

Nos. 20-1199 & 21-707

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IN THE

**Supreme Court of the United States**

STUDENTS FOR FAIR ADMISSIONS, INC.,  
*Petitioner,*

*v.*

PRESIDENT & FELLOWS OF HARVARD COLLEGE,  
*Respondent.*

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STUDENTS FOR FAIR ADMISSIONS, INC.,  
*Petitioner,*

*v.*

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

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

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**BRIEF FOR AMICI CURIAE HBCU LEADERS  
AND NATIONAL ASSOCIATION FOR EQUAL  
OPPORTUNITY IN HIGHER EDUCATION IN  
SUPPORT OF RESPONDENTS**

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**INTEREST OF *AMICI CURIAE***<sup>1</sup>

*Amici curiae* are leaders of Historically Black Colleges and Universities (“HBCUs”), as well as the National Association for Equal Opportunity in Higher Education (NAFEO).

Launched in 1969 to be “the voice for blacks in higher education,” NAFEO is the national membership association of the nation’s 106 HBCUs and roughly 80 Predominantly Black Institutions (PBIs). NAFEO’s members enroll more than 700,000 students, employ 720,000 faculty, and boast over 7 million alumni worldwide. NAFEO is led by President and CEO Lezli Baskerville, a Harvard University Advanced Leadership Fellow and Howard University School of Law Distinguished Alumna.

The HBCU leaders who join NAFEO in submitting this brief include:

Danielle R. Holley, Dean and Professor of Law,  
Howard University School of Law;

Dennis J. Shields, President of the Southern  
University System and Chancellor of the Southern  
University and A & M College;

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<sup>1</sup> All parties filed blanket consents to the filing of all *amicus curiae* briefs. No part of this brief was authored in whole or in part by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of this brief other than *amici curiae* and their counsel.

Ronald Mason, Jr., President, University of the District of Columbia;

Twinette L. Johnson, Acting Dean and Professor of Law, University of the District of Columbia David A. Clarke School of Law;

Malik Chaka Edwards, Interim Dean and John D. Fassett Professor of Law, North Carolina Central University School of Law;

Yolanda Pierce, Dean and Professor of Divinity, Howard University School of Divinity; and

Gina Spivey-Brown, Dean of Howard University School of Nursing and Allied Health.

*Amici* submit this brief to inform the Court of how generations of discrimination still limit Black students' access to higher education—and make it imperative that universities be permitted to consider race as one of many factors in a holistic admissions review. *Amici* also submit this brief to correct Petitioners' misstatements regarding HBCUs, which deeply value diversity and also employ holistic admissions reviews, and rebut the suggestion that HBCUs' ability to provide a quality education to Black students makes it unnecessary for other institutions to pursue diversity.

## BACKGROUND

### I. **The history of anti-Black discrimination in higher education and ongoing disparities.**

“The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 400–01 (1978) (Marshall, J., separate opinion). As for the role of universities, “[t]he academy never stood apart . . . it stood beside church and state as the third pillar of a civilization built on bondage.”<sup>2</sup> Respondents exemplify such a history, in which slavery, its legacy, and anti-Black discrimination have been deeply entwined with access to the nation’s top institutions of higher education.

*The legacy of discrimination against Black students.*

Harvard University has a long history of racial discrimination, beginning with its enslavement of Black persons and continuing through its disparate treatment of Black applicants and students until relatively recently.

From Harvard’s founding, slavery was an integral part of campus life and the University’s funding. Enslaved persons “served Harvard presidents and professors and fed and cared for Harvard students”;

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<sup>2</sup> Craig Steven Wilder, *Ebony & Ivy: Race, Slavery, and the Troubled History of America’s Universities* 10 (2013).

those enslaved by Harvard’s stewards “likely served Harvard’s students and maintained its campus.”<sup>3</sup> “Through connections to multiple donors, the University had extensive financial ties to, and profited from, slavery . . . . During the first half of the 19th century, more than a third of the money donated or promised to Harvard by private individuals came from just five men who made their fortunes from slavery and slave-produced commodities.”<sup>4</sup> The University also sponsored racist academic pursuits, such as “‘race science’ and eugenics and conduct[ing] abusive ‘research,’ including the photographing of enslaved and subjugated human beings.”<sup>5</sup>

During and after slavery, Black persons were barred from the halls of most institutions of higher education. In many states, Black persons were barred from obtaining *any* education. For example, the state of North Carolina criminalized teaching enslaved persons to read and write, citing the “tendency [of literacy] to excite dissatisfaction in their minds and to produce insurrection and rebellion, to the manifest injury of the citizens of this State.” Act of 1831, ch. VI, 1831 N.C. Sess. Laws 11. The Act, which subjected violators to fines, imprisonment, and whipping, was typical of those passed in other states at the time.<sup>6</sup>

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<sup>3</sup> Harvard Radcliffe Institute, *Harvard & the Legacy of Slavery* 15 (2022), <https://legacyofslavery.harvard.edu/report>.

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.*

<sup>6</sup> Leslie H. Fishel, Jr. & Benjamin Quarles, *The Negro American: A Documentary History* 115 (1967).

Until the mid-twentieth century, the University of North Carolina prohibited the enrollment of Black students.<sup>7</sup> The prohibition was lifted only after Black prospective law students, represented by Thurgood Marshall, secured a victory in *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951). But *de facto* discrimination soon replaced *de jure* discrimination. The inaugural class of three Black students at UNC was driven out by student opposition, and “[a]ll three students went on to earn their bachelor’s degrees elsewhere.”<sup>8</sup>

Ivy League universities also discriminated against Black students, representing what has been termed the “Jim Crow North.”<sup>9</sup> “[T]he members of the Ivy League were private, elite, and unabashedly exclusive.”<sup>10</sup> The first African-American undergraduate student graduated from Harvard in 1870, but until 1970 Harvard admitted fewer than 12 Black students annually.<sup>11</sup> And exclusionary

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<sup>7</sup> Nicholas Graham, *Historic African American Enrollment at UNC*, History on the Hill, UNC University Libraries (Apr. 21, 2016), <https://blogs.lib.unc.edu/hill/2016/04/21/historic-african-american-enrollment-at-unc/>.

<sup>8</sup> Michael Beauregard, *Column: The desegregation of UNC*, The Daily Tar Heel (Feb. 16, 2022), <https://www.dailytarheel.com/article/2022/02/opinion-desegregation-unc>.

<sup>9</sup> Stefan M. Bradley, *Upending the Ivory Tower: Civil Rights, Black Power, and the Ivy League* 23 (2018).

<sup>10</sup> *Id.* at 5.

<sup>11</sup> Amponsah, Moore, & Strickland, *Welcome to the Harvard Black Community*, The Harvard Crimson (Sept. 11, 2017), <https://www.thecrimson.com/article/2017/9/11/welcome-black-harvard/>.

dormitory policies kept many from matriculating. “Each [Black applicant] would receive a special letter indicating room prices. But if a black student could neither ‘afford our cheapest single room in Standish’ nor ‘get any negro to room with him,’ he could not reside [at Harvard].”<sup>12</sup> Several other Ivy League universities applied similar rules into the twentieth century.<sup>13</sup>

By 1910, “only fifty-four black students (men and women) [had] graduated with their bachelor’s degrees from elite [White institutions].”<sup>14</sup> And by 1963, “the new elite was still overwhelmingly white (about 98 percent).”<sup>15</sup> In the mid-twentieth century, “[e]lite universities did much to open themselves to diverse white ethnicities and religions, but still lagged in terms of the admission of black students.”<sup>16</sup>

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<sup>12</sup> Marcia Graham Synnott, *The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970*, at 91 (2013); see also Harvard & the Legacy of Slavery, *supra* n.3 at 45-46.

<sup>13</sup> Bradley, *supra* n.9 at 6-7 (Not until the late 1960s did “white administrators finally believe[] it was important to fully integrate black students with respect to admissions, housing, and other aspects of college life”).

<sup>14</sup> Bradley, *supra* n.9 at 26.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> *Id.*



*Segregation and persistent inequities also reduce the Black applicant pool.*

Ongoing *de facto* segregation, alongside the systemic disparities that inevitably flow from centuries of *de jure* and *de facto* discrimination, reduced the Black college applicant pool even *after* most overtly discriminatory admissions policies ended in the mid-1950s and 1960s.

Slavery endured on American soil for more than 250 years and has been legally dismantled for less than 160 years.<sup>17</sup> In the Emancipation Proclamation's wake, the country struggled to adopt measures to provide equality to Black persons—and then quickly abandoned them.<sup>18</sup> States and private institutions wielded state-sanctioned discrimination via Jim Crow laws and practices, subjugating Black citizens. *Plessy v. Ferguson*, 163 U.S. 537 (1896), legalized discrimination until this Court rectified its error in *Brown v. Board of Education*, 347 U.S. 483 (1954).

But school segregation did not simply disappear; it continued, as states resisted *Brown's* implementation. “White opposition to racially ‘mixed’ schools, born of racist attitudes about Black ability and character promoted by slaveholders, blocked equal access to education.”<sup>19</sup> Thus, “[s]egregated, under-resourced, and inferior elementary and secondary schools became the norm for African

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<sup>17</sup> Michael A. Lawrence, *The Thirteenth Amendment as Basis for Racial Truth & Reconciliation*, 62 Ariz. L. Rev. 637, 669 (2020).

<sup>18</sup> *Id.* at 655.

<sup>19</sup> *Harvard & the Legacy of Slavery*, *supra* n.3 at 9.

Americans.”<sup>20</sup> Both Massachusetts and North Carolina participated in primary and secondary school segregation long after *Brown*. Massachusetts did not formally outlaw segregation in schools until 1965.<sup>21</sup> Even then, Boston’s schools remained segregated through 1974.<sup>22</sup> North Carolina implemented the Pearsall Plan, which allowed “private school tuition grants for parents whose children were assigned to a desegregated school and local referenda whereby a community could decide whether to close its schools instead of desegregating them.”<sup>23</sup> Finally, in 1969, a federal court declared the Pearsall Plan unconstitutional.<sup>24</sup>

Discriminatory housing policies also entrenched school segregation after *Brown*. Redlining, which rendered Black families ineligible for many federally-backed home loans, locked them into neighborhoods with low home values and hobbled upward mobility.<sup>25</sup> “Contemporary manifestations of [redlining], such as persistently lower home values in Black neighborhoods, directly impact local services like

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<sup>20</sup> *Id.*

<sup>21</sup> Dennis Ford Eagan, *The Past, Present, and Future of School Desegregation Law in Massachusetts*, 34 *Suffolk U. L. Rev.* 541, 543 (2001).

<sup>22</sup> *Morgan v. Hennigan*, 379 F.Supp. 410, 482 (D. Mass. 1974).

<sup>23</sup> Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 *Nw. U. L. Rev.* 92, 112 (1994).

<sup>24</sup> *Godwin v. Johnson Cnty. Bd. of Educ.*, 301 F.Supp. 1339 (E.D.N.C. 1969).

<sup>25</sup> J. Kenyon Kummings & Christopher H. Tienken, *Redlining Education*, *Kappa Delta Pi Record* 100 (2021).

schools.”<sup>26</sup> As a result, “Blacks are more likely to live in racially isolated neighborhoods that concentrate poverty, and thus circumscribe the tax bases on which school districts draw for funding.”<sup>27</sup> Differences in school funding are staggering; during the 2015-2016 school year, predominantly non-White schools received \$23 billion less than predominantly White schools.<sup>28</sup>

*De facto* school segregation persists today—and is increasing in many areas.<sup>29</sup> Between the 2008-2009 and 2019-2020 school years, intensely segregated non-White Massachusetts schools increased from 143 to 192.<sup>30</sup> In North Carolina, the number of racially and economically isolated public schools grew by 6% between the 2006-2007 and 2016-2017 school years.<sup>31</sup>

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<sup>26</sup> LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 U. Chi. L. Rev. 499, 512-13 (2022).

<sup>27</sup> Osamudia James, *Superior Status: Relational Obstacles in the Law to Racial Justice and LGBTQ Equality*, 63 B.C. L. Rev. 199, 209 (2022).

<sup>28</sup> edBuild, *\$23 Billion* 2-4 (Feb. 2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

<sup>29</sup> Gary Orfield *et al.*, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* 2 (May 15, 2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

<sup>30</sup> Jack Schneider *et al.*, *School Integration in Massachusetts: Racial Diversity and State Accountability* 4, 10 (2020), [https://cecr.ed.psu.edu/sites/default/files/Demography\\_Report\\_FINAL\\_7.24.20.pdf](https://cecr.ed.psu.edu/sites/default/files/Demography_Report_FINAL_7.24.20.pdf).

<sup>31</sup> Kris Nordstrom, *Stymied by Segregation: How Integration Can Transform North Carolina Schools and the Lives of Its Students*,

Persistent and increasing school segregation harms Black students' educational opportunities. Segregated schools offer fewer opportunities that are key to success in today's overcompetitive college admissions environments, including Advanced Placement programs, gifted programs, and high-level math and science classes.<sup>32</sup> The substandard educational opportunities in segregated schools decrease college matriculation. "[S]tudents who attend a more racially segregated school have a lower probability of later enrolling in a four-year college."<sup>33</sup> One study found that offers to minority students to transfer from segregated, low-income schools to higher-income, predominantly White schools "increase[d] the probability of [their] attending college by 8 percentage points."<sup>34</sup> Thus, ongoing school segregation, even today, continues to shrink the Black applicant pool for higher education.

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Education & Law Project 1, 5 (2018), <https://www.ncjustice.org/wp-content/uploads/2018/11/STYMIE-D-BY-SEGREGATION-Integration-can-Transform-NC-FINAL-web.pdf>.

<sup>32</sup> Chandi Wagner, *School Segregation: Then and Now* 3, Center for Public Education (January 2017), <https://files.eric.ed.gov/fulltext/ED608823.pdf>.

<sup>33</sup> Jason Cook, *Race-Blind Admissions, School Segregation, and Student Outcomes: Evidence from Race-Blind Magnet School Lotteries*, IZA Institute of Labor Economics, DP No. 11909 3 (Oct. 2018), <https://docs.iza.org/dp11909.pdf>.

<sup>34</sup> Peter Bergman, *The Risks and Benefits of School Integration for Participating Students: Evidence from a Randomized Desegregation Program*, IZA Institute of Labor Economics, DP No. 11602 17 (June 2018), <https://docs.iza.org/dp11602.pdf>.

*Black student communities are essential for individual Black students to thrive at historically White institutions.*

In order for Black students who overcome these structural inequities to thrive at historically White institutions, it is critical that they have the support of a Black student community. Some Black students accepted to Ivy League schools report that that lack of community drove them to choose an HBCU instead.<sup>35</sup> One student recounted: “It’s impossible to figure [out who you are] in a space where you not only feel like you have to assimilate to fit in[ ] . . . but you have to prove that your existence has value.”<sup>36</sup>

Research supports the students’ skepticism. Black students at predominantly White institutions “experience more racial conflict, more pressure to conform to stereotypes, and less equitable treatment by faculty, staff, and teaching assistants than their White counterparts[.]”<sup>37</sup> They also “experience stress related to acceptance or fitting in, cultural conflict, . . . lack of resources, mistrust of the institution, racism, social support, and stigma[.]”<sup>38</sup> However, increasing representation of Black students on campus leads to

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<sup>35</sup> Erica L. Green, *Why Students Are Choosing H.B.C.U.s: ‘4 Years Being Seen as Family’*, The N.Y. Times (June 11, 2022), <https://www.nytimes.com/2022/06/11/us/hbcu-enrollment-black-students.html>.

<sup>36</sup> *Id.*

<sup>37</sup> Tabitha Grier-Reed, *The African American Student Network: An Informal Networking Group as a Therapeutic Intervention for Black College Students on a Predominantly White Campus*, J. Black Psychology 39(2), 169, 170 (2013).

<sup>38</sup> *Id.*

better educational experiences and outcomes.<sup>39</sup> As one UNC alumna testified, when more students of color were present, it “made [her] more confident” and enabled her “to share what [she] thought was important to the course discussion regardless of who else was in the room.” No. 21-1199, JA1010.

Recent, news-grabbing campus events underscore Black applicants’ concerns over predominantly White institutions’ campus climates. Just this May, Stanford students found a noose hanging outside a dormitory, the third such incident in as many years.<sup>40</sup> In Summer 2020, thousands of Harvard students received an email invoking lynching and racist epithets.<sup>41</sup> Black UNC students have been called racial epithets and told “no slaves’ were allowed in a frat house.”<sup>42</sup> These events highlight the need for communities of Black students on historically White campuses, both to bring the benefits of diversity to the

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<sup>39</sup> See No. 21-707, JA1625 (expert report describing study that “found that the level at which students of one’s own racial group were represented on campus impacted academic and social integration, academic achievement, and persistence”).

<sup>40</sup> Jonathan Franklin, *Stanford University investigates a noose found in a campus tree as a hate crime*, N.P.R. (May 10, 2022), <https://www.npr.org/2022/05/10/1097980610/stanford-university-noose-hate-crime>.

<sup>41</sup> Camille G. Caldera *et al.*, *FBI Launches Investigation into Racist Email Sent to Thousands of Harvard Affiliates*, *The Harvard Crimson* (June 22, 2020), <https://www.thecrimson.com/article/2020/6/22/harvard-racist-email-equity-prime-mortgage/>.

<sup>42</sup> Benjamin Wermund, *UNC students, alumni recount racial slurs and tensions on campus*, *Politico* (Mar. 6, 2019), <https://www.politico.com/story/2019/03/06/unc-race-admissions-2800907>.

broader student body and so that Black students feel safe and supported.

## **II. HBCUs' history of providing opportunities for black students.**

### *The Founding of HBCUs.*

“[F]ounded on the premise that everyone deserves an opportunity to pursue higher education,” HBCUs were created specifically to educate Black students, who were barred from entry to almost all other universities and colleges.<sup>43</sup>

America’s first Black college, initially called the African Institute and later renamed Cheyney University, was opened in Philadelphia in 1837 by a Quaker philanthropist to train teachers and trade and agricultural workers.<sup>44</sup> Additional HBCUs were established after the Civil War to serve newly-freed Black Americans. By 1890, over 200 HBCUs had been founded.<sup>45</sup> These schools were created through the combined efforts of Black churches, religious societies, Northern philanthropists, and the Federal Government’s Freedmen’s Bureau.<sup>46</sup> While those who

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<sup>43</sup> Ronyelle Bertrand Ricard & M. Christopher Brown II, *Ebony Towers in Higher Education: The Evolution, Mission, and Presidency of Historically Black Colleges and Universities* 15 (2008).

<sup>44</sup> *The First Of Its Kind*, Cheyney University, <https://cheyney.edu/who-we-are/the-first-hbcu/>.

<sup>45</sup> M. Christopher Brown II, *The Declining Significance of Historically Black Colleges and Universities*, 82 *J. Negro Edu.*, 1, 8 (2013).

<sup>46</sup> *5 Things To Know: HBCU Edition*, National Museum of African American History & Culture (Oct. 1, 2019),

founded and funded HBCUs sought to provide educational opportunities for Black students, many of them also were motivated by self-interest, seeking to both Christianize Black Americans and train them for industrial enterprises.<sup>47</sup>

In 1890, Congress passed the Second Morrill Act, which required states with segregated higher education systems to provide land grants and funding to non-White colleges and universities.<sup>48</sup> The Act declared that these institutions would receive an appropriation from the federal government as well as a one-to-one match from the state government—although many states refused to provide funding.<sup>49</sup> While unintentional, the Second Morrill Act “cemented” segregation and “formalized the manifestation of [ ]separate but unequal[ ] in higher education.”<sup>50</sup>

Until the mid-1960s, more than 90% of Black students enrolled in institutions of higher education

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<https://nmaahc.si.edu/explore/stories/5-things-know-hbcu-edition>.

<sup>47</sup> See Marybeth Gasman, *The Changing Face of Historically Black Colleges and Universities* 5, Penn Center for Minority Serving Institutions (2013),

[https://repository.upenn.edu/gse\\_pubs/335](https://repository.upenn.edu/gse_pubs/335); Marybeth Gasman, *Envisioning Black Colleges: A History of the United Negro College Fund* 13 (2007) (“The funding system created by . . . industrial moguls showed a strong tendency to control black education for their own benefit.”).

<sup>48</sup> Brown, *supra* n.45 at 8.

<sup>49</sup> Denise A. Smith, *Achieving Financial Equity and Justice for HBCUs* 4, The Century Foundation (Sept. 14, 2021).

<sup>50</sup> Brown, *supra* n.45 at 9.



matriculated at HBCUs.<sup>51</sup> Black students' professional options remained limited, however. According to a 1915 survey, there were approximately two dozen Black institutions of higher education in the United States, but Howard University was one of only three at which Black students could study medicine, dentistry, or pharmacy, and the only one with a law school.<sup>52</sup>

Though HBCUs differ from each other in a multitude of ways, they share a common mission to empower Black Americans and “uplift[] the condition of the Black community.”<sup>53</sup> Throughout their shared history, the schools have developed role models for Black youth, fostered expertise in educating underprepared students, trained a generation of Black leaders, and have served “as centers of black culture.”<sup>54</sup> As Justice Thomas explained in *United States v. Fordice*, HBCUs “have succeeded in part because of their distinctive histories and traditions; for many, historically black colleges have become a symbol of the highest attainments of black culture.” 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (internal quotation marks, citation omitted).

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<sup>51</sup> Mikyong Minsun Kim & Clifton F. Conrad, *The Impact of Historically Black Colleges and Universities on the Academic Success of African-American Students*, 47 *Research in Higher Education* 399 (2006).

<sup>52</sup> Susan T. Hill, *The Traditionally Black Institutions of Higher Education 1860 to 1982*, National Center for Education Statistics 5 (1984).

<sup>53</sup> Ricard & Brown, *supra* n.43, 9.

<sup>54</sup> Hill, *supra* n.52 at 41.

*The Disparate Funding of HBCUs.*

HBCUs provide an exceptional education to many Black students, but cannot fill the gaps left by other institutions' failures to matriculate diverse classes. The "dominant challenge" that HBCUs faced historically—and continue to face today—is underfunding.<sup>55</sup> By the end of the nineteenth century, private Black colleges had exhausted funding from missionaries.<sup>56</sup> White northern industrial philanthropy emerged as a funding source, with the General Education Board (GEB), a conglomeration of philanthropists, giving \$63 million to Black colleges between 1903 and 1964.<sup>57</sup> Though significant, this was only about one-fifth of what GEB gave to predominantly White institutions.<sup>58</sup> Black colleges also enrolled many students who could not afford to pay tuition.<sup>59</sup> By the early 1940s, HBCUs were running at deficits, with many unable to keep up with their operating costs.<sup>60</sup>

Public funding has disproportionately benefitted predominantly White institutions. Though the 1944 GI Bill expanded access to higher education to veterans and led to increased enrollments at HBCUs, HBCUs lacked state support to expand their campus infrastructure, housing, faculty and staff to serve

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<sup>55</sup> Ricard & Brown *supra* n.43, at 87.

<sup>56</sup> Gasman, *Envisioning Black Colleges*, *supra* n.47 at 13.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Smith, *supra* n. 49 at 5.

<sup>60</sup> Gasman, *Envisioning Black Colleges*, *supra* n. 47 at 20.

these students.<sup>61</sup> As a result, about 20,000 Black veterans were turned away from southern Black colleges—double the rate at other colleges.<sup>62</sup> It was not until 1986 that Congress attempted to address the financial needs of HBCUs through amendments to the 1965 Higher Education Act, providing funding for schools that met its definition of HBCUs.<sup>63</sup> Yet inequity persisted, and the past decades have seen a decline in federal support, with private HBCUs seeing a 42% reduction in federal funding between 2003 and 2015.<sup>64</sup>

Decades of underfunding have put today's HBCUs at a significant disadvantage compared to historically White institutions. In 2020, the 10 largest HBCU endowments totaled \$2 billion, compared with \$200 billion for the top 10 predominantly White institutions.<sup>65</sup> While Harvard's endowment for the 2021 fiscal year was \$53.2 billion, Howard's endowment was \$712.5 million—75 times less.<sup>66</sup>

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<sup>61</sup> Smith, *supra* n.49 at 4-5.

<sup>62</sup> *Id.* at 5.

<sup>63</sup> Michael Arzate, *Educating African Americans: A Brief Look into Historically Black Colleges in America*, National Archives: Rediscovering Black History (Oct. 22, 2013), <https://rediscovering-black-history.blogs.archives.gov/2013/10/22/educating-african-americans-a-brief-look-into-historically-black-colleges-in-america/>.

<sup>64</sup> Smith, *supra* n. 49 at 6.

<sup>65</sup> Green, *Why Students Are Choosing H.B.C.U.s*, *supra* n.35.

<sup>66</sup> *How Harvard could really help historically Black colleges*, Tampa Bay Times Editorial Board, Tampa Bay Times (May 26,

### III. HBCUs' ongoing role in the pursuit of educational equality and diversity.

Despite their comparative lack of funding, HBCUs continue to play an important role in preparing Black students to enter professional life, and at the highest levels. Today's HBCUs provide not only opportunity and education to a diverse student body, they also provide a vital source of diverse candidates for graduate and professional schools, adding to the pipeline of talent into the higher education ecosystem.

HBCUs have educated 80% of the nation's Black judges; half of its Black doctors, and lawyers; and 40% of the Black Members of Congress and engineers.<sup>67</sup> While HBCUs make up only 3% of the colleges and universities in the United States, HBCUs enroll 10% of all Black students and produce almost 20% of all Black college graduates.<sup>68</sup> Since the early 2000s, Howard University has sent at least as many Black students to science and engineering Ph.D. programs as Stanford, M.I.T., Harvard and Yale *combined*.<sup>69</sup>

HBCUs' nurturing mission and growing visibility have drawn a new wave of elite, highly competitive students.<sup>70</sup> Top-tier HBCUs "are increasingly becoming the first choice for some of the nation's most

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2022); *see also* Harvard University, Endowment <https://www.harvard.edu/about/endowment/>.

<sup>67</sup> Green, *supra* n.35.

<sup>68</sup> *The Numbers Don't Lie: HBCUs Are Changing the College Landscape*, UNCF, <https://uncf.org/the-latest/the-numbers-dont-lie-hbcus-are-changing-the-college-landscape>.

<sup>69</sup> Green, *supra* n.35.

<sup>70</sup> *Id.*

sought-after talent, according to interviews with dozens of students, guidance counselors, admissions advisers and college officials across the country.”<sup>71</sup>

Like Respondents, HBCUs value diversity and pursue it through holistic admissions processes.<sup>72</sup> For example, Howard School of Law notes on its Admissions page that while “poised to remain the flagship in producing attorneys of color, we seek to share the educational experience and richness that this institution offers with ethnically and culturally diverse individuals. Our approximately 450 students are comprised of people from all walks of life . . . from almost every US state and many foreign nations.”<sup>73</sup>

The demographic breakdowns of students at HBCUs vary widely from school to school, but many are racially diverse.<sup>74</sup> For example, Bluefield State University in West Virginia is an HBCU, but over 80% of its students are White.<sup>75</sup> At Xavier University of Louisiana, one in five students are not Black.<sup>76</sup> Asian American and Latinx enrollment at HBCUs

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<sup>71</sup> *Id.*

<sup>72</sup> *E.g.*, Spelman College, *Admissions* (“Our Board of Admission completes a holistic review considering academic achievement, leadership development, community service, extracurricular activities, and personal essay among other factors.”), <https://www.spelman.edu/admissions/frequently-asked-questions>.

<sup>73</sup> Howard University School of Law, *Admissions*, <http://law.howard.edu/content/admissions>.

<sup>74</sup> *Debunking Common Myths About HBCUs* (Sept. 30, 2021) <https://www.bestcolleges.com/resources/hbcu/common-myths/>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

has increased significantly in recent years.<sup>77</sup> And while significant numbers of Black students matriculate at many HBCUs, their holistic admissions approaches ensure that there is intra-racial diversity as well.

HBCUs are committed to socio-economic diversity, disproportionately enrolling low-income, first-generation students.<sup>78</sup> More than 75% of students at HBCUs rely on Pell Grants,<sup>79</sup> which are provided to students who demonstrate “exceptional financial need.”<sup>80</sup> HBCUs also work to minimize the financial obstacles their students face. On average, the cost of attendance at an HBCU is 28% less than attending a comparable non-HBCU, and 94% of HBCU students receive some type of financial aid.<sup>81</sup>

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<sup>77</sup> Gasman, *The Changing Face of [HBCUs]*, *supra* n.47 at 6 (Latinx and Asian-American enrollment has been particularly vigorous at HBCUs in Texas).

<sup>78</sup> See Liann Herder, *UNCF Report Reveals Social Mobility Made More Possible at HBCUs*, *Diverse Issues in Higher Education* (Nov. 18, 2021) (“Nationwide, institutions admit low-income earners at a rate of 22.5% . . . HBCUs admit 51.3%”), <https://www.diverseeducation.com/institutions/hbcus/article/15281654/uncf-release-report-highlighting-the-success-of-hbcus-at-moving-students-toward-the-middle-class>.

<sup>79</sup> *About HBCUs*, Thurgood Marshall College Fund, <https://www.tmc.org/about-us/member-schools/about-hbcus/>.

<sup>80</sup> Emma Kerr, *Everything You Need to Know About the Pell Grant*, *U.S. News & World Report* (Feb. 3, 2021), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/everything-you-need-to-know-about-the-pell-grant>.

<sup>81</sup> *About HBCUs*, *supra* n.79.

Recently, HBCUs have seen an increase in both applications and admissions. Howard University’s “[u]ndergraduate enrollment climbed 26 percent between 2019 and 2021.”<sup>82</sup> This fall, South Carolina State University is welcoming one of its largest and most diverse freshman classes ever; 800 students have accepted offers of admission, double the number from last year.<sup>83</sup> Claflin University Interim Vice-President for enrollment management Reynolds Brown equates this trend to students “seeing the value in attending HBCU, both from the academic side, and from the cultural aspect of it.”<sup>84</sup>

HBCUs thus will continue to play a critically important role in educating Black students, as well as many students from other racial backgrounds. But their existence does not mean that non-HBCUs—and particularly historically White institutions with legacies of discrimination against Black students—need not consider race as one aspect of a holistic admissions review, just as many HBCUs do.

### SUMMARY OF ARGUMENT

This Court should not overrule its holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003), reaffirmed in *Fisher v. University of Texas at Austin (Fisher II)*, 579 U.S. 365 (2016), that race may be one factor in a holistic admissions process. The interest this Court

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<sup>82</sup> Green, *supra* n.35.

<sup>83</sup> Becky Budds, *Local HBCU's see increase in enrollment* (July 5, 2022), <https://www.wltx.com/article/news/local/local-hbcus-see-increase-enrollment/101-d5ad6a0b-b83e-45b3-b7cd-a9e44a839dfd>.

<sup>84</sup> *Id.*

identified in *Grutter* and reaffirmed in *Fisher II*—student body diversity—remains as compelling today. Respondents and other top schools have yet to achieve that goal and thereby enable students of all races to participate fully and equally in academic life.

*Amici* HBCUs strongly support Harvard’s and UNC’s efforts to achieve racial diversity. HBCUs also strive for diversity in their admissions processes, using similar holistic processes. Background, § III. But it is of critical importance that institutions such as Respondents, with long histories of excluding and marginalizing Black students, be permitted to consider race as one factor in a holistic review in order to ensure that their incoming classes are racially diverse and Black students can feel safe and welcome.

Contrary to Petitioners’ suggestion, the fact that HBCUs provide a high-quality education to many Black students is no reason to conclude that race-conscious admissions policies are no longer needed at institutions like Harvard and UNC. HBCUs are selective and cannot accept every student that will be excluded from other universities if race is no longer considered as part of a holistic admission process. Petitioners’ suggestion that HBCUs can do so is, in essence, a call for re-segregation in higher education.

The goal of all public and private universities should be to cultivate a diverse student body where students of all races are included and feel welcome. That goal cannot be achieved at institutions that historically discriminated against Black students unless they are permitted to consider race as one factor in a holistic admissions process.



**ARGUMENT****I. Student body diversity remains a compelling goal that many universities have yet to achieve.**

*And if the word integration means anything, this is what it means: that we, with love, shall force our brothers to see themselves as they are, to cease fleeing from reality and begin to change it. . . . [W]e can make America what America must become.*

James Baldwin, *The Fire Next Time* (1st ed. 1963).

**A. Diversity in higher education remains a compelling interest that HBCUs also pursue—but that is critical for historically White institutions.**

The attainment of a diverse student body remains as compelling an interest today as it was when this Court upheld the holistic admissions analysis in *Grutter*. That interest is particularly compelling for elite historically White institutions such as Respondents, which continue to be the most viable portals—though not the sole portals, thanks in part to HBCUs—into the highest levels of American life.

Justice O’ Connor explained in *Grutter* that “universities occupy a special niche in our constitutional tradition,” tasked with preparing the leaders of tomorrow to enter public life and “today’s increasingly [diverse] global marketplace.” 539 U.S. at 329-30. She recognized that student body diversity “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” *Id.* at

330 (cleaned up). Thirteen years later, Justice Kennedy reaffirmed in *Fisher II* that many specific “educational benefits [ ] flow from student body diversity,” including better “learning outcomes,” “cross-racial understanding,” the cultivation of diverse leaders “for an increasingly diverse workforce and society,” and the “break[ing] down [of] racial stereotypes.” 579 U.S. at 381-82. Justice Kennedy rejected the charge, repeated here, that these goals are too “elusory or amorphous”; while they are not numerical, they are “concrete and precise”, and “mirror the ‘compelling interest’ this Court has approved in its prior cases.” *Id.*

Nothing about the last six years has made diversity any less compelling of an interest. As the courts below recognized here, universities still have a strong interest in pursuing diversity in order to promote cross-racial understanding, train future leaders, and break down stereotypes.<sup>85</sup> The district courts identified additional benefits of diversity, including that it “produc[es] new knowledge,” resulting in new fields of study and reshaping others; “promotes a more robust academic environment with a greater depth and breadth of learning;” “creates a richer sense of community;” and “improve[s] faculty scholarship.”<sup>86</sup> *See also* No. 21-707, Pet.Cert.App.13 (recognizing UNC’s finding that “diversity enhances student growth and development in the cognitive, affective, and interpersonal domains”).

Contrary to the suggestion of Petitioners and some *amici* (e.g., Okla.Br. 17-19), HBCUs also value and

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<sup>85</sup> *E.g.*, No. 21-707, Pet.Cert.App.158-60.

<sup>86</sup> No. 21-1199, Pet.Cert.App.34-35, 59, 108.

pursue diversity. For more than 150 years, HBCUs have done their part to promote diversity, preparing young and gifted Black men and women to lead—including in spheres where they once were, and too often remain, absent or unwelcome. Today’s HBCUs promote student body diversity through their own holistic admissions processes; like Respondents, they undertake an individualized review of each applicant that considers multiple factors including race, ethnicity, socioeconomic status, and geographic origin. Background, § III. As a result, significant numbers of Black students learn alongside White, Hispanic, Asian-American, Native American, and international peers.<sup>87</sup>

As HBCUs do, every university should be permitted to pursue diversity in a way that accounts for its unique historical and present-day characteristics. For historically White institutions where past discrimination continues to have present-day effects, that means considering race as one of many factors in a holistic analysis in order to ensure that each class is racially diverse.

**B. Student body diversity remains an unfulfilled goal.**

As this Court recently acknowledged, racial discrimination remains “a familiar and recurring evil” that “[t]he Nation must continue to make strides to overcome.” *Pena-Rodriguez v. Colo.*, 137 S.Ct. 855,

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<sup>87</sup> For example, in 2020, less than 68% of the Howard undergraduate student body identified as Black, with the remaining 32% comprised of Hispanic, Native American, White, Asian-American, international, and mixed-race students. See <https://datausa.io/profile/university/howard-university>.

868, 871 (2017); *see also Rucho v. Common Cause*, 139 S.Ct. 2484, 2502 (2019) (pointing to “our country’s long and persistent history of racial discrimination”); *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) (“[W]e are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.”).

Petitioners ignore the history of anti-Black discrimination in this nation’s universities—and its present-day impacts. They rightly note historic discrimination against Jewish and Asian-American students, but studiously avoid acknowledging the history of anti-Black discrimination. That approach is disingenuous. When considering whether race may play some role in a holistic admissions policy, this Court must frankly acknowledge the unique (and uniquely long) history of anti-Black discrimination in higher education when determining what the Equal Protection Clause requires or permits in that unique context.

Contrary to Petitioners’ mantra (*e.g.*, Br.47, 50), neither the Constitution—which from the outset discriminated against Black people, counting them as less than full persons and excluding them from core rights and economic self-determination—nor its historical application to education is color-blind. The Equal Protection Clause of the Fourteenth Amendment was adopted specifically to redress centuries of enslavement of Black people and anti-Black discrimination. And Harvard correctly points out (Br.23-24) that the Congress that enacted it subsequently passed race-conscious laws to benefit Black Americans as they struggled to gain equal

footing, demonstrating that it did not intend the Fourteenth Amendment to be applied in an entirely race-neutral way.

As this Court stated in *Grutter*, “[c]ontext matters.” 539 U.S. at 327. The context that motivated both the adoption of the Fourteenth Amendment and its application to permit some consideration of race in university admissions processes is the historic exclusion of and ongoing discrimination against Black people in this country. The Court should not ignore that critical context when deciding whether to overturn *Grutter*, *Fisher II*, and its other precedents allowing race to be considered a part of a holistic admission review.

The Court also must consider the question before it in light of the continuing lack of diversity in higher education, and recognize the connection between present disparity and past discrimination. To this day, Black students are still admitted to Harvard, UNC, and other top institutions in relatively small numbers<sup>88</sup>—just as this Court recognized six years ago in *Fisher II*, noting that the majority of classes at the University of Texas had no Black students. 579 U.S. at 384. Since *Fisher II*, we have learned that the effects of enslavement and segregation cannot be remedied in a generation. They are pernicious, deep-seated, and permeate many aspects of our society—

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<sup>88</sup> See, e.g., No. 21-1199, Pet.Cert.App.207-208 (between 1980 and 2019, the share of Black students at Harvard increased only modestly from the high single digits to the low double digits, while “the Asian American proportion of the admitted class has increased roughly five-fold”).

including who applies, and who is admitted, to top universities.

As Justice O'Connor recognized, diversity has not been achieved where minority students are admitted in "only token numbers." *Grutter*, 539 U.S. at 333. That deprives them of the opportunity to have their unique viewpoints—informed by their experiences growing up Black or Brown in America, but not defined by it—understood by their peers to be one of many diverse views held by minority students. It is only when Black and other minority students are represented in sufficient numbers in the classroom to be viewed as more than token representatives of their race that the educational experience can "diminish[ ] the force of [the racial] stereotypes" that still prevail. *Id.* Indeed, it is the burden of being one of few among many that has driven many excellent Black students to choose to attend an HBCU, rather than other top-tier options, in order to enjoy a more inclusive educational experience. Black students should not be forced to make such a choice—but they will be until historically White institutions achieve sufficient diversity to ensure that Black students are consistently represented in non-token numbers.

While a day may come when race can be disregarded in the admissions process, it is evident that erasing the effects of *centuries* of anti-Black discrimination to "level the playing field" for Black students will take more time. To see that diversity and its benefits have yet to be achieved, one need only consider the demographics at Harvard and UNC,

where Black students remain underrepresented,<sup>89</sup> and the experiences of Black students who have matriculated only to “experience loneliness and tokenism”<sup>90</sup>—and outright racism.<sup>91</sup>

So long as top universities remain “much less divers[e]” than the population from which they draw,<sup>92</sup> and so long as isolation, marginalization, and racial threats<sup>93</sup> are regular features of Black student life, some consideration of race as part of a holistic admissions analysis remains necessary to achieve the compelling interest of student body diversity—and secure its broader societal benefits.

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<sup>89</sup> See No. 21-707, Pet.Cert.App.19-20 (UNC “continues to face challenges admitting and enrolling underrepresented minorities, particularly African American males”); *id.* at 21 (“72% of UNC students identify as white, while only 0.5% identify as American Indian/Alaska Native, 8% as African American, 8% as Hispanic, and 12% as Asian/Asian American ... these numbers reflect much less diversity than North Carolina as a whole ....”).

<sup>90</sup> No. 21-707, Pet.Cert.App.20; *id.* at 21 (half of Black UNC students felt pressured to represent the views of their race in class, and 40% felt that they had to minimize aspects of their racial identity to fit in), 61 (testimony from minority students that they felt isolated and forced to speak for their race due to underrepresentation); No. 21-1199, Pet.Cert.App.78, n.33 (testimony from Black Harvard student that she felt isolated due to the low representation of Black students in her classes).

<sup>91</sup> No. 21-707, Pet.Cert.App.21 (91% of UNC students had heard insensitive and disparaging racial remarks, and 95% of African American students had experienced bias).

<sup>92</sup> *Id.*

<sup>93</sup> See p.12 *supra* (recent examples).

## II. Overruling *Grutter* would undermine student body diversity to the detriment of American universities and society.

If historically White universities such as Respondents are not permitted to consider race, even as one factor in a holistic analysis, the result will not be a color-blind admissions system that ensures that the best-qualified students gain space at top universities. It will be an admissions system that, once again, favors White applicants and admits significantly fewer Black students.

Prohibiting universities from considering consider race as part of their holistic admissions processes would not result in equal access. Rather, racial barriers remain baked into the process through considerations that—though facially neutral—systemically disadvantage Black and Brown students. *Cf. Ramos v. La.*, 140 S.Ct. 1390, 1394 (2020) (striking down state law that was “facially race-neutral” but was implemented to negate the participation of Black persons in public life as part of an effort to “establish the supremacy of the white race”). Thanks to decades of overt and covert discrimination, many factors considered by elite schools overwhelmingly favor White applicants. Standardized tests systematically undervalue Black students.<sup>94</sup> Legacy status gives an applicant the

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<sup>94</sup> See William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 Santa Clara L. Rev. 131, 152 (2002) (describing process by SAT designers to discard questions “correctly answered by more Blacks than Whites”); William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University*



equivalent of a 47-160 point increase on the SAT.<sup>95</sup> Applicants designated as legacies, “Dean’s interest” (*i.e.*, children of donors), athletes, or children of faculty (“LDACs”) generally make up 30% of each class at Harvard<sup>96</sup>—even though that applicant pool is disproportionately White.<sup>97</sup> Meanwhile, the percentage of Harvard students that are Black remains stagnant, ranging only from the high single-digits in 1980 to the low double-digits in 2019.<sup>98</sup>

As the First Circuit recognized, the result of barring universities from considering race would be a “dramatic decline” in diversity. No. 21-1199, Pet.App.77. The Massachusetts district court found that “eliminating consideration of race would cause the African American representation at Harvard to decline from approximately 14% to 6%”; *i.e.*, “more than half of the admitted African Americans[ ] would most likely not be admitted in the absence of Harvard’s race-conscious admissions process.”<sup>99</sup> Because elite institutions such as Harvard continue to function as key pipelines into top graduate schools, that decline in undergraduate diversity will have a

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*Admissions* 44-45 (1998) (discussing studies of standardized tests and law school admissions).

<sup>95</sup> Peter Schmidt, *Color and Money: How Rich White Kids Are Winning the War over College Affirmative Action* 31 (2007).

<sup>96</sup> No 21-1199, Pet.Cert.App.25, 169.

<sup>97</sup> *Id.* at 25.

<sup>98</sup> *Id.* at 207.

<sup>99</sup> No. 20-1199, Pet.Cert.App.210; *see also Fisher II*, 579 U.S. at 383 (noting that the six-year period where the University of Texas employed a supposedly race-neutral analysis was marked by “consistent stagnation in terms of the percentage of minority students enrolling”).

detrimental impact on diversity in professions ranging from finance to medicine to law, where Black professionals remain underrepresented.<sup>100</sup>

Petitioners argue that losses in Black student admissions as a result of a race-neutral approach can be avoided if universities cease giving preferences to legacies and children of donors or faculty. That is contrary to the record evidence. The Massachusetts district court found that, if Harvard stopped considering both race and “LDC” status, African-American student admissions still would *drop* by about 32%, from 14% to 10% of each class.<sup>101</sup> That is no small matter. As one Harvard student testified, students of color are already “a huge minority in almost every space” on campus, and any further loss in representation would be “catastrophic.” No. 20-1199, Pet.Cert.App.78, n.33. It would deter Black students from matriculating, deepening the racial impact of applying a supposed race-neutral admissions analysis.

Further, the question this Court has taken up is whether, under the Equal Protection Clause, race can be one factor in a holistic admissions analysis. If the Court answers that question in the negative, the

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<sup>100</sup> For evidence of the ongoing lack of diversity in the high echelons of professional life one need look no further than the cover of Petitioners’ brief, written by nine White men.

<sup>101</sup> No. 20-1199, Pet.Cert.App.74-77. Petitioners’ suggestion that losses in numbers of Black students can also be avoided by removing consideration of standardized tests is similarly misplaced, as the Massachusetts district court found only that such an approach “might” increase overall diversity “slightly,” and made no findings as to the impact on Black applicants specifically. No 21-1199, Pet.Cert.App.216.

result will be that universities are *barred from any* consideration of race, even while they remain *permitted* to consider factors that advantage White applicants. There is nothing “equal” about that process or result.

In short, directing admissions officers to ignore race in their review process will lead not only to far less diverse student bodies, but serve to reinforce—and likely exacerbate—ongoing racial disparities in all other aspects of American society. *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting) (“only an ostrich could regard the supposedly neutral alternatives . . . as race unconscious”). While the impacts will be felt most immediately by Black students, we all lose in the end, receding from rather than advancing toward the goal of a truly equal nation, where persons of all races are equally integrated into all aspects of life and centuries-old racial divides finally overcome.

Moreover, if consideration of race as one factor in a holistic admissions analysis is barred, the admissions process will not only become more unequal but also place unique burdens on students of color. SFFA is mistaken to suggest universities could simply replace race-consciousness with consideration of whether an applicant has “overcom[e] discrimination.” Pet.Br.52. Such an approach again would put Black students at a disadvantage. They would feel compelled to emphasize their racial identities in their applications even if they would prefer to write about their love of physics or volunteer work with special needs children. Again, it is Black and other minority students who would be burdened and disadvantaged by our inability to frankly

acknowledge what is so evidently true: Race still matters in our society. Until it ceases to do so, we must consider race when deciding who gains the privilege of admission to our institutions of higher learning, and the life-long advantages it bestows.

Thus, when it comes to higher education, “the way to stop discrimination on the basis of race” is *not* simply “to stop discriminating on the basis of race.” Pet.Br.71 (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007)). That platitude falsely equates this Nation’s centuries-long history of racism and discrimination against Black students with the effects on non-Black students of the more recent, limited measures designed to further the compelling goal of racial diversity in higher education *in light of that history*. So long as the effects of the centuries when Black students were excluded from equal access to higher education endure—which they indisputably still do—historically White institutions such as Harvard and UNC cannot realistically achieve student body diversity without some consideration of race.

### **III. HBCUs cannot redress the legacy of racism in higher education—nor should they be asked to.**

While Petitioners are correct that HBCUs provide high quality education (Br.55), they are not a fallback option for Black students not admitted elsewhere.

Many HBCUs are highly selective. For the class of 2025, Howard University’s admissions rate was

35%.<sup>102</sup> Hampton University's 2020 acceptance rate was 36%.<sup>103</sup> Florida A&M University, the only historically black university in the Florida system, accepted only 33% of applicants in 2020.<sup>104</sup> And many students who matriculate at HBCUs turn down spots at other top-tier universities, choosing to attend an HBCU in order to enjoy the sense of community that is unique to HBCUs.<sup>105</sup>

Furthermore, HBCUs, which remain starved for funding in comparison to historically White institutions, cannot serve every Black student who is denied a spot at another institution as a result of a supposedly race-neutral admissions policy. Not only do they lack the resources to do so, redressing other institutions' lack of diversity should not be HBCUs' responsibility. By suggesting that HBCUs can serve that function, Petitioners essentially advocate a return to a segregated dual system of higher education. That, of course, is directly at odds with the Court's decision in *Brown*.

HBCUs will continue to educate young people of all colors to enter professional life and become leaders in their chosen field, but their ability to provide a quality education to Black students is no reason to

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<sup>102</sup> Howard University, Admission Profile, <https://admission.howard.edu/undergraduate/admission-profile>.

<sup>103</sup> *Hampton University - Profile, Rankings and Data*, U.S. News and World Report <https://www.usnews.com/best-colleges/hampton-university-3714>.

<sup>104</sup> *Florida A&M University - Profile, Rankings and Data*, U.S. News and World Report, <https://www.usnews.com/best-colleges/florida-am-university-1480>.

<sup>105</sup> *See Green, supra* n.35.

conclude that other institutions no longer need strive for diversity. To the contrary, that Black students come to HBCUs to feel safe and avoid marginalization only highlights how far other institutions remain from achieving diversity.

Just as HBCUs do, historically White institutions like Harvard and UNC should be permitted to fashion holistic admissions policies. Those policies must account for the historic discrimination against Black and other minority students, and address how that legacy continues to interfere with the ability to attract and create a diverse student body. Allowing universities and colleges to consider race as but one relevant factor in a holistic admissions analysis is, frankly, the *minimum* needed to ensure that the Equal Protection Clause applies in practice to guarantee equal opportunities for Black students.

### CONCLUSION

The Court should uphold the decisions below, allowing Respondents to continue to consider race as one factor in their holistic admissions analysis.

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