

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC., *Petitioner*,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE, *Respondent*.

STUDENTS FOR FAIR ADMISSIONS, INC., *Petitioner*,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL., *Respondents*.

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

**BRIEF OF AMICI CURIAE
COLLEGE BOARD, NATIONAL ASSOCIATION FOR
COLLEGE ADMISSION COUNSELING,
AMERICAN ASSOCIATION OF COLLEGIATE REGISTRARS
AND ADMISSIONS OFFICERS, AND ACT, INC.
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICI CURIAE¹

Amici are the leading higher-education admissions and test-publishing organizations in the United States. Collectively, their interest is to assure that the Court has an accurate and evidence-based understanding of the admissions process, the appropriate use of tests in that context, and the actual reliance of higher-education admissions leaders on this Court's longstanding precedent associated with the consideration of race in admissions.

College Board. Founded in 1900, College Board is a mission-driven nonprofit organization that connects students to college success and opportunity. Its membership includes more than 6,000 of the world's leading educational institutions dedicated to promoting excellence and equity in education. Each year, College Board helps more than seven million students prepare for a successful transition to college through programs and services in college readiness and college success—including the SAT Suite of Assessments[®], the Advanced Placement (AP) Program[®], and BigFuture[®]. The organization also serves the education community through research and advocacy on behalf of students, educators, and schools. College Board is committed to developing valid, fair, and rigorously researched assessments and publishing guidelines and technical

¹ All parties consent to the filing of this brief. Pursuant to Rule 37.6, counsel for amici curiae authored this brief. No counsel for a party in this case authored this brief in whole or in part. No one other than amici curiae or their counsel contributed monetarily to the preparation and submission of this brief.

reports that ensure thoughtful and appropriate use by K-12 and higher-education stakeholders.

College Board also established the Access and Diversity Collaborative (ADC) in 2004. The ADC is advised and sponsored by multiple educational organizations (including NACAC and AACRAO), along with over seventy higher-education institutions. The ADC provides practical tools and guidance designed to help colleges, universities, and state systems of higher education develop and implement access and diversity policies and practices grounded in research that comply with the law. The ADC believes that effective education policy begins when experts come together from across disciplines to discuss and develop sound, data-driven practices. It has provided national field leadership on issues of policy and legal compliance since its establishment in the wake of this Court's *Grutter v. Bollinger* and *Gratz v. Bollinger* decisions.

National Association for College Admission Counseling (NACAC). Founded in 1937, NACAC is a nonprofit education association of more than 25,000 secondary school counselors, independent counselors, college admissions and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to post-secondary education. NACAC's mission is to empower college admission counseling professionals through education, advocacy, and community. NACAC centers its work on ethical and equitable service to students, providing research, professional development, and best-practice guidance to college admissions officers, school counselors, college advisors, and other professionals to encourage ethical, legally sustainable, and

educationally sound practice to support all students who seek postsecondary education.

American Association of College Registrars and Admissions Officers (AACRAO). Founded in 1910, AACRAO is a nonprofit, voluntary, professional association of more than 11,000 higher-education professionals who represent roughly 2,600 institutions in more than forty countries. AACRAO represents institutions in every part of the higher education community, from large public institutions to small, private liberal arts colleges. Its mission is to provide professional development, guidelines, and voluntary standards to be used by higher-education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology, and student services. Research, guidance, and best practices are shared with members and other higher-education stakeholders through training, publications, journals, and consulting services.

ACT, Inc. ACT, Inc., is a nonpartisan, nonprofit organization founded in 1959 with a mission to help people achieve education and workplace success through a commitment to equity, access, and opportunity. Each year, more than one million high school students take the ACT—a standardized testing program founded on the belief that academic preparation for college is best measured by assessing skills learned in high school that are required for success in college courses. The ACT provides objective information about academic preparedness for postsecondary education, and as one of multiple factors considered in admissions decisions, ACT scores can increase the accuracy of admissions decisions and help further a variety of important institutional objectives. Accordingly, ACT,

Inc., seeks to prevent the inappropriate use of ACT scores as the sole or determinative factor in postsecondary admissions decisions.

SUMMARY OF ARGUMENT

For well over a century, America's higher-education system has thrived as a beacon of opportunity, innovation, and global leadership. Among the common elements that undergird the broad array of American higher-education institutions is a nearly universal recognition of the power of student diversity. In the postsecondary context, establishing a diverse learning environment is widely viewed as essential to educational success.

Indeed, this Court has recognized the essential role that student engagement with difference serves in fostering critical thinking, skills in team collaboration, bridging differences in individual backgrounds, and realizing the multidimensional individuality of each person—all key elements associated with educational outcomes that make America's higher-education system the envy of the world. Moreover, learning experiences that facilitate students' ability to engage with diversity of all kinds—of experiences, ideas, race, and ethnicity, and more—are critical for an educational program to meet the needs of the current and evolving American workforce that is global in its reach and of an increasingly diverse America.

The continuing success of American higher education is also grounded on the cornerstone of academic freedom—a longstanding concern of the First Amendment, and integral to the process of selective postsecondary admission. It is essential that this Court

preserve the ability of higher-education admissions professionals to render judgments, unique to each institution and informed by each institution's mission, that elevate the distinct potential of students from all backgrounds. That flexibility, within the guardrails of a rigorous process and adherence to strict federal non-discrimination standards, has been a foundation for successful admissions efforts for decades.

Academic judgments inherent in higher-education admissions involve considerations of numerous factors regarding student applicants, which, in combination, are essential to the formation of classes in which students will expand their horizons, have their world views sharpened and challenged by exposure to other viewpoints and experiences, and prepare for productive and engaging lives. In a society where race still matters, an applicant's life experiences directly associated with their race and ethnicity constitute one part—and often an inextricable and influential part—of their self-identity and context.

Under current law, institutional leaders and enrollment professionals continue to adhere to a workable legal framework that has enabled flexible consideration of an individual's race when necessary. That framework has guided institutional diversity efforts for decades.

Petitioner's appeal advances one principal aim: for this Court to overturn decades of settled case law by forbidding higher-education institutions from considering applicants' individual racial or ethnic identities as part of a holistic review. The radical nature of Petitioner's request cannot be overstated. The dramatic about-face that Petitioner seeks would undo almost four-and-a-half decades of guidance and precedent that

affirms the appropriate, limited consideration of race and ethnicity as part of holistic review in higher-education admissions. Higher-education institutions engage in that review flexibly, carefully, and with this Court's precedents in mind, ensuring that any consideration of an applicant's race or ethnicity comports with parameters of "narrow tailoring." The holistic-review process, as admissions officers engage in it, is thus a far cry from the rote "classification" process that Petitioner describes in its brief.

Adopting Petitioner's view would throw admissions decision-making in American higher education into upheaval. Petitioner wants to morph the process into a mechanical procedure in which test scores and grades alone, or as the dominant measures, define applicants' merit—in contrast to the thorough holistic review in which admissions officers currently engage. Doing so would defy the test-makers' designs and the tests' intended use as one of dozens of factors that inform individualized judgments about an applicant's academic readiness and potential to contribute to and benefit from a learning community.

To eliminate or materially alter that framework of holistic judgments informed by many factors including race, as Petitioner requests, would undermine the investment that thousands of institutions and schools within those institutions have made in operationalizing this Court's strict and concrete standards in policies and practices that align with their educational missions and goals.

As the leading national higher-education admissions organizations, amici urge this Court to take stock of the consequential impact that Petitioner's draconian demand would have on students from all walks of life

—and reject it. Petitioner’s attempt to upend the entire higher-education admissions landscape based on a skewed and incomplete read of the extensive record involving two higher-education institutions—as well as its blanket assertions that lack evidence about the practices of thousands of institutions nationwide—should not stand.

ARGUMENT

I. Holistic review in higher-education admissions involves integrated consideration of the totality of all academic, non-academic, and relevant background factors that reflect the individual applicant’s promise to succeed, benefit, and contribute.

A. Holistic review achieves excellence by combining concrete standards and rigor with flexibility and autonomy to advance an institution’s educational mission and aims.

In challenging the constitutionality of the admissions process here, Petitioner mischaracterizes that process as one that places applicants on a “racial register,” Br. 1, 49, by mechanically engaging in “racial stereotyping,” *id.* at 47, 53. On the contrary, higher-education admissions entail a highly complex, multi-factored decision-making process, in which the admissions professionals comprehensively and individually evaluate candidates to assess their promise. The goal of that evaluation is to assemble a class of students who will explore and expand their potential, just as they challenge their peers to do the same for the benefit of *all* students who attend their institution.

1. Admissions decisions are not made in a vacuum. They instead reflect admissions officials' well-developed understanding of institutional missions, shaped by the educational expertise of faculty and leaders within the institution, feedback from employers who seek to hire from the pool of students admitted, and society's most important needs.²

On the ground, holistic-admissions practices are as different as the number of U.S. higher-education institutions, which are remarkably diverse.³ "Despite what the popular press and various guidebooks would suggest, . . . [d]ifferent institutions aspire to serve different educational needs, and different students will have their educational needs served by different kinds and types of colleges."⁴ Institution-specific admissions determinations vary correspondingly. "A particular institution's decision of whom and how to admit . . . must be related to the societal role that it elects to play."⁵

² See generally Gretchen W. Rigol, Coll. Bd., *Admissions Decision-Making Models: How U.S. Institutions of Higher Education Select Undergraduate Students* 5, 9, 19-36 (2003) (Rigol, *Admissions Models*) (describing the complexity of the admissions process and the factors that affect those judgments).

³ See Nat'l Rsch. Council, *Myths and Tradeoffs: The Role of Tests In Undergraduate Admissions* 10 (1999) (Nat'l Rsch. Council, *Myths and Tradeoffs*) ("U.S. colleges and universities could hardly be less uniform.").

⁴ Greg Perfetto et al., Coll. Bd., *Toward A Taxonomy of the Admissions Decision-Making Process: A Public Document Based on the First and Second College Board Conferences on Admissions Models* 5 (1999).

⁵ *Id.*

Despite the breadth of diversity among colleges and universities, effective holistic review policies adhere to a rigorous framework, grounded in education research and this Court’s strict requirements. *See infra* Pt. II. Effective holistic review demands that admissions officers carefully apply professional judgment, guided by standards, data, and evidence. It is a humanistic endeavor, involving many factors shaped by the qualifications, backgrounds, and experiences of prospective students, given the character and mission of the institution to which they apply.⁶ It is likewise shaped by the institution itself, reflecting the institution’s philosophy, nonacademic programs, and financial resources.⁷

Thus, the determination of merit in any individual instance—a judgment that is inextricably “defined in light of what educational institutions are trying to accomplish”⁸—is not, as Petitioner would have it, a decision based only on what a student may have accomplished. Rather, admissions decisions reflect institutional judgment: first, about who is qualified

⁶ *E.g.*, Michele Sandlin, *The “Insight Resume”: Oregon State University’s Approach to Holistic Assessment*, in *The College Admissions Officer’s Guide* 99 (Barbara Lauren ed., 2008); *see generally* Rigol, *Admissions Models* 7.

⁷ *See* Jerome A. Lucido, *How Admission Decisions Get Made*, in *Handbook of Strategic Enrollment Management* 147, 148-49 (Don Hossler & Bob Bontrager eds., 2015); Princeton Univ., U.S. Dep’t of Educ., No. 02-08-6002 (Sept. 9, 2015) (compliance resolution); Rice Univ., U.S. Dep’t of Educ., No. 06-05-2020 (Sept. 10, 2013) (compliance resolution).

⁸ William G. Bowen & Derek Bok, *The Shape of The River: Long-Term Consequences of Considering Race in College and University Admissions* 278 (2d prtg. 2000).

to do the work and therefore likely to benefit and succeed; and second (among students considered qualified), who should be admitted based on their likely contributions to the institutional community. To achieve this second goal, “many institutions” strive to “find[] the best balance of students with different academic interests, different talents and skills, and different background characteristics.”⁹ In sum, higher-education institutions use the admissions process to consider not just past performance but also future potential, and to assemble a class where the whole is greater than the sum of its parts.¹⁰

2. While holistic review will differ from institution to institution, the process typically entails three key features.

First, holistic review is a flexible framework that allows admissions professionals to review applications to understand and assess applicants in light of a range of quantitative and qualitative factors that inform applicants’ promise to succeed, contribute to the institution’s community, and benefit individually.¹¹

⁹ Rigol, *Admissions Models* 7.

¹⁰ There is, after all, no single definition of merit. And, more to the point, there *cannot be* a single definition of merit that would effectively satisfy all institutional goals, nationwide. *See id.* at 13-18, 39-46, app. D (describing numerous admissions models and processes pursued among various institutional types and listing over 100 academic and non-academic factors possibly relevant to admissions decisions); *see also infra* Pt. I.B.

¹¹ Detailed applications submitted by students include transcripts, high school profiles, standardized test scores, essays, and letters of recommendation. Some institutions also require separate materials for specialized programs or scholarships. Others are starting to introduce new measures to

Academic factors represent only one dimension of that framework. *See, e.g.*, Lucido 151-56; Rigol, *Admissions Models* 19-20. Multiple sources confirm the wide range of non-academic factors that can affect admissions decisions. For instance, College Board’s landmark Admissions Models Project identified not just academic factors—such as direct measures (*e.g.*, class rank, core curriculum, grades, test scores); caliber of high school; and evaluative measures (*e.g.*, artistic talent, grasp of world events)—but also seventy non-academic factors. Those non-academic factors included geography (*e.g.*, academically disadvantaged school, economically disadvantaged region, from far away, school with few or no previous applicants); personal background and attributes (*e.g.*, cultural diversity, first-generation status, personal disadvantage, membership in a traditionally underrepresented minority group, civic awareness, concern for others, creativity, determination/grit, persistence, maturity); extracurricular activities, service and leadership (*e.g.*, awards and honors, community service, work experience); and extenuating circumstances (*e.g.*, family problems, health challenges, frequent moves, responsibility for raising a family).¹² More recent studies affirm these conclusions.¹³

add depth to the traditional file, including assessments of “non-cognitive” abilities. *See* William E. Sedlacek, *Noncognitive Measures for Higher Education Admissions*, in *International Encyclopedia of Education* 845 (Penelope Peterson et al. eds., 3d ed. 2010).

¹² Rigol, *Admissions Models* app. D.

¹³ *See, e.g.*, Melissa Clinedinst, Nat’l Ass’n of Coll. Admission Counseling, *State of College Admission: 2019* (2019) (survey data illustrating the mix of factors, including core academic factors,

As these sources show, the vast majority of factors considered in admissions and embedded in holistic review—as well as the vast majority of complementary enrollment efforts such as those associated with awarding scholarships and pursuing recruitment initiatives—are race-neutral. They confer no individual benefit on students based on their race or ethnicity.

Second, contrary to Petitioner’s implication that holistic review involves a separate weighting or consideration of factors in isolation (Br. 1, 47, 49), admissions officers consider many intersecting and mutually influencing personal factors that are informed by the unique mission of each institution. Factors like character and perseverance, for example, are assessed based on multiple elements of an application. *See, e.g.*, Sandlin 99-108 (describing Oregon State University’s application, requiring answers to six questions designed to measure eight “noncognitive variables” as part of unique holistic-review process).

Third, admissions officers typically examine the context relevant to the applicant in making judgments that are, by definition, not susceptible to formulaic decision-making. For instance, admissions officers will read files for not only how students represent them-

that are important in admissions decisions); Lorelle Espinosa et al., Am. Council on Education, *Race, Class and College Access, Achieving Diversity in a Shifting Legal Landscape* (2015), <https://bit.ly/3oFwb9U> (reporting results of undergraduate admission survey inquiring about 19 admissions factors); Amy N. Addams et al., Ass’n of Am. Medical Coll., *Roadmap to Diversity: Integrating Holistic Review Practices into Medical School Admission Processes* 9-10 (2010) (describing an “Experiences, Attributes, and Metrics” model recommended for individual medical school policy development, with a collection of 26 factors that may be considered).

selves, but also how they took advantage of available opportunities or overcame challenges.¹⁴ A student who took one honors course at her elite urban high school with dozens of honors options might well be considered differently than another student from that elite school who maximized every opportunity provided to her or a student who took the only honors class available at his rural or under-resourced school.

Ultimately, holistic review is characterized by “rigor, consistency, and fairness”—evidencing “overall integrity” based on the “consideration of valid criteria that are applied consistently.” Arthur L. Coleman & Jamie Lewis Keith, Coll. Bd. & Education Counsel, *Understanding Holistic Review in Higher Education Admissions: Guiding Principles and Model Illustrations* (2018).¹⁵ To help ensure that the criteria are appro-

¹⁴ Lucido 157.

¹⁵ Among other relevant factors, multiple reviews and clear protocols, professional development and reader training, and ongoing evaluation of evidence are key factors associated with rigor, consistency, and fairness. Coleman & Keith 12-15. Effective holistic review practices include the participation of multiple, well-trained individuals who bring significant experience and expertise to the decision-making process. See Gretchen W. Rigol, Coll. Bd., *Selection Through Individualized Review* 17-18, 21-22 (2004). Though significant variation exists in institutions’ processes, applications routinely go through multiple levels of review that involve different admissions personnel. Typically, applications are assigned to initial readers, who make a preliminary recommendation to admit, defer, or deny; followed by committee or second readers. The process then typically concludes when teams of admissions leaders and senior managers work through “a complex calculus” across a broad set of considerations including academic quality, tuition revenue, heterogeneity in its many forms, and support for academic and non-academic programs. Lucido 162-63.

priate, admissions officers regularly evaluate predictive validity, working to improve their outcomes year to year. Institutions also conduct their own validity studies because the impact of different elements and variables can vary from campus to campus.¹⁶

Properly understood, then, holistic review is defined by institutional mission, grounded in principles of rigor and evidence. And, based on those foundations, it involves the intersecting mix of all factors that are considered, as to each individual applicant, with respect to their potential to succeed and benefit from their educational experience, as well as their potential to contribute to the educational experience of their peers.

B. Standardized test scores and grades, alone or in combination, do not equate to merit in holistic admissions.

Petitioner asserts that “similarly qualified applicants” can and should be clustered and evaluated based on an “academic index” of test scores and grade-point averages when gauging the presence of racial discrimination. Br. 23-24, 42-43. Indeed, Petitioner has proposed that test scores should be a principal determinant of merit. *E.g., id.* at 83 (“[T]he university could set aside 750 seats in the class for high-scoring, socioeconomically disadvantaged applicants and fill the rest of the class with the most academically qualified students.”).

¹⁶ See generally John W. Young & Jennifer L. Kobrin, Coll. Bd., *Differential Validity, Differential Prediction, and College Admission Testing: A Comprehensive Review and Analysis* (2001); Lucido 151.

Any hint that standardized test scores on their own are the equivalent of “merit” is unfounded. On the contrary, experts in the science of educational measurement have long recognized that while standardized tests in higher education provide relevant academic information to inform admissions judgments, those tests are but one data point of many in evaluating academic readiness for success in postsecondary studies, and are not the sole embodiment of “merit.”¹⁷

The major testing organizations agree. ACT, Inc., for instance, has cautioned that “no test can measure all the skills and knowledge needed for success in college” and so has encouraged “[u]sing multiple measures” to “increase[] the accuracy of admission over [decisions] obtained by using test scores alone.”¹⁸ College Board has likewise explained that SAT scores should be used “in conjunction with other indicators,

¹⁷ See, e.g., Nat’l Rsch. Council, *Myths and Tradeoffs* 25; *id.* at 22 (“Both the SAT and ACT cover relatively broad domains . . . relevant to the ability to do college work. Neither, however, measures the full range of abilities that are needed to succeed in college; important attributes not measured include, for example, persistence [and] intellectual curiosity. . . .”); see also Am. Educ. Rsch. Ass’n et al., *Standards for Educational and Psychological Testing* 198 (Standard 12.10) (2014) (“In educational settings, a decision or characterization that will have a major impact on a student should take into consideration not just scores from a single test but other relevant information.”).

¹⁸ ACT, Inc., *ACT Technical Manual* at 11.44 (2020); see Krista Mattern et al., *Commentary: Reviving the Messenger: A Response to Koljatic et al.*, 4 *Educ. Measurement: Issues and Prac.* 53, 55 (2021) (“[O]ver-reliance on any single measure [in college admissions], including test scores, is not good practice. Test scores should be but one of many factors considered as part of a holistic review, and they *should never* be used to exclude underserved students from higher education.”).

such as the secondary school record (grades and courses), interviews, personal statements, writing samples, portfolios, recommendations, etc., in evaluating the applicant’s admissibility at a particular institution,” and should be evaluated “in the context of [an applicant’s] particular background and experience.”¹⁹ See generally Richard J. Noeth, *Foundations of Standardized Admissions Testing* (2009). In short, just because one applicant has a higher test score does not necessarily mean they are more qualified for admission than an applicant with a lower score.

This guidance has informed institutional practice for decades, as demonstrated by nearly twenty years of data from NACAC that capture the common use of academic inputs and metrics beyond grades and scores, including honors and other college-level course performance, rank in class, strength of the curriculum to which the student has been exposed, and more.²⁰

In addition, qualitative criteria, such as particular accomplishments (e.g., academic awards, writing samples, etc.), as well as evidence of drive and initiative, are important to consider for a full picture of an applicant’s college readiness.²¹ So any notion that admis-

¹⁹ Coll. Bd., *Guidelines on the Uses of College Board Test Scores and Related Data* 7 (2018).

²⁰ E.g., Clinedinst, 14-17; see also *supra* p. 11.

²¹ See Warren W. Willingham & Hunter M. Breland, *Personal Qualities and College Admissions* 12-17 (1982); see also Angela L. Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. Pers. & Soc. Psych. 1087, 1087 (2007) (finding grit, as a qualitative personal quality, “demonstrated incremental predictive validity of success measures over and beyond” traditional factors such as “IQ and conscientiousness”).

sions test scores alone are the equivalent of academic merit is both counter to and unsupported by research, test publisher use guidelines, and longstanding and well-documented holistic admissions practice. As reflected above (pp. 7-14), holistic review in higher-education admissions involves the integrated consideration of all academic, non-academic, and relevant background factors that reflect an applicant's promise to succeed, benefit, and contribute.

C. Eliminating consideration of an applicant's unique lived experience and perspective associated with their race and ethnicity would unfairly treat applicants for whom that is a critical part of their life story.

Petitioner's incomplete depiction of Harvard's and UNC's consideration of race in their holistic-review practices underpins its indictment of all of higher education. Without evidence, Petitioner claims that all of higher education considers race and ethnicity in holistic review in a way that ignores this Court's concrete, detailed, and strict standards for whether, when, and how an institution may consider an individual's race in admissions, and instead uses "race as a proxy" for [applicants'] experiences or views," resulting in "stereotyping" based on race and ethnicity. Br. 47, 52-53. This argument sets the stage for Petitioner's request (Br. i) that this Court categorically "hold that institutions of higher education cannot use race as a factor in admissions," which is unwarranted.²² That

²² "In the real world, . . . [colorblindness] cannot be a universal constitutional principle." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment). Indeed,

draconian action—beyond dismissing the wisdom of decades of this Court’s precedent on which higher-education institutions have relied, *see infra* pp. 22-31 — ignores the reality of holistic review.

As explained above (pp. 12-14), holistic review does not result in categorical conclusions about an application based on assumptions or stereotypes related to race. To the contrary, individualized holistic review is what it says it is: a process through which all relevant factors about an applicant are analyzed in light of each other, in that applicant’s specific context. Admissions officers evaluate those factors in light of the actual record presented by the applicant—including, where relevant, how an applicant’s race or ethnicity may have influenced that applicant’s *distinct* experiences, perspectives, and aspirations integral to the applicant’s self-identity. *See supra* pp. 12-14.

To overrule its longstanding precedent and foreclose admissions professionals from considering race as part of an individualized review of a student’s application would deprive those professionals of information that they need to do their jobs effectively.²³ Indeed,

despite Petitioner’s characterizations, higher-education institutions consider race not to treat individual students “in different fashion solely on the basis of a systematic, individual typing by race,” *id.* at 789; *see Gratz v. Bollinger*, 539 U.S. 244, 271-75 (2003), but rather to enable a holistic process of *individualized review* inclusive of the kinds of factors described above as the long-standing, constitutionally permissible norm, *see Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

²³ While asking this Court to overrule *Grutter*, Petitioner suggests that considering an applicant’s experience, *e.g.*, “overcoming discrimination,” would be permissible. Br. 52. That approach highlights the incoherence of Petitioner’s position. On the one hand, Petitioner asks this Court to categorically wipe

admissions officers use individual race-related information to inform vital judgments about how students can both benefit from the institution's program and enrich the learning and growth of their peers. *See supra* Pts. I.A, I.C. For instance, essays designed to elicit how students see themselves in light of contributions that can be expected from them often trigger discussion of racial and ethnic background, among other factors that may not otherwise surface in the admissions process.²⁴

from the record *Grutter's* holding, which (based on principles set forth in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)) distinguished between considering applicants' race in the full context of their applications (which is permissible) and categorizing individuals by racial status and stereotyping them based on nothing more than assumptions (which is not). Br. 49-71. On the other, Petitioner suggests (without quite saying so) that considering an applicant's racial background as it relates to, for example, "overcoming discrimination" would somehow be allowed. *Id.* at 52. Either admissions officers can consider an applicant's story, inclusive of experiences and perspectives that may be directly associated with the applicant's race, or they cannot.

²⁴ By way of illustration, Duke University expressed its interest in the 2021-22 admissions cycle applicants expressing their identity in the application in the following way: "Duke University seeks a talented, engaged student body that embodies the wide range of human experience; we believe that the diversity of our students makes our community stronger. If you'd like to share a perspective you bring or experiences you've had that would help us understand you better, perhaps a community you belong to or your family or cultural background, we encourage you to do so here. Real people are reading your application, and we want to do our best to understand and appreciate the real people applying to Duke." First Year Applications, Duke Univ. Undergraduate Admissions, <https://bit.ly/3SbVhuk> (click "Essays"; then click "Short Essay Prompts") (last visited July 29, 2022). Similarly, the University of Colorado Boulder asks applicants to describe one of their unique identities in the following way: "At

An individual's life story and context very much matter in understanding their journey and promise. And excluding race and ethnicity as the only parts of a student's life that could not be considered in holistic review would deny students of any race, for whom race has been a significant influence in their lives, the opportunity to relay the story of who they are and how they see and experience the world.

Being able to consider the combination of each person's own experiences in life, in the context of the totality of their identities and other attributes (*e.g.*, socioeconomic status, family composition, educational background, interests, talents, and more) is key to avoiding stereotypes of what is "White" or "Black." Increasing percentages of a race by focusing on socio-economic disadvantage, first-generation status, or other neutral criteria, without any even limited consideration of race, can result in a class that reinforces racial stereotypes related to wealth and family education. And depriving individuals whose race has had a substantial influence on their self-identities and experience

the University of Colorado Boulder, no two Buffs are alike. We value difference and support equity and inclusion of all students and their many intersecting identities. Pick one of your unique identities and describe its significance." First Year Application Checklist, Univ. of Colo. Boulder, <https://bit.ly/2K80Nxn> (click "Essays") (last visited July 29, 2022). And the University of Pennsylvania expresses interest in how the university community will shape applicants' perspective and identity in the following way: "How will you explore community at Penn? Consider how Penn will help shape your perspective and identity, and how your identity and perspective will help shape Penn." Essays, Penn Admissions, <https://bit.ly/2W724fL> (last visited July 29, 2022).

would offend the dignity of the individual that is a cornerstone of the Equal Protection Clause.

In the end, it is a constellation of factors, not any one, that defines an individual applicant and drives an admission decision that is both educationally sound and consistent with this Court's precedent. The Constitution does not require complete disregard of that reality—including whether race has affected an individual's journey in life.

II. Higher-education institutions have for decades relied on this Court's workable standards for consideration of race in holistic admissions.

As this Court has repeatedly recognized, *stare decisis* “is a foundation stone of the rule of law,” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014), that “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process,” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Thus, “[o]verruling precedent is never a small matter,” *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015), and always “demands special justification,” *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). That is especially so where, as here, there is a long line of case law reaffirming and refining the relevant principles that Petitioner seeks to overturn.²⁵

²⁵ This case thus differs markedly from *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). There, the Court ruled that reliance interests in *Roe v. Wade*, 410 U.S. 113 (1973), dwindled after the Court “revisited *Roe*” in *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S.

Petitioner’s request that this Court overrule *Grutter* rests on its claims that the Court’s longstanding legal standards are neither workable nor relied on by higher-education institutions across the Nation. *See* Br. 60-71. Neither claim reflects the reality of higher education. To the contrary, the principles of workability and reliance, coupled with the resulting harm that would result if Petitioner’s draconian demand were granted, *see supra* pp. 20-21, compel rejection of Petitioner’s request to overrule *Grutter*.

A. This Court’s consistent precedent establishes a workable standard regarding consideration of race in holistic admissions.

Whether federal precedent is workable turns on “whether [that precedent] can be understood and applied in a consistent and predictable manner.” *Dobbs*, 142 S. Ct. at 2272. The precedent of *Grutter*, based on Justice Powell’s opinion in *Bakke*, and further detailed in *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (*Fisher I*), and *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) (*Fisher II*), requires that colleges and universities apply strict scrutiny to their particular race-conscious admissions practices under the Fourteenth Amendment’s Equal Protection Clause and Title VI of the Civil Rights Act of 1964. The last twenty years have shown that *Grutter* established a framework that was not only “built to last,” *Dobbs*, 142 S. Ct. at 2274, but that has in fact endured.

In crafting its argument to leave the impression that the only relevant case law is *Grutter*, Petitioner

883 (1992), leaving “very little of *Roe*’s reasoning” intact. 142 S. Ct. at 2271.

largely ignores this long line of pertinent authority. Higher-education institutions, however, have adopted and complied with these cases' clear and detailed instructions on the requirements to satisfy strict scrutiny's application to race-conscious holistic-review processes. These instructions, which are far from the "illusory check on . . . the use of race" that Petitioner asserts (Br. 62), include:

- The "burden" is on the institution to "prove that the means chosen . . . to attain diversity are narrowly tailored to [the educational] goal [though] a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes." *Fisher I*, 570 U.S. at 311; *Fisher II*, 579 U.S. at 376-377.
- "[I]t remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine" that race is considered flexibly and "that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of an application." *Fisher I*, 570 U.S. at 311-12 (citing *Grutter*, 539 U.S. at 337).
- Higher-education institutions are responsible for "proving a 'nonracial approach' would not promote its interest in educational benefits of diversity 'about as well and at tolerable administrative expense.'" *Fisher II*, 579 U.S. at 377.
- The extent and duration of race-consciousness must not exceed the need to create a setting

where all students can realize educational benefits associated with diversity. As a result, an institution must use and periodically review the availability and impact of race-neutral alternatives to determine whether they would be sufficient to achieve the institution's compelling diversity-associated educational aims. *Id.* at 384, 388.

- Finally, an institution's ongoing review must include a way of tracking progress toward an end of the need for race-consciousness considering internal and external changed conditions. *Id.* at 388.

These instructions, and others from this Court, have proven workable when applied by higher-education institutions. As explained in more detail below (pp. 26-31), multiple sources affirm professional-development and policy-leadership commitments to understanding and following this Court's requirements as they have been refined over time. *E.g.*, Coll. Bd., *Access and Diversity Collaborative*, <https://bit.ly/2m88YAA> (last visited July 23, 2022).

This Court has also shown that these instructions are workable. In suggesting (Br. 60) that “[n]o one believes in *Grutter*,” Petitioner disregards this Court's opinions affirming and amplifying *Grutter*'s standards²⁶:

²⁶ Although the Court divided 5-4 in *Grutter*, six Justices agreed with the principles set forth by Justice Powell in *Bakke*. See *Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting) (agreeing that “[o]ur precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by

- A six-Justice majority in *Gratz* adopted *Grutter*'s holding and applied it to the facts of that companion case, concluding that the University of Michigan failed to satisfy the Court's strict scrutiny standards. 539 U.S. at 257-76.
- A seven-Justice majority in *Fisher I* applied *Grutter*'s framework with additional evidentiary obligations of postsecondary institutions to fully consider and pursue, where viable, race-neutral strategies. 570 U.S. at 307-16.
- The Court in *Fisher II* further amplified the legal rules derived from *Grutter*, with additional evidentiary guidance on satisfying strict scrutiny. 579 U.S. at 376-89. Only one Justice called for *Grutter* to be overruled. *Id.* at 389 (Thomas, J., dissenting).²⁷

There is, in short, abundant evidence of this Court's establishment of a workable strict scrutiny standard.

empirical evidence," but disagreeing with how the majority applied that standard to the facts).

²⁷ In addition, in the secondary-school setting, this Court ruled against two school districts in a student assignment case, while, at the same time, all nine Justices recognized *Grutter* standards applicable to postsecondary institutions. *Parents Involved*, 551 U.S. at 720-25; *id.* at 770-71 (Thomas, J., concurring); *id.* at 791 (Kennedy, J., concurring); *id.* at 837 (Breyer, J., dissenting); *id.* at 865 (Stevens, Breyer, Souter, and Ginsburg, JJ., dissenting).

B. Higher-education institutions have relied upon and incorporated this Court’s strict scrutiny standard for decades.

Granting Petitioner’s request to overturn decades of precedent and guidance would upend substantial reliance interests arising from long history of policy development in higher education in response to evolving jurisprudence.

For decades, higher-education institutions, guided by federal agencies, have relied on and incorporated the standards set forth in this Court’s decisions.²⁸ Moreover, major national initiatives and programs have tracked and incorporated this Court’s standards, providing guidance on their implementation and affirming in the process that the Court’s standards are workable.

Thus, for two reasons, Petitioner is wrong when arguing that higher education has not relied on this Court’s precedent and that, in any event, this Court’s precedent does not justify institutional reliance.

1. Abundant evidence documents higher-education institutions’ decades-long history of, and extensive investment in, the proactive pursuit of educational

²⁸ Department of Education regulations and policies have consistently cited this Court’s decisions in enacting rules to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* The Department has applied standards announced by *Grutter* and its progeny both to uphold and to invalidate race-conscious practices. *See, e.g.*, Tex. Tech Univ. Health Scis. Ctr., U.S. Dep’t of Educ., No. 06-05-2085 (Mar. 7, 2019) (accepting resolution letter in which school agreed to race-neutral admissions process, based on Office for Civil Rights’ concerns that its “process may not be narrowly tailored”); Princeton Univ., U.S. Dep’t of Educ., No. 02-086002 (Sept. 9, 2015) (Office for Civil Rights finding no violation of Title VI).

program-driven admissions and enrollment policies that satisfy this Court standards.²⁹ Indeed, to comply with these standards, institutions have continuously developed and refined complex admissions and enrollment processes, relying on a broad range of perspectives, including from governing boards, task forces, and extensive staff and expert efforts. Professional-development efforts aimed at those in design, decision-making, and front-line roles illustrate the ways in which strict scrutiny principles have been (and are being) practically and faithfully applied.

Indeed, the diversity-focused resources, experience-sharing, and programming of amici and their partner organizations that serve their many thousands of members demonstrate the strong reliance on—and practical implementation of—the Court’s strict scrutiny standards for individual race considerations in diversity-aimed policies. The work of College Board, with its partners; and the American Association for the Advancement of Science (AAAS) illustrate such efforts.

²⁹ See, e.g., Univ. of Md., *Policy on Diversity in Educational Programs* (2005) (expressly committing to periodic review of its diversity-related policies and programs, and to considering “the viability of race-neutral approaches [in light of] . . . the extent to which the use of race-conscious policies place a burden on nonminorities”—all steps aligned with *Grutter’s* requirements), cited in Coll. Bd., *A Diversity Action Blueprint: Policy Parameters and Model Practices for Higher Education Institutions* (2010) (outlining specifics of institutional policies and plans that conform to federal precedent); see also Statement by Indiana University President (June 24, 2013), <https://bit.ly/3bamA7T> (“Indiana University will analyze the decision carefully before taking any action as a result of the Fisher [I] case.”); Bill Howard, Off. of Gen. Counsel, State Univ. of N.Y., *Analysis of Fisher v. University of Texas*, <https://bit.ly/3BqQVtt> (last visited July 27, 2022).

College Board, working with more than a dozen national organizations, more than sixty higher-education institutions, and an integrated team of outside specialized lawyers, has led the ADC's work since 2004.³⁰ In doing so, it has helped higher-education institutions ensure compliance with *Grutter*, *Gratz*, and their progeny. Over the seventeen years of its existence, the ADC has created blueprints for action and has hosted seminars and trainings for thousands of enrollment professionals with resources to advance policy design and legal compliance. These resources have focused on both the important role of race-neutral strategies and compliance with legal standards when race-consciousness is necessary.³¹

³⁰ Coll. Bd., *Access and Diversity Collaborative*, <https://bit.ly/2m88YAA> (last visited July 23, 2022).

³¹ See Coll. Bd., *Guidance and Resources*, <https://bit.ly/3OJJeBI> (last visited July 27, 2022). In addition to providing actionable summaries of major federal decisions since ADC's creation, resources focused on incorporating developing principles of law associated with holistic review and race-neutral strategies have included Arthur L. Coleman et al., Coll. Bd. & EducationCounsel, *The Playbook: Understanding the Role of Race Neutral Strategies in Advancing Higher Education Diversity Goals* (2d ed. 2019) (Coleman et al., *Playbook*); Arthur L. Coleman & Teresa E. Taylor, Coll. Bd., *Building an Evidence Base: Important Foundations for Institutions of Higher Education Goals Associated with Student Diversity* (2017); Arthur L. Coleman et al., Coll. Bd. & EducationCounsel, *Race-Neutral Policies in Higher Education: From Theory to Action* (2008).

The district court in the *University of North Carolina* case remarked on the University's seventeen years of actively participating in the ADC and heeding its guidance. *UNC Pet. App.* 114-15.

AAAS over the last decade has led two major diversity-related initiatives dedicated to assuring institutional compliance with governing legal standards. The first, its Diversity and the Law Project (D&L) in 2010 and again in 2021, created extensive institutional resources to advance effective and legally sustainable diversity policies in science and technology fields and encourage productive collaboration among policymakers and lawyers.³² For instance, D&L in 2021 produced in-depth legal and policy resources, which emphasize the requirements of strict scrutiny and the importance of neutral strategies for compliance.³³

The second initiative, AAAS's STEMM Equity Achievement (SEA) Change program, launched in 2018, emphasizes evidence-based decision-making, the importance of neutral strategies, and the requirements and imperative to satisfy legal standards. It provided a two-year curriculum on the legal standards as applied to effective policy in 2020 and 2021, complementing the D&L 2021 resources, and offers an ongoing structure for implementation.³⁴

2. Petitioner misplaces reliance (Br. 68) on this Court's dicta in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343.

³² AAAS & Education Counsel, *Diversity and the Law: 2021*, <https://bit.ly/3OJiBgj> (last visited July 27, 2022).

³³ *Id.*

³⁴ AAAS, *SEA Change Home Page*, <https://bit.ly/3vqJVZL> (last visited July 22, 2022).

Petitioner is wrong to suggest that this “expect[ation]” eliminates justifiable reliance in *Grutter* and its progeny, for two reasons. First, Petitioner overlooks the balance of this Court’s guidance in its later opinions in *Fisher I* and *II*. See *supra* pp. 22-25. Second, and as importantly, Petitioner ignores the context-relevant analysis that strict scrutiny requires to be applied on an institution-by-institution basis. In other words, Petitioner disregards the fact that under this Court’s standard, while some colleges and universities will consider race in their admissions process, others will not, or will consider it markedly less, as shifting demographics, institutional aims, and student experience create very different institutional realities than in decades before.

Given the history of reliance and the complex admissions evaluations processes developed by higher education to comply with this Court’s evolving case law, any material change in this Court’s precedent would severely limit higher-education institutions’ ability to fulfill their missions and societal roles, resulting in great harm to all students and society. Petitioner claims (Br. 69) that if this Court were to materially change or overturn its precedent, all an institution would need to do is to stop considering race in its holistic-review process. But that misses the point. An institution cannot remove a necessary piece of its admissions policy without extensive redesign, retraining, and reinvestment. Institutions already engage in many neutral alternatives, and those that also engage in limited individual race-consciousness do so only when necessary for the quality of their educational programs, benefiting all students, as dictated by this Court’s precedent. *E.g.*, Coleman et al., *Playbook* (chron-

icling over forty institutional examples of nine leading race-neutral strategies, framed in light of this Court’s legal guidance on the topic).

In sum, strict scrutiny’s standards already establish the required guardrails for the proper evidence-based justification of and limitations on individual race-consciousness by each institution under its facts. Accepting such a national edict as Petitioner suggests would eliminate that analysis, eviscerating strict scrutiny standards under federal law and upending decades of policy development to comply with these standards.

CONCLUSION

For decades, this Court has recognized and valued the special role that education in America serves, including its connection to helping future generations find their paths, achieve their potential, and succeed in their contributions to the communities in which they live. *Grutter*, 539 U.S. at 331; *Brown v. Bd. of Educ.* 347 U.S. 483, 493 (1954). In the Court’s own words, “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332.

Institutional leaders and admissions professionals who strive to advance those aims through impactful and lawful policy and practice should have at their disposal every legitimate strategy and tool to achieve their goals. The limited consideration of race and ethnicity in admissions, when necessary—consistent with the principles of *Bakke*, *Grutter*, *Gratz*, *Fisher I*, and *Fisher II*—is among those strategies, and should

be preserved in line with this Court's well-established, longstanding precedents.

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