, No. 21-707

In the
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

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 PETITIONER

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QUESTION 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?

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The Fourteenth Amendment states to not "deny to any person within its jurisdiction the equal protection of the laws." However, when examining precedents laid in the past and studies upon the effects of affirmative action, it is clear that race conscious affirmative action violates the Fourteenth Amendment. *Grutter v. Bollinger* should be overruled and institutions of higher education cannot use race as a factor in admissions because *Grutter* has no historical, constitutional, or jurisprudential foundations, is impractical, and spawns significant negative effects. In addition, overruling *Grutter* would not upset reliance interests as the diversity of the student body will remain without affirmative action policies.

ARGUMENT

I. *Grutter* should be overruled and this court should prohibit institutions of higher education from using race as a factor in admissions.

According to *Dobbs v. Jackson,* the " five factors that should be considered in deciding whether a precedent should be overruled" are:

1. Did the precedent "short-circuited the democratic process?"
2. Does the precedent lack grounding in constitutional text, history, or precedent?
3. Was the test established not "workable?"
4. Did the precedent cause distortion of laws in other areas?
5. Would overruling the precedent upend concrete reliance interests?

Grutter satisfies every consideration stated, except for the first factor, which is not applicable to this case. Overruling precedent is serious. However, it is not uncommon: this Court considers overruling precedent virtually every Term, many of this Court's "most notable and consequential decisions" overruled precedent, and almost "every current Member of this Court" has voted to overrule "multiple constitutional precedents" in "just the last few Terms." *Ramos,* 140S.Ct. at 1411. Thus, this Court should not be hesitant to overrule a case that has ignored the principles of the Constitution, prior precedents, and

the evidence showing the negative effects of its amorphous guidance.

A. *Grutter* has no constitutional, historical, or jurisprudential foundations.

Grutter's rationale in pursuing *racial* diversity to gain *nonracial diversity* - that is, diversity of backgrounds, experiences, and viewpoints(288 F.3d at 804-05 Boggs, J.,dissenting) - is unconstitutional to begin with. *Grutter* assumes that a university can predict an applicant's "views" or "experience[s]", based solely on race. This is pure racial stereotyping. 539 U.S. at 333; *see Hopwood,* 78 F.3d at 946. A university cannot use "race as a proxy" for an applicant's experiences or views. *Miller v. Johnson,* 515 U.S. 900, 914(1995). And the Fourteenth Amendment strictly forbids "the assumption that race or ethnicity determines how [individuals] act or think." *Metro Broad., Inc. v. FCC,* 497 U.S. 547, 602 (1990).

Furthermore, *Grutter's* racial stereotyping is even more unreasonable in our contemporary society "in which [racial] lines are becoming more blurred." *Schuette v. BAMN,* 572 U.S. 291, 308(2014). According to *Grutter's* logic, every applicant in a minority group would share the "experience of being a racial minority in a society, like ours, in which race unfortunately still matters."539 U.S. at 333. Although their geographic, socioeconomic, religious and other viewpoints and experiences would be different, minority applicants automatically receive unfair preferences, as shown in case of Harvard and UNC's admissions programs. However, this truism, that people of a certain race

have experience of being that race, cannot survive strict scrutiny. In addition, *Grutter* claims that racial preferences improve diversity because race is a proxy for certain views and experiences. Then it contradicts itself saying race is *not* a proxy for any views or experiences and thus it breaks down stereotypes. Clearly, that a person's skin color says nothing about who they are, what they think, or where they've been is a "lesson of life" learned by most at an early age. (Scalia, J., concurring in part and dissenting in part). Thus, *Grutter fails to provide* a justification for why *racial* diversity is necessary to achieve the benefits of student body diversity.

Rationalization in using racial preferences to gain diversity in backgrounds, views, and experiences is not the only uncompelling justification brought up by *Grutter*. *Grutter* claims that racial diversity will "break down racial stereotypes" and "prepar[e] students for an increasingly diverse workforce and society." *Id*. at 330(majority). In this case, minority students are treated as *instruments* to prepare white students for their future to be successful. Blumstein, *Grutter and Fisher: A Reassessment and a Preview, 65 Vand. L. Rev. En Banc 57, 66(2012).* Thus, the students who will gain the educational benefits of a racially diverse student body are those in majority ethnic groups. *Grutter* emphasized the importance of providing accessible diffusion of "knowledge and opportunity" to "all individuals regardless of race or ethnicity", since this Court has long recognized that "education…is the very foundation of good citizenship." *Brown v. Board of Education,* 347 U.S.

483, 493(1954). And thus rationalized using race as a factor in admissions programs of universities for the sake of "accessible education to… all". The Court failed to clarify how "all individuals" would benefit from the educational benefits provided by a diverse student body if the beneficiaries of it will only be limited to students in the major ethnic groups.

Its rationale to break down racial stereotypes is also directly contradictory to this Court's precedent. Racial classifications "exacerbate rather than reduce racial prejudice." *Adarand,* 515 U.S. at 229. Indeed, this view still continues to have an impact on lower court rulings. The Middle District of North Carolina concluded that minority students at UNC are "*still*…isolated, ostracized, stereotyped and viewed as tokens." UNC.Pet.App.185(emphasis added). It is the same for Harvard. *see* Harv.JA823. Furthermore, according to the National Center for Education Statistics's documentation, there was a "40 percent increase in campus hate crimes" just between 2011 and 2016. *see* Addressing Racial Trauma and Hate Crimes on College Campuses - Center for American Progress.

Since Grutter has been enacted for two decades, racial prejudices have not been reduced, but has been *either* kept at the same level or, in broader scope, increased as shown by the significant increase in campus hate crimes. Racial preferences in the name of reducing racial prejudices rather caused an increase in racial stereotyping and violence. It has failed its own "acid test" and it is time to try something new.

Although *Grutter* received "several experts' reports on the educational benefits of" *student body diversity*, it required no proof that "a 'critical mass' of underrepresented minorities" nor *racial* diversity of students were necessary to achieve the educational benefits. Rather, *Grutter* used the same logic that "exhume[d] *Plessy's* differential approach to racial classifications," *Metro Broad.*, 497 U.S. at 632(Kennedy, J., dissenting), and deferred to universities' "experiences and expertise." *Id.* at 333(majority). But, it is contradictory to *Brown* as it refused that "such deference is fundamentally at odds" with the strict scrutiny that governs "race based policies." *Johnson v. California,* 543 U.S. 499, 506. *Grutter* also referred to public and private universities' First Amendment rights to choose their own student body diversity, but it failed to acknowledge that as the government, state universities have no First Amendment rights. *see Hopwood,* 78 F.3d at 943 n.25; *Columbia Broad. Sys., Inc v. Democratic Nat. Comm.,* 412 U.S. 94, 139(1973)(Stewart J., concurring). Private universities do, but they have no right to use federal subsidies towards racial discrimination. *See Bob Jones Univ v. United States,* 461 U.S. 574, 603-04(1983); *Rust v. Sullivan,* 500 U.S. 173, 192-93(1991).

Grutter used Harvard as a model on how to use race. Yet, *Grutter* had a weak foundation as Harvard's admissions programs do not satisfy strict scrutiny regarding its discriminatory penalties towards Asian

Americans, interest in racial balancing, and misuse of its jurisdiction to consider race.

As previously found, Harvard "has repeatedly penalized one particular racial group: Asian Americans," CA1. U.S. Br.3. Asian Americans outperform white applicants on every measure of academic achievement, extracurricular rating and alumni reviews, and similarly on other considerable ratings. Harv.879, 1392-93, 1787. However, Asian Americans were admitted at the same rate as white applicants. Harvard's discriminatory penalties towards Asian American applicants is responsible for this occurrence. As the district court found "a statistically significant and negative relationship between Asian American identity and the personal rating assigned by Harvard admissions officers." Harv.Pet.App. 190; *see*, which Harvard has not provided a reason for. In addition, every regression model, including Harvard's, shows a significant admissions penalty against Asian American applicants. Lastly, even Harvard admitted significant influence of race in its admissions policies. Harv.Pet.App.195

Havard also engages in "deliberate racial balancing." CA1.U.S.Br.12. Which is prohibited by *Fisher I.* 570 U.S. at 311. As Harvard concedes, the admissions officers consult their "ethnic stats" throughout the process to prevent a "dramatic drop off in some group [from] last year," even if the total number of minority students have increased. Thus,

they seek to have a balance in racial diversity. The Court has never ruled in favor of this kind of racial engineering *Parents Involved,* 551 U.S. at 726-27(plurality)

Lastly, Harvard gives undue weight to race to achieve student body diversity. Universities must give "serious consideration to all the ways" an applicant contributes to diversity. *Grutter,* 539 U.S. at 337. However, religion, "the most fundamental part of [one's] identity," *Hanson v. N.Y.C.,* 804 F.3d 277, 302 n.14 (3d Cir.2015) is usually not considered by the admissions officers. Harv.JA 734-43. In addition, unlike Harvard's claims to value socioeconomic diversity, there are 23 times as many wealthy students on campus as poor students. Harv. JA755;*accord* Harv.JA787-91. Harvard nonetheless values racial diversity and gives significant preferences for minority students. Race is "determinative" for at least "45% of all admitted African American and Hispanic applicants,"Harv.Pet.App.209-10 which is not a "small portion of admission decisions," *Fisher II*, 579 U.S. at 384-85, and African American identity is comparable to getting a 1 on academic, extracurricular, or personal rating, which only 0.45%, 0.31%, and 0.03% of applicants receive. Harv.JA1393.

Harvard must demonstrate that its admissions program is "narrowly tailored" to achieve the educational benefits of "student body diversity." *Fisher I*, 570 U.S. at 314-15, in order to survive strict scrutiny. However, as evidence show, Harvard's policy

is not narrowly tailored, as it "has repeatedly penalized…Asian Americans;" nor does it seek to achieve educational benefits of "student body diversity" as it engages in racial balancing with far from "modest" preferences for minority students and does not consider "all the ways" an applicant contributes to diversity. *Grutter* thus lacks foundation in an admissions program it has relied on.

Dobbs v. Jackson requires that precedent must lack foundations in the constitution, history, and evidence to be overruled. *Grutter* not only ignored the Equal Protection Clause, but also numerous precedents protecting equal treatment regardless of one's race; it has ignored the history of our nation to eliminate racial classifications and rather followed the logic that has been utilized by schools that defended racial segregations in *Plessy*; it has no evidence to justify their rationale for racial classifications nor does it rely on a constitutional admissions program to justify racial classifications. Thus, *Grutter* satisfies every requirement of *Dobbs*.

B. Grutter is impractical.

Affirmative action first took place during the Reconstruction-era to provide assistance to African-Americans to allow them to fulfill the civic duties associated with being citizens of the United States, and help them survive as freedmen. However, even from the beginning, questions were raised upon how long this assistance should be offered. The framers of the Fourteenth Amendment clearly stated to not "deny to any person within its jurisdiction the equal protection of the laws" and established that "free government demands the abolition of all distinctions founded on color and race." President Andrew Johnson's opinion upon the Freedmen's Bureau Bill reflects the lack of constitutional basis for affirmative action as well; "A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution. Nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than for another." At that time, the policies of the Freedmen Bureau were used for the sole purpose of correcting the effects of slavery, completely different from the situation in the current present of attaining educational benefits. It is not wrong to obtain "the educational benefits that flow from a diverse student body" but using race in education "deprives children of the minority group of equal educational opportunities," therefore, unreasonable *Brown v. Board of Education*, 347 U.S. 483 (1954) *Brown* held the proposition that using race in any part of education is unconstitutional and using

race as a factor denies the "equal protection laws guaranteed by the Fourteenth Amendment."

In addition, *Grutter* itself ruled on the basis that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." It has already reached two decades since the ruling of *Grutter* and not much progress has been made towards the goal to achieve the benefits of student body diversity without taking race into account. The Court observed that race-conscious programs "must have a logical end point" or else it is "dangerous." Chief Justice Roberts furthermore added that these programs are "not going to stop mattering at some particular point. You're going to have to look at race because you say race matters to give us the necessary diversity." If race tells something about a person or is used to determine a person's qualifications, this directly contradicts the Constitution.

Another impractical aspect of *Grutter* is based on the issue of enrolling a "critical mass" to attain the "educational benefits that diversity is designed to produce." The critical mass that *Grutter* upholds cannot be achieved without assuring some "specified percentage of a particular group," which would entail some type of quota, unconstitutional by *Regents of California v. Bakke*, 438 U.S. 265 (1978). This is solely because there is no way to measure if a university attained those educational benefits without precisely "talk[ing] with students [and] faculty ... as to how

people feel." UNC.JA388; see UNC.JA 379-80. The only remaining option is also incredibly unrealistic as it requires "prolonged litigation," 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part). In addition, Chief Justice Roberts inquired why, between two applicants of the same "viewpoint," one white and the other African-American, the African American can get a "benefit" because of his race alone, and whether that involved something "very stereotypical." He proposed two African-American applicants who have "entirely different views' ' whom Harvard regards as "eligible for the same increase in the opportunities for admission based solely on their skin color" regardless of whether their views contribute to diversity or not. *see* A Time Limit on Affirmative Action? - The American Conservative.

C. *Grutter* caused significantly negative impacts.

By definition, affirmative action is the practice of favoring individuals belonging to groups regarded as disadvantaged; a method used to end discrimination by ultimately discriminating against another group. Not only is this implausible, but it reinforces discrimination to certain ethnic groups and brings more detrimental effects than discrimination itself.

There have been admission programs that intentionally discriminated against minorities, starting with Jewish students in the 1950s by Stanford University and now encompassing Asian Americans. Asian Americans are perceived as only grinds with

high test scores who are deemed to lack the "intangible characteristics, like student body diversity, that are central to its identity and educational mission." *Fisher v. University of Texas*, 570 U.S. 297 (2013). *SFFA v. Harvard* revealed the "school's history of using similar language to describe Jewish students nearly a century ago, which led to a "diversity" rationale designed to limit Jewish enrollment in favor of applicants from regions with fewer Jews, such as the Midwest." *see* The Uncomfortable Truth About Affirmative Action and Asian-Americans

Asian Americans have the lowest acceptance rate for each SAT test score bracket, having to meet a triple standard in college admissions; needing to score on average "approximately 140 point higher than a White student, 270 points high than a Hispanic student and 450 points higher than a Black student." Espenshade, Thomas J.; Alexandra Radford, No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life, Princeton University Press, 2009. While it may appear that Asian Americans compose a large population of the student body at Ivy league colleges, "The share of Asians at Harvard peaked at over 20% in 1993, then immediately declined and thereafter remained roughly constant at a level 3–5 percentage points lower, despite the fact that Asian-American population has more than doubled since 1993 as has the number of highly qualified Asian-American applicants." Unz, Ron, "The Myth of American Meritocracy," The Conservative, Page 14-51, December 2012. It's not surprising that discriminatory practices by Harvard and other Ivy League

universities have caused irreversible harm such as "stress/mental health issues, pressure to study more as the bar is raised higher; lack of trust in American institutions; self-identification crises; and fortification of racial barriers." Their practices provide a harsh reminder of past discriminations against Asian Americans such as the Chinese Exclusion Act of 1882, the segregation of Asian American schoolchildren in San Francisco's schools in the early twentieth century, and even up to modern scapegoating over COVID-19. Richard Sander (Author), Stuart Taylor Jr., Mismatch: *How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It.* When Asian Americans supposedly appear "different" from their neighboring Asian American applicants, they are paradoxically expected to prove that they have to stand out in a certain way in order to be accepted, along with their scores having to meet that triple standard.

Beyond just the negative effects of discrimination, affirmative action programs reinforced by *Grutter* also impose another aspect of failure in the education system- the high rates of drop out low grades of minority students in universities. A study done in 2004 shows that after the first year of law school, 50% of black students have GPAs that placed them at the bottom 10% of the class. The dropout rate among African Americans was also more than twice that of their white peers (19.3% vs. 8.2%) Another issue that arises from this is that "opportunities as lawyers often - our opportunities are determined by first year grades. The interviews that you get, which firms that will look at you - the professional opportunities that you have

often are key to our first year grades. And if you are a law student, regardless of your color, if you are at the bottom 10 percent your opportunities - professional opportunities have been significantly limited." *see* Report: Affirmative Action Harms Minority Law Students : NPR There is a similar drop out rate among students due to affirmative action policies and white students admitted as "legacies" with entering credentials that match those of students admitted because of a race preference. *see* How Affirmative Action at Colleges Hurts Minority Students | The Heritage Foundation

In addition, fewer minorities enter careers in science, technology, engineering, and math fields because "[there] are not enough [academically-gifted African-American or Hispanic students] at the very top tiers to satisfy the demand, and efforts to change that have had a pernicious effect on admissions up and down the academic pecking order, creating a serious credentials gap at every competitive level." A study conducted by UCLA law professor Richard Sander and UCLA statistician Roger Bolus indicated that "[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers." This proves that instead of affirmative action programs, merit based admissions serve higher benefits for minorities as students end up in schools where they're more likely to graduate and in the field of study that they want to pursue. Race should not be engraved as a factor in the

education system but rather merit to prevent one from being disadvantaged by the color of one's skin.

D. Reliance interests would not be upsetted by overruling *Grutter*.

Fundamentally, interest in treating individuals differently based on their ethnicity can not "outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Ramos*, 140 S.Ct \at 1408. And since *Grutter* "undermines the fundamental principle of equal protection as a personal right..the principle…must prevail." *Adarand*, 515 U.S. at 235 (op. O'Connor, J). Certainly, as multiple statistics show, the principle of equal protection is overruling the decision of *Grutter,* demonstrating *Grutter's* weak reliance interest. The State of Michigan, which prevailed in *Grutter*, passed Proposal 2 in 2006, which was later upheld by this Court in *Schuette v. Coalition*, to ban affirmative action in all public universities of Michigan. *Schuette,* 572 U.S. at 298-99. California, ever since Proposition 209 - which likewise banned race conscious affirmative action - was passed in 1996, faced extensive movements to reinstate racial preferences but the movements were nonetheless halted by votes in double digits. Ting, *'They Lost Party Because of That Ad': How No on Prop 16 Organizers Knew the Measure Would Fail, S.F.* Gate (Dec. 1, 2020), bit.ly/2XBrmAZ. Further weakening *Grutter's* reliance interest for racial classifications is the viewpoint of Americans. 74% of Americans are against colleges and universities

considering race when making admissions decisions, including 59% of African Americans and 68% of Hispanics, who are the huge beneficiaries of racial preferences in college admissions.

This Court had ruled in favor of race conscious admissions by "the narrowest of margins, over spirited dissents," as demonstrated by *Grutter's* 5-4 decision and *Fisher II's* 4-3 decision. Grutter also held that "all race-conscious admissions programs' must have a termination point", which ruled to be 25 years. *Id.* at 342.(majority). Thus, *Grutter*'s "self-destruct mechanism" and sharp division can not create strong reliance interest. 539 U.S. at 394 (Kennedy, J., dissenting). Affirmative action was "barely - and only provisionally-[permitted]" by this Court.

Furthermore, the reason for setting the termination point was to give universities time to reduce their racial preferences to comply with *Grutter*'s 25-year deadline. However, further undermining *Grutter*'s reliance interest is universities' rejection to satisfy *Grutter*'s ruling. Harvard believes that race-based admissions are "a temporary matter" and has not decreased its use of race at all. *Id*. at 342-43. UNC is the same. *see Supra* 40-45.

Reliance interest to gain student body diversity would also not be upsetted by overruling *Grutter*. As demonstrated by state universities in California, Washington and seven other states, colorblind admissions do not harm student body diversity.

University of California, despite the state's ban on racial preferences, claimed that it just admitted the "most diverse class ever." Watanabe, *UC Admits Largest, Most Diverse Class Ever, But It Was Harder to Get Accepted,* L.A. Times (July 19, 2021), lat.ms/3Cn77JZ. So did University of Michigan, with the incoming class of 2021 being "among the university's most racially and ethnically diverse classes ever…including 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. Universities like University of San Francisco, Florida Atlantic University, and University of Washington, which all are public schools of states that ban affirmative action, rank as one of the most diverse universities according to the U.S. News Ranking. *see* 2022-2023 University Rankings by Ethnic Diversity | US News Rankings. According to a study, if the most selective 193 institutions all used socioeconomic preferences, African American and Hispanic admissions, socioeconomic diversity and mean SAT scores at these universities would all increase. *See* UNC. JA1266-67. Furthermore, professional workforce including businesses, lenders, lawyers, and judges already do not consider diversity, yet are not harmed. *See* 42 U.S.C. . §2000e-2; §3604; §§1981-82; 15 U.S.C. §1691 et seq.; Batson, 476 U.S. at 100; Peña-Rodriguez v. Colorado, 137 S.Ct. 855, 868 (2017). Most universities "can keep their [admissions] systems exactly as they are" - considering all legitimate factors - "only they cannot" use race itself as a factor. *Id.; see* UNC.JA382. Therefore, although the burden of changing illegal policies is already "'not a

compelling interest for *stare decisis*,'" changing these policies would not be an extreme shift in ithe institutions of higher education. *Janus,* 138 S.Ct. at 2485 n.27.

The states of this nation, the citizens, this Court, universities, and the ruling of *Grutter* clearly demonstrate *Grutter*'s weak claim to reliance interest. It is time to overrule *Grutter* and history will remember *Grutter's* unjustified deviations from race neutrality as a mistake, as did with *Plessy.*

CONCLUSION

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