

Nos. 20-1199 and 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 ADMISSIONS AND TESTING
PROFESSIONALS AS *AMICI CURIAE*
SUPPORTING RESPONDENTS**

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<i>Fisher v. Univ. of Texas at Austin</i> , 579 U.S. 365 (2016)	24, 27, 30, 32, 35
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<i>Miller v. Johnson</i> , 515 U.S. 900 (1995).....	19
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Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291 (2014).....18, 30

Students for Fair Admissions, Inc. v. Univ. of N. Carolina, No. 1:14CV954, 2021 WL 7628155 (M.D.N.C. Oct. 18, 2021).....10-11, 21, 22

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 980 F.3d 157 (1st Cir. 2020).....11-12, 23

Students for Fair Admissions, Inc., v. President and Fellows of Harvard College (Harvard Corp.), 397 F. Supp.3d 126 (D. Mass. 2019) 32, 33

Sweezy v. New Hampshire, 354 U.S. 234 (1957)9

United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943)9

Other Authorities:

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.....3, 19

- Bureau of Labor Statistics,
<https://www.bls.gov/opub/mlr/2018/article/program-participation-and-spending-patterns-of-families-receiving-means-tested-assistance.htm>.....26
- Chan & Eyster, Does Banning Affirmative Action Lower College Student Quality? (2002),
<https://www.nuffield.ox.ac.uk/Users/Eyster/papers/euroafac.pdf>28
- Daniel & Greytak, Requiem for Affirmative Action in Higher Education: Case Analysis Leading to a Fisher v. University of Texas at Austin, 279 EDU.L.REP. 539, 547 (2012)24
- Deloitte, *The Diversity and Inclusion Revolution, Eight Powerful Truths* (2017),
https://www2.deloitte.com/content/dam/insights/us/articles/4209_Diversity-and-inclusion-revolution/DI_Diversity-and-inclusion-revolution.pdf 13, 14
- Fryer, et al., Color Blind Affirmative Action, National Bureau of Economic Research, NBER Working Paper Series No. 10103 (2003),
https://www.nber.org/system/files/working_papers/w10103/w10103.pdf.....28

Gompers and Kovvali, The Other Diversity Dividend, Harvard Business Review Magazine (July-August 2018), https://hbr.org/2018/07/the-other-diversity-dividend	14
Harpalani, Narrowly Tailored But Broadly Compelling: Defending Race-Conscious Admissions After Fisher, 45 SETON HALL L. REV. 761 (2015)	31
Kidder, How Workable are Class-Based and Race-Neutral Alternatives at Leading American Universities?, 64 UCLA L. Rev. 100 (2016), https://www.uclalawreview.org/wp-content/uploads/2019/09/Kidder-D64-update.pdf	29
Laycock, The Broad Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership, 78 TUL. L. REV. 1767 (2004).....	34
Lorenzo, et al., How Diverse Leadership Teams Boost Innovation (Jan. 23, 2018), https://www.bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation	14, 15
Madiraju, Whatever Happened to the Green Factors? Affirmative Action through the Lens of Desegregation Law,	

41 THE HARBINGER, N.Y.U. REV. L. & SOC. POLICY 57 (2018).....	34
McKinsey & Co., Delivering Through Diversity (Jan. 18, 2018), <a href="https://www.mckinsey.com/business-
functions/people-and-organizational-
performance/our-insights/delivering-
through-diversity?cid=eml-web">https://www.mckinsey.com/business- functions/people-and-organizational- performance/our-insights/delivering- through-diversity?cid=eml-web	13
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INTERESTS OF *AMICI CURIAE*

Amici Curiae are admissions and testing professionals focused on equitable access to post-secondary education.¹ ACCEPT, Inc. (“ACCEPT”)² is an advocacy group and community of college admissions professionals concerned with racial justice in the college admissions process. Association of College Counselors in Independent Schools, Inc. (“ACCIS”) is a non-profit membership organization of school-based college advisors. ACCEPT and ACCIS help admissions professionals confront and dismantle institutional and systemic barriers that prevent marginalized students from attaining post-secondary education. The National Center for Fair & Open Testing, Inc. (“FairTest”) is a non-profit organization that advances quality education and equal opportunity by promoting fair, open, valid and educationally beneficial evaluations of students, teachers and schools.

As such, ACCEPT, ACCIS, and FairTest have an interest in promoting individualized, holistic reviews of applicants that take into account the entirety of each applicant’s background and experience, including race, ethnicity, and all other factors relevant to a thorough analysis of those seeking

¹ Counsel for *amici curiae* authored this brief in whole. No other counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

² ACCEPT is an acronym for Admissions Community Cultivating Equity & Peace Today.

college admittance. The interest of ACCEPT, ACCIS, and FairTest coincides with admissions practices and policies implemented by Harvard College and the University of North Carolina and challenged by Petitioner in this appeal.

SUMMARY OF ARGUMENT

Every person deserves to be evaluated as an individual through an impartial assessment of one's own qualifications, experience, and opinions. That is in contrast to prejudgment of an applicant according to traits stereotypically associated with a racial or ethnic classification.³

Evaluation of an individual is what school admissions officers endeavor to accomplish. They gauge the whole of an individual who applies for university admission based on all the information in her application. That concept allows each applicant to provide individualized context in describing what she may contribute to the campus and classroom dynamic. That context may include racial- or ethnic-related challenges overcome by the applicant, such as growing up poor and Black in Mississippi, or a White applicant participating in community efforts to eliminate animus toward Asian-Americans in New York City.

³ As problematic as racial stereotypes are, it is even more troubling when the majority is the entity "assigning" the stereotypical characteristics or prejudgments to a set, or subset, of a racial or ethnic group, preventing the racial or ethnic group from defining itself.

Petitioner, Students for Fair Admissions, Inc. (“SFFA”), alleged Harvard College (“Harvard”) and University of North Carolina (“UNC”) admissions processes violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* (“Title VI”). SFFA argues this Court should eliminate all consideration of race, ethnicity, or other qualities that may place applicants in constitutionally protected classifications, making admission reviews a randomized academic numbers game instead of an individualized assessment of character, background, and experience.⁴

SFFA’s position would eliminate the right of individuals to explain their own views and experiences and deny applicants the opportunity to increase their chances of admission by including their full story, history, and body of experience in their applications. Individuals may be profoundly influenced by ethnic or racial issues and identities. Admissions officers, in SFFA’s view, should make admission decisions in a vacuum and ignore applicants’ proffered qualifications and personal factors that hint at race or ethnicity. Yet in order to to evaluate an individual fairly, admissions officers should not ignore anything the applicant believes is important to the admissions decision, such as personal qualities, experiences, and perspectives,

⁴ Petitioner’s complaint against Harvard in its prayer for relief seeks “(d) A permanent injunction requiring Harvard to *conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission.*” JA353, 490-91. (Emphasis added.)

some of which may involve race or ethnicity.

Achieving a student body diverse with varied experiences is a compelling goal, as Justice Powell recognized in the *Bakke* decision. To prepare the nation's future leaders, universities must encourage students to listen to, learn from, and make sound decisions using a multiplicity of perspectives from heterogeneous colleagues. Admissions officers' non-determinative consideration of race, ethnicity, and other individualized factors is significant in achieving student body diversity that helps prepare students for real-world leadership roles.

The District Courts below found UNC and Harvard considered and properly rejected race-neutral alternatives as unworkable and as unable to achieve this compelling university goal of a dynamic student body diverse with experiences and perspectives. Using socioeconomic status as an alternative, as Petitioner recommends for UNC, propagates a false stereotype that families on public assistance are primarily Black or Hispanic. Petitioner's proposals are unworkable and would fail to achieve the purpose for which SFFA presents them.

PRELIMINARY STATEMENT

Universities are charged with preparing future leaders for the real world. This mission, and the interest of maintaining a heterogeneous student body with a wide range of experiences to achieve it, have proven to be more compelling than when Justice Powell recognized in *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978) (finding compelling governmental interest in benefits derived from student body diversity that encompasses “qualifications and characteristics of which racial or ethnic origin is but a single though important element.”). Today, leaders and organizations beyond academia readily acknowledge the operational and managerial importance of considering a diversity of ideas and perspectives in making key decisions. Empirical studies, including those cited below, quantify the increasing value of work force diversity.

Use of race in college admissions draws a strict scrutiny level of judicial review to ensure no intentional racial discrimination occurs, requiring a compelling interest and narrowly tailored use of race to satisfy that compelling interest. *Grutter v. Bollinger*, 539 U.S. 306, 333-34 (2003) (law school had a compelling interest in obtaining the educational benefits that flow from the diverse backgrounds of student body, and race-conscious admissions process was narrowly tailored).

Reaching this compelling goal of student body diversity and fostering freedom of creative thought and expression in university classrooms requires

non-determinative consideration of race and ethnicity in the admissions process, consistent with the precedent of *Bakke* and its progeny. There are no workable alternatives to such consideration, as previously determined by Harvard and UNC.

Petitioner's purported "race-neutral" alternatives are wholly unworkable. They include creating a quota system at UNC for "socioeconomically disadvantaged" students with 750 non-competitive seats, which furthers the erroneous racial stereotype that most impoverished families are Black or Hispanic.

In analyzing SFFA's quota admission scheme, it is clear it would reduce student body diversity on university campuses and increase the quantity (but not necessarily the quality) of White enrollment. In place of race-conscious admissions procedures at UNC and Harvard, SFFA advocates for what it terms a "colorblind" system⁵ to divide applicants into two groups: those whose applications relate racial or ethnic experiences to illustrate applicants' positive personal qualities and to increase their chances of admission would land in one category; and those who do not refer to race or ethnicity whatsoever would land in another category. Ignoring all things racial and ethnic within an applicant's file effectively would result in unfairly discriminating against members of the former group by depriving them of full and fair opportunities to tell their personal

⁵ ACCEPT, ACCIS, and FairTest dispute SFFA's self-characterization of the scheme as "colorblind." Rather, the scheme would serve to make the student body more White.

stories in their admission applications. The SFFA system is constructed to prefer applicants whose personal accounts lack any racial or ethnic factors that SFFA argues should be studiously ignored by purported “colorblind” reviewers.

SFFA would scrap strict scrutiny levels of judicial review in favor of an outright ban all consideration of race or ethnicity in all circumstances. This draconian view of Title VI would require universities to blind themselves to personal racial or ethnic experiences as told by individuals that believe such experiences to be important in making admission decisions. For example, an admissions reviewer would have to ignore a White applicant’s essay on personal insights gleaned from growing up in a racially blended family or in a racially divided neighborhood. The reviewer would be similarly required to ignore a letter of recommendation referring to those same race-based insights, and also to ignore references to her parents’ college backgrounds if they attended a Historically Black College or University.

I. ACHIEVING DIVERSITY OF VIEWPOINTS AND EXPERIENCES IS A COMPELLING INTEREST

This Court has made clear that racial “classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.” *Grutter*, 539 U.S. at 326. This Court endorsed Justice Powell's conclusion that “the attainment of a diverse student body ... is a constitutionally permissible goal for an institution of

higher education.” *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013) (“*Fisher I*) (quoting *Bakke*, 438 U.S. at 311–12). Cf. *Gratz v. Bollinger*, 539 U.S. 244, 280 (2003) (goal of student diversity is compelling interest; automatic award of points based on race of applicant not narrowly tailored).

A. Academic Benefits of a Diverse Student Body

A university’s interest in a student body with diverse thoughts and experiences is compelling, and that compelling interest may be promoted through its student admissions procedures. *Bakke*, 438 U.S. at 314–15 (citing *In re Griffiths*, 413 U.S. 717, 721–722 (1973)). As Justice Powell wrote in this Court’s plurality decision:

The atmosphere of “speculation, experiment and creation”—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body... [I]t is not too much to say that the “nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the “robust exchange of ideas,” petitioner invokes a countervailing constitutional interest, that of the First

Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Bakke, 438 U.S. at 312-13. “It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.” *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankenfurter, J., concurring in result)). The most effective future leaders of our country must be exposed to a range of ideas from diverse sources in making decisions that guide our democracy, rather than have decision-making depend on conventional or knee-jerk views and ideas. *Bakke*, 438 U.S. at 312 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). As this Court stated in *Grutter*:

Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.

539 U.S. at 323. This Court confirmed that universities have a compelling interest in the educational benefits derived from diverse student populations. *Id.* at 333-34 (educational benefits of diverse student body includes racial understanding,

combating stereotypes, advancing in-depth learning, and preparing students for workforce and social diversity).

The District Court properly found UNC “recognized and actively pursued the educational benefits of diversity as one of its institutional priorities.” Evidence proved “the University’s commitment to diversity and its educational benefits is substantial and well-documented.” *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, No. 1:14CV954, 2021 WL 7628155, at *6 (M.D.N.C. Oct. 18, 2021). UNC’s task force in 2004 concluded:

- The University believes that it can achieve its educational, research, and service mission only by creating and sustaining an environment in which students, faculty, and its staff represent diversity, for example, of social backgrounds, economic circumstances, personal characteristics, philosophical outlooks, life experiences, perspectives, belief, expectations, and aspirations, to mention some salient factors.
- The University will achieve and maintain diversity on the campus through the admission of students and employment of faculty and staff who broadly reflect the ways in which we differ.
- The University promotes intellectual growth and derives the educational

benefits of diversity by creating opportunities for intense dialogue and rigorous analysis and by fostering mutually beneficial interactions among members of the community.

Id. The 2017 UNC Provost's Report on the Educational Benefits of Diversity identified specific educational benefits of student body diversity. The interrelated benefits that strengthen UNC's "educational experience" include: "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; and (5) enhancing appreciation, respect, and empathy." *Id.* at *7.

UNC professors testified the educational benefits of student body diversity include learning "how to navigate in a complex multicultural world," providing a "fertile ground for innovation... prevent[ing] the type of 'groupthink' that stifles new ideas." *Id.*

Harvard's goals include preparing its students to become leaders in an "increasingly pluralistic society" through "bridging differences and broadening perspectives in a diverse university community." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157, 192 (1st Cir. 2020). The District Court had found achieving those goals required racial categorization. *Id.*

Harvard's study of the value of student diversity, the Khurana Report, relied on discourse with students, alumni, faculty, athletic coaches, extracurricular advisors, the deans of admissions and student life, residential faculty deans, and other committees on admissions, financial aid, and educational policy. The report "emphatically embrace[d] and reaffirm[ed] the University's long-held...view that student body diversity—including racial diversity—is essential to [Harvard's] pedagogical objectives and institutional mission." *Id.* at 173. The Khurana Report identified Harvard's specific goals: (1) training future leaders in the public and private sectors; (2) equipping its graduates and itself to adapt to an increasingly pluralistic society; (3) better educating its students through diversity; and (4) producing new knowledge stemming from diverse outlooks. *Id.* at 173-74 (internal citations omitted).

Diversity of student population is fundamental to providing Harvard and UNC students with knowledge, interpersonal skills, and the ability to navigate the complex, multicultural real world today equipped with open and creative minds.

B. The Private Sector Has Quantified the Compelling Value of Diversity

The private sector empirically has shown the tremendous benefits of diversity. UNC and Harvard studies concluded that diversity was significantly beneficial to their academic missions. Global and domestic organizations use diversity as a tool to foster innovation. These organizations discourage

decision-making by stultified, homogenous leadership teams. If universities are to prepare future leaders, they must equip students for the diversity in decision-making that they will experience in the workplace and elsewhere.

“Awareness of the business case for inclusion and diversity is on the rise... companies have increasingly begun to regard inclusion and diversity as a source of competitive advantage, and specifically as a key enabler of growth.” McKinsey & Co., *Delivering Through Diversity*, at 1 (Jan. 18, 2018).⁶ The McKinsey report confirmed “the global relevance of the link between diversity—defined as a greater proportion of women and a more mixed ethnic and cultural composition in the leadership of large companies—and company financial outperformance.” *Id.* The report drew on data from more than 1,000 companies in twelve countries and measured profitability and “longer-term value creation.”

Diversity is key to innovation. “The most innovative company must also be the most diverse,” according to Apple, Inc. “We take a holistic view of diversity that looks beyond usual measurements. A view that includes varied perspective of our employees as well as app developers, suppliers and anyone who aspires to a future in tech. Because we know new ideas come from diverse ways of seeing

⁶<https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/delivering-through-diversity?cid=eml-web>

things.” Deloitte, *The Diversity and Inclusion Revolution, Eight Powerful Truths*, at 84-85 (2017)⁷ (two-thirds of 10,000 global leaders believe diversity is important or very important for succeeding in business; diversity was proven to increase profits by 20 percent and lower business risk by 30 percent). Deloitte found “high performing teams are both cognitively and racially diverse” and “[d]emographic diversity, for its part, helps teams tap into knowledge and networks specific to a particular demographic group.” *Id.*

A study of thousands of venture capital firms and tens of thousands of venture capital investments showed diversity among fund managers in a firm improved its financial performance and overall fund returns. Gompers and Kovvali, *The Other Diversity Dividend*, Harvard Business Review Magazine (July-August 2018)⁸ (noting recent National Bureau of Economic Research findings showed similar results for skilled occupations like medicine, law, and management that link diversity to the value of goods and services in the United States).

Seventy-five percent of those surveyed by Boston Consulting Group (from 1,700 companies in nine countries) believed diversity was gaining momentum in their organizations. The study found a “strong and statistically significant correlation between the diversity of management teams and overall

⁷https://www2.deloitte.com/content/dam/insights/us/articles/4209_Diversity-and-inclusion-revolution/DI_Diversity-and-inclusion-revolution.pdf

⁸ <https://hbr.org/2018/07/the-other-diversity-dividend>

innovation.” Lorenzo, et al., *How Diverse Leadership Teams Boost Innovation* (Jan. 23, 2018).⁹

Diversity of thought, experience, and perspective is crucial to effective organizational decisions. Universities must prepare students for the trending diversity required in modern decision-making in many organizations. The goal of diversity of thought, experience, and perspective is not a politically correct fad or a subterfuge for intentional racial discrimination, as SFFA tries to argue. It is a recognized and valuable business tool.

II. AWARENESS OF RACE AND ETHNICITY IS NECESSARY IF RELEVANT TO HOLISTIC EVALUATIONS OF INDIVIDUAL APPLICANTS AND THEIR OWN PERSONAL STORIES

A. Admission Officers Rely on Holistic, Individualized Applicant Reviews to Encourage Dynamic Learning Environments with Diverse Student Experiences, Perspectives, and Backgrounds.

If an applicant believed that describing her upbringing in the Church of Jesus Christ of Latter-day Saints (“LDS”) would enhance her possible admission, would an admission officer’s positive consideration of her religious background disclosed in her application violate Title VI? If a farm boy from a remote section of downstate Illinois believes his

⁹ <https://www.bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation>

character largely was shaped by the work ethic of his first-generation Irish-Catholic father, should his life story as laid out in his application be ignored by admission officers to avoid violating Equal Protection guarantees? Or ignore a White applicant whose application describes how he overcame his own racial animus after interning at an inner-city grade school?¹⁰ Or penalize an applicant who includes a photograph that identifies her by race or ethnicity? Clearly not.

Individuals applying for university admissions should be free to honestly explain their qualifications and personal backgrounds in detail if they think it will increase chances of admittance. To give each individual a fair shake, admissions officers should be free to read, consider, and act on the information that each applicant believes has been important in their life and why that should encourage their admission. It would be unfair to individuals, who believe such information is important to their chances of admission, to have that information ignored by reviewers.

SFFA's allegedly "colorblind" scheme favors race- and ethnicity-neutral applicants whose entire application—devoid of any implications of race or ethnicity—would be the only ones holistically

¹⁰ It is inexplicable in these circumstances how considering an *applicant's* LDS experiences or an *applicant's* influences from an Irish immigrant father could possibly discriminate by *class* against any other religion or any other national origin to be a constitutional violation. Yet Petitioner argues the same limited consideration of individual applicant's experiences with race or ethnicity violates Title VI *per se*. Pet. Brief at 6.

evaluated. Those applicants proffering accounts of racial or ethnic experiences to reflect such individual qualities as leadership, perseverance, or personal integrity would be negatively impacted by an admission officer's disregard of all applicant essays, letters of recommendation, and other information implicating ethnicity or race. Their applications would be considered based on non-holistic evaluations and incomplete personal information. In actuality, however, SFFA's scheme implicates race and ethnicity, but addresses it from the other direction. SFFA seeks to reward racially and ethnically vanilla applications that would not be ignored in whole or part in the purported interest of "colorblindness."

SFFA's "race-neutral" scheme effectively would trigger unfair and disparate treatment of applicants based on race and ethnicity. SFFA would permit reviewers to consider an applicant's volunteerism with the Junior League a "plus," for example, but force them to ignore an applicant's leadership role in the Urban League. Similarly, reviewers would have to ignore an applicant's mission work through her African Methodist Episcopal Church, because race is involved. The less an application speaks to diversity, the greater advantage the applicant would have because the review would have nothing to ignore. Rather than a "colorblind" process, SFFA would skew admission decisions to favor experiences and activities more closely related to the White experience.

UNC and Harvard each appropriately consider race and ethnicity as non-determinative factors in

evaluating each individual applicant within the full context of the personal background, experience, and struggles described in each application. The universities' thorough assessment of all such personal factors helps achieve a cognitively diverse student mix that injects a variety of perspectives, cultures, and ideas into their academic environments to help achieve their academic missions.

These universities do not automatically qualify anyone for admission or admit her by using race or ethnicity as a determining factor. Justice Powell's opinion in *Bakke* "emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." *Gratz*, 539 U.S. at 271 (reasoning that no single characteristic automatically ensured a desired contribution to a university's student diversity because, to assume everyone in the same racial, ethnic, or other category thinks alike, is itself stereotyping and unfair discrimination against each individual within that category).

This Court affirmed that *Fisher I* "did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met." *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 300 (2014). Institutions that receive government funds must not regard persons as class members but must treat each as an individual.

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730, (2007) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

Harvard's and UNC's admission procedures, described below, appropriately evaluate each applicant individually and holistically, including some recognition of race and ethnicity if relevant to their personal stories. The universities do not attempt to achieve racial balancing. *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (enrollment plans tied to "each district's specific racial demographics, rather than to any pedagogic concept of the level of student diversity needed to obtain the asserted educational benefits" violate Equal Protection Clause). They do not set aside a specific number of seats for applicants within racial or other classifications. *Cf. Bakke* (setting aside seats specifically for minority students to insulate them from competition from other applicants violates Equal Protection Clause and Title VI, Section 1983). They do not establish a points system that automatically favors admission for all minority candidates. *Cf. Gratz*, 539 U.S. at 270 (policy that distributes to every "underrepresented minority" applicant, solely because of race, one-fifth of the points needed to guarantee admission is not narrowly tailored to achieve its interest in educational diversity). The universities do not use separate scoring systems for minorities to increase their admission. *Cf. Hopwood v. State of Tex.*, 78 F.3d 932, 936 (5th Cir. 1996) (*abrogated by Grutter*, 539 U.S. 306) (rejecting relaxed admission requirements for Black and Mexican Americans).

The admissions processes at Harvard and UNC listen to the unique voice of each individual candidate who may speak freely in each application, a voice that effectively would be silenced by SFFA's purported "colorblind" scheme. The universities provide a forum for each applicant to emphasize what sets them apart from other candidates, potentially including personal racial or ethnic experiences that may provide insights into what the candidate would bring to the university experience. The schools do not mechanically favor candidates according to race or ethnicity, but consider race, ethnicity, or any other factor that a candidate may choose to include in an application for admission.

Routine information that SFFA would allow in admissions decisions may nevertheless signal racial and ethnic identity. An applicant's ZIP code may disclose race if it corresponds, for example, to East St. Louis, Illinois, Cochiti Pueblo, New Mexico, or Brownsville, Texas. Medical conditions may disclose racial or ethnic identities for applicants with sickle cell anemia or Tay Sachs. Applicants devoted to Bhangra dance would indirectly disclose their Punjabi background, even if they do not check any box for race. Each applicant should be entitled to have reviewers consider leadership experiences, whether in a mathematics club or in a Black students' organization.

1. UNC's narrow use of race and ethnicity in evaluating applicants

UNC invites, but does not require, prospective students in their applications to provide demographic information such as gender, race, and ethnicity, but also does not penalize the absence of such information during the evaluation process, according to uncontradicted trial testimony. *UNC*, 2021 WL 7628155 at *11. Candidates of different races are not reviewed, considered, or evaluated in separate groups. The University “mandates that race, ethnicity, and national origin may ‘never be used as anything other than one part of the comprehensive, holistic, and individualized review afforded to each candidate.’” *Id.* Training for UNC reviewers includes reminders that the university “aims to enroll a diverse class across multiple dimensions,” including “diversity of experience; ideas; backgrounds; socioeconomic status; racial and ethnic background; and first-generation college status.” *Id.* at *12.

UNC orders those who read applications “to consider each applicant as an individual based on all relevant factors revealed in his or her application in order to understand the candidate holistically and comprehensively,” so that race and ethnicity must be considered “as one factor among many.” *Id.* UNC has no quotas, no mechanical award of points, nor separate admission program based on race or ethnicity:

In other words, the goal “is for them to understand that when they read an

applicant, they're reading the entire applicant, not just the test score, not just the GPA, not just an essay. They're a whole person." To that end, the Admissions Office wants readers to "understand the context" of each applicant's experience, including their home life, school life, and the environment in which they have grown up. This is particularly important because "*success can be defined differently in different environments,*" and therefore a reader must "understand that some students won't have the curriculum that other students have simply because their high schools don't offer it, [or] that ... some students may have a lot of test prep options, while others may not."

UNC, 2021 WL 7628155 at *13 (emphasis added) (transcript citations omitted). A student's race or ethnicity might, or might not, receive a "plus" in the evaluation process, depending on the student's individual circumstances. The "plus" is not automatically awarded and does not automatically trigger an offer of admission. *Id.* at *15.

2. Harvard's narrow use of race and ethnicity in evaluating applicants

Harvard similarly looks at the totality of the applicant, taking into account all relevant factors. One of six general considerations for admission to Harvard is a "personal rating," a factor that SFFA

challenges as violating of Title VI. The personal rating “attempts to measure the positive effects applicants have had on the people around them and the contributions they might make to the Harvard community.” *Harvard College*, 980 F.3d at 168.

Harvard considers a number of factors for personal ratings that include “an applicant’s perceived leadership, maturity, integrity, reaction to setbacks, concern for others, self-confidence, likeability, helpfulness, courage, kindness, and whether the student is a ‘good person to be around.’” *Id.* To calculate the personal ratings, Harvard’s admissions officers generally review each applicant’s “admissions essays, teacher and guidance counselor recommendations, accomplishments, and alumni interview report, but almost any information in a student’s application can factor into the personal rating.” *Id.* Race is not part of a numerical personal score rating, but race-based experiences of an applicant may be considered if relevant to the applicant’s perseverance in overcoming adversity. *Id.* at 169. Admissions officers “can and do take an applicant’s race into account when assigning an overall rating” so that race may or may not be relevant to an admissions decision, as with other factors. *Id.*¹¹

¹¹ Harvard lists the factors as including “outstanding and unusual intellectual ability, unusually appealing personal qualities, outstanding capacity for leadership, creative ability, athletic ability, legacy status, and geographic, ethnic, or economic factors.” 980 F.3d at 169.

UNC and Harvard are following the model for individualized, race-conscious admissions processes endorsed by this Court in *Bakke*, *Grutter*, *Gratz*, *Fisher I*, and *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) (Fisher II) (Race-conscious admission program complied with Equal Protection Clause), and as applied by numerous lower courts. These cases upheld use of race-conscious factors in admissions evaluations that focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them, based on all the information in the applicant's file. *See, e.g., Grutter*, 539 U.S. at 323.

Eliminating all consideration of racial or ethnic attributes, if it were even possible, would lead to absurd results in the admissions process. Under SFFA's proposals, no admission decision could credit, for example, an applicant who took a leadership role in the Arab Feminist Union without violating Title VI and Title IX –because giving it any weight inherently implicates national origin and sex; similarly, if a school of performing arts applicant received favorable consideration for working in the Black Women's Playwright Group, considering that a "plus" would violate Title VI and Title IX, according to SFFA.¹² Participating in the StageSource

¹² SFFA posits that *Brown v. Topeka Bd of Educ. of Topeka*, 347 U.S. 483 (1954), requires schools to ignore racial or ethnic characteristics of university applicants. As legal commentators have noted, that argument is contrary to the reasoning and context of *Brown*. *See, e.g., Daniel & Greytak, Requiem for Affirmative Action in Higher Education: Case Analysis Leading to a Fisher v. University of Texas at Austin*, 279 *EDU.L.REP.* 539,

Playwrights' Alliance on the other hand would, according to SFFA, appropriately be considered in the admissions decision.

To gauge the whole person, admissions officers cannot ignore any fact that may have shaped the applicant's character and qualities, including the fact that the applicant overcame obstacles created by race or ethnicity.

B. No Workable Alternatives to Achieve Diversity Goals Exist to Replace Holistic, Individualized Reviews That Flexibly Consider Race and Ethnicity in the Context of Experience, Achievements, and Qualifications.

The Harvard and UNC admission decisions properly require reviewers to consider each applicant individually and the whole of her qualifications and attributes, not as someone in a racial or ethnic class. Race and ethnicity are considered only in the context of other information in the application and do not determine whether the applicant will be offered admission. There is no workable substitute for considering what role race or ethnicity, if any, played in the applicants' life story, achievements, and

547 (2012) (“can’t consider race” argued by civil rights advocates because race was used to subjugate and marginalize Black Americans prior to *Brown*; conservatives tried to conflate university remedial admissions with “the invidious, race-based assignment policies” of *Brown*). SFFA callously mimics the same cry as civil rights advocates for *Brown*, not to alleviate segregation, but to combat what SFFA regards as remedial race-based admissions policies at UNC and Harvard.

experience to best understand the totality of the individual seeking admission.

The District Courts below found, and SFFA does not seriously contest, that substituting socioeconomic disparity for race and ethnicity in the admissions process would lead to more White students admitted and less diversity of student bodies. That is because SFFA's alternative is centered on the unfair and incorrect stereotype that most families on public assistance are Black or Hispanic. This stereotype further ignores that portions of the Asian community may be the ones most likely to be economically disadvantaged.

According to the Bureau of Labor Statistics ("BLS"), of all families on some form of means-tested public assistance in 2018, only 13.6% of those with children under the age of 18 were Black; Hispanic families with children under 18 made up only 19.2%.¹³ Because less than one-third of such economically disadvantaged families are Black and Hispanic, any admission preference based on family income would result in increased White enrollment.

SFFA's purported "race-neutral" admissions scheme would encourage greater White enrollment. For example, SFFA proposes UNC set aside a quota of 750 seats for the "socioeconomically disadvantaged" applicants which, if the BLS statistics hold true, would likely result in only 250

¹³ <https://www.bls.gov/opub/mlr/2018/article/program-participation-and-spending-patterns-of-families-receiving-means-tested-assistance.htm>

seats (one-third) of the quota taken by Black and Hispanic students. Establishing SFFA's quota at UNC by taking 750 seats out of competition for "socioeconomic disadvantaged" applicants likely would yield more non-Black and non-Hispanic admissions, and therefore a less diverse student body.

SFFA's scheme would create a quota of 750 students who would automatically be admitted using poverty as the determining factor, insulating those seats from competition from other qualified students. The scheme simply creates a quota and does not consider the individual qualities of the applicants. This is no different from the University of Michigan automatic point system already rejected by this Court in *Gratz* or the set-aside program rejected in *Bakke*. This SFFA poor-student set-aside would not achieve the experiential diversity sought by the university because most families with children under 18 years old are neither Black nor Hispanic. SFFA's proposal would further promulgate the stereotype that most Black and Hispanic families live in poverty and require public aid. This false, painful stereotype should not be amplified by this Court.

Petitioner wrongly exaggerates the weight given to academic and socioeconomic factors in the universities' admissions method. SFFA's proposal ignores that the universities tried, and failed, to increase student diversity through enhanced consideration of socioeconomic and other factors. It ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a

reputation for academic excellence. *Fisher II* at 385; *Grutter*, 539 U.S. at 339.

Studies using modeled and real admissions data show SFFA's race-neutral alternatives would be detrimental to academic excellence at UNC and Harvard.

Johns Hopkins University and University of Oxford economists, modeling a plan admitting students based on a colorblind assessment of academic merits, with remaining admissions based on a lottery, concluded a race-conscious admission program maximizes total student quality in achieving any level of diversity and at a lower cost. Chan & Eyster, *Does Banning Affirmative Action Lower College Student Quality?* (2002).¹⁴

Carrying the Johns Hopkins-Oxford analysis further, Boston University and Harvard College economists modeled admission preferences based on proxies rather than lotteries, and incorporated data on real applicants at seven selective schools. The simulated admissions were based on academic predictors plus parents' education and median income in the applicant's ZIP code. The study found the data showed colorblind policies performed worse than "color-sighted policies." Fryer, et al., *Color Blind Affirmative Action*, National Bureau of Economic Research, NBER Working Paper

¹⁴

<https://www.nuffield.ox.ac.uk/Users/Eyster/papers/euroafac.pdf>

Series No. 10103 (2003)¹⁵ (colorblind admissions procedure in the seven sample schools resulted in losses of institutional efficiency in allocation of educational resources that were four to five times greater compared with a color-conscious admissions program.)

Colorblind admissions procedures cost universities substantially more resources than race-conscious systems, creating unacceptable administrative and financial burdens. As one researcher concluded:

The weight of social science research ... supports the conclusion that socioeconomic status is not an effective alternative to race conscious measures with respect to undergraduate diversity at selective colleges and universities in the United States. In addition, the very high cost of socioeconomic-based approaches (due to the combination of increasing financial aid commitments and foregoing tuition revenues) is difficult to reconcile with the U.S. Supreme Court's consideration of "tolerable administrative expense."

Kidder, *How Workable are Class-Based and Race-Neutral Alternatives at Leading American*

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https://www.nber.org/system/files/working_papers/w10103/w10103.pdf

Universities?, 64 UCLA L. Rev. 100, 131 (2016).¹⁶ The research noted the negative impact on racial diversity of UM and University of California from bans on race-sensitive admissions, as described in *Schuette*, 572 U.S. at 384-90 (2014) (Sotomayor, J., dissenting).

SFFA recycles race-conscious admission “alternatives” that this Court rejected in earlier decisions. This Court acknowledged the University of Texas at Austin (“UT”) “spent seven years attempting to achieve its compelling interest [in a diverse student body] using race-neutral holistic review. None of these efforts succeeded...” *Fisher II*, 579 U.S. at 385. UT “tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors.” *Id.* at 385.

Harvard and UNC had studied and rejected both SFFA alternatives as unworkable. Like the unsuccessful plaintiff in *Fisher II*, SFFA does not explain why race-neutral holistic review or preferences stemming from socioeconomic distinctions would work at Harvard or UNC when they failed to achieve diversity goals for the University of Texas at Austin.

SFFA promotes racial and ethnic stereotypes by suggesting Harvard and UNC treat each applicant as simply a data point by taking into account only test scores, GPA, and family income. SFFA’s proposals stereotypically presume all applicants

¹⁶ <https://www.uclalawreview.org/wp-content/uploads/2019/09/Kidder-D64-update.pdf>

have the same experience, personal qualities, and perspectives, or presume that universities should disregard those attributes as unimportant in the decision to accept new students. As one commentator explained:

[T]here is no race-neutral alternative that will allow identification of African American fencers or other individuals who explicitly defy racial stereotypes; by definition, any admissions policy that seeks to do so will have to consider race. Proxy measures such as socioeconomic status may be correlated with race, but standing alone, they will not allow universities to identify individuals who defy racial stereotypes. Until racial stereotypes themselves no longer exist, race-conscious policies will be needed to identify individuals who help break them down—and there is no reason to believe that racial stereotypes are going away any time soon.

Harpalani, *Narrowly Tailored But Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 794 (2015) (*Grutter's* goal of lessening racial stereotypes is served by admitting students who defy racial stereotypes, requiring consideration of their race, among other applicant contributions).

This Court previously rejected blind admissions calculated on grades and test scores as unworkable:

A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

...[P]rivileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court's cases have defined it and like any single metric, it will capture certain types of people and miss others....

Fisher II, 579 U.S. at 386-87.

As to setting aside 750 seats at UNC for the socioeconomically disadvantaged as a race-neutral alternative, this Court rejected similar quota systems and set-asides in *Bakke* and *Gratz*. The District Court below in *Harvard* rejected SFFA's proposals as similarly flawed and as perpetuating false racial and ethnic stereotypes. As the District Court noted, the fatal flaw in the California medical

school's admission program was its "disregard of individual rights." *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College (Harvard Corp.)*, 397 F. Supp.3d 126, 185 (D. Mass. 2019) (quoting *Bakke*, 438 U.S. at 320).

[I]t is vital that Asian Americans and other racial minorities be able to discuss their racial identities in their applications. As the Court has seen and heard, race can profoundly influence applicants' sense of self and outward perspective...Removing considerations of race and ethnicity from Harvard's admissions process entirely would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.

Harvard Corp., 397 F. Supp.3d at 194-95 (Internal citations omitted. Emphasis added.).

SFFA's proposed alternative admission schemes at UNC or Harvard would disregard an applicant's individual rights—including the right to be admitted or denied admission based all her individual traits and accomplishments disclosed to admissions

officers.¹⁷ Opponents of race-conscious admissions claim to want student diversity, academic excellence, and color-blind policies; “the result is a desperate desire to believe in some magic bullet that will produce all three.” Laycock, *The Broad Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1806 (2004) (studies demonstrate race-neutral really means proxies and lotteries that lower admission standards and substitute weaker White students for stronger White students, adding no diversity; and that race-conscious policies perform better than colorblind policies).

Harvard and UNC narrowly tailor admissions processes to use race and ethnicity as minimally as

¹⁷ SFFA apparently believes some sort of race-neutral alternative must exist because the University of Michigan and the University of California, which by law cannot consider race or ethnicity, nevertheless increased the number of diverse students. Petitioner, however, provides no information concerning the actual breakdown of those “diverse” students by race, the processes those universities use, whether unconscious biases or preferences affect the processes, or to show any causation rather than just correlation.

Petitioner’s inferences are in conflict with studies on this same matter. One commentator noted that, based on California Department of Finance data, the demographic percentages of Latinos and Blacks enrolled in California higher education was significantly lower between 1996 and 2000 after consideration of race in admissions was abolished. When Texas banned consideration of race after *Hopwood*, the University of Texas noted “diversity plummeted” and did not recover until after *Grutter*. Madiraju, *Whatever Happened to the Green Factors? Affirmative Action through the Lens of Desegregation Law*, 41 THE HARBINGER, N.Y.U. REV. L. & SOC. POLICY 57, 68-69 (2018).

possible to achieve compelling goals of assembling a dynamic student body diverse with wide ranges of ideas, experiences, and perspectives, which are highly valued by contemporary private sector organizations. This Court in *Grutter* found the hallmark of a narrowly tailored plan was applicant-by-applicant consideration that flexibly considered race without quotas, separate admissions tracks, or insulation from competition for admission due to race or ethnicity. *Grutter*, 539 U.S. at 334. SFFA would create quotas and separate admissions tracks. This scheme would crudely separate applicants by socioeconomic factors that serve as poor substitutes for race, ethnicity, and diversity of individual personal experiences. These schemes are not workable alternatives to the race-conscious, individualized, holistic evaluations of each applicant seeking university admission.

CONCLUSION

The Court should affirm the lower courts' dismissal of Petitioner's lawsuits. The lower courts made no error of law or fact, but faithfully followed this Court's rulings in *Bakke*, *Grutter*, *Gratz*, *Fisher I*, and *Fisher II*. The Court should reaffirm its holdings in those cases and reaffirm the universities' compelling interest in the comprehensive, holistic, and individualized review of university applications. The Court should likewise reaffirm the narrow use of race and ethnicity, employed by admissions officers to help evaluate the whole of an individual applicant – regardless of ethnicity or race – but for whom racial and ethnic experiences may have shaped background, character, and perspectives that would

benefit the university experience of all students and faculty.

To hold otherwise would inequitably stifle the narratives of applicants, who would be unable to tell an admissions officer why they believe their personal racial and ethnic experiences and perspectives burnish their qualifications for admission. Each college applicant should be judged in the admissions process on individual merit, whether that determination involves racial or ethnic considerations or not. If an applicant believes her individual merit should be assessed in a racial or ethnic context to explain the totality of her lived experience, she should be free to make that case in her application. She should not be downgraded for doing so.

For the foregoing reasons, *Amici Curiae* ACCEPT, Inc., Association of College Counselors in Independent Schools, Inc., and National Center For Fair & Open Testing, Inc. respectfully request that the decisions below be affirmed.

Respectfully submitted,

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