

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

On Writs of Certiorari to the United States
Courts of Appeals for the First and Fourth Circuits

BRIEF OF *AMICI CURIAE* BROWN UNIVERSITY,
CALIFORNIA INSTITUTE OF TECHNOLOGY, CARNEGIE
MELLON UNIVERSITY, COLUMBIA UNIVERSITY,
CORNELL UNIVERSITY, DARTMOUTH COLLEGE, DUKE
UNIVERSITY, EMORY UNIVERSITY, JOHNS HOPKINS
UNIVERSITY, PRINCETON UNIVERSITY, UNIVERSITY
OF CHICAGO, UNIVERSITY OF PENNSYLVANIA,
VANDERBILT UNIVERSITY, WASHINGTON UNIVERSITY
IN ST. LOUIS, AND YALE UNIVERSITY IN SUPPORT OF
RESPONDENTS

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INTEREST OF *AMICI CURIAE*¹

Amici Brown University, California Institute of Technology (“Caltech”), Carnegie Mellon University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, Johns Hopkins University, Princeton University, University of Chicago, University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University are American institutions of higher education. *Amici* have longstanding admissions policies similar to those the Supreme Court upheld in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Accordingly, *Amici* have substantial experience with holistic admissions policies that consider race and ethnicity as one factor among many.

**INTRODUCTION AND
SUMMARY OF ARGUMENT**

Amici speak with one voice to emphasize the profound importance of student body diversity—including racial and ethnic diversity—to their educational missions. The diversity that *Amici* seek in their admissions processes is nuanced and multifaceted; it encompasses myriad perspectives, talents, experiences, goals, backgrounds, and interests. *Amici* strive to enroll a diverse student body because *Amici*

¹ Pursuant to Rule 37, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

have found that doing so significantly strengthens the educational experience *Amici* can provide to their students. Diversity fosters a more robust spirit of free inquiry and encourages dialogue that sparks new insights. Diversity encourages students to question their own assumptions, to test received truths, and to appreciate the complexity of the modern world. Diversity prepares *Amici's* graduates to pursue innovation in every field, to be active and engaged citizens equipped to wrestle with the great questions of the day, and to expand humanity's knowledge and accomplishment.

Diversity promotes *Amici's* impact and excellence as well. *Amici's* impact in the world depends on the ability of their alumni to participate in, and be trusted by, a broad range of communities within our society. And the excellence of *Amici's* student body depends on the success of their admissions systems. *Amici* believe that exceptional talent exists in all sectors of society; a homogenous student body is a strong indication that the admissions system has not succeeded in finding the best and brightest students.

The record below confirms what *Amici* know to be true based on decades of experience: individualized and holistic review of applications is the best means that universities can employ to achieve meaningful diversity.

In calling for this Court to overrule *Grutter*, Petitioner offers a crabbed and indeed perverse view of diversity. In Petitioner's view, consideration of race and ethnicity reduces every applicant to a "crude stereotyp[e]." Pet. Br. 52. But *Amici's* collective experience teaches that it is impossible to fully

appreciate every applicant's experiences and perspectives while turning a blind eye to race and ethnicity. For many applicants, their race or ethnicity has influenced their identities, experiences, and perspectives—sometimes profoundly. Recognizing that does not mean embracing the canard that all applicants are affected by their race in the same way; it means acknowledging the simple truth that race can and does affect applicants in many different ways.

In Petitioner's view, there is no need to worry about the racial diversity of the student body because universities can simply "mak[e] students take a class on" "cross-racial understanding." Pet. Br. 55. Again, Petitioner's prescription bears no resemblance to the reality of what *Amici* know diversity—including racial and ethnic diversity—brings to the student experience. No class could replicate what diverse students learn from each other not just in classrooms, but also in dorm rooms, dining halls, performance spaces, and beyond.

And in Petitioner's view, this Court's decision in *Brown v. Board of Education* stands for the proposition that there is no compelling interest in a racially diverse student body. Pet. Br. 47. That is truly a benighted reading of what is perhaps our Nation's most powerful statement of the legal, social, and moral importance of students of different races learning together. *Amici* are fulfilling, not frustrating, *Brown's* promise when they consider racial diversity to be one of many goals in admitting a student body.

This Court should reject Petitioner's view. A decision by this Court forbidding all consideration of race in the admissions process would undercut *Amici's*

vital efforts to attain diverse student bodies. It also would effect an extraordinary intrusion into *Amici's* conduct of their academic affairs. Such an intrusion would break with this Court's long and established tradition of granting universities latitude to make educational judgments and respecting their academic freedom—a tradition that protects *Amici's* constitutional interests as well as their track record of providing the highest quality education the world has to offer. *Amici* urge this Court to uphold four decades of precedent establishing and reaffirming their right to consider race and ethnicity within the confines of an individualized and holistic review process.

ARGUMENT

- I. **The *Grutter* Standard Reflects *Amici's* Values and Practices.**
 - A. **Student Body Diversity Is Essential to Achieving *Amici's* Educational Mission.**

Amici's decades of experience implementing *Grutter* has demonstrated that a diverse student body brings irreplaceable value to the quality of their students' education. Student body diversity is therefore essential to achieving *Amici's* mission of providing the best possible educational experience to their students.²

² See, e.g., *Our Commitment to Diversity, Equity, and Inclusion*, Columbia College, <https://bit.ly/3PYXdV7> (last visited July 26, 2022); *Diversity Mission Statement*, Dartmouth College, <https://bit.ly/3JdwaDe> (last visited July 26, 2022); *Johns Hopkins University Statement of Principles on Diversity, Equity, and*

Amici's admissions policies are based on the shared principle that knowledge is forged when ideas must withstand examination from a wide range of perspectives. *Amici*'s intellectual communities grow stronger when students, faculty, and administrators engage with individuals whose experiences diverge meaningfully from their own. As Ruth Simmons, former president of *Amicus* Brown University, testified in the Harvard trial, "we know that difference is one of the primary means for students to test themselves, to test their background, to test their ideas, to challenge assumptions. And in that context, it is in coming in contact with difference that we tend to deepen our learning." JA990; *see also* 21-707 JA984.³ In *Amici*'s judgment, enrolling a diverse student body is critical to this goal and has allowed them to develop and maintain some of the best academic programs in the world.

Amici's judgment reflects the considered and repeated judgment of this Court, which has time and again recognized the benefits that a diverse student body yields for institutions of higher education.

First, the Court has recognized that "the educational benefits that flow from student body diversity," *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 310

Inclusion, Johns Hopkins Univ., <https://bit.ly/3RVCSlz> (last visited July 26, 2022).

³ Unless otherwise indicated, JA citations refer to the Joint Appendix in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (No. 20-1199). Citations to the Joint Appendix in *Students for Fair Admissions, Inc. v. University of North Carolina* (No. 21-707) are labeled "21-707 JA__."

(2013) (quoting *Grutter*, 539 U.S. at 330), include the deeper understanding students and professors achieve when an issue or problem is analyzed by individuals who bring differing perspectives and backgrounds to the question.

Second, “enrolling a diverse student body ‘promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.’” *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 381 (2016) (quoting *Grutter*, 539 U.S. at 328, 330). While this obviously has a direct benefit to students, it also is a key component in creating a dynamic and integrated campus environment for all members of the university community.

Third, and “[e]qually important, student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.” *Id.* (internal quotation marks omitted).

Fourth, student body diversity enhances the positive impact institutions of higher education can make in the world, as a diverse student body becomes a diverse group of alumni who will participate in, and be trusted by, a broader range of communities. As Justice O’Connor recognized in *Grutter*, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” 539 U.S. at 332.

Amici take seriously the educational benefits that result from “having different students live on your hallway, encountering different students who come from

backgrounds that are so different from yours that you have no choice but to learn about the complexity of the world that you're going into when you graduate." JA991; *see also* 21-707 JA614, 619–20. For many students, post-secondary education is the first time they are exposed to others whose experiences, opinions, faiths, and backgrounds differ markedly from their own. Through that exposure, students are encouraged to question their own assumptions and biases, to "realize that they exist in [the] context of others," and "to deepen the reservoirs of empathy." JA807; *see also* JA916 (former Harvard student testifying that "having had experiences and relationships with people from different ethnoracial groups made me a much better listener, a more empathetic person, someone who is a more critical thinker, and whose, like, perspective of the world is more broad"). Because of their commitment to diversity, universities "make new discoveries," "teach new courses," and "create new fields." JA993. And these innovations ultimately ripple out from educational institutions to benefit society at large.

Amici aim to create an environment in which students learn as much from one another outside the classroom as within. Student body diversity allows *Amici* to achieve this goal. As Judge Burroughs concluded below in the Harvard case, "[t]he evidence at trial was clear that a heterogeneous student body ... encourages learning outside the classroom, and creates a richer sense of community." 20-1199 Pet. App. 107–08. And as Judge Biggs similarly recognized in the UNC case, "a diverse student body improves students' capacity to work effectively with others: exposure to

diversity breaks down stereotypes, creates common understanding, and encourages empathy.” 21-707 Pet. App. 17. A student’s immersion in a diverse community is a unique and irreplaceable benefit, one that transforms all aspects of university life into opportunities for students to collaborate with—and learn from—people whose backgrounds, experiences, and perspectives are different from their own.

Contrary to Petitioner’s characterization, *Amici*’s adherence to the *Grutter* standard does not “trea[t] underrepresented minorities ... as *instruments* to provide educational benefits for other, mostly white students.” Pet. Br. 53–54. *All students* benefit from racial diversity. Moreover, racial diversity is but one axis of diversity considered in admissions. Students whose applications reflect geographic, socioeconomic, or ideological diversity are not “instrumentalized” for the benefit of other students. Like those other factors, race and ethnicity can inform students’ experiences and perspectives, and thus meaningfully affect their contribution to overall campus diversity. *Amici* aim to create an academic environment where everyone is both a contributor to and a beneficiary of a rich and diverse educational ecosystem—and under *Grutter*, they have been more successful than ever before.

In this context, Petitioner’s polemical accusation that universities like *Amici* embrace “segregation,” Pet. Br at 64, is absurd. *Amici*’s pursuit of student body diversity through their admissions practices embraces the opposite result—that students are “exposed to difference” at every opportunity. JA998. Whether through housing assignments, at extracurricular events,

or in the classroom, *Amici* ensure that students “have the opportunity to spend time with different students from different backgrounds in a common project.” *Id.* And Petitioner badly misses the mark when it invokes *Brown v. Board of Education*—this Court’s most powerful articulation of the importance of students of different races learning together—to attack racial diversity in colleges and universities. *See* Pet. Br. 47, 51. *Grutter* carries forward *Brown*’s recognition of the decisive importance of students of different races being able “to study, to engage in discussions and exchange views.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (quotation marks omitted).

Of course, *Amici* acknowledge that there are important limits on how the benefits of diversity may be pursued. A quota system “would amount to outright racial balancing, which is patently unconstitutional.” *Fisher I*, 570 U.S. at 311 (quoting *Grutter*, 539 U.S. at 330). Likewise, an admissions program that treated race or ethnicity as “*automatically* ensur[ing] a specific and identifiable contribution to a university’s diversity” would fall outside the scope of permissible consideration of race in university admissions. *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) (emphasis added). But neither of those concerns is triggered where admissions programs are specifically designed to take race into account *only* as “one factor among many,” and advance the very types of diversity that institutions including *Amici* have determined most effectively contribute to students’ educational experiences. *Grutter*, 539 U.S. at 340.

Petitioner notes “there was no evidence in *Grutter* that racial diversity yielded the benefits of student body

diversity in the broader sense—meaning a diversity of backgrounds, experiences, and view-points.” Pet. Br. 54–55. But over decades of applying *Grutter*, *Amici* have learned that racial diversity does contribute to “broader” student body diversity in terms of backgrounds, experiences, and viewpoints. An admitted class of students that consisted only, or predominantly, of students of one race or ethnicity would be missing something irreplaceable and indeed invaluable: the diverse experiences and perspectives that students of different races and ethnicities bring to the university community.⁴

Pursuing student body diversity also helps *Amici* locate the best and brightest students. *Amici* unequivocally reject the notion that any racial or ethnic group has a monopoly on human potential; outstanding talent exists in *every* sector of society. *Amici* have designed their educational offerings to cultivate that talent, and they have designed their admissions systems to find it. An admissions system that yields a racially and ethnically homogenous class is a system that is failing to secure the students *Amici* seek. *Amici*’s consideration of race and ethnicity in admissions avoids

⁴ See, e.g., JA801 (Harvard dean explaining that racial diversity is important because race “can shape our experience of ourselves,” “connect to our traditions, our cultures,” “shape how others experience us,” and thus “shape our understanding and perspective on the world”); JA929 (former student testifying that “[t]he experiences of a black working-class person are different from the experiences of a white working-class person and are different from the experiences of an Asian or Latino working-class person”); see also, e.g., JA971–72; 21-707 JA951, 982, 985, 1002–03, 1033.

this outcome; by considering race and ethnicity as one factor among many, *Amici*'s admissions systems yield a diverse student body that includes *more* of the students with the greatest talent and potential.

Amici's experiences illustrate the special contribution of racial and ethnic diversity to the development of knowledge. For example, a team of researchers at Carnegie Mellon University improved Electroencephalogram technology for people with coarse, curly hair after a Black undergraduate student realized that “a lot of the current solutions wouldn't work for my hair type.”⁵ Duke University undergraduate Patrick Duan was recently named a Faculty Scholar in recognition of his innovative research on “how universal ideals play out differently among the particularities of disparate cultures,” which grew out of interests he “naturally developed” after moving from his birthplace in “a ‘chintown’ of New York City ... to the white suburbs of Long Island.”⁶ Graduate students at Cornell have created a scholarly podcast focusing on “Black and Indigenous voices and how they are changing the stories archeology tells.”⁷ In the words of one doctoral student: “As a white archaeologist with Greek

⁵ Laura Sanders, *New Electrodes Can Better Capture Brain Waves of People with Natural Hair*, ScienceNews (Mar. 11, 2020), <https://bit.ly/3BeTq1W>.

⁶ Duke Today Staff, *Three Juniors Selected as Faculty Scholars for Excellence in Research*, Duke Today (May 5, 2022), <https://bit.ly/3vrS7sK>.

⁷ Kathy Hovis, *Student Podcast Explores Changing Face of Archaeology*, Cornell Chron. (Feb. 16, 2022), <https://bit.ly/3S23QrO>.

and northwestern European heritage, I've felt challenged by Black and Indigenous archaeologies to learn how modern history impacts where we are today in the Mediterranean.”⁸ Further examples abound.

The value of racial diversity is so obvious that Petitioner is forced to resort to the canard that taking race into account is itself racist because it supposedly assumes that all members of a particular race think alike. Pet. Br. 52, 64. Petitioner has it backwards. *Amici* unequivocally reject the notion that race can be equated with viewpoint. Just as nobody believes that residents of New York all have the same viewpoint, *Amici* do not believe students of a certain race all have the same viewpoint. But just as a class consisting solely of New Yorkers surely would be missing valuable perspectives,⁹ so too would a racially homogeneous class. Indeed, having a racially diverse student body *breaks down*

⁸ *Id.*

⁹ For that reason, *Amici* place great value on geographic diversity and consciously pursue the goal of geographic diversity in admissions. See, e.g., Office of Communications, *Princeton's Class of 2025 Arrives from Around the Globe, Embracing Increased Numbers of First-Gen and Lower-Income Students*, Princeton Univ. (Sept. 1, 2021), <https://bit.ly/3J938og> (reporting that Princeton's Class of 2025 come from “all 50 states — plus Washington, D.C., Guam, Puerto Rico and the U.S. Virgin Islands”); Mark Dunn, *Students of Yale College '24 — From 50 States, 53 Nations — Hit the Books*, Yale News (Aug. 31, 2020), <https://bit.ly/3b2sY0V>.

racial stereotypes because of the diversity of views, experiences, and outlooks among students of each race.¹⁰

SFFA’s suggestion that race-conscious admissions policies call into question the talents and accomplishments of admitted students of color is similarly meritless. *See* Pet. Br. 54. Universities’ pursuit of geographic diversity does not suggest that students from Oklahoma are less deserving of admission or otherwise inspire “prejudice” against such students; the same is true for students from underrepresented racial and ethnic groups. *See id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995)). All admitted students—regardless of geographic, racial, or ethnic background—are selected because in the university’s best judgment, those particular students are expected to contribute most to the university community.

In achieving diversity—including racial and ethnic diversity—*Amici*’s current admissions systems benefit their institutions, their students, and society. Without these benefits, *Amici* “could accomplish a mission, but it would be an impoverished mission that does not provide

¹⁰ *See, e.g.*, JA795 (Harvard dean describing the university’s “goal ... to really overcome this notion of stereotypes in which we sort of assume if you know something about somebody’s group characteristic, that tells you who they are as an individual or the complexity of their background”); 21-707 JA1005 (former student testifying that “I had so many different experiences interacting with black people and all of their diversity” that “I was able to get a clearer view of -- I guess the idea that blackness is not a monolith, that there are a lot of important differences between black individuals”).

for its students the kind of education that prepares them to live in the world that we now have.” JA996; *see also* JA571–72. That is why Judge Burroughs found that it was “axiomatic” that “diversity of all sorts, including racial diversity, is an important aspect of education.” 20-1199 Pet. App. 107; *see also* 21-707 Pet. App. 11 (reviewing evidentiary support for UNC’s conclusion that “a diverse and inclusive community is a critical element for a 21st century educational institution” (internal quotation marks omitted)). It is why this Court has long held that “nothing less than the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” *Grutter*, 539 U.S. at 324 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). And it is why the *Grutter* standard remains valuable and necessary today.

B. The *Grutter* Standard Gives Universities a Practicable and Effective Means of Achieving the Benefits of Diversity.

Amici believe in *Grutter* and what it stands for. *Amici*’s admissions policies vary to some degree, but they share a deep commitment to student body diversity. Over the last several decades, *Amici* have developed and implemented admissions processes that are carefully calibrated to achieve it.

Petitioner maintains that “[u]niversities themselves do not believe in *Grutter*,” Pet. Br. at 48, as the *Grutter* standard is too “vague” or impractical to implement, *id.* at 62. That is wrong. *Amici* have successfully structured their admissions systems to incorporate the principles first enunciated in *Bakke* and affirmed in

Grutter by implementing a holistic and individualized process for evaluating applications. This process has proven practicable, consistent with Court precedent, and key to achieving the crucial goal of student body diversity.

As Justice O'Connor recognized in *Grutter*, “[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies [as articulated in *Bakke*].” *Grutter*, 539 U.S. at 323. *Amici* are no exception. By design, *Amici*’s admissions programs are “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.” *Id.* at 334 (quotation marks omitted). These admissions policies “weigh[] many other diversity factors besides race that can make a real and dispositive difference” for applicants of all races and ethnicities, “sufficiently tak[ing] into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.” *Id.* at 338–39.

To ensure that all applicants are examined on their individual merits, *Amici* engage in a holistic review that considers a wide range of material. *Amici* obtain and review extensive information regarding each applicant’s life experiences, accomplishments, talents, interests, and goals, to assess both the applicant’s individual academic potential and the contribution the applicant may make to the class as a whole. For example, *Amici* consider applicants’ socioeconomic background, parental education level, and whether languages other than English are spoken in the home. They consider

applicants' educational experiences, valuing the diverse perspectives of students who have graduated from religious and secular schools; large and small schools; public and independent schools; day schools, homeschools, and boarding schools. They consider prior military service. They consider applicants' demonstrated leadership skills, their recommenders' assessment of their achievements and character, and all the other intangible characteristics that are crucial to ascertaining how an applicant will contribute to the university community. They "consider everything." JA997; *see also, e.g.*, JA580–81, 1090; 21-707 JA699.

This individualized and holistic consideration of each applicant allows *Amici* to evaluate *all of the characteristics* of the applicant that may affect their contribution to campus diversity. As such, the process has a built-in limiting principle: race and ethnicity alone may *never* be grounds for admission. In both ambition and operation, *Amici*'s individualized and holistic review adheres to the Supreme Court's directive that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Fisher I*, 570 U.S. at 309 (quoting *Grutter*, 539 U.S. at 337).

Amici's admissions processes treat the racial and ethnic backgrounds of applicants as "one factor among many." *Grutter*, 539 U.S. at 340.¹¹ No seats in the class

¹¹ Although Petitioner's complaint against Harvard asserts that Caltech does not consider race in admissions, JA413 ¶ 240, that assertion is unsupported and incorrect. *See also* Br. for Southeastern Legal Foundation as *Amicus Curiae* Supporting

are reserved for applicants of any race or ethnic background, nor are applicants of any race or ethnic background limited to a certain number of places. Instead, *Amici* consider applicants' race and ethnicity with extraordinary care and only in the most limited fashion necessary to ensure a meaningful contribution to the diversity of the student body. Through their holistic and individualized review processes, *Amici* have continued to strive for—and develop—student body diversity that “encompasses a ... broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.).

Student life on *Amici*'s campuses is a testament to the efficacy of their holistic admissions review. Contrary to Petitioner's assertion that students since *Grutter* “feel far less comfortable expressing minority viewpoints on campus,” there are few places in this country that are more diverse or place greater value on expression of diverse viewpoints than *Amici*'s campuses. *Amici*'s student groups are replete with racial diversity. *Amici*'s math clubs, sports teams, music groups, and dramatic ensembles are diverse racially and otherwise—and the students are better off for it. *Amici*'s communities actively embrace meaningful dialogue in and out of the classroom regarding all issues,

Petitioner at 2 (making same assertion). Like other *amici* represented here, Caltech considers applicants' race and ethnicity as part of an individualized and holistic review process.

no matter how contentious.¹² Petitioner’s blinkered view of campus life ignores the reality of the student experience.

Amici’s policies, inspired by the Harvard Plan first extolled by Justice Powell in *Bakke* and adopted by the Court as constitutionally permissible in *Grutter*, are narrowly tailored to the compelling interest of enrolling a diverse student body. Any consideration of race in *Amici’s* admissions is thoughtful, limited, and based on a holistic review of the applicant, just as *Grutter* envisions. This Court has long held that universities like *Amici* are entitled to consider race and ethnicity as one factor among many in the admissions process; it should adhere to those rulings.

¹² See, e.g., *History: The Barkley Forum for Debate, Deliberation, and Dialogue*, Emory Univ., <https://bit.ly/3zarWYx> (last visited July 26, 2022) (“[T]he Barkley Forum has expanded its mission to include more opportunities for students on Emory’s campus to be involved in dialogues on difficult topics, a practice that harkens back to the founding of debate at Emory in 1837.”); The American Whig-Cliosophic Society, *Who We Are*, Princeton Univ., <https://bit.ly/3PWTJm6> (last visited July 26, 2022) (“Founded in 1765 by students like James Madison and Aaron Burr, the American Whig-Cliosophic Society at Princeton University is the oldest collegiate debate and political union in the United States.”); *Yale Political Union*, Yale Univ., <https://bit.ly/3PG1FZg> (last visited July 26, 2022) (“The Union is a non-partisan debate forum dedicated to showcasing voices from across the political spectrum, emphasizing diversity of ideology and background.”).

**C. Petitioner’s Race-Neutral Proposals
Would Not Serve *Amici*’s Interest in
Diversity.**

Amici’s experience has demonstrated that the optimal means of creating a diverse student body—and thereby achieving *Amici*’s educational objectives— involves a limited consideration of race and ethnicity in admissions. By the same token, using exclusively race-neutral approaches to admissions decisions would undercut *Amici*’s efforts to attain “the benefits of diversity” they seek. *Fisher II*, 579 U.S. at 385. Petitioner argues that “real diversity” would not decline under its preferred admissions system, Pet. Br. at 70, but Petitioner is wrong.

The record bears this out. As the district court concluded in the Harvard trial, the evidence before the court “convincingly establish[ed] that no workable race-neutral alternatives [would yield] the level of racial diversity ... necessary” to achieve Harvard’s educational goals. 20-1199 Pet. App. 209. In particular, the record showed that the race-neutral alternatives proposed by Petitioner would lead to a near 33% reduction in the number of African American students admitted, absent other admissions policy changes that would “result in a significant decline in the strength of Harvard’s admitted classes across multiple dimensions, including its potential for academic and scholarly achievement.” *Id.* at 220.

Those findings are consistent with the experiences of other institutions that have adopted race-blind admissions. Petitioner cites the University of California as a model to emulate, *see* Pet. Br. 70, but since the UC

System was barred by state referendum from considering race in admissions starting with the 1998 freshman class, many of its campuses have *not* been able to attain the levels of student body diversity its educational leaders believe are needed to meaningfully enrich students' educational experiences.¹³ As the President and the Chancellors of the University of California explained in an *amicus* brief filed in *Fisher II*, despite the implementation of numerous race-neutral approaches aimed at enhancing diversity, “the enrollment rates for underrepresented minorities still have not rebounded at UC’s most selective campuses.”¹⁴ The University’s most recent Annual Accountability Report shows that this problem has persisted.¹⁵

The harms of a “race-blind” review process cannot be fully captured by the numbers. Indeed, a “race-blind” version of holistic review would not be a holistic review at all. The central purpose of *Amici’s* approach to admissions is to understand each applicant as a multifaceted individual, with a unique set of talents, experiences, and opinions. It would be entirely

¹³ See Br. of the President and the Chancellors of the Univ. of Cal. As *Amici Curiae* in Supp. of Resp’ts at 19–22, 30, *Fisher II*, 579 U.S. 365 (2016) (No. 14-981), 2015 WL 6735847.

¹⁴ *Id.* at 22; see also Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 Lewis & Clark L. Rev. 599, 636 & n.192 (2008) (collecting studies showing that reliance on socioeconomic status as an admissions factor alone cannot produce racial diversity).

¹⁵ See Univ. of Cal., *Annual Accountability Report 2020* at 113, <https://bit.ly/3BgyDuQ> (last visited July 26, 2022).

antithetical to this approach to ignore a facet of an applicant's identity that, for countless individuals, has shaped experiences and outlooks. Contrary to Petitioner's suggestion, *see* Pet. Br. 82, the effect of race and ethnicity on students' experiences and outlooks cannot be conflated with that of their socioeconomic status.¹⁶ To state the obvious, a person's race or ethnicity can play a formative role in forging personal identity. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("The enduring hope is that race should not matter; the reality is that too often it does."). A categorical bar on its consideration would severely hinder *Amici's* ability to consider each individual applicant on their own terms.

For decades, *Amici* have informed prospective students that they would carefully consider each applicant as an individual. Some applicants' racial and ethnic identities feature prominently in the way they

¹⁶ 21-707 JA767 (former student testifying that "there are distinct experiences about your race or ethnicity that are different from class, because I could walk around UNC and maybe not visibly be low income. ... [M]y race, my ethnicity, my brown skin is not something that I can hide. It is part of my identity that everyone sees and that everyone makes -- has their own prejudices and makes their own assumptions about me and the way I look, and so it's -- they're different."); 21-707 JA 951-52 (former student testifying that "if I'm running down the neighborhood and, you know, I don't have my cell phone on, whatever, people don't see me as someone that is relatively affluent; they see me as a black man. ... I don't really think that—socioeconomic status [and] race[,] in terms of how I interact with the world and perceive the world, ... I don't think they're very connected").

represent themselves and describe their experiences, their academic interests, and their future goals. Other applicants describe themselves in ways that emphasize non-racial factors, such as the challenges or privileges arising from their socioeconomic background or unique lessons learned growing up in a particular part of the world. Universities like *Amici* should not be ordered to blind themselves to—and thus wholly ignore—factors that some applicants highlight in their submissions while paying close attention to factors that others wish to emphasize.

Such a system would put those for whom race or ethnicity is especially formative at a distinct disadvantage. Unlike applicants whose identities have been affected mainly by their socioeconomic or geographic circumstances, applicants whose formative experiences relate to race or ethnicity would be denied the opportunity to convey their full, authentic selves when competing for admission to selective schools like *Amici*. Blindness to certain applicants' formative experiences inevitably results in blindness to the full strength of those prospective students' applications. *See, e.g.*, JA907 (testimony of former student) (“Q: How could you have fully shared about your ambitions without any reference to your ethn racial identity? A: I could not have done that. All of my life’s ambitions revolve around communities of color and my ethn racial identity.”); JA937 (testimony of former student that “if race were to have been removed and I couldn’t have talked about that, I don’t know what I would have written about because all of my experiences are informed by the fact that I am Vietnamese American”);

21-707 JA951 (“I would say every experience that I had prior to college was informed by the color of my skin, and so my perspective going into college was similarly so.”).

Petitioner offers no workable solution. Under Petitioner’s theory, universities like *Amici* need not be concerned about turning a blind eye to race and ethnicity because they will remain able to “focus on actual disadvantage, rather than using race as a proxy for it.” Pet. Br. 57. In reality, however, such a system would cause massive confusion among applicants, guidance counselors, and admissions officers about where to draw the line. Should an applicant avoid writing about challenges she faced as the only Asian-American member of her high school drama group? What about a white applicant’s experience of recognizing for the first time that wearing the jersey of his favorite sports team alienates his Native American classmate?

Predictably, at the University of California’s most selective campuses, the burdens of mandated race-blind admissions weigh most heavily on underrepresented minority students. A survey administered by the University showed that African-American and Latinx students at those campuses—the least racially diverse in the UC System—“report[ed] feeling that students of their race are not respected” at “substantially higher percentages” than at UC’s most diverse campuses. Br. of the President and the Chancellors of the Univ. of Cal. as *Amici Curiae* in Supp. of Resp’ts at 31–32, *Fisher II*, 579 U.S. 365 (2016) (No. 14-981), 2015 WL 6735847; see also Adriane Kayoko Peralta, *A Market Analysis of Race-Conscious University Admissions for Students of Color*, 93 Denv. L. Rev. 173, 217 (2015) (“[T]he hidden

costs of racial isolation ... are greater in race-neutral settings because there are fewer students of color. Considering all of these factors, a student of color has a better chance at thriving at a race-conscious college.”).

Petitioner’s proposed alternatives would fundamentally reduce the quality of *Amici*’s educational offerings. Petitioner’s desired educational system is a manifestly inferior simulacrum of a meaningful education: in Petitioner’s ideal world, schools would provide a more homogenous student body their dose of “diversity” by “making students take a class on the topic.” Pet. Br. 55; *see, e.g.*, JA820–21 (Harvard dean testifying that “[i]t’s one thing to read about something in a book. It’s much more impactful and a better learning environment if the students can debate it from their own perspectives.”). Petitioner deems this “alternative” sufficient to remedy any loss of “cross-racial understanding” caused by eliminating race-conscious admissions—as if exposure to and engagement with peers’ lived experiences means nothing. Pet. Br. 55. To *Amici*, it is painfully clear that Petitioner’s desired approach, as well as others proposed, would hinder them from achieving their educational missions.

Amici take race into consideration among other factors because they recognize “the reality is that” “race [does] matter[.]” *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment); *accord Grutter*, 539 U.S. at 332–33. This is undisputed, even by Petitioner. Pet. Br. 49 (“No one is under the illusion that we live in a post-racial society, or that racial discrimination is a thing of the past.”). The hundreds of thousands of admissions applications *Amici*

review each year reflect this reality. As applicants' submissions show, race and ethnic background sometimes do significantly impact experiences, perspectives, and areas of accomplishment. *See, e.g.*, JA1090–91 (testimony of Harvard President). Under *Amici*'s admissions policies, no prospective student is forced to address, or precluded from addressing, the role race or ethnicity has played in their lives. Instead, *Amici* let prospective students decide whether and how their race features in their applications. *Amici* then consider race and ethnicity in conjunction with the many other factors that may contribute to applicants' identities and future contributions to the university environment.

In sum, reliance on race-neutral measures alone is a poor substitute for individualized, holistic review that takes account of race and ethnicity in the limited manner *Grutter* allows. *Amici* share the hope that someday, "progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring). But that day is not today. Consistent with the district courts' conclusions in the trials below, no race-neutral alternative presently can fully replace race-conscious individualized and holistic review to obtain the diverse student body *Amici* have found essential to fulfilling their missions.

II. Prohibiting Race-Conscious Admissions Would Effect an Extraordinary Intrusion into the Operations of Private Universities Such As *Amici*.

In seeking a complete prohibition on consideration of race or ethnicity in admissions, Petitioner asks this Court to effect an extraordinary intrusion into *Amici*'s conduct of their academic affairs. Such an intrusion would break with this Court's long tradition of granting universities wide latitude in their educational judgments—a tradition that protects universities' own constitutional interests as well as the status of American higher education as the envy of the world.

A. This Court Has Long Recognized That Granting Universities Latitude in Their Admissions Decision-Making Protects Important First Amendment Values.

This Court has repeatedly affirmed universities' freedom in defining "characteristics, like student body diversity, that are central to [their] identity and educational mission." *Fisher II*, 579 U.S. at 388. As Justice Kennedy put it, "precedent support[s] the proposition that First Amendment interests give universities particular latitude in defining diversity." *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring in part and concurring in the judgment).

This latitude reflects important constitutional principles. Indeed, *Grutter*'s recognition of the "constitutional dimension, grounded in the First Amendment," of universities' autonomy is nothing new. *Grutter*, 539 U.S. at 329. "Academic freedom, though not

a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.” *Bakke*, 438 U.S. at 312 (opinion of Powell, J.); cf. *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident.”). This tradition began long before *Grutter*, see, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (observing that “academic freedom” is “a special concern of the First Amendment”), and has persisted long after, see, e.g., *Fisher I*, 570 U.S. at 308 (same).

Universities’ decisions regarding their own admission standards fit squarely within the scope of constitutionally protected academic freedom this Court has recognized for generations. “[T]o determine for itself on academic grounds ... who may be admitted to study” is one of the “*essential freedoms of a university.*” *Sweezy*, 354 U.S. at 263 (emphasis added) (Frankfurter, J., concurring in the judgment); see *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (“The freedom of a university to make its own judgments as to education includes the selection of its student body.”). *Amici’s* freedom to retain their carefully considered admissions policies is not merely a matter of convenience or policy preference; it is a matter of constitutional importance.

While this Court has repeatedly recognized universities’ First Amendment interest in educational autonomy, it has not had occasion to thoroughly examine that interest or how it interacts with countervailing rights under the Equal Protection Clause. But if this Court categorically forbids universities from considering race in admissions—no matter how carefully

calibrated the admissions system, no matter how small a factor race would play, and no matter how critical the university deems consideration of race to the fulfillment of its academic objectives—then this Court *necessarily* would be passing upon the strength of universities’ First Amendment interest. And it would be doing so without the benefit of full briefing on the subject. *See* Pet. Br. 55–56 (addressing universities’ First Amendment rights in a single paragraph of its argument).

Amici recognize that their First Amendment rights are not absolute, but those rights are nonetheless too important to disregard. *Grutter* reflects this understanding, whereas Petitioner seeks a result that discounts *Amici*’s constitutional rights entirely. In doing so, Petitioner advocates for groundbreaking precedent that would inform decision-making in cases where antidiscrimination principles butt up against other First Amendment freedoms. Petitioner offers no limiting principle that would prevent judicial indifference to First Amendment rights in the context of academic freedom from extending to freedoms involving religious exercise and political expression, for example.

“First Amendment freedoms need breathing space to survive,” *Keyishian*, 385 U.S. at 603–04 (quotation marks omitted), and “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Yet Petitioner invites this Court to stifle *Amici*’s First Amendment freedoms without any consideration of either the First Amendment or *Amici*’s individual admissions schemes at all. This Court should decline that invitation. *Cf.*

Sweezy, 354 U.S. at 250 (warning that the “government should be extremely reticent to tread” into “the areas of academic freedom”).

B. Universities’ Freedom to Make Academic Judgments Enables *Amici* to Remain at the Forefront of Higher Education.

This Court’s reluctance to second-guess universities’ academic judgments is of practical importance as well. It offers *Amici* the flexibility to “provide that atmosphere which is most conducive to speculation, experiment, and creation” and thus remain competitive in the marketplace for the very best students, researchers, and professors from around the world. *Grutter*, 539 U.S. at 363 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the judgment)).

Amici have carefully considered how best to create such an atmosphere, and have concluded that a student body that is diverse in perspectives, viewpoints, backgrounds, and experiences is necessary. *Amici* have also carefully considered how best to select a student body that is diverse in perspectives, viewpoints, backgrounds, and experiences, and have concluded that blinding themselves to applicants’ racial and ethnic affiliations would create a significant impediment to achieving that goal. This critical educational judgment underlies *Amici*’s admissions policies. And it has proven successful: with the latitude to pursue a racially and ethnically diverse student body, *Amici* have created an atmosphere of innovation that positively contributes to the nation and the world by fueling new discoveries and insights. *See supra* 11-12.

Of course, *Amici's* educational judgments are not immutable. *Amici* must retain the flexibility for their decision-making to evolve as our society evolves. But for this moment in our history, *Amici* have made the inherently academic determination that race-blind admissions would impede their efforts to offer the educational experience most aligned with their missions. This is precisely the type of "legitimate academic judgment[]" that "courts have stressed the importance of avoiding second-guessing." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990); *cf. Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (noting that courts should offer "great respect for the faculty's professional judgment" when evaluating educational decisions).

It would be an extraordinary and detrimental infringement on *Amici's* academic freedom for this Court to blindfold universities to any part of their applicants' submissions, including race or ethnicity. This Court has consistently refused to "retreat from [its] principle of respect for legitimate academic decisionmaking." *Univ. of Pa.*, 493 U.S. at 199 (emphasis omitted). It should not retreat now and impose an unduly constrictive rule on universities like *Amici*.

CONCLUSION

The Court should affirm that institutions of higher education may employ holistic admissions programs that are not blind to an applicant's race or ethnicity.

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