Nos. 20–1199 & 21–707

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* UNITED STATES SENATORS AND FORMER SENATORS SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici, current and former United States Senators, submit this brief to urge the Court to adhere to the settled principle that diversity in higher education is a compelling governmental interest. As current and former members of the branch of government charged with responsibility for "enforc[ing], by appropriate legislation" the Fourteenth Amendment, U.S. Const. amend. XIV, § 5, cl. 1, *amici* have a distinctive perspective to offer on the questions presented in these cases.

Congress has taken numerous actions, over a period of many years, confirming its view that diversity in higher education is a compelling governmental interest, and demonstrating its commitment to achieving that vital goal. As legislators, *amici* have devoted substantial attention to a range of complex policy issues related to diversity in American colleges and universities, and have worked to forge consensus on measures by higher education institutions aimed at broadening educational opportunity and promoting inclusion.

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[1] No party or counsel for any party authored any part of this brief, and no person other than *amici* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided blanket consent to the filing of *amicus* briefs.

Amici are:

Senator Richard Blumenthal of Connecticut
Senator Cory A. Booker of New Jersey
Former Senator Lincoln Chafee of Rhode Island
Senator Christopher A. Coons of Delaware
Senator Richard J. Durbin of Illinois
Senator Dianne Feinstein of California
Senator Mazie K. Hirono of Hawaii
Senator Alex Padilla of California
Senator Edward J. Markey of Massachusetts
Senator Jeffrey A. Merkley of Oregon
Senator Christopher S. Murphy of Connecticut
Senator Patty Murray of Washington
Senator Jack Reed of Rhode Island
Senator Elizabeth Warren of Massachusetts
Senator Sheldon Whitehouse of Rhode Island

SUMMARY OF ARGUMENT

In the nearly six decades since Congress enacted the Civil Rights Act of 1964, this Court consistently has recognized that achieving diversity in higher education is a compelling governmental interest, and that some consideration of the racial and ethnic background of individuals applying to colleges and universities can be given when necessary to achieve that compelling end. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272–76, 311–17 (1978) (opinion of Powell, J.); *Grutter v. Bollinger*, 539 U.S. 306, 325–33 (2003); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 373–74 (2016).

Congress has been equally consistent in upholding these principles. Congress repeatedly has endorsed the importance of diversity in higher education, as

well as the importance and propriety of race-conscious programs in other aspects of American life. Congress's efforts include its enactment of Title VI of the Civil Rights Act of 1964.

Departing from consistent precedent and established legislative practice would be unwarranted in this case. In the many decades since Congress enacted Title VI and this Court decided *Bakke*, hundreds of public and private institutions of higher education in the United States have, like Respondents here, relied on the principle that diversity in higher education is a compelling governmental interest. There is no valid reason to overrule precedent in these cases. Petitioner's assertions that Respondents are engaged in racial balancing or intentional discrimination against Asian Americans are unfounded on this record, and, in any event, provide no basis for overruling *Bakke*, *Grutter*, and its progeny.

ARGUMENT

I. Both This Court And Congress Have Consistently Recognized That Diversity In Higher Education Is A Compelling Governmental Interest.

Both this Court and Congress have long recognized that there is a compelling governmental interest in achieving diversity in American colleges and universities. The considered views of these branches of the federal government should be maintained in this case.

A. This Court has long recognized that diversity in higher education is a compelling governmental interest.

For more than four decades, this Court has recognized that colleges and universities have a compelling interest in the educational benefits that result from enrolling students from a diverse range of backgrounds.

In *Regents of the University of California v. Bakke*, Justice Powell, who provided the critical fifth vote for the Court's judgment, explained that "attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education," particularly given that the "academic freedom" of such institutions "long has been viewed as a special concern of the First Amendment." 438 U.S. 265, 311–12 (1978) (opinion of Powell, J.). Drawing students from across a range of backgrounds is "widely believed to . . . promote[]" the "atmosphere of speculation, experiment and creation [] so essential to the quality of higher education." *Id.* at 312 (quotation marks omitted). By maintaining a student body that is diverse in numerous ways—including not only race, but also sex, background, geography, and interests—colleges and universities create opportunities for students "to learn from their differences and to stimulate one another to reexamine their most deeply held assumptions about themselves and their world," from "unplanned, casual encounters" as in the classroom. *Id.* at 312 n.48 (quoting William G. Bowen, Pres., Princeton Univ., Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (1977)). Justice Powell explained that "wide exposure to the

ideas and mores of students as diverse as this Nation of many peoples" is essential to training future leaders and professionals to "serve a heterogeneous population." *Id.* at 313–14 (quotation marks omitted). Justice Powell singled out Respondent Harvard University's undergraduate admissions program as a model of a constitutionally permissible system "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.* at 317.

In *Grutter v. Bollinger*, the Court expressly "endors[ed] [Justice Powell's] view that student body diversity is a compelling state interest that can justify the use of race in university admissions." 539 U.S. 306, 325 (2003). The Court explained that there is "a constitutional dimension, grounded in the First Amendment, of educational autonomy," and that "attaining a diverse student body [can lie] at the heart of [a university or graduate school's] proper institutional mission." *Id.* at 329. Diversity in higher education can produce "substantial" "educational benefits" for the campus community as a whole. *Id.* at 330. Interaction with people from different backgrounds "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." *Ibid.* (quotation marks and alteration omitted). It facilitates "livelier, more spirited, and simply more enlightening and interesting" classroom discussions, with appreciably positive results on learning outcomes. *Ibid.*

The Court also recognized that diversity in higher education broadly benefits society. American

businesses competing in world markets require employees with skills that "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Ibid.* Echoing Justice Powell, the Court observed that the legitimacy of tomorrow's leaders depends in part on their reflecting the rich diversity of the populations they serve. *See id.* at 331–33.

Nowhere is this more obvious than in the Nation's armed forces, where diversity is "essential to the military's ability to fulfill its principal mission to provide national security." *Id.* at 331 (quoting Br. of Lt. Gen. Julius W. Becton, Jr., et al. as *Amici Curiae*, *Grutter v. Bollinger*, 2003 WL 1787554, at *5 (U.S. filed Jan. 21, 2003)). Because the military recruits its officers from colleges and universities—namely the service academies and Reserve Officer Training Corps programs at civilian institutions—higher education diversity is critical to military effectiveness. *Ibid.*

Six years ago, the Court reiterated that the Constitution permits state colleges and universities to consider race among other factors in constituting a diverse student body. *See Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) (*Fisher II*). *Fisher* upheld the constitutionality of the University of Texas at Austin's hybrid admissions scheme, under which most students were admitted based on their class rank at in-state schools, while a quarter or less of the class was admitted based on a holistic assessment that considered, but did not depend on, students' race. *Id.* at 373–74. After first remanding for the Fifth Circuit to reconsider whether the University had demonstrated that consideration of race was

necessary to achieving the educational benefits resulting from diversity, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 313–14 (2013) (*Fisher I*), the Court concluded that the University's program satisfied strict scrutiny, *Fisher II*, 579 U.S. at 385. In reaching that conclusion, the Court noted the University's "reasoned, principled explanation" of why consideration of race in admissions was necessary to achieve the many benefits of a diverse student body, which, in the University's view, included "the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry." *Fisher II*, 579 U.S. at 381–82 (quotation marks omitted and alterations adopted).

In short, the Court has long recognized that diversity in higher education is a compelling interest that colleges and universities may pursue as an aspect of "[t]he freedom of a university to make its own judgments as to education." *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)). Further, in pursuing that interest, the Court has determined that colleges and universities properly may consider race as one factor in holistic, individualized admissions processes. *See id.* This Court's longstanding approach is sound and should be applied in these cases.

B. Congress has also recognized the benefits achieved by diversity in higher education.

The Court's recognition that diversity in higher education is a compelling governmental interest is confirmed by decades of legislation by Congress recognizing and furthering this compelling goal.

1. Congress has acted to promote diversity in higher education.

Congress could have responded to this Court's decisions by amending Title VI to forbid all race-conscious federally-funded action, but it consistently has declined to do so, even when amending Title VI in other significant respects. *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99–506, § 1003, 100 Stat. 1807, 1845 (codified at 42 U.S.C. § 2000d-7) (abrogating States' Eleventh Amendment immunity in suits under Title VI).[2] Indeed, Congress has done much more than simply remain silent in response to this Court's decisions. It repeatedly has enacted legislation aimed at increasing diversity, including racial diversity, in higher education. For example, the

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[2] For examples of legislation responding to this Court's decisions, *see, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5 (codified at, *inter alia*, 29 U.S.C. § 626(d) and 42 U.S.C. § 2000e-5(e)(3)) (responding to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); Religious Freedom Restoration Act, Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb *et seq.*) (responding to, *inter alia*, *Emp. Div. v. Smith*, 494 U.S. 872 (1990)); Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 ("in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964," *Landfraf v. USI Film Prods.*, 511 U.S. 244, 250 (1994)).

College Cost Reduction and Access Act, Pub. L. No. 110–84, 121 Stat. 784 (2007), allocated $100 million to (among other things) "increase the number of Hispanic and other low income students attaining degrees in the fields of science, technology, engineering, or mathematics." *Id.* § 771, 121 Stat. 818 (codified at 20 U.S.C. § 1067q(b)(2)(B)(i)). The Act also appropriated $750 million to fund grants to States for students "underrepresented in postsecondary education," including need-based grant aid and counseling aimed at increasing student applications and retention. *Id.* § 802, 121 Stat. 813 (codified at 20 U.S.C. § 1141(d)(2)(B)(i)).

Similarly, in 2008, Congress enacted the Higher Education Opportunity Act, Pub. L. No. 110–315, 122 Stat. 3078, which created numerous programs for promoting greater participation in higher education by members of racial minority groups. While some of these programs aimed to support institutions that serve a high percentage of minority students and students from low-income backgrounds, *e.g.*, *id.* § 502, 122 Stat. 3331 (codified at 20 U.S.C. § 1102 *et seq.*), others were aimed at fostering diversity in colleges and universities more broadly, *e.g.*, *id.* § 801, 122 Stat. 3392–96 (codified at 20 U.S.C. § 1161g) (Patsy T. Mink Fellowship Program "to provide . . . awards to assist highly qualified minorities and women to acquire the doctoral degree, or highest possible degree available, in academic areas in which such individuals are underrepresented"). The Act also required colleges and universities to provide prospective and enrolled students with greater transparency about "student body diversity," including the percentage of students who "are a self-identified member of a major

racial or ethnic group." *Id.* § 488, 122 Stat. 3294 (codified at 20 U.S.C. § 1092(a)(1)(Q)).

In addition, Congress repeatedly has enacted legislation aimed at increasing the diversity of students studying science, technology, engineering, and mathematics ("STEM") and other fields important to U.S. economic growth and national security. For example, Congress has directed the National Science Foundation, in awarding grants to colleges to promote "advanced-technology fields," to prioritize applications that include plans for recruiting and enrolling "women and other underrepresented populations in STEM fields." 42 U.S.C. § 1862i(d)(2)(D). More recently, Congress, recognizing a shortage in qualified STEM workers and reflecting its determination that "historically[] underrepresented populations are the largest untapped STEM talent pools in the United States," directed the National Science Foundation to "continue to support programs designed to broaden participation of underrepresented populations"—including women and members of minority racial groups—"in STEM fields." 42 U.S.C. § 1862s-5(a)(1), (b)(3), (c)–(d); *see also* 15 U.S.C. § 7404(a)(1) (establishing grants to institutions of higher education to improve recruitment of members of underrepresented groups for computer and network-security study programs); 50 U.S.C. § 1902 (authorizing the Department of Defense to consider whether the distribution of fellowships to enable college students to work in national security fields or study languages of particular importance to U.S. national security "reflects the cultural, racial, and

ethnic diversity of the population of the United States").

As these examples demonstrate, Congress has determined that increasing the participation of members of underrepresented racial and ethnic groups in key fields will promote economic competitiveness and national defense.

2. Congress has fostered diversity at military service academies.

Congress's recognition of the value and need for diversity in higher education is reflected with special clarity in its treatment of military service academies—*i.e.*, colleges operated directly by the Federal Government in which diversity is critical to national interests.

Across presidential administrations, the Armed Forces have viewed the diversity of the officer corps, as well as of enlisted personnel, as essential to the effective and efficient fulfillment of their mission to safeguard the Nation and protect its interests abroad. Each service academy has prioritized creating diverse communities of cadets and midshipmen, who, along with ROTC graduates, form the core of the Armed Forces' officer corps. West Point, for example, "admits a racially, ethnically, and geographically diverse Corps of Cadets so as to reflect the racial and ethnic composition of [its] enlisted force and our country" and "believe[s] a diverse student body results in a superior education for [its] cadets and in phenomenal leaders

for our nation's enlisted soldiers."[3] The Naval Academy has identified as its "Strategic Imperative One" the recruitment, admission, and graduation of a "diverse and talented Brigade of Midshipmen."[4] And each service academy has established an office of (or committee on) diversity and inclusion.[5]

Congress has long supported these efforts. Through appropriations, Congress funds not only these diversity and inclusion initiatives, but also the service academies' affiliated one-year preparatory schools, which the academies have long used as a pipeline to increase the enrollment of racial and ethnic minorities.[6] In addition, Congress recently

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[3] U.S. Military Academy West Point, Multi-Cultural by Design, https://www.westpoint.edu/admissions/prospective-cadets/diversity (last visited July 31, 2022).

[4] U.S. Naval Academy, Strategic Plan, https://www.usna.edu/StrategicPlan/archives/2011-2020/strategic_imperatives.php (last visited July 31, 2022).

[5] *See* U.S. Military Academy West Point, Office of Diversity, Inclusion, and Equal Opportunity (ODIEO), https://www.westpoint.edu/about/west-point-staff/office-of-diversity (last visited July 31, 2022); U.S. Naval Academy, Office of Diversity, Equity, and Inclusion, https://www.usna.edu/Diversity/index.php (last visited July 31, 2022); U.S. Air Force Academy, Office of Diversity and Inclusion, https://www.usafa.edu/about/culture-climate-diversity/ (last visited July 31, 2022); U.S. Coast Guard Academy, Inclusion and Diversity, https://www.uscga.edu/inclusion-and-diversity/ (last visited July 31, 2022); U.S. Merchant Marine Academy, Diversity, https://www.usmma.edu/diversity (last visited July 31, 2022).

[6] *See, e.g.*, GAO Report 03-1017, Military Education: DOD Needs to Align Academy Preparatory Schools' Mission Statements with Overall Guidance and Establish Performance Goals at i (2003) ("In accordance with DOD guidance and the service academies'

enacted legislation requiring greater transparency concerning the racial, ethnic, and gender makeup of the applicants, nominees, appointees, and enrolled students at the service academies. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ("NDAA FY21"), § 575, Pub. L. No. 116–283, 134 Stat. 3388, 3645 (2021); *see also* Coast Guard Academy Improvement Act, NDAA FY21, div. G, title LVXXXII, subtitle E, §§ 8271–78.

In short, Congress has acted repeatedly to foster diversity in institutions of higher education, including military service academies, confirming this Court's recognition that there is a compelling national interest in achieving this goal.

C. This Court Should Give Weight To The Views Of The Political Branches Concerning The Compelling Need For Diversity In Higher Education.

Congress's repeated recognition that diversity in higher education is vitally important is entitled to significant weight. The Legislative Branch is, of course, "a coequal branch of government whose Members take the same oath [as Members of the Court] to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). As the Court has explained, "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because" a question is cast under the

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expectations, the preparatory schools give primary consideration for enrollment to enlisted personnel, minorities, women, and recruited athletes."), *available at* https://www.gao.gov/assets/gao-03-1017.pdf.

Constitution. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973). In particular, "courts must accord substantial deference to the predictive judgments of Congress" in determining the constitutionality of congressionally approved acts. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997). That is so because "[s]ound policymaking often requires legislators," rather than judges, "to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994). "As an institution, . . . Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon . . . complex and dynamic" issues that implicate the Constitution. *Id.* at 665–66 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331, n.12 (1985)).

Those principles apply here. Higher education is a complex subject that raises many issues that are best addressed by Congress. Congress has addressed these issues over many years, and repeatedly determined that race-conscious programs are both appropriate and necessary to further diversity in higher education. The Court should not "substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker*, 453 U.S. at 67–68.

That is particularly true where, as here, Congress after careful study has determined that certain laws further a compelling governmental interest. *See, e.g.*,

Oregon v. Mitchell, 400 U.S. 112, 230 (1970) (acknowledging congressional determination that law was not "reasonably related to any compelling state interests"); *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972) (same). The Court should reject the invitation to second-guess its prior decisions especially when, as here, they have been affirmed and reinforced by Congress.

II. In Enacting Title VI Congress Sought to Further, Not Prohibit, Race-Conscious Measures Aimed at Advancing Equality of Opportunity for Historically Disadvantaged Groups.

Congress's consistent and longstanding efforts to foster diversity include its enactment of Title VI of the Civil Rights Act of 1964.

As Representative Emanuel Celler, then Chairman of the House Judiciary Committee and the floor manager of the legislation in the House, explained, Title VI was first and foremost designed "to override . . . Federal assistance to racially segregated institutions." 110 Cong. Rec. 2467 (1964). Senator Hubert Humphrey, the Senate floor manager, similarly observed: "The practices of segregation or discrimination, which Title VI seeks to end, are unconstitutional" and "Title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.* at 6544.

It is also important to recognize that Congress enacted Title VI against a backdrop of Executive

Branch action seeking to promote equality of opportunity for historically disadvantaged racial groups, and that Congress intended Title VI to permit, not prohibit, the Executive Branch's efforts to root out segregation and promote diversity throughout the American economy by all means necessary.

A. Before and after Congress enacted Title VI, the Executive Branch sought to promote equality of opportunity for historically disadvantaged groups, including through "race-conscious" means.

Shortly after his inauguration in January 1961, President Kennedy announced "the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons" contracting with it, Exec. Order No. 10925 (preface) (Mar. 6, 1961) ("EO 10925"), and included in the same order a requirement that certain federal "contractor[s] . . . take affirmative action to ensure that applicants are employed . . . without regard to their race, creed, color, or national origin," *id.* § 301.[7]

Subsequent executive action made clear that "[t]he only meaning which can be attributed to [EO 10925's] 'affirmative action' language" is one that would permit—as one necessary tool in the fight against discrimination—"color-conscious" efforts intended to secure equality of opportunity for disadvantaged

[7] This "affirmative action" requirement initially applied to federal procurement contracts; in June 1963, it was extended to all federally assisted construction contracts. *See* Exec. Order No. 11114 (June 22, 1963).

groups. *Contractors' Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159, 173–74 (3d Cir. 1971); *see also Assoc. Gen. Contractors of Mass. v. Altshuler*, 490 F.2d 9, 17 (1st Cir. 1973) (describing "federal affirmative action programs" in which "race [could be used] as a criterion of selection where the goal is equal opportunity").

Notably, in June 1963, President Kennedy directed Labor Secretary Willard Wirtz to promulgate regulations under EO 10925 "requir[ing] that the admission of young workers to apprenticeship programs be on a completely nondiscriminatory basis."[8] The envisioned rules were meant to address the pressing problem whereby contractors looking for highly-skilled laborers would frequently encounter a lack of "qualified [Black] applicants," because numerous Black laborers "have never had apprenticeship training because they have been barred from the apprenticeship list[s]."[9]

At about the same time, civil rights-minded unions running apprenticeship programs were attempting to proactively address this shortage by commencing affirmative action programs that focused on selecting and training Black apprentices in particular.[10] The

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[8] President John F. Kennedy, Message on Civil Rights and Job Opportunities (June 19, 1963), *in* Civil Rights: Hearings on H.R. 7152 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess., at 1452 (1963) (hereinafter "Hearings on H.R. 7152").

[9] Hearings on H.R. 7152, *supra* note 8, at 1797 (testimony of George Meany, President of the AFL-CIO).

[10] Hearings on H.R. 7152, *supra* note 8, at 1754 (testimony of Joseph M. Bar, Mayor of Pittsburgh) (discussing agreement among unions running apprenticeship programs to "take an

Department of Labor, in promulgating the apprenticeship rules requested by President Kennedy under EO 10925, took specific account of the need for these affirmative action programs. While the promulgated rules generally mandated that the selection of "apprentices [be] on the basis of qualifications alone," they also created an exception whereby less-qualified apprentices could be selected if "*the selections otherwise made would themselves demonstrate that there is equality of opportunity*" in view of the "racial and ethnic composition of the [apprenticeship] program." 28 Fed. Reg. 11,313, 11,313–14 (Oct. 22, 1963) (proposed rule) (emphasis added); *see* 28 Fed. Reg. 13,775, 13,775–76 (Dec. 18, 1963) (final rule) (same). In so doing, the Department of Labor's rules recognized that generally mandating merit-only apprenticeship selections—while specifically permitting additional selections meant to secure "equality of opportunity" for members of disadvantaged racial groups—was consistent with President Kennedy's directive to eliminate the discrimination against Black laborers that pervaded these apprenticeship programs.

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appropriate number of . . . qualified nonwhite applicants."); *see also id.* at 1797–98 (testimony of George Meany, President of the AFL-CIO) (describing affirmative "campaign[s] put on by the people who run apprentice training programs" "to bring Negros into [such] apprentice training").

B. Congress intended Title VI to permit, not prohibit, the Executive Branch's efforts to achieve equality of opportunity for disadvantaged groups, including through "race-conscious" means.

In debating the Civil Rights Act of 1964, Congress was well aware of President Kennedy's and Labor Secretary Wirtz's actions. Testimony about the private sector's efforts to promote affirmative action in apprenticeship programs was presented to the House Judiciary Committee during the hearings on H.R. 7152 (the bill that became the Civil Rights Act).[11] In addition, members of both the House and Senate took note of the "apprenticeship standards" promulgated by Secretary Wirtz. *See* H.R. Rep. 88–914, at 38 (1963); 110 Cong. Rec. 6871 (1964) (Sen. Stennis).

With awareness of these ongoing efforts, Congress did not expressly define the "discrimination" prohibited by § 601 of Title VI, but instead (as this Court has held) made clear that Congress intended § 601 to "proscribe[] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (quoting *Bakke*, 438 U.S. at 287 (opinion of Powell, J.); and citing *Bakke*, 438 U.S. at 325, 328, 352 (opinion of Brennan, J.)). Thus, with respect to Title VI, Congress "specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial

[11] *See* Hearings on H.R. 7152, *supra* note 8, at 1754, 1797–98.

doctrine." *Bakke*, 438 U.S. at 337 (opinion of Brennan, J.).

Significantly, Congress in the text of § 602 of Title VI then empowered "[e]ach Federal department and agency" to "effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders of general applicability." Civil Rights Act of 1964, Pub. L. No. 88–352, § 602, 78 Stat. 241, 252–53. In so doing, Congress "invest[ed] federal departments and agencies with the power to define the discrimination forbidden by" § 601.[12] Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining 'Discrimination'*, 70 Geo. L. J. 1, 3, 9, 29–32 (1981); *see also Bakke*, 438 U.S. at 381–82 (White, J., concurring in part and dissenting in part) (observing that it is "evident from the face of § 602 that Congress intended the departments and agencies to define and to refine, by rule or regulation, the general proscription of § 601" (internal citation omitted)).[13] As Attorney

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[12] This understanding of § 602 can be reconciled with the notion that § 601 prohibits only forms of discrimination that are proscribed by the Equal Protection Clause. *See Alexander*, 532 U.S. at 286 (majority opinion) ("[A]ssum[ing] for purposes of this decision that § 602 confers the authority to promulgate" regulations that do not track precisely the contours of the Equal Protection Clause); *Bakke*, 438 U.S. at 338–39 (Brennan, J., concurring) (advancing the constitutional-incorporation understanding of § 601, while simultaneously advocating that Title VI "provid[ed] the Executive Branch with considerable flexibility in interpreting and applying [§ 601's] prohibition on racial discrimination").

[13] *See also Guardians Ass'n v. Civ. Serv. Comm'n of City of New York*, 463 U.S. 582, 622–23 (1983) (Marshall, J., dissenting); *Alexander v. Sandoval*, 532 U.S. 275, 294 n.19 (2001) (Stevens,

General Kennedy explained during the hearings that preceded the passage of the statute, federal agencies in charge of a "particular program" will look to § 601's nondiscrimination principle "as a general criterion to follow, [and] will establish the rules that will be followed in the administration of the program—so that the recipients of the program will understand what they can or cannot do."[14]

Congress affirmatively contemplated that agencies would use their delegated flexibility under § 602 in a manner that would not require prohibiting any consideration of race in all circumstances. For example, when Senator Johnston offered an amendment that would expressly authorize federal grantees to take race into account when placing children in adoptive and foster homes, Senator

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J. dissenting).

[14] Hearings on H.R. 7152, *supra* note 8, at 2740. Senator Humphrey similarly observed that the "large number of programs, each with its own special problems and patterns of administration" made "it wise to leave the agencies a good deal of discretion as to how they will act." 110 Cong. Rec. 6324 (1964); *see also id.* at 5612 (Sen. Ervin) ("What constitutes unequal or unfair treatment? Section 601 and section 602 of Title VI do not say. They leave the determination of that question to the executive department or agencies administering each program[.]"). Congress's "concern for this broad delegation inspired Congress to amend the pending bill to ensure that all regulations issued pursuant to Title VI would have to be approved by the President." *Alexander*, 532 U.S. at 294 n.19 (Stevens, J. dissenting); *see* 110 Cong. Rec. 2499 (1964) (amendment of Rep. Lindsay); *ibid.* (advocating that the "latitude" of regulatory power vested by § 602 of Title VI necessitated Lindsay's amendment requiring Presidential approval).

Pastore successfully opposed the amendment, which was defeated by a 56–29 vote, on the ground that there was no danger that federal administrators would prohibit the use of racial criteria in such circumstances.[15] 110 Cong. Rec. 13695 (1964). Legislators also observed that the use of race-conscious measures to further diversity in elementary schools where there had been no segregation by law would not be dictated by Title VI directly but instead would be left to the judgment of state and local communities. *See, e.g., id*. at 10920 (Sen. Javits); *id.* at 5807, 5266 (Sen. Keating); *id.* at 13821 (Sens. Humphrey and Saltonstall); *id.* at 6562 (Sen. Kuchel); *id.* at 13695 (Sen. Pastore).

Notably in light of § 602's express delegation of a measure of interpretive authority to federal agencies in enforcing § 601, numerous agencies within the Executive Branch swiftly promulgated rules, approved by the President, prohibiting discrimination in covered programs and activities—but simultaneously providing that "[a]n individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his." *E.g.*, 29 Fed. Reg. 16,298, 16,299 (Dec. 4, 1964) (Department of Health, Education, and Welfare).[16] Numerous

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[15] Senator Pastore repeatedly made clear that Title VI did not outlaw the use of racial criteria in all circumstances. *See* 110 Cong. Rec. 2773–74, 6562 (1964).

[16] *See also, e.g.*, Housing and Home Finance Agency, 29 Fed. Reg. 16,280 (Dec. 4, 1964); Department of the Interior, 29 Fed. Reg.

federal programs were thereafter instituted which were race-conscious in precisely this sense.[17] For its part, the Department of Labor's regulations implementing Title VI and extending § 601's nondiscrimination requirement were careful not to "supersede" the apprenticeship standards promulgated by Secretary Wirtz that permitted affirmative action efforts by civil rights-minded unions.[18]

In the wake of the Civil Rights Act of 1964, many American colleges and universities instituted, for the first time, affirmative-action programs focused on admitting minority applicants. Many of these institutions were spurred to act by dramatic gaps in minority educational attainment revealed by surveys conducted by the Department of Health, Education and Welfare ("HEW") pursuant to the Civil Rights Act.[19] *See* Robert M. O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L.J. 699, 700–01, 719 (1971); *see*

16,293 (Dec. 4, 1964); Department of State, 30 Fed. Reg. 314 (Jan. 9, 1965); National Aeronautics and Space Administration, 30 Fed. Reg. 301 (Jan. 9, 1965); Office of Economic Opportunity, 30 Fed. Reg. 325 (Jan. 9, 1965); Department of State, 30 Fed. Reg. 314 (Jan. 9, 1965).

[17] *See* Br. of United States as *Amicus Curiae*, *Regents of Univ. of Cal. v. Bakke*, 1977 WL 204788, at *1–2, *1A (U.S. filed Sept. 19, 1977) (detailing "numerous minority-sensitive programs" adopted by Congress and the Executive Branch during this era).

[18] *See* 29 Fed. Reg. 16,284, 16,287 (Dec. 4, 1964) (exempting "Executive Orders 10925 and 11114, and regulations issued thereunder").

[19] *See* Civil Rights Act of 1964, Title IV, § 402, Pub. L. No. 88–352, 78 Stat. 247 (1964) (requiring biannual surveys on educational attainment).

also Br. of Columbia Univ. et al. as *Amici Curiae*, *Regents of the Univ. of Cal. v. Bakke*, 1977 WL 188007, at *3–4 & n.2 (U.S. filed June 7, 1977) (describing the "minute minority fraction (no more than 1% in many fields)" of students in higher education as having prompted the decision by multiple universities to "develop admissions programs designed to increase minority enrollment"). In the judgment of these American colleges and universities, these new affirmative action programs were critical to the achievement of equal opportunity in higher education. *See* Br. of Columbia Univ. et al., *supra*, 1977 WL 188007, at *4 (absent "conscious treatment of an applicant's membership in a minority group," admissions decisions "would not yield a large enough number of minority students to achieve substantial diversity"). And, from that perspective, they had a swift and remarkably effective impact: "largely from the application of special or preferential admissions policies" "the percentage of minority undergraduates at many institutions doubled in the fall of 1968 and doubled again the following year." O'Neil, *supra*, at 700, 723.

The commencement of these affirmative action programs by institutions of higher education shortly after the Civil Rights Act's passage prompted HEW and the President to address their permissibility under Title VI via administrative rulemaking. Continuing the precedent set by Secretary Wirtz in 1963 of not quashing nascent affirmative action efforts intended to promote diversity, HEW's regulations explained that "recipients are not prohibited from taking affirmative action to overcome the effects of conditions, which resulted in limited

program participation by persons of a particular race, color, or national origin."[20] 38 Fed. Reg. 17,978, 17,978 (July 5, 1973) (final rule); *see also* 36 Fed. Reg. 23,494, 23,494–96 (Dec. 9, 1971) (proposed rule); 45 C.F.R. §§ 80.3(b)(6)(ii), 80.5(j).

In sum, Congress, in enacting Title VI, far from "*limiting* Executive authority in defining appropriate affirmative action" that may be taken by recipients of federal funds, *Contractors' Ass'n*, 442 F.2d at 173 (emphasis added), aimed to *facilitate* executive flexibility in a manner solicitous of affirmative action, *see ibid.*

III. Overruling *Grutter* Is Not Warranted.

A. Strict scrutiny is the standard for race-conscious policies across all fields.

The Court should reject Petitioner's demand that it overrule *Grutter*. Petr.Br. 49–71. *Grutter* maintained the Court's longstanding doctrine that "all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny." 539 U.S. at 326 (quotation omitted). That is, "such classifications are constitutional only if they

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[20] By 1977, twenty-six other federal agencies had adopted similar Title VI regulations providing that "the consideration of race, color, or national origin" is not prohibited "if the purpose and effect [is] to remove the consequences of practices or impediments which have restricted the availability of, or participation in, [a] program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin." Supp'l Br. for United States as *Amicus Curiae*, *Regents of the Univ. of Cal. v. Bakke*, 1977 WL 189556, at *16 n.14 (filed Nov. 16, 1977) (detailing these regulations).

are narrowly tailored to further compelling governmental interests." *Ibid.* *Grutter* emphasized that its analysis was "no less strict" than for any other context. *Id.* at 328. Indeed, *Grutter*'s application of strict scrutiny was no different from the Court's application of strict scrutiny in other cases. *See Johnson v. California*, 543 U.S. 499, 515 (2005) (applying strict scrutiny to racial classifications made by the California Department of Corrections).

Nor has the Court strayed from its precedents by "giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits," in recognition of the fact that there are "complex educational judgments in [this] area that lie[] primarily within the expertise of the university." *Grutter*, 539 U.S. at 328. The Court's approach here is consistent with its precedents holding elsewhere that "strict scrutiny *does* take relevant differences into account—indeed, that is its fundamental purpose." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) (internal quotation omitted). "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Ibid.*; *see also Johnson*, 543 U.S. at 515 ("Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, *which is designed to take relevant differences into account*." (emphasis added)).

Such deference, given "within constitutionally prescribed limits," *Grutter*, 539 U.S. at 328, is by no means absolute. Indeed, in *Grutter*, the Court conducted a searching analysis of the University of Michigan Law School's admissions policy.

First, the Court recognized the compelling and permissible nature of the Law School's goal to "enroll a critical mass of minority students . . . [a concept] defined by reference to the educational benefits that diversity is designed to produce," while explaining that a different goal of "assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin"—what the Court called "racial balancing"—would be "patently unconstitutional." *Id.* at 329–30 (internal quotation omitted).

Second, the Court concluded that the benefits of diversity advanced by the Law School's policy were "substantial," based on the factual findings of the district court and the facts presented in the briefs of various *amici*. *Id.* at 330; *see also id.* at 330-31 (explaining that the benefits of diversity are "not theoretical, but real," while referencing *amicus* briefs from "major American businesses" and "high-ranking retired officers and civilian leaders of the United States military").

Third, the Court recognized that its findings on this score were consistent with its own precedents, including *Brown v. Board of Education*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *Plyler v. Doe*, 457 U.S. 202 (1982), which recognized the importance of higher education for "all individuals

regardless of race or ethnicity," and the fact that "[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." *Grutter*, 539 U.S. at 331–33.

Fourth, the Court conducted a searching analysis to conclude that the Law School's admissions program "bears the hallmarks of a narrowly tailored plan." *Id.* at 334–43.

Thus, there was nothing "less strict" about the Court's application of strict scrutiny in *Grutter*. That decision was thorough, well-reasoned, and correct.

B. Overruling *Grutter* would represent an unjustified departure from principles of *stare decisis*.

Principles of *stare decisis* weigh against overruling *Grutter*. "*Stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

In practice, this means the Court "demands a special justification" to overturn precedent, as *"stare decisis* always requires 'reasons that go beyond mere demonstration that the overruled opinion was wrong,' for 'otherwise the doctrine would be no doctrine at all.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., opinion concurring in part and

concurring in judgment) (quoting *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment)); *see also Dickerson v. United States*, 530 U.S. 428, 443 (2000) (similar).

No such special justification exists here. Contrary to the suggestions of Petitioner and various *amici*, the carefully limited admissions program that the Court upheld in *Grutter* has worked not only at Harvard and UNC but across thousands of college admissions classes over the course of decades. Tellingly, every university or college that has filed an *amicus* brief in these cases (as well as member organizations that represent universities and colleges) has done so in support of Harvard and UNC and not one has pronounced *Grutter* unworkable.[21]

Moreover, "[c]onsiderations in favor of *stare decisis* are at their acme" when private institutions and individuals have "reliance interests" in the maintenance of precedent, *Payne*, 501 U.S. at 828, and also where (as here) Congress "has acted in reliance" on the Court's decision, *Hilton v. S.C. Pub. Rvs. Comm'n*, 502 U.S. 197, 202 (1991). *Grutter*, along with *Bakke, Fisher,* and *Gratz v. Bollinger*, 539 U.S. 244 (2003), have not only resulted in repeated legislation by Congress over the course of decades that recognizes diversity as a compelling interest, *see*

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[21] *See Students for Fair Admissions v. Harvard*, No. 20–1199 (U.S.); *Students for Fair Admissions v. Univ. of N.C.*, No. 21–707 (U.S.); *Students for Fair Admissions v. Harvard*, No. 19–2005 (1st Cir.); *Students for Fair Admissions v. Harvard*, No. 14-cv-14176 (D. Mass.); *Students for Fair Admissions v. Univ. of N.C.*, No. 14-cv-954 (M.D.N.C.).

supra Parts I.B., II, but these precedents have also "invited colleges and universities to rely on the permissibility of a holistic, flexible approach like Harvard's as a benchmark in structuring their own admissions policies," U.S.Br. 19. Countless colleges and universities throughout the United States have accepted that invitation—and, in so doing, relied on the principle, long recognized by Congress, and reaffirmed in *Grutter*, that diversity in higher education is a compelling governmental interest.

Assertions that Respondents are engaged in "racial balancing," *e.g.*, Petr.Br. 75–77, or that Respondent Harvard is intentionally discriminating against Asian American applicants, *e.g.*, Petr.Br. 72–75, are unfounded. The district courts below found that Respondents were not using quotas or engaging in "racial balancing" (or, in *Harvard*, intentionally discriminating against Asian American applicants).[22] And in *Harvard*, the First Circuit identified no clear error in the district court's findings.[23] Petitioner

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[22] *See, e.g.,* Harv.Pet.App. 208 ("The [district court] finds that the statistical evidence shows that Harvard has not imposed racial quotas or otherwise engaged in impermissible racial balancing."); Harv.Pet.App. 261 ("[T]here is no evidence of any . . . intentional discrimination on the part of Harvard . . . nor is there evidence that any particular admissions decision was negatively affected by Asian American identity."); U.N.C. Pet.App. 168 ("There is no evidence or claim that the University [of North Carolina] uses a quota system to racially balance its incoming class[.]").

[23] *See, e.g.*, Harv.Pet.App. 64–65 ("The district court properly concluded that Harvard does not utilize quotas and does not engage in racial balancing."); Harv.Pet.App. 98 ("The district court did not clearly err in finding that Harvard did not intentionally discriminate against Asian Americans.").

attempts to second-guess those factual findings, but offers no good reason for overturning them.

In any event, Petitioner's arguments about the lower courts' findings of fact provide no basis for overruling *Grutter,* which rejected as "patently unconstitutional" both "racial balancing" as well as any "classifications . . . motivated by illegitimate notions of racial inferiority or simple racial politics." 539 U.S. at 326, 330 (quotation omitted). Thus, even if the Court were to disagree with the lower courts' factual determinations, that disagreement would not provide a basis for overruling *Grutter*.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals in No. 20–1199 and the decision of the District Court in No. 21–707.

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