No. 21-707

In the
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC., PETITIONER
Petitioners,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

VIKRAM VALAME
Counsel of Record
Gunn High School
780 Arastradero Road
Palo Alto, California 94306

11/12/22

QUESTIONS PRESENTED

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

SUMMARY OF ARGUMENT

The Fourteenth Amendment was ratified to make good on this nation's promise that "all men are created equal" ¶ 2. Although unheeded for a century, it was vindicated unanimously in *Brown v. Board of Education*, 347 U.S. 483 (1954). As this court stated in *Alexander v. Holmes County*, 396 U.S. 19 (1969), despite pleas for time: racial categorization must be terminated "at once" *id.* at 20.

Grutter v. Bollinger 539 U.S. 306 (2003) did violence to that promise, should not be given precedential effect, and must be overruled. The decision satisfies each of the factors that have informed this court when revisiting precedent.

Firstly, *Grutter* is egregiously wrong. By granting deference to those engaged in racial discrimination, it turned a whole body of strict scrutiny precedent, from both before and after the decision, on its head.

Secondly, numerous negative consequences have undermined its holding. Higher education has seen a drastic increase in racialization and decrease in diversity despite the intentions of the Grutter Court.

Thirdly, the application of "some, but not complete judicial deference" has proven unworkable. As seen

in this court's decisions, *compare Fisher v. University of Texas,* 570 U.S. 297 (*Fisher I*); *Fisher v. University of Texas*, 579_2 U.S. 365 389-90 (Fisher II) as well as the inability of universities to adhere to its mandates.

Grutter "was not correct when it was decided, and it is not correct today" *Lawrence v Texas,* 539 U.S. 558 at 578. The time has come to overrule it.

ARGUMENT

I. Grutter should be Overruled

A. Stare Decisis Framework

Although precedents of this court are entitled to respect, "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law", *Hurst v Florida* 577 U. S. ____ (2016) (slip op., at 9). As this case comes before the court, "[t]hat policy is at its weakest" as the error in Grutter cannot be altered by Congress *see City of Boerne v Flores,* 521 U.S. 507 (1997) (Enforcement authority of congress cannot redefine this judicial precedent) and can only be corrected federally by this court "overruling [its] prior decisions", *Agostini v Felton* 521 U.S. 203 at 235 (1997).

To guide the *stare decisis* analysis, the court has articulated several non-exclusive factors that guide its consideration. The first, gateway test, asks if the prior decision was "not just wrong, but grievously or egregiously wrong", Ramos v Louisiana, 590 U. S. ____ (2020) (Kavanaugh J., Concurring) (slip op., at 7). Within this penumbra, "the fact that a decision has proved 'unworkable'", *Montejo v. Louisiana*, 556 U.S. 778 (2009), if it is "mistaken in the light of later cases", *United States v Cotton,* 535 U. S. 625 (2002), or has resulted in the "distortion of many important but unrelated legal doctrines", *Dobbs v Jackson Women's Health Organization* 597 U. S. ____ (2022) (slip op., at

62) all inform the analysis.

A second factor relates to the negative consequences of a decision on real-world individuals and applications of the law. For example, in *Knick v Township of Scott,* 588 U. S. ____ (2019) where "unanticipated consequences of [*Williamson County,* 473 U. S. 172 (1985)] were not clear until 20 years later" (slip op., at 5) the court undertook a searching analysis of precedent and ultimately overruled the decision. This doctrine is even stronger where the negative consequences of a decision have been apparent from its inception, as was made clear by the *Brown* court's repudiation of *Plessy v. Ferguson*, 163 U. S. 537 (1896), where the court declined to require fundamental changes in circumstances beyond the proven harms of a prior mistake.

The third factor articulated by the court deals with "cases involving property and contract rights, where reliance interests are involved" *Payne v. Tennessee*, 501 U.S. 808, 828-30, (1991). Importantly, reliance interests cannot rest on "contract provisions that will expire on their own in a few years' time." *Janus v. American Federation of State, County, and Municipal Employees Council 31,* 585 U. S. ____ (2018) (slip op., at 45), nor when decisions of this court have provided notice and a time to wind down conduct subject to the decisions that rest on dubious foundations. Considerations like the "antiquity of the precedent", *Montejo* 556 U.S. 778 at 782 inform this consideration as well. Further, in the unique context of racial discrimination, this court has found that reliance on "the latest decision, however recent and questionable" dwarfed by "important principles of this Court's equal

protection jurisprudence, established in a line of cases" now stretching back over 75 years *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 at 231 (1995). The court was right then, and the principle it announced is prescient for the circumstances presented here.

As explained below, because each of these *stare decisis* factors is met, *Grutter* must be overruled.

B. Grutter was plainly erroneous

The strength of a precedent is a threshold issue in the stare decisis calculus. As the court recently stated, "a view of the Fourteenth Amendment that" we know "was (and remains) foreclosed by precedent" *Ramos v. Louisiana* 590 U.S. at ___ (slip op. at 9) should not be given continued vitality. Grutter's essential holding was to declare that "student body diversity is a compelling state interest that can justify the use of race in university admissions" 539 U. S. 306 at 325 (2003). In doing so the court also decreed that the constitution provides a "degree of deference to a university's academic decisions, within constitutionally prescribed limits" *id.,* at 328. The conflict with black letter law begins immediately on several fronts.

1. Compelling State Interest

Firstly, elevating an interest in student body diversity is out of step with the court's use of that term in other cases. In *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984) the court held that while the best interests of a child were ordinarily those of the highest order, they ceased to be 'permissible considerations for removal of an

infant child from the custody of its natural mother" *id.* when justified on racial grounds. Similarly, efforts to create societal equality, though ordinarily one of the highest callings of government, are not compelling when accomplished through racial discrimination *Shaw v. Hunt,* 517 U. S. 899 at 909-910 (1996); *Accord City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 at (1989) ("such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality"). Even more forcefully, this court has rejected affirmative action-based justifications in the realm of secondary education *despite* proponents of affirmative action asserting that it is *more* effective at earlier ages*, Parents Involved in Community Schools v. Seattle School Dist. No. 1* 551 U.S. 701 (2007).[1] The specific interest outlined in the court's analysis is thus inconsistent with caselaw from both before and after it was decided.

Critically, SFFA does not take the position that *all* measures to enhance diversity are unconstitutional. This court has consistently articulated a narrow "remedial" justification for such discrimination in the context of strict scrutiny. Indeed, where a

---

[1] *See* e.g. *Parents Involved* Amici Brief of the Am. Psychological Ass'n, et al. at 29 (accessible at https://www.findlawimages.com/efile/supreme/briefs/05-908/05-908.mer.ami.apa.pdf, last visited 12/16/2022). Illustrative example, Petitioner strenuously disagrees with the conclusions outlined in this brief.

governmental body has itself been complicit in violations of the Fourteenth Amendment, it is usually the case that a non-race-based plan "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system" and is thus "intolerable" *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968). This obligation has been faithfully applied by the judiciary since *Brown* itself e.g. *Freeman v Pitts* 503 U.S. 467 (1992), and may even extend to situations where a school "could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by" others *Id.* (plurality op.) The critical factor to such remedial authority is that "a generalized assertion of past discrimination in a particular industry or region is not adequate" *Shaw* 517 U.S. 899 at 909. A state "must identify that discrimination, public or private, with some specificity before they may use race-conscious relief" *Ibid.* Overruling *Grutter* would restore this test in the realm of college admissions. While the evidence makes clear that Harvard's current system of race-based admissions would fall, it would *not* prevent the use of race in the remedial context. For example, an applicant's writing about their efforts to overcome stereotypes or racially motivated discrimination could be considered and evaluated by the university both as an example of an applicant's character and as a narrowly tailored remedial measure for past conduct.

As a matter of empirics and logic, then, "educational diversity" as a separate interest announced in *Grutter* is an incoherent interest for a state to pursue. Any student can report on their experiences as a member of a racial group under a remedial rationale, so the use of race over and beyond such benefits *only* applicants who choose *not* to share information about their

experiences. The ultimate effect is to enact into policy "the stereotypical assumption that the race of" students "is linked to" their life experiences *Metro Broadcasting v. FCC*, 497 U.S. 547 at 632 (1990) (op., of Scalia J.), in essence, "the precise use of race as a proxy the Constitution prohibits" *Miller v. Johnson*, 515 U.S. 900 at 914 (1995). Not only does this highlight the inconsistency of the decision with caselaw, it elides a fundamental internal tension in the logic of *Grutter*. A program aimed at "the breaking down of racial stereotypes" *Grutter* at 308 cannot operate on the assumption that race is the sole source of "varying backgrounds and experiences" *id.* at 316, at least without acting against its own goals.

The use of educational diversity as a compelling state interest untethered from a remedial rationale is erroneous.

2. Means-Ends Scrutiny

With *Grutter's* elevation of an amorphous interest in "diversity" to the level of a compelling interest, the need for an exacting review of the means-ends portion of the strict scrutiny analysis becomes ever more important. Yet here too the error is compounded by an unprecedented form of "judicial deference" in the strict scrutiny context. It is bedrock law that "judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis" *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 at 501 (1989). The logic of deference to legislative assemblies bears a close resemblance to the "fundamental errors in Plessy, its standard of review and its validation of rank racial insult by the State"

Metro Broad., 497 U.S. at 631 (Kennedy, J., dissenting). Indeed, the parallels between the position of UNC are those of the majority in *Plessy* are striking. *Compare* Brief in Opposition at 31 ("a 'reasoned, principled explanation' for its decision to pursue the educational benefits that flow from student-body diversity, that conclusion is entitled to judicial deference") *with* "In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people" *Plessy* at 550[2]. To be sure, UNC's intentions are more benign than those of the state legislature in *Plessy*, yet the schemes they propose are substantively identical.

In practice, this deference has eroded many of the foundational principles behind strict scrutiny. For example, "one might assume that [UNC] came to its policy only as a last resort. Distressingly, this is not so: There is no evidence that the" university "has ever experimented with, or even carefully considered, race-neutral methods of achieving its goals" *Johnson v. California*, 543 U.S. 499 (2005) (Stevens J., concurring in part and dissenting in part). In other contexts, the court has been clear that racial discrimination is indeed a last resort for solving a compelling governmental interest, see *Parents Involved* 551 U.S. 701 (Kennedy J., Concurring). Yet in the context of university admissions, *Grutter* and its progeny have held that *any* "meaningful, if still limited" *Fisher v.*

---

[2] *But see Plessy* at 558 (Harlan J. Dissenting) "I do not understand that the courts have anything to do with the policy or expediency of legislation."

University of Texas at Austin, 579 U.S. ___ (2016) impact can suffice under its modified strict scrutiny principles.

Compare that anemic standard to the first amendment context. When governments "[fail] to regulate vast swaths of conduct that similarly diminished its asserted interests", *Williams-Yulee v. Florida Bar* 575 U. S. ____ (2015), their laws are promptly declared void *see Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 543– 547 (1993). Normally, ignoring the *marginal* benefit of an ordinance implicating constitutional rights would see it struck down, but not here.

Even worse, a university is afforded not only deference but the ability to create its "own definition of the diversity it seeks", untethered from a unique factual presentation of the unique benefits such a new definition proves. In essence, relying on suppositions from *Grutter* itself, a college or university can assert its own methods of racial discrimination, checked only by an amorphous, "deferential" standard of review. The consequences of this resemble affirmative action gone wild. A university can assert a compelling interest in maintaining race-based admissions *and* its "reputation for academic excellence" *Fisher II* 579 U.S. at 387. Yet this means that the university has snuck in an additional compelling interest: "academic excellence". After all, if they sacrificed a few points off their SAT scores or U.S. News Rankings for the sake of a socioeconomic plus or percentage programs, the need to use race for educational diversity purposes would disappear. This is not a hypothetical scenario, just a decade ago respondents declared in a brief filed with this court that the results of a race-neutral

program would be "a 56 point average decline in average SAT scores, a 0.10 point fall in predicted first year GPAs" Amicus Brief for UNC Chapel-Hill Case No. 11-345[3] at 34. At that time, respondents asserted that the program's benefit "would experience a negligible, 1% increase in non-white students" *Ibid. But see Fisher II* 579 U.S. at 387 ("meaningful, if still limited" impact is sufficient). If an interest in maintaining a marginally higher SAT profile and 1st year GPA is "compelling" despite a *decrease* in "racial diversity", then that term has lost all force and meaning in the strict scrutiny analysis.

Respondents have not contended that marginal academic benefits constitute a compelling state interest, yet the natural consequence of their position is that their interest is an "interest in maintaining a 'prestige' … school whose normal admissions standards disproportionately exclude blacks and other minorities." *Grutter* 539 U.S. at 347 (Scalia J., Dissenting).

At the very least, the requirement to not pursue race-neutral criteria, which are *necessarily* more narrowly tailored than facial discrimination, should render *Grutter*'s standard clearly out of step with the surrounding jurisprudence.

3. Original Meaning

Respondents' newfound originalist defense of *Grutter*

---

[3] Accessible at https://www.scotusblog.com/wp-content/uploads/2016/08/11-345-respondent-amicus-UNCCH.pdf

fails on three critical fronts.

Firstly, *Grutter* simply did not rely on originalist reasoning to arrive at its conclusions. Neither the majority nor the dissents relied on such arguments, instead falling back on this court's more recent precedents starting in the mid-20th century, precedents that as shown above, are flatly inconsistent with the notion of race-based educational discrimination. Indeed, respondents' arguments, which do not even attempt to rely on the "critical mass" *Grutter* 539 U.S. 306 at 330 identified as the compelling state interest, instead appearing to make the much broader claim, repeatedly rejected by this court, that generalized societal discrimination may be used as a justification for state-sponsored discrimination *See* Brief in Opposition at 29 cf. *Palmore* 466 U.S. 429 at 433 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). Yet as this court has explained, "We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies" *Montejo v Louisiana* 556 U.S. 778 (2009).

Secondly, they ignore the fundamentals of our nation's history, where we "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). This includes the Declaration of Independence, but also influential pre-founding literature *See*, e.g., James Otis, Rights of the British Colonies Asserted

and Proved ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), reprinted in B. Bailyn, ed., and state constitutions Va. Dec. of Rights § 1 (1776) "all men are by nature equally free and independent.", reprinted in 1 THE FOUNDERS' CONSTITUTION 6 (P. Kurland & R. Lerner, eds., 1987). This tradition was, as it is today, firmly concerned with people as individuals, who "rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general" The Federalist No. 36 at 217 (emphasis added). Although the horrific practices of slavery and black codes clearly transgressed these principles, systems of patronage that define the most essential quality of a person to be their race, *see* e.g. Harv.JA1143-44[4]; UNC.JA639 clearly do so as well. *Particularly* when that is accomplished by dishing out an active *disadvantage* to Americans of Asian descent applying to their school.

Thirdly, the isolated examples of reconstruction era practice cited fit comfortably within the remedial rationale outlined above. To the extent that they do not, they were repudiated by *Brown*, which squarely rejected the application of an "inconclusive" historical context to deprive the amendment of the color blindness that its text requires 347 U.S. 489-492.

Take each example UNC cites in turn. To begin with, each involves the *Federal Government*'s practices in the immediate aftermath of the Civil War. By its text, the 14th Amendment *empowers* the federal

---

[4] Companion Case

government, while subjecting the states to its prohibitions. To the extent that the historical examples relied on by UNC flow from this use of purely federal authority, they provide little evidence of the original meaning of the 14th amendment. Indeed, this court should not rely on "halfway originalism" *James v AFSCME* 138 S. Ct. 2448, which seeks to import the "reverse-incorporation" of *Bolling v. Sharpe*, 347 U.S. 497 (1954) into a historical context that decision did not consider.

Even accepting the applicability of that decision to historical context, each of the examples cited by UNC falls short. Firstly, it discusses a series of proposals that would have included extremely direct language in the 14th amendment relating to color blindness. Yet "this snippet of drafting history could just as easily support the opposite inference." *Ramos* 590 U. S. ____ (2020), that the framers wished for an expansive interpretation of the amendment that prohibited both discrimination on the basis of "race, color, or previous condition of servitude." *and* broader "class legislation", as the former is a subset of the latter Cong. Globe, 39th Cong., 1st. Sess. 2766 (1866).

UNC's second example relates to the provision of certain claims collection benefits for black soldiers immediately after the civil war *see* Brief in Opposition at 31. Yet this legislation too was enacted as a fundamentally remedial measure, on the concern that unscrupulous claims agents were defrauding black soldiers out of their payments based on race. Indeed, Representative Scofield, explained, "we have passed laws for the protection of white soldiers, but not going quite as far as this, because, unlike the blacks, they have not been excluded from your schools by legal

prohibition, nor have they all their lives been placed in a dependent position." Cong. Globe, 40th Cong., 1st Sess. 444 (1867) (statement of Rep. Scofield). This finding plainly encompasses the kind of actual & specific legal violations which permit, and in some cases require, remedial measures to be taken. This is particularly true in the context of fraud against the armies of the United States as they enforced the constitution, "these areas of Art. II duties the courts have traditionally shown the utmost deference to" the political branches United States v. Nixon, 418 U.S. 683 at 710 (1974). Educational policy in peacetime is a far cry from the extreme circumstances respondents rely on.

Each of the other measures enacted by Congress at the time plainly concerned mitigating the effects of slavery and massive southern opposition to the newly passed constitutional amendments. The Freedmen's Bureau was explicitly formed for that remedial purpose, and although there were instances of it providing services to those who had been previously emancipated, it was as true then as it is today that instances of discrimination beyond chattel slavery itself can justify remedial measures.

C. Grutter has Proven Unworkable in Practice

As can be expected from a decision that was as profoundly erroneous as *Grutter*, it cannot "be understood and applied in a consistent and predictable manner" *Dobbs* 597 U. S. ____ (slip op., at 56) (2022).

Start with its application 'on the ground' in admissions offices that are charged with applying it.

The record shows that, in private, school officials pay no heed to *Grutter*'s admonitions of narrow tailoring for a "critical mass" of students. Executive Vice-Provost Jim Dean was candid:

> Q: Is the university's use of race in admissions today designed to achieve the critical mass of underrepresented minorities on campus?
>
> A. No.
>
> Q. And how is -- how is what the university is trying to achieve different than achieving critical mass, in your mind?
>
> A. Well, my understanding of the term "critical mass" is that it's a -- I'm trying to decide if it's an analogy or a metaphor; UNC.JA401[5]

This is not an isolated or unexpected incident. The fact of the matter is that *Grutter* places admissions offices in an impossible position: they must acquire a "critical mass" of students, without defining the exact size of a critical mass, "which is patently unconstitutional" *Grutter* 539 U.S. at 330. The majority in *Fisher II* attempted to redefine the term critical mass away

---

[5] Accessible in the companion case docket: https://www.supremecourt.gov/DocketPDF/20/20-1199/222330/20220502150330963_21-707%20JA%20Vol%201.pdf

from a specific number of students required to achieve the educational benefits of diversity, but instead to the achievement of "concrete and precise goals" that were "sufficiently measurable to permit judicial scrutiny" 579 U.S. ____ (slip op., at 12). Not only did this depart from *Grutter*'s student-specific "educational benefits" in favor of more nebulous long-term goals, but the court also grew no closer to *measuring* the progress of higher education toward those goals.

Fisher II, for example, considered "stagnation in terms of the percentage of minority students enrolling" *id.* at 14 as a factor in this analysis, despite maintaining that the practice was "patently unconstitutional". 'Indeed, since this court's precedents have made clear that there can be no numerical cap on minority enrollment statistics, consideration of racial data in this manner has no compelling endpoint at all, much less the narrowly tailored one the Grutter court wished to impose.

The only metric that universities have put forth involves polling whether a "majority of students tell us that there is no diversity in the classroom" Fisher II JA317a-318a[6] or even less concrete "feedback from the University community as to how people feel" UNC.JA388 about diversity on campus. Not only are these definitions circular, in that they ask students to measure diversity to measure diversity, but universities are also unwilling to commit to a "concrete definition" *Ibid.* of diversity in the classroom at all.

---

[6] Accessible at https://tarlton.law.utexas.edu/ld.php?content_id=19667205

Indeed, despite UNC's refusal to accord preferences to applicants it deems Asian-American, it is unwilling to say that it has achieved a "critical mass" of that pan-racial group. *Id.* at 375 It is doubtful that these explanations would survive APA review for mere substantial evidence, much less the struct scrutiny that *Grutter* requires of them.

It has been over 19 years since *Grutter* was handed down, and over 44 since *Bakke.* "[T]he governing constitutional principles no longer bear the imprint of newly enunciated doctrine" *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 at 438 (1968). Yet the inability of school administrators to follow, or even develop a metric to trace their progress has shown the failure of governing constitutional principles to produce real progress.

Further, the current regime of college admissions fails to produce "predictable" decision-making for applicants and admissions officers writ large. While admissions officers admit under oath that "Because critical mass is amorphous, you know, there -- there is really not a way to make the determination." UNC.JA390, they engage in "winks, nods, and disguises" *Gratz v Bollinger*, 539 U.S. at 304-05 (Ginsburg, J., dissenting) to their applicants, through methods like subjective "personal rating" and "character" scores which consistently assign deprecating qualities to those of Asian descent. *See* UNC.JA460 ("Asian Americans seem to be stronger on a lot of the things […] the one exception being the personal quality measure that African Americans and Hispanics do better on."). Through these methods and more, and in conjunction with the inability to track progress, universities have failed to undertake the

"periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity" *Grutter* 539 U.S. at 306. Rather, UNC has determined racial discrimination is "indispensable in fulfilling its mission." UNC-Amicus-Br., Fisher v. Univ. of Tex. at Austin, No. 11-345 at 5, and, as explained above refuses to accept even strong race-neutral plans to encourage diversity.

These "jurisprudential consequences" *Ramos* 590 U. S. ____ (2020) (Kavanaugh J., Concurring) (slip op., at 7) are even more relevant because they show that race-based affirmative action has failed its own "acid test" *Grutter* 539 U.S. at 343 of ultimately "eliminating the need for any racial or ethnic preferences at all" *ibid.* As seven justices agreed in *Grutter*, "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" 539 U.S. 343 *accord.* at 351 "racial discrimination in higher education admissions will be illegal in 25 years" (Thomas J., Dissenting). Today, courts like the first circuit write that "No Supreme Court precedent requires Harvard to identify a specific end point for its use of race" *SFFA v Harvard* 980 F.3d 157 (1st Cir. 2020), *but see Grutter* 539 U.S. at 342 "all governmental use of race must have a logical end point".

The past two decades of experience have clearly shown that *Grutter* is not a precedent that can reliably be followed.

D. Negative Consequences

Beyond its doctrinal shortcomings, the rule announced in *Grutter* has created substantial negative

consequences for millions of Americans who are applying, studying, or graduating from institutions of higher learning. The "unfairness of the rule pronounced" Payne v. Tennessee, 501 U.S. 808 at 826 (1991) and its racially polarizing impact are on a supposedly neutral practice *Ramos* 590 U. S. ____ (2020) (slip op., at 21) counsel in favor of overruling it.

It is undisputed that UNC disfavors applicants it deems to be "Asian American" entirely because they make up 'too high' of a percentage of their student body. UNC.Pet.App.15, n.7, 37. As explained above, that manifests both directly, by continuing the legacy of a "yellow panic" caused by excessive "Asian labor in the Americas" Erika Lee "The "Yellow Peril" and Asian Exclusion in the Americas" Pacific Historical Review, Vol. 76, No. 4, pages 537–562. ISSN 0030-8684, or indirectly through personal ratings that add a veneer of objectivity to a system that describes students as antisocial beings who lack empathy, courage, and social skills. UNC.JA460.

The reinforcement of these stereotypes in a process as vital as college admissions have serious consequences for students and entire generations of Asian Americans. From an early age, students are told that they must appear "less Asian" to be competitive at top universities. One admissions consulting service describes "parents of 5-year-olds" paying for advice on getting their children into schools, advice that often boils down to not mentioning contributions to society that are the province of "Asian extracurriculars" How to Get Into an Ivy League University (as an Asian

American)[7]. When these and other resources designed to help students navigate their adolescence advocate for the abandonment of one's family, history, identity, and interests for the sake of admission, it is no small wonder that "Asian American college students are 1.6 times more likely than all others to make a serious suicide attempt" George Qiao, Why Are Asian American Kids Killing Themselves? Plan A Magazine, Oct. 3, 2017, found at https://planamag.com/why-areasian-american-kids-killing-themselves/ *see also* cert-state BRIEF OF AMICI CURIAE THE ASIAN AMERICAN COALITION at 19-20.

These pernicious effects have also extended to broader communities within the United States. While hard data is difficult to acquire in this domain, studies have confirmed the common-sense understanding that fostering denial of identity increases "cultural gaps and intergeneration conflict between the students and their parents" Yi-Chen (Jenny) Wu, Admission Considerations in Higher Education Among Asian Americans, American Psychological Association, leading to a host of negative social and personal consequences. These are, unfortunately, the predictable consequences of contravening the "basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*" *Adarand* 515 U.S. at 227. This nation's history has consistently demonstrated that such broad deviation, despite good intentions, "can only exacerbate rather

---

[7] http://www.brightstory.info/blogpodcast/2021/6/11/how-to-get-into-an-ivy-league-as-an-asian-american

than reduce racial prejudice," id. at 227.

The consequences for colleges themselves have also been dire. The obsession with race allowed by its consideration in every stage of the admissions process has come even as colleges formalize racial divisions. Activities such as divided commencement ceremonies are growing in popularity even as UNC defends the use of race for the sake of inclusiveness. See Hartocollis *Colleges Celebrate Diversity With Separate Commencements*, New York Times (June 2, 2017) https://www.nytimes.com/2017/06/02/us/black-commencement-harvard.html. These activities are actively contrary to the policy that race-based admissions were designed to foster in the first place. Although this court hoped that "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single" part has been subordinated to a preeminent interest in racial composition and activities. Bakke, 438 U. S., at 315.

These racial consequences have strongly favored overruling precedent in the past. *Ramos* 590 U. S. ____ (2020). They should do so again here.

E. No Legitimate Reliance Interests

Respondents assert a reliance interest in the racial admissions framework developed by *Grutter*, but reliance interests sufficient to sustain erroneous precedent have arisen only "where advance planning of great precision is most obviously a necessity" *Dobbs* (slip op., at 64) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833 (1992)).

No such precision is found here, in college admissions, because the process is necessarily open to change and flexibility each and every year. Indeed, Grutter's mandate for periodic revisions to admissions policies should have put institutions of higher education well on notice that their use of race would require change in time.

This is even more explicit because of the 25-year self-destruct mechanism embedded in the opinion. Respondents cannot claim to rely on a precedent that made its sunset crystal-clear decades ago.

Unable to show concrete reliance interests, UNC shifts to airy concerns about "democratic dialogue" *see* BIO at 32. "But this Court is ill-equipped to assess generalized assertions about the national psyche" *Dobbs* (slip op., at 64), and has not taken stock in democratic experimentation when such experimentation has come at the cost of equality under the law. *Brown v Board* 347 U.S. 483 (1954); Batson v. Kentucky, 476 U.S. 79 (1986).

Even if this court wished to consider the pulse of democracy, it is clear that the people of the United States consistently reject racialized preferences in admissions. Just two years ago, California, no stranger to diversity, voted overwhelmingly to affirm its ban on such admissions. *See* General Election Statement of Vote (Nov. 3, 2020) https://www.sos.ca.gov/elections/prior-elections/statewide-election-results/general-election-november-3-2020/statement-vote.

Other factors also cut against weight to reliance interests. *Grutter* is younger than precedents like Michigan v. Jackson 475 U. S. 625 (1986) were when

the court overruled them for lack of antiquity *Montejo* 556 U.S. 778, 792-93 (2009). And each of this court's major college admissions cases has been decided "by the narrowest of margins, over spirited dissents challenging [their] basic underpinnings" *Payne v. Tennessee*, 501 U.S. 808, 828-30, (1991). *See* Bakke 438 U.S. at 408 (Stevens J., Dissenting); *Grutter* 539 U.S. at 350 (Thomas J., Dissenting); *Fisher II* 579 U.S. ____ (Alito J., Dissenting).

These factors, in conjunction with the patently erroneous nature of *Grutter* itself, dispel any claim to reliance interests in this case.

CONCLUSION

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved* 551 U.S. 701. (op. of C.J. Roberts). The nature of this court's error in *Grutter v Bollinger* has been to delay that promise to the American people for over two decades. In that time, become as ever as ever before that such a tactic cannot succeed in reforming society towards the supposedly benign objectives that drive it. That interpretation of the constitution has never been correct, and today it once again fails the test of stare decisis as have other long lines of discriminatory precedent.

This court should overrule *Grutter* and its progeny and reaffirm that "we are just one race here. It is American." Adarand, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in judgment).

Respectfully submitted,

VIKRAM VALAME
COUNSEL OF RECORD
GUNN HS
780 Arastradero Road
Palo Alto, California 94306

12/16/22