No. _____

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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November 11, 2021 *Attorneys for Petitioner*

QUESTIONS PRESENTED

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

2. Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

PARTIES TO THE PROCEEDING

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

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

Respondents also are Cecilia Polance; Luis Acosta; Star Wingate-Bey; Laura Ornelas; Kevin Mills, on behalf of Q.M.; Angie Mills, on behalf of Q.M.; Christopher Jackson; Julia Nieves, on behalf of I.M.; Tamika Williams, on behalf of A.J.; Romonia Jones; and Andrew Brennan. These parties were defendant-intervenors below.

RULE 29.6 STATEMENT

SFFA has no parent company or publicly held company with a 10% or greater ownership interest in it.

RELATED PROCEEDINGS

United States District Court (M.D.N.C.):

Students for Fair Admissions, Inc. v. University of North Carolina, et al., No. 14-cv-954-LCB (Jan. 13, 2017) (order granting motion to intervene)

Students for Fair Admissions, Inc. v. University of North Carolina, et al., No. 14-cv-954-LCB (Sept. 29, 2018) (order denying motion to dismiss)

Students for Fair Admissions, Inc. v. University of North Carolina, et al., No. 14-cv-954-LCB (Sept. 30, 2019) (order denying motions for summary judgment)

Students for Fair Admissions, Inc. v. University of North Carolina, et al., No. 14-cv-954-LCB (May 28, 2020) (order granting partial judgment on the pleadings)

Students for Fair Admissions, Inc. v. University of North Carolina, et al., No. 14-cv-954-LCB (Oct. 18, 2021) (trial findings of fact and conclusions of law)

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JURISDICTION

The district court's final judgment was entered on November 4, 2021. App.252. This petition is filed under Supreme Court Rule 11. The Court has jurisdiction under 28 U.S.C. §1254(1) and §2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1, clause 2 of the Fourteenth Amendment to the United States Constitution states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

INTRODUCTION

This case is a companion to *Students for Fair Admissions, Inc. v. President and Fellows of Harvard University*, No. 20-1199. Both cases were filed on the same day. The *Harvard* case challenges racial preferences at the nation's oldest private college, and this case challenges racial preferences at the nation's oldest public college. The *Harvard* case asks this Court to overrule *Grutter* and hold that Title VI forbids funding recipients from using race in admissions. This case asks the Court to recognize that, for public schools, the Fourteenth Amendment's guarantee of racial neutrality compels the same conclusion. Certiorari before judgment is appropriate here for the same reasons it was in *Gratz v. Bollinger*, the companion case to *Grutter* that was argued and decided on the same day.

"It is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). "'[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment). "'[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.'" *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 316 (2013) (Thomas, J., concurring).

"Our nation gave its word over and over again: it promised in every document of more than two

centuries of history that all persons shall be treated Equally." *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1390 (Cal. 1980) (Mosk, J., dissenting). "Our constitution," as Justice Harlan recognized, "is color-blind and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissent). The Court vindicated the promise of equality in *Brown v. Board of Education*, 347 U.S. 483 (1954), rejecting "'any authority … to use race as a factor in affording educational opportunities.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007).

Yet *Grutter v. Bollinger*, 539 U.S. 306 (2003), abandoned the principle of racial neutrality that *Brown* vindicated. *Grutter* did so by improperly affording broad deference to university administrators to pursue a diversity interest that is far from compelling. To this end, *Grutter* endorsed racial objectives that are amorphous and unmeasurable and thus incapable of narrow tailoring. Unsurprisingly then, universities have used *Grutter* as a license to engage in outright racial balancing. This case shows that judicial scrutiny under *Grutter* is anything but strict. A decision that was written to create no reliance interests, *Grutter* satisfies every factor that this Court considers when deciding to overrule precedent.

If this Court revisits *Grutter*, it should also review whether universities like UNC are even complying with existing precedent. They are not. Like Harvard, UNC rejects any race-neutral alternative that would *change* the composition of its student body, even if those alternatives would improve overall student-

body diversity. But public schools have no legitimate interest in maintaining a precise racial balance, and they have no compelling interest in preventing minor dips in average SAT scores. The same Fourteenth Amendment that required public schools to dismantle segregation after *Brown* cannot be cowed by the diktats of university administrators. If California and Michigan can maintain elite public universities without sorting applicants by race, then North Carolina can, too. This Court should grant certiorari and reverse the district court.

STATEMENT OF THE CASE

SFFA filed this case against UNC the same day that it filed its companion case against Harvard. Like Harvard, UNC is devoted to using race indefinitely and at every stage of its admissions process. The district court—after seven years of litigation and an eight-day trial—upheld UNC's system under a version of strict scrutiny that was anything but.

A. UNC's Use of Race in Its Admissions Process

As Harvard is the nation's oldest private college, UNC is the nation's oldest public college. App.3. UNC's admissions process is highly competitive. App.23. It receives more than 43,000 applications each year for a class of about 4,200 students. App.23. State law requires that no more than 18% of each class can be from out of state (or UNC suffers major financial penalties); but about twice as many out-of-staters apply each year as in-staters. App.23 & n.8. Out-of-

state applicants thus are admitted at a far lower rate (12-14%) than in-state applicants (47-50%). App.23.

UNC uses a student's race as a factor in its admissions process. UNC awards racial preferences to African Americans, Hispanics, and Native Americans; UNC identifies these students as "underrepresented minorities." App.15, n.7, 37. Asian Americans and whites don't receive a racial preference; UNC doesn't consider these groups "underrepresented" because their percentage enrollment at UNC is higher "'than their percentage within the general population in North Carolina.'" App.15, n.7, 37; *see* App.21 (Asian Americans are not "underrepresented" because they are 3% of the North Carolina population but 12% of the UNC student body). Although college admissions are zero-sum, *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 136 S.Ct. 2198, 2227 n.4 (2016) (Alito, J. dissenting), UNC insists that being Asian American or white is never a "negative[]" in its process, D.C.Dkt.244 at 549:12-14.

UNC considers an applicant's race at "'every stage'" of the review process. App.51. In reviewing applications, admissions officers focus intently (and sometimes crudely) on an applicant's race, as revealed by online chats among admissions officers.

- "I just opened a brown girl who's an 810 [SAT]."
- "If its brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."
- "Still yes, give these brown babies a shot at these merit $$."

- "I am reading an Am. Ind."
- "[W]ith these [URM] kids, I'm trying to at least give them the chance to compete even if the [extracurriculars] and essays are just average."
- "I don't think I can admit or defer this brown girl."
- "perfect 2400 SAT All 5 on AP one B in 11th"
  "Brown?!"
  "Heck no. Asian."
  "Of course. Still impressive."
- "I just read a blk girl who is an MC and Park nominee."

Pl's Ex. 84 (D.C.Dkt.163-16); *see also* Pl's Ex. 74 (D.C.Dkt.166-6) ("Stellar academics for a Native Amer/African Amer kid."); Pl's Ex. 75 (D.C.Dkt.163-27) ("I'm going through this trouble because this is a bi-racial (black/white) male."). In the ultimate decision, a student's race is often the "determinative" factor in whether the student is admitted or denied. App.112-13.

When awarding racial preferences, UNC's goal isn't to achieve a "critical mass." UNC does not "discuss the concept of 'critical mass' in its Admissions Office, has not determined if it has achieved a critical mass of underrepresented students, and has not defined the term." App.54-55; *see* D.C.Dkt.167 at 144:22-145:5 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is."). UNC instead uses race to achieve the "educational benefits of diversity." App.56-58. UNC has

never "set forth a proposed time period in which it believes it can end all race-conscious admissions practices." App.62.

Before SFFA filed this lawsuit, UNC authored an amicus brief in *Fisher I*. *See* UNC-Amicus-Br., *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (S. Ct. Aug. 9, 2012). There, UNC told the Court that its use of race as a factor in admissions was "indispensable in fulfilling its mission." *Id.* at 4-5. UNC also noted that it had rejected a race-neutral alternative that would *increase* the percentage of underrepresented minorities admitted to UNC (from 15% to 16%) because average SAT scores could decline by 56 points (from 1317 to 1262) and first-year GPAs could drop by 0.1 points (from 3.26 to 3.16). *Id*. at 33-34.

B. Proceedings Below

On November 17, 2014—the same day that SFFA sued Harvard—SFFA sued UNC in the Middle District of North Carolina for violating the Fourteenth Amendment and Title VI. A 501(c)(3) voluntary membership organization, SFFA is dedicated to defending the right to equality in college admissions. App.3. SFFA sued on behalf of its members, including students who were denied admission to UNC and who stand ready and able to apply to transfer if UNC stops racially discriminating. App.234-35, 243-44.

In Count III of its complaint, SFFA alleged that UNC's admissions process is illegal because it "uses race as a factor in admissions." App.188. Although there was "'no dispute that [UNC] considers race as a factor within its admissions process,'" SFFA's claim

was foreclosed by Supreme Court precedent. App.189. In May 2020, the district court granted UNC partial judgment on the pleadings on Count III. App.187-90.

In November 2020, the district court held an eight-day bench trial on SFFA's remaining claims, which challenged whether UNC was complying with existing precedent. The court heard testimony from UNC employees, UNC students, and experts from both parties. App.7. SFFA's expert, a highly respected economist from Duke University, presented evidence showing that UNC awards substantial preferences for African Americans and Hispanics. App.63-64; *see* D.C.Dkt.228 at 114:14-224:20; D.C.Dkt.229 at 229:22-298:1; D.C.Dkt.247-1 at 12, 15, 33-34, 37-40, 43, 46-48. SFFA's other expert, a leading authority on race-neutral alternatives, presented evidence that UNC had a number of workable race-neutral alternatives available, including alternatives that would provide socioeconomic preferences instead of racial ones. App.120 & n.39; D.C.Dkt.244 at 424:1-460:11; D.C. Dkt.247-2 at 13-23.

On October 18, 2021, nearly seven years after SFFA's complaint was filed, the district court ruled for UNC, holding that UNC's use of race satisfies strict scrutiny and was consistent with this Court's precedents. First, the court held that UNC's use of race was narrowly tailored because the university uses race "flexibly as a 'plus' factor" and only as "one among many factors." App.165-75. The court found that the non-statistical evidence, including the admissions officers' chatroom discussions, *supra* 5-6, was consistent with "the type of holistic process UNC describes" and

didn't show that race is "a defining feature of [any] application." App.40-41, 169. Examining the statistical evidence, the court found that both parties' experts were "highly qualified," App.63-65, but that UNC's expert's analysis was "more probative on the issue of whether race is a dominant factor," App.171-75. The court concluded that UNC's use of race was constitutional because it is the decisive factor in only 5.1% of out-of-state decisions and 1.2% of in-state decisions. App.112-13.

Second, the court held that UNC had no viable race-neutral alternatives that would allow it to "achieve the educational benefits of diversity about as well as its current race-conscious policies and practices." App.176-83. Giving admissions preferences based on socioeconomic status instead of race, the court believed, would always fail because "the majority of low-income students are white," and so universities would just "'be choosing more white students.'" App.136-37. In addition, the court rejected as unworkable race-neutral alternatives that would cause small changes in the admitted class. App.134-35, 139-40. For example, the court found that one race-neutral alternative was unworkable because underrepresented minority admissions would decline from 16.5% to 16.0%, average SAT scores would be in the 90th percentile instead of the 92nd percentile, and UNC would have to admit some students based solely on academic criteria. App.134 n.43; Dkt.247-2 at 23.

In the end, the district court emphasized, UNC's use of race should continue indefinitely. Because race is "interwoven in every aspect of the lived experience

of minority students," race could never be "ignore[d]" or "reduce[d] [in] importance." App.185. Until the nation ended its "struggle with racial inequality," minority students would continue to be "less likely to be admitted in meaningful numbers on [race-neutral] criteria." App.186. Thus, despite UNC's long use of racial preferences, the university was "far from creating [a] diverse environment" and still had "much work to do." App.184-86.

The district court entered its final judgment on November 4, 2021. App.252. SFFA immediately appealed to the U.S. Court of Appeals for the Fourth Circuit. *See Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-2263 (4th. Cir.).

REASONS FOR GRANTING THE PETITION

This Court should grant immediate review because this case presents a question of "imperative public importance" that is already before the Court in *SFFA v. Harvard*. S.Ct. R. 11. This Court regularly grants certiorari before judgment "in situations where similar or identical issues of importance [are] already pending before the Court and where it [is] considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." *Supreme Court Practice* §2.4 (11th ed. 2019) (listing cases).

This case and *Harvard* should be heard together. The first question presented in both cases is the same: whether this Court should overrule *Grutter* and hold that institutions of higher education cannot use race as a factor in admissions. This Court can resolve that

momentous question in either case. But if it decides to revisit *Grutter*, its analysis would be more complete if it considered both a private university (Harvard) and a public university (UNC) and both the Constitution (UNC) and Title VI (Harvard and UNC).

This Court acted similarly in *Grutter* itself. After the en banc Sixth Circuit ruled for Michigan Law School, Barbara Grutter asked this Court to review "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race" in admissions. *Grutter*, 539 U.S. at 322. This Court granted certiorari. *Id.* Meanwhile, a district court had upheld Michigan's process for using race in *undergraduate* admissions. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 831 (E.D. Mich. 2000). Jennifer Gratz thus petitioned for certiorari before judgment so this Court "could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003). This Court agreed, allowing it to consider the constitutionality of race-based admissions in two key contexts. The Court should do the same here.

Grutter's core holding—that universities can use race in admissions to pursue student-body diversity—is plainly wrong. It satisfies all the criteria that this Court considers when overruling precedents. Only this Court can overrule its own precedent, and whether to overrule *Grutter* is "an important question of federal law that has not been, but should be, settled by this Court." S.Ct. R. 10(c). That question was not raised in the *Fisher* litigation—the only other time this Court evaluated a university's race-based

admissions under *Grutter*. *Fisher I*, 570 U.S. at 311, 313. This case, especially when paired with *Harvard*, presents an ideal opportunity to reexamine *Grutter*.

If the Court grants certiorari to reconsider *Grutter*, then it should also grant certiorari on the second question presented here: whether UNC fails strict scrutiny because it refuses to use workable race-neutral alternatives. Again, this Court did something similar in *Grutter* and *Gratz*. After concluding that universities could use race in admissions to pursue student-body diversity, this Court went on to consider whether the two admissions programs there satisfied strict scrutiny—affirming the Sixth Circuit in *Grutter* and reversing the district court in *Gratz*.

As in *Gratz*, *Fisher I*, and *Harvard*, the court below "did not hold the University to the demanding burden of strict scrutiny." *Fisher I*, 570 U.S. at 303. The district court was presented with multiple workable race-neutral alternatives, including ones that would improve overall diversity at UNC. The district court rejected them, however, because they would change the racial or socioeconomic composition of UNC's student body or lead to slightly lower average SAT scores. But UNC could not show that these changes would prevent it from achieving the educational benefits of overall student-body diversity—an interest distinct from racial diversity and the only compelling interest that this Court has recognized. And the fact that the government finds a race-neutral alternative painful or unpleasant has never been a reason to let it keep classifying its citizens by race.

I. The Court should grant certiorari to consider overruling *Grutter*.

Overruling precedent is always serious, "[b]ut *stare decisis* is not an inexorable command." *Franchise Tax Bd. of Calif. v. Hyatt*, 139 S.Ct. 1485, 1499 (2019) (cleaned up). This Court considers overruling a precedent virtually every Term, many of this Court's "most notable and consequential decisions" overruled precedent, and almost "every current Member of this Court" voted to overrule "multiple constitutional precedents" in "just the last few Terms." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (collecting cases). That's because stare decisis "'is at its weakest when [this Court] interpret[s] the Constitution,'" as it did in *Grutter*. *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2177 (2019).

When deciding whether to overrule a precedent, this Court considers "a number of factors." *Hyatt*, 139 S.Ct. at 1499. Those factors can be organized into "three broad considerations":

1. Is the prior decision "not just wrong, but grievously or egregiously wrong"?
2. Has the prior decision "caused significant negative jurisprudential or real-world consequences"?
3. Would overruling the prior decision "unduly upset reliance interests"?

Ramos, 140 S.Ct. at 1414-15 (Kavanaugh, J., concurring in part). These considerations all point in the same direction here: *Grutter* should be overruled.

A. *Grutter* is grievously wrong.

Grutter was wrong the day it was decided. Despite reaffirming that "all" racial classifications must satisfy strict scrutiny, *Grutter* held that "student body diversity" can "justify the use of race in university admissions." 539 U.S. at 325-26. That holding departs from the Constitution's original meaning, contradicts other precedents, has eroded over time, and has no true defenders.

Grutter has no support in the Fourteenth Amendment's "historical meaning." *Ramos*, 140 S.Ct. at 1405. As written, the Fourteenth Amendment contains no exceptions. The Amendment, according to its framers, enshrines the principle that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). That principle was not new: the self-evident truth that "all men are created equal" was a cornerstone of the American founding. Decl. of Independence, 1 Stat. 1 (July 4, 1776). While the country long violated that principle in practice, *e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy*, 163 U.S. 537, those violations did not alter or diminish the principle itself. As Justice Harlan immediately recognized in *Plessy*, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. at 559 (dissent). His dissent was ultimately vindicated in *Brown*, where this Court denied "'any authority … to use race as a factor in affording educational opportunities.'" *Parents Involved*, 551 U.S. at 747. Because *Brown* is right, *Grutter* is wrong.

Grutter also "conflicted with" this Court's broader equal-protection jurisprudence. *Knick*, 139 S.Ct. at 2178. Despite the absolutism of the constitutional text, this Court has held that racial classifications are legal if they satisfy strict scrutiny. But this Court often rejects interests as not compelling enough to justify racial classifications. Protecting a child's best interests isn't enough. *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984). Neither is remedying societal discrimination. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996). Creating a racially diverse faculty to provide "role models" for minority students isn't compelling either. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (plurality). Why these interests are not compelling—but "'cross-racial understanding'" and "livelier" "classroom discussion" are, *Grutter*, 539 U.S. at 330—is impossible to explain. *Grutter* should have rejected these all-too-familiar justifications for sorting students by race. *See Fisher I*, 570 U.S. at 320-30 (Thomas, J., concurring).

Grutter's diversity rationale is not only uncompelling; it flouts basic equal-protection principles. Although *Grutter* praised the "educational benefits" of student body diversity writ large, its assumption that a university can predict, based solely on race, an applicant's "views" or "experience[s]" is little more than racial stereotyping. 539 U.S. at 333; *see Hop-wood v. Texas*, 78 F.3d 932, 946 (5th Cir. 1996). The Fourteenth Amendment normally forbids "the assumption that race or ethnicity determines how [individuals] act or think." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting); *see Bush v. Vera*, 517 U.S. 952, 985-86 (1996). If a university wants to admit

students with certain experiences (say, overcoming discrimination), then it can evaluate whether individual applicants have that experience. It cannot simply use "race as a proxy" for certain experiences or views. *Miller v. Johnson*, 515 U.S. 900, 914 (1995). Especially not today, "in a society in which [racial] lines are becoming more blurred." *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (plurality).

The educational benefits that *Grutter* identified are similarly suspect. *Grutter* insisted that race-based admissions would "break down racial stereotypes" and "'prepare[] students for an increasingly diverse workforce and society.'" 539 U.S. at 330. *Grutter* thus treats underrepresented minorities not as the beneficiaries of racial preferences, but as *instruments* to provide educational benefits for other, mostly white students. Blumstein, *Grutter and Fisher: A Reassessment and a Preview*, 65 Vand. L. Rev. En Banc 57, 65-66 (2012). "This is affirmative action gone wild." *Fisher II*, 136 S.Ct. at 2232 (Alito, J., dissenting).

Even accepting *Grutter*'s perverse logic, the Court required no proof that "a 'critical mass' of underrepresented minorities [wa]s necessary" to secure any educational benefits. 539 U.S. at 333; *see* 288 F.3d 732, 804-05 (6th Cir. 2002) (en banc) (Boggs, J., dissenting). The Court simply deferred to the law school's "experience and expertise." 539 U.S. at 333. But that logic "exhumes *Plessy*'s deferential approach to racial classifications." *Metro Broad.*, 497 U.S. at 632 (Kennedy, J., dissenting). The schools defending segregation, after all, also wanted courts to defer to their experience and expertise. *Fisher I*, 570 U.S. at 320-30 (Thomas,

J., concurring). But the *Brown* Court rightly refused because, contrary to *Grutter*, the law presumes that racial classifications "exacerbate rather than reduce racial prejudice." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 229 (1995).

Grutter's narrow-tailoring reasoning cannot "'withstand careful analysis'" either. *Janus v. AFSCME*, 138 S.Ct. 2448, 2481 n.25 (2018). Narrow tailoring normally demands proof that racial classifications are "necessary" to achieve the compelling interest—that race was a "'last resort.'" *Parents Involved*, 551 U.S. at 734-35. But *Grutter* demands much less. Race need only have a "minor" impact on diversity. *Fisher II*, 136 S.Ct. at 2212. Universities can reject race-neutral alternatives that, quite circularly, "may well compromise [their] own definition of … diversity." *Id.* at 2214. Universities can also reject alternatives that would compromise their "reputation for academic excellence." *Id.* at 2213. And universities can reject "facially neutral" alternatives, like percentage plans, that would knowingly "boost minority enrollment." *Id.*

This last holding is particularly indefensible. Facially neutral policies are, at the very least, *more narrowly tailored* than "individual racial classifications." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment). They "are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race." *Id.* Strict scrutiny requires universities to try them "before turning to racial classifications." *Fisher I*, 570 U.S. at 312.

Grutter's "foundations" have also "sustained serious erosion." *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). Legally speaking, *Grutter* has no foundations, "[g]iven how unmoored it was from the start." *Ramos*, 140 S.Ct. at 1405. But to the extent "later developments could have done more to undermine" *Grutter*, "they have." *Id.*

Every time the lower courts have extended *Grutter*, this Court has reversed. *Grutter* cannot be applied to K-12 students. *Parents Involved*, 551 U.S. at 722-25. *Grutter* creates no right to race-based admissions. *Schuette*, 572 U.S. at 300-14. And this Court "clarified" that *Grutter* does not weaken the narrow-tailoring standard that applies to other racial classifications. *Fisher II*, 136 S.Ct. at 2209; *see Fisher I*, 570 U.S. at 312-14. Even in the one case that upheld an admissions policy under *Grutter*, this Court stressed that its decision was "*sui generis*" and had "limit[ed] value for prospective guidance." *Fisher II*, 136 S.Ct. at 2208-09.

UNC thinks this Court "*twice* reaffirmed the holding of *Grutter*" in *Fisher I* and *Fisher II*. Dkt.153 at 25. But Ms. Fisher did not "ask[]" the Court "to overrule [*Grutter*]," so this Court did not "consider how much weight to give *stare decisis* in assessing [*Grutter*'s] continued validity." *Citizens United v. FEC*, 558 U.S. 310, 376-77 (2010) (Roberts, C.J., concurring). "The Court's unwillingness to overturn [*Grutter*]" in *Fisher I* or *Fisher II* thus "cannot be understood as a *reaffirmation* of that decision." *Id.* at 377.

In terms of factual foundations, the *Harvard* litigation revealed that *Grutter* rests on a lie. *Grutter* used Harvard as its model for how to use race. 539 U.S. at 335-39. But while Harvard insinuated that it uses race as one small factor to break ties between qualified candidates, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 323-24 (1978) (op. of Powell, J.), it actually obsesses over race throughout its process and awards massive preferences to certain groups. *See* Pet'n for Cert. 8-12, *SFFA v. Harvard*, No. 20-1199 (S. Ct. Feb. 25, 2021) (*Harvard* Pet'n). Harvard also neglected to mention that its policies were designed to screen out disfavored minorities—first Jews, now Asian Americans. *See id.* at 4-19.

For its part, UNC has never tied its admissions program to this Court's precedent. UNC does not use race to enroll "a 'critical mass' of underrepresented minorities." *Grutter*, 539 U.S. at 333. Though critical mass is the only concept this Court has ever approved, UNC does not pursue that goal, use that metric, or even understand what "critical mass" means. UNC also disagrees that race-based admissions are "'a temporary matter'" that should "terminate … as soon as practicable." *Id.* at 342-43. Since *Grutter*, UNC has not decreased its use of race, and its racial preferences have no end in sight.

UNC's disregard for *Grutter* is not unusual; essentially no defenders of race-based admissions "support the line that it has taken this Court over 40 years to draw." *Janus*, 138 S.Ct. at 2481-82. Several Justices have maintained, contrary to *Grutter*, that policies meant to "benefit" racial minorities should not receive

strict scrutiny in the first place. *E.g.*, *Fisher I*, 570 U.S. at 336-37 (Ginsburg, J., dissenting); *Schuette*, 572 U.S. at 373-74 (Sotomayor, J., dissenting); *Parents Involved*, 551 U.S. at 829-37 (Breyer, J., dissenting). Elite universities agree. Shortly after *Grutter* was decided, the defendant in that case confessed that he had pressed "the 'diversity' rationale" as a litigation strategy. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 Colum. L. Rev. 1589, 1590-91 (2003). He bemoaned that he could not defend racial preferences as "a 'remedy' for past societal discrimination"—what everyone in higher education "really believed." *Id.*; *accord* Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34-36 (2002); Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 471-72 (1997).

That no one believes in *Grutter* suggests that *Grutter* is not worth believing in. *Grutter*'s "defenders" are no doubt entitled to "base it on [other] concerns … rather than the reasoning of the opinion itself." *Knick*, 139 S.Ct. at 2178. But they are not entitled to do so while also claiming the mantle of stare decisis. *Citizens United*, 558 U.S. at 384-85 (Roberts, C.J., concurring).

B. *Grutter* has spawned significant negative consequences.

Grutter has also proven "unworkable in practice." *Knick*, 139 S.Ct. at 2178. While the Fourteenth Amendment contains no exceptions to the rule of "racial neutrality," this Court has applied a "case-by-case" approach that reviews each racial classification under "strict scrutiny." *Croson*, 488 U.S. at 518-19

(Kennedy, J., concurring in part and concurring in the judgment). But "the assumption" underlying this approach is that, in practice, "the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality." *Id.* at 519. Strict scrutiny is supposed to approximate an outright ban "because [the standard] forbids the use even of narrowly drawn racial classifications except as a last resort." *Id.*

As it turns out, narrow tailoring does not meaningfully limit universities' use of race. This Court's precedents encourage universities to "resort to camouflage"—to use "winks, nods, and disguises" instead of explicit racial quotas. *Gratz*, 539 U.S. at 304-05 (Ginsburg, J., dissenting). Obscurity, after all, is the only way a university could navigate *Grutter*'s Delphic instructions. How else could a school seek a "critical mass" of racial minorities without seeking "'some specified percentage'"? 539 U.S. at 329-30. Or make race "'outcome determinative'" for minorities without making it the "defining feature" of their application? *Id.* at 337-39.

The only way to test whether universities' obscure policies satisfy *Grutter*'s vague boundaries is through "prolong[ed]" litigation, *id.* at 348 (Scalia, J., concurring in part and dissenting in part)—an increasingly unrealistic option. This case alone has required nearly seven years of expensive, cumbersome litigation. A few individual applicants (like Allan Bakke, Jennifer Gratz, Barbara Grutter, and Abigail Fisher) have brought these cases in the past. But individuals' claims for prospective relief expire once they

graduate, and their claims for damages greatly "narrow" the scope of judicial review. *Fisher II*, 136 S.Ct. at 2210. And nowadays, an individual plaintiff would risk the unspeakable cruelty that Ms. Fisher faced when she sued the University of Texas. *See* Dkt.150-4, *SFFA v. Harvard*, No. 14-cv-14176 (D. Mass. Apr. 29, 2016) (documenting the threats, insults, and harassment). These costs make narrow tailoring an illusory check on universities' use of race.

In addition to these "jurisprudential consequences," *Grutter* has had significant "real-world consequences." *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring in part). Most acutely, *Grutter* sustains admissions programs that intentionally discriminate against historically oppressed minorities. Jewish students were the first victims of holistic admissions, and Asian Americans are the main victims today. Asians have faced enormous racial discrimination in this country, from the Chinese Exclusion Act, to the internment of Japanese Americans, to modern scapegoating over COVID-19. Weybright, *Study Finds Increasing Discrimination Against Asians and Asian Americans*, WSU Insider (Nov. 4, 2020), bit.ly/39rc9YI. Every day, Asian Americans are stereotyped as shy, passive, perpetual foreigners, and model minorities who are interested only in math and science. *Harvard* Pet'n 30-31.

By considering race alongside subjective criteria, universities invite admissions officers to rely on anti-Asian stereotypes. These subjective criteria also conceal unspoken ceilings on Asian-American admissions. The disparities that Asian Americans face

compared to their white peers are so stark that, when SFFA showed the data to a high-school counselor in *Harvard*, she started crying in her deposition. *See* Dkt.414-3 at 150-55, *Harvard*, No. 14-cv-14176 (D. Mass. June 15, 2018) (explaining that she was crying "[b]ecause these numbers make it seem like there's discrimination, and I love these kids and I know how hard they work").

This discrimination is not news to Asian-American high-schoolers: An entire industry exists to help them appear "less Asian" on their college applications; and the unlevel playing field contributes to their unusually high levels of anxiety, depression, and suicide. *Harvard* Pet'n 31. These ongoing "effects," combined with the "racist origins" of holistic admissions, "strongly support overruling" *Grutter*. *Ramos*, 140 S.Ct. at 1417 (Kavanaugh, J., concurring in part); *see Harvard* Pet'n 4-5.

More broadly, *Grutter* tells universities that it's okay to treat students differently based on race—a legal imprimatur with well-known repercussions. Racial preferences, this Court has explained, are poisonous. They "stimulate our society's latent race consciousness," "delay the time when race will become … truly irrelevant," and "perpetuat[e] the very racial divisions the polity seeks to transcend." *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *Adarand*, 515 U.S. at 227-29; *Schuette*, 572 U.S. at 308 (plurality).

These repercussions are precisely what has reverberated in *Grutter*'s wake. Far from pursuing "'integration of [their] classrooms and residence halls,'"

Grutter Resp'ts' Br. 5, universities are now openly embracing segregation—encouraging race-specific graduations, housing, orientations, networking, and more. Pierre, *Demands for Segregated Housing at Williams College Are Not News*, NAS (May 8, 2019), bit.ly/2KasdoS. And their obsession with race has impeded their progress toward *Grutter*'s true aim: obtaining a diversity of *viewpoints*. 539 U.S. at 330; *see* Haidt, *Viewpoint Diversity in the Academy*, bit.ly/2LOGnfM; Stiksma, *Understanding the Campus Expression Climate: Fall 2019*, bit.ly/2XJN45v. One of the biggest obstacles to achieving *Grutter*'s aims, it seems, is *Grutter* itself.

C. *Grutter* has generated no legitimate reliance interests.

Grutter cannot be sustained in the name of reliance interests. This Court puts little stock in reliance interests when it overrules precedents, like *Grutter*, that authorize racial classifications. *E.g.*, *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (overruling *Grovey v. Townsend*); *Batson v. Kentucky*, 476 U.S. 79, 95-96 (1986) (overruling *Swain v. Alabama*); *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (overruling *Korematsu*). Reliance interests did not deter the Court from dismantling segregation, even though it recognized *Brown*'s "wide applicability" and the "considerable complexity" of enforcement. 347 U.S. at 495.

That's because no one has a legitimate interest in treating people differently based on their skin color—and certainly not an interest that could "outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Ramos*, 140 S.Ct. at

1408. When a decision of this Court "undermines the fundamental principle of equal protection as a personal right," it is "the principle," not the decision, that "must prevail." *Adarand*, 515 U.S. at 235 (opinion of O'Connor, J.).

Because *Grutter* departs so far from our basic ideals, the decision has not "'become part of our national culture.'" *Ramos*, 140 S.Ct. at 1406. *Grutter* "is only two decades old"—a lack of "antiquity" that "cut[s] in favor of abandoning [it]." *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009). And most Americans believe that colleges and universities should not consider race at all when making admissions decisions (73%), including strong majorities of African-Americans (62%) and Hispanics (65%). Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, Pew (Feb. 25, 2019), pewrsr.ch/2Xq43K0. Several States have expressly banned their universities from considering race—including the State that prevailed in *Grutter*. *Schuette*, 572 U.S. at 298-99. California, too, has long prohibited racial preferences. In 2020, despite an expensive and visible campaign to reinstate racial preferences, Californians voted by double digits to retain their ban. Ting, *'They Lost Partly Because of That Ad': How No on Prop. 16 Organizers Knew the Measure Would Fail*, SF Gate (Dec. 2, 2020), bit.ly/2XBrmAZ.

Among this Court's precedents, *Grutter* has a uniquely weak claim to reliance interests because "the opinion contains its own self-destruct mechanism." 539 U.S. at 394 (Kennedy, J., dissenting). *Grutter* concludes with a warning that the Court expects "racial

preferences will no longer be necessary" in "25 years." *Id.* at 343 (majority); *accord id.* at 350-51 (Thomas, J., concurring in part and dissenting in part). While this 2028 end date was somewhat arbitrary, the principle underlying it was not. "[A]ll race-conscious admissions programs" must have "a termination point," *Grutter* stressed, to ensure that their "'deviation from the norm of equal treatment'" serves "'the goal of equality itself.'" *Id.* at 342 (majority) (quoting *Croson*, 488 U.S. at 510). The "'acid test of their justification,'" *Grutter* noted, is "their efficacy in eliminating the need for any racial or ethnic preferences at all.'" *Id.* at 343.

If *Grutter* is right—if all race-based admissions must end and universities must decrease their reliance on race over time—then *Grutter* cannot create meaningful reliance interests. Anyone treating *Grutter* as a permanent blessing of race-based admissions is failing to heed the opinion itself. No one should be structuring affairs around a practice that federal law "barely—and only provisionally—permits." *Schuette*, 572 U.S. at 317 (Scalia, J., concurring in the judgment).

While overturning *Grutter* will mean that universities can no longer use race in admissions, the burden of changing illegal policies "'is not a compelling interest for stare decisis.'" *Janus*, 138 S.Ct. at 2485 n.27. And the changes here need not be "'extensive.'" *Id.* Most universities "can keep their [admissions] systems exactly as they are"—with holistic, individualized review that considers all legitimate factors—"only they cannot" use race itself as a factor. *Id.* Real

diversity would not decline (and would likely improve), given the availability of race-neutral alternatives. The University of California, for example, boasts that it just admitted its "most diverse class ever," despite the State's ban on racial preferences. Watanabe, *UC Admits Largest, Most Diverse Class Ever, But It Was Harder to Get Accepted*, L.A. Times (July 19, 2021), https://lat.ms/3Cn77JZ. So too did the University of Michigan, whose 2021 incoming class "is among the university's most racially and ethnically diverse classes" ever, with "37% of first-year students identifying as persons of color." Dodge, *Largest Ever Student Body at University of Michigan This Fall, Officials Say*, MLive.com (Oct. 22, 2021), bit.ly/3EgLAD2.

Nor would overturning *Grutter* upset any reliance interests of students. Prospective students do not "rely" on getting preferences tied to their race—something they cannot control. And no admitted student would be affected by SFFA's forward-looking relief. As for current students, ending racial preferences will take time, even in this case. Hardly anyone on campus now will still be there when the first class admitted without racial preferences arrives.

* * *

This case presents a unique opportunity to rectify *Grutter*'s error. Paired with *Harvard*, this case will allow the Court to resolve the ongoing validity of race-based admissions under both Title VI and the Constitution—in cases involving our nation's first public college and first private college, brought by the same plaintiff, and with trial records that are extensive and

fully developed over more than a decade of combined litigation. Now is the time to "stop discrimination on the basis of race" by "stop[ping] discrimination on the basis of race." *Parents Involved*, 551 U.S. at 748.

II. The Court should also grant certiorari to consider whether UNC's admissions program satisfies strict scrutiny.

This Court should also review whether UNC is complying with existing precedent. If *Grutter* is overruled, then this Court will benefit from detailed briefing on the race-neutral alternatives available to UNC. Because those alternatives are available to many schools, briefing this question will help the Court assess what a post-*Grutter* world would look like and why *Grutter*'s departure from racial neutrality is wholly unjustified. If *Grutter* is clarified or narrowed, then the lower courts would benefit from this Court's application of strict scrutiny here—an analysis that this Court performed in *Gratz* without waiting for the circuit court's judgment.

Under this Court's precedents, UNC's admissions program must withstand strict scrutiny. Its use of race must be "narrowly tailored" to achieve "the only interest that this Court has approved in this context": the educational benefits of "student body diversity." *Fisher I*, 570 U.S. at 314-15. To be narrowly tailored, race-based admissions must be "'necessary'" to achieving those educational benefits. *Id.* at 312. Race is not necessary if a "workable race-neutral alternative[]" is available—*i.e.*, if the university "could achieve sufficient diversity without using racial classifications." *Id.*

UNC has workable race-neutral alternatives. For example, it could set aside 750 seats in the class for disadvantaged applicants and fill the rest of the class with the most academically qualified students. App.134 n.43. This alternative would *increase* socioeconomic diversity while maintaining racial diversity and academic excellence. App.134 n.43; D.C.Dkt.244 at 443:13-448:20; Dkt.247-2 at 23. Other alternatives, such as admitting the top academic performers in each North Carolina high school, produce similar results. App.138-41; *see also* D.C.Dkt.244 at 424:1-450:4; D.C.Dkt.247-2 at 13-23.

Still more successful alternatives have been used by public universities in States where racial preferences are banned (such as UC-Berkeley and UCLA). These universities have, for example, increased socioeconomic preferences; increased financial aid; adopted policies promoting geographic diversity, including percentage plans and the use of zip codes; eliminated preferences for legacies; eliminated preferences for children of faculty and staff; eliminated early action; increased recruitment efforts; increased admission of community college transfers; and developed partnerships with disadvantaged high schools. *See* D.C.Dkt.244 at 412:22-417:4-13, 449:10-450:4. Those institutions remain elite and, by their telling, diverse. *See supra* I.C.

In concluding that UNC must continue using race, the district court applied strict scrutiny in name only. Like the First Circuit in *Harvard*, the district court rejected race-neutral alternatives because they would meaningfully change UNC's "'actual'" outcomes.

App.126, 143-44. But the government cannot distribute benefits and burdens based on race—the most odious classification known to American law—because race neutrality would cause a public institution to *change*. Desegregation required radical changes, but those real and threatened consequences did not deter this Court from enforcing the Constitution's demands. *E.g.*, *Allen v. Cty. Sch. Bd. of Prince Edward Cty.*, 249 F.2d 462, 465 (4th Cir. 1957) (that "the schools might be closed" could not justify continued segregation); *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966) ("no consideration of prison security or discipline" could justify continued segregation of Alabama penal facilities), *aff'd*, 390 U.S. 333 (1968).

The question is not whether race-neutral alternatives will change an institution, or whether the university finds them painful or philosophically disagreeable. The question is whether race-neutral alternatives "'could promote the substantial interest about as well and at tolerable administrative expense.'" *Fisher I*, 570 U.S. at 311-12. The substantial interest here is broad student-body diversity, not "'racial diversity.'" *Id.* So the district court was wrong to reject alternatives because they would require UNC to admit, for example, fewer minority students from wealthier families, App.131-32; more white students from poorer families, App.136-37; slightly fewer unrepresented minorities, App.134 & n.43, 139-40; or 0.5% Native Americans instead of 1.8%, App.139; D.C.Dkt.251-1 at 38; D.C.Dkt.154-22, Ex. 11, Tbl.1. UNC would have to prove that these minor changes would prevent it from achieving *student-body diversity* writ large. That robust evidentiary showing was

not made here, and couldn't possibly be made if the district court was right that race plays only a minor role at UNC. *Cf.* App.112-13, 175. That universities in California and Michigan are more racially diverse than ever before means that the evidence UNC needs almost certainly doesn't exist.

While this Court's precedents do not require universities to tolerate a "dramatic sacrifice" of diversity or academic excellence, UNC is not being asked to make any dramatic sacrifices. *Grutter*, 539 U.S. at 340. UNC is not being asked to, for example, admit students through a lottery. *See id.* Nor is UNC being asked to "abandon … academic selectivity." *Id.* Schools can remain elite while tolerating a dip in SAT scores. *Cf.* App.134 & n.43, 139-40. Concluding otherwise is particularly odd given the fact that many high-quality schools are abandoning this metric. *See University of California Will No Longer Consider SAT and ACT Scores*, N.Y. Times (May 15, 2021), nyti.ms/3ojysqv (noting that "[m]ore than half of the country's four-year colleges and universities dismissed the ACT or SAT for fall 2021 admission[,] including top universities like Brown, Caltech, Carnegie Mellon, Columbia, the University of Virginia and Yale"). Indeed, *UNC itself* is perfectly willing to sacrifice this metric to meet its racial goals. App.48, 73-78; Dkt.247.1 at 12, 15. In all events, slight dips in average SAT scores are a small price to pay in service of ending state-sanctioned discrimination against high schoolers based on race.

CONCLUSION

This Court should grant certiorari.

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