

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS
OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, *et al.*,
Respondents.

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

BRIEF OF AMHERST, BARNARD, BATES, BOWDOIN, BRYN
MAWR, CARLETON, COLBY, CONNECTICUT, DAVIDSON,
FRANKLIN & MARSHALL, HAMILTON, HAMPSHIRE,
HAVERFORD, MACALESTER, MIDDLEBURY, MOUNT
HOLYOKE, OBERLIN, POMONA, REED, SARAH LAWRENCE,
SMITH, ST. OLAF, SWARTHMORE, TRINITY, UNION, VASSAR,
WELLESLEY, AND WILLIAMS COLLEGES, AND BUCKNELL,
CLARK, TUFTS, WASHINGTON & LEE, AND WESLEYAN
UNIVERSITIES, *AMICI CURIAE*, SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*¹

Amici curiae are thirty-three private, highly selective residential colleges whose small size and excellence attract students from around the nation and the world.² They provide their students a liberal arts education in the broadest sense—a rich, deep training obtained through encounters with varied academic subject matter and interactions with classmates of different backgrounds, experiences, and viewpoints.

Because of their excellence, each of *Amici* is highly regarded and flush with applications from well-qualified candidates. Because of their size, they offer admission to only a small fraction of those applicants. And because of their goals, they select applicants not mechanically based on test scores, but holistically based on a wide range of personal factors. Each year, *Amici* decide which set of applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of society. Each college deliberately

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to its preparation or submission. Letters consenting to the filing of *amicus curiae* briefs have been lodged by the parties with the Clerk of this Court.

² Although several of *Amici* are universities, their selectivity and emphasis on a liberal arts education in a residential setting align them with the others, and for convenience this brief refers to *Amici* as “colleges” throughout. While some *Amici* are larger, typical of the group are Amherst (total enrollment 1,970 students in fall 2020), Williams (approximately 2,000), and Trinity (2,200), each roughly one-third the size of Harvard.

The full list of *Amici* can be found in Appendix A.

seeks to enroll and house on campus a highly diverse group of students—from different states and countries; from urban and rural backgrounds; home-schooled, private-schooled, and public-schooled; with differing economic circumstances; with different kinds of experiences, talent, or athletic ability; students who will be the first in their families to go to college and, among some of *Amici*, students with family connections to the schools.

Amici have a direct interest in the outcome of this case because Petitioner’s claim against Harvard College is asserted under Title VI of the Civil Rights Act of 1964 and other laws. *See, e.g., Cannon v. Univ. of Chi.*, 441 U.S. 677 (1978) (applying Title IX of the Education Amendments of 1972, patterned on Title VI, to a private institution without suggestion of differential application); *Grove City Coll. v. Bell*, 465 U.S. 555, 566–67 (1984) (same). A decision overruling *Grutter v. Bollinger*, 539 U.S. 306 (2003), would deal a powerful blow against *Amici*’s effort to create diverse student bodies.

Both the Court’s opinion and Justice Kennedy’s dissent in *Grutter* approvingly cited the brief filed by most of these same *Amici* and endorsed and commended the ways in which *Amici* seek to enroll broadly diverse classes. *See* 539 U.S. at 323; *id.* at 391–92 (Kennedy, J., dissenting). *Amici* submit this brief both to alert the Court to the substantial harm that applying Petitioner’s arguments to them would cause and to advise of the extent to which *Grutter* remains workable and scrupulously applied by small colleges.

SUMMARY OF ARGUMENT

Because the outcome of this case could have a detrimental effect on admissions programs in higher education nationwide, the Court should consider the experiences of small, selective private colleges and universities that have applied *Grutter* faithfully and successfully for nearly twenty years. In a society in which race still matters, *Amici's* experience has shown the educational benefits of a diverse student body and the societal benefits of educating diverse future leaders. Those considerations militate against Petitioner's attempt to overturn *Grutter*.

Amici have a compelling interest in enrolling diverse classes. Studies consistently show that diversity—including racial diversity—meaningfully improves learning experiences, complex thinking, and non-cognitive abilities. Diversity also generates pedagogical innovations and decreases prejudice. These benefits are especially pronounced at liberal arts colleges and small universities, where smaller class sizes lead to greater engagement among diverse students.

Over the past twenty years, *Amici* have scrupulously applied and relied on *Grutter's* teachings in the admissions process. They focus on the individual applicant and employ race only as part of a holistic consideration. They have revisited their programs to determine whether workable race-neutral alternatives exist that would produce the educational benefits of diversity. But *Amici* have repeatedly concluded that race cannot be excluded entirely from admissions considerations if they are to enroll the diverse classes critical to their educational mission.

Because diversity remains a compelling interest for *Amici*, and race-conscious processes continue to be necessary to achieve it, this Court should uphold *Grutter*.

ARGUMENT

GRUTTER SHOULD BE UPHELD.

Petitioner’s brief centers on two premises: that *Grutter* is “egregiously wrong” because it permits consideration of race in college admissions; and that because Harvard and the University of North Carolina (“the oldest private and public colleges in America”) have “ignored” *Grutter*, *Grutter* must be overruled. Pet’r Br. 2. As an initial matter, Petitioner greatly distorts the factual record established in the two cases below. In both cases, the district court made numerous factual findings after an extensive trial that belie the narrative presented by Petitioner. *See* Harvard Br. 11–17; UNC Br. 19. But even if Petitioner’s factual account were accurate, and Harvard and UNC flouted *Grutter* (a conclusion refuted by the record), that still would not warrant overruling *Grutter*.

This Court has identified a number of factors that bear on the question when to apply the principle of *stare decisis*. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2264–65 (2022); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part). While *Amici* agree with Respondents’ analyses of those factors at issue here, *Amici* submit this brief to highlight three: *Grutter* was not “egregiously wrong”; it is workable in practice, as *Amici*’s own experiences show; and *Amici* have built up strong

reliance interests in the preservation of its holding. *Cf. Dobbs*, 142 S. Ct. at 2265. It would be legally unwarranted and highly destabilizing to jettison *Grutter* after so many years of allowing colleges to pursue race-conscious admissions policies.

A. *Amici* Have a Compelling Interest in Enrolling Diverse Classes.

1. *Diversity is an Especially Compelling Interest at Colleges Like Amici.*

Grutter and the line of cases including *Regents of University of California v. Bakke*, 438 U.S. 265, 313 (1978), and *Fisher v. University of Texas*, 579 U.S. 365 (2016), identified several compelling interests that the enrollment of a diverse student body serves. One is educational: encounters with others holding different views and possessing different backgrounds train and sharpen students’ minds to a greater degree. Another is social: diversity promotes inter-group understanding and combats stereotypes. *See Grutter*, 539 U.S. at 330. Diverse educational environments prepare students for success as adults in a dynamic, democratic, and increasingly diverse society.³ And a third implicates “educational autonomy”: colleges have the “right to select those students who will contribute the most to the ‘robust exchange of ideas.’” *Id.* at 329.

Research confirms these diffuse and wide-ranging benefits. Studies consistently show that diversity—including racial diversity—improves learning experiences, problem-solving and critical-thinking skills,

³ Elizabeth Anderson, *The Imperative of Integration* 2–3 (2010); Amy Gutmann, *Democratic Education* 212 (1987).

and interpersonal and leadership skills.⁴ Diversity also enhances students' cultural and social awareness, appreciation of differing perspectives, civic engagement, and concern for the public good.⁵ Intergroup contact occasioned by racial diversity helps reduce prejudice as well.⁶ Research shows that underrepresented students tend to experience less frequent discrimination at more diverse institutions.⁷ These benefits are shared by all students, regardless of race.⁸ Indeed, diversity benefits not only educational institutions but also society as a whole.⁹

⁴ Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 *Rsch. Higher Educ.* 529, 530 (2004); Anthony L. Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 *Psych. Sci.* 507, 509 (2004).

⁵ Lisa B. Spanierman et al., *Participation in Formal and Informal Campus Diversity Experiences: Effects on Students' Racial Democratic Beliefs*, 1 *J. Diversity Higher Educ.* 108, 124 (2008); Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 *Rev. Higher Educ.* 185, 191–93 (2007).

⁶ Nisha C. Gottfredson et al., *The Effects of Educational Diversity in a National Sample of Law Students: Fitting Multilevel Latent Variable Models in Data with Categorical Indicators*, 44 *Multivariate Behav. Rsch.* 305, 319 (2009).

⁷ Sylvia Hurtado & Chelsea Guillermo-Wann, *Diverse Learning Environments: Assessing and Creating Conditions for Student Success—Final Report to the Ford Foundation*, UCLA: Higher Educ. Rsch. Inst. (2013).

⁸ Elizabeth Aries, *Race and Class Matters at an Elite College* 66 (2008).

⁹ Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 *J. Higher Educ.* 430, 430–31 (2006).

However significant these benefits are across higher education in general, they are magnified at liberal arts colleges and small universities like *Amici*.¹⁰ As many social scientists have shown, structural diversity—that is, the sheer numerical representation of diverse groups—is necessary but not sufficient to achieve the full educational benefits of diversity.¹¹ What matters is *engagement* among diverse peers, or “interactional diversity.”¹² Schools like *Amici* foster such engagement by cultivating close-knit communities where students live together and constantly interact.¹³ Those kinds of interactions tend to be less frequent at institutions with larger student enrollments or where more students commute, even when those institutions are more structurally diverse.¹⁴

¹⁰ See Paul D. Umbach & George D. Kuh, *Student Experiences with Diversity at Liberal Arts Colleges: Another Claim for Distinctiveness*, 77 J. Higher Educ. 169, 172 (2006); Ernest T. Pascarella et al., *Liberal Arts Colleges and Liberal Arts Education: New Evidence on Impacts*, 31 ASHE Higher Educ. Rep. 1, 37 (2005).

¹¹ Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 333 (2002).

¹² *Id.*

¹³ Umbach & Kuh, *supra* note 10, at 172.

¹⁴ Chang, *supra* note 4, at 546.

In addition to the concentrated learning environment at small schools, the nature of liberal arts pedagogy promotes students' openness to diversity.¹⁵ Researchers point to meaningful student-faculty contact, cooperative learning environments, rigorous academic standards, and a supportive campus environment as contributing factors, among others.¹⁶ The "humanities orientation" of a liberal arts education similarly correlates with improved racial understanding.¹⁷

The inescapable realities of increased diversity on a national and global scale confirm the value of learning in such a richly diverse environment. Virtually all major employers consider it "important" that employees be "comfortable working with colleagues, customers, and/or clients from diverse cultural backgrounds" and be able to share "ideas, experiences, viewpoints, and approaches with diverse groups of people."¹⁸ Thus, as research shows, "[s]tudents can learn better how to navigate adulthood in an increasingly diverse

¹⁵ Tricia A. Seifert et al., *The Effects of Liberal Arts Experiences on Liberal Arts Outcomes*, 49 *Resch. Higher Educ.* 107, 107–25 (2008).

¹⁶ Camille A. Farrington, *Noncognitive Outcomes of Liberal Arts Education*, Mellon Found. (Jan. 2019), <https://tinyurl.com/ycyjt23>.

¹⁷ Richard D. Kahlenberg, *Foreword to Amy Stuart Wells et al., How Racially Diverse Schools and Classrooms Can Benefit All Students*, The Century Found. (2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/>.

¹⁸ *Id.*

society—a skill that employers value—if they attend diverse schools.”¹⁹

As they learn from their experiences enrolling diverse students, *Amici* constantly recalibrate their curricular offerings to prepare students better for life beyond college. *Amici* report changes and improvements in what is taught and how it is taught, as well as extracurricular programming. For instance, an intensive effort to improve the success rates of students of color in science and math at Carleton resulted in pedagogical innovations that benefitted Carleton’s math and science students generally. At Swarthmore, a peer-mentoring initiative aimed at increasing retention of underrepresented minority students in biology and other STEM fields resulted in marked improvement for all students. The program proved so successful that Swarthmore created multiple similar programs across the sciences.

Just as *Amici* strive to enroll diverse students, prospective students look to enroll at diverse institutions.²⁰ Research indicates that students increasingly prefer diverse campuses where they regularly engage with classmates from underrepresented groups.²¹

¹⁹ *Id.*

²⁰ Scott Jaschik, *All Student Groups Care About Diversity*, Inside Higher Ed (Nov. 1, 2021), <https://www.insidehighered.com/admissions/article/2021/11/01/all-student-groups-want-diversity-campus>.

²¹ John M. Carey et al., *It’s College Admissions Season, and Students Are Looking for Diverse Campuses*, Wash. Post (Apr. 14, 2020), <https://www.washingtonpost.com/politics/2020/04/14/its-college-admissions-season-students-are-looking-diverse-campuses>.

Overwhelming majorities of incoming students rate “understanding other cultures” and “learning to relate to people of other races and nationalities” as “essential” or “very important” skills to learn in college. Likewise, students broadly support admissions policies that account for race as a means to build diverse learning communities.²² Were *Amici* unable to offer the diversity that students value and demand, they would likely receive fewer applications and enroll fewer of the brightest students.

These goals have always been “at the heart” of *Amici*’s educational and social mission. *Id.* at 329. Informed by experience, *Amici* have long promoted the value of students’ encounters with diversity of all kinds—including racial diversity—in a close-knit environment. It is no accident that Hamilton College was established as the Hamilton-Oneida Academy in 1793 as “a school for the children of the Oneida Indians and of the white settlers” moving into the region. Oberlin resolved in 1835 that “the education of people of color is a matter of great interest and should be encouraged and sustained in this institution.” The founders of Oberlin College grappled with the idea of integration and decided that “bringing together students with different backgrounds and experiences” made for a superior education.²³ Over 185 years of

²² Nikki Rojas, *Students Call Ensuring Diversity on Campus Vital*, Harv. Gazette (Jan. 27, 2022), <https://news.harvard.edu/gazette/story/2022/01/college-students-discuss-need-to-ensure-diversity-on-campus/>.

²³ Nancy S. Dye, Inside Oberlin, *Our Place in History*, Oberlin Alumni Magazine, Winter 2002–03, https://www2.oberlin.edu/alummag/oamcurrent/oam_winter2003/inside_oberlin.html.

experience informs Oberlin's steadfast commitment to diversity today.²⁴ Bates was founded by abolitionists in 1855 who resolved immediately to admit applicants previously excluded from most American institutions of higher education. Middlebury graduated a Black student in 1823, and Amherst and Bowdoin followed in 1826 and 1833. In short, even while many Blacks were still enslaved, some colleges were intentionally recruiting diverse students in the service of their educational missions.

W.E.B. Du Bois made the basic point more than 100 years ago: "The function of the university is not simply to teach bread-winning, or to furnish teachers for the public schools . . . [but] is, above all, to be the organ of that fine adjustment between real life and the growing knowledge of life, an adjustment which forms the secret of civilization."²⁵ As former Carleton College President Robert A. Oden, Jr. later put it, "the single greatest source of growth and development is the experience of difference, discrepancy, anomaly," and "the free and uncensored play of ideas and opinions and arguments and positions is central to the fabric of a liberal arts education."²⁶ A college "peopled by

²⁴ Diversity and Social Justice, Oberlin College, <https://www.oberlin.edu/about-oberlin/mission-and-values/diversity-and-social-justice>.

²⁵ W.E.B. Du Bois, *The Souls of Black Folk* (1903), <http://www.bartleby.com/114/5.html>.

²⁶ Robert A. Oden, Jr., Former President, Carleton College, Inauguration Convocation Address: Carleton and the Liberal Arts: Yesterday, Today, and Tomorrow (Oct. 25, 2002), <https://www.carleton.edu/president/news/inauguration-convocation-address-carleton-and-the-liberal-arts-yesterday-today-and-tomorrow/>.

those representing and trying out such ideas and opinions and arguments is a finer college for the presence of these people.”²⁷

Nowadays, Williams’ training materials for its admissions application readers state that “the college seeks students who are intellectually curious thinkers, dynamic creators—of art, ideas, and initiatives—inside the classroom and beyond it, and leaders and collaborators who will work together and independently to strengthen the Williams community and help move it forward.” Williams believes that “all students—regardless of race, ethnicity, socioeconomic status, to name a few—benefit when studying with peers from varied backgrounds and lived experiences rather than in a homogeneous setting.”

This Court has long recognized a university’s ability to select its own student body as one of its “essential freedoms.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Relying on that principle, Justice Powell in *Bakke* found it “of paramount importance” that a university have autonomy to select a diverse student body that contributes to the “robust exchange of ideas.” *Bakke*, 438 U.S. at 313 (opinion of Powell, J.). And in *Grutter*, the Court found worthy of deference a college’s judgment as to the necessity of student-body diversity to achieve the college’s educational mission. 539 U.S. at 328. For all the reasons stated above, sound educational policy justifies such deference.

²⁷ *Id.*

2. *Eliminating Any Consideration of Race Would Defeat Amici's Efforts to Enroll Diverse Classes.*

Without the ability to take race into account in admissions, *Amici* would find the kind of diversity they seek nearly impossible to attain. Institutions located in rural, more homogeneous areas (for example, Bates, Carleton, Hamilton, and Middlebury) would likely default to racially uniform classes resembling their surroundings. Even schools located in less homogeneous areas would likely struggle to identify and admit prospective students from certain underrepresented groups, however much they desired their presence (for example, Native Americans at Amherst).

Research has shown that the elimination of race-conscious admissions policies at highly selective institutions would have a drastic resegregating impact.²⁸ Black enrollment would likely decline between 50% and 70%; the probability of Black applicants receiving offers of admission would drop to half that of white students; and the percentage of Black students matriculating would drop from roughly 7.1% of the student body to 2.1%. Strictly enforced, a “do not consider race” policy would “presumably take [B]lack enrollments . . . back to early 1960s levels, before colleges and universities began to make serious efforts to recruit minority students.”²⁹ *Amici* themselves have

²⁸ Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action*, Univ. of Cal. Davis (Oct. 2006) at 7–10, <https://tinyurl.com/2p9eda8c>.

²⁹ William G. Bowen & Derek Bok, *The Shape of the River* (20th anniv. ed. 2018) at 39. Bowen’s and Bok’s study, originally pub-

reached similar conclusions. Amherst, for example, has determined that an entirely race-blind policy would reduce the percentage of historically underrepresented students of color in its student body—including Native American, Black, and Hispanic students—by approximately half.³⁰ Thus, prohibiting the consideration of race in admissions, as Petitioner seeks, would not only roll back the benefits of diversity but also result in substantial resegregation.³¹

Other strategies to foster diversity without considering race are unlikely to be panaceas. Petitioner argues that Harvard could promote racial diversity by reducing admissions based on family connection. The record here does not support that argument, and the experience of *Amici* undermines it. Several *Amici* have already eliminated such admissions, and yet race-conscious processes remain necessary.

Similarly, it is unrealistic to believe that highly selective institutions could promote diversity simply by improving search techniques or by treating socioeconomic status as a complete proxy for race. California’s efforts to restore some of the diversity lost since

lished in 1998, examined the long-term consequences of considering race in college and university admissions, drawing heavily from a database compiled by the Andrew W. Mellon Foundation focusing on twenty-eight leading schools, roughly one-third of which are *Amici* here. The majority opinion in *Grutter* cited their work. *See* 539 U.S. at 330.

³⁰ These studies, conducted as part of a “periodic review” of Amherst’s admissions policy, *see Grutter*, 539 U.S. at 342, disprove Petitioner’s glib assertions that no schools heed *Grutter*’s commands.

³¹ *See generally* Bowen & Bok, *supra* note 29.

the passage of Proposition 209 have not been successful, and instead, the university system has seen sharp drops of Black and Hispanic students at the more selective institutions—*i.e.*, the ones most comparable to *Amici*.³² After an exhaustive review of a range of race-neutral initiatives, Williams determined that none, either alone or in concert with one another, would, in the absence of race-conscious admissions policies, position Williams to achieve its diversity-related goals without significant and unacceptable sacrifice to other institutional priorities. Williams concluded that the alternatives would be either logistically infeasible or ineffective at enrolling a diverse student body. As several researchers concluded, “class-based preferences cannot be substituted for race-based policies if the objective is to enroll a class that is both academically excellent and diverse.”³³

It is likely that *Amici* would have to work significantly harder to achieve their diversity interests in a post-*Grutter* world. For most of them, it would be impossible to reach their same levels without completely changing their academic or financial model, including by expanding class sizes or admitting candidates who are not well-suited to their offerings.³⁴

³² See Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California’s Proposition 209*, Berkeley Ctr. for Stud. in Higher Educ., Rsch. & Occasional Paper Series (2020).

³³ Bowen & Bok, *supra* note 29, at 51.

³⁴ Petitioner claims that statements from the University of California and the University of Michigan claiming their incoming classes are diverse show that absent *Grutter*, “real diversity

B. *Grutter* is Workable in Practice.

Petitioner devotes much of its brief to pillorying *Grutter* based on the evidentiary record it believes it established regarding two schools. The brief overflows with sweeping generalizations: “*Grutter* rests on a lie” (Pet’r Br. 58); “No one believes in *Grutter*” (*id.* at 60); “*Grutter*’s version of narrow tailoring does not meaningfully limit universities’ use of race” (*id.* at 61); “Universities, if they were given truth serum, would agree that this Court’s precedent is impossible to navigate” (*id.*).

Those broad pronouncements are not true. In the years since *Grutter* was handed down, *Amici* have structured their admissions programs around *Grutter*’s guidance, spent considerable capital seeking ways to improve their admissions programs to comply with it, and consistently explored the viability of other race-neutral alternatives, as *Grutter* requires. Whatever Petitioner thinks it has uncovered about Harvard’s and UNC’s admissions programs, Petitioner has not remotely shown that *Grutter* is unworkable across the board. To the contrary, *Amici* and other colleges have been applying *Grutter* successfully without the “significant negative consequences” required to overturn this Court’s precedents. *Cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part).

would not decline.” Pet’r Br. 70. But Petitioner ignores the differences between the options available at large, public school systems like those schools or the University of Texas. *See Fisher*, 579 U.S. at 370–76 (describing “Top Ten Percent Plan” whereby Texas students in the top ten percent of their class may choose to attend any public university in the state).

1. *Grutter Laid Out Clear Guidance for College Admissions Programs.*

The notion that *Grutter*'s standards are irredeemably vague or that "no one knows what they mean" are belied by the decision itself. *Grutter* carefully described a number of practices in which an admissions program may not engage. First and foremost, a race-conscious admissions program "cannot use a quota system." *Grutter*, 539 U.S. at 334. That means schools cannot create a system that insulates categories of applicants who have "certain desired qualifications" or who "belong to certain racial or ethnic groups" from competition with other applicants. *Id.* Nor may schools use "mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.* at 337. The program must not "unduly harm members of any racial group," *id.* at 341, and it must be limited temporally, *id.* at 342.

The Court also detailed the hallmarks of an admissions program that *would* pass strict scrutiny. To the extent race is considered, it must be done in a "flexible, nonmechanical way." *Id.* at 334. Thus, an admissions program may treat race or ethnicity "only as a plus in a particular applicant's file." *Id.* The "paramount" concern for any admissions program using race as a factor must be the "individualized consideration" of each applicant. *Id.* at 337. The program must be flexible enough to ensure that race is not the "defining feature" of any application. *Id.* The University of Michigan Law School, for example, gave "substantial weight" to diversity factors besides race. *Id.* at 338. In an admissions program that passes strict scrutiny, therefore, "diversity" must not be a mere proxy for race or ethnicity, but should take into

account other factors such as family hardship and extensive community service. *Id.*

According to *Grutter*, a program’s goal of achieving a “critical mass” or a methodology that involves paying “some attention to numbers” “does not transform a flexible admissions system into a quota.” *Id.* at 335–36. Nor does even an admissions program’s use of “daily reports,” which keep track of the racial and ethnic composition of the class. *Id.* at 336. If, however, an admissions program uses numbers or percentages in a more “rigid” manner, or if admissions officers give race more or less weight based on information contained in those daily reports, the Court suggested the program would not pass strict scrutiny. *Id.*

These are not nebulous requirements but rather clear directives that *Amici* and other admissions programs nationwide can, and do, understand and apply. Rather, it is Petitioner that misunderstands the rules. Petitioner claims that “*Grutter* sustains admissions programs that intentionally discriminate against historically oppressed minorities.” Pet’r Br. 62. But if such a program existed, it would plainly violate *Grutter*’s directive that a program must not “unduly harm members of any racial group.” 539 U.S. at 341. Even if Petitioner’s version of the facts here were accurate, to presume that *other* schools cannot comprehend or apply *Grutter*’s holding—or choose not to—is baseless.

While Petitioner bemoans the case-by-case approach that is the hallmark of strict scrutiny, *see* Pet’r Br. 60–61, “‘good faith’ on the part of a university is ‘presumed’ absent a showing to the contrary,” *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318–19

(opinion of Powell, J.)). There has been no such showing regarding *Amici* or thousands of institutions of higher learning; to the contrary, as discussed below, *Amici* have meticulously followed *Grutter*'s standards. To overrule *Grutter* based on the actions of a single school or two is akin to throwing the baby out with the bathwater.

2. *Amici's Admissions Programs Follow Grutter's Teachings.*

Consistent with their educational missions described above, *see* Point A *supra*, *Amici* seek to enroll the most capable and talented class of students that is ready to learn and likely to spread the benefits of education. Necessarily, their admissions decisions are nuanced, multi-factorial, and never purely quantitative. *Amici* do not, and never have, accepted applicants in descending order of their standardized-test scores until the class is full.³⁵ Instead, *Amici* consider qualified applicants holistically, looking for indicia of exceptional promise and motivation beyond quantitative results.

Amherst is a prime example. Its review does not involve the application of any formula or algorithmic approach. It attempts to frame each individual student's achievements within the context of his or her opportunities, as well as the student's unique perspectives within the context of the college's mission. The process starts with a committee-based evaluation

³⁵ Indeed, *Amici* have found that SAT and ACT scores are not reliably predictive of educational achievement throughout college. Many have reduced their reliance on standardized test scores in their admissions processes, while others have made them optional or eliminated their consideration altogether.

where several reviewers rate an individual's application. It culminates in a routing decision: either to deny the applicant or to refer the application to the full admissions committee. At that stage, the committee reviews the application and discusses the applicant's potential fit to Amherst and the college's institutional priorities. At no point in the process is race considered in a vacuum. Rather, it may be considered as a relevant context for the initial review, or as part of the full committee's consideration of Amherst's institutional priorities.³⁶ As instructed by *Grutter*, Amherst does not employ any "mechanical" bonus policy on account of a student's race.

The factors considered by Amherst College (listed in no particular order) are typical of such holistic review:

1. The strength of the candidate's academic program in relation to the opportunities available at the candidate's secondary school;
2. The candidate's academic record, taking into account the rigor of the grading system at the candidate's secondary school;

³⁶ Since 1983, Amherst Admission's Mission Statement has detailed that "above all," the college looks for "students of intellectual promise who have demonstrated qualities of mind and character that will enable them to take full advantage of [Amherst's] curriculum." The statement goes on to point out that the college "seek[s] qualified applicants from different racial, ethnic, and socioeconomic backgrounds—students whose several perspectives might contribute significantly to a process of mutual education with and beyond the curriculum." Mission Statement of the Amherst College Office of Admission, Amherst College, <https://www.amherst.edu/admission/mission-statement>.

3. The depth of academic talent at the candidate's secondary school;
4. Intellectuality, creativity, or an unusually well-developed commitment to a particular academic field, as evidenced in the candidate's essays, teacher recommendations, and guidance-counselor report;
5. The candidate's standardized-test scores, if submitted;³⁷
6. The extent and depth of the candidate's non-academic achievement and leadership;
7. Formalized and standardized assessments of the candidate's athletic or artistic ability made by coaches and arts faculty;
8. The candidate's socio-economic status;
9. Particular personal, family, and economic hurdles faced by the candidate and/or immediate or extended family, including (but not limited to) race and ethnic background;
10. Ongoing and prospective support from extended family, community-based organizations, opportunity programs, or religious organizations;
11. Prospects for success or lack thereof in the candidate's particular field of academic interest;

³⁷ Test scores are optional at Amherst, and are not considered at several other *Amici*.

12. Potential to support community building or cross-cultural understanding across diverse populations; and
13. Ability to contribute an underrepresented perspective to intellectual, academic, and social discourse.

None of *Amici* use an admissions program remotely similar to the type found unconstitutional in *Bakke* or *Gratz v. Bollinger*, 539 U.S. 244 (2003), or outlined as impermissible in *Grutter*. None employ a quota similar to that in *Bakke*. And contrary to Petitioner’s contentions, *Amici* do not use “winks, nods, and disguises,” Pet’r Br. 61, to camouflage outright racial quotas. They assign no numerical points or weights for race or enforce racial quotas. Nor do they require students to self-categorize by skin color or ethnic background. The same evaluative procedures are used for all applicants regardless of race or ethnic background. For example, file readers do not consult “dailies”—reports which provide a running snapshot of the racial or ethnic composition of the incoming class—to make individual admissions decisions. See *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting) (citing Brief for Amherst College et al. as *Amici Curiae* 10).

The holistic admissions process for each of *Amici* thus approximates factors lauded by Justice Powell in *Bakke* and Justice Kennedy (in dissent) in *Grutter*: facially nondiscriminatory, without quotas, considering race without insulating any applicant “from comparison with all other candidates for the available seats.” *Grutter*, 539 U.S. at 334–35. Race necessarily plays a role because consideration of every kind of diversity

(socio-economic, artistic, musical, athletic, family connection, foreign residence) does as well, but one applicant's race is never "decisive when compared" with another. *Bakke*, 438 U.S. at 317 (opinion of Powell, J.). As Justice Kennedy stated, *Amici*'s "compelling interest in a diverse student body" is "achieved by a system where individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

Contrary to Petitioner's overbroad assertions, colleges like *Amici* would *not* agree that this Court's precedent is "impossible to navigate," even if "given truth serum."³⁸ Pet'r Br. 61. Their experience shows the opposite. For decades, *Amici* have developed and implemented policies that carefully follow the clear guideposts that the Court articulated in *Grutter* for admissions policies nationwide. And while no single metric can reflect the critical educational benefits of diversity that *Amici* have achieved by following those guideposts, their experience over the years shows that their efforts have in fact provided significant benefits. *See supra*, at Point A.1.

C. *Amici* Have Heavy Reliance Interests in Enrolling Diverse Classes.

Contrary to Petitioner's arguments that *Bakke* and *Grutter* have fostered no reliance interests (Pet'r Br. 65), *Amici* have spent a generation adapting their op-

³⁸ Petitioner's suggestion that institutions of higher learning are less than truthful in their admissions practices is unsupported by the record and ignores this Court's general presumption that institutions like *Amici* operate in good faith. *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318–19 (opinion of Powell, J.)).

erations and offerings to a model that allows race-conscious admissions and to the expectation that they will be able to enroll a critical mass of minority students. To change those expectations now would have a significant, detrimental effect on *Amici*.

For starters, *Amici* have made substantial investments in the development and administration of an admissions programs tailored to the requirements of *Grutter* and *Bakke*. They have devoted resources to specialized recruitment efforts and to building relationships with secondary public and private schools, high-school counselors, and community-based organizations. See, e.g., *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 785 (1992) (acknowledging reliance interests of corporations that structured their activities and made corporate expenditures based on prior precedent). Likewise, they have invested in services to make sure minority students—whatever their race—will thrive there. Students, in turn, look to see whether those services are available during the recruitment stage. The inability of institutions to consider race in admissions will make it more difficult for them to attract competitive applicants, thereby harming recruiting. *Amici* have also promoted their institutions as places for students to grow and learn from the diversity they offer, in part based on the diversity they have been able to obtain through the types of holistic admissions processes permitted by *Grutter*. To remove consideration of racial diversity from the equation will harm *Amici*'s recruitment efforts because they will no longer be able to offer it to prospective students.

Perhaps most important, *Amici* have developed curricula focused on that mission, have endowed professorships and scholarships in those areas, and have made the humanities a centerpiece of their students' college experiences.³⁹ As noted by Respondent Harvard, use of Petitioner's preferred race-neutral alternative would lead to a dramatic drop in humanities students there. Harvard Br. 40–41. It could have an even larger effect at smaller schools like *Amici*, where those types of investments cannot be recouped as easily nor can priorities shift as quickly.

CONCLUSION

In the twenty years since *Grutter* was decided, colleges like *Amici* have applied it in good faith and successfully. The consideration of race in admissions as part of a holistic, individualized assessment produces multiple tangible benefits, which would otherwise be unattainable for *Amici*. Because the Fourteenth Amendment and Title VI do not forbid *Amici* from considering race or ethnic background among other factors, so long as they are considered in the correct fashion, *Grutter* should be upheld and the judgments below affirmed.

³⁹ Amherst, for example, has developed a significant Black Studies program that includes three endowed professorships and awards an annual monetary gift via the Charles Hamilton Houston prize to a senior personifying a commitment to realizing humane ideals. Decreasing the number of students interested in the humanities devalues programs and awards like those at Amherst. Other schools have made similar investments.

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APPENDIX A

The list of *Amici* is as follows:

Amherst College	Pomona College
Barnard College	Reed College
Bates College	Sarah Lawrence College
Bowdoin College	Smith College
Bryn Mawr College	St. Olaf College
Bucknell University	Swarthmore College
Carleton College	Trinity College
Clark University	Tufts University
Colby College	Union College
Connecticut College	Vassar College
Davidson College	Washington & Lee University
Franklin & Marshall College	Wellesley College
Hamilton College	Wesleyan University
Hampshire College	Williams College
Haverford College	
Macalester College	
Middlebury College	
Mount Holyoke College	
Oberlin College & Conservatory	