

Nos. 20-1199 & 21-707

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF
APPEALS FOR THE FIRST AND FOURTH CIRCUITS**

**BRIEF OF *AMICI CURIAE* DEBORAH COHEN
AND 67 OTHER PROFESSORS
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

This brief is filed on behalf of Deborah Cohen and 67 additional *amici curiae*. Deborah Cohen is the Chair of the History Department and the Richard W. Leopold Professor of History at Northwestern University in Evanston, Illinois. The author of multiple prize-winning books, she previously taught at Brown University and American University. She holds degrees from the University of California at Berkeley and Harvard University. She has over two decades of teaching experience.

The other *amici curiae* are current and former professors who teach, or have taught, at the undergraduate and graduate levels at universities throughout the United States in a wide variety of subjects.²

Collectively, *amici* have hundreds of years of experience in higher education. By virtue of their extensive teaching experience, *amici* have seen first-

¹ The position *amici* take in this brief has not been approved or financed by petitioners, respondents, or their counsel. See Sup. Ct. R. 37.6. Neither petitioners, respondents, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. All parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court. See Sup. Ct. R. 37.3.

² *Amici* submit this brief only in their individual capacities, and not on behalf of the universities where they teach or have taught.

hand the benefits of diversity in higher education,
benefits *amici* seek to preserve.

SUMMARY OF THE ARGUMENT

Under this Court’s precedent, universities can consider race in making admissions decisions so long as (1) there is a compelling interest in using race, with diversity being one such interest; (2) the use of race is narrowly tailored to achieve the compelling interest; and (3) race is not considered in a mechanical fashion, but rather as part of a holistic process that evaluates each applicant individually based on multiple factors, including academic and non-academic achievements. *See* Argument I, *infra*.

Students for Fair Admissions (“SFFA”), an anti-affirmative action group, and the *amici* that support it, argue that this Court should reverse prior precedent and rule that admissions must be colorblind. SFFA and its supporters are wrong.

First, contrary to the unsupported claims of SFFA and its *amici*, the diverse student bodies that result from race-conscious admissions policies benefit all students because exposure to students from a wide range of backgrounds enhances the educational experiences of all students, whether White or minority. *See* Argument II, *infra*.

Second, several of SFFA’s *amici* contend that race-conscious admissions policies foster “neo-segregation” on campus and therefore impede the vibrant exchange of ideas. While SFFA purports to embrace diversity on campus and to object only to race-conscious admission policies, these *amici*, as shown in Argument III, *infra*, have dropped the pretense altogether. Instead, these *amici* attack the

very concept of diversity on campus, however achieved. But diversity on student campuses, and the resultant proliferation of student affinity groups on campus – which follow in a long tradition of student organizations centered on religious and gender identity – have facilitated a robust exchange of ideas this Court has anticipated it would.

Third, SFFA and its supporters argue that prohibiting affirmative action will not lead to less diversity in admissions. But, as Argument IV, *infra*, demonstrates, when states have prohibited affirmative action, diversity has suffered.

ARGUMENT**I. THIS COURT HAS REPEATEDLY HELD THAT THE NARROWLY TAILORED USE OF RACE IN UNIVERSITY ADMISSIONS SERVES A COMPELLING GOVERNMENTAL INTEREST.**

SFFA asks this Court to reverse its prior precedents upholding the narrowly tailored use of race in admissions programs. *See* Pet'r Br. 49. SFFA claims that the reasoning in these cases "cannot withstand" careful analysis. *Id.* at 50, 56 (internal quotations omitted). But SFFA is wrong and the Court should decline its request.

This Court has long held that there is a compelling governmental interest in achieving and maintaining diversity in our Nation's educational system, and, accordingly, it has upheld race-conscious admissions programs directed at obtaining a "critical mass" of minority students. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 369 (2016) ("*Fisher II*"); *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (opinion of Powell, J.). This Court has held that universities can consider race in making admissions decisions so long as (1) there is a compelling interest in using race, with diversity being one such interest; (2) the use of race is narrowly tailored to achieve the compelling interest; and (3) race is not considered in a mechanical fashion, but rather as part of a holistic process that evaluates each applicant individually based on multiple factors, including academic and

non-academic achievements. *See, e.g., Fisher II*, 579 U.S. at 388.

This Court repeatedly has approved state efforts to ensure diversity in educational institutions for the benefit of all students. *See, e.g., Bakke*, 438 U.S. at 315 (opinion of Powell, J.) (stating that “the interest of diversity is compelling in the context of a university’s admissions program”); *Grutter*, 539 U.S. at 330; *Fisher II*, 579 U.S. at 388. These rulings were not made in error: they are consistent with the text and history of the equal protection clause.

Most recently, in *Fisher II*, this Court again recognized that its prior precedents establish that achieving diversity at institutions of higher learning is a compelling governmental interest. 579 U.S. at 381. As this Court explained, “a university may institute a race-conscious admissions program as a means of obtaining ‘the educational benefits that flow from student body diversity.’” *Id.* (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) (“*Fisher I*)). In so doing, this Court emphasized that a university is owed “considerable deference” in defining those characteristics that are central to its identity and educational mission, including diversity. *Id.* at 388. As this Court’s decisions from *Bakke* to *Fisher II* have explained, enrolling a diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, . . . enables students to better understand persons of different races,” and “better prepares students for an increasingly diverse

workforce and society.” *Id.* (quoting *Fisher I*, 570 U.S. at 330; *Grutter*, 539 U.S. at 328).

Deference, of course, is not a blank check. A university’s use of race in admissions must be narrowly tailored to achieving diversity, including by being used as part of a holistic assessment of each individual. In *Grutter*, for example, this Court upheld the University of Michigan Law School’s admissions system because it “did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate’s application.” *Fisher II*, 579 U.S. at 372 (citing *Grutter*, 539 U.S. at 337, 343–44). In *Fisher I*, this Court reiterated that a fixed quota system for race is inappropriate, but that consideration of race is permissible where the university can demonstrate that a “nonracial approach” would not promote its interest in the educational benefits of diversity. *Fisher I*, 570 U.S. at 310–12. As this Court summarized in *Fisher II*, “Though ‘[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative’ or ‘require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,’ it does impose ‘on the university the ultimate burden of demonstrating’ that ‘race-neutral alternatives’ that are both ‘available’ and ‘workable’ ‘do not suffice.’” 579 U.S. at 377 (alterations in original) (quoting *Grutter*, 539 U.S. at 339, then *Fisher I*, 570 U.S. at 312).

This Court has thus already addressed the issue of race-conscious admissions in *Bakke*, *Grutter*,

Fisher I, and *Fisher II*, each time reaffirming that universities can consider race in making admissions decisions to achieve educational diversity and refusing invitations to reverse that conclusion. This Court should decline requests by the SFFA to reverse these precedents. A rule that a university's consideration of race in its admissions process is always unconstitutional would be disruptive and would deprive students of the opportunity to study on diverse campuses that the Court's precedents have sought to protect.

II. ALL STUDENTS BENEFIT FROM A DIVERSE STUDENT BODY BECAUSE EXPOSURE TO STUDENTS FROM A WIDE RANGE OF BACKGROUNDS ENHANCES THE EDUCATIONAL EXPERIENCES OF ALL STUDENTS, WHETHER WHITE OR MINORITY.

SFFA and its supporters argue that seeking to create diverse student bodies by considering race in the application process harms both the applicants who are denied admission and the minority groups whom it supposedly helps. They wrongly assert that racial preferences exacerbate rather than reduce racial prejudice, and deny evidence of the educational benefits of race-based admissions. Pet'r Br. 53–55 (arguing that the educational benefits identified by this Court in *Grutter* were “unpersuasive,” and that underrepresented minorities are treated as *instruments* to provide educational benefits to mostly White students rather than beneficiaries of racial preference programs); *see also* Brief of Project 21 as *Amicus*

Curiae in Support of Petitioner 23–25, 32–33 (May 9, 2022) (race-based diversity policies instrumentalize racial minorities and disproportionately benefit wealthy members of favored races); Brief of Legal Insurrection Foundation as *Amicus Curiae* in Support of Petitioner 8–20 (May 9, 2022) (arguing that use of race in admissions has not achieved the promised “robust exchange of ideas”); Brief of The Claremont Institutes’ Center for Constitutional Jurisprudence as *Amicus Curiae* in Support of Petitioner 2–5 (May 9, 2022) (“Claremont Br.”) (asserting that *Grutter* should be abandoned because schools have demonstrated they are not interested in fostering a robust exchange of ideas). As demonstrated below, the petitioners and their *amici* are incorrect.

Scholarly research supports the conclusion that all students benefit from racial and ethnic diversity on college campuses and demonstrates that those benefits outlast a student’s time on a college campus and have proven positive impacts on American business and our society. Indeed, “barring higher education institutions from access to a diverse student population denies them a singularly important tool for preparing students for their own futures and for the future of our society.”³

³ Am. Council on Educ. & Am. Ass’n. of Univ. Professors, *Does Diversity Make a Difference?: Three Research Studies on Diversity in College Classrooms* 5 (May 2000) (hereinafter *Does Diversity Make a Difference*), <https://www.aaup.org/NR/rdonlyres/97003B7B-055F-4318-B14A-5336321FB742/0/DIVREP.PDF>.

A. ALL STUDENTS BENEFIT FROM RACIAL AND ETHNIC DIVERSITY AT UNIVERSITIES.

Ample studies have shown that exposure of students to a wide range of backgrounds enhances the educational experiences of all students.⁴ Scholarly research has shown, for example, that diversity at universities improves the “intellectual engagement, self-motivation, citizenship, and cultural engagement, and academic skills like critical thinking, problem-solving, and writing – for students of all races.”⁵ Ninety percent of faculty members in one study said that diversity did not reduce student quality or educational substance, and many strongly believed it enriched the educational experience of White students.⁶

⁴ See, e.g., *id.* at 3 (racial and ethnic diversity positively affects college students); Am. Fed’n of Tchrs., AFT Higher Educ., *Promoting Racial and Ethnic Diversity in the Faculty: What Higher Education Unions Can Do* 4 (2010), <https://www.aft.org/sites/default/files/facultydiversity0310.pdf> (same). See also *Grutter v. Bollinger*, 288 F.3d 732, 760 (6th Cir. 2002) (*en banc*) (Clay, J., concurring) (quoting Michigan’s expert Professor Patricia Gurin as concluding that “[s]tudents learn better in a diverse educational environment,” and “patterns of racial segregation and separation historically rooted in our national life can be broken by diversity experiences in higher education”).

⁵ Kristin Tsuo, *Diversity for All: The Importance of Racial and Socioeconomic Diversity in Higher Education*, The Century Found. (July 14, 2015), <https://tcf.org/content/commentary/diversity-for-all-the-importance-of-racial-and-socioeconomic-diversity-in-higher-education/>.

⁶ *Does Diversity Make a Difference*, *supra* note 3, at 3–4 (diversity positively influenced students’ beliefs about the

According to an article from The Century Foundation, students with interracial interactions showed significant gains in critical thinking and problem-solving skills when compared to students in non-diverse groups.⁷ Some researchers posit that diverse groups outperform non-diverse ones because varying perspectives increase the number of approaches to finding solutions.⁸ “Diversity jolts us into cognitive action in ways that homogeneity simply does not.”⁹ In a 2004 study involving more than 350 students from three universities, researchers determined that a dissenting opinion on a social issue by a Black person presented to White people was considered more novel, and led to broader thinking, than presentation of the same dissenting view by a White person, demonstrating the value in learning within diverse environments.¹⁰

quality of their education, and helped all students achieve the essentials goals of the university).

⁷ Tsuo, *supra* note 5; *see also* Am. Univ., School of Educ. Online Programs, *The Benefits of Inclusion and Diversity in the Classroom* (July 24, 2019) (hereinafter *The Benefits of Inclusion and Diversity in the Classroom*), <https://soeonline.american.edu/blog/benefits-of-inclusion-and-diversity-in-the-classroom> (reporting outperformance by diverse groups in problem-solving scenarios).

⁸ Nancy Cantor & Peter Englot, *Defining the Stakes: Why We Cannot Leave the Nation’s Diverse Talent Pool Behind and Thrive*, in *The Future of Affirmative Action* 27, 28–30 (Richard D. Kahlenberg ed., 2014); Richard D. Kahlenberg, *Achieving Better Diversity: Reforming Affirmative Action in Higher Education*, The Century Found. (Dec. 3, 2015), <https://tcf.org/content/report/achieving-better-diversity>.

⁹ *The Benefits of Inclusion and Diversity in the Classroom*, *supra* note 7; Katherine W. Phillips, *How Diversity Works*, 311(4) *Sci. Am.* 43, 46 (Oct. 2014).

¹⁰ Phillips, *supra* note 9, at 45.

“Simply interacting with people from different backgrounds encourages group members to prepare better, to anticipate alternative viewpoints, and to be ready to work towards consensus,” fostering deeper inquiry and producing more effective teams.¹¹

In addition to enhancing students’ educational experiences, racial diversity on university campuses increases the likelihood that students will socialize across racial lines and discuss racial matters.¹² This in turn has a positive impact on student retention, overall college satisfaction,

¹¹ The Century Found., *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms* (Apr. 29, 2019), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/> (citing Phillips, *supra* note 9, at 42–47); *see also* Cantor & Englot, *supra* note 8, at 28 (individuals with differing life experiences “strongly enrich the quality, creativity, and complexity of group thinking and problem-solving” that occurs); Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action 143* (“Diversity Challenged”) (Gary Orfield & Michal Kurlaender eds., 2001) (copy of relevant pages lodged with Clerk of the Court) (law students surveyed reported that educational diversity improves their ability to work and socialize with people of other races and ethnicities).

¹² *See* Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, in *Diversity Challenged* 175 (2001); Scott E. Carrell et al., *The Impact of College Diversity on Behavior Toward Minorities*, 11(4) *Am. Econ. J.: Econ. Pol’y* 159, 161 (Nov. 2019) (explaining that the theory that interpersonal contact can be an effective way of reducing prejudice between groups was first introduced by Williams Jr. (1947) and Allport (1954)).

and intellectual and social self-confidence among students.¹³ For example, one study of the United States Air Force Academy analyzed whether interactions with Black peers affected White students' decisions to seek a Black roommate sophomore year. The study found "suggestive evidence that diversity itself leads to meaningful increases in subsequent cross-race interaction for White students who had relatively little exposure to blacks," provided that the diversity was not achieved by lowering academic standards.¹⁴ The Center for American Progress has similarly noted the positive impact of increased racial diversity at universities on near- and long-term intergroup relations.¹⁵ Students' interracial experiences – for both minorities and non-minorities – can lead to breaking down stereotypes formed during youth in homogenous environments, increased exploration of preconceived notions, and increased tolerance and acceptance of others.¹⁶

¹³ See Chang, *supra* note 12.

¹⁴ Carrell et al., *supra* note 12, at 160–61 (finding no effect on future behavior where White students interacted with Black students in the bottom third of the high school performance distribution).

¹⁵ Sophia Kerby, *10 Reasons Why We Need Diversity on College Campuses*, Ctr. for Am. Progress (Oct. 9, 2012), <https://www.americanprogress.org/article/10-reasons-why-we-need-diversity-on-college-campuses/>.

¹⁶ Katie Brown, *The Top 5 Ways That Diversity in Education Benefits Students Success*, Univ. of Fla. Coll. of Journalism and Commc'ns (May 20, 2020), <https://www.jou.ufl.edu/2020/05/20/the-top-5-ways-that-diversity-in-education-benefits-students->

Prior exposure to diversity prepares employees for this critical aspect of their jobs.¹⁹

Second, diversity in the educational system creates a necessary pipeline for diversity in the Nation's professional ranks. In *Bakke*, Justice Powell explained that the Nation's leaders must be trained through wide exposure to differing viewpoints. 438 U.S. at 312 (opinion of Powell, J.). Fortune 500 companies agree that diversity is good for the bottom line; more than sixty of these companies – including Coca-Cola, General Electric, Johnson & Johnson, and many others – supported race-based admission policies in an amicus brief submitted in *Grutter*.²⁰ In a study conducted by Forbes, 85 percent of respondents said diversity is crucial for their businesses, and approximately 75 percent plan to leverage diversity to achieve their business goals.²¹ Studies consistently show that diversity also drives innovation and fosters creativity – key components to competitiveness in business. For example, a 2003 study of executives at 177 national banks revealed that for banks focused on innovation, increases in racial diversity were related to better financial performance.²²

Finally, educational diversity strengthens our democracy because "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry,

¹⁹ Tsuo, *supra* note 5 (measuring the impact of diversity experiences on students thirteen years post-graduation).

²⁰ Kerby, *supra* note 15.

²¹ *Id.*

²² Phillips, *supra* note 9, at 44.

it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332.²³ Studies have also shown that educational diversity increases students’ post-graduation civic engagement,²⁴ which this Court has noted is “essential if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332.

III. EFFORTS TO INCREASE RACIAL AND ETHNIC DIVERSITY DO NOT LEAD TO SEGREGATION OR SUPPRESSION OF FREE EXPRESSION.

As discussed above, in *Grutter*, this Court upheld the use of race-conscious admissions in higher education because achieving a critical mass of underrepresented minorities on campus creates diversity, which enables a robust exchange of ideas. *Grutter*, 539 U.S. at 333; *see also Fisher I*, 570 U.S. at 310–15 (reaffirming *Grutter*). Seeking to overturn this longstanding – and recently and repeatedly

²³ The Court’s recognition of the importance of diversity in the legal profession is well supported by academic studies. *See, e.g.*, Michelle J. Anderson, *Legal Education Reform, Diversity and Access to Justice*, 61 Rutgers L. Rev. 1011 (2009); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 Geo. J. Legal Ethics 1079, 1101 (2011) (ABA stating that the absence of diversity in government threatens to delegitimize the law itself).

²⁴ *See, e.g.*, *The Benefits of Inclusion and Diversity in the Classroom*, *supra* note 7 (describing a Century Foundation study and U.S. Department of Education statement confirming students’ experiences with diversity increased community engagement).

affirmed – precedent, SFFA argues that race-conscious admissions policies are not necessary to achieve diversity on campus.

Several *amici* in support of SFFA go one step further and attack *Grutter*'s premise: they argue against diversity on campus itself and claim that it leads not to a robust exchange of ideas, but to “neo-segregation” and censorship. *See, e.g.*, Claremont Br. 5; Brief of National Association of Scholars as *Amicus Curiae* in Support of Petitioner 8 (May 6, 2022) (“NAS Br.”). According to these *amici*, diversity produces “neo-segregation,” and constricts the robust exchange of ideas on campus because underrepresented minority students tend to congregate and even form affinity groups to represent their interests on campus. *Id.*²⁵

These anti-diversity *amici* never back up this argument with statistical evidence, or adequately prove a causal connection between diversity on campus and restricted campus speech. If their argument sounds familiar, that is because it had been raised and debated in public for decades before

²⁵ Several *amici* in support of SFFA even advance the risible notion that underrepresented students form affinity groups because they cannot compete academically with the broader student body, hoping to avoid “academic competitiveness.” *See* Brief of Gail Heriot & Peter N. Kirsanow as *Amicus Curiae* in Support of Petitioner 7 (May 9, 2022) (“Gail Br.”); NAS Br. 9 (same). This argument is rarely made with respect to White students, including the students who join organizations like the Federalist Society, for obvious reasons.

Fisher II.²⁶ Nothing has changed, and neither should the result.

To be sure, increased diversity on campus has resulted in a proliferation of student affinity groups. But the anti-diversity *amici* present racial and ethnic student affinity groups as some new phenomenon when these affinity groups are part of a long tradition of student associations on campus. Further, the anti-diversity *amici* are wrong about these student affinity groups' effect on campus. Affinity groups neither produce "neo-segregation" nor endanger academic freedom; instead, they integrate campuses, and produce a robust exchange of ideas. In other words, these student affinity groups represent *Grutter's* promise fulfilled.

A. RACIAL AND ETHNIC STUDENT AFFINITY GROUPS ARE PART OF A LONG TRADITION OF STUDENT ORGANIZATIONS.

Student affinity groups do not represent a break in tradition for campus life, but a continuation. Religious student groups have been a fixture on campuses across this country for more than a century. For example, Catholic student groups like the Newman Club began appearing on campuses across the country as early as the 1880s

²⁶ See, e.g., Diane Seo, *Do Ethnic Clubs Unify or Divide?*, L.A. Times (May 12, 1996), <https://www.latimes.com/archives/la-xpm-1996-05-12-mn-3441-story.html>; Letters to the Editor, *Cornell's 'Segregation' Issue*, Wall St. J. (May 30, 1996), <https://www.wsj.com/articles/SB833399113180083500> (debating Black student residence halls).

when Catholic students were admitted in significant numbers.²⁷ Jewish student groups likewise began appearing on campuses across the country at least as early as the 1920s, when Jewish students were admitted in significant numbers.²⁸ Gender-specific student groups also have a long history on college campuses, and have existed since universities began admitting women in significant numbers.²⁹

Religion- and gender-specific affinity groups serve a valuable purpose: they provide affiliate students with a sense of community and facilitate discussions on topics of special interest to those groups. Tellingly, the anti-diversity *amici* do not object to these affinity groups, or any others that are not predominantly Black or Hispanic. There is no claim, for example, that Asian-American affinity groups contribute to “neo-segregation.” While the

²⁷ See J.D. Long-Garcia, *Newman Centers: A Brief History*, U.S. Catholic (Jan. 16, 2012), <https://uscatholic.org/articles/201201/newman-centers-a-brief-history/> (Newman Club beginning on University of Wisconsin campus as early as 1883).

²⁸ See *History of Hillel*, Hillel Int'l, <https://www.hillel.org/about/hillel-story#:~:text=Founded%20in%201923%20and%20adopted,of%20Hillel's%20growth%20and%20evolution> (last visited July 21, 2022) (first Hillel opened up at the University of Illinois Urbana-Champaign in 1923).

²⁹ Rena Simkowitz, *History of Women and Women's Organizations at Harvard*, in *Students in Service and Leadership at Harvard: A Collection of Student Multimedia Essays from SOCIOL1130: Student Leadership and Service in Higher Education* (Manja Klemenčič ed., 2018), <https://scalar.fas.harvard.edu/studentpower/2014-title-ix-complaint-against-harvard-cited-final-clubs> (speech by Drew Gilpin Faust, the then Dean of the Radcliffe Institute for Advanced Study and later president of Harvard).

anti-diversity *amici* nominally attack Black and Hispanic student groups, their real gripe is with the fact that there are now enough Black and Hispanic students on campus to form affinity groups in the first place.

B. THE PROLIFERATION OF STUDENT AFFINITY GROUPS PROMOTES INTEGRATION AND THE ROBUST EXCHANGE OF IDEAS THAT *GRUTTER* PROMISED.

The anti-diversity *amici*'s argument that student affinity groups create "neo-segregation" on campus and prevent the robust exchange of ideas that this Court championed in *Grutter* falls flat. First, student affinity groups facilitate a robust exchange of ideas because they tend to discuss topics of special concern to their members, which would not otherwise be discussed on campus, and they then introduce those new perspectives to the campus at large. Second, student affinity groups contribute to the robust exchange of ideas on campus by encouraging members to participate in classroom discussions with non-members on issues of general concern. Third, the proliferation of student affinity groups leads to greater integration and a more robust exchange of ideas on campus because students often have more than one identity and belong to more than one affinity group. Finally, the proliferation of student affinity groups leads to greater integration on campus because they tend to collaborate on issues of mutual concern, and introduce members to each other, facilitating a more robust exchange of ideas.

1. Student Affinity Groups Contribute to the Robust Exchange of Ideas on Campus Because They Introduce Debate on Topics That Would Otherwise Be Ignored.

Student organizations host conferences and lectures on topics that would likely otherwise be ignored on campus. Consider Cornell’s Ujamaa residential community, a Black-centric student association that anti-diversity *amici* cite as evidence that race-conscious admissions lead to greater segregation on campus and a less robust exchange of ideas. *See* Gail Br. 8-9. The Ujamaa Residential College has hosted “lectures by internationally renowned speakers, dinners hosted by affiliated faculty members,” and hosts the “the State of Black America Conference, the annual Festival of Black Gospel, and the weekly student-organized forum Unity Hour – at which lively and educational discussions are never in short supply.”³⁰ These events are open to the entire campus; the ideas and perspectives shared at these events might not otherwise be expressed on campus. Students who belong to the Ujamaa house share those ideas and perspectives in writing, history, international relations, and science courses, where they are discussed by the broader campus community.

³⁰ *Ujamaa Residential College*, Student & Campus Life, Cornell Univ., <https://scl.cornell.edu/residential-life/housing/campus-housing/upperlevel-undergraduates/program-houses/ujamaa-residential-college> (last visited July 21, 2022).

2. Student Affinity Groups Contribute to the Robust Exchange of Ideas on Campus by Providing Underrepresented and Minority Students with Support and Encouraging Them to Contribute Unique Perspectives to the Broader Campus Debate.

Student groups formed around racial and ethnic identities exist to give students a sense of comfort and belonging on campus, which, in turn, provides them the confidence and voice to raise issues of specific concern to that group or to challenge old ideas with new perspectives. As the students themselves have explained, “allowing for a space where students can express their identities without fear of tokenization or marginalization will encourage students to exist more freely in the broader campus community, rather than recede from it.”³¹

³¹ See Editorial, *On the need for affinity housing*, The Williams Rec. (Apr. 17, 2019), <https://williamsrecord.com/73685/opinions/on-the-need-for-affinity-housing/>; Pierce Wilson & Sabrina Eager, *Dartmouth Affinity Groups Provide Support, Community*, The Dartmouth (Sept. 7, 2021, 5:20 AM), <https://www.thedartmouth.com/article/2021/09/dartmouth-affinity-groups-provide-support-community> (One student explained how affinity groups “gave me the confidence to move around this campus. Just knowing that there are people who look like me, that can relate to the things that I’ve dealt with, it helped a lot.”).

3. The Proliferation of Student Affinity Groups Contributes to the Robust Exchange of Ideas Within Each Group Because Members Often Belong to More Than One Group, Which Further Increases the Overall Exchange of Ideas on Campus.

The anti-diversity *amici* have pointed to the proliferation of affinity groups as evidence of “neo-segregation.” See, e.g., NAS Br. 8-10. While the proliferation of student affinity groups may give the appearance of an ever-dividing campus, that appearance is superficial and does not hold up to closer inspection because students often belong to more than one group. Consider how a religious Black woman’s experience on campus is affected by the creation of a Black student affinity group. Before the Black student group existed, she might only have joined a religious group or a women’s affinity group and been exposed to debate and various perspectives on issues of special concern to those groups. Now, with the creation of a Black student affinity group, she might be a member of multiple groups, and might bring perspectives and ideas to which she was exposed at one group to the others. Far from increasing segregation, the proliferation of groups exponentially increases dialogue among students, and contributes to a “robust exchange of ideas” within each group on campus that would not otherwise exist.

4. **Student Affinity Groups Do Not Lead to Segregation, but Rather Facilitate Integration and Collaboration.**

The presence of racial- and ethnic-specific student affinity groups encourages dialogue and coalition-building. Consider how a broad array of student organizations on Harvard's campus responded to the trial in this very case: they coalesced in support of race-conscious admissions and diversity on campus, each bringing its own perspective to the debate. As Harvard's student newspaper reported, "students from different affinity groups united to protest publicly and host teach-ins to show their support for affirmative action and diversity at large."³² That same report quoted leaders of student groups explaining how the lawsuit itself "provided a coalition-building opportunity for students of color," and how despite "differences racially between our student groups," they came together to "act in solidarity with these other minority groups and communities of color." *Id.* Indeed, on Harvard's campus, groups co-hosted events to "hear [each] other's perspectives" and "first[-]hand accounts of black students or Latinx students" on campus as it related to admissions. *Id.*

³² Camille G. Caldera & Amanda Y. Su, '*We Will Tell Our Stories*': *Students of Color Build Coalitions In Face of Threat to Affirmative Action*, Harv. Crimson (May 28, 2019), <https://www.thecrimson.com/article/2019/5/28/admissions-coalition-building/>.

IV. WHEN STATES HAVE PROHIBITED AFFIRMATIVE ACTION, DIVERSITY HAS SUFFERED.

SFFA and its supporters argue that prohibiting affirmative action will not lessen diversity in admissions. They point to data from states that have eliminated race-based admissions, arguing that this Court's decision in *Grutter* erroneously assumes that diversity cannot be achieved by any other means than affirmative action. However, they rely on very limited data from a small sample of institutions that is unrepresentative of the experiences of minority students who have been affected by statewide bans on race-conscious admissions policies.³³ Petitioners' and their allies' arguments overlook significant data evidencing the sharp declines in diversity in college acceptances and enrollment since states' implementation of affirmative action bans. Moreover, petitioners and their supporters argue that educational missions have not been undermined in any measurable way in universities that are prohibited from considering race in admissions.³⁴ But this argument overlooks the decline in degree attainment and the persistent disparities in wealth and income for minority groups since the implementation of such bans.

³³ See generally Brief of Amici Curiae Oklahoma and 18 Other States in Support of Petitioner (May 9, 2022) ("Okla. Br.").

³⁴ *Id.*

A. STATEWIDE BANS ON RACE-BASED ADMISSIONS POLICIES HAVE RESULTED IN DECLINES IN MINORITY STUDENT ADMISSIONS AND ENROLLMENT.

States recognize that affirmative action policies help to alleviate disparities in educational achievements. Texas, for example, reinstated race-based admissions policies after *Grutter*. A 2018 study conducted by the University of Texas's Education Research Center found that minority groups benefited from the re-implementation of affirmative action. The study tracked the changes in college applications and found that affirmative action policies, in fact, played an important role in increasing minority students' secondary school efforts, college applications, and college graduation rates in Texas.³⁵ The state's research and decision to lift its ban on race-based admissions policies prove

³⁵ Mitra Akhtari et al., *The Effects of Race-Based Affirmative Action in Texas*, Univ. of Tex. at Austin Educ. Rsch. Ctr. (Nov. 2018), <https://texaserc.utexas.edu/wp-content/uploads/2018/11/41-UTA059-Brief-AffAction-10.31.18.pdf>. Note, however, that even without affirmative action bans at private elite institutions, liberal arts colleges, and public flagships, Black and Latino students remain underrepresented compared to the percentage of college-aged Black and Latino students. See Andrew Howard Nichols, *Debunking 5 Myths about Affirmative Action*, The Educ. Tr. (Oct. 12, 2017), <https://edtrust.org/the-equity-line/debunking-5-myths-affirmative-action/>; Andrew Howard Nichols & J. Oliver Schak, *Broken Mirrors*, The Educ. Tr. (Mar. 6, 2019), <https://edtrust.org/resource/broken-mirrors-black-representation>.

that affirmative action can often increase diversity in higher education.

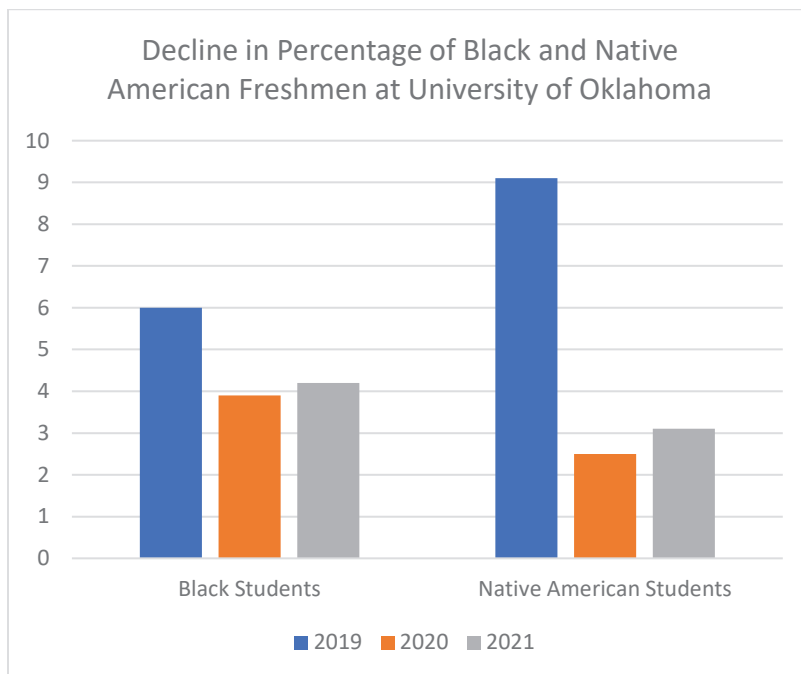
Since this Court’s 1978 decision in *Bakke*, several states have nonetheless issued statewide bans on the use of racial preferences in admissions decisions.³⁶ These bans have significantly reduced admissions of Black and other minority students. For example, Oklahoma enacted such a ban in November 2012. In its *amicus* brief, it states that since the ban, “there has been no long-term severe decline in minority admissions at the University of Oklahoma.”³⁷ However, the percentage of Black freshman students enrolled at the University of Oklahoma dropped from 6 percent in 2019 to 3.9 percent in 2020 and 4.2 percent in 2021.³⁸ Similarly, the percentage of freshman Native American students fell significantly, from over 9 percent in 2019 to only 2.5 percent in 2020 and 3.1 percent in

³⁶ See Idaho Code § 67-5909A (2020); Okla. Const. art. II, § 36A (2020); N.H. Rev. Stat. Ann. § 187-A:16-a (2020); Ariz. Const. art. II, § 36 (2010); Neb. Const. art. I, § 30 (2008); Mich. Const. art. I, § 26 (2006); Fla. Exec. Order No. 99-281 (1999), <https://www.dms.myflorida.com/content/download/705/3389/file/ExecutiveOrder99-281.pdf>; Wash. Rev. Code. § 49.60.400 (1998); Cal. Const. art. I, § 31 (1996).

³⁷ See Okla. Br. 10.

³⁸ *First-Time Freshman Analysis Fall 2020*, Institutional Rsch. and Reporting, Univ. of Okla. (Sept. 2020), https://www.ou.edu/content/dam/irr/docs/Annual%20Reports/First%20Time%20Freshmen/FTF_Analysis_Fall_2020%20revised4.pdf; see also, *First-Time Freshman Analysis Fall 2021*, Institutional Rsch. and Reporting, Univ. of Okla. (Sept. 2021), https://www.ou.edu/content/dam/irr/docs/Annual%20Reports/First%20Time%20Freshmen/FTF_Analysis_Fall_2021.pdf.

2021. The following table summarizes these changes:



Severe and steady declines in minority admissions and enrollment have also taken place at public universities in other states that implemented bans earlier. Proposition 209 was enacted in California in 1996, prohibiting state institutions from using race, ethnicity, or sex as criteria in public education, public employment, and public contracting.³⁹ Proposition 209 led to a decline in college applications from and the enrollment of underrepresented minorities, including reduced Black and Hispanic student enrollment at every

³⁹ Cal. Const. art. I, § 31 (1996).

University of California (“UC”) campus.⁴⁰ After the 1998 implementation of the ban, underrepresented minority applicants became substantially less likely to earn admission and enroll at UC. For example, in 1990, 8 percent of students enrolled at UC Berkeley were Black. However, after the 1998 ban, Black enrollment declined to only 4 percent, then to 2 percent in 2015, even though Blacks made up 9 percent of the population in California.⁴¹ Similarly, at the University of California, Los Angeles (“UCLA”), admission rates for underrepresented minorities plummeted from 52.4 percent in 1995 to 24 percent in 1998. As a result, the percentage of underrepresented minorities fell by more than one-

⁴⁰ Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California’s Proposition 209*, Research & Occasional Paper Series: CSHE.10.2020, Ctr. for the Study of Higher Educ., UC Berkeley (Aug. 2020), https://cshe.berkeley.edu/sites/default/files/publications/rops.cshe.10.2020.bleemer.prop209.8.20.2020_2.pdf; Liliana M. Garces, *Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 *The Rev. of Higher Educ.* 93, 100 (2012), <https://eric.ed.gov/?id=EJ1003835>; Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 *The Rev. of Economics and Statistics* 712, 719-720 (2012), <https://www.jstor.org/stable/23261474>.

⁴¹ Tiffany Jones & Andrew Howard Nichols, *Hard Truths: Why Only Race-Conscious Policies Can Fix Racism in Higher Education*, *The Educ. Tr.* (Jan. 2020), <https://files.eric.ed.gov/fulltext/ED603265.pdf>; Jeremy Ashkenas et al., *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, *N.Y. Times* (Aug. 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html>.

half: from 30.1 percent of the entering class in 1995 to 13.6 percent in 2012.⁴²

Interestingly, the decline in minority representation at UC came even as the minority population in California increased.⁴³ For example, at UCLA the proportion of Latino first-year students declined from 23 percent in 1995 to a mere 17 percent in 2011, even though the proportion of Latino college-aged persons in the state increased from 41 percent to 49 percent during that period.⁴⁴ The proportion of Black freshmen at UCLA declined from 8 percent in 1995 to 3 percent in 2011, even though the proportion of Black college-aged persons in California increased to 9 percent during that same period.⁴⁵ A table summarizing this decline is included below:

⁴² Erwin Chemerinsky, Op.-Ed., *If the Supreme Court bans affirmative action, it continues the U.S. legacy of racial discrimination*, L.A. Times (Jan. 25, 2022, 11:31 AM PT), <https://www.latimes.com/opinion/story/2022-01-25/op-ed-supreme-court-bans-affirmative-action-discrimination>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Percentage of Latino and Black Freshmen at UCLA		
	1995	2011
Latino Freshman	23%	17%
Black Freshman	8%	3%

Today, Black and Latino students remain underrepresented at UC.⁴⁶ A 2020 Urban Institute study compared the percentage of Black and Latino students in the state's overall population to the percentage of those attending college in the state.⁴⁷ At UC San Diego in 2017, 18.4 percent of students identified as Hispanic. Yet the potential market of 18- to 24-year-old Hispanic students statewide for more selective institutions like San Diego is 39.4 percent. Meanwhile, only 1.5 percent of students at UC San Diego identified as Black in 2017.

Schools in Michigan saw similar declines in enrollment after that state banned affirmative

⁴⁶ Ashkenas et al., *supra* note 41.

⁴⁷ Tomas Monarrez & Kelia Washington, *Racial and Ethnic Representation in Postsecondary Education*, Ctr. on Educ. Data and Pol'y, The Urb. Inst. (last updated June 22, 2020), https://www.urban.org/sites/default/files/publication/102375/racial-and-ethnic-representation-in-postsecondary-education_1.pdf.

action. According to the National Center for Education Statistics, Black enrollment at the University of Michigan dropped nearly 10 percent – from 1,615 to 1,476 – in the three years following the state’s enactment of Proposition 2, which eliminated race-conscious admission policies.⁴⁸

A similar phenomenon can be seen in higher education in Florida. Following the governor’s executive order in 2000 banning race-based preferences in decisions for admission at state-operated universities, Black enrollment has fallen significantly, particularly at the graduate and professional school level. The Journal of Blacks in Higher Education (“JBHE”) reports that since the ban went into effect, the greatest impact has been felt at the state’s two most prestigious law schools.⁴⁹ At the University of Florida Levin College of Law, in 2000, there were 53 Black students in the entering class. By 2004, however, the number had dropped by more than one-half, to only 22 Black first-year law students.⁵⁰ This year, Black first-year

⁴⁸ Adam Harris, *What Happens When a College’s Affirmative-Action Policy Is Found Illegal*, The Atlantic (Oct. 28, 2018), <https://www.theatlantic.com/education/archive/2018/10/when-college-cant-use-race-admissions/574126/>.

⁴⁹ *How State Bans on Race-Sensitive Admissions Have Damaged Black Enrollments in Professional Schools*, The J. of Blacks in Higher Educ., https://www.jbhe.com/features/51_professional_schools.html (last visited June 22, 2022).

⁵⁰ Other factors, including a public dispute among University of Florida Levin College of Law faculty regarding racial diversity of professors, may have contributed to the decline in Black enrollment immediately following the 2000 ban on race-

enrollments rebounded to 35, which is still 34 percent below the level that existed prior to the enactment of the ban. At the Florida State University College of Law, there were 23 Black students in the entering class in 2000.⁵¹ Notably, this year there are only 10 Black students in the first-year class. Likewise, JBHE reports that at the University of Florida's medical school, there were 12 Black first-year students in the class that enrolled in 2000, the year immediately before the ban on race-sensitive admissions went into effect. The following year, the number of entering Black medical students dropped nearly in half, and this year there are 10 Black students in the first year of medical school at the University of Florida.

The effects of statewide affirmative action bans have also gone beyond the undergraduate level in states other than Florida. According to JBHE, in 1997 the regents' ban on affirmative action took effect for graduate programs in the UC system. That year, Black admits dropped from 77 to 18, a decrease of 76.6 percent. Black first-year enrollments dropped from 20 in 1996 to only one in 1997.

conscious admissions. See William Glaberson, *Accusations of Bias Roil Florida Law School*, N.Y. Times (Oct. 30, 2000), <https://www.nytimes.com/2000/10/30/us/accusations-of-bias-roil-florida-law-school.html>.

⁵¹ Note, between 2000 and 2022, University of Florida Levin College of Law reduced the size of its entering class from over 400 students in previous years to 241 students in 2021, potentially contributing to a decline in the number of Black matriculants. See *Entering Class Profile, Class of 2024 (Fall 2021*)*, UF Law (Aug. 31, 2021), <https://www.law.ufl.edu/admissions/apply/entering-class-profile>.

Similarly, in 1994, the year before the affirmative action admissions plan was announced, Black enrollments at the UCLA law school reached an all-time high of 46 Black students. The next year, after the ban was announced, Black enrollments dropped by more than one-half, to two Black students. In 1997, when the ban took effect, there were only 10 black first-year law students at UCLA. By 1999, only three Black first-year law school students enrolled at UCLA.⁵²

The impact of the ban on race-sensitive admissions at California's elite state-operated law schools is also reflected in the rates of admission. In 2005 only 36, or 10.7 percent, of the 336 Black applicants to the Boalt Hall Law School at the University of California, Berkeley were accepted for admission. In 1996, before the ban on affirmative action went into effect, nearly 20 percent of all Black applicants were admitted. At the UCLA School of Law, only 8 percent of Black applicants were admitted in 2005. In 1996, more than 26 percent of Black applicants were admitted. At the Haas School of Business at the University of California, Berkeley, the affirmative action ban had a similar impact. In 1996, before the ban went into effect, there were 11 Black students who matriculated at the business school, while in 1997, the number dropped to five Black students. JBHE reports that in 2005 there was only one Black student in the entering class at the Haas School. In 1996, however, Blacks were 4.5

⁵² *Id.*

percent of the entering students at the Haas School. This year the figure is 0.4 percent.

The data described above shows that, contrary to petitioners' views, eliminating race-based preferences in admissions decisions negatively impacts minority students and leads to less diversity in colleges and professions. As a result, several states that have implemented bans, including California, Florida, and Michigan, have not been able to reflect the states' full diversity in their state universities since the bans went into effect.

B. STATEWIDE BANS ON AFFIRMATIVE ACTION HAVE LED TO A GENERAL DECLINE IN DEGREE ATTAINMENT FOR BLACK ADULTS, AS WELL AS AN "OPPORTUNITY GAP" IN EDUCATION AND INCOME.

As a result of statewide bans on affirmative action, there has generally been a decline in degree attainment for Black adults. Among Black adults, ages 25 to 34, the percentage with a college degree has declined to 30 percent. Degree attainment among younger White adults, however, is nearly 10 percent higher than it is for older White adults.⁵³ That is, the current level of degree attainment for Blacks is lower than the attainment levels of Whites

⁵³ Andrew Howard Nichols & J. Oliver Schak, *Degree Attainment for Black Adults: National and State Trends*, The Educ. Tr. (2017), <https://files.eric.ed.gov/fulltext/ED593322.pdf>.

in 1990 – over a quarter of a century ago.⁵⁴ In certain states, including Oklahoma and Washington – states that banned race-based admission policies – the percentage of degree attainment among Black students in the state has been ranked below average.⁵⁵

As a result, minority groups continue to experience disparities that extend beyond higher education. There is an “opportunity gap” and persistent disparities in education and income, leaving minorities with fewer opportunities to build generational wealth. In today’s economy, a college degree is increasingly beneficial. Generally, unemployment rates are lower for people with higher educational attainment. For example, in 2016, the net worth of a typical White family was reported to be \$171,000 – nearly ten times greater than that of a typical Black family.⁵⁶ That data proves that there is a gap in wealth between Black and White households, reflecting a society that still denies equal opportunities to *all* of its citizens. Furthermore, aside from mere financial benefits, degree attainment is associated with larger social benefits, including less crime and incarceration, better health, and higher levels of voting and

⁵⁴ *Id.* at 1.

⁵⁵ *Id.* at 3.

⁵⁶ Emily Moss et al., *The Black-white wealth gap left Black households more vulnerable*, Brookings (Dec. 8, 2020), <https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable/>.

political engagement.⁵⁷ Without equitable access to higher education, Black communities and other minority groups are relegated to an overall lesser quality of life. Thus, eliminating affirmative action in higher education reaches far beyond college admissions, and has real world social consequences, especially for the minority groups that are most impacted.

Certain *amici* rely on earnings from graduates of the University of Michigan to argue that incomes after bans on race-based admissions did not fall.⁵⁸ But they ignore the impact specifically on Black and minority groups. While these *amici* make the claim that “[University of Michigan] Wolverines are no less desirable to businesses and employers now that they are graduating from a school with race-neutral admissions,”⁵⁹ it is presumable that White graduates are the main beneficiaries, because the earnings do not account for the 10 percent decline in Black students who were not enrolled following the ban.

Further, the petitioners state that “the ability of students to thrive in the workforce without attending schools that racially balance their student body is further demonstrated by the success of Historically Black Colleges and Universities

⁵⁷ Philip Trostel, *It's Not Just the Money: The Benefits of College Education to Individuals and to Society*, Lumina Issue Papers, Lumina Found. (Oct. 14, 2015), <https://www.luminafoundation.org/files/resources/its-not-just-the-money.pdf>.

⁵⁸ *See* Okla. Br. 17.

⁵⁹ *Id.*

(HBCUs).”⁶⁰ However, HBCUs are the exception. HBCUs were established with the principal purpose of educating Black Americans during a time of legal segregation when Black people were not permitted to attend predominantly White institutions.⁶¹ Petitioners argue that while HBCUs do not meet respondents’ definition of “diversity” which is claimed to be necessary for minority students’ success, they are correct that HBCUs play a major role in providing access to higher education and wealth mobility.⁶² However, HBCUs were merely the first line-of-defense against racism in higher education. Affirmative action still plays a necessary role in admissions for even HBCU graduates who go on to obtain law and medical degrees and attend other graduate school programs at colleges and universities that are not HBCUs.

CONCLUSION

For the foregoing reasons, the Court should affirm its precedent and uphold the race-conscious admissions programs of the President & Fellows of Harvard College and the University of North Carolina.

⁶⁰ *Id.* at 17-18.

⁶¹ *Historically Black Colleges and Universities*, Nat’l Ctr. for Educ. Stat., <https://nces.ed.gov/fastfacts/display.asp?id=667>.

⁶² *See* Okla. Br. 18.

August 1, 2022

Respectfully submitted,

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APPENDIX

**APPENDIX: LIST OF *AMICI* – 67 CURRENT
AND FORMER EDUCATORS IN HIGHER
EDUCATION WHO SUPPORT
RACE-CONSCIOUS ADMISSIONS**

Barbara A. Atwood
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Emerita
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and Juvenile Law
Certificate Program
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The University of
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Dakota
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Dakota

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 Department of African
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Professor and Michael
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 School
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Judge John W. Ford
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University of Kansas
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