

Nos. 20-1199, 21-707

IN THE
Supreme Court of the United States

20-1199

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

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
_____ *Respondent.*

21-707

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

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 THE AMERICAN CIVIL
LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION
OF MASSACHUSETTS, AND AMERICAN CIVIL LIBERTIES
UNION OF NORTH CAROLINA LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	5
I. Diversity Remains a Compelling Interest in Higher Education.	5
A. The Judgment that Student Body Diversity Furthers the Academic Enterprise Deserves Deference as an Exercise of Academic Freedom.	6
B. Student Body Diversity Furthers the Purposes of the Fourteenth Amendment.	11
C. The Interest in Student Body Diversity Remains Compelling Today.	17
II. Consideration of Race through Holistic, Individualized Review Is a Narrowly Tailored Means of Pursuing Student Body Diversity. .	19
A. Holistic, Individualized Review Considers Race Contextually as One Factor Among Many in Assessing an Applicant’s Characteristics and Experiences.	20
B. Holistic Review Affirms the Dignity of Individual Applicants.	22
CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Adarand Constructors, Inc. v. Peña</i> , 515 U.S. 200 (1995)	1, 3
<i>Ballard v. United States</i> , 329 U.S. 187 (1946)	10
<i>Board of Directors of Rotary International v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987)	6
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	3, 9, 14
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992)	6
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	1
<i>Fisher v. University of Texas at Austin (Fisher I)</i> , 570 U.S. 297 (2013)	1, 6
<i>Fisher v. University of Texas at Austin (Fisher II)</i> , 579 U.S. 365 (2016)	1, 2, 6, 9, 11, 14, 20, 21, 22
<i>Gratz v. Bollinger</i> , 539 U.S. 244 (2003)	1
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<i>Keyishian v. Board of Regents of the University of the State of New York</i> , 385 U.S. 589 (1967)	7, 9
<i>McLaurin v. Oklahoma State Regents for Higher Education</i> , 339 U.S. 637 (1950)	9

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<i>United States v. Associated Press</i> , 52 F. Supp. 362 (S.D.N.Y. 1943)	9
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Brief of Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents, *Fisher II*, 579 U.S. 365 (2016) (No. 14–981), 2015 WL 6735839 15

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<i>Groups and an Agenda for Future Research</i> , 52 J. Int'l. Bus. Stud. 4 (2021).....	9
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INTEREST OF AMICI¹

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of these principles, the ACLU has appeared both as direct counsel and amicus curiae in numerous racial justice cases, including *Fisher v. University of Texas at Austin (Fisher II)*, 579 U.S. 365 (2016), *Fisher v. University of Texas at Austin (Fisher I)*, 570 U.S. 297 (2013), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The ACLU of Massachusetts, Inc., and the ACLU of North Carolina Legal Foundation are statewide affiliates of the national ACLU.

INTRODUCTION AND SUMMARY OF ARGUMENT

Race-conscious admissions, narrowly tailored to further the compelling academic interest in diversity, have been an established and constitutionally sanctioned practice in our nation's universities and colleges for more than half a century. The practice was central to the integration of many of

¹ No party counsel authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief. Blanket letters of consent to the filing of amicus briefs have been lodged by the parties with the Clerk of Court.

our nation's most prestigious institutions after centuries of racial exclusion. And it remains, in the view of numerous institutions of higher education, critical to ensuring an education that exposes students to the full range of experiences and perspectives.

Yet Petitioners invite the Court to hold that diversity is not a compelling interest, and that race-conscious admissions practices contradict the purpose of the Fourteenth Amendment. Pet. Br. 51. They ask the Court to overturn as “egregiously wrong” its long-established precedents upholding narrowly tailored race-conscious admissions programs, reaffirmed most recently in *Fisher II*, 579 U.S. 365 (2016). Pet. Br. 50. In their view, the Constitution and Title VI require schools to blind themselves to the reality that race often matters in contemporary society, and require this Court to reject the considered academic judgment of Harvard University, the University of North Carolina (UNC), and virtually every institution of higher learning in the nation—even if it would lead, as it surely would, to a more racially divided educational experience for countless young people.

Petitioners' request is fundamentally inconsistent with the original meaning of the Fourteenth Amendment, which was understood at adoption to have as its “pervading purpose” not formal color-blindness but ending the subjugation of racial minorities, especially Black people, and the provision of equality of opportunity, including by providing for

race-conscious remedial measures.² *Slaughter-House Cases*, 83 U.S. 36, 71 (1872).

Petitioners’ argument is also inconsistent with this Court’s precedent, which has not mandated colorblindness in all settings. Justice Harlan, oft cited to justify a “colorblind” view of equal protection, harshly condemned the formal equality of “separate but equal” for failing to reckon with the difference that race often makes. *See Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (“Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”). In *Brown v. Bd. of Educ.*, this Court similarly focused on the harms of segregation to minority students in rejecting “separate but equal.” 347 U.S. 483, 493 (1954) (segregation “deprive[d] the children of the *minority group* of educational opportunities.”) (emphasis added). And in *Grutter*, this Court reiterated that “[s]trict scrutiny must take “relevant differences” into account.’ Indeed, . . . that is its ‘fundamental purpose.’ Not every decision influenced by race is equally objectionable.” 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 228). Consideration of race, as one part of a holistic

² *See* Jacobus tenBroek, *Equal Under Law* 201 (rev. ed. 1974) (“The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen’s Bureau and civil rights bills . . . beyond doubt.”); *see generally* Br. Amici Curiae of the American Civil Liberties Union and the ACLU of Texas in Supp. of Resp’ts, *Fisher II*, 579 U.S. 365 (2016) (No. 14–981), 2015 WL 6754973; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985).

assessment of college applicants, furthers the values of education, integration, and equal protection, and is constitutional.

Because the original understanding and stare decisis arguments are addressed in other briefs, including those of Respondents, the ACLU focuses here on the case for deference to the considered academic judgment of Respondents (and the academy generally) that racial diversity is essential to their intellectual and pedagogical missions.

I. Student body diversity in higher education is a compelling interest, and both UNC and Harvard permissibly consider race in admissions in a narrowly tailored way to achieve that interest. Relying on this Court's settled precedent, both schools have articulated compelling interests in diversity and have considered race as one factor among many in a flexible, holistic review process.

Harvard and UNC have each concluded that a diverse student body benefits the entire university community by promoting academic debate and inquiry, exposing all members of the community to a broader set of ideas, and enhancing respect for different perspectives. That academic judgment, concurred in by virtually every institution of higher learning, warrants this Court's deference. Moreover, by bringing together people of different backgrounds, including different racial backgrounds, diversity on campus promotes understanding across social differences, promotes integration, and helps to combat inequity on and off campus. Because universities are able to draw students from across the country, they have a unique opportunity to bring together

individuals from a wide range of diverse communities and backgrounds to learn from each other.

II. The consideration of racial difference as one factor among many in the holistic review of individuals is a narrowly tailored means of achieving this end, because, like it or not, racial identity remains a significant feature of individual identity. Schools typically consider a wide range of diversity factors, including gender, socioeconomic status, geography, and extracurricular activities and interests. Considering race along with these other factors acknowledges that race is also an important aspect of identity that often shapes an individual's experiences and outlook. To recognize this fact does not reduce people to their identities or to impose a stereotype, but acknowledges that identity has many features. Considering racial identity is therefore an important step in achieving a truly diverse student body. Requiring universities to purposefully ignore an applicant's race would override the overwhelming academic consensus that its consideration is crucial to their mission, undermine efforts to ensure that students are exposed to and learn from a wide variety of views and experiences, and impede efforts at integration in one of the few institutions in our society that has the ability to achieve it.

ARGUMENT

I. Diversity Remains a Compelling Interest in Higher Education.

Institutions of higher education have a compelling interest in student body diversity, including racial diversity, and this Court owes deference to Respondents' academic judgment on that

score. For over forty years, this Court has ruled that a university pursuing the “educational benefits that flow from a diverse student body” may consider race as one factor among many in a holistic, individualized review of applicants. *Fisher II*, 579 U.S. at 381 (quoting *Fisher I*, 570 U.S. at 310). This conclusion rests in significant part on the “deference [that] must be given ‘to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.’” *Id.* at 376–77 (quoting *Fisher I*, 570 U.S. at 310). Neither the academic judgment that race is an important factor in assembling a diverse student body, nor the deference owed to such educational judgments, has changed in any way that would justify overturning this Court’s settled precedent.

A. The Judgment that Student Body Diversity Furthers the Academic Enterprise Deserves Deference as an Exercise of Academic Freedom.

Like many other compelling interests, the benefits of diversity are both tangible and intangible.³

³ See, e.g., *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992) (“[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State ‘to the burden of demonstrating empirically the objective effects on political stability that [are] produced’ by the voting regulation in question.”) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (“The impossibility of perfect tailoring is especially apparent when the State’s compelling interest is as intangible as public confidence in the integrity of the judiciary.”); *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (“[A s]tate’s

“Both ‘tradition and experience lend support to the view that the contribution of diversity [to higher education] is substantial.’” *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313). UNC and Harvard have each articulated well-reasoned interests in the pursuit of diversity on their respective campuses. Harv. JA1285 (Report of the Committee to Study the Importance of Student Body Diversity (2016)); UNC Pet. App. 10–14 (Trial Findings of Fact and Conclusions of Law (Oct. 18, 2021)).

The academic judgment that a diverse student body is central to the mission of Harvard and UNC deserves substantial deference. Academic freedom is “a special concern of the First Amendment,” and includes a university’s “selection of its student body.” *Bakke*, 438 U.S. at 312; *see also Grutter*, 539 U.S. at 329 (“In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy.”); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (academic freedom is therefore “a special concern of the First Amendment”); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957) (same). A university’s prerogative to determine “who may be admitted to study” is one of the “four essential freedoms of a university,” along with the freedoms to determine “on academic grounds who may teach, what may be taught, [and] how it shall be taught.” *Sweezy*,

compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services.”) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984)).

354 U.S. at 263 (Frankfurter, J., concurring) (internal quotation marks omitted).

Both Harvard and UNC have made the academic judgment that diversity is critical. Harvard appointed a committee to study the issue, and found that “student body diversity—including racial diversity—is essential to our pedagogical objectives and institutional mission: “[i]t enhances the education of all of our students, it prepares them to assume leadership roles in the increasingly pluralistic society into which they will graduate, and it is fundamental to the[ir] effective education.” Harv. JA1306 (Report of the Committee to Study the Importance of Student Body Diversity (2016)); *see also* Harv. Pet. App. 107–108 (“The evidence at trial was clear that a heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community.”). Similarly, UNC assembled a working group that identified five “interrelated, mutually reinforcing educational benefits of diversity: 1. Promoting the robust exchange of ideas[;] 2. Broadening and refining understanding[;] 3. Fostering innovation and problem-solving[;] 4. Preparing engaged and productive citizens and leaders[;] 5. Enhancing appreciation, respect, and empathy.” UNC JA1393.

Harvard’s and UNC’s respective judgments that diversity is essential to their academic enterprise are widely shared and well founded. This Court has recognized that the pursuit of student body diversity furthers academic inquiry. The classroom is “peculiarly the ‘marketplace of ideas,’” training the Nation’s future leaders “through wide exposure to that robust exchange of ideas which discovers truth

‘out of a multitude of tongues.’” *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)). Assembling a diverse student body from qualified applicants enables a school “to provide that atmosphere which is most conducive to speculation, experiment and creation.” *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263). Diversity “promotes learning outcomes” and exposes students to new ideas and ways of thinking. *Fisher II*, 579 U.S. at 381–382 (quoting *Grutter*, 539 U.S. at 330).

The value of exposure to new ideas and dialogue among people with diverse perspectives, like many academic judgments, extends beyond the quantifiable.⁴ Still, some of the benefits of diversity to academic work have been empirically demonstrated. Several studies have identified the value of working in diverse teams in research and scholarly work across many fields, including science and law.⁵ One study

⁴ The Court in *Brown* also recognized the importance of the unquantifiable or “intangible” dimensions of education, “including the ‘ability to study, to engage in discussions and exchange views with other students.’” 347 U.S. at 493 (quoting *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 641 (1950)).

⁵ See, e.g., Bedoor K. AlShebli et al., *The Preeminence of Ethnic Diversity in Scientific Collaboration*, 9 *Nature Commc’ns* 1, 9 (2018); Richard B. Freeman & Wei Huang, *Collaborating With People Like Me: Ethnic Co-Authorship Within the United States*, 33 *J. Lab. Econ.* S289, S313 (2015) (“[G]reater diversity and breadth of knowledge of a research team contributes to the quality of the scientific papers that the team produces.”); Gunter K. Stahl & Martha L. Maznevski, *Unraveling the Effects of Cultural Diversity in Teams: A Retrospective of Research on Multicultural Work Groups and an Agenda for Future Research*, 52 *J. Int’l. Bus. Stud.* 4, 10 (2021) (finding that “increased cross-

concluded that greater gender diversity within STEM research teams improved the teams' collaborative processes.⁶ Another found that articles published by law reviews with diverse staff were on average cited more often than articles published by reviews with non-diverse staff.⁷ These and other social science findings lend further support to the Court's and the academy's longstanding recognition of the value of diversity. Although people of a particular race or gender do not "act as a class," the "truth is" that people with different identities are "not fungible," and "a community made up exclusively of one is different from a community composed of both." *Ballard v. United States*, 329 U.S. 187, 193 (1946). As this Court noted in *Grutter*, 539 U.S. at 333, "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."

Respondents' judgment that student body diversity is essential to their academic mission is thus well supported by the judgments of other universities, scientific studies, and this Court's precedent. Nothing

cultural competences lead to more effective communication, conflict management, trust building, and other processes and emergent states that mediate high team multicultural performance.").

⁶ Julia B. Bear & Anita Williams Woolley, *The Role of Gender in Team Collaboration and Performance*, 36 *Interdisc. Sci. Revs.* 146, 151 (2011) ("[G]ender diversity can also enhance group processes, which are increasingly important as collaboration becomes a centerpiece in the production of science.").

⁷ Adam Chilton et al., *Assessing Affirmative Action's Diversity Rationale*, 122 *Colum. L. Rev.* 331, 397 (2022).

has changed that would justify this Court abandoning that traditional deference and imposing its own views on a matter of institutional academic freedom.

B. Student Body Diversity Furthers the Purposes of the Fourteenth Amendment.

Enrolling a diverse student body also helps to combat discrimination and to further integration, and to that extent affirmatively promotes Fourteenth Amendment values. Few things are more central to the flourishing of a multicultural society than mutual understanding. When free and open academic inquiry takes place in a diverse student body, it “helps to break down racial stereotypes, and enables students to better understand persons of different races.” *Fisher II*, 579 U.S. at 381 (quoting *Grutter*, 539 U.S. at 330). George Washington’s defense of geographic diversity in a national university is equally if not more applicable to racial diversity. He urged the benefits of a national university “where the Youth from *all parts* of the United States might receive the polish of Erudition,” explaining that this would bring young people together “when friendships are formed, and habits established,” and would help students “by degrees discover that there was not that cause for those jealousies and prejudices which one part of the Union had imbibed against another part.”⁸ Research also supports the impact of student diversity in

⁸ George Washington, *To Alexander Hamilton, September 1, 1796* in George Washington: A Collection 649 (William B. Allen, ed. 1988).

reducing stereotypes and forging common understanding.⁹

Student body diversity also improves students' equal ability to participate in, contribute to, and learn from the academic community. Harvard students testified to the importance of diversity at Harvard for their educational experiences. Br. of Amici Curiae 25 Harvard Students and Alumni Organizations in Supp. of Resp'ts 20–22, 30–31. For example, as one student observed, learning about diversity within Black and Latinx communities helped her to better “understand the African diaspora in Latin America,” and to become “a better advocate for the Latinx community and . . . better able to identify classism, and racism, and colorism within [her] own community.” *Id.* at 20–21. In the same vein, UNC students testified that the lack of sufficient diversity and the underrepresentation of students of color caused them to experience feelings of isolation, alienation, tokenism, and pressure to represent their race or ethnicity. Resp'ts Cecilia

⁹ See, e.g., James Sidanius et al., *The Diversity Challenge: Social Identity and Intergroup Relations on the College Campus* 318–319 (2008) (finding that racially and ethnically heterogeneous connections made in college reduced prejudices and increased egalitarian values); Uma M. Jayakumar, *Can higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615 (2008) (finding that white students who experienced cross-racial interactions during college were better able to relate to others with differing viewpoints years after college and continued to socialize with people of other races).

Polanco et al. Br. in Opp. to Cert. 8–9, *SFFA v. UNC*, No. 21–707.¹⁰

A diverse student body helps offset feelings of isolation among members of minority groups and encourages more active engagement in academic discussions. When a school attracts a critical mass of students of different ethnicities, diversity also “diminish[es] the force of stereotypes,” or the “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” *Grutter*, 539 U.S. at 333. “[A] critical mass of students from one race/ethnic background allows individual students in that race/ethnic group to disagree with one another in the classroom, to move away from the burden of being a ‘token,’ and be engaged in learning as individuals rather than as group representatives.”¹¹

Student body diversity also demonstrates to “[a]ll members of our heterogeneous society” that they

¹⁰ Amicus Speech First’s argument that “college campuses have systematically suppressed freedom of thought and speech in the name of ‘diversity’” is unfounded speculation. Br. of Speech First as Amicus Curiae in Supp. of Pet. at 16, *SFFA v. Harvard*, No. 20–1199 & *SFFA v. UNC*, No. 21–707. While intolerance for diverse perspectives on some college campuses is certainly a problem, Speech First fails to demonstrate any causal connection between student body diversity and the suppression of speech at any university, much less at either UNC or Harvard. The answer to intolerance is tolerance, not the elimination of diversity.

¹¹ Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 Nat’l Black L.J. 71, 90 (2010); see also Celestial S. D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. Davis L. Rev. 1209 (2005); Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 Univ. Fla. J.L. & Pub. Pol’y 11 (2003).

can “have confidence in the openness and integrity” of universities that serve as “path[s] to leadership” in our society. *Grutter*, 539 U.S. at 332. Education plays a “fundamental role in maintaining the fabric of society,” training the next generation of leaders, and “sustaining our political and cultural heritage.” *Id.* at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)); see also *Brownoma*, 347 U.S. at 493 (Education “is the very foundation of good citizenship”). “Effective participation by members of all racial and ethnic groups in the civil life of our Nation” is facilitated in important ways by their effective participation in higher education. *Grutter*, 539 U.S. at 332. As the Kerner Commission wrote in its landmark report of 1968, “integration is the only course which explicitly seeks to achieve a single nation rather than accepting” a dual or permanently divided society.¹² And in a society still marked by widespread de facto racial segregation in housing, employment, and civic life, universities provide one of the most important opportunities to create an integrated environment, at a time when young people’s ideas and identities can be profoundly influenced.

Student body diversity also promotes equitable access to the professions and greater equity throughout society. Education among a diverse student body “better prepares students for an increasingly diverse workforce and society.” *Fisher II*, 579 U.S. at 381 (quoting *Grutter*, 539 U.S. at 330). A diverse educational experience helps prepare students

¹² National Advisory Commission on Civil Disorders, *Report on the Causes, Events, and Aftermaths of the Civil Disorders of 1967* at 225 (1967).

to enter and succeed in a full range of post-graduate careers.¹³

Professions, as well as the public they serve, also benefit from a diverse field of employees and practitioners, and diversity in education promotes diversity in the professions. For example, one UNC student testified that her experiences in a diverse school will “enable her to treat and care for a diverse patient population in her career as a doctor.” Resp’ts Cecilia Polanco et al. Br. in Opp. to Cert. 9. “[G]reater diversity among health professionals is associated with improved access to care for racial and ethnic minority patients, greater patient choice and satisfaction, better patient–provider communication, and better educational experiences for *all* students while in training.”¹⁴ Yet these benefits cannot be

¹³ See, e.g., Br. of Fortune-100 and Other Leading American Businesses as Amici Curiae in Supp. of Resp’ts, *Fisher II*, 579 U.S. 365 (2016) (No. 14–981), 2015 WL 6735839; Br. of Lt. Gen. Julius W. Becton Jr., et al. as Amici Curiae in Supp. of Resp’ts, *Fisher II*, 579 U.S. 365 (2016) (No. 14–981), 2015 WL 6774556; *Grutter*, 539 U.S. at 308 (“Major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security.”).

¹⁴ Brian D. Smedley et al., Inst. of Med., *In the Nation’s Compelling Interest: Ensuring Diversity in the Health Care Workforce* 5 (2004); see also Brian D. Smedley et al., Inst. of Med., *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* 122–23 (2003) (finding “racial and ethnic minority physicians are more likely to practice in minority and medically underserved communities,” and are “more successful in recruiting minority patients to participate in clinical research,” and that “[r]acial and ethnic diversity of health professions

achieved without deliberate effort. “Latinos and African-Americans comprise nearly one-third of the nation’s population, but they account for only slightly more than one-tenth of U.S. physicians.”¹⁵

Similarly, researchers find that “[a] social determinant of . . . mental health disparities in the United States is a lack of multicultural competent clinicians available to clients of color.”¹⁶ “When racial and ethnic minority individuals do receive mental health care, it is often of lower quality than that received by their White, non-Latino counterparts . . . includ[ing] client experiences of intentional or unintentional discrimination and . . . stereotyping.”¹⁷ The ability of universities to effectively provide a diverse student body thus furthers not only its own immediate academic interests, but the physical and mental health of the country at large.

faculty and students helps to ensure that all students will develop the cultural competencies necessary for treating patients in an increasingly diverse nation.”); U.S. Dep’t of Health and Hum. Servs., *HHS Action Plan to Reduce Racial and Ethnic Health Disparities: Implementation Progress Report 2011–2014* at 7 (Nov. 2015) (“Racial and ethnic diversity in the health care workforce is associated with improved access to care.”); cf. Angus Chen, *Women Die More from Heart Attacks Than Men—Unless the ER Doc Is Female*, *Sci. Am.* (Aug. 6, 2018), <https://www.scientificamerican.com/article/women-die-more-from-heart-attacks-than-men-mdash-unless-the-er-doc-is-female> (“Women make up a mere quarter of emergency doctors in the U.S. . . . If a heart attack patient is a woman and her emergency physician is a man . . . her risk of death suddenly rises by about 12 percent.”).

¹⁵ U.S. Dep’t of Health and Hum. Servs., *supra*, at 7.

¹⁶ Frank R. Dillon et al., *A Dyadic Study of Multicultural Counseling Competence*, 63 *J. Counseling Psychology* 57, 57 (2016).

¹⁷ *Id.*

C. The Interest in Student Body Diversity Remains Compelling Today.

The value of diversity in higher education is as important now as ever, and nothing has changed in the national community that would warrant this Court abandoning the deference it has long paid to this uniquely academic judgment. In a society that remains characterized by substantial residential segregation, higher education affords a unique opportunity to bring together people of different backgrounds and worldviews, thereby promoting cross-cultural understanding and serving as a laboratory of democracy. The United States is becoming increasingly diverse, but also increasingly divided and stratified. The vestiges of past intentional discrimination “remain today, intertwined with the country’s economic and social life.” *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 528 (2015); *see also* UNC Pet. App. 11. n.5 (Trial Findings of Fact and Conclusions of Law (Oct. 18, 2021) (“Despite its comparatively recent embrace of diversity [UNC’s] important strides . . . have fallen short of repairing a deep-seated legacy of racial hostility.”)); UNC JA1685–90, JA1697 (Expert Report of Dr. David Cecelski) (documenting UNC’s fight against integration into the early 1980s).

The persistence, and in some context, deepening, of racial segregation underscores the continuing compelling need for universities to consider race in order to assemble diverse student bodies. Over eighty percent of major metropolitan areas in the U.S. were more segregated in 2019 than

in 1990.¹⁸ Most public schools serve their local neighborhoods, and the secondary schools from which universities draw their applicants are also very often racially segregated.¹⁹ Scholars have identified a rising

¹⁸ Stephen Menedian et al., *Twenty-First Century Racial Residential Segregation in the United States*, U.C. Berkeley (June, 30, 2021), <https://belonging.berkeley.edu/roots-structural-racism>; see also Tracy Hadden Loh et al., *Separate and Unequal: Persistent Residential Segregation is Sustaining Racial and Economic Injustice in the U.S.*, Brookings Inst. (Dec. 16, 2020), <https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us>; John R. Logan, *The Persistence of Segregation in the 21st Century Metropolis* (Dec. 11, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3859616>.

¹⁹ U.S. Gov't Accountability Off., *K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination* 10 (April 2016), <https://www.gao.gov/assets/680/676745.pdf> (reporting that between 2000-01 and 2013-14, “both the percentage of K-12 public schools that were high poverty and comprised of mostly Black or Hispanic students . . . and the students attending these schools grew significantly.”); *id.* at 12 (“[T]he number of students attending [majority Black or Hispanic] schools more than doubled, increasing by about 4.3 million students, from about 4.1 million to 8.4 million students.”); see also Erica Frankenberg et al., UCLA Civil Rights Project, *Harming our Common Future: America’s Segregated Schools 65 Years After Brown* 22–23 (2019), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf> (Between 1968 and 2019, “the nation’s enrollment of white students . . . declined by 11 million . . . while the enrollment of Latinos . . . increased by 11 million. There are now nearly three million Asian students and two million students who identify as multiracial.”); *Id.* at 4 (In 2016, the average white student “attend[ed] a school in which 69% of the students [were] White, while Latino students attend[ed] a school in which 55% of the students [were] Latino.”); *Id.* at 22–23 (finding that the average Black student attended

national trend of “intensely segregated schools,” where either non-white or white students make up ninety percent or more of enrollment.²⁰ Both Black and Latinx students are increasingly educated in intensely segregated K-12 schools.²¹ “Context matters when reviewing race-based governmental action under the Equal Protection Clause.” *Grutter*, 539 U.S. at 327. In these circumstances, the ability of universities to bring together a diverse student body and to promote the many benefits that follow is all the more essential. And Plaintiffs have failed to show any basis for overturning this Court’s precedents requiring deference to the academy’s considered judgment that diversity remains critical to their success.

II. Consideration of Race through Holistic, Individualized Review Is a Narrowly Tailored Means of Pursuing Student Body Diversity.

An admissions process directed to furthering the compelling interest in student body diversity satisfies strict scrutiny when it provides each applicant an individualized, holistic review in which race is one factor among many other pertinent

schools in which 47% of students were Black and Asian American and Pacific Islander (AAPI) students attended schools with “disproportionately large” numbers of same-race peers.).

²⁰ Frankenberg et al., *supra*, at 21.

²¹ Gary Orfield et al., UCLA Civil Rights Project, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* 5 (May 15, 2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

elements of diversity. *Grutter*, 539 U.S. at 334; *see also Fisher II*, 579 U.S. at 373–74 (upholding admissions policy where a portion of the class admitted based in part on evaluation of “applicant’s potential contributions to the University’s student body based on the applicant’s leadership experience, extracurricular activities, awards/honors, community service, and other special circumstances,” including race). Such a policy permits a university to pursue its interest in diversity without “unduly burden[ing] individuals.” *Grutter*, 539 U.S. at 341. “The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007). Here, as with the compelling interest in diversity, nothing has changed to alter this Court’s conclusion that such limited consideration of race is an adequately narrowly tailored means.

A. Holistic, Individualized Review Considers Race Contextually as One Factor Among Many in Assessing an Applicant’s Characteristics and Experiences.

“[D]iversity takes many forms,” and many characteristics and life experiences—including race, ethnicity, gender, religion, sexual orientation, language skills, socioeconomic status, family status, hometown, alumni connections, and cultural background—may inform an applicant’s outlook, and therefore what she may have to offer to campus diversity. *See Fisher II*, 579 U.S. at 380. An individual’s extracurricular activities, whether

playing football or the oboe, leading debate club or editing the school paper, balancing part-time or volunteer work, help shape the applicant's potential contributions to the learning community. Universities that seek to create a diverse student body through their admissions process may choose to consider the attributes of an applicant on these, and other, dimensions. *Bakke*, 438 U.S. at 404 (Blackmun, J., concurring) (“in the admissions field . . . educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.”). The growing gender disparity in college enrollment—59.5% of college students are women while 40.5% are men—has led some colleges to consider gender an important variable in admissions as well.²²

As one aspect of a holistic, individualized review, “consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities.” *Fisher II*, 579 U.S. at 375. In the University of Texas’s admissions program, for example, “the consideration of race, within the full context of the entire application, may be beneficial to any UT Austin applicant—including whites and Asian-Americans.” *Id.* The same holds true for Harvard and UNC.

Race neutral alternatives are an inadequate means of achieving the compelling interest in student body diversity. No single metric can fully assess the range of qualities, experiences and views that may

²² Douglas Belkin, *A Generation of American Men Give Up on College: ‘I Just Feel Lost’*, Wall Street Journal (Sept. 6, 2021), <https://www.wsj.com/articles/college-university-fall-higher-education-men-women-enrollment-admissions-back-to-school-11630948233>.

contribute to a college class. *Id.* at 385 (“any single metric will capture certain types of people and miss others”). Thus, as one example, this Court found that “to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity.” *Id.* at 386–87. To bar any consideration of race ignores the unique ways in which race may add to diversity. It fails to account, for example, for the experience of a white student attending majority-minority schools, of a Black male applicant with a background in and desire to study dance, or a Hmong student who immigrated to a rural area of Minnesota as a child. Because race, like many other aspects of identity, remains relevant to (even if not determinative of) who we are as individuals, schools need to be able to take it into consideration in constructing a truly diverse student body.

B. Holistic Review Affirms the Dignity of Individual Applicants.

Including race as part of holistic, individualized review also permits full consideration of each individual applicant. It allows an applicant to express—and a university to hear—the full range of characteristics and experiences that may make them distinctive. Universities thus typically invite applicants to submit essays discussing their identities, experiences, and beliefs, and how those qualities might contribute to the college environment. For example, the first of seven 2021–2022 Common Application essay prompts, used by over 900 colleges, asks applicants: “Some students have a background, identity, interest, or talent that is so meaningful they believe their application would be incomplete without it. If this sounds like you, then please share your

story.”²³ Another asks applicants to reflect “on a time when you questioned or challenged a belief or idea,” and another asks applicants to discuss “a period of personal growth and a new understanding of yourself or others.”²⁴ See also JA 111a, *Fisher I*, 570 U.S. 297 (2013) (No. 11–345), 2012 WL 1883284, at *111a (One of University of Texas’s optional essays asked applicants to describe “exceptional hardships, challenges, or opportunities that have shaped or impacted your abilities or academic credentials, personal responsibilities, exceptional achievements or talents, educational goals, or ways in which you might contribute to an institution committed to creating a diverse learning environment.”).

If colleges may not consider race in the application process, they may not be able to undertake a truly holistic assessment of applicants for whom race is salient to the diverse perspectives they can contribute to a university. “[O]ne’s own, unique experience” of race, as of other personal characteristics, “is likely to affect an individual’s views.” *Grutter*, 539 U.S. at 333. “It belittles applicants to invite their self-presentations and then to deliberately ignore aspects of their personal accounts that they believe to be important.”²⁵ Prospective students will often tell colleges and universities that race has been salient in their lives,

²³ *What Are the 2021-2022 Common App Essay Prompts?*, Common App, <https://appsupport.commonapp.org/applicantsupport/s/article/What-are-the-2021-2022-Common-App-essay-prompts> (last visited July 26, 2022).

²⁴ *Id.*

²⁵ Br. of Dean Robert Post & Dean Martha Minow as Amici Curiae in Supp. of Resp’ts at 22, *Fisher II*, 579 U.S. 365 (2016) (No. 14–981), 2015 WL 6735850, at *22.

because, for many, it has. By accounting for race in the holistic admissions process, Harvard and UNC recognize that these contributions to diversity may exist even if an applicant does not write about their race explicitly. Harv. Br. 30, 55; Polanco Br. 12–13.

Prohibiting schools from hearing those perspectives, or from crediting them, while permitting those same schools to credit all other parts of an applicant’s multi-faceted identity, fails to place race “on the same footing for consideration” as other elements that contribute to diversity. *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317).

“The enduring hope is that race should not matter; the reality is that too often it does.” *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part, concurring in judgment). Race, and the experience of racial discrimination, continue to form the experiences of individuals, and in turn the operation of institutions. And as George Washington recognized, young people brought together at a university can help to overcome “jealousies and prejudices.” In this way, colleges and universities can be part of the solution, not just another part of the problem. But to be able to do so, it is imperative that universities can select and assemble truly diverse student bodies—and as UNC, Harvard, and virtually every other college have determined, that requires the narrowly tailored consideration of race. As nothing has changed to alter that judgment, this Court should reaffirm the propriety of that practice.

CONCLUSION

The judgments of the First Circuit and the District Court for the Middle District of North Carolina should be affirmed.

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