No. 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
UNIVERSITY OF NORTH CAROLINA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT-STUDENTS

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July 25, 2022

QUESTIONS PRESENTED

1. Whether this Court should overrule *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013), and *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) to prohibit universities from considering race as one of several factors in a narrowly tailored admissions process.

2. Whether the district court properly determined that the University of North Carolina at Chapel Hill carried its burden to show the University has engaged in good-faith consideration of workable race-neutral alternatives and there are no workable substitutes for its holistic, race-conscious policy at this time.

PARTIES TO THE PROCEEDING

Petitioner is Students for Fair Admissions (SFFA). Petitioner was the plaintiff below.

Respondents are the University of North Carolina; the University of North Carolina at Chapel Hill; the University of North Carolina Board of Governors; John C. Fennebresque; W. Louis Bissette, Jr.; Joan Templeton Perry; Roger Aiken; Hannah D. Gage; Ann B. Goodnight; H. Frank Grainger; Peter D. Hans; Thomas J. Harrelson; Henry W. Hinton; James L. Holmes, Jr.; Rodney E. Hood; W. Marty Kotis, III; G. Leroy Lail; Scott Lampe; Steven B. Long; Joan G. Macneill; Mary Ann Maxwell; W. Edwin McMahan; W.G. Champion Mitchell; Hari H. Math; Anna Spangler Nelson; Alex Parker; R. Doyle Parrish; Therence O. Pickett; David M. Powers; Robert S. Rippy; Harry Leo Smith, Jr.; J. Craig Souza; George A. Sywassink; Richard F. Taylor; Raiford Trask, III; Phillip D. Walker; Laura I. Wiley; Thomas W. Ross; Carol L. Folt; James W. Dean, Jr.; and Stephen M. Farmer. These parties were defendants below.

Respondents also are Cecilia Polanco; Luis Acosta; Star Wingate-Bey; Laura Ornelas; Kevin Mills, on behalf of Q.M.; Angie Mills, on behalf of Q.M.; Christopher Jackson, on behalf of C.J.; Julia Nieves, on behalf of I.N.; Tamika Williams, on behalf of A.J.; Ramonia Jones, on behalf of R.J.; and Andrew Brennen. These parties were defendant-intervenors below and are referred herein as "Respondent-Students."

CORPORATE DISCLOSURE STATEMENT

Respondent-Students Cecilia Polanco, et al., are a multiracial, multiethnic group of students and now alumni at the University of North Carolina at Chapel Hill, none of whom has a parent corporation, and there is no publicly held corporation that owns 10% or more of any of their stock.

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INTRODUCTION

For over forty years, this Court's strict scrutiny framework for race-conscious admissions has proven to be an effective way of ensuring that the nation's "leaders [are] trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 313 (1978) (internal quotation and citation omitted).

These words have not rung hollow. From *Bakke* to *Grutter* to *Fisher*, this Court's decisions have served as strong guideposts for universities to pursue holistic admissions processes that consider race as only one factor among several others on an individual basis—and only when nonracial alternatives have proven ineffective or intolerable.

The University of North Carolina at Chapel Hill ("UNC"), for several years, has followed this framework to pursue its mission to "serve as a center for research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders." JA.344 (internal citation omitted). As the state's premier flagship and a leading university nationally, UNC has expanded race-neutral programs, but those efforts fall short of accomplishing its mission.

UNC needs race-conscious admissions to achieve the diversity, including racial diversity, that is critical to its mission. This is, in part, because of the University's sordid history of excluding Black applicants well into the twentieth century and its present-day effects, which impede the University's ability to attract, enroll, and retain Black, Latino, and

Native American students, in particular. As Respondent-Student Star Wingate-Bey testified regarding several confederate relics on UNC's campus, having to walk past the "racist wallpaper . . . every day adds to that feeling of not being valued . . . ." JA.991.

Still, race is not singled out, but is instead one factor among over forty carefully considered by UNC. The ability to flexibly consider race as part of a holistic assessment is a hallmark practice of narrow tailoring and starkly differs from the forbidden practices that automatically advantage any applicant because of their race. UNC does not use any racial quotas, bonus points, separate admissions tracks, or racial balancing. Indeed, SFFA did not bring such claims against UNC.

And contrary to SFFA's misleading invocation of *Brown*, UNC's holistic admissions process bears no resemblance to the kind of racial segregation rejected there. Nearly seventy years ago in *Brown*, this Court struck down the exclusion of Black students from attending white-only schools on the basis of their race under the Equal Protection Clause. In doing so, this Court recognized the importance of racial integration and cross-racial dialogue in a learning environment and in building the foundation for an educated citizenry. Consistent with *Brown* and its legacy, UNC's admissions process is designed to bring together students of different racial backgrounds and harness the benefits of diverse, integrated education, including improving cross-racial dialogue and breaking down stereotypes.

Unlike the schools in *Brown*, UNC does not exclude students or student groups on the basis of race. White students remain a strong majority of

enrollment at UNC. SFFA's own evidence shows that hundreds of white students with lower average test scores and grades were admitted ahead of Black students with higher averages, further indicating that race does not play an outsized role in UNC's holistic process and that UNC steadfastly adheres to precedent.

In the end, SFFA has failed to carry its heavy burden demonstrating that *Grutter* should be overruled. Uncontradicted student and alumni testimony show how holistic race-conscious admissions is working and how the educational benefits of diversity at UNC are reaching students of *all* backgrounds in line with UNC's mission. A white male veteran alumnus testified that interacting with peers of different racial and ethnic backgrounds "made class discussions a real world experience" and were among the "most rewarding experiences" at UNC. Pl.Ex.119.2 at 66. Respondent-Student Hanna Watson, a Black alumna, described how racial diversity in classes fostered "better feedback" and discussion, JA.1002, and *intra*-racial diversity within UNC's Black community broke down stereotypes by showing "[B]lackness is not a monolith." JA.1005.

There is no evidence to the contrary. Indeed, a broad spectrum of society, including public and private universities, military leaders, businesses, professionals, and scholars, among others, have emphasized to this Court, and will restate their opinions in this case: race-conscious admissions is compelling and necessary because of its lasting, positive impacts on society and democracy.

UNC's reliance on race-conscious admissions, however, is not endless. It continues to scrutinize its own policy against other available race-neutral

alternatives, as required by this Court. But presently, as the lower court concluded based on the substantial record, none work "about as well and at tolerable administrative expense" as UNC's race-conscious program. Pet.App.184.

UNC's holistic race-conscious admissions process is critical to ensuring all students learn in an atmosphere of well-rounded, talented students who represent a broad range of experiences and viewpoints. This Court's decisions and the district court decision below show how the *Grutter* standard is working and how America is benefitting. This Court should affirm.

STATEMENT OF THE CASE

A. UNC's Ongoing Diversity Goals

UNC has thoroughly considered the importance of diversity and how its positive impacts reverberate across campus and society. As the district court concluded, based on "largely uncontested evidence," UNC has a compelling interest in pursuing the educational benefits of diversity. Pet.App.8, 158-59. UNC has recognized that it must admit a diverse student body to realize its mission to "serve as a center for research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders." Pet.App.192 (internal citations omitted). UNC defines diversity broadly to include "all the ways in which people differ" including, but not limited to, differences in: socioeconomic status, religion, work

experiences, physical ability, and racial or ethnic identity. Pet.App.9 (internal citations omitted).

UNC has identified five overarching goals for diversity: (i) promoting the robust exchange of ideas; (ii) broadening and refining understanding; (iii) fostering innovation and problem-solving; (iv) preparing engaged and productive citizens and leaders; and (v) enhancing appreciation, respect, and empathy. Pet.App.13. Academic research confirms such benefits flow from a diverse student body. JA.1492-1501, 1610-11.

UNC regularly assesses its progress towards meeting its diversity goals, closely examining both quantitative and qualitative data consistent with best practices. Pet.App.15-17; *see generally* JA.1637-38.

B. UNC Continues Working Toward Its Diversity Goals

UNC's pursuit of diversity is producing meaningful benefits for students and alumni of all backgrounds. Pet.App.17-18. Respondent-Students, among other witnesses, testified "credibly and compellingly" that racial diversity has enriched their educational experiences and broadened their understanding and perspectives. Pet.App.18. Ms. Wingate-Bey, a Black alumna, explained how classrooms with greater racial and ethnic diversity "made my education a lot richer" because it created a learning environment where students could "dive deep into . . . the text we were reading, to relate back to our experiences: Our shared experiences, our different experiences." JA.984.

Respondent-Student Cecilia Polanco, a Salvadorean American alumna, described how

interactions with members of UNC's Black Student Movement allowed her to "empathize and be conscious and aware" of "other people's experiences" involving the police. JA.1705. Rachel Gogal, a white alumna, explained that attending class with students "from a variety of different backgrounds and cultures" raised "important perspectives" that pushed her and her peers to "conside[r] real-world, current issues" and "learn how to be better crisis communicators." Def.Ex.108a at 55. Professors confirmed these benefits in the classroom. As Frank Baumgartner, a Distinguished Professor of Political Science at UNC, recognized: "classroom discussion and learning in my courses is richer and deeper when we have a diverse group of students in the classroom," including across race and ethnicity. Def.Ex.118 at ¶ 20.

Alumni and professors also affirmed that exposure to diversity is necessary to prepare future leaders across various sectors. Pet.App.17-18. Mary Cooper, a white alumna, testified that her educational experiences with diversity "prepared her to work with, coach, and teach others who do not look like her or who have not had similar experiences." Pet.App.17-18. Rimel Mwamba, a Black alumna, testified that her experiences as a student will enable her to treat and care for a diverse patient population in her career as a doctor. Pet.App.18. The benefits of diversity are further confirmed by climate surveys and expert analyses submitted at trial. JA.1482-01,1537-42, 1606-08, 1657-60; *see also infra* Sect.II.C. (discussing additional benefits of diversity).

C. Despite Progress, the Need for Ongoing Work Remains.

While the benefits of diversity are accruing at UNC, race-conscious admissions remains necessary because the University still struggles to enroll and support underrepresented students of color. As one reference point showing persistent barriers facing Black students, total Black enrollment at UNC in 2016 was only 8% compared to a state population in North Carolina of 21.5%; by contrast, white student enrollment registered at 72% compared to 69% across the state. Pet.App.21. In 2013, the enrollment of Black men fell below 100 students in the first-year class, which "caused a lot of hurt" to UNC's Black students and harmed the overall educational environment. Pet.App.60-61 (internal citation omitted).

UNC's continuing challenges of recruiting and retaining students of color stem, in part, from the University's long-lasting, sordid history of racial exclusion. As detailed by expert historian Dr. David Cecelski, UNC was a strong and active promoter of racial subjugation and white supremacy for most of its history. Pet.App.11 n.5; JA.1679. From its founding in 1789 through much of the twentieth century, UNC excluded all people of color from its faculty and student body. JA.1680-85. Even after a court order forced UNC to admit students of color in 1955, the University and State continued to fight integration. JA.1685-90. In fact, UNC permitted racial hostility and discrimination against students of color well into the 1980s. JA.1685-90. For example, UNC officials barred Black students from participating in most campus social events, using the swimming pool, and living in dormitories with white students. JA.1686.

Kenneth Ward, a Black alumnus who graduated in 1984, testified during trial that he repeatedly faced racial epithets, received hate mail, and encountered Ku Klux Klan rallies on campus, finding little reprieve from the administration. JA.781, 783-84. Other Black alumni shared similar experiences of racial harassment. *See* JA.1689; *see also* JA.958, 1037; Def.Int.Ex.15 at ¶ 10; Def.Int.Ex.16 at ¶ 10; Def.Int.Ex.17 at ¶ 7.

UNC's history of racial subjugation and its present-day manifestations on campus still affect student life, JA.1651-56, 1697, further affecting the University's ability to enroll Black, Latino, and Native American students. Pet.App.19-20. Respondent-Students described how the numerous confederate relics[1] strewn across UNC's campus make students of color feel less "safe and supported by the university." JA.765. These physical reminders of UNC's discriminatory legacy "pervaded [their] UNC experience," JA.1011, and made them more "careful" when participating in class. JA.959. Moreover, UNC's historical artifacts have attracted current-day white supremacists to campus. JA.1010-13, 1039-40. When the Sons of Confederacy recently marched onto UNC's campus to rally around a confederate monument housed on campus, Ms. Mwamba, a Black alumna, described how the experience made many students of color feel exposed and seek support from one another. JA.1040.

Respondent-Students spoke directly to the isolation and tokenism commonly experienced by underrepresented students of color on UNC's campus.

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[1] As of January 2018, more than half a dozen buildings on campus bore the names of leaders of the Ku Klux Klan and white supremacy campaigns. JA.1683.

Respondent-Student Andrew Brennen described being "the only African American in [a] class," which prevented him from speaking up about racially-salient issues. JA.955-56. Other Respondent-Students described how the "low" representation of students of color made it "hard to speak up," JA.762-63; how they were often the "sole representative" for their race, JA.973, 987-88; and how classmates derogatorily referred to them as a "slave[]" or the "N word[]." JA.1037; *see also* Pet.App.20-21, 61-62. Far from isolated incidents, climate surveys similarly show that students of color disproportionately experience increased levels of alienation and hostility on campus. Pet.App.20-21.

As the district court concluded, though UNC has pursued diversity's benefits and "there is some realization of progress, there is more work to be done." Pet.App.164-65. UNC has recognized that "the [v]estiges of [prior] discrimination" remain today and must be overcome to fulfill the University's mission to prepare North Carolinians for today's pluralistic world. Pet.App.11 (internal citations omitted).

D. UNC's Good-Faith Evaluation and Implementation of Race-Neutral Alternatives

The district court found that "UNC has engaged in serious, good faith consideration" of race-neutral ("nonracial" or "race-blind") approaches and carried its burden of showing "there are not workable or viable [race-neutral alternatives], singly or in conjunction" that would achieve comparable benefits at tolerable expense. Pet.App.114, 144. UNC is already implementing and expanding many of the

most promising race-neutral strategies. Pet.App.114. For example, UNC engages in extensive recruitment efforts to encourage students from underrepresented backgrounds, including students of color, to apply and enroll in the University. Pet.App.118-20. Respondent-Students and UNC's witnesses confirmed such recruitment activities are effective and, in significant part, depend on UNC's current Black, Latino, and Native American students and alumni who are key ambassadors for persuading applicants of color to matriculate. JA.761, 1639-41.

Since 2004, UNC has also rigorously assessed potential race-neutral alternatives to replace its race-conscious policy. Pet.App.114-15. To date, UNC has yet to identify a workable alternative that would not compromise its educational and diversity goals. Pet.App.113-18.

At trial, UNC's expert Dr. Caroline Hoxby explored the ceiling of what was possible with regard to race-neutral admissions policies. Pet.App.180. She ran more than one hundred simulations of various admissions plans and made very favorable assumptions to maximize each plan's chances of success. Pet.App.133-34, 180. Even with these generous assumptions, Dr. Hoxby found that *none* of the simulated race-neutral alternatives would result in the levels of racial diversity or academic preparedness currently achieved by UNC. Pet.App.125-43, 182. UNC's expert Dr. Bridget Long extensively reviewed race-neutral alternatives implemented in other states and confirmed that UNC had no viable alternatives that would work in the real world. Pet.App.182

Richard Kahlenberg was SFFA's sole witness to attempt to counter UNC's substantial evidence on

available race-neutral alternatives. In addition to finding that Mr. Kahlenberg lacked "an intimate knowledge of the simulations" that he was testifying about, Pet.App.180, the district court found that he overstated the viability of alternatives. For example, Mr. Kahlenberg's socioeconomic-based plans would "compromise UNC's tenuous momentum towards achieving a critical mass of underrepresented students even in the best-case scenarios." Pet.App.136. Moreover, such plans "rely on both unrealistic assumptions . . . and would severely undermine the University's ability to pursue any other type of diversity." *Id.*

By contrast, the district court found that UNC's expert, Dr. Hoxby, provided "credible" and "exhaustive" evidence that "strengthens [UNC's] assessment that no available race-neutral alternative would allow the University to achieve its compelling interest nearly as well as race conscious strategies at tolerable expense." Pet.App.143, 180.

UNC's combined race-neutral and race-conscious efforts developed through the *Grutter* framework stand in "marked contrast to the discriminatory and obstructionist policies that defined the University's approach to race for the vast majority of its existence." Pet.184. Ultimately, the court concluded that UNC's pursuit of diversity's benefits is "not only constitutionally permissible, but welcomed" as UNC continues to make progress towards "creating the diverse environment described in its Mission Statement and other foundational documents." Pet.App.184.

E. UNC's Holistic Admissions Process

Alongside several race-neutral programs implemented by UNC in recent decades to increase diversity, *see* JA1639-47, UNC has adopted a narrowly tailored race-conscious admissions process to admit a class of students who are exceptional and diverse, including across race and ethnicity. Pet.App.22, 184. UNC's admissions plan employs a "whole person" review process to admit exceptional students whose "collective strengths" will "foster excellence within the University community; enhance the education of everyone within it; provide for the leadership [across sectors] . . . and enrich the lives of all the people of North Carolina." JA.624, 701, 1412.

UNC has concluded, through its academic judgment, that identifying candidates whose attributes fulfill these goals requires evaluating applicants in the full context of their life circumstances. *Id.*; Pet.App.29-30. If voluntarily self-disclosed, race and ethnicity may be considered as "one of more than forty criteria." Pet.App.37. Race is always viewed in light of a candidate's full range of potential contributions. Pet.App.167-68. UNC never awards automatic points or insulates candidates from review based on race; nor does applying a "tip" based on race automatically result in an offer of admission. Pet.App.37.

Respondent-Students' testimony and application files demonstrate that UNC's holistic, race-conscious process enables the University to see how an applicant's race or ethnicity may have led to unique life experiences and outlooks, thereby allowing students of color to convey the full breadth of their achievements and contributions. For example, Ms.

Polanco wrote her personal essay to UNC about being a "first generation Salvadorean American," who "excelled [in advanced placement courses] despite being the only Latina in a predominantly white environment." JA.1750-51. These experiences gave her "tough skin" and instilled in her an "impenetrable pride in [her] Salvadorean culture" that she would carry to UNC's campus, if admitted. JA1751.

Race-conscious admissions also allows UNC to fully evaluate individual applicants in the context of the inequality that may have shaped their educational opportunities. As the district court observed, "many of the state's Black and Hispanic students lack equal access to college preparatory resources." Pet.App.71 n.24. Respondent-Students' testimony confirmed that many students of color experience restricted access to resources often tied, in part, to their race. JA.791-92, 965-66, 1018-19, 1021, 1700. As a result, normative criteria often do not fully capture the talents and drive of some students of color; but race-consciousness helps ensure such students are not overlooked. The trial record and empirical research demonstrate that, once students of color are admitted, they excel on campus and as graduates, even if they have lower incoming academic scores. *See, e.g.* JA.792, 1713-14. Respondent-Student Luis Acosta, for example, testified regarding how he struggled on standardized tests due to restricted access to test preparation and less familiarity as a first-generation student. *See* JA.1713-14. However, once enrolled in UNC's pre-medical program, he worked hard and ultimately enrolled in medical school. JA.1013-14, 1713-14. By contrast, students with whom he attended high school, and who scored much higher on tests, dropped out of the pre-medical track. JA.1713-14; *see also* Brief

for Empirical Scholars as Amici Curiae Supporting Respondents at 14-16, Fisher II, 579 U.S. 365 (2016) (No. 14-981) (citing authorities indicating students of color attending selective institutions with race-conscious programs achieve higher grades, graduate at higher rates, and secure greater earnings than their peers at less selective schools); *see also* D.C.Dkt.250 at 24-25.

F. SFFA Sues UNC

In 2014, SFFA sued UNC alleging three claims: (1) UNC does not use race as a mere plus factor in admissions decisions; (2) UNC overlooked available race-neutral alternatives; and (3) the consideration of race is not permissible and *Grutter* should be reversed. Pet.App.1-3. Because this Court's decisions squarely foreclose the third claim, the district court entered judgment in UNC's favor on that claim. *Id.* SFFA's first and second counts proceeded to trial. Pet.App.2-3.

In 2015, Respondent-Students moved to intervene as defendants. Respondent-Students are a racially and ethnically diverse group of historically underrepresented and marginalized students of color who applied, attended, and/or recently graduated from UNC. Pet.App.4-5. The district court granted Respondent-Students' participation because of their substantial stake in a case which has "a direct and significant impact on North Carolinians' access to UNC-Chapel Hill" and profoundly affects the educational benefits obtained on campus. D.C.Dkt.79 at 13-14.

The district court held an eight-day trial in November 2020, receiving testimony and evidence from the parties, including Respondent-Students.

Pet.App.7. After thoroughly examining the evidence, the district court issued its 155-page opinion concluding that UNC "met its burden of demonstrating that the University's undergraduate admissions program withstands strict scrutiny and is therefore constitutionally permissible." Pet.App.145.

Indeed, the record bears out how UNC's admissions process conforms with this Court's precedents. *See, e.g.,* Pet.App.22-37. SFFA's own expert testified how UNC admits many white students with relatively low combined standardized test scores and grade point averages and rejects many underrepresented students of color with relatively high test scores and grades. Pet.App.78. The court found that such evidence demonstrated how the holistic admissions program was effectively working by considering several other factors for admission. Pet.App.77-79. Similar evidence in *Grutter* demonstrated how the university's policy flexibly appreciated many diversity factors besides race and thereby bore the hallmarks of a narrowly tailored plan. *See Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

SUMMARY OF ARGUMENT

Nothing short of "the [n]ation's future" depends on ensuring that colleges can create spaces of free, cross-racial exchange; break the cycle of racial exclusion; and reap the tremendous academic and social benefits of racially diverse campuses and classrooms. *See Bakke,* 438 U.S. at 312 (internal citations omitted). In *Bakke*, Justice Powell affirmed the constitutionality of holistic plans that fairly view

every applicant as an individual. *Grutter* cemented *Bakke*'*s* framework and propelled national progress by allowing universities to acquire the "real," "substantial," and "laudable" benefits of diversity—but only through narrowly tailored means and only when race-neutral alternatives do not suffice. *See Grutter*, 539 U.S. at 332. While *Grutter* has allowed universities to make significant strides, some—like UNC—still struggle to enroll underrepresented students of color due to a range of contextual factors that inhibit access. This Court must affirm *Grutter* and the decision below.

Grutter's lawfulness and correctness are grounded in a strict scrutiny framework that is consistent with the Fourteenth Amendment's anti-subjugation history and this Court's jurisprudence recognizing that "context matters" when evaluating a governmental entity's purpose for using race. *Id.* at 337 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960)).

Far from mandating colorblindness, the Framers of the Fourteenth Amendment rejected proposals to prohibit all racial classifications, and particularly emphasized securing equal rights and opportunities for Black Americans. Moreover, the Reconstruction Congress that enacted the Fourteenth Amendment also enacted race-conscious legislation, including in the area of education, further indicating the permissibility of race-conscious programs.

Brown and its antecedents carried forward the Equal Protection Clause's anti-subordination principles, recognizing racial integration and cross-racial exchange as important elements of equal educational opportunity. *Grutter* is wholly consistent with *Brown*, allowing universities to pursue the

profound benefits of racially integrated education through narrowly tailored means that ensure no student is excluded because of their race.

Race-conscious admissions also fully aligns with this Court's Fourteenth Amendment jurisprudence, including decisions in employment and voting cases where courts regularly evaluate the constitutionality of race-conscious practices on a case-by-case basis using the applicable strict scrutiny framework.

And as *Bakke*, *Grutter, Gratz*, *Fisher I*, and *Fisher II* have confirmed, this Court's framework is working. UNC's "whole person" review exemplifies how the holistic, race-conscious programs permitted by *Grutter* have enabled universities to best fulfill their missions, account for their particularized challenges, and ensure talented students of all backgrounds can fully convey their perspectives and contributions.

The broad diversity that *Grutter* facilitates remains a compelling constitutional interest that is equally—if not more—vital today. SFFA cannot sustain its heavy burden to justify why this Court should overrule that precedent. *Grutter* was not wrongly decided, much less egregiously so. *Grutter* fully comports with this Court's long line of cases permitting race-conscious policies that survive strict scrutiny. *Grutter* also provides a workable standard that courts have effectively employed to strike down programs that mechanically apply bonus points (*Gratz*) and uphold individualized policies (*Grutter*), *but only after* conducting a highly searching inquiry.

Grutter generates considerable and concrete benefits: enriching the education of all students, developing skills for a twenty-first century workforce,

and preparing graduates who are both racially diverse and well-equipped to lead in a pluralistic society. And *Grutter* has engendered extensive reliance interests which—if disrupted—would inflict severe harms and erode institutional trust. A nationwide ban on race-conscious admissions would block the pipeline of well-qualified racially diverse college graduates whose contributions are critical for the welfare of businesses, healthcare, the military, and countless institutions central to democracy.

Unable to justify revisiting *Grutter,* SFFA attempts to challenge UNC's consideration of race-neutral alternatives; but this claim is also meritless. UNC has seriously considered race-neutral alternatives and carried its burden to show none suffice, as demonstrated by the district court's extensive findings. Undeterred, SFFA unpersuasively relitigates the facts by overstating the success of ill-conceived, hypothetical race-neutral alternatives. In fact, applying those hypotheticals would reduce both the breadth and depth of diversity on UNC's campus, wreaking adverse consequences including: greatly diminishing the benefits flowing to students; increasing tokenism and racial hostility; and stunting UNC's recent progress towards a more inclusive campus that departs from the University's segregative past. Neither the Constitution nor this Court's strict scrutiny framework compels such deleterious results.

ARGUMENT

I. Race-Conscious Admissions Is Consistent with the Fourteenth Amendment and *Brown*.

The Fourteenth Amendment's Equal Protection Clause was enacted to end racial subjugation and ensure that the promise of equality would be a reality for Black Americans. U.S. Const. amend. XIV, § 1, Equal Protection Clause; *see* Evan Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 Geo. L.J. 1, 4 (2021). The Equal Protection Clause's historical record reflects intentions to not only prohibit discriminatory laws, but to also permit race-conscious measures to ensure that marginalized people are not deprived of equal opportunities. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985). UNC's limited consideration of race to achieve diversity is entirely consistent with the Fourteenth Amendment's purpose.

A. The Fourteenth Amendment and *Brown*

Far from SFFA's proffered "colorblind" approach, the Thirty-Ninth Congress passed the Fourteenth Amendment with the understanding that the Amendment would address the subjugation of Black people. During Senator Jacob Howard's introduction of the Fourteenth Amendment to the Senate, he discussed the importance of the Amendment to specially ensure that Black people had equal opportunity and treatment and were no longer subjugated, imploring: "Is it not time, Mr. President,

that we extend to the black man . . . the equal protection of the law?" Cong. Globe, 39th Cong., 1st Sess. 2766 (1866); *see also* Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment* 330 (2021); Cong. Globe. 39th Cong. 1st Sess. 632 (explaining subsequent legislation that "ameliorat[ed] . . . the condition of the colored people" was constitutional because it sought to "break down discrimination between whites and blacks").

Indeed, Congress expressly rejected language that would have adopted a race-blind approach under the Fourteenth Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866) (7 yeas, 38 nays in Senate vote defeating proposed language providing that "no State . . . shall . . . recognize any distinction between citizens . . . on account of race or color or previous condition of slavery").

The same Congress also made clear that it did not intend the Fourteenth Amendment to ban all considerations of race, passing race-conscious laws during the consideration of, and after the ratification of, the Amendment. Just one month after passing the Fourteenth Amendment, Congress enacted the Freedmen's Bureau Act of 1866, which expanded benefits to formerly enslaved individuals, including the education of Black children. *See* Schnapper, *supra*, at 764-68, 772-75 (internal citation omitted). The same Congress passed another bill providing financial support to Black women and children. *See* Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 430 (1997) (citing Act of July 28, 1866, Ch. 296, 14 Stat. 310 (1866)). The Fortieth Congress specially assisted Black servicemen through the 1867 Colored Servicemen's Claims Act. 1867 Colored Servicemen's Claims Act, Res. 25, 40th Cong., 15 Stat. 26 (1867).

Moreover, discussions of legislation proposed in Congress shortly after the Fourteenth Amendment was enacted emphasized that the Equal Protection Clause not only prevents discriminatory laws, but also imposes an affirmative obligation or "positive duty" on states to ensure that laws are providing equal protection to all. *See* Barnett & Bernick, *supra*, at 339-40.

This Court has repeatedly reaffirmed the anti-subordination purpose of the Fourteenth Amendment when striking down state laws mandating racial segregation in education. In *Sweatt v. Painter*, the Court ordered the University of Texas Law School to admit Heman Sweatt, a Black applicant who had "possessed every essential qualification for admission, except that of race, *upon which ground alone* his application was denied." *Sweatt v. Painter*, 210 S.W.2d 442, 443 (Tex. Civ. App. 1948) (emphasis added), *writ refused, rev'd*, 339 U.S. 629 (1950). The Court held that the law schools' facilities for white and Black students were substantially unequal and, therefore, violated equal protection. *Sweatt*, 339 U.S. at 635-36. But the Court's holding was not reached in a vacuum. The Court reasoned that Mr. Sweatt's exclusion denied him the "standing in the community, traditions and prestige" that were customarily accorded to white students who graduated from the state's flagship university. *Id.* at 634. Just as importantly, this Court recognized that preparing students for work and citizenship in a diverse society is difficult, if not impossible, on racially segregated campuses because higher education serves as the "proving ground" for professional "learning and practice, [and] cannot be effective in isolation" from America's increasingly diverse population. *Id.*

Four years later, in *Brown*, this Court again grounded its Fourteenth Amendment decision in concerns with the racial subordination of Black children and the importance of cross-racial dialogue. *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954), *supplemented sub nom.*, 349 U.S. 294, (1955). The Court struck down school policies that systemically subordinated Black children based on their race. The Court underscored the "effect of segregation itself on public education," determining that segregated schools violated the Fourteenth Amendment by both perpetuating the stigmatization and "inferiority" of Black students and "depriv[ing] them of some of the benefits they would receive in a racial(ly) integrated school system." *Brown*, 347 U.S. at 494-95 (internal quotation and citation omitted). The unanimous *Brown* Court cited *Sweatt* in explaining how the quality of a learning environment depends in large part on "'those qualities which are incapable of objective measurement,'" *id.* at 493 (quoting *Sweatt*, 339 U.S. at 634), but which affect one's "'ability to study, to engage in discussions and exchange views with other students.'" *Id.* (quoting *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 641 (1950)). *Brown's* holding rests on the fact that the Fourteenth Amendment was established to ensure that Black people were provided equal opportunities. But it also recognizes how ignoring intangible factors—such as negating students' ability to dialogue across differences—causes learning to suffer and undercuts the Equal Protection Clause's guarantees.

SFFA grossly mischaracterizes and distorts this Court's ruling in *Brown*, suggesting that it forbids universities from ensuring that their doors remain

open to qualified students of all races. Pet.Br.47. *But see Grutter*, 539 U.S. at 332 (holding the benefits of diversity are compelling, in part, because they allow for "the path to leadership [to] be visibly open to talented and qualified individuals of every race and ethnicity"). Holistic race-conscious admissions policies that seek to achieve diversity (like those at UNC) advance *Brown*'s promise of equal educational opportunities and a functional democracy through integration and meaningful cross-racial exchange. In *Brown* and *Grutter*, the Court recognized that education is critical to this nation's democracy, noting that "education . . . is the very foundation of good citizenship." *Grutter*, 539 U.S. at 331; *Brown*, 347 U.S. at 493. And just as in *Brown*, where the Court contrasted the harm caused by segregated schooling with the benefits of a diverse, "racial(ly) integrated school system," *Brown*, 347 U.S. at 494 (internal quotation omitted), *Grutter* recognizes the important benefits of students learning in an integrated, "racially diverse educational setting." *Grutter*, 539 U.S. at 331 (internal quotations omitted).

Brown and *Grutter* both ensure that race is never the defining basis for exclusion or inclusion. In spirit and effect, permissible race-conscious policies ensure talented students from *all* racial backgrounds undergo the *same* comprehensive, individualized review process; and that process values *all* forms of diversity and only appreciates race as one factor among several in the context of an individual's application. *See, e.g.*, *Grutter*, 539 U.S. at 337; *Fisher v. University of Texas*, 579 U.S. 365, 370-75 (2016) ("*Fisher II*").

SFFA's comparisons to *Brown* are not only factually inapposite but also deeply misconstrue this

Court's jurisprudence. In support of its far-reaching and erroneous description of the Fourteenth Amendment as intending "colorblindness," SFFA selectively cites to Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). While Justice Harlan did describe the Constitution as "color-blind" in spite of the aforementioned history, he also espoused anti-subordination principles in the same breath, stating that "in view of the constitution . . . there is in this country no superior, dominant, ruling class of citizens." *Id.* at 559 (Harlan, J., dissenting). Justice Harlan further noted that the Fourteenth Amendment was "primarily designed" to protect Black Americans from "exemption from legal discriminations." *Id.* at 556 (Harlan, J., dissenting) (internal quotations omitted).

Race-conscious admissions effectuates the Fourteenth Amendment's original purpose by ensuring equal educational opportunity for underrepresented groups, without excluding anyone on the basis of race. As explained further below, such policies enhance the participation of all members of our society, ameliorate the present-day effects of ongoing discrimination, and allow universities to achieve their broader missions and diversity goals.

B. Narrowly Tailored Race-Conscious Admissions Programs Advance Fourteenth Amendment Interests.

Selective universities, like UNC, "represent the training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S. at 332. SFFA seeks to block access to these training grounds for many Black and other historically marginalized people by asking this

Court to forbid all institutions from adopting narrowly tailored race-conscious plans—irrespective of the institution's particularized history, present-day challenges, and compelling educational goals. Hamstringing universities' efforts to ensure open and fair access would undermine the Fourteenth Amendment's original anti-subordination purpose and exacerbate the obstacles facing talented Black Americans and others in accessing highly resourced universities.

But the Equal Protection Clause was never intended to lead to such absurd results. That is why this Court developed its strict scrutiny framework: to ensure that, when universities' legitimate diversity goals are impaired, they can address them in the most careful way, consistent with the Equal Protection Clause. The record in this case demonstrates convincingly how this plays out in real-time.

UNC considers race alongside over forty other criteria in order to "understand the context" of each applicant's experience because "success can be defined differently in different environments." Pet.App.29. Testimony and evidence from Respondent-Students demonstrate how UNC's context-rich evaluation carefully considers race for individual applicants.

At trial, all of the Respondent-Students explained how and why they discussed their race and racialized experiences[2] in their application: to convey

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[2] SFFA concedes that a university may consider evaluating a student's application based on that applicant's experiences, including racialized experiences. Pet.Br.52; *see also* Pet.Cert.15-16. To the extent that SFFA's amici suggest that such practice and mere awareness of race violates the Fourteenth Amendment, the Court should not reach such a question because the issue was not presented in SFFA's petition for certiorari, opening brief, or briefs in the court below. *See Berkemer v. McCarty*, 468 U.S. 420,

the full breadth of their achievements, contributions to the college community, and future potential as leaders. JA.755-69, 769-94, 948-62, 962-78, 978-92, 994-1013, 1029-42. For example, Mr. Brennen wrote his application essay about countering the stereotypes that he faced as a young Black man, such as when classmates questioned his academic ambition and wide-ranging interests beyond "rap music" and "the hood." JA.1707, 1725-26. In response to UNC's question about personal motivation, Mr. Brennen expressed: "I do what I do because people do not expect it from me, [and] because others who look like me are not able to do it." JA.1707, 1726. For Mr. Brennen, discussing his racialized experiences was "the only option that would fully capture [his] perspective." JA.1707-08.

Conversely, ignoring their racial identity would make it impossible for many students to fully convey what they could offer to UNC's campus. *See, e.g.*, JA.1708. Ms. Mwamba explained: "[I]t's really important, at least for my application, that UNC see . . . who I am . . . holistically and how the color of my skin and the texture of my hair impacted my upbringing." JA.1033; *see also* JA.1701-02 (Ms. Polanco explaining she could not have shared her aspirations and successes without referencing her ethnicity); JA.1709 (Respondent-Student Laura Ornelas explaining that she could not "portray a complete picture of the person [she] was and [is] to the admissions committee"); JA.1712-13 (Mr. Acosta describing how eliminating race and ethnicity from

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443, n.38 (1984) ("Absent unusual circumstances . . . we are chary of considering issues not presented in petitions for certiorari."); *see also Parke v. Raley,* 506 U.S. 20, 28 (1992).

admissions "would have taken out a majority of what [he] would have talked about . . . it would have disrupted a lot.").

UNC's limited but meaningful consideration of race also accounts for barriers that can superficially suppress the credentials of equally talented students of color who are capable of thriving at UNC. Respondent-Students corroborated the trial court's findings that North Carolinian students of color face barriers to accessing coursework like Advanced Placement classes and test preparation. JA.776-79, 964-67, 1016-23. Furthermore, students attending predominantly white, affluent schools tend to perform better on standardized tests—as compared to their equally talented peers attending predominantly minority schools—because of their greater access to test preparation courses that boost scores by 200 or 300 points. JA.777-78, 791-92. Consequently, standardized test scores systematically underpredict the talents of Black, Latino, and other historically marginalized groups due to a variety of factors, including cultural biases in testing questions. *See generally* Roy O. Freedle, *Correcting the SAT's Ethnic and Social Class Bias: A Method for Reestimating SAT Scores*, 73 Harvard Educ. Rev. 1 (2003); Brief for Experimental Psychologists as Amici Curiae Supporting Respondents, Fisher II, 579 U.S. 365 (2016) (No. 14-981). UNC's consideration of race allows the university to account for these special implications facing students of color.

Respondent-Students' experiences also reflect how some educators' racially biased views can prevent equally talented Black and Latino students from accumulating prestigious credentials. Ms. Polanco, for example, was discouraged from enrolling in advanced

coursework because "[c]ounselors were not used to advising a Latina student with my drive . . . ." JA.1700. Race-conscious admissions allows UNC to evaluate applicants in the context of the racial inequities that may have shaped their opportunities. Indeed, SFFA's expert, Mr. Kahlenberg, concedes that the strength of a student's "essays, their grades, their SATs, [and] their extracurriculars" should be viewed in light of "what obstacles they've had to overcome in life to achieve that record." JA.552.

Contrary to SFFA's assertion, UNC does not provide an automatic tip to every Black, Latino, and Native American applicant. Pet.App.36-37. But race may play a meaningful role in the context of a student's individual application and contribute to achieving UNC's diversity goals. Mr. Acosta's application file shows that the admissions officer commented on the broad spectrum of Mr. Acosta's strengths: supportive recommendations; first generation status; extracurriculars, including more than 300 volunteer hours and notable leadership positions; and test scores that, while not high, were nevertheless contextualized by his bilingual abilities, lower-income status, and other indicators of scholarly strength. Def.Int.Ex.30 at 41. Alongside these varied considerations, the admissions officer noted that Mr. Acosta would "add diversity" to UNC, an observation likely drawn from his own essays discussing his racial identity and his mentoring of grade school students on the importance of building cross-cultural friendships. *Id.*; *see also id.* at 6-7, 13-14. Altogether, his file reflects how UNC's admissions process employs a "highly individualized, holistic review" that flexibly considers "all pertinent elements of diversity." *Grutter*, 539 U.S. at 309 (citation omitted).

Allowing for the limited but meaningful consideration of race ensures a diverse student body, inclusive of students whose life experiences have been shaped by their race. But reversing course and striking race-conscious admissions as SFFA urges threatens to exclude exceptional applicants of color who strengthen UNC's campus community and whose post-graduation activities fulfill UNC's mission to promote "the betterment of society" and the lives of North Carolinians. As a student at UNC, Mr. Acosta succeeded academically and actively participated in a mentoring program for at-risk Latino middle school students. *See* D.C.Dkt.238 at 64-65; JA.1013, JA.1026-27. Now in medical school at UNC, Mr. Acosta has served as co-president for the Latino Medical Student Association and Vice President for Diversity and Campus Affairs. JA.1027. Mr. Acosta plans to become a doctor who can improve the lives of people in low-income communities. JA.1028. Other Respondent-Students similarly earned academic honors and prizes at UNC; served as student leaders and mentors on UNC's campus; materially contributed to campus dialogue; pursued post-graduate degrees in medicine, business, and divinity; and have since served in leadership roles that expand educational and professional opportunities for families in North Carolina and nationally. *See* D.C.Dkt.250 at 24-25 (describing achievements and contributions). Ms. Mwamba graduated as an Honors Laureate with distinction and subsequently worked as a Research Fellow at the Duke Global Health Institute. JA.1029, 1040. Ms. Watson received UNC's Robert B. House Memorial Prize in Poetry and proceeded to pursue a Masters in Divinity at Princeton. JA.995, 1013. And Ms. Polanco was

inducted into UNC's highest honorary society and upon graduation served as the Executive Director of SEEDs, a Durham-based youth development organization. JA.756-58.

Respondent-Students corroborate the testimony of Stephen Farmer, UNC's Vice Provost for Enrollment and Undergraduate Admissions, that race-conscious admissions enables UNC to enroll students of color who are all "incredible," JA.649, equipped to flourish at the University, and best positioned to advance UNC's state-specific mission to "teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders." JA.614; *see also* JA.697. As in *Sweatt*, UNC's race-conscious admissions program is preparing students for work and citizenship in our diverse society as higher education serves as the "proving ground" for professional "learning and practice." 339 U.S. at 634.

II. SFFA Fails to Carry its Heavy Burden to Upend *Grutter*.

SFFA concedes that overturning precedent is "serious" business. Pet.Br.49; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring) (citation omitted); *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (declining to overrule *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999)); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (declining to overrule *Auer v. Robbins*, 519 U.S. 452 (1997)); *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (declining to overrule *Blockburger v. United States*, 284 U.S. 299 (1932)).

Disrupting precedent is a serious matter

because our legal system was "founded in the law rather than in the proclivities of individuals" to preserve "the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). Adhering to established precedent "avoids the instability and unfairness that accompany disruption of settled legal expectations," *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality), and promotes "the evenhanded, predictable, and consistent development of legal principles, [that] fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Gamble*, 139 S. Ct. at 1969 (internal quotation and citation omitted).

When addressing *stare decisis*, this Court will only overturn precedent if the challenger can demonstrate convincingly "special justification" or "strong grounds." *Ramos*, 140 S. Ct. at 1413-14 (internal quotations and citations omitted). For example, this Court may reconsider a decision that is "grievously or egregiously wrong," but only when the precedent has "caused significant negative jurisprudential or real-world consequences" and when overruling would not "unduly upset reliance interests." *Id.* at 1414-15.

Here, SFFA has failed to carry its "severe burden," *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980), to provide a "special justification" for why the case was wrongly decided. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). The factors considered for overturning precedent all weigh strongly against reversing *Grutter* and *Bakke*:[3] the precedent is

[3] SFFA ignores *Bakke*, but five Justices agreed that universities could consider race in admissions under certain circumstances.

correct; the applicable standard is working and producing substantial benefits across colleges and the nation; and it has engendered extensive reliance interests which—if upended—would inflict severe harms and erode institutional trust.

A. *Grutter* Is Not Egregiously Wrong.

Contrary to SFFA's mischaracterizations, the ability to consider race as one of many factors in university admissions as articulated in *Grutter* is consistent with the Fourteenth Amendment and aligns with this Court's jurisprudence.

1. Grutter Is Consistent with the Meaning of the Fourteenth Amendment.

Grutter's holding fully aligns with the original meaning of the Fourteenth Amendment, as discussed above. *See supra* Sect.I.A. SFFA attempts to recast the Fourteenth Amendment as colorblind, *see* Pet.Br.50, but its arguments conflict with the historical record and, at the *very least,* cannot satisfy the high burden that SFFA bears. This Court has emphasized that "something more than 'ambiguous historical evidence' is required before we will flatly overrule . . . major decisions of this Court." *Gamble*, 139 S.Ct. at 1969 (quoting *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 479

See 438 U.S. at 311-19 (plurality); *id.* at 324-26 (Brennan, J., concurring in part and dissenting in part). In *Grutter,* this Court "endorse[d]" Justice Powell's view and recognized his opinion "ha[d] served as the touchstone for constitutional analysis" upon which "[p]ublic and private universities across the Nation ha[d] modeled their own admissions programs." 539 U.S. at 323.

(1987)).

The original meaning of the Fourteenth Amendment is grounded in efforts to eliminate the continual subjugation of Black Americans and was passed by a Congress that expressly rejected calls to foreclose any consideration of race.[4] In fact, the origins of the Fourteenth Amendment have been traced back to abolitionist writers and politicians. *See, e.g.*, Randy Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. Legal Analysis 165 (2011).

The aforementioned historical record disproves SFFA's bald assertion that race-conscious policies have "no support" in the Fourteenth Amendment's historical meaning and its supporting authority is easily discredited. Pet.Br.50. For instance, SFFA claims that the Amendment enshrined colorblindness, *id.*, citing a floor statement from Senator Daniel Pratt, but Pratt was elected *after* the Amendment's passage. Joseph E. Holliday, *Daniel D. Pratt: Senator and Commissioner*, 58.1 Indiana Magazine of History 17-51 (1962). Moreover, in the same statement cited by Petitioners, Senator Pratt acknowledged the Amendment's race-consciousness, noting that the purpose of the Amendment was to ensure that "every [B]lack man born in the United States" has the same rights as all other citizens, and that it was "judicially declared by the Supreme Court that [the Fourteenth Amendment] *had special reference to the colored race*." 2 Cong. Rec. 4081 (1874) (emphasis added).

In fact, as this Court has held, the "one

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[4] For further discussion, see Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 275-81 (1997).

pervading purpose" of the Reconstruction amendments was "freedom of the [en]slaved race." *Slaughter-House Cases*, 83 U.S. 36, 71 (1872). At the *very least*, the record demonstrates that SFFA cannot meet its heavy burden to show the historical record unambiguously forbids any consideration of race.

2. Grutter Is Consistent with this Court's Jurisprudence.

SFFA is equally wrong to suggest that *Grutter* conflicts with this Court's broader equal protection jurisprudence, Pet.Br.51, and that the First Amendment does not apply. Pet.Br.55-56. This Court has long allowed the consideration of race. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (citing *U.S. v. Paradise*, 480 U.S. 149, 167 (1987)). Relying on this Court's equal protection cases, *Grutter* emphasized that "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." 539 U.S. at 327; *see also Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (recognizing that in racial gerrymandering cases, the Equal Protection Clause "prohibits a State, *without sufficient justification*, from separat[ing] its citizens into different voting districts on the basis of race" (internal quotation and citation omitted)).

"Race-based action" that is necessary to further a compelling interest squarely falls "within constitutional constraints." *Adarand*, 515 U.S. at 237; *see also Bethune-Hill*, 137 S. Ct. at 800-01; *Miller v.*

Johnson, 515 U.S. 900, 920 (1995) (holding that, if a challenger establishes racial predominance in a redistricting challenge under the Equal Protection Clause, the burden shifts to the state to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest")).

SFFA also wrongfully contends that *Grutter* allows for admissions "based solely on race." Pet.Br.52-54. *Grutter* explicitly holds that such practices are prohibited and that race may be considered as "one factor among many," in the context of an individual's application. *Grutter*, 539 U.S. at 340; *see also Fisher II*, 570 U.S. at 301.

First Amendment jurisprudence, likewise, supports affirmance of *Grutter*. *See generally* U.S. Const. amend. I. This Court has held for over forty years that a university's interest in selecting a student body consistent with its mission and goals, including a diverse student body, is rooted in First Amendment academic freedoms. *Fisher II*, 579 U.S. at 376; *see also Grutter*, 539 U.S. at 329; *Bakke*, 438 U.S. at 312. Universities occupy a unique space for airing a "[c]ompetition in ideas and governmental policies [which] is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U. S. 23, 32 (1968); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

Recognizing the special role universities play in sustaining a pluralistic democratic society, this Court has restrained itself from unnecessarily intruding on the "freedom in the community of American universities" since such disruption "would imperil the future of our Nation" and ultimately cause "our civilization [to] stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *see also id.* at

262 (Frankfurter, J., concurring) (recognizing "the dependence of a free society on free universities"). Consequently, this Court's jurisprudence establishes that universities are entitled to some deference in defining their educational goals and desired student attributes to advance their particular institutional mission. *Fisher II*, 579 U.S. at 376-77.

B. *Grutter* Is Working.

This Court considers a decision's "jurisprudential consequences," including the "workability" of the standard when revisiting precedent. *Ramos*, 140 S. Ct. at 1414-15. The *Grutter* framework is clear, coherent, and effectively applied by courts and implemented by universities nationwide. In fact, this Court's decisions in the University of Michigan cases demonstrate convincingly how the Court's strict scrutiny framework works to both uphold permissible race-conscious policies and strike down impermissible policies. In *Grutter*, the Court upheld the law school's holistic admissions program where race was considered alongside several other factors and "only as a plus in a particular applicant's file." *Grutter*, 539 U.S. at 334 (internal quotation omitted). But in *Gratz*, the Court struck down an undergraduate college's admissions program because its automatic allocation of points to every student of certain underrepresented student groups violated the Court's narrow tailoring prong. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

This Court and the lower courts have continued to consistently apply the framework, ensuring that only university programs that "narrowly tailor[] use of race and ethnicity in admissions decisions" to

further the "compelling interest in obtaining the educational benefits that flow from a diverse student body" pass constitutional muster. *Smith v. Univ. of Wash.*, 392 F.3d 367, 375 (9th Cir. 2004); *see also Fisher II*, 579 U.S. at 376; *SFFA v. Harvard*, 980 F.3d 157, 185 (1st Cir. 2020); Pet.App.8-162. Indeed, the Court's application of the strict scrutiny framework first articulated in *Bakke* has helped universities achieve their compelling diversity interests through holistic admissions that satisfy narrow tailoring, while concurrently steering universities away from mechanical preferences, such as those with bonus points and set-aside seats.

SFFA's claim that "*Grutter* largely deferred to universities' experience and expertise" is also overstated. Pet.Br.55 (quotations omitted). *Grutter* permits limited deference on the first prong of articulating a compelling interest in diversity's educational benefits; but the applicable framework remains "searching" and demands a "detailed judicial inquiry" on the second question of narrow tailoring to "'smoke out' illegitimate uses of race." *Grutter*, 539 U.S. at 326 (internal quotation and citation omitted); *see also Fisher v. University of Texas*, 570 U.S. 297, 312 (2013) ("*Fisher I*") (explaining that, under *Grutter*, courts must apply strict scrutiny by "giving close analysis to the evidence of how the process works in practice").

SFFA's contention that *Grutter's* import has eroded is also baseless. In *Fisher I*, the Court reiterated "*Grutter*'s command that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny," *Fisher I*, 570 U.S. at 298 (internal quotations omitted), and emphasized that "student body diversity that

'encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element'" remains a compelling interest. *Id.* at 315 (quoting *Bakke*, 438 U.S. at 315).

Here, too, the district court engaged in a similar analysis scrutinizing UNC's consideration of diversity as a compelling interest, its consideration of race-neutral alternatives, and its narrowly tailored means. Pet.App.8-144, 158-83. The fact that SFFA, like the plaintiffs in *Fisher* and *Grutter*, failed to prove its claims in court and rebut the university's substantial record showing that UNC faithfully followed the *Grutter* roadmap, does not demonstrate that the standard is not working. It just shows that SFFA's evidence—to which it delegated only two experts—was unconvincing. Because SFFA has failed to seriously challenge diversity as a compelling interest, much less "offer the kind of special justification needed to overrule" *Grutter*, this Court should reaffirm *Grutter*. *Kisor*, 139 S. Ct. at 2418.

C. *Grutter* Continues to Have Significant Real-World Benefits.

This Court also carefully considers the "precedent's real-world effects on the citizenry" when weighing a request to overrule precedent. *Ramos*, 140 S. Ct. at 1415.

The Court's longstanding view that racial and ethnic diversity has important and significant real-world benefits—as articulated in *Bakke*, *Grutter*, *Fisher*, and numerous education-related cases[5]—is

[5] *See Grutter*, 539 U.S. at 330; *Fisher II*, 136 S. Ct. at 2210; *Bakke*, 438 U.S. at 311-23 (plurality); *Brown*, 347 U.S. at 493-95,

backed by a consensus among educators, social scientists, and students and alumni. Dr. Uma Jayakumar testified how research demonstrates the two-way benefits of racially diverse campuses, including: reducing prejudice and stereotypes; improving racial/cultural understanding and engagement; furthering overall student well-being and retention; increasing civic development and social agency; improving academic skills and cognitive outcomes; enhancing personal growth and development; and developing capacity for teamwork and leadership. JA.1608-11. These benefits persist into adulthood. *Id.*

Substantial and "compelling" evidence presented in this case—evidence that SFFA did not even try to rebut—further supports the profound benefits of diversity. Students, alumni, and professors confirmed the importance of racial diversity for developing leadership skills in a rapidly diversifying workforce and world. Melody Barnes, who served as chief counsel on the Senate Judiciary Committee and as Director of the White House Domestic Policy Council, expressed: "my exposure to a diverse community of students and faculty [at UNC] were essential preparation for my role" in the national government. Def.Ex.117 at ¶¶16-18. Rye Barcott, who served in the Marines and then pursued a career in business and entrepreneurship, explained: "[c]ross-cultural skills are also important from a military perspective, especially since the types of conflicts we

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494 n.11; *see also Sweatt*, 339 U.S. at 634; *McLaurin*, 339 U.S. at 640-41; *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982) ("[I]t should be equally clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom.'") (internal citation omitted).

face are increasingly counterinsurgency." Def.Ex.116 at ¶18. Professors like Joseph Desimone, UNC's Eminent Professor of Chemistry, similarly observed through decades of teaching and practice that exposure to racial diversity "is central to innovation" and "plays a powerful role in preparing UNC-CH students for their professional endeavors." JA.1574, 1577-78.

UNC's climate surveys, admitted into the record, also captured the benefits harnessed by the University's pursuit of diversity's benefits. In 2016, a strong majority of UNC students reported that they either "very often" or "often" have learned from perspectives offered by UNC students of a different race or ethnicity (70%). Pl.Ex.119.2 at 49.

While these benefits are undoubtedly accruing, it is clear that many universities—UNC included—have not yet reached their diversity goals. Underrepresented students of color continue to experience racial isolation, tokenism, and racial hostility at frequent and disproportionate rates. JA.1662. With such challenges at hand, now is not the time for the Court to reverse the progress being made and quash the concrete benefits flowing to students, alumni, and society more broadly.

At trial, SFFA offered *no* evidence negating the manifold benefits of racial diversity that this Court has repeatedly described as "not theoretical but real." *Grutter*, 539 U.S. at 330. In fact, SFFA's expert, Mr. Kahlenberg, agreed that student body diversity, including racial diversity, makes learning "deeper and richer," prepares students to be "more creative in their problem-solving," and reduces bias. JA.546. Despite SFFA's own expert's attestations, SFFA

unconvincingly tries to question these benefits through far-fetched assertions.

SFFA, for example, proffers that universities' pursuit of racial diversity has become an "obsession" that stymies a "diversity of viewpoints." Pet.Br.65. This contention fails on several levels. First, SFFA's cited sources fail to make any causal connection between the purported suppression of viewpoint diversity on college campuses and *Grutter*'s holding on race-conscious admissions. *See* Pet.Br.65. Yet, ample research shows that greater racial diversity increases the airing of different viewpoints and dialogue. *See, e.g.*, Jeffrey F. Milem, et al., *Making Diversity Work on Campus: A Research-Based Perspective* 7 (2005) (racial diversity "leads to a broader collection of thoughts, ideas, and opinions held by the student body, and this in turn increases the probability of exposing a student, irrespective of his or her race and opinion, to a wider range of perspectives on a particular issue"); *see also* Brief of American Educational Research Association et al. as Amici Curiae Supporting Respondents, Fisher II, 579 U.S. 365 (2016) (No.14-981).

SFFA's suggestion that universities' pursuit of racial diversity results in speech suppression is not only baseless, but offensive: it implicitly presumes that people of color have homogenous viewpoints and that increasing their numbers will somehow chill the viewpoints of white students and professors. This argument engages in precisely the type of racial stereotyping that SFFA purportedly contests.

SFFA also avers that *Grutter* has spawned negative consequences because universities are adopting affinity-based "housing," "orientations," and "networking" opportunities that allegedly impede

"integration" goals. Pet.Br.64. Once again, SFFA's assertions belie the facts and run contrary to prevailing research. First, SFFA establishes no plausible connection between *Grutter* and a rise in affinity-based activities. Setting aside that evidentiary void, SFFA is flatly wrong to suggest affinity-groups promote segregation. To the contrary, racial affinity groups often help increase cross-racial interactions and understanding by sponsoring cultural events that are open to the entire student body. *See* Def.Ex.135 at ¶¶ 12, 28, 30 (UNC administrator explaining student affinity organizations "provide information and experiences to community members to which they might not have had access otherwise" by offering "formal workshops, discussion series, and guest speakers").

Research and student testimony further demonstrate how affinity groups beget important academic and social benefits. Ms. Watson, an African American alumnus, shared that having spaces with more students of color "made [her] more confident as a person," and enabled her "to share what [she] thought was important to the course discussion regardless of who else was in the room." JA.1010; *see also* J.A.1634.

Altogether, SFFA's ill-supported arguments cannot deny the profound real-world benefits flowing from racial diversity on college campuses that *Bakke* and *Grutter* have helped to cultivate.

D. Overturning *Grutter* Would Unduly Upset Reliance Interests and Spawn Significant Negative Consequences.

That *Grutter*'s reasoning is correct, workable, and producing tremendous benefits are reason enough for upholding settled precedent. But adherence to *Grutter* is also compelled by concrete "reliance interests of the American people" who depend on universities like UNC to enroll and train graduates who can contribute to our increasingly diverse society. *Ramos*, 140 S. Ct. at 1408. These include critical sectors such as the healthcare industry, the military, and businesses that rely on universities to cultivate the breadth and depth of diversity that *Grutter* facilitates to produce professionals who are both racially diverse and well-equipped to tackle today's most pressing challenges; as well as students who seek more inclusive, diverse learning institutions.

Experience proves that in the absence of race-conscious admissions, enrollment and degree attainment of underrepresented students of color will decline at selective institutions. In effect, such a prohibition will severely block the pipeline of racially diverse college graduates to crucial professions. *See, e.g.*, William C. Kidder, *Proposition 16 and a Brighter Future for All Californians: A Synthesis of Research on Affirmative Action, Enrollment, Educational Attainment and Careers at the University of California* (C.R. Project/ Proyecto Derechos Civiles, Los Angeles, C.A.), Oct. 2020 at 2-3, https://tinyurl.com/u2c8yxe6; William C. Kidder, *Restructuring Higher Education Opportunity? African American Degree Attainment After Michigan's Ban on Affirmative Action* (C.R. Project/ Proyecto Derechos Civiles, Los Angeles, C.A.),

Aug. 2013 at 1-2, 5-7, http://papers.ssrn.com/sol3/abstract=2318523.

The level of reliance across varied sectors on race-conscious admissions to strengthen their workforce cannot be overstated. In healthcare, for example, diversity in health professionals is vital to improving public health outcomes. *See, e.g.,* Kidder (Aug. 2013), *supra* at 2. Overturning *Grutter* would be damaging, as states that banned affirmative action have suffered significant reductions in underrepresented minority students at public medical schools. Dan P. Ly et al., *Affirmative Action Bans and Enrollment of Students from Underrepresented Racial and Ethnic Groups in U.S. Public Medical Schools*, 175 Annals of Internal Med. 873, 875-77 (2022); Kidder (Oct. 2020), *supra* at 2; Kidder (Aug. 2013), *supra* at 5.

In the military, growing and maintaining a highly qualified, diverse officer corps is also a national security priority; nullifying a state flagship's necessary race-conscious admissions policy would seriously disrupt the military's cohesion and effectiveness. *See* Brief for Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents at 5-35, Fisher II, 579 U.S. 365 (2016) (No.14-981).

Business leaders similarly underscore how race-conscious admissions programs are even more important today than when *Grutter* was decided since businesses must meet the demands of the country and world economies that have further diversified. *See* Brief for Fortune-100 and Other Leading American Businesses as Amici Curiae Supporting Respondents at 7-14, Fisher II, 579 U.S. 365 (No. 14-981).

Likewise, the federal government has asserted its "vital interest" in the "benefits of diversity" and in

having a diverse pool of college graduates who can join the government's ranks. *See* Brief for the United States as Amicus Curiae at 17, SFFA v. Harvard, 142 S. Ct. 895 (2022) (No. 20-1199) (citations omitted).

And of course, UNC applicants and students of all backgrounds have a settled expectation that the state's flagship will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world. *See, e.g.*, D.C.Dkt.39-1 at 6-7 ¶¶ 14-15; 23-24 ¶¶ 12-14. Both research and the record underscore how underrepresented students of color would be less likely to apply to state flagships like UNC and less likely to accept admissions offers if UNC stopped considering race and racial diversity declined. *See* D.C.Dkt.246 at 48 ¶¶ 104-05; 50 ¶108. As Ms. Ornelas candidly expressed: if UNC stopped considering race, "I would have reconsidered if I were to apply to UNC at all" because it would convey "the university isn't interested in how I identify." JA.1709.

In response to these serious reliance interests, SFFA avers that even without *Grutter* "real diversity would not decline" because colleges could allegedly lean on race-neutral alternatives. Pet.Br.70. But experience proves that race-neutral alternatives do not work at selective universities like UNC. A 2020 study that analyzed nineteen universities across states which have implemented affirmative action bans between 1997 and 2013 (including Michigan and California) found persistent declines in the share of underrepresented people of color (Black, Latino, and Native American) among admitted and enrolled students, despite the adoption of various race-neutral measures to counter these declines. Mark Long & Nicole Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in*

Public Universities, 42 Educ. Evaluation & Pol'y Analysis 188, 196-99 (2020).

Altogether, overruling *Grutter* would disrupt the significant reliance interests of critical sectors, as well as North Carolina students and applicants. SFFA's contention that *Grutter* "has no true defenders," Pet.Br.50, is disingenuous and wrong. *See also* docket entries for *Fisher II,* 579 U.S. 365 (2016), https://tinyurl.com/96e5amvb; *Fisher I,* 570 U.S. 297 (2013), https://tinyurl.com/5fjuk5d7*; Grutter,* 539 U.S. 306 (2003), https://tinyurl.com/px3k6kwc (broad sector of amici repeatedly expressing support for affirmative action); Greg Stohr, *Supreme Court to Consider Banning Race in College Admissions*, Bloomberg, Jan. 24, 2022, https://tinyurl.com/4zp6amtm (only nine out of fifty states have banned affirmative action).

III. UNC Has Sufficiently Considered Race-Neutral Alternatives.

SFFA's final gasp asks this Court to rewrite the record and hold that UNC improperly considered race-neutral alternatives. Pet.Br.83-86. Yet, SFFA's argument misconstrues precedent by suggesting, in effect, that UNC must exhaust "every conceivable" race-neutral alternative irrespective of the impact of such admissions policies on the University's own reputation and diversity goals. *See Fisher II*, 579 U.S. at 377.

Just six years ago in *Fisher II*, this Court held a university need not "exhaust[] . . . *every conceivable* race-neutral alternative" to a race-conscious admissions process. 579 U.S. at 377 (emphasis added) (internal citation omitted). A university seeking to

consider race must show that "a nonracial approach would not promote its interest in the educational benefits of diversity about as well and at tolerable administrative expense." *Id.* (internal quotation marks and citation omitted). Consequently, a university is required to show "that race-neutral alternatives that are both *available* and *workable* do not suffice." *Id.* (emphases added) (internal quotation marks and citation omitted).

A race-neutral approach is unavailable or unworkable if it compromises the university's "reputation for academic excellence," or the university's commitment to pursuing "all . . . aspects of diversity," including aspects other than racial and ethnic diversity. *Id.* at 385.

SFFA disagrees with the district court's extensive, fact-bound findings that UNC has carried its burden of demonstrating that there is no available race-neutral approach. *See* Pet.Br.83-85; Pet.App.113-44, 176-83. More specifically, SFFA quibbles over the district court's rejection of its own preferred race-neutral alternatives endorsed by its expert, Richard Kahlenberg. Pet.Br.83-85. But as the district court meticulously detailed, all of the alternatives would likely exact "deleterious effect[s]" on student body diversity, academic preparedness, or both. Pet.App.113-44, 176-83.

Setting aside the methodological weaknesses of Mr. Kahlenberg's approach, Pet.App.179-80, SFFA's largely numerical arguments are unpersuasive: they fail to account for UNC's state-specific context; ignore the shortcomings of narrow metrics such as test scores and GPA; and neglect the substantial harms that will flow from the all-but-certain declines in the breadth and depth of racial diversity on UNC's campus.

A. SFFA Fails to Account for Contextual Factors.

As an initial matter, SFFA's analysis utterly fails to account for UNC's specific context and the real-world impacts on students that influence the benefits of diversity. The Supreme Court has emphasized that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327 (citing *Gomillion*, 364 U.S. 339 at 343-44). Qualitative and quantitative considerations guide the viability of admissions plans to achieve a university's educational objectives. *See Fisher II,* 579 U.S. at 380-85 (upholding race-conscious program after examining both "demographic data" and "anecdotal evidence" showing Black and Latino students' "feelings of loneliness and isolation").

Here, UNC adopted a comprehensive framework that considers both predicted demographic representation and contextual factors that affect the University's ability to cultivate the benefits of diversity. *See* Pet.App.113-18 (outlining the range of measures used to evaluate the availability of race-neutral alternatives, including considering outcomes at similar institutions employing such alternatives, conducting simulations, and creating subcommittees to analyze conditions). UNC's particularized sociohistorical context, in part, necessitates race-conscious admissions to promote greater diversity. Students of color continue to feel tokenized in classes and face overt forms of racial hostility that are ameliorated by greater numbers of underrepresented students of color. Pet.App.20-21, 57-58, 61-62, 150-51, 184-85. In addition, North Carolina's

underrepresented students of color continue to lack equal access to college preparatory resources, and such racial disparities have increased in recent years. Pet.App.71 n.24. These disparities in North Carolina's secondary education system bolster UNC's compelling interest in fashioning a holistic, individualized process that considers race as one among many factors to ensure "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332.

By contrast, SFFA narrowly focuses on flawed, hypothetical models and on the experiences of other states, wholly excluding the significant, state-specific environmental factors that—once accounted for—support the district court's conclusion that race-neutral alternatives will not yield comparable benefits at tolerable expense.

B. SFFA's Preferred Alternative Would Undermine UNC's Pursuit of All Aspects of Diversity and Valuable Characteristics That Align with its Mission.

Respondent-Students' evidence underscores the ways in which SFFA's endorsed alternatives would severely harm UNC's diversity goals. SFFA first contends that Mr. Kahlenberg's Modified Hoxby Simulation is a workable alternative that would yield comparable benefits. Pet.Br.83-84. But this plan would effectively force UNC to entirely abandon holistic admissions by forcing UNC to admit students on only three criteria: socioeconomic status, high school grades, and test scores. *See* Pet.App.134. This type of mechanical admissions process would directly undermine UNC's broad diversity goals, *see*

Pet.App.9, and runs contrary to this Court's well-settled value for diversity in all forms. *See Fisher II*, 579 U.S. 386-87 (rejecting proposed alternative based on "class rank alone" because admitting students on any single metric "is in deep tension with the goal of educational diversity as this Court's cases have defined"). Such limited review unduly risks overlooking various "intangible" characteristics that UNC seeks in its student body which "are incapable of objective measurement but which make for greatness" in a university setting. *Id.* at 388 (quoting *Sweatt*, 339 U.S. at 634).

Ms. Ornelas explained how her experiences and contributions would not be captured by narrowly considering her socioeconomic status alone, Pet.App.132, nor by focusing alone on her grades and test scores. JA.968-69. The Modified Hoxby Simulation's mechanical process could not account for the fact that, while Ms. Ornelas fell outside of the top 10% of her class, her recommenders highlighted her ability to successfully navigate multicultural environments, her "great patience and incredible work ethic," and the fact that she "adds so much to our school [community] in and out of the classroom." Def.Int.Ex.29 at 13, 33. This Court's precedents do not require a flagship university to completely abandon individualized review and miss out on well-rounded students such as Ms. Ornelas who—in UNC's experience and judgment—could most contribute to the UNC campus and rise to leadership.

C. SFFA Fails to Account for the Likely Declines in the Depth and Breadth of Diversity on UNC's Campus.

SFFA next summarily, and erroneously, asserts that its three proposed "socioeconomic plans" (Simulations 3, 13, and 11) and its two proposed "percentage plans" (Simulations 8 and 9) are all "workable race-neutral alternatives." Pet.Br.84-85. But the record is replete with detailed findings demonstrating how such alternatives "would be counterproductive" by forcing UNC "to abandon the current admissions process in favor of untested proposals that, even in the best-case scenarios and under dubious assumptions, exact significant consequences" on student body diversity, academic preparedness, or both. Pet.App.183-84.

SFFA is too quick to downplay the material harms that would flow from the drops projected by several of its preferred alternative admissions policies. For example, SFFA contends that an alternative is workable even if this change would result in a 73% reduction in the Native American population admitted to UNC, cutting their numbers from seventy students to nineteen. *See* Pet.Br.85; Pet.App.139. Setting aside the fact that the district court cited additional grounds for rejecting this alternative, Pet.App.141-42, the record supports UNC's conclusion that such a stark decline would unduly inhibit the University's ability to cultivate comparable benefits. *See Grutter*, 539 U.S. at 320, 329 (concluding a 70% drop in the share of minority students in the admitted class, from 14.5% to 4%, supported the necessity of race-conscious admissions).

Climate surveys and witness testimony—which

remain unrebutted in the record—confirm that Native American, Black, and Latino students have frequently reported a heightened sense of isolation and alienation on UNC's campus. *See* Pet.App.20-22, 61. Such declines would stifle Native American and other underrepresented students' participation and the cross-racial exchanges on campus that yield the profound benefits that UNC seeks. JA.1610-22.

Student and alumni testimony corroborate that a decline in the number of Black, Latino, or Native American students would significantly lessen the educational benefits flowing to students and further exacerbate the levels of racial isolation and tokenism already felt by such students. *See* JA.765-66 (explaining that such a reduction would be "harmful for the student body" because there are such "limited numbers [of students of color] already"); JA.989-90 (noting that a decline would harm "all . . . aspects" of campus life from the social interactions, to the educational setting, to the learning environment).

SFFA's misguided attempt to simply substitute socioeconomic diversity for racial diversity, *see, e.g.*, Pet.Br.44-45, is equally unavailing. Racial diversity produces distinct benefits that are not reproduced by socioeconomic diversity. Pet.App.131-32. Expert testimony confirmed socioeconomic diversity is "not interchangeable with racial diversity when it comes to contributing to a diversity in opinions regarding certain educationally relevant topics," including issues related to racial inequity. JA.1546-49. Respondent-Students highlighted this point by uniformly affirming that their racial and ethnic identities formed their perspectives in ways that could not be captured by their socioeconomic identities. Pet.App.131-32. As Mr. Acosta explained, his racial

and ethnic identity is more visibly salient and therefore resulted in unique experiences, and correspondingly, reflected a unique viewpoint that would be missed by only focusing on his socioeconomic status. JA.1018, 1712-13.

Even the simulations that seemingly reflect smaller declines in certain underrepresented groups are problematic and misleading, underpredicting the likely declines in at least three ways. First, Mr. Kahlenberg's simulations wrongly assumed no underrepresented student of color will leave the applicant pool if UNC stops considering race. *See, e.g.*, JA.594-95, 598-99, 600 (Mr. Kahlenberg describing simulations 8, 3, and 13, which presume no one joins the applicant pool, or leaves the applicant pool); JA.595 (Mr. Kahlenberg presuming 100% of eligible high schoolers would apply); JA.595-96 (Mr. Kahlenberg conceding both assumptions highly unlikely).

The trial record and other states' experiences confirm that ending race-conscious admissions will reduce applications from underrepresented students of color and produce a marked decline in diversity. After California and Texas ended their race-conscious policies, Black and Latino students applied at lower rates. *See* JA.847-48.[6] Respondent-Students discussed the likelihood of such trends occurring at UNC if the University stopped considering race. JA.1709; *see also*

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[6] *See also* JA.1431 (Committee on Race-Neutral Strategies discussing how "studies have generally suggested that schools which eliminate the use of race or ethnicity have tended to experience declines in applications from underrepresented students"); JA.1635 (explaining bans on affirmative action have generally had a "discouragement effect" that leads students of color to not apply to an institution).

JA.998. As Ms. Wingate-Bey explained, a race-blind process sends a message to applicants of color that they "aren't valued for the specific cultural experiences that we could bring to UNC." JA.990.

Second, SFFA fails to address the cumulative negative impact that a decline would have on UNC's ability to compete for and retain talented Black, Latino, and Native American students. SFFA does not rebut evidence showing a drop in diversity would likely trigger a downward spiral in representation since students of color play a crucial role in UNC's ability to recruit and retain other underrepresented students. *See, e.g.*, JA.769, 792-93 (Mr. Ward observing, based on decades of experience working with college-bound youth, that students of color would be less inclined to attend UNC if the number of underrepresented students of color decreased on UNC's campus); JA.1704 (Ms. Polanco testifying that seeing other Latino students was "important" in convincing her to attend UNC); JA.648, 652 (Mr. Farmer explaining the critical role of students of color in recruitment).

Third, the simulations fail to account for the foreseeable loss of diversity *within* each racial group (or "intra-racial diversity") and the associated reduction in educational benefits. It is all but certain that UNC would experience diminished intra-racial diversity if the University switched from an entirely holistic process to a process that mechanically applies socioeconomic "boosts" or automatically admits students solely based on particular numerical metrics such as test scores, grades, or a formulaic application of UNC's ratings. Respondent-Students, experts, and UNC all affirmed that having diversity within each racial group is crucial for enriching the educational

environment and breaking down preconceived stereotypes. JA.760, 970, 1005-06, 1027, 1620-21; *see also* JA.1375 ("difference within difference[] is a crucial component" of UNC's ability to extend the educational benefits of diversity). By failing to provide similarly high levels of intra-racial diversity, SFFA's proffered race-neutral alternatives would severely reduce students' learning and inhibit UNC from meeting its educational objectives.

The likely decline in the number of Black, Latino, and Native American students on UNC's campus—and the reduced diversity within each group—under SFFA's proposed nonracial alternatives would significantly lessen the educational benefits flowing to students recognized by this Court as compelling, and further exacerbate the levels of racial isolation, tokenism, and stereotyping already felt by UNC's underrepresented students of color. This Court's precedent does not require UNC to pursue such harmful measures.

CONCLUSION

Respondent-Students respectfully urge this Court to affirm the decision below.

Respectfully submitted,

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