Briefing Report, *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers* (October 2010)

[18]Center for Indivdual Rights, « Pitt Prof Fights For Academic Freedom, » at https://www.cir-usa.org/case/norman-wang-v-university-of-pittsburgh/ .

by the *Journal of the American Heart Association* ("JAHA"), came under attack in social media. Without citing a single error in Wang's research, *JAHA* decided to "retract" the article, and in the summer of 2020, the University of Pittsburgh, based on the controversy but again without any findings of any errors or misstatements on Dr. Wang's part, decided to remove him from administrative positions at the university.

In March 2021, Georgetown University's Law Center pressured one professor to resign, and placed another on suspension, for having a conversation about the disproportionate academic difficulty experienced by Black students at the law school.[19] In October 2021, MIT canceled an invited science lecture by a distinguished professor from the University of Chicago when it became known that the professor had made rather mild criticisms of racial preferences in academic hiring.[20] The term "cancel culture" is often used loosely, but one message is well understood throughout American higher education: seriously questioning the use or effects of large racial

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[19] Robert Shibley, « One Georgetown Law professor fired, one resigns after conversation about black students' academic performance accidentally recorded, » (2021) https://www.thefire.org/one-georgetown-law-professor-fired-one-resigns-after-conversation-about-black-students-academic-performance-accidentally-recorded/

[20] Robert Soave, « MIT Canceled a Professor's Guest Lecture Because He Opposes Race-Based Admissions, » https://reason.com/2021/10/21/mit-dorian-abbot-cancel-lecture-affirmative-action/

preferences is a dangerous, career-threatening enterprise. It should be obvious that in such an environment, careful, candid, engaged deliberation about the educational tradeoffs involved in large racial preferences is extraordinarily difficult.

E. Universities are unwilling to comply with the Supreme Court's guidelines for the permissible use of preferences. In past decisions on affirmative action, this Court has sought to formulate standards that constrain the use of racial preferences in higher education admissions, while preserving a role for the judgment and discretion of university leaders. But educators have not, in the aggregate, responded in good faith.

Thus, Justice Powell's controlling opinion in *Bakke* appeared to significantly constrain the use of racial preferences in admissions; it prohibited schools from using racial quotas, and ruled out the use of preferences to foster general social or remedial goals. Preferences based upon an applicant's race could be used only on a par, and for the same purposes, as preferences based upon many other diversity characteristics, such as geography or the occupation of one's parents.[21] A careful study performed several

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[21] "[P]etitioner's argument that [a quota] is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferented aggregation of

years after *Bakke* found, however, that the extent of preferences used by medical schools and law schools was virtually unchanged.[22] Only one in one hundred law school admissions officers surveyed felt that Bakke had a "significant" impact upon their own school's policies, though a large majority agreed that other law schools had had racial quotas before *Bakke*.[23]

A generation later, the Court's opinions in *Grutter* and *Gratz* ruled out the use of mechanical formulae by universities in granting racial preferences, and held that race could only be considered as a "plus" factor on a similar footing to a host of other diversity considerations. Schools must give "serious, good-faith consideration of workable race-neutral alternatives" to achieving diversity; in default of such alternatives, race could only be used in a "holistic" process in which an individual's race

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students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Regents of the University of California v. Bakke*, 428 U.S. 265, 315 (1978) .

[22] Susan Welch and John Gruel, *Affirmative Action and Minority Enrollments in Medical and Law Schools* (1998).

[23] As discussed in the brief amicus submitted on the question of granting certiorari in *SFFA v. Harvard*, undergraduate admissions at Harvard still follow the functional equivalent of a quota. Brief for Richard Sander as amicus curiae in support of neither party, on petition for writ of certiorari, *SFFA v. Harvard* (2021).

combined with other diversity characteristics put them over the admissions threshold.[24]

The restrictions sounded impressive, but their only apparent effect was to cause universities to rename their mechanical processes "holistic" ones. In a 2011 study, amicus analyzed admissions data from dozens of public law schools, and found that the average size of racial preferences used by law schools had grown since *Grutter*, and that admissions had become *more* mechanical – the overwhelming majority of law school admissions decisions could be predicted correctly knowing only an applicant's LSAT score, her undergraduate GPA, and her race.[25] Almost no law schools even gathered data on the socioeconomic background of students, and students (including minority applicants) from modest circumstances received no observable preference on those grounds.[26]

F. Universities are increasingly opaque and unwilling to providing data on student admissions and outcomes. Over the twenty years amicus has studied the practice and effects of affirmative action in American higher education, there has been a precipitous decline in the willingness of colleges and universities to operate

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[24] *Grutter v. Bollinger* 539 U.S. 306, 333-343 (2003).

[25] Sander, "Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter," in Kevin McGuire, *New Directions in Judicial Politics* (2012), pp. 293-95.

[26] Sander, "Class in American Legal Education," 88 *Denver University L.Rev.* 631, 654-660 (2011).

transparently and, in particular, to share data pursuant to public records requests. In 2003, amicus asked six public law schools for anonymized, individual-level data on their past year's admissions; all six speedily complied. In 2007, amicus's staff made similar requests of all the nation's public law schools, and nearly one hundred public undergraduate colleges, and obtained useful data from about 70% of the schools. A significant number of schools demurred, either contending that state FOIA laws did not require such disclosures, or seeking exorbitant fees to produce the data. In 2013, amicus made similar requests to essentially the same group of law schools and colleges; this time amicus received useful data from only about 20% of the schools.[27] In the course of a decade, the transparency available through public-records laws had shriveled away.

Amicus found a similar pattern at amicus's own university. In 2007, amicus (along with several other economists) sought individual-level (but anonymized) data on all applicants to the University of California over the period from 1992 to 2006, as well as "outcomes" data (e.g., undergraduate grades, majors, time to graduation) for those admitted. The university negotiated with us over a period of several months on how to shape the disclosed information in ways that would protect anonymity, but willingly

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[27] Sander, "Admissions Practices at Public Universities," UCLA Working paper, posted at https://webshare.law.ucla.edu/Faculty/bibs/sander/Sander-AdmissionsPracticesatPublicUniversities-9-16.pdf

produced a public database in 2008 that served our research purposes reasonably well. The dataset has been widely used to study a variety of issues, including how California's adoption of Proposition 209 in 1996 affected university admissions and student outcomes.[28]

In 2018, amicus and his colleagues asked the university to update the 2008 database, providing similar information for more recent cohorts of students. University officials deliberated for several months, and then turned down the request; they refused not only to provide comprehensive updated information, but to provide *any* individual-level data. Simultaneously, they entered into an agreement with a graduate student, Zachary Bleemer, who was studying at Berkeley under professors who had been enthusiastic defenders of racial preferences at universities. Bleemer was given access to all the data we were seeking – at a more granular level – *provided he did not share the data with any non-approved scholar*. In ten years, UC had shifted from practices that recognized the value of transparency and robust exchanges among scholars to a policy that not only greatly limited transparency, but promoted a

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[28] See, for example, Kate Antonovics and Ben Backes, "*The Effect of Banning Affirmative Action on College Admissions rules and Student Quality*," 49 Journal of Human Resources 295 (2014); Peter Arcidiacono, Esteban Aucejo, and V. Joseph Hotz, "*University Differences in the Graduation of Minorities in STEM Fields: Evidence from California*, 106 American Economic Review 525 (2016).

privileged research position for approved "insiders" – policies that obscure truth rather than promote it.

G. In sum, the practices and policies of universities, and the environment in which they currently operate, are inimical to the sort of deliberative processes envisioned in earlier Court decisions. Rather than merit a special level of deference, the contemporary university merits a special level of skepticism as to all policies and declarations related to matters of race.

II. The record in the case provides strong support for the plaintiff's case, and not for the opinions below.

A. To a much greater degree than in any prior case on racial preferences, the parties in Harvard and UNC cases relied upon empirical data, and sophisticated econometric models, to develop and support their key claims. The three principal analysts involved – Professors David Card (for Harvard), Caroline Hoxby (for UNC), and Peter Arcidiacono (for the plaintiffs in both cases) – are all distinguished labor economists. The opposing experts worked from the same underlying datasets, and on many important points they agreed. On a variety of major issues, however, they came to very different conclusions. The judicial opinions below consistently favored Card's and Hoxby's findings over Arcidiacono's, when the experts disagreed, and it is foreseeable that one or more partisan amicus briefs will be filed before this Court endorsing the defendants' experts and discounting Arcidiacono's testimony. On what objective basis might we place

more weight on the methods and analysis of one side rather than the other?

B. First, it is noteworthy that, so far as we can tell, neither David Card nor Caroline Hoxby have sought to publish any of the substantive results from their analyses in the Harvard or UNC cases in academic journals. Since each of these cases afforded unique access to internal university data, and a unique opportunity to analyze various aspects of the college admissions process – areas of strong interest for both Card and Hoxby – it is odd on its face that none of the work underlying their expert testimony has found its way into the research literature. In contrast, Peter Arcidiacono has, with two collaborators, developed his findings from the two cases into ***four*** academic papers.[29] Strikingly, all four of these have been accepted for publication by prestigious, peer-reviewed economic journals.[30] This tells us two important things – first, that Arcidiacono believed that the conclusions he was drawing in his

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[29] Peter Arcidiacono, Josh Kinsler, and Tyler Ransom, "*Recruit to Reject? Harvard and African American Applicants*," forthcoming, Economics of Education Review (2022); Arcidiacono, Kinsler, and Ransom, "*Asian American Discrimination in Harvard Admissions*," European Economic Review 144 (2022); Arcidiacono, Kinsler, and Ransom, "*Legacy and Athlete Preferences at Harvard*," 40 Journal of Labor Economics 133 (2022); Arcidiacono, Kinsler, and Ransom, "*Divergent: the Time Path of Legacy and Athlete Admission at Harvard*," Journal of Human Resources (forthcoming, 2022).

[30] Note that all three experts were subject to similar court-imposed restrictions to preserve the confidentiality of much of the underlying data in the cases.

expert testimony fully met professional standards, and second, that a large number of peer reviewers, chosen by editors on the basis of their expertise rather than because of any position they might have on the SFFA cases, found Arcidiacono's methods and conclusions sound.

C. A second telling aspect of the Harvard/UNC expert testimony lies in a comparison of how Card and Hoxby criticized Arcidiacono's analyses. According to Card, Arcidiacono's models were faulty because they failed to control for enough variables. According to Hoxby, Arcidiacono's models were faulty because they controlled for *too many* variables. Since Arcidiacono's models were quite similar in the two cases – within the boundaries created by the available data – both of these critiques cannot be true. (And, given the success Arcidiacono's models had in subsequently satisfying peer reviewers, it is likely neither critique is true.) Yet the two district judges in the Harvard and UNC cases accepted the respective (and inconsistent) critiques offered by Card and Hoxby.

D. The Card and Hoxby reports rely significantly on arguments that are, at their core, nonsensical. Professor Card observes that race must be a minor factor in Harvard's admissions, because "the marginal effect of race [upon the chance of admission] is very small for almost all applicants."[31] This is true by definition: Harvard admits only a tiny percentage of all applicants, so for over 90% of minority applicants, race has no effect on the

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[31] Rebuttal Report of David Card, Ph.D., at 69.

admissions decision because the applicant is rejected. Thus, while Card's statement is true, it tells us nothing informative about the actual operation of preferences at Harvard. Professor Hoxby similarly focuses, in much of her analysis, on the "median marginal effect" of race in admissions decisions;[32] in other words, if one arrays all applicants from strongest to weakest, what is the weight given to race for the "median" applicant? Since most UNC applicants are rejected (including, by definition, the "median" applicant), then here again, the race effect on the "median" applicant is zero. But this of course tells us nothing about the actual use or scale of admissions preferences.

This same type of double-talk was on display in an oft-repeated argument advanced by Harvard: that although the university used racial preferences, it "never considers an applicant's race to be a negative. If it considers race, it's always in a positive light. The fact that one applicant is given a plus or a tip doesn't mean that another who is not given that tip is being discriminated against." Does Harvard really not understand that if the number of seats in a freshman class is fixed, discrimination in favor of one racial group necessarily means discrimination against another racial group?[33]

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[32] Reply Report of Caroline M. Hoxby, Ph.D., at 11.

[33] Transcript of Bench Trial, Day 1, Before the Honorable Allison D. Burroughs, SFFA v. Harvard, at 73 (Opening argument of Bill Lee).

III. The analysis and holdings of the courts below in *SFFA v. Harvard* illustrate the ambiguities in the Court's current tests for the permissible use of race, and the need for clearer standards.

In a brief submitted last year on the question of granting certiorari in *SFFA v. Harvard*,[34] amicus offered four examples from the evidentiary record of how Harvard's admissions practices appeared to violate core guidelines from the Court's past decisions on higher education preferences – yet the decisions below found no violations. At a minimum, amicus argued, the Court should take the opportunity provided by the rich empirical record in SFFA v. Harvard to clarify its standards. But these four examples also show how the absence of bright-line rules in the Court's past decisions have allowed universities – and lower courts – to elide limitations on the use of racial preferences. These examples are also, therefore, case studies of the unworkability of the Court's current jurisprudence on racial preferences in higher education. Rather than repeat those arguments here, amicus simply notes them and refers the Court to his earlier brief.

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[34] Brief for Richard Sander as amicus curiae in support of neither party, on petition for writ of certiorari, *SFFA v. Harvard* (2021).

IV. A Growing Literature on the Mismatch Problem Documents the Self-Defeating Nature of Large Racial Preferences.

A. In an academic environment of reduced transparency and intensifying hostility toward objective analysis of admissions regimes (see Sections I.D and I.F above), it is difficult for scholars to obtain access to the sort of data that would allow careful analysis of the effects of affirmative action policies. But the corpus of research that exists should give any honest observer great pause about the utility of large racial preferences.

B. Multiple studies have shown a clear "social mismatch" effect.

1. A team of scholars worked with the Air Force Academy to test experimentally a promising strategy: assign incoming students who were expected to struggle academically (i.e., students admitted with significant preferences) to academically strong roommates, in the expectation that the social relationships developing from these assignments would help the low-credential students to improve performance. (The Academy created a control group of students who were assigned roommates in the normal manner.) The experiment produced effects opposite to those predicted – and the authors had the intellectual integrity to publish their results.[35] Large gaps in credentials between

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[35] Scott Carrell, Bruce Sacerdote, and James West, "*From Natural Variation to Optimal Policy? The Importance of Endogenous Peer Group Formation*," 81 Econometrica 855

roommates produced disengagement rather than osmosis.

2. Several Duke economists secured their university's cooperation to study how patterns of social interaction evolved during students' four years of college.[36] They found that freshmen arriving on campuses developed a significant number of interracial friendships – a good outcome. But over time, friendship groups became stratified by academic achievement; "A" students tended to maintain friendships with other "A" students, and "B-" students tended to maintain friendships with other "B-" students. These patterns developed independent of race, but (entirely) because of large admissions preferences, academic performance was also strongly stratified by race. The result was that the friendships Duke students left college with were racially stratified – indeed, student friendship networks were, on average, more racially stratified at the end of college than the students' friendship networks had been in high school. In other words, large preferences directly counteracted a key purpose of the preferences: they led to large performance differences that pulled students apart rather than fostering close interracial exchange and understanding.

(2013). *Econometrica* is perhaps the most prestigious journal in the world for empirical social science.

[36] Peter Arcidiacono, Esteban Aucejo, Andrew Hussey, and Kenneth Spenner, "*Racial Segregation Patterns in Selective Universities*," 56 Journal of Law and Economics 1039 (2013). The scholars Citation to the article. It is unlikely that Duke University would permit such a study today.

3. When considering the implications of such research, it is important to bear in mind the cascade effect.[37] Individual college administrators feel they are choosing between a racially diverse campus with large preferences, or a predominantly white and Asian campus without them. But when we consider the higher education system as a whole, it is clear that the vast majority of schools would be as racially integrated, or more racially integrated, under a system of no preferences than under a system of large preferences. Many students who currently attend Harvard through large preferences would be highly qualified for admission to Duke in a no-preference regime, and many students receiving large preferences at Duke would be highly qualified to attend UNC in a no-preference regime. Large preference systems shift students up a tier in the eliteness ranking, but do not expand the pool of underrepresented-minority freshmen, and then damage the long-term prospects of those "preferenced" freshmen.[38]

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[37] Because of the cascade effect, top-tier schools that use large racial preferences admit and enroll minority students who would, in the absence of preferences, attend "Tier 2" schools; those schools consequently must choose between having very few minority students or imitating the large preferences of the "Tier 1" schools. This pattern then repeats for lower tier schools. The problem is documented and elaborated upon in Sander and Taylor, *Mismatch*, *supra* note 5, Chapter 2.

[38] See Peter Arcidiacono, Shakeeb Khan, and Jacob Vigdor, "*Representation versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?*" 95 Journal of Public Economics 1 (2011), which examines the aggregate effects

C. Multiple studies have shown a clear "science mismatch" effect.[39] Among students who are interested in STEM fields, those who receive a large admissions preference are much more likely to drop out of STEM – or drop out of college – than otherwise similar students who do not receive a preference. As with virtually all mismatch findings, this type of mismatch affects white, Black, and Hispanic students equally; what matters is not the race of the student, but the size of the preference they receive.[40]

D. The evidence for a large mismatch effect in law school continues to mount. Amicus's original, well-known study, published in 2004 by the *Stanford Law Review*[41], reported a series of facts that seemingly could only be explained by a large mismatch effect. When controlling for pre-law credentials (i.e., LSAT scores and undergraduate grades), Black students failed the bar at much higher rates than white students. But, again controlling for pre-law credentials, Blacks performed about as well as whites in law school, and when controlling for law

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of preferences upon social interactions, taking into account the cascade effect.

[39] A leading study is Frederick Smyth and John McArdle, "*Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*," 45 Research in Higher Education 353 (2004); several other studies are discussed in USCCR, *Encouraging Minority Students*, supra note 17.

[40] Smyth & McArdle, *id*.

[41] Richard Sander, "*A Systemic Analysis of Affirmative Action in American Law Schools*," 57 Stanford L. Rev. 367 (2004)

school grades along with pre-law credentials, Blacks performed as well as whites on bar exams. These patterns make perfect sense if there is a large mismatch effect. That is, the large racial preferences used by law schools tend to place Black students at an academic disadvantage in the particular law schools they attend; their learning suffers and their grades are clustered at the bottom of the class, and consequently (and as predicted by these non-racial factors) Black graduation and bar passage rates suffer. Critics argued that the article did not provide a direct "causal" model of mismatch. This was, of course, true in the sense that the data only allowed the analysis of group effects; one could not measure mismatch directly at the individual level. The critics, however, could not articulate any alternative mechanism that would explain the observed facts. In 2016, the prestigious *Journal of Economic Literature* ("JEL") published a detailed review of the mismatch literature that sought to achieve a dispassionate assessment of the "particularly contentious" debate over law school mismatch.[42] The review, which was co-authored by a critic and a defender of affirmative action, found the evidence for law school mismatch "fairly convincing," and pointed out that the low quality of the available data would tend to bias estimates away from finding mismatch.[43] Thus, data allowing direct measurement of the gap between

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[42] Peter Arcidiacono and Michael Lovenheim, "*Affirmative Action and the Quality-Fit Tradeoff*," 54 Journal of Economic Literature 3, 11 (2016).

[43] *Id*. at 20.

individual student credentials, and the median credentials at their school, might well show larger mismatch effects.

That more direct measurement now exists. Through a series of public records requests, Robert Steinbuch and amicus have been able to assemble data that allows us to directly measure mismatch and its impact on bar passage outcomes for over four thousand students at three law schools. Our analysis of the data, which has been peer-reviewed and accepted for publication by the *Journal of Legal Education*, reveals very large and highly statistically significant mismatch effects upon bar passage, and also shows that, when credentials (and preferences) are controlled, racial differences disappear.[44] As the *Journal of Economic Literature* review predicted, the better data, directly measuring mismatch, showed that it played an even larger role than previously thought in explaining racial gaps in bar passage. Once again, we have a strong finding that it is preferences, not race, which explain large racial disparities in educational outcomes.

E. Mismatch likely explains high minority attrition in the pipeline through medical training. New research on medical education[45] shows much the

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[44] Richard Sander and Robert Steinbuch, "Mismatch and Bar Passage: A School-Specific Analysis," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054208

[45] Richard Sander, "*Affirmative Action in Medical School: A Comparative Exploration*," 49 Journal of Law, Medicine, and Ethics 190 (2021). As the text suggests, no existing work has

same patterns that amicus identified in law schools in "Systemic Analysis": large racial preferences (with race dominating other "diversity" factors in admissions, like socioeconomic status); large credential disparities, by race, within individual medical schools; and much higher rates of academic and certification failure among those receiving large preferences. Although Blacks have made up 7% to 9% of all medical school matriculants for decades, Blacks make up only 5% of all physicians[46] and are disproportionately likely not to successfully certify for their chosen specializations; the available evidence is at least consistent with a finding that this high attrition rate is largely due to large medical school admissions preferences.

V. Conclusion: the consequences of race-neutrality would be beneficial, especially if the Court can craft its ruling to encourage compliance.

A. If the Court simply clarifies its earlier holdings, and produces more objective definitions of "racial balancing" and "predominant factors", little real change is likely to occur, for the reasons

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directly tested the effect of mismatch in medical education, but a substantial variety of findings are consistent with a mismatch effect, and no alternative hypothesis has been advanced to explain the very high rates of minority attrition and non-certification.

[46] https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018.

discussed in Part I of this brief. Higher education leaders have too many incentives to merely feign compliance, and enforcement actions are extremely difficult to bring. Finding instead that the policy of deference has proven unworkable, and that in any case colleges and universities have had fifty years to engage in "temporary" racial classifications, the Court should simply prohibit the use of racial preferences or racial discrimination in admissions.

B. There would be three likely effects of a simple ban, judging from the experience of the University of California after Proposition 209, which amicus has closely studied.

1. Colleges and educators will have much stronger incentives to address "pipeline" issues that explain much of the current performance gaps across racial groups. After Prop 209, the University of California invested several hundred million dollars in efforts to improve K-12 education in the state (especially at the high school level). UC campuses formed partnerships with low-performing schools; UC launched programs to familiarize high-school students, especially those from schools that traditionally sent fewer students to UC, with UC's various requirements; and undertook many other "pipeline-building" efforts. During the decade after Prop 209, high school graduation rates for Blacks and Hispanics jumped in California, and the number of Black and Hispanic UC applicants increased three-to-

fourfold.[47] There is, moreover, very strong evidence that the very public removal of racial preferences increased the rate at which admitted Black and Hispanic students accepted those offers and enrolled at UC, especially at those schools (Berkeley and UCLA) which had, prior to Prop 209, used preferences most aggressively.[48] In other words, minority students appeared to seek out more enthusiastically schools that did not use racial preferences.

2. The winding down of racial preferences in undergraduate admissions coincided with substantial improvements in minority academic outcomes, very plausibly a result of a reduction in academic mismatch.[49] Black and Hispanic GPAs rose relative to those of whites and Asian-Americans; graduation rates (especially four-year graduation rates) rose, and a larger share of Black and Hispanic graduates successfully completed degrees in STEM fields. There is no dispute that many more Blacks and Hispanics were earning UC degrees ten years after Prop 209 than ever had during the pre-1998 era of racial

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[47] Richard Sander, "*Fifteen Questions About Proposition 16 and Proposition 209*," University of Chicago Law Review Online (2020).

[48] Kate Antonovics and Richard Sander, "*Affirmative Action Bans and the 'Chilling Effect*," 15 American Law and Economics Review 252 (2013).

[49] See Arcidiacono, Aucejo, and Hotz, supra note 28, and Sander and Taylor, *supra* note 5, Chapter 9.

preferences, nor that UC campuses were collectively more integrated.[50]

3. A third consequence of "race-neutrality" was a greater use of so-called "race-neutral substitutes." Initially, this meant an increase in the use of moderate socioeconomic preferences.[51] In 2001, the university introduced its "top 4%" system, which guaranteed a place in UC to any student who was in the top 4% of her high school class measured either by test scores or grades; in 2011 this was expanded into a "top 9%" program. The university calculated a disadvantage ranking for each California high school, and various campuses began to give some preference based on a school's low ranking.

4. At UC, along with these three beneficial consequences of race-neutrality, there was, over time, a fourth consequence: growing pressure to re-introduce covert racial preferences. The timing of re-introduction followed a pattern. Those UC programs, such as UC's law schools, that were most directly in a "national" market for top Black and Hispanic students (and thus were competing heavily with schools that continued to use preferences) experienced the largest short-term drops in minority enrollment, loudly denounced race-neutrality, and

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[50] Sander and Taylor, *supra* note 5, Chapter 9.

[51] Kate Antonovics and Ben Backes, "*The Effect of Banning Affirmative Action on College Admissions rules and Student Quality*," 49 Journal of Human Resources 295 (2014).

soon reintroduced covert preferences.[52] They were gradually followed by other (mostly graduate-level) programs that also competed on national markets. The absence of significant pushback (or any litigation) as a result of renewed race-conscious admissions encouraged undergraduate campuses to follow their example; these campuses adopted "holistic" admissions systems that quietly but more and more aggressively incorporated racial preferences.[53] At this writing, the university encourages, in a myriad of ways, individual programs to pursue racial proportionality, despite voters' reaffirmation of Prop 209 in the 2020 election.

5. Two conclusions from the University of California experience seem relevant to the Court's deliberations on possible paths forward. First, a new rule that finds racial preferences in university admissions to violate Title VI and the 14th Amendment is likely to produce net positive effects for Blacks and Hispanics through greater attention by universities to the K-12 pipeline, less stigmatization of high-achieving minority students, and a reduction of mismatch effects. Despite these beneficial effects, individual colleges (especially the most elite ones), and much of the media, will focus disproportionately

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[52] Danny Yagan, "*Supply versus Demand under an Affirmative Action Ban: Estimates from UC Law Schools*," 137 Journal of Public Economics 38 (2016). Sander and Taylor, *supra* note 5, Chapter 10.

[53] Robert Mare, *Holistic Review in Freshman Admissions at UCLA, 2009-11 Update, Prepared for the Committee on Undergraduate Admissions and Relations with Schools* (2014).

on those cases where minority enrollments drop sharply, and these colleges and university programs will face strong pressure to covertly re-introduce preferences. If preferences are re-introduced, without notable negative repercussions, they are very likely to spread, as they have at UC and at other universities under race-neutral regimes.

C. The challenge, then, for a Court contemplating a clear standard of race neutrality in university admissions comes not from the fallout to minority students; these students will overwhelmingly thrive in a race-neutral regime. The challenge comes rather from compliance: will universities obey the law? The University of California experience arguably provides some basis for optimism. Many institutions, given such a clear rule, will be inclined to comply, and the fact that a Supreme Court rule would apply nationally *will mitigate the "competitive" pressures that eroded compliance at UC*. Still, experience shows that the danger of non-compliance is very real, and the Court should consider methods of improving the odds of compliance. These methods may include: (a) liberal standing requirements for challenges to race-based practices at universities; (b) in litigation, a burden of demonstration on universities to show statistically the basis for apparent departures from race neutrality; (c) a requirement that universities that rely significantly on "race-neutral" methods of achieving diversity provide meaningful transparency on the operation and use of those methods.

Respectfully submitted,

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